UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 04-21670
	)	
MARJORIE J. JUSCZAK,	)	Chapter 13
	)	
Debtor.	)	Judge Arthur I. Harris

ORDER DENYING MOTION FOR DISQUALIFICATION AND RECUSAL
(DOCKET #57)

On September 13, 2004, the debtor, Marjorie J. Jusczak, filed a petition under Chapter 13 of the Bankruptcy Code. On November 5, 2004, Jusczak filed a motion for voluntary dismissal of her Chapter 13 case pursuant to 11 U.S.C. § 1307(b) (Docket #44). On November 9, 2004, this Court granted Jusczak's motion for voluntary dismissal, which resulted in the imposition of a 180-day filing bar pursuant to 11 U.S.C. § 109(g)(2) (Docket #47). The Court also retained jurisdiction "to consider sanctions that have been or may be requested by a party in interest or that the Court may seek to impose on its own initiative."[1] *Id.* On November 22, 2004, the debtor filed a motion for disqualification and recusal of the undersigned judge pursuant to 28 U.S.C. § 455 and Bankruptcy Rule 5004(a) (Docket #57). For the reasons that follow, the debtor's motion is denied.

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[1] On November 19, 2004, the debtor filed a notice of appeal of the order dismissing her case and retaining jurisdiction for possible sanctions (Docket #55), and on November 22, 2004, the debtor filed a motion for a stay pending appeal (Docket #58). The Court will address the motion for a stay pending appeal in a separate order.

DISCUSSION

Section 455 of Title 28 of the United States Code provides 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.
>
> (b) He shall also disqualify himself in the following circumstances:
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> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.

Judge Whose Impartiality Is Being Questioned Is Responsible for Deciding the Issue in the First Instance

"Section 455 clearly contemplates that decisions with respect to disqualification should be made by the judge sitting in the case, and not by another judge." *United States v. Balistrieri*, 779 F.2d 1991, 1202-03 (7th Cir. 1985). *Accord Green v. Nevers*, 111 F.3d 1295, 1303 (6th Cir. 1997) (judge not required to transfer recusal motions to another judge); *Bernard v. Coyne*, 31 F.3d 842, 843 (9th Cir. 1994)(responsibility for deciding § 455 recusal motion lies solely with judge to whom motion is directed); *In re Medrano Diaz*, 182 B.R. 654, 659 (Bankr. D.P.R. 1995)("[A] judge whose impartiality is being questioned is responsible for deciding the issue in the first instance."), *aff'd*, 204 B.R. 842 (D.P.R. 1996), *aff'd*, 1909 WL 4397 (1st Cir. 1997).

Standard For Recusal Under Section 455

As the Sixth Circuit noted in *Union Planters Bank v. L & J Development Co.*, 115 F.3d 378, 383 (6th Cir. 1997):

> Pursuant to § 455(a), a judge must recuse himself or herself "where a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." This statute is designed "to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." Accordingly, "[w]here the question is close, the judge must recuse himself."

(citations omitted).

Disqualification under § 455 generally must be predicated upon extrajudicial conduct rather than on judicial conduct. *See, e.g.*, *Green v. Nevers*, 111 F.3d at 1303-04. As Justice Scalia explained at length in writing for the Supreme Court in *Liteky v. United States*, 510 U.S. 540, 550-56 (1994):

> 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 were 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." 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.

> . . . [An extrajudicial source] is not the *exclusive* reason a predisposition can be wrongful or inappropriate. A favorable or unfavorable predisposition can also deserve to be characterized as "bias" or "prejudice" because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment.
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> . . . .
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> . . . It is enough for present purposes to say the following: First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. . . . *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration--even a stern and short-tempered judge's ordinary efforts at courtroom administration--remain immune.

(citations omitted) (emphasis in original). *See also Youn v. Track, Inc.*, 324 F.3d 409, 423 (6th Cir. 2003) (" 'Personal' bias is prejudice that emanates from some

source other than participation in the proceedings or prior contact with related cases."); *United States v. Nelson*, 922 F.2d 311, 319-20 (6th Cir. 1990) (same); *In re M. Ibrahim Khan, P.S.C.*, 751 F.2d 162, 164-65 (6th Cir. 1984) (bankruptcy judge did not demonstrate bias such as to warrant his disqualification).

Application of Recusal Standard to the Debtor's Motion in this Case

In the present case, the debtor's motion for recusal is based entirely upon expressions of attitude or opinion made from the bench or in the Court's written rulings. These are precisely the types of ruling that the Supreme Court and the Sixth Circuit have said almost never constitute a valid basis for a bias or partiality motion. They may be proper grounds for appeal but not for recusal. *See Liteky*, 510 U.S. at 555. "It is not inappropriate for a court to express outrage based solely on the facts before it when the court finds that a party has abused legal process in acting in bad faith." *In re M. Ibrahim Khan, P.S.C.*, 751 F.2d at 165.

Nor do any of the specific examples cited in the debtor's motion provide any indication of a deep-seated favoritism or antagonism that would make fair judgment impossible. For example, debtor's counsel asserts that the Court is biased because the Court has raised, on its own initiative, the possibility of sanctions under 28 U.S.C. § 1927. While the Court is aware of a split among the

circuit courts as to whether bankruptcy courts, as "unit[s] of the district court" under 28 U.S.C. § 151, constitute "a court of the United States" within the meaning of that 28 U.S.C. § 1927, *compare In re Cohoes Indus. Terminal, Inc.*, 931 F.2d 222, 230 (2d Cir. 1991) ("[A] bankruptcy court may impose sanctions pursuant to 28 U.S.C. § 1927."), *with In re Courtesy Inns, Ltd.*, 40 F.3d 1084, 1086 (bankruptcy court may not impose sanctions under § 1927), the possible use of § 1927 as one of several bases for imposing sanctions hardly constitutes evidence of a deep-seated antagonism, especially given the absence of controlling precedent in this circuit. Moreover, this Court is well-aware that imposition of sanctions "must be exercised with restraint and discretion," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991), and that "the sanction levied must thus be commensurate with the egregiousness of the conduct." *In re Downs*, 103 F.3d 472, 478 (6th Cir. 1996).

Debtor's counsel has also criticized the Court's failure to explain the Court's reasoning for potentially imposing sanctions; however, this criticism is premature. To the extent that the Court considers the imposition of sanctions on its own initiative, the Court does so only after describing the specific conduct that appears to merit sanctions in an order to show cause. The subjects of the order to show cause are then given ample opportunity to address such allegations on the merits.

In this case, the Court had planned to issue such an order to show cause on November 23, 2004; however, the Court determined that it needed to address the recusal motion filed on November 22, 2004, before addressing any other matters involving the debtor and debtor's counsel.

Another example of purported bias that the Court finds without merit is the raising of matters sua sponte. While the Court is generally reluctant to raise matters on its own initiative, Section 105 of the Bankruptcy Code expressly provides:

> No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, *or to prevent an abuse of process*.

(emphasis added). The Court's position in this case is roughly analogous to that of the United States Trustee who, without any prompting from the Court, moved for dismissal of this case with sanctions "based on Debtor's abuse of the bankruptcy system" (Docket #5 at 1). Presumably, the United States Trustee took this unusual action in a Chapter 13 case because he believed it was warranted as part of his duty to supervise the administration of bankruptcy cases under 28 U.S.C. § 586 and his authority to "appear and be heard on any issue" under 11 U.S.C. § 307.

Nor is the Court's consideration of in rem relief outside the context of an

adversary proceeding evidence of a deep-seated antagonism that would make fair judgment impossible. While the Court has indicated in the past, including in statements to counsel during this proceeding, that it is not inclined to grant such relief absent the filing of an adversary proceeding, *see* Bankruptcy Rule 7001, there is precedent to the contrary within this circuit and elsewhere. *See*, *e.g.*, *In re Amey*, 314 B.R. 864, 870 & n.1 (Bankr. N.D. Ga. 2004)(granting in rem relief as to debtor's interest in real property without adversary proceeding); *In re Price*, 304 B.R. 769, 772-73 (Bankr. N.D. Ohio 2004) (same). Moreover, the added protections of an adversary proceeding may be unnecessary if the imposition of such relief comes on the court's initiative through an order to show cause. Indeed, the Court believes it has the authority to consider such relief under 11 U.S.C. §§ 105 & 362(d), Bankruptcy Rule 9011, and the Court's inherent authority. *See*, *e.g.*, *In re DeVille*, 361 F.3d 539, 551 (9th Cir. 2004) ("[[T]he bankruptcy court correctly relied on its inherent power as a sanctioning tool"); *Fries v. Helsper*, 146 F.3d 452, 459 (7th Cir. 1998) (affirming district court's use of Rule 11 to enjoin plaintiff from filing another federal lawsuit based on same claim); *In re Amey*, 314 B.R. at 870 n.1 (granting in rem relief as to debtor's interest in real property "under § 362(d) to provide meaningful stay relief and under § 105(a) to prevent abuse of the bankruptcy process"). In short, nothing in debtor's motion suggests

that a reasonable person would conclude that the judge's impartiality might reasonably be questioned or that the judge has a personal bias or prejudice that merits recusal under 28 U.S.C. § 455 and applicable case law.

CONCLUSION

For the foregoing reasons, the debtor's motion for disqualification and recusal (Docket #57) is denied.

IT IS SO ORDERED.

/s/ Arthur I. Harris 11/24/2004
Arthur I. Harris
United States Bankruptcy Judge