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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANIEL GONZALEZ,
Plaintiff,
v.
DEPARTMENT (BUREAU) OF REAL
ESTATE, et al.,
Defendants.

No. 2:15-cv-2448 GEB GGH

ORDER

Plaintiff, appearing in pro se, has moved to disqualify the undersigned Magistrate Judge from further hearing this matter on the ground that he has shown bias and prejudice toward the plaintiff. ECF No. 83. He rests his motion on both 28 U.S.C. sections 144 and section 455. Under either section, the motion fails. However, it is first necessary to discuss a predicate issue to a motion for recusal under section 144.

Section 144 (as opposed to section 455) does not permit the challenged judge to review the merits of recusal-- except where the litigant does not file a declaration/affidavit demonstrating the nature of the bias alleged, or the declaration is insufficient on its face. 28 U.S.C. section 144 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

1 bias or prejudice either against him or in favor of any adverse party, such judge
2 shall proceed no further therein, but another judge shall be assigned to hear such
3 proceeding.

4 However, the court in Berger v. United States, 255 U.S. 22 (1922), held that the judge
5 against whom a disqualification motion is brought may, indeed must, pass on the declaration's
6 legal sufficiency as opposed to the truth of the facts alleged. See Berger, 255 U.S. at 32. To be
7 sufficient, the declaration must state facts which, if deemed to be true, fairly support the
8 allegation of bias or prejudice which stems from an *extrajudicial source* and which may prevent a
9 fair decision. U.S. v. Azhocar, 581 F.2d 735, 739-740 (9th Cir. 1976). See also United States v.
10 Grinnel, 384 U.S. 563, 583 (1966) which states that ["t]he alleged bias and prejudice to be
11 disqualifying must stem from an extrajudicial source and result in an opinion on the merits on
12 some basis other than what the judge learned from participation in the case."

13 Pursuant to the foregoing authority the court has carefully examined the Memorandum
14 and Declaration submitted by plaintiff and finds that he raises only issues of court rulings with
15 which he disagrees. Principal among his criticisms is the failure of the court to address the
16 absence of proof of service on a particular pleading that plaintiff stated he never received in "hard
17 copy." See inter alia ECF No. 4 at 7:5-8:20. In plaintiff's view, the judge's position on the issue
18 creates an inference of preference for opposing counsel. This assumption is, in light of the
19 foregoing, insufficient to show extrajudicial bias. Rather plaintiff is simply challenging the
20 court's judicial decision-making. These allegations do not rise to the level of those specified in
21 28 U.S.C. section 144 pursuant to which it would be the duty of the court to refer the matter to an
22 independent judicial officer to determine that extrajudicial bias is shown.

23 Having determined that the undersigned may rule in this matter, the foregoing also
24 disposes of plaintiff's recusal arguments on the merits under both sections. 28 U.S.C. § 455
25 provides: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in
26 any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a).
27 "Under both recusal statutes [section 144 and 455], the substantive standard is whether a
28 reasonable person with knowledge of all the facts would conclude that the judge's impartiality

