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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:)	Case No. 06-22225-D-7
)	
BETSEY WARREN LEBBOS,)	
)	
Debtor.)	
)	
)	
LINDA SCHUETTE,)	Adv. Pro. No. 07-2006-D
)	
Plaintiff,)	Docket Control No. JG-3
)	
v.)	
)	
BETSEY WARREN LEBBOS,)	
et al.,)	
)	
Defendants.)	DATE: September 12, 2007
)	TIME: 10:00 a.m.
)	DEPT: D

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM DECISION

I. INTRODUCTION

On June 26, 2006, Betsey Warren Lebbos ("Debtor") filed a voluntary chapter 7 petition, thereby commencing the case in which this adversary proceeding is pending. On January 3, 2007,

1 Linda Schuette, the chapter 7 trustee in the case ("Plaintiff")
2 filed a complaint seeking to set aside alleged fraudulent
3 transfers, to recover property and/or monetary damages, for
4 turnover of property, and for declaratory relief, thereby
5 commencing this adversary proceeding. The defendants in the
6 adversary proceeding are the Debtor, individually and as a
7 trustee of the Aida Madeleine Lebbos No. 2 Trust ("the Trust"),
8 the Defendant, as a trustee of the Trust, and Thomas Carter, as a
9 trustee of the Trust.¹

10 On August 17, 2007, the Defendant filed a document entitled
11 "Request for Disqualification of Honorable Robert Bardwil"
12 ("Request"). The caption of the Request contained a hearing date
13 of August 29, 2007, but the Defendant did not file a notice of
14 hearing or an application for an order shortening time, as
15 required by Local Bankruptcy Rule 9014-1.

16 Also on August 17, 2007, co-defendant Thomas Carter filed his
17 own request, in the form of an "Affidavit for Disqualification of
18 Honorable Robert Bardwil," and on August 24, 2007, the Debtor
19 filed a document in the parent bankruptcy case entitled "Judicial
20 Disqualification Affidavit For Honorable Robert Bardwil Due to
21 His Interest in the Outcome, Partisanship, Bias, Prejudice, And
22 Prejudgment Against The Disabled." Finally, on September 6,
23 2007, the Debtor filed a document bearing the same title in this
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25 1. The Plaintiff also named Ms. Lebbos, Mr. Gold, and Mr.
26 Carter as trustees of the Aida Madeleine Lebbos Trust II. The
27 caption of the request that is the subject of this decision refers to
28 that trust as "non-existent." The court makes no decision herein
with regard to the correct name of the trust or as to whether there
are one or more trusts at stake in this proceeding.

1 adversary proceeding.

2 On August 29, 2007, the court issued orders on the first
3 three matters, the Debtor's affidavit in the parent case and Mr.
4 Gold's request and Mr. Carter's affidavit in this adversary
5 proceeding, construing the matters as motions, setting them for
6 hearing on September 12, 2007, and setting a deadline of
7 September 5, 2007, for the filing of responses. The Plaintiff,
8 through her counsel, Michael Dacquisto, filed opposition in all
9 three matters on August 30, 2007.

10 On September 12, 2007, the court heard oral argument. The
11 following parties appeared and presented argument: Jason Gold on
12 his own behalf, John Read (by telephone), making a special
13 appearance for the Debtor, and Michael Dacquisto (by telephone),
14 for the Plaintiff.

15 No objection was made to any evidence offered. The motion
16 having been briefed and argued by those parties wishing to be
17 heard, the court took the motion under submission.

18 II. ANALYSIS

19 A. Legal Standards for Disqualification

20 This court has jurisdiction over the motion pursuant to 28
21 U.S.C. sections 1334 and 157(b)(1). The motion is a core
22 proceeding under 28 U.S.C. section (b)(2)(A) & (0); In re Betts,
23 143 B.R. 1016, 1018 (Bankr. N.D. Ill. 1992).

24 "A bankruptcy judge shall be governed by 28 U.S.C. § 455,
25 and disqualified from presiding over the proceeding or contested
26 matter in which the disqualifying circumstance arises, or, if
27 appropriate, shall be disqualified from presiding over the case."

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1 Fed. R. Bankr. P. 5004(a).

2 Section 455 of Title 28 provides in part as follows:

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

5 (b) He shall also disqualify himself in the following
6 circumstances:

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

9 * * *

10 (4) He knows that he . . . has a financial
11 interest in the subject matter in controversy
or in a party to the proceeding, or any other
12 interest that could be substantially affected
by the outcome of the proceeding.

13
14 The disqualification statute was comprehensively revised in
15 1974, to provide for disqualification not only where a judge
16 holds a personal bias or prejudice, but also to spell out a list
17 (not fully reproduced above) of various interests and
18 relationships that require the judge to disqualify himself from
19 hearing a proceeding; such interests and relationships were only
20 generally stated in the prior statutory language. Liteky v.
21 United States, 510 U.S. 540, 546-48 (1994). Section 455(a) was
22 added to include objective, "catch-all" grounds for
23 disqualification, in addition to the earlier "interest or
24 relationship" grounds and "bias or prejudice" grounds, which are
25 now specifically stated and set forth in the various subsections
26 making up § 455(b). Liteky, 510 U.S. at 548. Under § 455(a),
27 "[the standard for recusal is clearly objective: 'whether a
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1 reasonable person with knowledge of all of the facts would
2 conclude that the judge's impartiality might reasonably be
3 questioned'." In re Georgetown Park Apts., Ltd., 143 B.R. 557,
4 559 (B.A.P. 9th Cir. 1992), quoting United States v. Nelson, 718
5 F.2d 315, 321 (9th Cir. 1983) (other citations omitted).

6 The Code of Conduct for United States Judges (the "Code of
7 Conduct") mirrors the provisions of 28 U.S.C. § 455. The Code of
8 Conduct requires that "every judicial officer must satisfy
9 himself that he is actually unbiased towards the parties in each
10 case and that his impartiality is not reasonably subject to
11 question." In re Bernard, 31 F.3d 842, 843 (9th Cir. 1994).
12 Under this standard, the judge must not only be subjectively
13 confident that he is unbiased; it is also objectively necessary
14 that "an informed, rational, objective observer would not doubt
15 his impartiality." Id. at 844, citing United States v. Winston,
16 613 F.2d 221, 222 (9th Cir. 1980). However, "to say that §
17 455(a) requires concern for appearances is not to say that it
18 requires concern for mirages." United States v. El-Gabrownny, 844
19 F. Supp. 955, 961 (S.D.N.Y. 1994). As such, recusal must be
20 based on factors in the record and in the law. Id. at 962.

21 Cases applying recusal statutes apply a presumption of
22 impartiality. E.g. In re Larson, 43 F.3d 410, 414 (8th Cir.
23 1994) (judge presumed impartial; parties seeking recusal bear
24 "substantial burden" of proving otherwise); First Interstate Bank
25 v. Murphy, Weir & Butler, 210 F.3d 983, 987 (9th Cir. 2000)
26 ("Judicial impartiality is presumed"); In re Spirtos, 298 B.R.
27 425, 431 (Bankr. C.D. Cal. 2003) ("A judge is presumed to be
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1 qualified to hear a matter and the burden is upon the moving
2 party to prove otherwise").

3 In addition, "[j]udges have an obligation to litigants and
4 their colleagues not to remove themselves needlessly . . .
5 because a change of umpire in mid-contest may require a great
6 deal of work to be redone . . . and facilitate judge-shopping."
7 In re Betts, 143 B.R. 1016, 1020 (Bankr. N.D. Ill. 1992), quoting
8 In re National Union Fire Ins. Co., 839 F.2d 1226, 1229 (7th Cir.
9 1988) (omitting citation); see also In re Computer Dynamics,
10 Inc., 253 B.R. 693, 698 (E.D. Va. 2000) (judge equally obligated
11 not to remove himself when there is no necessity and to do so
12 when there is), aff'd 10 F. App'x 141 (4th Cir. 2001).

13 B. The Defendant's Arguments

14 1. Contentions re Factual Allegations of the Complaint

15 The Defendant begins with two paragraphs outlining his
16 contentions regarding the factual allegations in the Plaintiff's
17 complaint, and concludes that the Plaintiff's attempt to take
18 property allegedly belonging to the Trust is "offensive and
19 fraudulent." It is not necessary or appropriate that the court
20 consider these contentions in ruling on the Request, and the
21 court therefore will not address or consider them.

22 2. Allegedly Prejudging the Issues

23 The Defendant states that "[o]n or about August 1, 2007 the
24 Honorable Robert Bardwil stated he would deny my motion to change
25 venue of this case even though no such motion has yet been
26 filed." The Defendant concludes that the court prejudices issues
27 in the case, and that a reasonable observer would therefore doubt
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1 the court's ability to be fair and impartial. The Defendant
2 states that "a transcript is on order." Request at ¶ 9.

3 The court has been unable to locate a transcript in the
4 record where remarks were made that might be construed as
5 suggested by the Defendant, and therefore, will not further
6 address the specifics of this issue. However, the court is
7 confident that it has not and will not prejudge issues in the
8 adversary proceeding.

9 3. Allegations Previously Considered

10 In paragraphs 12 and 13 of the Request, the Defendant raises
11 a number of arguments that have previously been raised by the
12 Debtor in the parent bankruptcy case, and concludes therefrom
13 that the court has "a deep-seated hostility and antagonism"
14 toward the Debtor, that the court will not read pleadings from
15 the Debtor or the defendants, "and will automatically rule
16 against [the Defendant], as a co-defendant with her, on all
17 issues."²

18 The particular arguments raised in these paragraphs have
19 been previously considered by the court and addressed in the
20 court's Memorandum Decision filed April 13, 2007 (DN 250 in the
21 parent case).³ The court's responses will not be repeated here.

22 / / /

23 4. Entry of Defaults

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27 2. The Defendant acknowledged at the hearing on this matter
that the Debtor prepared the Request and the Defendant reviewed it.

28 3. The abbreviation "DN" refers to the docket number of the
particular entry on the court's docket.

1 On February 7, 2007, the Plaintiff filed requests for entry
2 of the defaults of the Defendant and his co-defendants, Thomas
3 Carter and the Debtor.⁴ On February 13, 2007, the court issued
4 an Entry of Default and Order Re: Default Judgment Procedures in
5 response to the Plaintiff's requests.⁵ The defaults were entered
6 by the clerk of the court, as provided by Federal Rule of Civil
7 Procedure 55(a), incorporated in this adversary proceeding by
8 Federal Rule of Bankruptcy Procedure 7055. The requests for
9 default were not presented to or considered by the undersigned.

10 The Defendant construes the issuance of these defaults as
11 follows:

12 In the face of my not being served with the summons and
13 the complaint, and the Court appearing to have actual
14 knowledge that the plaintiff's lawyer, Michael
15 Dacquisto, lied and committed perjury to this Court in
16 claiming that he served me, the Honorable Robert
17 Bardwil did permit this fraud and perjury to continue
18 and let a fraudulent default against me be entered,
19 knowing that I had never been served.⁶

20 The best that can be said of this interpretation is that it
21 is untrue.

22 The Defendant continues as follows:

23 His [the undersigned's] comments indicate he had actual
24 knowledge that the default was a fraud. He took no
25 action relative to the fraud of the plaintiff. I
26 believe this is evidence of his bias which renders his
27 fair judgment impossible. Second, the record reflects
28 the plaintiff and her lawyer misled my lawyer by
entering a default when he pointed out that they had
not served me and he offered his cooperation.⁷

4. With regard to the Defendant, DNs 16 and 19.

5. With regard to the Defendant, DNs 24 and 25.

6. Request at 5:1-6.

7. Request at 5:6-10.

1 The Defendant then states that the undersigned has condoned
2 "the commission of crimes of deceit and perjury by the plaintiff
3 and her lawyer," which "crimes" he contends "are plain on the
4 face of the pleadings." Request at 5:11-15.

5 The Defendant has failed to quote or otherwise identify the
6 comments in question, and the court is aware of none. He has
7 failed to identify any pleadings that evidence the commission of
8 a crime by the Plaintiff or her Counsel, on their face or
9 otherwise, and the court is aware of none. That the court "took
10 no action" in response to the entry of the defaults was in
11 accordance with applicable procedural rules, which provide for
12 the court to take action with respect to entry of a default only
13 when the matter is brought to the court's attention by a party in
14 interest, either by way of a motion for a default judgment or a
15 motion to set aside the default.⁸

16 5. Setting Aside of Defaults

17 The Defendant next quotes the undersigned at a hearing on
18 March 14, 2007 on the motion of the Debtor, as a defendant in
19 this adversary proceeding, to set aside the default described
20 above, as to the Debtor.^{9 10} The court incorrectly referred to
21 the Debtor as being incarcerated, from which the Defendant
22 concludes that the court has a "deep-seated antagonism and
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25 8. See Federal Rule of Civil Procedure 55(d)(2) and (c),
26 incorporated in bankruptcy adversary proceedings by Federal Rule of
Bankruptcy Procedure 7055.

27 9. The Debtor's motion is DN 27 in this adversary proceeding.
28 The motion of the Defendant and Thomas Carter is DN 34.

 10. The transcript is DN 223 in the parent bankruptcy case.

1 hostility" and an "intense hatred" for the Debtor.¹¹ On the
2 contrary, the court's reference was intended to suggest that she
3 may have had difficulty in timely responding to the complaint;
4 thus, the remark was entirely innocuous. The court notes that it
5 did in fact set aside the defaults of the Debtor and her co-
6 defendants, including the Defendant.

7 The Defendant next focuses on the court's observation at the
8 hearing that there was "a likelihood that any appellate court
9 will certainly give the defendants the opportunity to defend
10 themselves." The Defendant takes this remark to mean that the
11 only reason the court set aside the defaults was that it feared
12 being reversed on appeal.¹²

13 On the contrary, recognition on the part of a trial judge
14 that an appellate court is likely to reverse a particular ruling
15 is nothing more than a recognition of the state of the law.

16 The Defendant then asserts that the undersigned has
17 "transferred his hatred for the debtor" to the Defendant and his
18 co-defendant. "He is stating an identity of party as if we were
19 all the same party whom he hates and despises."¹³ The court finds
20 this assertion to be inexplicable. Certainly, there is nothing
21 in the record to support such a conclusion, either as to the
22 Debtor or as to her co-defendants. In fact, the court has gone
23 to great lengths to try to reconcile the Debtor's asserted
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26 11. Request at ¶ 17.

27 12. Request at ¶ 18.

28 13. Request at ¶ 20.

1 physical disabilities with her duties to appear and cooperate in
2 her bankruptcy case.¹⁴

3 6. Allegedly Encouraging Harassment of the Defendant

4 The Defendant next accuses the Plaintiff's counsel of
5 communicating with him directly when he was represented by
6 counsel. The Defendant cites "Exhibit A," consisting of copies
7 of envelopes from the Plaintiff's counsel, addressed to the
8 Defendant and postmarked on February 28, March 12, and March 14,
9 2007.¹⁵ (From proofs of service filed with the court, it appears
10 the Plaintiff's attorney served the Defendant and his then
11 attorney Raymond Aver with papers opposing various motions.)

12 The Defendant says he "understand[s] that the Honorable
13 Robert Bardwil supports this," and thus, "provides the trustee
14 and her lawyer preferential treatment," and encourages them "to
15 harass defendants directly." There is simply no basis in reality
16 for this contention.

17 7. Allegedly Cutting Off the Debtor

18 The Defendant next complains of a remembered incident in
19 which the undersigned allegedly "yell[ed] at Ms. Lebbos" and said
20 he would cut her off "so that she can not speak."¹⁶ With no
21 transcript furnished by the Defendant, the court assumes this is
22 the instance also addressed by the Debtor in her second attempt
23 to disqualify the undersigned.

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25 14. See Memorandum Decision on Debtor's "Judicial Disqualifi-
26 cation Affidavit For Honorable Robert Bardwil Due to His Interest in
the Outcome, Partisanship, Bias, Prejudice, And Prejudgment Against
The Disabled," filed herewith in the parent case.

27 15. Request at ¶ 21.

28 16. Request at ¶ 22.

1 The transcript reveals that the Debtor repeatedly
2 interrupted the proceedings, objected to "allowing the
3 interference of my criminal process by an attorney who is lying
4 and defrauding everybody," made references to criminal and
5 unethical conduct, and brought up her attempt to have the
6 Trustee's Counsel disbarred, all in an effort to persuade the
7 court that she, and not the Trustee's Counsel, should be the one
8 to ask her probation officers whether she could attend the
9 meeting of creditors in San Jose.¹⁷ The court's caution to the
10 Debtor was a reasonable and prudent attempt to control the
11 courtroom proceedings, fully justified in the circumstances.

12 Finally, the court will briefly address the Defendant's
13 remarks at the hearing on this matter. The Defendant's arguments
14 at the hearing demonstrated dissatisfaction with the court's
15 denial of the Debtor's motion to transfer the proceeding to the
16 Central District of California. The Defendant referred to the
17 venue motion, and stated that "the property is down here" [in the
18 Los Angeles area], "the trustees are down here," he is in law
19 school, and the Debtor is extremely ill. The Defendant stated he
20 does not know why the court wants "to keep the case there [in
21 Sacramento]."

22 The cases are uniform that a "judge's adverse rulings in the
23 course of a judicial proceeding almost never constitute a valid
24 basis for disqualification based on bias or partiality." 12 JAMES
25 WM. MOORE, ET AL., MOORE'S FED. PRACTICE § 63.21[4] (3d ed. 2006)
26 (citing cases); see also Liteky, 510 U.S. at 554-55.

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28 17. Transcript of April 25, 2007 hearing, DN 327 in the parent
case, pages 21-29.

1 The Defendant next addressed the merits of the case,
2 asserting that the property is trust property and always has
3 been. He added that the court has said it is going to take trust
4 property without giving the trust an opportunity to be heard.
5 The contention is without support. In fact, the court set aside
6 the default of the three co-trustees, Ms. Lebbos, Mr. Gold, and
7 Mr. Carter, and has allowed them repeated extensions of the
8 deadline to file an answer or other responsive pleading. The
9 Defendant, through counsel, filed a motion to set aside his
10 default on February 20, 2007. Yet it was almost six months
11 later, on August 17, 2007, that the Defendant filed his first
12 responsive pleading, a motion to dismiss. (At a hearing on
13 August 1, 2007, the court had granted the most recent extension
14 of time, to August 17. DN 187.) The facts do not support the
15 conclusion that the court has been anything less than completely
16 fair to the Defendant.

17 III. CONCLUSION

18 For the reasons stated above, the court finds that the
19 Defendant has not met his burden under 28 U.S.C. § 455(a) of
20 overcoming the presumption of impartiality and demonstrating that
21 the impartiality of the undersigned might reasonably be
22 questioned. Neither has the Defendant demonstrated grounds for
23 disqualification under 28 U.S.C. § 455(b).

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27 The court will issue an order consistent with this
28 memorandum.

1 Dated: September 24, 2007

/s/

ROBERT S. BARDWIL
United States Bankruptcy Judge

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