IT IS ORDERED as set forth below:

Date: September 9, 2016

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CASE NO. 10-92243-WLH
	)	
ALFONZA MCKEEVER,	)	CHAPTER 7
	)	
Debtor.	)	JUDGE WENDY L. HAGENAU
	)	

ORDER ON DEBTOR'S MOTION TO RECUSE PRESIDING JUDGE AND TRUSTEE

The Debtor's Motion to Recuse Presiding Judge and Trustee [Docket No. 369] came before the Court for review. For the reasons discussed below, the Motion to Recuse Presiding Judge is DENIED and the Motion to Recuse the Trustee will be set for hearing.

BACKGROUND

This case has a long and contentious history. The Debtor, Alfonza McKeever ("McKeever" or "Debtor"), filed a petition under Chapter 13 of the United States Bankruptcy Code on October 29, 2010, and was initially represented by counsel. During the Chapter 13 case, Cranberry Financial LLC ("Cranberry") filed a motion for relief from stay to foreclose on business property located at 5361 Covington Highway, Decatur, Georgia ("Property").

Cranberry also filed a proof of claim for the debt and security deed on the Property, including attorney fees. The Debtor objected to the claim. Because of the amount of other claims filed in the case, the Debtor filed a motion to convert his case to one under Chapter 11 on May 16, 2011. The motion to convert was granted, and the case was converted to one under Chapter 11 on July 13, 2011. Neither Cranberry's motion for relief from stay nor the Debtor's objection to Cranberry's claim was heard in the Chapter 13 case.

When the case was converted to one under Chapter 11, it had already been pending for eight months with no plan confirmed. The Debtor filed a Chapter 11 plan on November 2, 2011 and a disclosure statement the next day and made payments to Cranberry in the interim. Numerous objections were filed to the plan and disclosure statement, and at least one set of amendments was made to each. On March 28, 2012, the United States Trustee ("UST") filed a motion to dismiss the Chapter 11 case on the grounds that it did not appear the Debtor could confirm a Chapter 11 plan. Cranberry urged the Court to convert the case to one under Chapter 7 rather than to dismiss it. On April 24, 2012, Debtor's counsel moved to withdraw from his representation of the Debtor, but the Debtor opposed his counsel's request. The Court then entered an order on May 10, 2012, allowing the parties to enter into mediation and requested counsel to remain through the mediation.

The mediation was unsuccessful. The objection to Cranberry's claim was specially set for an evidentiary hearing on January 23, 2013. The claim objection was inexplicably withdrawn on January 18, 2013. The Court then held a status conference on January 23, 2013, where it became clear to the Court that the Debtor continued to object to the Cranberry claim, that a potentially valid basis for such an objection existed, and that the relationship between Debtor and counsel had deteriorated to a point where withdrawal was appropriate. The Court therefore

permitted counsel to withdraw and appointed a Chapter 11 trustee. The trustee appointed was Cathy Scarver.

The Court held an initial status conference with the Trustee, the Debtor and other parties in interest on February 21, 2013. The Trustee later filed a status report, notifying the Court of an accident that occurred at the Property. Cranberry then filed a motion to prohibit the use of cash collateral, alleging that an insurance check had been issued for the damage to the Property and wanting to ensure that it was not used without Cranberry's permission or the Court's authority. Nevertheless, the Court learned that the insurance check, which had been made payable jointly to McKeever Paint & Body and Cranberry, had been negotiated even though Cranberry's counsel represented that Cranberry had not endorsed the check. In response, the Court converted the case to one under Chapter 7.

Ms. Scarver remained the trustee in the Chapter 7 case. Shortly after the conversion, another attorney appeared on behalf of the Debtor. He withdrew a year later, alleging the Debtor did not follow his advice. The Debtor has remained unrepresented since May 15, 2014. During the Chapter 7 case, the Trustee objected to the claim of Cranberry. On the eve of trial, the Trustee and Cranberry reached a settlement and filed a motion to compromise. The proposed settlement awarded Cranberry an allowed secured claim of $85,000 rather than the $129,000 plus that Cranberry claimed was due at the time. After an evidentiary hearing on the merits of the compromise, the Court approved the compromise over the Debtor's objection.

In the meantime, the UST filed an action against Mr. McKeever, objecting to his discharge. Thereafter, on August 27, 2015, Ms. Scarver, as the Chapter 7 Trustee, filed her complaint against the Debtor and multiple other members of the Debtor's family related to the disposition of the insurance check and other matters. After a four-day trial, the Court entered an

order denying Mr. McKeever's discharge on May 23, 2016 [Docket No. 95 in Adv. Proc. No. 13-5417]. The Debtor has appealed this decision.

By notice dated May 23, 2016 [Docket No. 353 in the main case], the Court noted the Debtor's estate includes the Property which has not yet been liquidated. It appears to the Court that this is the last remaining significant asset to be liquidated in the estate. The Court therefore scheduled a status conference for July 12, 2016, stating it would "solicit information and provide direction regarding the steps needed for liquidation of the Property and the timeframe for such liquidation." At the conclusion of the status conference, the Court entered an order on July 14, 2016 [Docket No. 363], directing the Trustee to file a notice on or before July 29, 2016, stating an amount of money the Trustee would accept in return for a release of the Property to the Debtor or his designee (a "Settlement Amount").

The Trustee filed such a Notice on July 29, 2016 [Docket No. 365], stating the Trustee would accept $175,000 in addition to certain releases of liens filed by the Debtor's family and withdrawal of claims filed by various parties related to the Debtor and certain other provisions. The Court held a hearing on the Trustee's Notice on August 18, 2016. The Trustee stated her belief that the Property is worth between $225,000 and $250,000, and that the claims secured by the Property are approximately $140,000. The Debtor testified during the trial on denial of his discharge that the Property was worth approximately $500,000, but opposed the amount the Trustee requested. His primary objection was that Cranberry's claim should not have been allowed for $85,000. He also objected to the various conditions the Trustee included in the "settlement offer". The Court explained to the Debtor that the Court's goal in setting an amount and terms for a "settlement" was to provide the Debtor an opportunity to obtain a refinancing of the Property such that secured claims could be paid in full as well as at least some of the administrative claims. The Court explained to the Debtor on multiple occasions that the Property

must be monetized either by the Trustee selling it to a third party or by the Debtor refinancing the Property to provide the Trustee with substantially equivalent consideration. The Debtor filed his Motion to Deny Trustee's Settlement Amount Offer, Notice and Response to this Court's Order and Present Full Faith Credit, Rule 44 Federal Rule of Civil Procedure [Docket No. 368], in which he further explained his objections to the Trustee's Settlement Amount.

After reflection, and based on the positions of the parties, the Court declined to enter an order on the Trustee's proposed settlement and instead entered an order on August 19, 2016 [Docket No. 371], stating that the Court would not require the Debtor to accept the Trustee's proposal, the parties were free to negotiate with each other if they desired, but the parties were also free to pursue actions and remedies otherwise available to them under the Bankruptcy Code. On the same day, the Court entered an order which, subject to objection, authorized the Trustee to retain counsel to begin proceedings to dispossess the Debtor and his family from the Property.

The Debtor's Motion, filed the day after the hearing on the Trustee's settlement offer, alleges generally that the Judge is biased and prejudiced against him. He alleges the Judge has failed to give his claims due consideration on a reasonable and equal basis to the Trustee; the Judge erred in denying him a discharge; the Judge erred in indicating that she would authorize a settlement between the Debtor and the Trustee on the grounds set forth by the Trustee; the Judge granted "every" Trustee request and denied all of the Debtor's requests without explanation; and the Judge conspired with the Trustee to deprive the Debtor of his property.

JUDICIAL RECUSAL

Recusal of this judge from hearing any further matter in this case is governed by 28 U.S.C. § 455(a), which provides, "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The appropriate test under Eleventh Circuit law is "whether an objective,

disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988). See also Mantiply v. Horne (In re Horne), 630 Fed Appx. 908, 910 (11th Cir. 2015, *petition for cert filed* (U.S. March 30, 2016) (No. 15-1229) (cites omitted). The Court will "not consider the perceptions of idiosyncratic, hypersensitive, and cynical observers." Id. (cites omitted). And, "the judge need not recuse himself based on the 'subjective view of a party' no matter how strongly that view is held." United States v. Sammons, 918 F.2d 592, 599 (6th Cir. 1990) (cites omitted). Further, a judge is not '"recusable for bias or prejudice [when] his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings.'" Tucker v. Mukamal, 2015 WL 5166276 at *2 (11th Cir. Sept. 4, 2015) (citing Liteky v. United States, 510 U.S. 540, 551 (1994)).

Section 455 "does not invite recusal whenever it is requested by a party." Guthrie v. Wells Fargo Home Mortgage, N.A., 2015 WL 1401660 at *3 (N.D. Ga. March 26, 2015). In fact, "there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." Id. (cites omitted). "[C]ourts must exercise great care in considering motions for recusal so as to discourage their use for purposes of judge shopping or delay[.]" Barna v. Haas (In re Haas), 292 B.R. 167, 175 (Bankr. S.D. Ohio 2003).

Importantly, "it is the facts, not the movant's allegations, that control the propriety of recusal." Guthrie at *3. "Recusal cannot be based on 'unsupported, irrational or highly tenuous speculation.'" United States v. Cerceda, 188 F.3d 1291, 1293 (11th Cir. 1999) (cites omitted). Furthermore, allegations made under 28 U.S.C. § 455 need not be taken as true. Weatherhead v. Globe International, Inc., 832 F.2d 1226, 1227 (10th Cir. 1987). Finally, motions to recuse under Section 455 "are typically decided by the presiding judge." Guthrie at *3.

The Debtor's Motion alleges this Court is biased against him. Bias and partiality, such as forms a basis for recusal, can arise either because the judge has learned information outside the course of judicial proceedings which forms the basis of the judge's opinion or where even from information provided only in court, the judge forms an opinion "so extreme that fair judgment appears impossible." Haas, 292 B.R. at 176. All of the Debtor's allegations are based on actions the Court has taken on pending motions and matters before the Court, all of which are based on the evidence presented in connection with the various motions. The Debtor has not alleged, and cannot allege, that the Court has any information about the matters on which it has ruled from any source other than what has been presented to the Court in hearings in which the Debtor has participated. The Court's opinions which have been formed as a result of the Debtor's actions and testimony in this case do not create a basis for recusal.

The Debtor's allegations seem to be that this judge cannot render a fair judgment. This is not true. Moreover, the Supreme Court has recognized that recusal is not required even if the judge has formed a negative opinion of the party, except in rare circumstances.

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced where properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." (cite omitted). Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.

Liteky, 510 U.S. at 550-51. Moreover, the Debtor's allegations are conclusory and not supported by facts. The Court will review each of the allegations made by the Debtor:

A. Denying the Debtor a discharge – The Debtor argues the Court has shown bias and prejudice by denying him a discharge even though he has presented a reasonable plan that would allow him to satisfy the creditors' claims in full without liquidation. This allegation provides no basis for recusal because "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion". Liteky, 510 U.S. at 555. First, the Court's Order Denying the Debtor a Discharge occurred after four days of trial, and the Debtor has appealed the order. An appeal is the appropriate step for the Debtor to take when he disagrees with a ruling of the Court. Second, the Court notes that a denial of discharge is based on the actions taken by the debtor during the course of the bankruptcy case and is not related to whether a debtor could otherwise propose a plan. Third, the Court notes that the Debtor is in a Chapter 7 bankruptcy case, having failed to present a satisfactory plan or disclosure statement for almost two years when he was in the Chapter 11 case from July 13, 2011 to April 25, 2013. Finally, the Court notes the Debtor steadfastly refuses to pay the secured claim of Cranberry even though the Court has approved a settlement between the Trustee and Cranberry fixing the claim at $85,000. As recently as the hearing on August 18, 2016, the Debtor attempted to revisit and relitigate the amount due to Cranberry. The Debtor has not accepted the responsibility of paying the claim which has been fully and finally fixed by the Court. The Debtor has not and is not proposing to repay his creditors and the Court's Order denying him a discharge is based on the evidence presented at the trial.

B. The Debtor alleges the Court is biased and prejudiced by showing a substantial likelihood on the record that it would grant the Trustee's "unqualified motion to set a mandatory settlement amount". As explained above, the Court elicited a number from the Trustee upon the payment of which the Trustee would release the Property to the Debtor or his designee in lieu of selling the Property to a third party on the open market. The Court's attempt was to provide the

Debtor with an opportunity, which is not required. However, because the Debtor expressed no willingness to agree to the Trustee's settlement, and because the nature of a "settlement" means the two parties must agree, the Court did not enter an order on the Trustee's proposed settlement amount. What the Debtor misunderstands is that the Court's attempt to have the Trustee specify a settlement number she was willing to accept was to assist the Debtor by avoiding the necessary dispossession of the Debtor from the Property and the sale of the Property on the open market to a potential third party. The order of which the Debtor complains was not entered and no grounds for recusal exist.

C. The Debtor alleges the Judge has shown active bias and prejudice by "allowing the Trustee to skirt established law concerning the Trustee's fiduciary duties to McKeever's estate without reprimand or censure". The Debtor does not state the specific facts he believes show the Trustee "skirted" her fiduciary duties to the estate or that the Court "allowed" it. The Debtor has filed no prior motions to remove the Trustee and the Court has ruled on none. The only possible relevant factual allegation in the Motion relates to the Trustee hiring a family member to cut the grass at the Debtor's Property. The Trustee testified to this fact at the discharge hearing, and the Debtor had an opportunity to cross-examine the Trustee on this point (although it was irrelevant to the Debtor's disposition of the insurance check at issue). No evidence was presented that the task required (cutting the grass) was not actually required or that the amount charged was in excess of what the Trustee would have paid had she hired a third party. Moreover, as discussed below, the Court will hold a hearing on Debtor's present motion to remove the Trustee. Thus, the Debtor's allegation that the Court has permitted the Trustee to skirt her duties is baseless.

D. The Debtor argues the Court is biased and prejudiced because it has "granted every request made by the Trustee without reserve while denying each request for relief made by

McKeever without explanation." This allegation is simply untrue. This case has been pending for six years, and the Court has held a hearing on virtually every motion that has been filed. The Court has not granted all the Trustee's motions. For example, at Docket Nos. 301 and 340 are orders denying the Trustee's request to hire counsel and an environmental firm to facilitate a sale of the Property. At the hearings on those Trustee requests, in November 2014 and January 2016, the Court instructed the Trustee to delay active sales efforts until the dischargeability action was resolved and it was certain the Trustee would need to sell the Property. The Court has permitted this Debtor extensive leeway in representing himself and in allowing family members to assist him even though they are not members of the bar. The Court's rulings have included explanations, either orally or in writing. If the Debtor disagreed with any of the Court's rulings, an appeal was the appropriate remedy. When the Court has ruled against the Debtor, it has been because the evidence and the law required it.

E. Debtor argues the Court is biased and prejudiced because the Court has rendered decisions that have deprived the Debtor of property without satisfying his legitimate and verifiable debts and that such decisions have allegedly been for the benefit of persons not associated with the estate's or creditors' claims. No facts are alleged to support these allegations. Nevertheless, any orders entered by this Court regarding the disposition of the Debtor's property have been based upon the evidence presented and the bankruptcy law. The Debtor continues to dispute the validity of claims which the Court has, after hearing testimony from the parties including the Debtor, ruled are valid.

F. While not included in the Motion to Recuse, the Court notes the Debtor has filed a complaint in the United States District Court for the Northern District of Georgia against this judge, Ms. Scarver and her counsel Russell Patterson. However, "[a] judge is not disqualified merely because a litigant sues or threatens to sue him." Bush v. Washington Mutual Bank, F.A.

(In re Bush), 232 Fed. Appx. 852, 854 (11th Cir. 2007) (cites omitted). Granting such a motion to recuse "would mean that a litigious pro se party such as the plaintiff would have an effective means to manipulate and needlessly delay the judicial process." In re Dean, 2007 WL 7142579 *2 (Bankr. N.D. Ga. August 22, 2007) (cites omitted). The Court notes further that the pending lawsuit clearly arises out of the undersigned judge's performance of her judicial duties in the Debtor's bankruptcy case. No other relationship between the undersigned judge and the Debtor exists. "Under the doctrine of judicial immunity, therefore, there is no colorable basis for the lawsuit." Id. "If the leveling of unsupported accusations is sufficient to render a judge biased and to force recusal, the debtor could conceivably run through all of the Federal and State court judges available to hear his cases in a very short time." In re Bush, 2005 WL 6487198 at *5 (Bankr. N.D. Ga. July 14, 2005). Therefore, the pending complaint against the undersigned judge by Mr. McKeever does not provide a basis for recusal of the judge.

The Debtor has presented no facts which support this Court's recusal. The Debtor's only real allegations are that this Court has ruled against him on several occasions, which have resulted in the denial of his discharge and the disposition of estate property. Those facts do not demonstrate bias in favor of the Trustee or against the Debtor, but rather this Court's view of the application of the law to the facts presented to it. This Court therefore DENIES the Debtor's request for recusal.

REMOVAL OF TRUSTEE

The Debtor has also requested that the Trustee be removed. Removal of a trustee is governed by 11 U.S.C. § 324, which requires a notice and hearing. At that hearing, the Debtor will bear the burden to prove specific facts that demonstrate cause to remove Ms. Scarver as trustee. "Removal of a trustee is an extreme remedy." In re Dye, 2008 WL 2773549, *1 (Bankr. N.D. Ga. May 6, 2008) (cites omitted). "Generally, actual harm to the estate must be shown."

Id. Cause for removal may include incompetence, or the trustee's unwillingness to perform the duties of a trustee, a lack of disinterestedness or the trustee holding an interest adverse to the estate, the trustee violating her fiduciary duty to the estate or the trustee is guilty of misconduct in office or personal misconduct. Id. See also In re Waller, 331 B.R. 489, 493 (Bankr. M.D. Ga. 2005). The Court will review the evidence presented at a hearing in light of this standard. The Court will enter a separate notice of hearing on this portion of the Debtor's motion.

END OF ORDER

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