

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

In re:)
)
ROSE MARINE, INC.)
)
debtor,)
)
ROSE MARINE, INC.)
)
plaintiff)
)
vs.)
MARINE CONTRACTING CORPORATION)
EARL J. HADEN, JR., ROBERT H.)
THOMPSON, and JOHN BUDGE)
)
defendants)

O R D E R

This is an appeal of a final order of the bankruptcy court dated May 10, 1990. The May 10 order denied reconsideration of the bankruptcy court's order of April 27, 1990, which ordered, among other things, that the attorney for the debtor corporation be barred from testifying as a witness in the trial of the adversary proceeding if he remained as an attorney of record in the case. This appeal presents the question whether a party must move to exclude an attorney from testifying, or for disqualification of the attorney, when the party answers the complaint. Because the answer to that question is no, the Court

AFFIRMS the bankruptcy court's order.

BACKGROUND

This appeal grows out of an adversary proceeding filed in the bankruptcy court in 1988. Austin is the president and principle shareholder of Rose Marine, the plaintiff in the adversary proceeding. On October 13, 1989, the defendants in that adversary proceeding moved to disqualify Austin as plaintiff's counsel, arguing that he was a material witness in the case. The bankruptcy court agreed with the defendants, and ordered that, if Austin was going to appear as a witness, he could not continue as an attorney in the case. In paragraph 12 of his motion to reconsider, Austin argued that the motion to disqualify should have been filed much earlier in the litigation. From this, the Court discerns that Austin objected to the order on the grounds that, by not moving for disqualification when they answered, the defendants waived or were estopped from asserting their right to move for disqualification. Austin renews this argument on appeal.

ANALYSIS

A. Preliminary Matters

A root principle of appellate law is that an appellant must brief the issues it wishes the appellate tribunal to decide. Arguments and issues that have not been briefed are deemed waived.

E.g., In re Block Shim Dev. Co.--Irving, 118 B.R. 450, 452 n.2 (N.D. Tex. 1990); Stewart v. Law Offices of Dennis Olson, 93 B.R. 91, 95 n.9 (N.D. Tex. 1988), aff'd mem., 878 F.2d 1432 (5th Cir. 1989); see Gramegna v. Johnson, 846 F.2d 675, 677 (11th Cir. 1988); Bray v. Director Office of Workers' Compensation Programs, 664 F.2d 1045, 1048-49 (5th Cir. Unit B Dec. 1981). Further, arguments for which no supporting law is cited are also deemed abandoned. In re Hager, 90 B.R. 584, 588 (N.D.N.Y. 1988). Although Austin's "Statement of Issues Presented" section of his brief poses twenty-three questions, he has properly briefed only one: the waiver/estoppel argument. Accordingly, he has waived any other objections he may have to the bankruptcy court's ruling.

B. The Merits

It is hornbook law that, 'absent 'extraordinary circumstances' or 'compelling reasons,' an attorney who participates in a case should not be called as a witness. United States v. Dack, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984). The question whether an attorney in a case should testify implicates the attorney's competency as a witness. Determination of that question is committed to the discretion of the trial court. E.g., United States v. Nyman, 649 F.2d 208, 211 (4th Cir. 1980); United States v. Bates, 600 F.2d 505, 511 (5th Cir. 1979). This Court therefore reviews the bankruptcy court's

ruling for abuse of discretion. An abuse of discretion occurs if the judge fails to apply the proper legal standard, or fails to follow proper procedures, or bases his ruling upon findings of fact that are clearly erroneous. E.g., In re Red Carpet Corp., 902 F.2d 883, 890 (11th Cir. 1990); In re Beverly Mfg. Corp., 841 F.2d 365, 369 (11th Cir. 1988).

On appeal, Austin argues that the defendants waited too long to object to Austin's potential appearance as a witness and attorney in the same case. The general rule, however, "is that an objection to the competency of a witness should be raised at the time the party is presented as a witness." United States v. Odom, 736 F.2d 104, 112 (4th Cir. 1984) (citations omitted). The record does not reflect whether Austin was being "presented" when the defendants filed their motion, or whether they moved for disqualification sometime beforehand. Austin appears to argue that the defendants should have objected as soon as they answered the complaint. Austin cites no pertinent law in support of this assertion, and the Court's research uncovered no cases requiring the defendants to do so at that time. The motion to disqualify was timely.

In contrast, Austin knew at the time he filed the complaint that he was a key witness in his case, yet decided to represent Rose anyway. This practice generally is considered unethical. The American Bar Association Code of Professional Responsibility states: "A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious

that he . . . ought to be called as a witness" Code of Professional Responsibility, Disciplinary Rule 5-101(B). There are several exceptions to this general rule, but the bankruptcy judge held that Austin 'failed to set forth any basis under the ABA to permit [him] to continue as counsel for the plaintiff and to appear as a witness for the plaintiff in this proceeding." Order of April 27 1990, at 9, Adv. Proc. No. 88-4038 (Bankr. S.D. Ga.). The bankruptcy court applied the proper legal standard in making this determination as well. Austin simply did not make the required showing that one of the exceptions to the attorney/witness rule or the ABA rule appropriately applied in this case. Thus, not only was the defendants' motion timely, but it was Austin's duty to ensure that such a situation would not arise in the first place.

CONCLUSION

Because the bankruptcy court applied the proper legal and procedures, and because Austin has not demonstrated that any pertinent findings of that court were clearly erroneous, this Court holds that the bankruptcy court did not abuse its discretion. The order of the bankruptcy court is AFFIRMED.

SO ORDERED this 10th day of April, 1991.

B. AVANT EDENFIELD, CHIEF JUDGE
UNITED STATES DISTRICT JUDGE

SOUTHERN DISTRICT OF GEORGIA