

FILED

Lucinda B. Rauback, Clerk
United States Bankruptcy Court
Savannah, Georgia
By pbryan at 10:24 am, Dec 13, 2012

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)
) Chapter 7 Case
JAMES ALLEN ZOW, SR.)
) Number 12-41944
)
Debtor)

**OPINION AND ORDER ON DEBTOR’S MOTION REQUESTING THE
HONORABLE LAMAR W. DAVIS, JR. TO DISQUALIFY HIMSELF FROM
FURTHER PROCEEDINGS IN CV12-41944**

FINDINGS OF FACT

Debtor filed his Chapter 7 case on October 2, 2012. Shapiro & Swertfeger, LLP, (“S&S”), on behalf of Regions Bank, d/b/a Regions Mortgage (“Regions”), filed a Notice of Appearance in the case on October 11, 2012. Dckt. No. 20. Debtor objected to the Notice of Appearance (“NOA Objection”) on November 2, 2012. Dckt. No. 32. A Section 341 Meeting of Creditors (“341 Meeting”) commenced on November 8, 2012. Dckt. No. 41. The 341 Meeting was continued to December 21, 2012. *See id.*

S&S filed a Motion Seeking an Order Compelling Debtor to Submit to a Rule 2004 Examination (“2004 Motion”) on November 9, 2012. Dckt. No. 44. S&S’s 2004 Motion stated that Debtor refused to answer certain questions and challenged the standing of Regions and S&S to question him. *Id.* at 1-3. The Court entered an order requiring the

2004 examination to proceed on December 5, 2012. Dckt. No. 48. Debtor then moved to Vacate the Order Granting Regions's Motion to Compel Debtor to Submit to a Rule 2004 Examination ("Motion to Vacate") on November 26, 2012. Dckt. No. 69. Two days later, Debtor filed an Emergency Motion for Protective Order & Stay Compelling Debtor to Submit to a Rule 2004 Examination ("Emergency Motion for Stay"). Dckt. No. 75.

The Court scheduled a hearing for December 4, 2012, to consider Debtor's NOA Objection, Debtor's Motion to Vacate, and Debtor's Emergency Motion for Stay. Debtor then filed a Motion for Continuance Respecting Hearing Scheduled for December 4, 2012 ("Motion to Continue Hearing") on November 30, 2012 (Dckt. No. 82), and the Court denied that motion. Dckt. No. 83.

On December 3, 2012, the Debtor filed two additional motions. First, he filed an Emergency Alternative Motion for Continuance Respecting 2004 Examination Scheduled for December 5, 2012 ("Motion to Continue 2004"). Dckt. No. 87. Second, he filed a Motion Requesting the Honorable Lamar W. Davis, Jr. to Disqualify Himself from Further Proceedings in CV12-41944 ("Motion to Disqualify"). Dckt. No. 88.

At the commencement of the hearing on December 4, 2012, the Court announced that the Motion to Disqualify had been received and although not assigned for a

hearing, the Court believed it could not proceed on the scheduled hearings until the disqualification motion was decided. Hearing Transcript, Dckt. No. 104 at 8-10.

Counsel for Regions appeared at the December 4 hearing, unaware of the filing of the Motion to Disqualify. *Id.* at 5. A copy was provided to counsel during a recess. During the colloquy in court on this subject, Debtor stated that he objected to Regions's counsel participating in the hearing, and so the hearing was adjourned. *Id.* at 11-19. After the hearing, Debtor filed an Emergency Objection to Respondent Remaining Under Court Ordered Compulsion to Submit to a Rule 2004 Examination. Dckt. No. 90. On December 5, 2012, Regions filed a Stipulation Postponing Debtor's 2004 Examination (Dckt. No. 91), while the matter of disqualification is resolved.

After consideration of the record and Debtor's allegations, the Court now enters the following Conclusions of Law.¹

CONCLUSIONS OF LAW

When presented with a motion to disqualify, the Court must first determine whether disqualification is warranted prior to ruling on other pending matters in the

¹A substantial number of additional pleadings have been filed regarding matters separate from the issue of disqualification. For the sake of clarity and brevity, the Court will limit the discussion in this Order only to allegations relevant and necessary to deciding whether recusal is warranted here.

proceeding.² See *In re Bailey*, 2011 WL 7702798, *3 (Bankr. S.D. Ga. 2011) (Davis, J.) (“Once the issue of disqualification is raised . . . it is incumbent upon the court to resolve the issue in order for the matter at hand to proceed either with this judge; or, if appropriate, before another court unfettered by a lingering question of partiality or prejudice.”) (quoting *In re Austin*, 1990 WL 10007488, *2 (Bankr. S.D. Ga. December 10, 1990) (Dalis, J.)). To do otherwise is to run the risk that a judge, who ultimately agrees it is proper to recuse, will have entered rulings in the interim which should have been decided by another judge. Having concluded that Debtor’s Motion to Disqualify had precedence, I adjourned court to permit time for the Motion to Disqualify to be ruled on.

I now turn to that motion. Debtor makes the following contentions to support his Motion to Disqualify, stating, in relevant part, that:

1. According to Chatham County Land Records, Mr. Thomas J. McNamara was involved as the closing attorney with a real estate transaction involving Judge Lamar W. Davis, Jr. On June 11, 2009, the law firm of McNamara & Adams filed a security deed between Judge Davis and Mortgage Electronic Registration Systems (hereafter referred to as MERS).
2. Judge Davis security deed reflects MERS is the grantee under the Security Instrument.

²The Court recognizes, however, that certain factual circumstances may not require suspension of the proceedings.

3. Judge Davis Discharge of Deed to Secure Debt reflects MERS as contractual party executing the discharge of deed to secure debt.
4. Debtor's Statement of Financial Affairs disclosed several pending lawsuits in which MERS is Defendant in Case No. 12-571 and Case No. CV10-1883.
5. The Executive Summary of Multistate/Federal Settlement of Foreclosure Misconduct Claims stated, inter alia, claims against MERSCORP, Inc. or Mortgage Electronic Registration Systems, Inc. (MERS) are not released from claims. Moreover, the settlement agreement does not prevent any action by individual borrowers who wish to bring their own lawsuits. State attorneys general also preserved, among other things, all claims against the Mortgage Electronic Registration Systems (MERS), and all claims brought by borrowers.
6. Debtor's Statement of Financial Affairs disclosed several pending lawsuits in which Debtor alleged forgeries, deceptive business practices and fraudulent conduct by persons involved with the forged alleged promissory note and fraudulent security deed filed by the law firm of McNamara & Adams on December 9, 2008.
7. A cursory review of Mr. Thomas McNamara's signature on Judge Davis's security deed reveals the same stark difference in Mr. McNamara's purported signature on the security deed filed as an attachment to Regions Bank's Motion for Relief From Stay and Amended Motion for Relief From Stay
8. On April 27, 2011, Plaintiff, Mr. Zow filed a complaint against Mr. Thomas J. McNamara and Mr. J. Craig Adams pursuant to O.C.G.A. §

45-17-20 to wit: the purported notary signatures of Mr. McNamara and Mr. J. Craig Adams did not remotely match their signature cards on file with the Superior Clerk's office. The complaint was filed with Mr. Daniel Massey, Clerk of Superior Court for transmission to Chatham County District Attorney.

9. Mr. Thomas J. McNamara is a key witness and potential defendant in the attempted wrongful foreclosure of Debtor's jointly owned homestead property.
10. Mr. McNamara's purported signature on the security deed at issue in these proceedings and other pending lawsuits does not remotely match his true signature on his Georgia Notary signature card on file with the Clerk's office. Additionally, Mr. Craig Adams' purported signature on the "borrower's waiver of rights" did not remotely match his true signature on his Georgia Notary signature card on file with the Clerk's office. Mr. Adams admitted under oath in a deposition to apparent violations of Georgia Notary laws and suspect "closing practices".
11. On November 26, 2012, Debtor filed an Emergency Motion to Vacate the Order Granting Regions Bank dba Regions Mortgage (hereafter Regions Bank) Deficient Motion to Compel Debtor to Submit to a 2004 Examination. Expressly within that motion in the section entitled "Introduction", Debtor provided Exhibits in support of misconduct by Mr. Thomas McNamara's law firm of McNamara & Adams. Additionally, an exhibit of former employee, Ms. Jennifer Reese is provided.
12. On November 28, 2012, Debtor filed his compliance with S.D. Local Rule 7.1.1 filing. Debtor disclosed the interests of Mr. Thomas

McNamara and Mr. J. Craig Adams of McNamara & Adams.

13. Attorney William R. Claiborne, who represented Ms. Helen E. Sullivan against Mr. Thomas McNamara in Case No. CV10-1325-BA concluded and argued, "Unfortunately, based upon the deeds referenced above, there no[w] (sic) exists a question as to the accuracy of every deed filed with the Chatham County Superior Court Clerk by the McNamara firm." (emphasis supplied)
14. The involvement of the law firm McNamara & Adams in a financial transaction involving real property owned by Judge Davis and specifically Mr. McNamara's purported signature is a legitimate basis for concern by Debtor and relevant to the question of disqualification.

Dckt. No. 88 at 2-5 (internal citations and footnotes omitted).

Distilled to its essence, Debtor seeks to disqualify the undersigned as presiding judge in this case because Debtor alleges that (1) an attorney he has sued or may sue was the closing attorney in a real estate transaction I was party to in 2009, (2) MERS was the counter party to my security deed, (3) the closing attorney's signatures on certain documents of mine and of the Debtor's may have been signed by others, (4) the closing attorney is a key witness in the dispute between Debtor and Regions, and (5) the involvement of the same closing firm in an unrelated financial transaction involving real property owned by me is a "legitimate basis for concern."

Debtor argues in his Motion to Disqualify that:

[A] reasonable person, knowing the relevant facts, would expect that Judge Davis should disqualify himself from the entire proceeding . . . The U.S. Supreme Court in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988), exemplified [sic] the sort of “appearance of impropriety” which can occur even without the judge’s awareness of it—it still gives rise to disqualification. Moreover, the highest Court further explained, “it is appropriate to consider the risk of injustice to the parties in the particular case, the risk of undermining the public’s confidence in the judicial process.”

Id. at 5.

Bankruptcy Rule 5004(a) provides that “[a] bankruptcy judge shall be governed by 28 U.S.C. § 455, and disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstance arises or, if appropriate, shall be disqualified from presiding over the case.” FED. R. BANKR. P. 5004(a). The standard for a judge’s recusal is whether the judge’s impartiality might reasonably be questioned. 28 U.S.C. § 455(a). Section 455 further provides that a judge must recuse under the following circumstances:

- (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (2) Where in private practice he served as lawyer in the

matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

28 U.S.C. § 455(b).³

However, this list is non-exclusive and illustrative only. The test is whether

³In deciding this matter, the Court has also considered Canon 3(C)(1) of the Code of Conduct for United States Judges, which provides a similar non-exclusive list of examples as to when a judge shall recuse.

a person with knowledge of all the circumstances would reasonably question a judge's impartiality. Austin, 1990 WL 10007488, *2. This is an objective test which is far broader than the itemized list. "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 865 (1988).

For instance, § 455 refers to matters arising in "the" proceeding--meaning the proceeding in which the disqualification is sought.⁴ However, I conclude that a disqualifying circumstance can also arise out of a separate proceeding which shares common elements with "the" proceeding. Although the parameters of Debtor's claim against Mr. McNamara, Regions, MERS, or others are not fully known, a reasonable person might question a judge's impartiality if the judge was party to a transaction factually similar to Debtor's loan closing, even if the transaction was wholly separate from the pending case. This is accentuated if the transaction was closed by the same attorney whose conduct, Debtor contends, is actionable in damages. Because of the factual similarities between the two closings, a person might reasonably perceive the presiding judge to have a parallel interest to a party in "the" proceeding. The judge's personal experience in the unrelated, but similar, transaction might also raise a reasonable perception that the judge would draw on his own experience or other extra-judicial facts, knowingly or not, in ruling in the case before him.

⁴Bankruptcy Rule 5004(a) designates as the relevant proceeding "the proceeding or contested matter in which the disqualifying circumstance arises." FED. R. BANKR. P. 5004(a). Section 455 notes that the "proceeding" includes "pretrial, trial, appellate review, or other stages of litigation." 28 U.S.C. § 455(d)(1).

The Eleventh Circuit has stated that section 455 “does away with the old ‘duty to sit’ doctrine and requires judges to resolve any doubts they may have in favor of disqualification.” U.S. v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989); *see also* Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988) (“It has been stated on numerous occasions that when a judge harbors any doubts concerning whether his disqualification is required he should resolve the doubt in favor of disqualification.”). The court in Kelly also explained that “[t]he duty of recusal applies equally before, during, and after a judicial proceeding, whenever disqualifying circumstances become known to the judge.” Kelly, 888 F.2d at 744. Thus, I must be conscious of the possibility that what appear now to be somewhat speculative and tenuous circumstances may later develop into cause for a mid-case recusal, which is not favored. *Cf. In re Nat’l Union Fire Ins. Co.*, 839 F.2d 1226, 1229 (7th Cir. 1988). (“... a change of umpire mid-contest may require a great deal of work to be redone . . . and facilitate judge-shopping.”).

I am mindful of the twin, competing policies behind section 455. U.S. v. Greenough, 782 F.2d 1556, 1558 (11th Cir. 1986).

The first [policy] is that courts must not only be, but must seem to be, free of bias or prejudice. Thus the situation is viewed through the eyes of the objective person. A second policy is that a judge, having been assigned to a case, should not recuse himself on unsupported, irrational or highly tenuous speculation. If this occurred the price of maintaining the purity of the appearance of justice would

be the power of the litigants or third parties to exercise a veto over the assignment of judges.

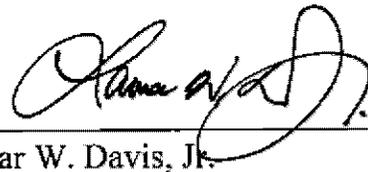
Id. Thus, I have “as much an obligation not to recuse myself where there is no reason to do so as I do to recuse myself where the converse is true.” Austin, 1990 WL 10007488, *3.

It is not readily apparent to me how what the Debtor has pleaded would require a decision to recuse. However, mindful that an “appearance of impropriety” may arise even without the judge’s awareness of the reasons for it, I consider it a serious matter. Because the facts in this matter are so convoluted and not fully developed, it is possible, in the eyes of a reasonable person, that an appearance of impropriety exists or that circumstances down the road could cause a highly undesirable mid-stream recusal. This is especially true as the motion juxtaposes my involvement in an unrelated financial transaction with allegations of wrongdoing by the closing attorney in that transaction, when that closing attorney is a “potential defendant” in a lawsuit by Debtor and a potential key witness in a contested matter which I may be called upon to hear. *See* Dckt. No. 74 at 4.

For that reason, and because I must resolve any doubts in favor of disqualification, I conclude that I must recuse myself and direct the Clerk to reassign the case to one of my colleagues.

ORDER

Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT that Debtor's Motion Requesting the Honorable Lamar W. Davis, Jr. to Disqualify Himself From Further Proceedings in CV12-41944 is GRANTED. I recuse myself from hearing this case and refer the case to the Honorable Susan D. Barrett, Chief United States Bankruptcy Judge, for further action.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 12th day of December, 2012.