

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-09-90017

BEFORE
Lynch, Chief Circuit Judge

ORDER

ENTERED: JANUARY 7, 2010

Complainants, filed a complaint of judicial misconduct under 28 U.S.C. § 351(a) against a First Circuit bankruptcy judge. The complainants allege that the judge wrongfully failed to recuse himself and exhibited bias in issuing certain orders while presiding over one of the complainants' bankruptcy proceedings. The complainants say they are managing members of the debtor corporation.¹

The complainants allege that the judge was obligated to withdraw from the case because they had filed a previous misconduct complaint against him, and because they filed this complaint. The complainants state that they had filed this complaint a number of years ago in connection with an earlier proceeding, and that this earlier complaint mandated the judge's recusal from the present

¹The complainants submit an identical complaint filed by the corporation itself. Because the governing statute requires that a misconduct complaint be filed by a "person," this matter is not cognizable. 28 U.S.C. § 351(a).

matter.² The complainants assert that both the recusal statute, 28 U.S.C. § 455, and a state code of judicial conduct mandated the judge's withdrawal from the present proceeding. The state law provision is inapplicable because the judge is a member of the federal bench. The Code of Conduct for United States Judges does apply to members of the federal bench.

The complainants secondly allege that, in addition to failing to withdraw from the present case, the judge issued orders reflecting his bias against them. These include: 1. an order lifting an automatic stay; 2. an order denying the complainants' motion for recusal; and 3. an order dismissing the case.

The complainants further allege that the judge used rude language and a harsh tone at particular hearings and reflected bias on his part. They cite a hearing held on the complainant's motion to reconsider the order lifting the stay in which they allege the judge exhibited a "loud, unpleasant, and unprofessional demeanor," and stated that, "[i]f [the complainant] wants me to recuse myself, have him come in here and tell me to my face." The complainants submit an affidavit of a creditor with allegations that the judge engaged in intemperate behavior at this hearing and

²The complainants state that they had filed a misconduct complaint because, in the earlier case, the judge denied the debtor corporation, then owned by the complainants and others, the protection from a hostile creditor to which they were entitled under Chapter 11. They assert that, instead of allowing the debtor to "reorganize its very small debt," the judge "joined" the creditor and his counsel by "intentionally refusing to allow the protection afforded to any Debtor [sic], under Chapter 11 of the bankruptcy code." The complainants state that this misconduct complaint was filed with the state supreme court, the state board of bar overseers, the FBI and other agencies. The complainants do not mention the outcome of this complaint and the judge has stated that he did not learn of this complaint until the complainants filed a motion for recusal in the pending case. This complaint was not properly filed, see 28 U.S.C. § 351, et. seq., and its allegations are not part of the present matter. The allegations have been reviewed, however, in accordance with Rule 5 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial Misconduct) and it has been determined that there is not cause to investigate the matter further. (Rule 5 requires the Chief Judge to review charges of misconduct that are not properly submitted to determine whether the identification of a complaint is warranted.)

noting that "anyone in the court room [sic] that day could see that this Judge [sic] is only out to hurt and damage [the complainant]." The affiant further corroborates that the judge made a statement that the complainant should appear in person to seek the judge's recusal. The affiant adds an allegation that the judge's "emotions stayed high throughout the remainder of the hearing. His mind seemed to be made up before other points were even brought up." The affiant concludes that, in his opinion, the judge's "open and obvious dislike of [the complainant] prevented us from making our claim as a secured creditor."

Lastly, the complainants charge that the judge wrongfully failed to adequately notify the creditor (who filed the affidavit) of two hearings: the hearing on the motion for relief from stay and the hearing on the complainants' recusal motion. The creditor states in the affidavit that he had been informed of the latter hearing but did not attend because he assumed that only the recusal motion would be addressed. Instead, the court also heard a motion to dismiss and, subsequently, dismissed both the bankruptcy case and the creditor's adversary proceeding against another creditor. The complainants conclude that the judge engaged in "intentional malfeasance and misconduct, . . . unquestionable bias and premeditated malice . . . damaging the Debtor [sic] and the Creditors [sic]. . . ."

The judge has presided over at least seven other bankruptcy cases in which one or both of the complainants have been a party. There is no basis for the complainants' argument that the prior misconduct complaint necessitated the judge's recusal from the case at issue. See e.g. U.S. v. Giorgi, 840 F.2d 1022, 1034-1036, (1st Cir. 1988), and Kampfer v. Gokey, 175 F.3d 1008, (2d Cir. 1999), citing Litkey v. U.S., 510 U.S. 540, 551, 114 S.Ct. 1147 (1994). Such a blanket rule would effectively give "parties a random veto over the assignment of judges." Giorgi, supra, 840 F.2d at

1034. In the present matter, complainants' prior judicial misconduct complaint was not filed in the proper venue. (The complaint was purportedly filed it with the state bar association, the FBI and others but not with the federal courts in accordance with the governing statute. See 28 U.S.C. § 351 et. seq.) Further, the judge stated that he was never made aware that a complaint had been filed against him until the complainants asserted they had in connection with the later motion to disqualify. The complainants provide no evidence to the contrary. 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.³ The allegation to that effect is, therefore, 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 Misconduct), Rule 11(c)(1)(A).

The issue remains, however, whether the complainants provide independent facts, aside from the existence of a previous misconduct complaint, that provide a basis for a finding of bias or misconduct. We have reviewed the complaint, and its attachments, against the record, and have listened to the tapes of the relevant hearings. Contrary to the complainants' allegations, the court's orders, the judge's statements, and his tone and demeanor, are devoid of any indication of bias or other wrongdoing. Nor was the judge responsible for the alleged failure of a creditor to receive

³A violation of the recusal statute or of the Code of Conduct for U.S. Judges does not necessarily constitute judicial misconduct. See Boudin, C.C.J., Order, In re: Complaint No. 362, December 16, 2003, at 2, and cases cited ("Although a violation of the recusal statute, 28 U.S.C. § 455(a), is not automatically a violation of the Judicial Misconduct statute, conceivably a sufficiently egregious violation, especially if coupled with evidence of bad faith, might in some circumstances rise to the level of judicial misconduct.") See also Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial Misconduct), Commentary on Rule 3 (While "the Code of Conduct for United States Judges may be informative" to questions of judicial misconduct, a violation of the Code does not automatically constitute judicial misconduct under the statute.)

proper notice of two hearings.

The first of the contested orders -- allowing relief from the automatic stay -- was granted because no objection had been received to the creditor's motion. The court subsequently held a hearing on the complainants' motion to reconsider the order lifting the stay. All parties present were heard before the court denied the motion on numerous cited grounds.

The day before this hearing, complainants had filed an ex-parte emergency motion to disqualify the judge. The court heard this motion and a motion to dismiss at the same hearing. At this hearing, the complainant testified under oath on the grounds for his recusal motion, including his previous misconduct complaint. The judge denied the motion for disqualification, and explained that neither the prior misconduct complaint (which the complainants had not properly filed and about which the judge had no knowledge) nor the included affidavit provided any reasonable grounds to question his 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.

Regarding the motion to dismiss, the judge heard from the moving party who asserted that, because the voluntary bankruptcy petition lacked the consent of a managing partner of the debtor corporation and was filed with the sole purpose of evading a state court action, it should be dismissed. Complainants' counsel presented his argument that evidentiary issues remained and the case was not appropriate for dismissal. The court took the matter under advisement and subsequently issued a memorandum opinion ordering the dismissal of the case. The judge explained that the moving party purports to hold a fifty percent membership in the debtor corporation which had precipitated a pending state court action. Citing case law, the judge 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. Accordingly, he dismissed the case and all related adversary proceedings.

There is no information in the complaint or the reviewed record supporting the contention that any of the cited orders were improperly motivated. "An allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, is merits related." As such, the charges that these orders demonstrated the judge's bias or wrongdoing are dismissed as not cognizable pursuant to 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(B).

The complainants next assert that, separate from the substance of the court's decisions, the judge's language, tone and demeanor illustrate prejudice against the complainants. First, "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, supra, at 4. See also Boudin, C.C.J., Order, In Re: Complaint No. 431, June 26, 2006, at 5, in which then Chief Judge Boudin, based upon his review of a taped hearing, explained that a judge's "briskness of manner" was neither uncommon nor provided an "objective basis . . . to support a finding of either favoritism or discourtesy." Second, our review of the audio tape of these hearings "conclusively refute(s)" this charge. See 28 U.S.C. § 352(b)(1)(B). As part of a limited inquiry undertaken pursuant to Rule 11(b) of the Rules of Judicial Misconduct, I have listened to the audiotapes of the relevant hearings as have two others who assisted me. I find that the judge was professional, patient, calm, and polite at all times. The judge did not raise his voice, express frustration or engage in any other intemperate behavior that could have been interpreted as a "dislike" or predilection against the complainants.

The judge did not say anything during these hearings that indicates bias or malice. When complainants' counsel raised the recusal motion at the hearing (on the motion to reconsider the order

lifting the stay), the judge replied that he would set it up for a hearing so that "[the complainant] can come in here and tell me face to face why he thinks I ought to do it." This statement is not remotely indicative of judicial misconduct. See 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial Misconduct, Rule 11(c)(1)(A).

The transcript of the other challenged hearing (on the motions to recuse and to dismiss) demonstrates that the judge heard from the complainant's counsel and allowed counsel to call witnesses in support of the recusal motion. The complainant appeared and described his prior misconduct complaint before the court denied the motion.⁴ Turning to the motion to dismiss, the court again heard from all the parties present. The judge directed questions to complainants' counsel and counsel responded. Before ruling, the judge asked whether anyone had "anything further," and stated that he would take the matter under advisement. The judge used no inappropriate language or gave any 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 is dismissed pursuant to 28 U.S.C. § 352(b)(1)(B). See also Rules of Judicial Misconduct, Rule 11(c)(1)(D).

⁴The court held:

There's [sic] no facts . . . that would support or even question my impartiality. If you made a complaint in . . . I never knew about it. You surely didn't make it to the right party. If you made a complaint yesterday, I was told something was filed. I have not looked at it, and I don't intend to look at it.

In the previous case I made adverse rulings against your [company], or whatever it was. They were not appealed. If they were appealed, it surely didn't go in your favor. . . I know I made rulings that you thought were adverse to your interest, but I made them under the facts of that case and the law. I do not think that my impartiality can be reasonably questioned, and for that reason I'm denying your motion to recuse.

The final claim is that the judge failed to properly notify the creditor (who submitted the affidavit) of relevant hearings, thus denying him the opportunity to assert his claim. However, any error or oversight in this regard does not 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.). Neither, of course, would counsels' mistakes be attributable to the judge.

The record indicates that there was no hearing on the initial motion for relief from the stay. Because no objection was filed, the court allowed this motion on the papers.⁵ At the hearing on the motion to reconsider this order, the creditor at issue appeared and was heard by the court.

The court subsequently scheduled the hearing on the motion to recuse, and the moving party filed a notice scheduling his motion to dismiss for hearing at the same time. The certificate of service states that the notice was served electronically on counsel for the complainants and the trustee; it does not indicate service on counsel for the creditor at issue. Meanwhile, counsel for this creditor had recently filed a pleading stating that he could not access the CM/ECF system until his training was complete later that month. Thus, it is certainly possible that, as alleged, the creditor did not receive notice that the motion to dismiss would be heard along with the complainants' recusal motion. While this raises a possible issue of attorney oversight (on the part of counsel for the moving party and/or the creditor whose counsel knew he was not receiving electronic notices), it has no bearing whatsoever on the judge's conduct. As the issue is not one of judicial misconduct, the allegation is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial Misconduct, Rule 11(c)(1)(A). Moreover, a complaint that is based on the merits of the court's rulings is not a cognizable complaint of misconduct. See 28 U.S.C. § 352(b)(1)(A)(ii). See also

⁵The certificate of service filed with the motion states that a hard copy was mailed to the complainants and that all "others receive notice through the Court's ECF/CM system."

Rules of Judicial Misconduct, Rule 11(c)(1)(B).

For the reasons stated, Judicial Misconduct Complaint No.01-09-90017 is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), 352(b)(1)(A)(ii), and 352(b)(1)(B).

4/7/10
Date

Sandra Lynch
Chief Judge Lynch