IT IS SO ORDERED.

Kay Woods

Honorable Kay Woods
United States Bankruptcy Judge

Dated: August 08, 2007
03:54:51 PM

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
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RANDALL J. HAKE and MARY ANN HAKE,	*	**CASE NUMBER 04-41352**
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Debtors.	*	
	*	
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	*	
BUCKEYE RETIREMENT CO., LLC., LTD.,	*	**ADVERSARY NUMBER 06-04153**
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
RANDALL J. HAKE and MARY ANN HAKE,	*	
	*	**HONORABLE KAY WOODS**
Defendants.	*	
	*	

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ORDER DENYING MOTION TO RECUSE
NOT INTENDED FOR NATIONAL PUBLICATION

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The following order is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnbuscourts.gov is not the result of direct submission by this Court. The opinion is

available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

On July 30, 2007, Plaintiff Buckeye Retirement Co., LLC., Ltd. ("Buckeye") filed Plaintiff's Motion to Reconsider July 18, 2007 Order Granting Chris Hake's Motion for Protective Order and Buckeye's Renewed Motion to Recuse ("Renewed Motion") (Adv. Doc. # 113).[1] The Renewed Motion deals with two separate topics, as follows: (i) request for the Court to reconsider its Order Granting Motion of Christopher R. Hake For Protective Order and Deeming Deposition to be Concluded, dated July 18, 2997 ("July 18 Order") (Adv. Doc. # 110), and (ii) renewed motion for this Court to recuse itself and reassign trial of this adversary proceeding to another judge. The Court will address the renewed request for recusal before ruling further in this case.

Incorporated by reference into the Renewed Motion is Buckeye Retirement Co., L.L.C., Ltd.'s Motion to Recuse filed in Debtors' main bankruptcy case ("First Motion to Recuse")(Main Doc. # 234). (Renewed Motion at 8.) The First Motion to Recuse was based on 28 U.S.C. § 455(a), which provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (West 2004). This Court denied the First Motion to Recuse by Order Denying Buckeye Retirement's Motion to Recuse entered November 17, 2005 ("November 17, 2005 Order")

[1] On August 8, 2007, while this order was being put into final format, Debtors filed Memorandum in Opposition to Motion to Recuse. (Adv. Doc. # 117.)

(Main Doc. # 237), which was based on the record of the hearing on November 16, 2007. Specifically, the Court stated at the hearing, "I'm going to deny the motion to recuse on the basis that I do not believe a reasonable person could find that I have an appearance of impropriety or that I'm not impartial in this case." (Trans. of November 16, 2005 hearing at 5.)

Buckeye appealed the November 17, 2005 Order to the Bankruptcy Appellate Panel for the Sixth Circuit ("BAP") on November 18, 2005 (Main Doc. # 239). The BAP dismissed the appeal on the basis that the November 17, 2005 Order was not a final appealable order.[2] (March 16, 2006 BAP Order at 1 (unnumbered).)

The Renewed Motion also incorporates by reference Plaintiff's Motion to Withdraw the Reference ("Motion to Withdraw the Reference") filed on October 20, 2006 in this adversary proceeding (Adv. Doc. # 12). (Renewed Motion at 8.) The sole basis for the Motion to Withdraw the Reference was Buckeye's allegation that this Court "has made a predetermination that the Defendants will obtain a discharge from the payment of their lawful debts. Accordingly, under 28 U.S.C. §455(a), [sic] Judge Woods should be recused from presiding over the trial of the Discharge Adversary Proceeding." (Memorandum in Support of Motion to Withdraw the Reference at 2.) Not only has this Court denied the First Motion to Recuse, United States District Court Judge Peter C. Economus denied the Motion to Withdraw the Reference by Memorandum Opinion and Order dated April 27, 2007 ("Order Denying Withdrawal of Reference")(Adv. Doc. # 77).

[2] Despite the BAP Order of March 16, 2006, in essence, Buckeye obtained appellate review of its recusal arguments when the United States District Court denied Buckeye's Motion to Withdraw the Reference.

Judge Economus distinguished the cases Buckeye advanced in support of its position and held, "Here, there is no evidence that the bankruptcy judge has expressed any personal bias towards Buckeye or people in similar proceedings." (Order Denying Withdrawal of Reference at 6.) One of the reasons cited by Buckeye in the Motion to Withdraw the Reference was the imposition of sanctions based upon this Court's finding that there was no good faith basis for Buckeye to have filed the Motion for Leave (as defined in the Order Denying Motion to Withdraw the Reference). Judge Economus specifically recognized that the BAP had upheld the imposition of sanctions and chided Buckeye for quoting the BAP opinion in a "particularly selective and misleading" way. (Order Denying Motion to Withdraw the Reference at 8.) Judge Economus stated:

> There is nothing in the bankruptcy court's Order or the record that gives this Court pause. To the contrary, the bankruptcy judge has been exceedingly thorough, even issuing lengthy written orders on procedural issues. Furthermore, the bankruptcy judge's decisions to impose sanctions against Buckeye was upheld by the BAP.

Id. at 8-9.

Buckeye "incorporate[s] by reference as if set forth verbatim" its arguments in the First Motion to Recuse and the Motion to Withdraw the Reference. All of the arguments advanced by Buckeye in the First Motion to Recuse and the Motion to Withdraw the Reference have been dealt with by prior orders of this Court and/or the District Court. Two courts have considered and rejected Buckeye's recusal arguments. As a consequence, this Court will not unnecessarily add to the record by reiterating the findings and

conclusions that resulted in the denial of both of Buckeye's "incorporated" motions, but instead incorporates the substance of such orders herein. Moreover, this Court notes that the November 17 Order and the Order Denying Withdrawal of the Reference remain the law of the case.

Having disposed of the "incorporated" arguments for recusal, the only basis for recusal in the Renewed Motion is this Court's July 18 Order. Buckeye contends that, by not providing Buckeye with ten days to respond to Christopher R. Hake's Motion for Protective Order, which was filed on July 13, 2007, and by basing its decision "on a ground not asserted by Chris Hake" (Renewed Motion at 2), this Court has become an advocate for Debtor/Defendants Randall J. Hake and Mary Ann Hake ("Debtors").

The only case cited by Buckeye in support of its Renewed Motion is *Anderson v. Sheppard*, 856 F.2d 741 (6th Cir. 1988). Buckeye argues that this Court must recuse itself because, based upon the July 18 Order, it has become an advocate for Debtors. Citing to "*Anderson* at 747," Buckeye argues, "It is respectfully submitted that the Court is no longer 'an impartial or unbiased arbiter', [sic] but has, from all outward appearances, 'assumed the posture as an advocate' for the Hakes." (Renewed Motion at 8.) The *Anderson* case, however, is easily distinguishable from the instant proceeding. The Sixth Circuit held that recusal was appropriate in *Anderson* because:

> [T]he district court had become involved in the settlement negotiations, and had clearly determined that Anderson should settle on the terms offered by Ford. In evidencing that clear bias, the district judge informed Anderson that if the case had gone to the jury in the first trial, "the jury would have sent

> [Anderson] down the tube." Anderson was informed that he was "shooting craps" and that the odds were clearly against him at a second trial. In essence the district court was no longer an impartial or unbiased arbiter, but had from all outward appearances assumed the posture of an advocate. *See Reserve Mining Co. v. Lord*, 529 F.2d 181, 186 (8th Cir. 1976)(en banc) ("[w]hen the judge joins sides, the public as well as the litigants become overawed, frightened and confused.") The bias and hostility of the district court can perhaps be best summed up in his concluding statement to Anderson that "I think you're doing a dumb thing. . . ."

Id. at 747.

Here, there are no similarities to the facts in *Anderson*. This Court has not been involved in any settlement negotiations and has not – on any occasion – suggested that the parties should settle, much less suggested terms that it might consider appropriate or reasonable. Likewise, this Court has not made any remarks concerning any "predetermined" outcome of this adversary proceeding. The fact that the Court, in issuing the July 18 Order, relied on a ground not advanced by the party seeking the protective order in no way constitutes "advocacy" by the Court on behalf of any party. In this case, the Order at issue deals with a motion for a protective order made by a non-party to this action. The fact that the person moving for the protective order was Debtors' son is of no moment; the decision was issued to protect a non-party deponent. There simply is no basis for Buckeye's conclusion that, by entering the July 18 Order, this Court "assumed the posture of an advocate." (Renewed Motion at 8 *(quoting Anderson* at 747).)

Buckeye provides as support for the Renewed Motion that "[u]nfortunately, this is the second time that the Court has

granted a motion by Chris Hake to prohibit the taking of his deposition (main bankruptcy D.N. 299), and in each instance the Court did not allow Buckeye the right to file a response." (Renewed Motion at 7.) In the same way that Buckeye was "particularly selective and misleading" in the Motion to Withdraw the Reference (Order Denying Motion to Withdraw the Reference at 8), Buckeye is equally selective and misleading here.[3] Buckeye's own conduct prohibited it from having ten days to respond to the previous motion to quash subpoena. Buckeye issued a subpoena on January 11, 2006 for the deposition of Christopher Hake on January 20, 2006, in connection with the hearing on Debtors' Amended Disclosure Statement (Main Doc. # 285). The January 25, 2006 date for the Disclosure Hearing had been scheduled in November 2005 and objections to disclosure were due on January 17, 2007.

Because Buckeye only provided nine days notice in the subpoena, the Court could not have provided Buckeye with ten days to respond to the motion for protective order. In granting the motion for protective order, this Court found that it was well taken because it was burdensome and unnecessary, since the noticed deposition would have occurred after the objection deadline of January 17, 2006, and since Buckeye had previously deposed Christopher Hake on the same subject matter.

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[3] Despite Local Bankruptcy Rule 9013-1, which applies generally to motion practice, there is nothing that requires the Court to provide a party response time when the Court is considering a discovery motion. Nor does Fed. R. Civ. P. 26(c) require a hearing. The rule simply states that upon "good cause shown," the court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" Fed. R. Civ. P. 26(c).

Where, as here, the Court has not taken any actions that constitute advocacy or, from the point of view of an objectively reasonable person could possibly be construed as advocacy, on the part of any party, the *Anderson* case is not applicable.

Buckeye has repeatedly advanced its subjective opinion that this Court "does not like" Buckeye and that the Court is biased. Buckeye's contention of bias, however, is based on this Court's prior rulings rather than any objective criteria of prejudice, bias or partiality. Quite simply, Buckeye disagrees with the outcome of this Court's July 18 Order, but there is nothing in that Order from which an objective observer could conclude that the Court has become an advocate for Debtors.

Since Buckeye bases its Renewed Motion on the July 18 Order, the proper analysis is found in *Liteky v. United States*, 510 U.S. 540 (1994). Instead, Buckeye relies on *Anderson*, which the Sixth Circuit has not cited in any subsequent opinions regarding recusal. Two years after the *Anderson* case, the Sixth Circuit dealt with recusal under Section 455(a) in *United States v. Sammons*, 918 F.2d 592 (6th Cir. 1990).

> It has long been the law of this circuit that "a judge must recuse [himself] if a reasonable, objective person, knowing all of the circumstances, would have questioned the judge's impartiality." The standard is an objective one; hence, the judge need not recuse himself based on the "subjective view of a party" no matter how strongly that view is held.
>
> In addition, prejudice or bias must be personal or extrajudical in order to justify recusal under section 455(a).

Id. at 599 (internal citations omitted).

The *Sammons* case was cited by the United States Supreme Court in *Liteky* for the proposition that the Sixth Circuit, like "[m]ost Courts of Appeals to consider the matter ha[s] rejected th[e] contention" that the "extrajudicial source" doctrine has no application to section 455(a). *Id*. at 546. The Supreme Court discussed the extrajudicial source doctrine and explained that its applicability requires some factor from an extrajudicial source in recusal motions:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and or themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudical source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . 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 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, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

Id. at 555 (internal citations omitted). The Supreme Court went on to describe what is not the proper basis for recusal, as follows: "*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." *Id*. at 555-56 (emphasis in original).

Although Buckeye may disagree with this Court's July 18 Order – and, indeed, has asked for this Court to reconsider it – there is nothing in the July 18 Order or the record of the entire case that requires or even suggests that recusal is appropriate. As stated succinctly by the Supreme Court in *Liteky*, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Id.* at 555. *See also Youn v. Track, Inc.*, 324 F.3d 409, 423 (6th Cir. 2003) ("Plaintiffs base their allegations exclusively on the magistrate judge's orders and oral statements during proceedings related to this action. . . . Plaintiffs fail to allege anything 'which a reasonable person would believe would indicate [the] judge has a personal bias against the[m].'") (*quoting Gen. Aviation, Inc. v. Cessna Aircraft, Co.*, 915 F.2d 1038, 1043 (6th Cir. 1990)); *United States v. Nelson*, 922 F.2d 311, 319-20 (6th Cir. 1990) ("The law with regard to recusal under section 455 is straightforward and well-established in the Sixth Circuit. A district judge is required to recuse himself 'only if a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.' This standard is *objective* and is not based 'on the subjective view of a party.') (emphasis in original) (*quoting Wheeler v. Southland Corp.*, 875 F.2d 1246, 1251-52 (6th Cir. 1989).

Last, this Court notes that Buckeye's timing regarding the Renewed Motion is suspect. The Final Pre-trial in this case, at which time the Court will set this matter for trial, is scheduled for August 9, 2007 – a mere ten days after Buckeye filed the Renewed Motion on July 30, 2007. *In Barna v. Haas* (*In re Haas*), 292 B.R. 167 (Bankr. S.D. Ohio 2003), one of the plaintiffs filed

a motion to recuse based on comments allegedly made by the judge at a status conference in August 2002 and a sanctions hearing in October 2002. The court noted, "It was only at the end of February, 2003, with the trial less than three weeks away, that the Plaintiffs felt sufficiently aggrieved to file the Recusal Motion." *Id.* at 181. The court noted further:

> A strong argument can be made that the Recusal Motion should be denied purely on the basis of untimeliness. Under 28 U.S.C. § 455, a motion for recusal "is timely if it is made 'at the earliest possible moment' after [the movant] obtain[s] information of possible bias."

Id., n.8 (internal citations omitted).

In the instant case, Buckeye has twice before (unsuccessfully) moved to recuse this Court. The Renewed Motion provides no new basis for recusal; Buckeye merely cites to a new order of this Court – the July 18 Order – as the basis for recusal. As set forth above, a court's rulings cannot be the basis for recusal under section 455(a).

For the foregoing reasons, this Court denies the Renewed Motion.

IT IS SO ORDERED.

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