

SEP 16 2016

CIRCUIT EXECUTIVE

**FOR THE JUDICIAL COUNCIL
OF THE ELEVENTH CIRCUIT**

111590051

**IN RE: COMPLAINT OF JUDICIAL
MISCONDUCT OR DISABILITY**

ON PETITION FOR REVIEW*

Before: TJOFLAT, HULL, MARCUS, WILSON, PRYOR, MARTIN, JORDAN, ROSENBAUM, and JULIE CARNES, Circuit Judges; MOORE, MERRYDAY, THRASH, BOWDRE, LAND, STEELE, WATKINS, and WOOD, Chief District Judges.

Upon consideration of the petitioner's complaint by a review panel consisting of Judges Tjoflat, Wilson, Pryor, Land, and Steele, the order of Chief Judge Ed Carnes filed on 26 April 2016, and of the petition for review filed by the complainant on 7 June 2016, with no non-disqualified judge on the Judicial Council Review Panel having requested that this matter be placed on the agenda of a meeting of the Judicial Council,

The Judicial Council Review Panel hereby determines that the disposition of this matter was proper and said disposition is hereby AFFIRMED.

The foregoing actions are APPROVED.

FOR THE JUDICIAL COUNCIL:


United States Circuit Judge

* Chief Circuit Judge Ed Carnes and Chief District Judge Rodgers did not take part in the review of this petition.

APR 26 2016

David J. Smith
Clerk

CONFIDENTIAL

**BEFORE THE CHIEF JUDGE
OF THE ELEVENTH JUDICIAL CIRCUIT**

Judicial Complaint No. 11-15-90051

IN THE MATTER OF A COMPLAINT FILED BY _____

IN RE: The Complaint of _____ against _____, U.S. Bankruptcy Judge for the U.S. Bankruptcy Court for the _____ District of _____, under the Judicial Conduct and Disability Act of 1980, Chapter 16 of Title 28 U.S.C. §§ 351-364.

ORDER

_____ (“Complainant”) has filed this Complaint against United States Bankruptcy Judge _____ (the “Subject Judge”), pursuant to Chapter 16 of Title 28 U.S.C. § 351(a) and the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States (“JCDR”).

As an initial matter, after Complainant filed his Complaint, he filed a supplemental statement. The filing of that supplemental statement is approved. See 11th Cir. JCDR 6.7.

Background

The record shows that in February 2013 the _____ filed a voluntary petition for Chapter 11 bankruptcy, listing Complainant as a creditor. On April 2, 2013, the _____ filed a motion to allow Complainant limited relief from the automatic stay and to determine whether a certain claim was derivative in connection with lawsuits Complainant had filed against the _____ and its board members. On April 5, 2013, _____ entered a notice of appearance as “co-counsel” for Complainant in the bankruptcy case. The notice stated that Complainant was “a retired _____ and former member of the _____ of _____ and has appeared and is actually participating pro se in the case.”

At an April 16, 2013 hearing on the motion for relief from the stay, the Subject Judge asked Complainant, “what’s your goal, to destroy the _____?” and _____ responded that the goal was to “vindicate things within the _____ that are going completely wrong.” After further explanation, the Subject Judge stated, “It sounds to me like this might be a reason for the appointment of a trustee now that they’re in Chapter 11.” Later the Subject Judge stated, “Well, that might be a basis for the appointment of a

trustee,” and _____ responded, “We think, Judge, at a minimum that that’s required here.” The Subject Judge denied the motion for relief from the stay without prejudice.

A few days after the hearing, the _____ moved to appoint a Chapter 11 Trustee. The Subject Judge entered an order directing the United States Trustee to appoint a Chapter 11 Trustee under 11 U.S.C. § 1104. On May 10, 2013, the United States Trustee appointed _____ as Trustee. In a sworn statement accompanying the application for approval of the Chapter 11 Trustee, _____ indicated that he had no connections with the debtors, creditors, other parties in interest, or their attorneys, except that he was “on the panel of Chapter 7 Trustees” in the district.

On May 22, 2013, _____ filed an application asking the court to authorize and approve the employment of _____ and his firm as accountants for the Trustee. In an attached affidavit, _____ stated that to the best of his knowledge, he did not have any connection with the debtors, their affiliates, creditors, or any of their attorneys in matters related to the case. After that, Complainant filed a motion to dismiss the case, alleging that the debtor had filed it in bad faith. On June 17, 2013, the Subject Judge entered an order approving the employment of _____ and his firm. At a June 18, 2013 hearing Complainant, who was appearing on his own behalf, stated that a motion to continue the hearing had been filed “yesterday” and the Subject Judge responded that the motion was untimely because “[d]ocuments must be filed two days prior to a hearing, local rule.”

At a July 2, 2013 hearing on a motion to assume a lease of real property, the Subject Judge asked how long the _____ had been in existence, and Complainant responded that it had been “at this facility” since 1995. The Subject Judge then stated, “20 years, until you came along,” and “Until you came along and started the litigation.” The Subject Judge granted the assumption of a lease. After that, Complainant asked if he could say one more thing, the Subject Judge replied “Certainly,” and Complainant made a statement. Complainant then asked if he could say one other thing, and the Subject Judge stated, “No.”

On July 30, 2013, Complainant filed a “Stipulation for Substitution of ‘Of Counsel’” in which he stated that he was “a retired _____” who was “appearing pro se,” and he sought to have a different law firm “substituted as Of counsel” for him. On the same day, Complainant filed an emergency motion to remove _____ as Trustee, arguing that _____ sworn statement that he had no connection with the attorneys for any party was false because Complainant’s attorney, _____, had acted as counsel for _____ in state and federal court. Complainant signed that motion as “_____, pro se.”

At a hearing on August 7, 2013, the Subject Judge asked Complainant various questions about when he learned of _____ representation of _____, and then the Subject Judge stated that the hearing would be conducted as an evidentiary hearing.

Later, _____ was called as a witness and testified that he had represented _____ in other matters. _____, as counsel for Complainant, moved to recuse the Subject Judge based on Complainant's "understanding" that the Subject Judge and _____ had "a relationship" that "goes back _____ years," and he argued that the Subject Judge might be prejudiced in making a credibility determination between _____ and Complainant. The Subject Judge denied the motion from the bench. Complainant asserted that the Subject Judge had made hostile statements toward him on two occasions, and the Subject Judge again denied the oral motion to recuse. The Subject Judge took under advisement the motion to remove _____ as Trustee.

After the hearing, the Subject Judge entered an order approving in part Complainant's Stipulation for Substitution of "Of Counsel," allowing the substitution of Complainant's counsel, but rejecting the proposed "hybrid representation." On August 12, 2013, _____ resigned as Trustee in the case, and the next day, the Subject Judge denied as moot the motion to remove _____. After that, Complainant filed a "Motion for Relief Respecting the Conduct of" _____, which the Subject Judge denied without prejudice as moot.

On August 22, 2013, Complainant's new counsel, _____, filed a motion to recuse the Subject Judge, arguing that he was biased and prejudiced against Complainant, had exhibited "overt hostility," and had made "bizarre rulings." On September 9, 2013, the Subject Judge granted the motion to recuse, stating: "Recusal is appropriate where the actions and questions of the Court might give the appearance of partiality to the approximately _____ members of the _____. Therefore, in order to avoid even the appearance of impartiality, this Court will recuse itself." After that order was issued, the case was reassigned to another bankruptcy judge.

Complaint

In his Complaint of Judicial Misconduct or Disability, Complainant asserts that his original attorney, _____, "boasted" that he had known the Subject Judge for _____ years, and that _____ "also has a long relationship with _____, the most frequently appointed Trustee in the District and has represented _____ . . . on several occasions for reduced or no fees." Complainant states, "Allegedly, _____ has long had a personal relationship with [the Subject Judge], his frequent golf partner, for whom he has allegedly paid green fees and membership in their golf club. _____ is also the primary, if not sole client and financial benefactor of [the Subject Judge's] son, _____."

Complainant alleges that the Subject Judge made "nasty, demeaning comments" toward Complainant, citing his question, "'What's your goal, to destroy the _____?'" and stating that the Subject Judge "chastis[ed]" Complainant for exercising his First Amendment rights at the July 2, 2013 hearing. Complainant alleges that the Subject

Judge “manufactur[ed] ‘Local Rules’ that do not exist,” citing the transcript of the June 18, 2013 hearing and stating in a footnote that “per _____, this was just [the Subject Judge’s] little charade designed for me.” Complainant contends that the Subject Judge violated his duty to determine the appropriateness of fee applications even when there are no objections.

Complainant also contends that the Subject Judge violated 11 U.S.C. § 1104 and the Code of Conduct for United States Judges at the April 16, 2013 hearing by rejecting the debtor’s motion for relief from the stay without giving any reasons, and opining that a Chapter 11 Trustee was needed even though the debtor “was fully functioning and that none of the requirements of 11 USC § 1104 had even been claimed, much less satisfied.” Complainant states, “Surely [the Subject Judge] had his friend _____ in mind for this plumb assignment.”

Complainant complains that the United States Trustee appointed _____ over Complainant’s objections, stating that the United States Trustee “surely knew [the Subject Judge] favored _____ and may have even discussed it with the Judge.” Complainant contends that the Subject Judge approved the motion for the appointment of _____ “despite Bankr. Rule 5002(b) and despite any semblance of compliance with the Statute, § 1104.” Complainant alleges that in approving _____ appointment, the Subject Judge “ignored the knowing falsity set forth by both the U.S. Trustee and _____ claiming _____ had ‘no connections’ with any party or attorney” in the case. In addition, Complainant states that the Subject Judge “ignored the perjury of _____ whose affidavit in support of _____ motion to hire him as his accountant also claims ‘no connections’ to anyone in the _____ case . . . despite that it is beyond dispute that debtor’s counsel consulted _____ as an expert witness prior to _____ appointment”

Complainant takes issue with the August 7, 2013 hearing, stating the Subject Judge “sua sponte conducted an evidentiary hearing with characteristic nasty comments[], complete disregard of my essential due process right of notice, and all for the single purpose of serving as _____ counsel and trying to factually establish a defense of ‘laches’ to _____ perjury.” Complainant states that when the Subject Judge “gave _____ the signal,” the Subject Judge should have immediately recused himself for overt bias and for acting as _____ counsel.” Complainant alleges that in order to “further protect[] _____,” the Subject Judge denied as moot three post-resignation motions seeking damages against _____ based on Complainant’s contention that he had committed perjury, which allegedly injured Complainant and the debtor.

Complainant takes issue with the Subject Judge’s treatment of Complainant’s Stipulation for Substitution of “Of Counsel,” generally contending that the Subject Judge disapproved of the hybrid representation because “friend _____ was out.” Finally,

Complainant states that “the inherent dishonesty and lack of integrity of [the Subject Judge] screams from his” order granting the motion to recuse “on the disingenuous grounds that he had suddenly discovered he had some sort of affinity for the [] members, something which slipped his mind for the prior seven months.” Complainant attached various documents to his Complaint.

Supplement

In his supplemental statement, Complainant alleges that _____ has filed fee applications that include a sworn statement that no part of the monies he requests will be shared with anyone, but it appears that he split fees with other individuals with whom he was “50-50 partners.” Thus, Complainant alleges that, if certain allegations made in certain pleadings are accurate, “it could mean that literally scores, if not hundreds of [] fee applications were filed with false representations” Complainant states, “This matter involves fraudulent fee applications totaling millions of dollars that were filed by a close friend of” the Subject Judge “and approved by him despite his probable knowledge that they were fraudulent.

Discussion

Rule 3(h)(3)(A) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States provides that cognizable misconduct does not include “an allegation that is directly related to the merits of a decision or procedural ruling.” The Rule provides that “[a]n allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related.” *Id.* The “Commentary on Rule 3” states in part:

Rule 3(h)(3)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations “[d]irectly related to the merits of a decision or procedural ruling.” This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge’s ruling. Any allegation that calls into question the correctness of an official action of a judge — without more — is merits-related.

To the extent Complainant’s allegations concern the substance of the Subject Judge’s official actions, rulings, and orders entered in the case, the allegations are directly related to the merits of the Subject Judge’s decisions or procedural rulings. As for the matter of recusal, Canon 3C(1) of the Code of Conduct provides in part that a judge shall disqualify himself in a proceeding in which his “impartiality might reasonably be questioned.” *Guide to Judiciary Policy (Guide)*, Vol. 2A, Ch. 2, Canon 3C(1). The enumerated examples include when a person related to the judge or the judge’s spouse “within the third degree of relationship, or the spouse of such a person is: (i) a party to

the proceeding, or an officer, director, or trustee of a party; [or] (ii) acting as a lawyer in the proceeding.” Guide, Vol. 2A, Ch. 2, Canon 3C(1)(d). Complainant has not alleged that _____ or _____ or either of their spouses is related to the Subject Judge or his spouse. The Judicial Conference’s Committee on Codes of Conduct, in Advisory Opinion No. 11, “Disqualification Where Long-Time Friend or Friend’s Law Firm Is Counsel,” explained that a judge need not recuse from a case when a long-time friend is acting as counsel unless the judge’s impartiality might reasonably be questioned, such as when the friend is the godfather of one of the judge’s children and the “relationship is like that of a close relative.” Guide, Vol. 2B, Ch. 2, Advisory Opinion No. 11.

Complainant has not shown that the Subject Judge had a relationship with _____ or _____ that would have required him to disqualify himself at some point before he granted Complainant’s motion to recuse. During a hearing on August 7, 2013, Complainant requested that the Subject Judge recuse and then filed a written motion to recuse on August 22, 2013. The Subject Judge granted that motion on September 9, 2013, stating that “after carefully considering all of the papers that ha[d] been filed,” he would recuse in order to avoid even the appearance that he might not be impartial. Complainant’s allegations that the Subject Judge should have disqualified himself at some earlier point in the proceedings are completely unsubstantiated and are merely an attack on the merits of the Subject Judge’s official actions and rulings. See JCDR 3(h)(3)(A) (“An allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related.”) (emphasis added).

Complainant’s remaining claims are based on insufficient evidence to raise an inference that the Subject Judge violated the Code of Conduct, had a conflict of interest, treated Complainant in a demonstrably egregious and hostile manner, ignored false statements, was not impartial, acted to benefit or protect _____, knowingly approved fraudulent fee applications, or otherwise engaged in misconduct. Complainant’s allegations that _____ “allegedly paid green fees and membership [for the Subject Judge] in their golf club” and that _____ is the Subject Judge’s son’s “primary, if not sole client and financial benefactor” are just bare assertions unsupported by any evidence. “Allegations are not evidence of the truth of what is alleged,” Wright v. Farouk Sys., Inc., 701 F.3d 907, 911 n.8 (11th Cir. 2012), and Complainant has not presented evidence that would raise any inference of misconduct.

The allegations of this Complaint are “directly related to the merits of a decision or procedural ruling,” JCDR 11(c)(1)(B), and the Complaint “is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists,” JCDR 11(c)(1)(D). For those reasons, pursuant to Chapter 16 of Title 28 U.S.C. § 352(b)(1)(A)(ii) and (iii), and Rule 11(c)(1)(B) and (D) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States, this Complaint is **DISMISSED**.

A handwritten signature in black ink, appearing to read "E. Hand", written in a cursive style. The signature is positioned above a horizontal line.

Chief Judge