IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

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WALTER P. LARSON,

Appellant,

-vs-

UNITED STATES OF AMERICA
SMALL BUSINESS ADMINISTRATION,

Appellee.

MEMORANDUM DECISION AND ORDER

Civil No: C-87-414W

Bankruptcy No. 87C-42

This matter is before the court on appeal from the United States Bankruptcy Court's decision to dismiss the Chapter 11 bankruptcy filed by Mr. Walter Park Larson ("the debtor"). A hearing was held in this matter on September 18, 1987, at which the debtor was represented by Lorin N. Pace and the United States government, on behalf of the Small Business Administration, was represented by Dana Sohm. Prior to that hearing, the court had carefully read all pertinent memoranda in the record. Following oral argument, the court took the matter under advisement and thoroughly reviewed the entire file in addition to relevant statutory and case law. Being now fully advised, the court renders the following memorandum decision and order.

Factual Background

The events that led to this case began in January of 1981 when Zions Bank lent $550,000.00 to Larson Ford Sales, Inc., with repayment guaranteed by the debtor, among others, and with collateral including, in part, the debtor's personal

residence on Craig Drive in Salt Lake City, Utah. Subsequently, the Small Business Administration ("SBA") succeeded to Zions Bank's interest in the loan.

Eventually, Larson Ford Sales, Inc., failed as a business and several bankruptcies and lawsuits ensued. Although the procedural history is fairly complicated, the court's concern is focused on the following events. In the fall of 1986, the SBA scheduled a foreclosure sale of the debtor's home to take place January 7, 1987. Thirty minutes before that foreclosure sale, the debtor's attorney filed the present Chapter 11 bankruptcy which forced the sale to be cancelled. At the same time, the debtor's attorney filed a motion to disqualify Bankruptcy Judge Clark, which motion was accompanied by an affidavit from the debtor's attorney. On February 27, 1987, the SBA, in turn, filed a motion to dismiss the Chapter 11 with prejudice, a motion for sanctions pursuant to Rule 9011, a motion for relief from the automatic stay, and a motion to enjoin the debtor from refiling any further bankruptcies. A hearing was set on the SBA's motions for March 25, 1987.

The debtor filed no opposing memoranda until March 20, 1987, the Friday before the scheduled hearing. That memoranda from the debtor made no substantive objection to any of the SBA's motions but objected to the hearing itself on the grounds that the debtor's previously filed motion to disqualify Judge Clark had not yet been resolved. On March 24, 1987, the day before the SBA hearing was scheduled to take place, the clerk of the

bankruptcy court scheduled a hearing on debtor's motion to disqualify Judge Clark to be held in front of Judge Allen, the other bankruptcy judge, one hour prior to the scheduled time for the SBA's motions to be heard in front of Judge Clark.

At the hearing in front of Judge Allen on the debtor's motion for disqualification of Judge Clark, the debtor's attorney began by moving to have Judge Allen recuse himself because of his alleged previous association with Zions Bank. Judge Allen denied the motion, finding "no reason by which [his] impartiality might reasonably be questioned" with respect to hearing and deciding the motion to disqualify Judge Clark. Then Judge Allen proceeded with the motion to disqualify Judge Clark. After receiving testimonial evidence on this issue, Judge Allen determined that there were insufficient grounds to justify disqualifying Judge Clark, hence Judge Allen denied the debtor's motion.

Thereafter, the parties proceeded to Judge Clark's courtroom for the scheduled hearing on SBA's motions. At the conclusion of that hearing, Judge Clark granted the SBA's motion to dismiss the debtor's Chapter 11 bankruptcy and also enjoined the debtor from refiling any new bankruptcy proceedings that would affect the SBA debt. In so doing, Judge Clark made the following findings of fact:

> In this case, it is clear that there is no business for this Chapter 11 debtor to reorganize. Instead his desire is to litigate the chose of inaction [sic]. The courts are beginning to make quite clear that it is not appropriate for a non-business,

> completely non-business debtor to be in a Chapter 11 reorganization. Most recently the Eighth Circuit spoke to his point in Wamsganz v. Boatmen's Bank of De Soto. [Wamsganz v. Boatmen's Bank of De Soto, 804 F.2d 504 (8th Cir. 1986)]
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> Also here we have for all relevant purposes a single creditor in the Chapter 11. The debtor wants to do what he can't do under the federal law outside of the bankruptcy. This court holds that that is an inappropriate purpose. For these reasons, the case will be dismissed because of the multiple filings and the inappropriateness of this case. The court will enjoin the debtor from refiling under the bankruptcy code to effect this debt of the SBA.
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> . . .
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> In this case, the court is unable to find the sort of bad faith that would compel it to issue sanctions pursuant to 9011 and therefore it declines to do so.

Pages 50-51 of the transcript located at page 260 of the Record.

The debtor is now appealing the outcome of both hearings.

Analysis

I. Debtor's Motion to Disqualify

A. Procedural Aspects

The debtor argues that the bankruptcy court erred in setting a hearing on the SBA's motions when the debtor's previously filed motion to disqualify had not yet been resolved. The motion to disqualify was made pursuant to 28 U.S.C. § 144 and, apparently, 28 U.S.C. § 455.[1] Under either of these

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[1] The debtor's motion actually listed sections 144 and 544, but the court is proceeding under the assumption that the 544 listing is a typographical error for 455.

sections, the procedure by which the issue of recusal or disqualification is reviewed lies largely within the discretion of the judge in question since no particular procedure is prescribed. In this case, Judge Clark's decisions, first, to hold a hearing on the debtor's motion to disqualify and, second, to have that hearing held before another judge instead of himself were both properly within his discretion pursuant to the statutes. Furthermore, it is the opinion of this court that Judge Clark's decision to handle the matter thusly does not infer, as the debtor argues, that Judge Clark found the affidavit from the debtor's attorney to raise a legitimate issue of judicial partiality. If Judge Clark had so found, he logically would have had Judge Allen hear the SBA's dispositive motions, in order to comply with section 144, rather than having Judge Allen merely handle the motion to disqualify.

The debtor contends that he was unfairly prejudiced by the fact that the hearing on his motion to disqualify was set with less than 24 hours notice. The court's response to this contention is virtually the same as its response to the debtor's preceding argument. Inasmuch as the relevant statutes do not decree a specific procedure for a judge to follow in this type of situation, Judge Clark was acting within his proper judicial discretion when he decided to hold a hearing at all. Obviously, the time and setting of this gratuitous hearing were concededly also within Judge Clark's discretion. If the hearing disadvantaged anyone, quite clearly it disadvantaged the party

being moved against, i.e., the SBA. In effect, this hearing gave the debtor, as the moving party, an opportunity to present testimonial evidence to supplement the rather scanty allegations in its affidavit.

The debtor also contends that the bankruptcy court erred in not giving him a chance to file an affidavit with respect to his motion to have Judge Allen recuse himself from hearing the motion to disqualify Judge Clark. At oral argument before this court, however, the debtor's counsel conceded that, pursuant to the language in section 144 which states that "a party may file only one such affidavit in any case," the debtor was statutorily precluded from filing an affidavit against Judge Allen since he had already done so against Judge Clark. Although the debtor thereby withdrew his argument on this point, it is worth noting that, by allowing the debtor to verbally present the allegation in support of his motion to have Judge Allen recuse himself, the bankruptcy court afforded him virtually the same procedural opportunity as if he had submitted an affidavit.

B. Substantive Aspects

The standard of review this court must apply in considering the bankruptcy court's decision to deny the debtor's motion to disqualify Judge Clark is the "abuse of discretion standard."[2] As discussed above, this court is of the opinion

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[2] With respect to § 455, see, e.g., Voltmann v. United Fruit Company, 147 F.2d 514 (C.C.A.N.Y. 1945). With respect to § 144, see, e.g., Smith v. State of North Carolina, 528 F.2d 807 (C.A.N.C. 1975).

that Judge Clark clearly did not abuse his discretion when he chose to handle the motion by setting a hearing and having that hearing before another judge. The next step of this court's review, then, must focus on whether Judge Allen abused his discretion in denying the motion to recuse himself and also in denying the motion to disqualify Judge Clark. The debtor's motion to have Judge Allen recuse himself was based on the grounds that, in his previous private practice, Judge Allen apparently represented Zions Bank which is the bank that preceded SBA's interest in this loan. This court is of the opinion that Judge Allen did not abuse his discretion in finding that his previous association would not impair his impartiality in handling the motion to disqualify Judge Clark.

This court finds that Judge Allen also properly acted within his discretion when he denied the debtor's motion to disqualify Judge Clark. The debtor's motion was based on the following: (1) an affidavit stating that Judge Clark had made an inappropriate in-chambers declaration about the case, and (2) testimony that Judge Clark had been seen engaged in conversation in front of his house with Bryce Wade, a principal of the dealership that took over Larson Ford's premises as a result of the latter's Chapter 11 proceeding.

With respect to the second grounds for the debtor's motion, Judge Allen was justified in finding that Judge Clark's association with Bryce Wade failed to demonstrate that he possessed a personal bias or prejudice warranting disquali-

fication. Relevant case law holds that, even where a judge is fairly well acquainted with a party to the litigation, that judge need not necessarily be disqualified from handling the case.[3] In our situation, Bryce Wade, with whom Judge Clark was seen conversing, is not even a party in interest to the present litigation. Absent any evidence to support so much as an inference to the contrary, Judge Allen had good reason to discount Judge Clark's association with Bryce Wade as a threat to Judge Clark's impartiality.

In considering the primary grounds for the debtor's motion, i.e., the affidavit, it is worth noting at the onset that Judge Clark probably would have been justified in denying the debtor's motion solely on the nature of the affidavit submitted. The language in section 144 states that the affidavit shall be submitted by the party making the motion. In the debtor's case, however, it was the debtor's attorney who signed and submitted the affidavit. In the annotations to section 144, this specific issue is addressed in footnote 42 which cites a case in which a motion for disqualification was properly denied because the affidavit filed in support of the motion was not that of the party but rather that of the party's counsel - which did not satisfy the statutory requirement. Giebe v. Pence, 431 F.2d 942 (C.A. Hawaii 1970).

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[3] See, e.g., In re Beard, 811 F.2d 818 (4th Cir. 1987); Maier v. Orr, 758 F.2d 1578 (Fed. Cir. 1985); Parrish v. Board of Commissioners of the Alabama State Bar, 524 F.2d 98 (5th Cir. 1975).

Aside from the problem of the affidavit having been submitted by the debtor rather than by his attorney, there is serious doubt as to whether the allegations contained therein suffice to raise a legitimate question about the impartiality of Judge Clark. Relevant cases hold that an affidavit, in order to be legally sufficient to invoke section 144, must set out facts and reasons that give fair support to the charge of personal bias or prejudice on the part of the judge.[4] In the instant case, the affidavit submitted by the debtor's counsel consists of the following single sentence:

> Lorin N. Pace, being first duly sworn, deposes and says that the Honorable Glan [sic] E. Clark is prejudiced against the Petitioner herein, Walter P. larson, in that on or about the 3rd day of November, 1986, in the presence of William Grant Morrison and Russell Walker, stated that he thought the home of Petitioner should be sold and that the Court calendar was too busy to provide for an evidentiary hearing.

Applying a "reasonable person standard,"[5] this court is unconvinced that the single conclusory statement of the affidavit raises any real question about Judge Clark's competence pursuant to section 144 which requires a "sufficient affidavit." This impression simply adds to the court's conviction that the bankruptcy court's handling the debtor's motion for disqualification by way of a hearing was more deferential to the debtor

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[4] See, e.g., Parrish v. Board of Commissioners of the Alabama State Bar, 524 F.2d 98, 100 (5th Cir. 1975); Berger v. United States, 255 U.S. 22, 33 (1921).

[5] This standard was expressly applied in Parrish, supra.

than was necessary.

Assuming that the debtor's affidavit had been sufficient in form, (i.e., that it had come from the party himself rather than his attorney and that it had contained sufficient facts and reasons to give fair support to the charge it made), the bankruptcy court still would have been justified in denying the motion based on the substance of the debtor's allegation. Pertinent case law makes it clear that judicial statements, even if derogatory, do not constitute grounds for disqualification of a judge.[6] Consequently, this court affirms, both on procedural and substantive grounds, the bankruptcy court's denial of the debtor's motion to disqualify.

II. Dismissal of the Debtor's Chapter 11 Bankruptcy

The debtor contends that the representations of fact made at the hearing on SBA's motion for dismissal should not have been accepted by the judge since they were presented by SBA's attorney. It is clear from the record, however, that those factual representations were amply supported by the evidence then before Judge Clark. Applying the "clearly erroneous" standard of review, the court is convinced that Judge Clark did not err in allowing and even relying on statements made by SBA's attorney since they were sufficiently supported by the record.

Additionally, the debtor argues that Judge Clark's

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[6] See, e.g., United States v. Dodge, 429 U.S. 1099 (1976); Martelli v. City of Sonoma, 359 F. Supp. 397 (D.C. Cal. 1973); John Hopkins University v. Hutton, 316 F. Supp. 698 (D.C. Md. 1970).

findings of fact are erroneous because they are not supported by the evidence. In summary, Judge Clark's findings are as follows:[7]

> (1) there is no viable business in this case for a Chapter 11 to reorganize;
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> (2) this case is a multiple bankruptcy case;
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> (3) "for all relevant purposes," this is a single creditor case.

Having reviewed the record and considered the oral arguments of counsel, it is the decision of this court that Judge Clark made no clear error in arriving at these findings of fact.

The debtor next contends that Judge Clark's conclusion to dismiss this Chapter 11 bankruptcy was unjustified in the absence of a specific finding of bad faith on the part of the debtor. The debtor also argues that filing a Chapter 11 bankruptcy for the admitted purpose of accomplishing a stay does not necessarily warrant a dismissal. Nothing in the statutory language pertinent to Chapter 11 bankruptcies makes bad faith a prerequisite for dismissal. Indeed, section 1112(b) refers to dismissing a case "for cause" and then lists a number of possible albeit not all-inclusive reasons, including, "inability to effectuate a plan."[8] Based on the relevant language of the statutes, it is the opinion of this court that Judge Clark did

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[7] For the exact wording, see supra pp. 3-4.

[8] Judge Clark implicitly based his decision to dismiss the debtor's case at least in part on such inability to effectuate a plan when he found that there was no viable business for a Chapter 11 to reorganize.

not err in finding sufficient grounds to dismiss this case even absent a finding of bad faith in the debtor's filing. Judge Clark's findings of fact are not clearly erroneous nor do his conclusions of law constitute an abuse of his discretion.

Accordingly,

IT IS HEREBY ORDERED THAT THE DECISIONS OF THE BANKRUPTCY JUDGES ARE AFFIRMED both in denying the debtor's motions for disqualification of Judge Clark and recusal by Judge Allen and in granting the SBA's motion to dismiss the debtor's Chapter 11 bankruptcy and to enjoin the debtor from refiling future bankruptcies with respect to the SBA's debt. This order shall suffice to terminate the case and no further order need be prepared by counsel.

Dated this 25 day of September, 1987.

David K. Winder
United States District Judge

Mailed a copy of the foregoing to the following named counsel this 25 day of September, 1987.

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