

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

THOMAS F. SCHMIDT,)
)
 Plaintiff,)
)
 vs.)
)
 FIDELITY NATIONAL TITLE)
 INSURANCE COMPANY, a)
 California Corporation, JOHN)
 DOES 1-10, JANE DOES 1-10, DOE)
 CORPORATIONS, PARTNERSHIPS)
 and/or OTHER ENTITIES 1-10,)
)
 Defendants.)

CIVIL NO. 07-00356 HG-LEK

**ORDER DENYING COUNTERCLAIM
DEFENDANT'S MOTION TO RECUSE
MAGISTRATE JUDGE LESLIE E.
KOBAYASHI**

)
 FIDELITY NATIONAL TITLE)
 INSURANCE COMPANY,)
)
 Third-Party)
 Plaintiff,)
)
 vs.)
)
 DAMON L. SCHMIDT and LORINNA)
 SCHMIDT,)
)
 Third-Party)
 Defendants.)

)
 FIDELITY NATIONAL TITLE)
 INSURANCE COMPANY,)
)
 Counter Claimant,)

vs.)
)
 THOMAS F. SCHMIDT,)
)
 Counterclaim)
 Defendant.)
 _____)

**ORDER DENYING COUNTERCLAIM DEFENDANT'S MOTION TO RECUSE
MAGISTRATE JUDGE LESLIE E. KOBAYASHI**

Counterclaim Defendant filed a Motion to Recuse Magistrate Judge Leslie E. Kobayashi ("Motion") on October 16, 2008, approximately 15 months after the commencement of this action. The Motion alleges that the Magistrate Judge was involved in an attorney fee dispute with Counterclaim Defendant and his wife approximately 30 years ago. Upon consideration of the allegations presented in the Motion, Counterclaim Defendant's Motion To Recuse Magistrate Judge Leslie E. Kobayashi (Doc. 143) is **DENIED**.

PROCEDURAL HISTORY

On July 3, 2007, Thomas F. Schmidt filed the Complaint against Fidelity National Title Insurance Company ("Fidelity"). (Doc. 1, "Complaint".)

On July 25, 2007, Fidelity filed an Answer and Counterclaim against Thomas S. Schmidt ("Counterclaim Defendant"). (Doc. 5.) Fidelity also filed a Third-Party Complaint against Damon L. Schmidt and Lorinna Schmidt ("Third-Party Defendants"). (Doc. 5.)

On June 2, 2008, Fidelity filed a First Amended Answer ("Answer") and First Amended Counterclaim ("Counterclaim") against Counterclaim Defendant Thomas F. Schmidt. (Doc. 99.)

Defendant Fidelity also filed a First Amended Third-Party Complaint ("Third-Party Complaint") against Third-Party Defendants Lorinna Schmidt and Damon Schmidt. (Doc. 99.)

On October 16, 2008, Counterclaim Defendant Thomas F. Schmidt filed a Motion to (1) Discharge Michael R. Goodheart, Esq., as His Attorney of Record; (2) To Extend All Pretrial Deadlines and to Continue Trial Date and to Allow Plaintiff Thomas F. Schmidt Time to Retain New Counsel; and (3) To Recuse Magistrate Judge Leslie E. Kobayashi. (Doc. 143, "Motion".)

On November 17, 2008, the Court issued a Minute Order denying Counterclaim Defendant Thomas F. Schmidt's Motion to Discharge Michael R. Goodheart, Esq., as His Attorney of Record. (Doc. 148.) The November 17, 2008, Minute Order also denied Counterclaim Defendant's Motion to Extend All Pretrial Deadlines and to Continue Trial Date and to Allow Plaintiff Thomas F. Schmidt Time to Retain New Counsel.

The only outstanding issue remaining to be decided in Counterclaim Defendant's October 16, 2008, Motion filed before this Court is the recusal of Magistrate Judge Leslie E. Kobayashi pursuant to 28 U.S.C. § 455(a). 28 U.S.C. § 144 provides for Counterclaim Defendant's Motion to Recuse to be decided by another judge. United States v. That Luong, 2008 U.S. Dist. LEXIS 40898, at *1-3 (E.D. Cal. 2008).

STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 455(a), "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The substantive standard used by the Court in applying 28 U.S.C. §455(a) and § 144 is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." United States v. Hernandez, 109 F.3d 1450, 1453 (9th Cir. 1997) (quoting United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986)); see also Pesnell v. Arsenault, 2008 U.S. App. LEXIS 19552, at *11 (9th Cir. 2008).

ANALYSIS

The only reason alleged by Counterclaim Defendant Thomas F. Schmidt for the recusal of Magistrate Judge Leslie E. Kobayashi concerns her involvement in an attorney fee dispute that took place in the late 1970's. (Motion at 7-8.) According to Counterclaim Defendant Thomas F. Schmidt, Magistrate Judge Leslie E. Kobayashi, who was a practicing attorney at the time, represented another attorney in a proceeding involving the collection of unpaid fees from Counterclaim Defendant Thomas F. Schmidt and his wife. (Motion at 8.) Counterclaim Defendant

alleges that “[t]he actual litigation was brief, but very acrimonious.” Id. Magistrate Judge Leslie E. Kobayashi’s involvement as an attorney in another attorney’s fee dispute with Counterclaim Defendant Thomas F. Schmidt and his wife, approximately 30 years ago, would not lead a reasonable person to question the Magistrate Judge’s impartiality in the present action. Counterclaim Defendant has not alleged any facts that would satisfy the requirements for recusal under 28 U.S.C. § 455(a) or § 144. Pesnell, 2008 U.S. App. LEXIS at *11.

The Court also considers the timeliness of Counterclaim Defendant’s Motion. The Complaint was filed by Counterclaim Defendant Thomas F. Schmidt in July 2007. The present motion to recuse Magistrate Judge Leslie E. Kobayashi was filed in October 2008, approximately 15 months after the commencement of this action. Magistrate Judge Leslie E. Kobayashi has been the presiding Magistrate Judge for this entire 15 month period, and has issued approximately fifteen Orders and held approximately five hearings/conferences with the various parties to this action. Pursuant to 28 U.S.C. § 144, a party seeking the recusal of a judge in a district court proceeding must file an affidavit “not less than ten days before the beginning of the term [session] at which the proceeding is to be heard,” or show “good cause” for the failure to file the affidavit within such time. Counterclaim Defendant’s Motion for Recusal is not timely

pursuant to 28 U.S.C. § 144, and does not show "good cause" as to why the Motion to Recuse Magistrate Judge Leslie E. Kobayashi was filed more than one year after the action's commencement.

Upon consideration of these factors, the Court holds that the recusal of Magistrate Judge Leslie E. Kobayashi is not warranted in this action.

CONCLUSION

Counterclaim Defendant's Motion To Recuse Magistrate Judge Leslie E. Kobayashi (Doc. 143) is **DENIED**.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, November 18, 2008.



/s/ Helen Gillmor
Chief United States District Judge

**THOMAS F. SCHMIDT V. FIDELITY NATIONAL TITLE INSURANCE COMPANY,
ET AL.; CIVIL NO. 07-00356 HG-LEK; ORDER DENYING COUNTERCLAIM
DEFENDANT'S MOTION TO RECUSE MAGISTRATE JUDGE LESLIE E. KOBAYASHI**