UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

PAUL S. HUDSON, Case No. 00-11683

Debtor(s).

WASHINGTON 1993, INC.,

Plaintiff(s),

-against- Adversary No. 00-90091

PAUL S. HUDSON,

Defendant(s).

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Court Judge

MEMORANDUM-DECISION AND ORDER

Currently before the court is the motion of Paul S. Hudson ("Debtor") pursuant to Federal Rule of Civil Procedure 59, made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 9023, for reconsideration of the court's January 30, 2004 Decision & Order ("January 2004 Decision"). The court denied the Debtor's motion for intradistrict transfer or, in the alternative, for recusal of the court in this adversary proceeding, now on remand to the court, and the Debtor's underlying bankruptcy case.[1] The court, by decision and order dated August 21, 2001, denied the Debtor a discharge pursuant to 11 U.S.C. § 727 (a)(4). The Debtor moved for reconsideration of the affirmance of this court's decision by the United States District Court based in part on an alleged settlement reached with the bankruptcy trustee. The district court, on reconsideration, remanded the matter for the court to determine whether the settlement affects the court's determination that the Debtor should be denied a discharge.

Before turning to the merits of the Debtor's motion, the Debtor raises procedural issues

[1]The Debtor indicates that the recusal motion as it relates to his underlying bankruptcy case has been rendered moot as it was based on an objection filed by the Chapter 7 Trustee to a supplemental claim of exemption that was subsequently settled. (*See* Mem.of Law ¶ I.A and Hudson Aff. in Reply to Richard Corvetti Opp'n ¶ 7.) The Debtor, however, believes that the adversary proceeding and his bankruptcy case should both be transferred to the same judge to conserve judicial and party resources. *Id*. It is somewhat curious that the Debtor believes the court's recusal is required in the adversary proceeding because the court's impartiality might "reasonably be questioned" (Hudson Aff. in Supp. of Intradistrict Transfer or Recusal ¶ 2 (Dkt. No. 108)), yet he no longer questions the court's impartiality with respect to his underlying bankruptcy case.

that must be addressed. Richard Corvetti, a creditor and the assignee of Washington 1993, Inc., plaintiff in the adversary proceeding, opposes the Debtor's motion. The Debtor notes that Mr. Corvetti's opposition papers were submitted on or about March 4, 2004,[2] the date of the hearing on the motion, rather than three days prior to the motion as required by Local Rule 9013 - 1(c)(1).[3] On March 1, 2004, however, the Debtor filed a Supplementary Affidavit in Support of Motion and Memorandum of Law in Support of Motion. As a result of both parties submitting papers days before the return date of the motion, the court indicated at the hearing held telephonically on March 4, 2004 that it would consider all papers filed and provide the Debtor and Mr. Corvetti until March 11, 2004 to submit any further submissions by facsimile to the court, with originals for filing to follow. The Debtor did not object and, in fact, filed a Reply Memorandum of Law and Affidavit In Reply on March 9, 2004, and a Supplemental Memorandum of Law on May 21, 2004.

The Debtor also questions Mr. Corvetti's standing to oppose the motion. This argument was previously raised by the Debtor (Hudson Reply Aff. ¶¶ 2-12 (Dkt. No. 120) and Reply Mem. of Law (Dkt. No. 121)) and addressed by the court in the January 2004 Decision. No new evidence or argument has been presented by the Debtor on this issue.

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[2]While Opposition to Debtor's Motion to Reconsider/Reargue/Renew Decision, dated March 3, 2004, was sent by Richard Corvetti via facsimile to the Clerk of the Court, this opposition was never filed with the Clerk's office and, thus, is not part of the record before the court. Subsequently, on March 12, 2004, Mr. Corvetti did file Opposition to Debtor's Motion to Reconsider/Reargue/Renew, dated March 10, 2004.

[3]Local Bankruptcy Rule 9013-1(c)(1) provides:
Answering papers and any opposing memoranda shall be served and filed so as to be received no later than three business days before the return date of the motion.

In support of his motion, the Debtor offers three arguments. First, he asserts that he did not know the provisions of 28 U.S.C. § 144 applied to bankruptcy judges resulting in the omission of an affidavit of disqualification and certificate of good faith from the attorney of record, which the Debtor submits for the first time with his motion for reconsideration. Second, the court allegedly failed to consider that the criminal referrals it made to the United States Attorney in the Debtor's 1995 Chapter 11 bankruptcy case were based on ex parte allegations by the Debtor's then attorney on August 9, 1995, without notice to the Debtor. The Debtor alleges these referrals have resulted in personal as well as objective bias, and a prosecutorial interest, that has carried over to the Debtor's current bankruptcy case. Third, the Debtor relies upon a recent Third Circuit decision, *In re Kensington Intl. Ltd.*, 368 F.3d 289 (3d Cir. 2004), for the proposition that recusal is required under 28 U.S.C. § 455(a) when a judge holds ex parte meetings involving the merits or procedures affecting the merits and no transcripts are made.

Federal Rule of Civil Procedure 59 grants a court the power to alter or amend a judgment after its entry when there has been a clear error or manifest injustice in an order of the court or if newly discovered evidence is unearthed. *In re Bird*, 222 B.R. 229, 235 (Bankr. S.D.N.Y. 1998) (citations omitted). This criteria is strictly construed against the moving party. *Id.* Generally, motions for reconsideration are not granted unless "the moving party can point to controlling decisions or data that the court overlooked - - matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *In re BDC 56 LLC*, 330 F.3d 111, 123 (2d Cir. 2003) (quoting *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)).

In his underlying motion, the Debtor sought recusal pursuant to Federal Rule of

Bankruptcy Procedure 5004(a) and 28 U.S.C. §§ 144**,** 453 and 455[4]. For the Debtor, who is also an attorney, to assert that he did not know the court would consider the applicability of § 144 is somewhat troubling when the Debtor himself sought relief pursuant to § 144. A motion to reconsider should not be used to provide the court with that which could have been provided previously. There is nothing contained in the Debtor's affidavit or certificate of good faith that was not available to the Debtor at the time his motion was made.

Furthermore, the court never decided whether 11 U.S.C. § 144 does in fact apply to bankruptcy court judges noting instead that:

> There is case law holding that 11 U.S.C. § 144 applies only to district court judges and not to bankruptcy court judges because bankruptcy court judges are subject to recusal only under 28 U.S.C. § 455. . . . Because the impartiality of the court has been questioned, however, the court deems it appropriate to address the merits of Mr. Hudson's allegations.

(January 2004 Decision at 8, fn 6.)

The court also noted that:

> In addition to an affidavit, § 144 requires that the motion to recuse be accompanied by a certificate of counsel of record. 28 U.S.C. § 144. Since Mr. Hudson is acting pro se, he is unable to submit such a certificate. Although Mr. Hudson's motion to recuse based upon 28 U.S.C. § 144 may be procedurally flawed, because the court found the facts included in Mr. Hudson's motion to be legally insufficient to require disqualification under § 144, it need not address the deficiencies in its form.

(January 2004 Decision at 9, fn 8.)

Despite the Debtor's attempt to correct possible procedural flaws under the guise of a motion to reconsider, the court concluded it need not address these possible shortcomings in reaching its

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[4]See December 7, 2003 Notice of Motion for Intradistrict Transfer or Recusal (Dkt. No. 109) and December 7, 2003 Memorandum of Law (Dkt. No. 110).

decision. Thus, the Debtor's certificate of good faith and affidavit of disqualification do not change the court's earlier decision.

The August 9, 1995 chambers conference[5] was previously advanced by the Debtor as a basis for recusal (Hudson Aff. in Supp. of Intradistirict Transfer or Recusal ¶¶ 18, 19, 20 (Dkt. No. 108)). In the January 2004 Decision, the court acknowledged that the Debtor had filed a similar "suggestion for recusal" in or about February 2002 in an adversary proceeding commenced by the Chapter 7 Trustee (Adv. Pro. No. 01-90322). The court noted that the Debtor's previous request was denied by Memorandum-Decision and Order dated March 12, 2002 (the "March 2002 Decision"), which was not appealed. For the reasons articulated in the court's March 2002 Decision, the court indicated it would not transfer the case or recuse itself based on the information contained in paragraphs "17"-"25" of the motion, which basically reiterated the basis for the Debtor's "suggestion for recusal." References to the court's criminal referral and the ex parte chamber's conference are contained within these paragraphs.

In the Debtor's original "suggestion for recusal," he asserted that the court's view in his case has been colored due to allegations of wrongdoing made by his attorney at the time. (Ex. C to Hudson Aff. in Supp. of Intradistirict Transfer or Recusal (Dkt. No. 108), Decl. in Supp. of Suggestion for Recusal ¶ 5.) In addition, the Debtor asserted the court was involved extra judicially in his case, including meeting ex parte with his attorney and accuser in August 1995.

[5]On August 9, 1995, the court held a chambers conference in the context of the Debtor's 1995 Chapter 11 case with the Debtor's then attorney and an attorney from the Office of the United States Trustee. The conference was held in connection with the Debtor's former attorney's request to shorten notice on a motion to withdraw from the case and the United States Trustee's request to shorten notice on a motion to convert or dismiss the case. The court granted both requests and scheduled hearings on both motions for August 10, 1995.

Id. With this motion, the Debtor asserts the court overlooked the date upon which the court notified the United States Attorney of the Debtor's alleged wrongdoings, namely August 9, 1995. The Debtor concludes this meant the referral was made prior to hearing from the Debtor on August 10, 1995. The Debtor asserts he was prepared to establish his innocence on August 10, 1995, but was denied the opportunity.

As the court explained in its March 2002 Decision:

> Courts often entertain ex parte applications to shorten notice and neither the Debtor himself or his new counsel argued lack of notice with respect to the applications or the motions. Given that both of them had the opportunity to oppose the requested relief in either motion or to correct the record regarding any matters pending before the court, the Debtor has failed go show how the August 9th conference compromised his procedural due process or impacted his credibility. Furthermore, although it is true that the court made a criminal referral regarding a matter involving a check that was central to a hearing held on August 7th, section 3057 of Title 18 mandates criminal referrals by judges whenever they have reasonable grounds for believing a violation of the bankruptcy laws has occurred.

(March 2002 Decision at 3-4.)

The Debtor appears to be arguing that despite the mandatory reporting requirements of 18 USCS § 3057,[6] he should have been given the opportunity to be heard prior to the court making its

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[6]18 U.S.C.S. § 3057 provides:

> (a) Any judge, receiver, or trustee having reasonable grounds for believing that any violation under chapter 9 of this title [18 USCS under §§ 151 et seq.] or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed. Where one of such officers has made such report, the others need not do so.
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> (B) The United States attorney thereupon shall inquire into the facts and report thereon to the judge and if it appears probable that any such offense has been

referral to the United States Attorney. However, an individual does not have a due process right to notice and an opportunity to be heard before a criminal referral is made. Section 3057 of Title 18 does not create such a right. As articulated in *Goodwin v. Durkin*, 194 B.R. 214 (9th Cir. BAP 1996):

> The result would be nonsensical, in that it would (1) require that all potential criminal defendants be provided notice of a possible criminal referral; (2) permit the potential defendant to appear and present evidence on whether the conduct should be referred for investigation; and (3) permit the potential defendant to appeal an adverse decision that the criminal referral should be made.

Id. at 223.

Although the court is obligated to report apparent violations of 18 U.S.C. § § 151 et seq., it does not otherwise act in any capacity relative to prosecution of those violations. That role is specifically left to the United States Attorney, and the court does not serve as its investigator. As the Debtor acknowledges, any remarks made by the court concerning the criminal referral were made during judicial proceedings within the confines of the Debtor's prior 1995 case. (Supp. Aff. in Supp. of Mot. to Recons./Reargue/Renew ¶ 3.)

In re Kensington Intl. Ltd., *supra*, relied upon by the Debtor is distinguishable from this case. In *Kensington*, the Third Circuit directed that three of five asbestos-related bankruptcies assigned to a district judge for coordinated case management be reassigned. The court found the judge's impartiality might be questioned under 28 U.S.C. § 455(a) due to conflicts of advisors he

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> committed, shall without delay, present the matter to the grand jury, unless upon inquiry and examination he decides that the ends of public justice do not require investigation or prosecution, in which case he shall report the facts to the Attorney General for his direction.

appointed to assist him with the case, which could not be disassociated form the judge, and ex parte meetings the judge, advisors, and parties participated in. *Id*. The fee applications filed by the advisors revealed more than 325 hours of ex parte meetings with the attorneys for various parties in the five asbestos cases. *Id.* at 297. The Third Circuit recognized that the ex parte meetings with the parties had not been limited to procedural matters, but as the judge himself explained:

> "[T]he purpose of the ex parte meetings was to ensure that each committee or corporate constituency was afforded the opportunity to provide to the Court insights as to why, in the competition for limited dollars, its claim was just.". . . In other words, the ex parte meetings went to the very heart of the proceedings.

Id. at 311.

There have been no allegations that improper ex parte communications have occurred in the Debtor's pending Chapter 7 bankruptcy case or in the adversary proceeding. The Debtor refers to an ex parte meeting held on August 9, 1995,[7] approximately 9 years ago, in the context of his 1995 Chapter 11 case. At that time, ex parte applications to shorten the notice requirement for motions were presented to the court pursuant to Federal Rule of Bankruptcy Procedure 9006(c) as required by Local Bankruptcy Court Rule 9013-1(c)(1).[8] Federal Rule of Bankruptcy Procedure 9006(c) provides, in relevant part, that "when an act is required or allowed to be done at or within a specified time . . . the court for cause shown may in its discretion **with or without motion or**

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[7]See *supra* note 5.

[8]Local Bankruptcy Court Rule 9013-1(c)(1) provides, in part:
A request for an order reducing any specified notice period shall be made by application to the appropriate judge for an expedited hearing on the motion pursuant to FRBP 9006(c).

notice order the period reduced." Fed. R. Bankr. P. 9006(c)(1) (emphasis added). Unlike *Kensington*, no ex parte communications on the merits transpired on August 9, 1995.

None of the Debtor's arguments have merit. The Debtor has not satisfied the court that reconsideration is appropriate. Neither factual matters nor controlling precedent the court overlooked have been provided that would have changed its decision. Therefore, the Debtor's motion for reconsideration is denied.

It is SO ORDERED.

Dated:

Albany, New York

Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge