

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

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David J. Smith
Clerk

CONFIDENTIAL

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

Judicial Complaint No. 11-18-90164

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”).

Background

The record shows that in January 2014 _____ filed a voluntary petition for Chapter 11 bankruptcy, and several months later the case was transferred to the United States Bankruptcy Court for the _____ District of _____. Complainant and his law firm _____ filed a notice of appearance in the case as counsel for certain creditors. The record shows that the creditors, through Complainant, filed multiple objections and motions in the case, and Complainant appeared at multiple hearings before the Subject Judge. At a hearing in May 2014 the Subject Judge stated at one point, “Well, _____, forgive me for interrupting you, and I probably will do it more, and I apologize for what may strike you as rudeness, but I’m trying to understand this in broad strokes” In April 2015 Complainant filed a notice withdrawing his appearance as counsel on behalf of the creditors, and there were additional proceedings in the case.

The record shows that in July 2014 _____ and _____ filed a voluntary petition for Chapter 13 bankruptcy. Complainant and his law firm entered a notice of appearance as counsel for creditor _____. In August 2014 the Subject Judge dismissed the case because the debtors had failed to file certain documents, and the debtors moved to reopen the case. _____, through Complainant, opposed reopening the case and noted that it had already filed a complaint against the debtors to recover unpaid legal fees on behalf of “_____ assignor,” which was Complainant’s law firm. The debtors later filed an amended motion to vacate the dismissal order and to reopen the

case. After a hearing in October 2014, the Subject Judge granted that motion. There have been additional proceedings in the case.

The record shows that in November 2016 the _____ (_____) filed a voluntary petition for Chapter 11 bankruptcy. Complainant, another attorney, and Complainant's law firm entered a notice of appearance as counsel for creditor _____. At a January 2017 hearing on various motions, Complainant noted that his client had not received mortgage payments from the debtor for a period of time. Complainant began to say, "In addition ---," but the Subject Judge interrupted, saying, "I have read the papers, _____."

After that, the Subject Judge addressed a motion for a protective order that _____ had filed and said: "_____, I have never seen a request for 91 categories of documents, going back to 2006, in a matter in which the first default is alleged to have occurred in 2015. What are you doing?" The Subject Judge granted the motion for a protective order, noting that Complainant could take discovery about confirmation of the plan, but if discovery went beyond that, the Subject Judge would grant additional motions for protective orders. The Subject Judge stated:

Your request for 91 categories of documents going back nine years is ridiculous, 10 years, 11 years. Nine would be ridiculous, too. 11 is two years more ridiculous. I just don't understand.

Perhaps it is that your office doesn't have any work to do and so you're just generating paper for the sheer cussed joy of killing innocent electrons.

Later during the same hearing, the Subject Judge told Complainant: "The factual question, I'm letting you take discovery on. The legal issue, I'm not, and we'll see whether we get anywhere. I'm certainly not prejudging any of this. I just don't want lawyers to be incurring enormous expenses in what looks like a pretty simple case."

At a hearing in late March 2017, Complainant suggested that the court first address a motion for relief from stay that had been filed, and the Subject Judge stated, "All right. I have read the papers, _____. So please don't feel the need to fill me in from the beginning of time." Later in the hearing, the Subject Judge addressed _____ motions for a protective order and for sanctions, and counsel for _____ generally took issue with Complainant's discovery requests.

Complainant stated that he would "like to go through the discovery requests," and the Subject Judge responded, "No, I've read them. _____, you just don't know when to quit, do you?" The Subject Judge noted that Complainant's discovery requests had gone "way beyond" what the court had previously allowed. The Subject Judge granted _____ motion for a protective order, sanctioned Complainant and his client

_____, and stated, “ _____, this is not a forum that tolerates metastasizing litigation so that it crushes a case.” After additional proceedings in the case, the Subject Judge granted a motion to approve a settlement between _____ and _____.

Meanwhile, in early March 2017 _____ initiated an adversary proceeding against _____ and another company, seeking to disallow the creditors’ claims and raising other claims for relief against _____. The next month, Complainant and another attorney filed a Joint Stipulation for Substitution of Counsel, substituting the other attorney in place of Complainant as counsel for _____. In June 2017 Complainant’s law firm, through Complainant, filed a Motion to Quash Subpoena and Motion for Protective Order: (1) stating that the firm had a retaining lien on _____ documents until it had been paid in full; (2) noting that _____ had subpoenaed certain documents from the firm; and (3) seeking a protective order to prevent _____ from accessing the documents in light of the retaining lien. _____ filed a response, arguing in part that Complainant’s termination as counsel in the case was due to his wrongdoing, and the retaining lien need not be protected in those circumstances.

At a hearing in June 2017, the Subject Judge addressed the motion for protective order, and the following exchange took place:

[Complainant]: Your Honor, we got a subpoena, and the subpoena asked us –

[The Subject Judge]: I’ve read the papers, _____.

[Complainant]: Okay. Would you like me to argue the motion or –

[The Subject Judge]: If you’d like to argue the motion, but please assume that I’ve read the papers.

Counsel for _____ later asserted that _____ had terminated Complainant’s representation for cause, and Complainant argued there had been no evidence of misconduct.

The Subject Judge denied the motion for a protective order. After noting that a retaining lien was not a basis for quashing a subpoena under the relevant rules, the Subject Judge stated:

There are sufficient allegations in this file of misconduct. I am not making any determination that there has been misconduct. But I am not going to permit _____ to continue what I have perceived from the early stages of this case as a deliberate effort on _____ part to make the restructuring

and the reorganization of [] as difficult, if not impossible, as he possibly could.

... My conclusions are the ones that I've drawn from observing the case, mainly that _____ has been as uncooperative and unhelpful as possible. And I am not going to permit him to refuse to turn over the precise information that's necessary for this case to move forward.

... But I am not going to permit this case to be stopped dead in its tracks for another unknown number of months because _____ is attempting or wants to impede its progress to the greatest extent possible.

In July 2017 the Subject Judge entered an order denying the law firm's Motion to Quash Subpoena and Motion for Protective Order and directing Complainant and his firm to produce documents to _____ within seven days. The law firm filed an emergency motion to stay the Subject Judge's order pending appeal. The Subject Judge issued an order denying the motion to stay on various grounds, stating: (1) "the Court has the strong initial impression that _____ representation of _____ was terminated for cause, and in 'a situation where the lawyer possessing the lien is entirely at fault causing his withdrawal,' the retaining lien will not be protected by a court"; and (2) "the public's interests are not served by lawyers who delay cases and make them more difficult to adjudicate."

The law firm filed a notice of appeal and filed in the district court an emergency motion to stay the Subject Judge's order directing it to produce documents. On July 19, 2017, a magistrate judge issued an order granting the motion to stay pending the resolution of the appeal. The magistrate judge found that the district court would likely determine that the bankruptcy court had incorrectly disregarded the retaining lien, noting that the bankruptcy court had expressly declined to find whether misconduct had occurred. The magistrate judge explained: "To be clear, the Undersigned is giving no opinion about any of the alleged misconduct. Furthermore, the Undersigned certainly sympathizes with the bankruptcy court's goal of efficiently shepherding its case and avoiding delay tactics from attorneys." The magistrate judge emphasized, however, that the bankruptcy court had not made a finding about misconduct. In a footnote, the magistrate judge noted that the district court could send the matter back to the bankruptcy court to determine whether Complainant had engaged in misconduct, and "be careful what you wish for" might apply in those circumstances.

On March 16, 2018, the district court entered an order reversing the Subject Judge's order denying the law firm's Motion to Quash Subpoena and Motion for Protective Order and remanding for further proceedings. The court found that, without a finding that misconduct occurred, the bankruptcy court could not compel the law firm to produce its files without adequate security. In a footnote, the district court noted that the

law firm had asserted that the Subject Judge had a personal prejudice against Complainant, but “nothing in the record shows any bias sufficient to withdraw the reference” from the Subject Judge.

On March 21, 2018, in the adversary proceeding, the law firm filed a Notice of Withdrawal of Attorney’s Retaining Lien and Charging Lien, noting that it had reached a settlement with _____ on the matter. In May 2018 _____ filed an amended complaint against _____, and the parties later filed cross-motions for summary judgment. On August 1, 2018, the Subject Judge held a hearing at which counsel for _____, the general partner of _____, and counsel for _____ appeared. At the hearing, counsel for _____ discussed a claim raised in the amended complaint, noting that the claim included a section on attorney’s fees with two lawyers listed, including “_____, a name that your Honor is very familiar with in this case, and ---.” The Subject Judge stated:

Let me interrupt you, because it’s unlikely that anyone in the room will have any nice things to say about _____, and so since we are all very likely to be singing from the same page of the same hymnal, let’s just avoid that discussion

There have been additional proceedings in the adversary case.

Complaint

In his Complaint of Judicial Misconduct or Disability, Complainant states that, from the first time he appeared before the Subject Judge in the Chapter 11 case filed by _____ and throughout his representation of the creditors in that case, he experienced “rude, abusive and disrespectful treatment” by the Subject Judge. He states that every time a motion was heard on behalf of his clients, the Subject Judge “made it readily apparent that he was not receptive to hearing the issues presented in such motion.”

Complainant notes that, on several occasions, the Subject Judge made statements to the effect that he had read Complainant’s motion and that Complainant should bear that in mind when making his argument. Complainant asserts it was “clear from the dismissive nature in which he made these comments that it was [the Subject Judge’s] intent to stifle [Complainant’s] presentation before him.” He states that the Subject Judge did not make similar comments to other litigants in the case. Complainant alleges that the Subject Judge “made it clear, from the inception and by giving short shrift to my presentations, that he was biased against me and my clients’ position.” Complainant notes that he does not know why the Subject Judge treated him with “such rudeness and disrespect, but his hostility towards me became so apparent that my clients felt the need to hire another law firm as co-counsel . . . to overcome the evident bias.”

About the Chapter 13 case filed by the _____, where Complainant and his law firm represented _____, Complainant states that a motion he filed clearly explained that _____ was a “wholly owned affiliate” of his law firm and that the debtors owed the firm “an indebtedness for attorneys’ fees” that had been assigned to _____. Complainant notes that, at a hearing in October 2014, after the debtors’ counsel advised the court that _____ claim arose out of a debt to the law firm, the Subject Judge “accused [Complainant] of not being candid with the court.” He states this was “extremely upsetting as it was an aspersion on [his] character” in a matter unrelated to the merits of the objection. Complainant also notes that he advised the court at the hearing that there was another creditor who had filed an objection and who was not on the debtor’s list of creditors. He states that the Subject Judge responded, “[t]hat is the silliest thing I have heard in a long time. If they filed an objection – they filed a pleading stating they weren’t . . . on the service list that obviously means they have notice of the case.” (Alteration and omission in original). Complainant states he was “unsettled” by the Subject Judge’s statement, and that it was “highly insulting and indeed hard to believe.”

Complainant alleges that in the Chapter 11 case filed by _____, in which Complainant represented _____, he experienced:

extreme hostility from [the Subject Judge] from the inception because of his failure to consider well-developed and concisely briefed arguments and in his rude and abusive treatment of me, in which he left no doubt in my or anyone else’s mind in the courtroom, that [he] harbors an intense dislike of me, to the point that I felt compelled to advise my client to obtain alternate counsel as I had the well-founded fear that my client could not obtain a fair trial or hearing before [the Subject Judge].

Complainant describes the dispute involving the retaining lien, noting that the Subject Judge stated at a hearing that he believed that Complainant had deliberately sought to hinder the case, which Complainant states was “simply untrue.” Complainant contends that his law firm vigorously opposed the relief sought by _____ on a sound legal basis, noting that the Subject Judge later found in favor of _____ on many of the bases that Complainant had raised in earlier motions and that the Subject Judge had rejected.

Complainant also takes issue with the Subject Judge’s statements that he had a strong impression that Complainant’s representation of _____ was terminated for cause and that Complainant had acted to delay the case, as well as his findings concerning the retaining lien that were made without holding an evidentiary hearing. He points out that the Subject Judge’s order was later overturned by the district court. He states, “It is disturbing that a judge would make a ruling based upon their impressions of

an attorney and not based upon actual evidence. The evident bias of such a ruling is clearly inappropriate.”

Complainant states that he would not have filed his Complaint of Judicial Misconduct or Disability if not for the Subject Judge’s “totally inappropriate commentary” and “outrageous” statement at the August 1, 2018 hearing that “‘it’s unlikely that anyone in the room will have any nice things to say about _____, and so since we are all very likely to be singing from the same page of the hymnal, let’s just avoid that discussion’” Complainant found the comment, made when he was “not even present to defend” himself, to be “absolutely appalling.” He contends that for a federal judge to make such a statement “in a courtroom filled with professional colleagues . . . is extraordinarily inappropriate, deeply insulting, offensive, abusive, and beyond the pale . . . ,” especially when the Subject Judge does not know Complainant personally. Complainant states he is approaching his 70th birthday and does not know of any reason why he should not be treated with dignity and respect. He contends that the Subject Judge made statements about Complainant’s “lack of worth as a human,” which are “a clear abuse of his office” and which “invited pejorative commentary” from other attorneys involved in the case. Finally, Complainant asserts that the Subject Judge’s actions violated multiple canons of the Code of Conduct for United States Judges. He attached various documents to his Complaint.

Discussion

Rule 3(h)(1) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States provides that cognizable misconduct “is conduct prejudicial to the effective and expeditious administration of the business of the courts.” Under JCDR 3(h)(1)(D), cognizable misconduct includes “treating litigants, attorneys, or others in a demonstrably egregious and hostile manner.”

Rule 3(h)(3)(A) 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, findings, and orders in the cases, the allegations are directly related to the merits of the Subject Judge's decisions or procedural rulings. Complainant's remaining claims are based on allegations lacking sufficient evidence to raise an inference that the Subject Judge was biased against Complainant, treated him in a demonstrably egregious and hostile manner, or otherwise engaged in misconduct.

The Subject Judge's statement, "it's unlikely that anyone in the room will have any nice things to say about _____, and so since we are all very likely to be singing from the same page of the same hymnal, let's just avoid that discussion," does not rise to the level of demonstrably egregious and hostile treatment given the context in which it was made. It was made at a hearing attended by those with whom Complainant had contentiously litigated various matters. While the Subject Judge could have been more measured in his comments and more polite and gracious in his demeanor, "expressions of impatience, dissatisfaction, annoyance, or even anger" are generally not grounds for a complaint of misconduct. Liteky v. United States, 510 U.S. 540, 555-56, 114 S. Ct. 1147, 1157 (1994). Complainant has pointed to some comments that indicate the Subject Judge's impatience, dissatisfaction, and annoyance but that do not constitute misconduct. "A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration" do not establish partiality or bias. Id.

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**.



Chief Judge