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MAY 26 2011

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 13
	)	
MARY KAY PULLEN,	)	CASE NO. **10-82188** - MHM
	)	
Debtor.	)	
	)	
MARY KAY PULLEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ADVERSARY PROCEEDING
	)	NO. 10-6355
CAIN V. HARRIS,	)	
GARY C. HARRIS,	)	
	)	
Defendants.	)	

ORDER DENYING
DEFENDANTS' MOTION TO RECUSE

On April 21, 2011, Defendants filed a *Motion to Recuse Judge Murphy* (Doc. No. 76) (the "Motion"). Defendants seek disqualification of the undersigned from presiding over this adversary proceeding. Bankruptcy Rule 5004(a) provides that disqualification of a bankruptcy judge is governed by 28 U.S.C. §455, which provides:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding...[.]

Section 455 includes no provision for referral of the question of recusal to another judge; if the judge sitting on a case is aware of grounds for recusal under this section, the judge has a duty to recuse himself or herself. *U. S. v. Sibla,* 624 F.2d 864 (9th Cir. 1980); *In re Corrugated Container Antitrust Litigation,* 614 F.2d 958 (5th Cir.), *cert. denied* 449 U.S. 888 (1980); *U.S. v. Battle,* 235 F.Supp.2d 1301 (N.D.Ga. 2001)(J. Evans).

The standard for recusal based on a claim of lack of impartiality is an objective standard. *In re Evergreen Security, Ltd.,* 570 F. 3d 1257 (11th Cir. 2009). Recusal is appropriate if a reasonable person with knowledge of all the surrounding facts and circumstances would conclude that the judge's impartiality might reasonably be questioned. *Id., citing Cheney v. U.S. District Court for District of Columbia,* 541 U.S. 913 (2004); *Microsoft Corp. v. U.S.,* 530 U.S. 1301 (2000).

The order authored by the undersigned upon which Defendant bases his allegations of bias, prejudice or lack of impartiality was entered August 4, 2010 (the "Order"). The Order was entered in an adversary proceeding that arose in connection with a prior bankruptcy case in which Plaintiffs were joint debtors (the "Malpractice Adversary Proceeding"). The Malpractice Adversary Proceeding had been filed against Plaintiffs' former bankruptcy counsel seeking damages for malpractice. The full title of the Order is *Order Specifying Damages*, and contained an analysis of the events transpiring from the date of Plaintiffs' first visit to the attorney/defendants through the significant events in the bankruptcy case, in order to reach an estimate of the compensatory damages to which Plaintiffs were entitled.

Defendants in the instant adversary proceeding were not parties to the Malpractice Adversary Proceeding in which the Order was entered, but Defendants were active litigants in the main bankruptcy case and were aware of the Malpractice Adversary Proceeding. Defendants assert that they were unaware of the contents of the Order until recently.

The bases for the Motion are that the undersigned "gratuitously refers to [Defendant] Gary C. Harris as a "mad dog attorney," (sic) three times" in the Order. Also, Defendants assert that the Order contains a reference to a contempt order entered in the bankruptcy case (Case No. 07-65415, Doc. No. 177) but improperly failed to note that the contempt order "was on appeal to the district court and was vacated on December 23, 2009." Finally, Defendants complain about the following statement in the Order: "Throughout the three years of litigation, Plaintiffs were also subject to threats and harassment from Mr. Harris."

A full reading of the Order will show that all the comments about Mr. Harris were made within the context of calculating the appropriate amount of compensatory damages to be awarded to Plaintiffs in the Malpractice Adversary Proceeding. The term "mad dog attorney" was a quote of a term used by the attorneys who were the subject of the malpractice action and was relevant to the conclusion that those attorneys knew from the outset that Plaintiffs were confronted with a legal situation that was likely to be vigorously litigated by Mr. Harris and, therefore, the case should have garnered close attention to the remedies and protections offered by the Bankruptcy Code.

The Order was entered in 2010, more than three years after the bankruptcy case had been filed during which the undersigned presided over numerous motions and two

adversary proceedings involving Defendants. In the course of that bankruptcy case, a contempt order was entered finding that Defendant Gary Harris had violated the automatic stay. That order was appealed by Mr. Harris, and was later vacated, but the order was vacated, not as a result of the appeal, but as a result of the parties settlement. No court found that the findings of fact on which the citation of contempt was based were unsupported by the record or insufficient to support a finding of contempt. The conclusion that Plaintiffs had suffered from three years of threats and harassment was based upon testimony and observations during the course of the bankruptcy case and proceedings over which the undersigned presided.

Defendants' motion to recuse is legally insufficient to support disqualification. Alleged bias must be personal and it must stem from an **extra-judicial** source. *Loranger v. Stierheim,* 10 F.3d 776 (11th Cir. 1994); *U.S. v. Merkt,* 794 F.2d 950 (5th Cir. 1986); *U.S. v. Phillips,* 664 F.2d 971 (5th Cir. Unit B 1981).[1] A motion for disqualification may not rely upon conduct or facts learned by a judge in the judge's judicial capacity. *Loranger v. Stierheim,* 10 F.3d 776; *Hale v. Firestone Tire & Rubber Co.,* 756 F.2d 1322 (8th Cir. 1985); *U.S. v. Bond,* 847 F.2d 1233 (7th Cir. 1988); *King v. U.S.,* 576 F.2d 432 (2d Cir.), *cert. denied,* 439 U.S. 850 (1978). The entry of an order entered in a judicial capacity cannot serve as a basis for disqualification. *See, U.S. v. Beneke,* 449 F.2d 1259 (8th Cir. 1971).

In rare cases, a judge may be disqualified if the record evidences pervasive bias and prejudice. *Loranger v. Stierheim,* 10 F.3d 776 (11th Cir. 1994). Allegations of such bias is insufficient, however, if the well-informed observer would perceive no factual

[1] *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981), renders decisions of the Fifth Circuit issued prior to September 30, 1981, binding precedent for the Eleventh Circuit.

basis for such allegations except previous rulings adverse to the party moving to recuse. *See In re Taylor*, 417 F. 3d 649 (7th Cir. 2005); *Loranger v. Stierheim,* 10 F.3d 776 (11th Cir. 1994); *U.S. v. Merkt,* 794 F.2d 950 (5th Cir. 1986); *U.S. v. Phillips,* 664 F.2d 971 (5th Cir. Unit B 1981);*Hale v. Firestone Tire & Rubber Co.,* 756 F.2d 1322 (8th Cir. 1985); *U.S. v. Bond,* 847 F.2d 1233 (7th Cir. 1988); *King v. U.S.,* 576 F.2d 432 (2d Cir.), *cert. denied,* 439 U.S. 850 (1978). Defendants alleged no facts that would support a finding of such pervasive bias or prejudice; therefore, Defendants' motion to recuse is without merit. Accordingly, it is hereby

ORDERED that Defendants' motion to recuse is ***denied.***

IT IS SO ORDERED, this the 25th day of May, 2011.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE