

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
Eastern Division

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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In Re:

**LEVEL PROPANE GASES, INC.
ET. AL.,**

Debtor.

**In Proceedings Under Chapter 11
(Jointly Administered)
Case No.: 02-16172**

JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

Before the Court is William H. Maloof's ("Mr. Maloof") Motion to Disqualify Judge. Debtors oppose the Motion. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and General Order No. 84 of this District. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (O). After considering both parties' pleadings and conducting a hearing, the following factual findings and conclusions of law are rendered:

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These above-styled consolidated cases, which are pertinent to Mr. Maloof's Motion, were commenced on June 6, 2002 by the filing of involuntary petitions for relief under Chapter 7 of the Bankruptcy Code (the Chapter 7 cases) against Park Place Management, Inc., The Park Place Companies, Inc., Park Place, Inc., Over-Flo Lot, Inc., Level Propane Gases, Inc., Level Energy Group, Inc. and WHM Enterprises, Inc.. On June 11, 2002, this Court entered an Agreed Final Order and Stipulation: a) Acknowledging the authority of Charles Sweet as Sole Director of All Debtors; b) Converting Cases to Voluntary Cases under Chapter 11; c) Granting Order for Relief Under Chapter 11; d) Ordering Joint Administration of all Cases; and e) Granting Other Relief (the "Agreed Order").

The sale of the Debtors' propane distribution business to Eaglerock was approved by Court order entered on June 27, 2003, over Mr. Maloof's objection. The sale closing occurred on July 2, 2003, at which time Eaglerock assigned all of its rights under the asset purchase agreement to its assignee, Horizon Propane, LLC. On November 5, 2003, Debtors sought approval of the sale of Level Propane's parking lot assets. That sale was approved on December 10, 2003, without objection by Mr. Maloof. Further, Mr. Maloof did not timely seek a stay of the either the June 27, 2003 or December 10, 2003 orders approving the sales. His untimely requests for stay, filed in January 2004 were denied. Mr. Maloof's appeals to the District Court with respect to both sale orders were dismissed and his Motion to Reconsider such dismissal denied.¹

On June 6, 2006, Mr. Maloof filed a Motion to Vacate the Agreed Order Converting Chapter 7 Proceedings to Chapter 11 Proceedings Entered Into on June 11, 2002 and Motion for Leave to Controvert the Involuntary Bankruptcy Petition Filed June 6, 2002. (Docket 2969). In that motion, he sought to vacate the Agreed Order, of which he was a signatory, on the basis that the order was a fraud upon the court and that the Bank Group and the Debtors had no intention at the time the Order was signed "to preserve and protect the assets of Debtors' estates, prevent any further losses thereto . . . as going concerns for the benefit of their estates and creditors." This Court denied Mr. Maloof's Motion to Vacate in part on the basis that he had waited four years to challenge the Agreed Order which he, himself, had signed, (Docket 3039), and that denial was affirmed by the District Court on appeal.²

¹See N.D. Ohio Case No. 1:04cv0092, Memorandum and Order (March 24, 2006) and Memorandum Order (March 19, 2007).

²See N.D. Ohio Case No. 1:07cv0153, Memorandum and Order (August 16, 2007)

Mr. Maloof then made two repetitive challenges to the Examiner's investigation and report issued as a result of such investigation. On January 31, 2006, he filed a motion styled "Motion of William H. Maloof to Reopen Examiner's Investigation and for Substitute Examiner" ("First Motion to Reopen"). (Docket 2887). In his First Motion to Reopen, he argued that cause existed to reopen the Examiner's Investigation because Debtors' postpetition management had orchestrated a campaign of document destruction and that the documents destroyed would have established that the Debtor was solvent at the time of filing of the involuntary petition. After a duly-notice evidentiary hearing, the Court entered a Memorandum of Opinion and Order denying Mr. Maloof's First Motion to Reopen. (Docket 2974). No motion for reconsideration or notice of appeal was filed by Mr. Maloof or any other party.

On July 12, 2006, Mr. Maloof filed a motion styled, "Renewed and Restated Motion to Reopen Examiner's Report and for Appointment of a Substitute Examiner" ("Second Motion to Reopen"). (Docket 2981). In his Second Motion to Reopen, he requested the Court examine alleged "multiple instances of document disposal and shredding." The Court denied Mr. Maloof's Second Motion to Reopen, concluding, in part, that the motion requested unwarranted relief and violated the doctrine of laches and finality. (Docket 3037). The Debtors then sought sanctions against Mr. Maloof for filing duplicative, untimely and unwarranted motions and supplemental pleadings related to the Second Motion to Reopen. The Court granted the Motion for Sanctions in part and imposed sanctions in the form of attorneys' fees and costs relative to the filing and defense of the Second Motion to Reopen and the related supplemental pleadings. (Docket 3047). The Court further enjoined Mr. Maloof from requesting an examiner to investigate matters which have previously been examined and/or been adjudicated by this Court.

Consequently, he appealed the imposition of sanctions and this Court was affirmed by the District Court on appeal.³ This Court was also affirmed by the District Court with respect to its denial of the Second Motion to Reopen.⁴

After those unsuccessful attempts, Mr. Maloof changed strategies and, on November 14, 2006, filed a Motion to Disqualify Debtor's Counsel Pursuant to 11 U.S.C. § 327. In that Motion, he alleged that Debtors' counsel, after nearly five years of work, did not meet the disinterestedness standard under 11 U.S.C. § 327. That Motion was denied and his appeal thereof was dismissed by the District Court.

On October 11, 2007 Mr. Maloof made his fifth attempt to challenge these bankruptcy proceedings by filing his Third Amended Motion to Vacate the Agreed Conversion Order of June 11, 2002 and Sale Order of June 27, 2003. After conducting a hearing on the Motion, considering the pleadings and some 20 exhibits attached, the Court denied the Motion. (Docket 3253). His request to have the denial of that Motion stayed pending appeal was denied.

Herein, Mr. Maloof moves for disqualification pursuant to 28 U.S.C. § 455 and Bankruptcy Rule 5004, Federal Rules of Bankruptcy Procedure. Bankruptcy Rule 5004 states in pertinent part:

Rule 5004. Disqualification.

- (a) Disqualification of Judge. A bankruptcy judge shall be governed by 28 U.S.C. § 455, and disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstance arises or, if

³See N.D. Ohio Case No. 1:07cv0150, Memorandum and Order (August 16, 2007).

⁴See N.D. Ohio Case No. 1:07cv0103, Memorandum and Order (August 16, 2007).

appropriate, shall be disqualified from presiding over the case.

28 U.S.C. § 455 states in pertinent part:

- (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

“A judge must recuse himself if a reasonable, objective person, knowing all of the circumstances, would have questioned the judge’s impartiality.” *Hughes v. United States*, 899 F.2d 1495, 1501 (6th Cir. 1990). However, “there is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is.” *Easley v. University of Michigan Board of Regents*, 853 F.2d 1351, 1356 (6th Cir. 1988)(citation omitted). The decision whether to recuse is within the sound discretion of the sitting judge. *Green v. Nevers*, 111 F.3d 1295, 1303 (6th Cir. 1997).

Adverse judicial “rulings alone almost never constitute [a] valid basis for a bias or partiality motion” and are “[a]lmost invariably . . . proper grounds for appeal, not for recusal.” *Liteky v. United States*, 510 U.S. 540, 555 (1994). Further, disqualification “must be predicated . . . upon extrajudicial conduct rather than on judicial conduct.” *Youn v. Track, Inc.*, 324 F.3d 409, 423 (6th Cir. 2003). Finally, a motion for recusal must be timely filed after the discovery of the facts which allegedly support disqualification. *See, First Interstate Bank v. Murphy, Weir & Butler*, 210 F.3d 983, 988 (9th Cir. 2000); *Willner v. University of Kansas*, 848 F.2d 1020, 1022 (10th Cir. 1988), *Apple v. Jewish Hospital*, 829 F.2d 326, 333 (2d Cir. 1987); *Deslesdernier v. Portiere*, 666 F.2d 116, 121-22 (5th Cir. 1982); *City of Cleveland v. Cleveland Elec. Illuminating Company*, 503 F.Supp. 368, 378-81 (N.D. Ohio 1980).

After nearly six years of unsuccessfully challenging these bankruptcy proceedings, both

before this Court and on appeal, Mr. Maloof seeks to have the presiding judge disqualify himself from further adjudication of these cases. Purportedly, Mr. Maloof bases his request for recusal on contents of a certain article from the *Cleveland Free Times* that was attached to a motion filed on June 6, 2002 by the petitioning creditors in the case. Mr. Maloof alleges that the article contained “scurrilous, scandalous, and defamatory material” and that because of such article “the reputation of the Movant in the eyes of the Judge was irreparably damaged.” And that because of the article, “Judge Baxter has acted throughout these proceedings in a manner consistent with this taint of personal prejudice against Affiant.”

First, the fact that Mr. Maloof has waited nearly six years to seek recusal is indication that the request is disingenuous at best. He alleges that the defamatory article was attached to the moving papers filed by the petitioning creditors. The involuntary petition was filed on June 6, 2002, nearly six years ago. To the extent Mr. Maloof alleges that this entire bankruptcy case has been tainted by an article attached to the moving papers, such allegations, if truly meritorious, certainly should have been made much earlier in these proceedings. Furthermore, this Court is unfamiliar with the article and its contents and therefore has not developed any opinion, let alone bias, against Mr. Maloof based on the article or otherwise. The motion to which the article was attached was withdrawn five days after it was filed, and the issues raised in said motion were settled by an agreed order converting the case to Chapter 11.

Mr. Maloof also mentions in his affidavit the fact of the subject judge’s prior employment as an Assistant United States Attorney. He alleges that the person responsible for the alleged defamatory statements contained in the *Free Times* article was part of a drug ring that was prosecuted by the United States District Attorneys’ Office while the subject judge was employed

with that office. While it is true that the subject judge was formerly employed by the U.S. Department of Justice more than twenty years ago, he was never employed as a federal prosecutor in the Criminal Division of the U.S. Attorney's Office, nor has he ever prosecuted a criminal matter of any kind. More specifically, the subject judge has no knowledge, direct or otherwise of the referenced matter. However, to further insure that this Court had no involvement with such case, this matter will be referred to the Department of Justice for verification that this Court was not in any way connected to the prosecution of said criminal case.

The remainder of Mr. Maloof's affidavit details various decisions wherein Mr. Maloof was not granted the relief he sought or relief, which he opposed, was granted in favor of the Debtors. Mr. Maloof takes particular issue with this Court's February 28, 2008 order denying Mr. Maloof's Third Amended Motion to Vacate. Essentially, Mr. Maloof argues that the only way this Court could have denied the Motion without conducting an evidentiary hearing is if this Court was biased against him based on the *Cleveland Free Times* article. This Court issued a twelve-page reasoned decision denying Mr. Maloof's Third Amended Motion to Vacate after conducting a hearing on the Motion. Upon consideration of the parties' respective arguments, examination of the exhibits attached, and the record generally, this Court concluded that an evidentiary hearing on the matter was unwarranted. The decision not to conduct an evidentiary hearing was certainly not based on any alleged defamatory article that was attached to a June 6, 2002 pleading, which this Court was never required to rule upon.

In brief, this Court has acted with nothing less than impartiality and fair treatment towards Mr. Maloof. Accordingly, the Movant's Motion to Disqualify is not well-premised and is hereby denied.

IT IS SO ORDERED.


JUDGE RANDOLPH BAXTER
UNITED STATES BANKRUPTCY COURT

Dated, this 6th day of
May, 2008.