

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-09-90017

BEFORE

Lipez and Thompson, Circuit Judges,
McAuliffe, Lisi and Gelpi, District Judges

ORDER

ENTERED: SEPTEMBER 14, 2010

Petitioners, litigants, have filed a petition for review of Chief Judge Lynch's order dismissing their complaint under the Judicial Conduct and Disability Act, 28 U.S.C. § 351 (a), against a bankruptcy judge in the First Circuit. The petitioners originally alleged that the judge wrongfully failed to withdraw and exhibited bias while presiding over one of the petitioners' bankruptcy proceedings.

The petitioners alleged that the judge was obligated to withdraw from the case because of a previous misconduct complaint that the petitioners had filed against the judge some years earlier in connection with another of their bankruptcy proceedings. The petitioners contended that the judge's withdrawal from the present case was mandated by both the recusal statute, 28 U.S.C. § 455, and by the state Code of Judicial Conduct. (The Code of Conduct for United States Judges provides analogous standards of conduct.)

The petitioners secondly alleged that, in addition to failing to withdraw, the judge issued

orders in the case reflecting bias against them. These included: 1. an order allowing a creditor relief from the automatic stay; 2. the court's denial of the petitioners' emergency motion to disqualify the judge; and 3. the dismissal of the case.

The petitioners next charged that the judge's rude language and harsh tone reflected bias. They cited a hearing on the petitioners' motion to reconsider the order lifting the stay, in which the judge allegedly exhibited a "loud, unpleasant, and unprofessional demeanor," and stated that, "[if the petitioner] wants me to recuse myself, have him come in here and tell me to my face." The petitioners submitted an affidavit of another creditor attesting to the judge's intemperate behavior at this hearing.

Lastly, the petitioners charged that the judge wrongfully failed to notify the creditor (whose officer filed the affidavit) of two hearings: the hearing on the first creditor's motion for relief from stay and the hearing on the petitioners' recusal motion. On this point, the affidavit stated that the creditor had been informed of the latter hearing but did not attend it because he assumed that only the recusal motion would be addressed. Instead, the court apparently also heard a motion to dismiss and, subsequently, dismissed both the bankruptcy case and an adversary proceeding that this creditor had filed.

Chief Judge Lynch dismissed the complaint pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), and 352(b)(1)(A)(ii), and 352(b)(1)(B). As an initial matter, Chief Judge Lynch observed that the judge had presided over at least seven other bankruptcy cases to which one or both of the petitioners were a party. The Chief Judge determined that neither the previous cases, nor the alleged prior misconduct complaint filed against the judge, necessitated the judge's recusal from the present case. See e.g. U.S. v. Giorgi, 840 F.2d 1022, 1034-1036, (1st Cir. 1988), and *cases*

cited. Chief Judge Lynch noted that the judge stated that he was never made aware of the previous misconduct complaint, the petitioners provided no evidence to the contrary and, further, the prior complaint was not filed in the proper venue. Chief Judge Lynch explained that the filing of a previous misconduct complaint does not itself require a judge's recusal from a subsequent case, let alone when the complaint was improperly filed and the judge was unaware of its existence. Thus, the allegation that the petitioners' previous misconduct complaint mandated the judge recusal from the case at issue was dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial-Conduct), Rule 11(c)(1)(A).

With respect to the petitioners' remaining charges, Chief Judge Lynch first dismissed the claims challenging the court's orders as merits-related pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). Turning first to the order allowing relief from the automatic stay, the Chief Judge observed that the motion was initially granted without objection. At the hearing held to consider the petitioners' motion to reconsider the order lifting the stay, all parties present were heard in full before the court denied the motion on numerous cited grounds.

Regarding the second contested order -- denying the motion for recusal -- Chief Judge Lynch observed that the court held a hearing on this motion, as well, at which it heard the petitioners' argument in full before denying the motion on the grounds there was no reasonable basis for questioning the judge's impartiality under either the recusal statute, 28 U.S.C. § 455(a), or under the disqualification provisions of the Code of Conduct for U.S. Judges, Canon 3.

Chief Judge Lynch next pointed out that, in dismissing the case, the court cited applicable case law and reasoned that, as there were no assets in the estate to be liquidated and the dispute

was essentially one between two parties, the matter belonged in state court. As there was no information in the complaint or in the reviewed record suggesting that any of the cited orders was motivated by judicial malice or bias, Chief Judge Lynch dismissed these charges as merits-related pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B).

Chief Judge Lynch next determined that the audio recordings of the cited hearings "conclusively refuted" the charges that the judge's language, tone and demeanor illustrated prejudice. See 28 U.S.C. § 352(b)(1)(B). The Chief Judge listened to recordings of both of the relevant hearings in their entirety, before concluding that the judge was professional, patient, calm, and polite at all times. Chief Judge Lynch further noted that, "absent extraordinary circumstances, the tone maintained by the judge during a proceeding is not a basis for a finding of misconduct." Boudin, C.C.J., Order, In Re: Complaint No. 444, January 23, 2007, at 4.

Chief Judge Lynch also concluded that the judge did not say anything during these hearings that indicated bias or malice. The cited statement -- to the effect that the petitioner "can come in here and tell me face to face why he thinks I ought to [withdraw]" -- was not remotely indicative of judicial misconduct. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A).

The same held true for the other challenged hearing. Chief Judge Lynch observed that the court heard from all the parties present at the hearing, and that there was no inappropriate language or other indication of judicial intemperance, much less any unusual circumstances that would suggest bias or misconduct. Accordingly, the charge that the judge's language, tone or demeanor -- in either of the two referenced hearings -- demonstrated bias was dismissed pursuant

to 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial-Conduct, Rule 11(c)(1)(D).

As to the petitioners' final claim -- that the judge failed to properly notify one of the creditors of two hearings -- Chief Judge Lynch determined that there was no evidence of judicial bias or error in this regard but that, regardless, any such oversight would not alone suggest judicial misconduct. See e.g., Boudin, C.C.J., Amended Order, In re: Complaint No. 406, September 9, 2005, at 3 (Clerical errors do not suggest judicial misconduct.).

Regarding the first cited hearing, Chief Judge Lynch observed that, as no objection had been filed, the initial motion for relief from the stay was allowed on the papers. The creditor at issue appeared and was heard by the court at the subsequent hearing on the motion to reconsider this order.

The Chief Judge noted that the court had scheduled the second of the cited hearings, on the motion to recuse. The moving party then scheduled the motion to dismiss for hearing at the same time. It appeared to the Chief Judge that counsel for the creditor at issue had recently filed a pleading indicating difficulty accessing CM/ECF. Thus, the Chief Judge explained that it was possible that, as alleged, the creditor did not receive notice that the motion to dismiss would be heard at the scheduled hearing, along with the petitioners' recusal motion. However, while this may have been an issue of attorney oversight (on the part of counsel for the moving party and/or the creditor's counsel who knew he was not receiving electronic notices), it had no bearing whatsoever on the judge's conduct. Thus, the allegation pertaining to a lack of notice was dismissed. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A).

The petitioners ask the Judicial Council to review the Chief Judge's dismissal of their

complaint.¹ The petitioners repeat the original charges that the judge conducted hearings without providing adequate notice, improperly ordered the release of the bankruptcy assets from the automatic stay, and improperly failed to withdraw, despite the petitioner's previous misconduct complaint.

The petitioners presents no information beyond that which was thoroughly addressed by the Chief Judge. Regarding the adequacy of notice, Chief Judge Lynch thoroughly reviewed the record of the cited hearings and properly determined that there was no evidence that the judge intentionally sought to deprive the creditor, or others, of any notice to which they were entitled. Absent such evidence -- of which there was none -- any judicial error in this regard would not constitute judicial misconduct. Thus, the allegations to this effect were properly dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial-Conduct, Rule 11(c)(1)(A).

With respect to the relief from the automatic stay, the petitioners now assert that the court intentionally and improperly granted the creditor relief from the stay, despite "several written notices detailing a 23-count RICO complaint" that the petitioners intended to file against the creditor. As Chief Judge Lynch observed, the initial order allowing relief from the stay was granted without objection. At the hearing on the petitioners' motion to reconsider the order, the judge heard from all the interested parties and denied the motion, noting that it was a Chapter 7 proceeding and there was no reorganization. There was and is no evidence of bias in the court's consideration of the issue, or elsewhere in the record of the case, that would undermine the

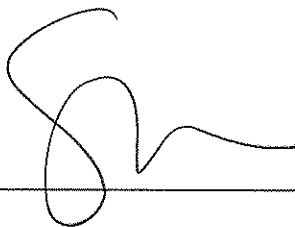
¹The petitioners also ask the Judicial Council to address "new and additional allegations" that detail the judge's "various abuses of law, and the harm that his freewheeling and prejudicial actions caused to creditors and debtors alike." Because the judicial council should "ordinarily review the decision of the chief judge on the merits, treating the petition for review for all practical purposes as an appeal," Rules of Judicial-Conduct, *Commentary on Rule 19*, the petitioners' new charges have been submitted to Chief Judge Lynch as a new complaint.

integrity of the order. Accordingly, this claim was aptly dismissed as merits-related pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial-Conduct, Rule 11(c)(1)(B).

Finally, the Chief Judge correctly determined that neither the previous misconduct complaint, nor any other information in the reviewed record, required the judge's recusal from the petitioners' proceeding. Further, as observed by Chief Judge Lynch, the record is devoid of evidence of bias or animus in connection with the judge's denial of the recusal motion. Thus, the charge that the judge improperly failed to withdraw from the proceeding was appropriately dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), and 352(b)(1)(A)(ii).

Essentially, both the original complaint and the petition for review are based upon the dissatisfaction of the petitioner, and the noted creditors, with the court's reluctance to lend the protections afforded by a bankruptcy proceeding to the present matter. The judge dismissed the case on the grounds that the dispute did not belong in bankruptcy court. However, there was and is no evidence that the judge's ruling(s) in this regard, or otherwise, were improperly motivated, or that the judge engaged in any other wrongdoing. Accordingly, the misconduct complaint was properly dismissed pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), 352(b)(1)(A)(ii), and 352(b)(1)(B).

For the reasons stated herein, the order of dismissal issued in Judicial Misconduct Complaint No. 01-09-90017 is affirmed. See Rules of Judicial-Conduct, Rule 19(b)(1).

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a series of loops and a horizontal line extending to the right.

Susan Goldberg, Acting Secretary