

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
JAMES K. ARINGTON) CASE NO. 05-17035
)
)
Debtor)

DECISION ON MOTION FOR RECUSAL

At Fort Wayne, Indiana, on March 20, 2006.

The debtor in this Chapter 7 case is proceeding pro se. On March 17, 2006, he filed a motion for recusal pursuant to 28 U.S.C. § 144. Incorporated into the motion is the affidavit contemplated by the statute. The statute provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.
28 U.S.C. § 144

“Recusal under section 144 is mandatory once a party submits a timely and sufficient affidavit and . . . presents a certificate stating that the affidavit is made in good faith.” United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993). This does not mean, however, that recusal is automatic. The judge whose recusal is sought is allowed to pass upon the legal sufficiency of the affidavit and its timeliness. United States v. Balistrieri, 779 F.2d 1191, 1200 (7th Cir. 1985). See also, Sykes,

7 F.3d at 1339. In doing so,

the court must assume the truth of its factual assertions even if it knows them to be false. At the same time, the facts averred must be sufficiently definite and particular to convince a reasonable person that bias exists; simple conclusions, opinions, or rumors are insufficient. The affidavit also must show that the bias is personal rather than judicial and that it stems from an extra judicial source – some source other than what the judge has learned in the case. Sykes, 7 F.3d at 1339 (citing Balistrieri, 779 F.2d at 1199 (internal citations and quotation marks omitted)). See also, U.S. v. Barnes, 909 F.2d 1059, 1071-72 (7th Cir. 1990).

In this instance, although the court is willing to accept the Debtor’s affidavit as being timely, it is not legally sufficient.

Debtor’s affidavit states that while in the courtroom on March 8, 2006, waiting for his case to be called, he observed

Judge Grant . . . in a fit of displeasure, likely justified, with the conduct of the Attorneys who not [sic] present and those that were late on the filings in his Court. Judge Grant started with the statement in open court, which he has to be ‘the S.O.B. of the day’ and ended with, ‘ . . . we might as well let the *pro se* litigants do this.’

Characterizing the reference to pro se litigants as “inflammatory,” the affidavit expresses the debtor’s belief that the court has a bias against pro se litigants and, since the debtor is proceeding pro se, against him personally. In passing upon this affidavit, the court should consider only the particular “facts” it contains and may properly disregard conclusions and expressions of opinion. Consequently, the court does not need to consider the allegations of bias, either as to pro se litigants or against the debtor. Action Realty Co. v. Will, 427 F.2d 843, 844 (7th Cir. 1970). Similarly, the characterization of its remarks as “inflammatory” is also something the court is not bound to accept. Balistrieri, 779 F.2d at 1200.

Stripped of the affidavit’s opinions and conclusions, debtor’s motion distills itself into the proposition of whether, in the course of expressing its displeasure with the conduct of attorneys in

an unrelated case, the court's statement that "... we might as well let the *pro se* litigants do this" would "convince a reasonable person that bias exists," Balistreri, 779 F.2d at 1199 – a bias grounded in some type of "personal animus or malice" against the debtor "which a fair minded person could not entirely set aside when judging certain persons or causes." Id., at 1201. The answer to this question can only be no. To begin with, the statement has absolutely nothing to do with the debtor and so cannot demonstrate any kind of bias against him. If a brief but specific reference to a particular litigant in a related case is not sufficient to demonstrate personal bias or prejudice, see, U.S. v. Birrell, 262 F. Supp. 97 (D. S.D. N.Y. 1967); U.S. v. Birrell, 276 F. Supp. 798 (D. S.D. N.Y. 1967), and "allegations of bias stemming from present and past cases in which the judge and moving party were involved are not proper grounds for recusal," U.S. v. Barnes, 909 F.2d 1059, 1072 (7th Cir.1990), a statement that says nothing about the debtor, made during the course of a ruling in an entirely unrelated case, cannot do so. Even if the court's remark is construed as some kind of negative reference to a class of litigants of which the debtor is a part – *pro se* litigants – the motion is still insufficient. There is nothing about the comment that "display[s] a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky v. U.S., 510 U.S. 540, 555; 114 S.Ct. 1147, 1157 (1994). See e.g., Berger v. U.S., 255 U.S. 22, 41 S.Ct. 230 (1921).

Even when the debtor's characterization of the court's remarks as "inflammatory" or otherwise intemperate is accepted as accurate, that still is not sufficient to demonstrate bias or prejudice. The comments were made in connection with a ruling and admonitions handed down in an unrelated case. The same comments made in the debtor's own case would not require recusal, see, Matter of Huntington Commons Assoc., 21 F.3d 157, 159 (7th Cir. 1994); having been made in someone else's case should not produce a different result. As the Supreme Court has observed:

[J]udicial 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. Liteky, 510 U.S. at 555-556; 114 S. Ct. at 1157 (emphasis original).

Debtor's motion for recusal will be denied. An order doing so will be entered.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court