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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

THE ELEANORA J. DIETLEIN
TRUST, DEREK NEUMANN AND
GINA NEUMANN,

Plaintiff,

v.

AMERICAN HOME MORTGAGE
INVESTMENT CORP., et al.,

Defendants.

Case No. 3:11-CV-0719-LRH (VPC)

ORDER

Before the court is the motion of plaintiffs, the Eleanora J. Dietlein Trust, Derek Neumann and Gina Neumann (“plaintiffs”) for recusal under 28 U.S.C. § 455(a) (#44). Co-trustees and interested parties William Dietlein and Nora Dietlein Christensen (“co-trustees”) opposed (#s 58 & 59), and plaintiffs did not rely.

I. Procedural Background

Plaintiffs originally filed this action on September 12, 2011, and defendants, American Home Mortgage Servicing, Inc. and WL Ross & Co. LLC, removed it to this court on October 5, 2011 (#1). The chronology of the case relevant to plaintiffs’ motion to recuse concerns a January 10, 2013, settlement conference in which the parties purportedly settled the case (#29). The court ordered the parties to submit a stipulation to dismiss the case with prejudice no later than April 17, 2013. *Id.* The parties never did so, and for unexplained reasons, the matter did not come to the court’s attention until January 3, 2014.

1 On January 3, 2014, Mr. Wilson, counsel for one of the interested parties and a co-
2 trustee, telephoned the court's chambers (#59; Decl. of Gregory Wilson). Mr. Wilson attests the
3 purpose of his call to chambers was to inquire of the court's judicial assistant about the status of
4 the case. *Id.* As Mr. Wilson's declaration reports, court staff had left for the day, and Judge
5 Cooke answered the telephone. *Id.* Mr. Wilson's declaration correctly recounts the
6 conversation, which was to inquire about the status of the settlement of the case. *Id.*

7 The court reviewed the docket sheet, which confirmed that although the case had been
8 settled in January 2013, the parties had never submitted the stipulation and order dismissing the
9 case with prejudice. Therefore, on January 6, 2014, the court issued a minute order noting that
10 the stipulation had not been filed and directing the parties either to file the stipulation to dismiss
11 the case by January 24, 2014; otherwise, the court scheduled a status hearing on January 27,
12 2014 (#31). The status hearing proceeded because the parties failed to file the stipulation.

13 At the January 27, 2014 status hearing, the court recited the chronology of the case and
14 then reported to counsel what precipitated the minute order (#31) and the hearing:

15 The Court: And, interestingly, the reason - and I'm just
16 disclosing this because this is unusual. Mr. Wilson
17 called chambers, I don't know, right before New
18 Years, or something, sir? Do you recall when it
was?

19 Mr. Wilson: It was the first week of January, a Friday afternoon.

20 The Court: Right. And so no one was in - thank you, sir. No
21 one was in chambers except me. And so I answered
the phone. And it was Mr. Wilson.

22 And so I turned my computer back on. And he was
23 telling me about this. And, you know, he was not a
24 party to the case at the time. And so I went back on
my computer.

25 And he said, you know, there's this settlement, and,
26 you know, I represent these other people who have
27 an interest in this and who weren't privy to the
settlement.

1 And so I said oh, well, hmm. And so I thanked Mr.
2 Wilson. And then on Monday I, sure enough,
3 looked at everything. And then I sent out a minute
4 order setting today's conference because I wanted
5 to know what the heck was going on in this case.

6 Transcript of January 24, 2014 hearing, pages 9, lines 13-25; 10:1-8 (#38).

7 It is the court's ex parte telephone conversation on January 3, 2014 that is the basis of
8 plaintiffs' motion to recuse.

9 **II. Discussion and Analysis**

10 Recusal is governed by 28 U.S.C. §§ 144 and 455. Under section 144, a party seeking
11 recusal must set forth, in an affidavit, facts and reasons for the belief that bias or prejudice exists.
12 *See* 28 U.S.C. § 144.¹ The standard for recusal under sections 144 and 455 is "whether a
13 reasonable person with knowledge of all the facts would conclude that the judge's impartiality
14 might reasonably be questioned." *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986).
15 The alleged prejudice must result from an extrajudicial source; a judge's prior adverse ruling is
16 not sufficient cause for recusal. *Id.* The challenged judge should rule on the legal sufficiency of
17 the recusal motion in the first instance *Id.* at 940.

18 Canon 3A(4)(b) of the Code of Conduct for United States Judges specifically addresses
19 plaintiffs' concern:

20 (4) A judge should accord to every person who has a legal
21 interest in a proceeding, and that person's lawyer, the full right to
22 be heard according to law. Except as set out below, a judge should
23 not initiate, permit, or consider ex parte communications or
24 consider other communication concerning a pending or impending
25 matter that are made outside the presence of the parties or their
26 lawyers. If a judge receives an unauthorized ex parte
27 communication bearing on the substance of a matter, the judge
28 should promptly notify the parties of the subject matter of the
communication and allow the parties an opportunity to respond, if
requested. A judge may:

* * * * *

¹Plaintiffs' motion is not supported by an affidavit.

1 (b) when circumstances require it, permit ex parte
2 communication for scheduling, administrative, or emergency
3 purposes, but only if the ex parte communication does not address
4 substantive matters and the judge reasonably believes that no party
will gain a procedural, substantive, or tactical advantage as a result
of the ex parte communication.

5 As Canon 3A(4)(b) explains, an ex parte communication is permissible for administrative
6 purposes that do not concern substantive matters, and the judge reasonably believes no party will
7 gain a procedural, substantive, or tactical advantage. Such is the case here. Mr. Wilson clearly
8 intended to speak with court staff to inquire about the status of a pending case, but the judge
9 answered the call instead, as chambers staff had left for the afternoon. Mr. Wilson's phone call
10 was purely for administrative purposes, and there was no substantive discussion about the case at
11 all. Mr. Wilson reported the status of the settlement and did disclose he represented an interested
12 party or parties, but nothing more. The court reviewed the docket sheet, which confirmed that
13 the stipulation to dismiss the case had never been submitted, so on the following business day,
14 the court issued a minute order directing the parties to file the stipulation to dismiss the case or to
appear at a status conference.

15 Had court staff answered Mr. Wilson's call, the result would have been the same, and Mr.
16 Wilson's inquiry was nothing more or less than a communication about an administrative matter
17 in a pending case. When the parties did not submit the stipulation to dismiss, the court held a
18 hearing shortly thereafter so the parties could report on the status of the settlement agreement.
19 The court then reported its conversation with Mr. Wilson on the record at the hearing.

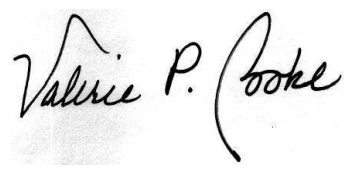
20 Plaintiffs also cite the court's comments at the January 24, 2014 hearing as a further basis
21 for recusal. See motion for recusal (#44) at page 2, lines 13-17. Plaintiffs take these comments
22 out of context. As the transcript of the hearing accurately reflects, the court's comments had
23 nothing to do with the January 3, 2014 telephone conference with Mr. Wilson; rather, the
24 comments concerned papers filed subsequent to the notice of the hearing. See #s 32, 35, 36, &
25 37.

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III. Conclusion

The court has considered plaintiffs' motion, and concludes that the ex parte conversation with Mr. Wilson on January 3, 2014 is not a basis for recusal for the reasons stated in this order. Plaintiffs' motion for recusal (#44) is **DENIED**.

DATED: March 7, 2014.



VALERIE P. COOKE
UNITED STATES MAGISTRATE JUDGE