Brautigam v. Damon et al Doc. 85

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MICHAEL G. BRAUTIGAM,
Plaintiff,

Case No. 1:11-cv-551
Spiegel, J.
Litkovitz, M.J.

vs.

GEOFFREY P. DAMON, et al.,
Defendants.

ORDER

This matter is before the Court on defendant Geoffrey P. Damon's "Affidavit of Bias and Prejudice" (hereafter, "Affidavit") against the undersigned brought pursuant to 28 U.S.C. § 144. (Doc. 84).

I. Defendant's Affidavit

Defendant Damon has been proceeding pro se throughout the litigation of this matter. Defendant alleges that plaintiff Michael Brautigam, who is also proceeding pro se, has been permitted to engage in abusive tactics and submit "vile pleadings" without admonishment by the undersigned. (Affidavit, ¶ 3). Defendant alleges that the undersigned has "repeatedly demonstrated bias and prejudice" against him by allowing plaintiff to ignore the requirements of the Federal Rules of Civil Procedure and by refusing to make findings adverse to plaintiff, despite clear evidence showing that this matter does not belong in federal court. (Affidavit, ¶ 4). Defendant further asserts that the undersigned took no punitive action against plaintiff when he failed to comply with the rules by refusing to cooperate during a telephone conference convened for the purpose of submitting a joint discovery plan (Affidavit, ¶¶ 5, 6); ignored the lack of initial disclosures and scheduled a hearing on a motion to compel discovery against defendant even though a number of dispositive motions and jurisdictional issues remain undecided (Affidavit, ¶ 7); issued a scheduling order when the parties failed to submit their own, apparently so as not to

Dockets.Justia.com

inconvenience plaintiff (Affidavit, ¶ 8); ignored "significant judicial admissions" and failed to make findings of judicial estoppel and lack of subject matter jurisdiction (Affidavit, ¶ 9); elected to proceed with a hearing on the pending motion to compel before addressing three dispositive motions which are pending before the Court (Affidavit, ¶ 10); rescheduled the hearing on the motion to compel at plaintiff's request without notice to either defendant (Affidavit, ¶¶ 11, 12); conducted a lengthy conference during which the undersigned permitted plaintiff, an attorney, to review his defective discovery requests and then submit a revised set of discovery requests to defendant Damon (Affidavit, ¶ 13); and ignored a motion for a protective order which defendant filed against plaintiff.[1] (Affidavit, ¶ 16). Defendant requests the undersigned's immediate recusal from this matter based on her purportedly biased and prejudiced conduct "in allowing Mr. Brautigam to dictate the manner and means of this litigation" at defendant's expense as outlined in the Affidavit. (Affidavit, ¶¶ 14, 16).

II. The Statute

Title 28 U.S.C. § 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 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,[2] 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

[1] The motion for a protective order was filed on November 4, 2013. (Doc. 77). Plaintiff filed a response in opposition to the motion on November 12, 2013. (Doc. 78).

[2] The provision that an affidavit shall be filed within "ten days before the beginning of the term at which the proceeding is to be heard" no longer has any applicability as courts have not operated by "term" for several decades. *RIT Rescue & Escape Sys., Inc. v. Fire Innovations, LLC*, 1:08CV1101, 2008 WL 5263694, at *1 n.1 (N.D. Ohio Dec. 16, 2008) (citing Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144 (Federal Judicial Center 2002)).

made in good faith.

Once an affidavit is filed under § 144, the judge whose partiality is challenged has a duty to examine the affidavit to determine whether it is both timely[3] and legally sufficient. *Easley v. Univ. of Michigan Bd. of Regents*, 853 F.2d 1351, 1355-56 (6th Cir. 1988) (citing *In Re City of Detroit,* 828 F.2d 1160, 1164 n. 2 (6th Cir. 1987) (citing *Berger v. United States,* 255 U.S. 22, 32 (1921)). Thus, the undersigned is obligated to examine defendant's § 144 affidavit to determine whether it satisfies the requirements of the statute. In making this determination, the Court must accept as true the factual allegations set forth in the affidavit that are "sufficiently definite and particular to convince a reasonable person that bias exists[.]" *Scott,* 234 F. App'x at 352 (citing *Hoffman v. Caterpillar, Inc.,* 368 F.3d 709, 718 (7th Cir. 2004)). However, the Court is not bound to accept the conclusions that defendant has drawn from those factual allegations. *Id.* (citing *Tezak v. United States,* 256 F.3d 702, 717 (7th Cir. 2001)).

A presiding judge is presumed to be impartial, and a party who challenges the judge's impartiality has "the substantial burden of proving otherwise." *Scott,* 234 F. App'x at 352 (citing *United States v. Denton,* 434 F.3d 1104, 1111 (8th Cir. 2006)). The judge does not bear the burden of proving her impartiality. *Id.* (citing *In re McCarthey,* 368 F.3d 1266, 1269 (10th Cir. 2004)). Thus, defendant Damon bears the burden of proving the undersigned is not impartial.

III. The Affidavit does not comply with 28 U.S.C. § 144.

The Court will assume for purposes of this order that the Affidavit is timely. In addition to the requirement that an affidavit be timely, § 144 imposes the following obligations on a party proceeding under the statute: (1) the affiant must submit an affidavit that sets forth "the facts

[3] The Sixth Circuit has found that a § 144 affidavit is timely if it is submitted "at the earliest moment after the movant acquires knowledge of the facts demonstrating the basis for such disqualification." *Scott v. Metro. Health Corp.*, 234 F. App'x 341, 352 (6th Cir. 2007) (quoting *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993)).

and the reasons for the belief that bias or prejudice exists"; and (2) the affiant must submit a certificate of counsel of record stating the affidavit is made in good faith. 28 U.S.C. § 144. Defendant has failed to satisfy both of these requirements.

First, the affidavit is not accompanied by a certificate of counsel of record stating it is made in good faith. Nor has defendant submitted a certificate of good faith as a pro se litigant.[4] Because § 144 is "heavily weighted in favor of recusal," the certification and other requirements of § 144 are strictly construed to prevent abuse of the statute. *Scott*, 234 F. App'x at 352 (citing *Hoffman*, 368 F.3d at 718). Defendant's failure to meet the threshold requirement of certification under 28 U.S.C. § 144 mandates denial of his request for the undersigned's recusal. *See Scott*, 234 F. App'x at 352-53 (declining to consider whether § 144 affidavit was timely and sufficient in light of plaintiff's failure to file the certificate of counsel required under the statute).

Even if defendant had submitted a certificate of counsel of record stating that his § 144 affidavit was made in good faith, reassignment to another judge would not be mandated unless the affidavit was sufficient. To satisfy this requirement, an affidavit filed under § 144 must allege "facts which a reasonable person would believe would indicate a judge has a personal bias against the moving party." *Youn v. Track, Inc.*, 324 F.3d 409, 423 (6th Cir. 2003) (quoting *Gen. Aviation, Inc. v. Cessna Aircraft, Co.,* 915 F.2d 1038, 1043 (6th Cir. 1990)). The standard is an objective one. *RIT Rescue & Escape Sys., Inc.,* 1:08CV1101, 2008 WL 5263694, at *1 (citing *Liteky v. United States,* 510 U.S. 540, 548 (1994)). "[T]he judge need not recuse himself based

---

[4] Some courts have determined that a pro se party cannot supply the required certificate of counsel. *See Robinson v. Gregory*, 929 F. Supp. 334, 337-38 (S.D. Ind. 1996); *Williams v. New York City Housing Authority*, 287 F. Supp.2d. 247, 249 (S.D. N.Y. 2003). These courts have reasoned that a pro se litigant does not stand in the shoes of counsel for purposes of this provision due to the potential for abuse of the mechanism provided by § 144 and because pro se parties have other means to protect themselves against biased and prejudiced judges. *Ibid.* The Court need not resolve the issue for purposes of this order in light of plaintiff's failure to submit any type of certificate and because the affidavit itself is insufficient.

on the 'subjective view of a party' no matter how strongly that view is held." *United States v. Sammons,* 918 F.2d 592, 599 (6th Cir. 1990) (citing *Browning v. Foltz,* 837 F.2d 276, 278 (6th Cir. 1988)).

Moreover, to warrant recusal, the bias alleged by the affiant must be a "personal" bias that arises from an extrajudicial source. *Youn*, 324 F.3d at 423 (quoting *United States v. Grinnell Corp.,* 384 U.S. 563, 583 (1966)). Personal bias is prejudice that emanates from a source other than the judge's participation in the proceedings or prior contact with related cases. *Id*. (citing *Wheeler v. Southland Corp.,* 875 F.2d 1246, 1251-52 (6th Cir. 1989) (citing *Demjanjuk v. Petrovsky,* 776 F.2d 571, 577 (6th Cir. 1985)). Rather, personal bias has its source in "the judge's background and association[s] and not from the judge's view of the law." *Id.* (citing *Grinnel Corp*., 384 U.S. at 1090) (internal quotation marks omitted). Disqualification under § 144 cannot be premised on bias that stems from the "judge's view of the law or the facts of the case itself[.]" *Fharmacy Records v. Nassar*, 572 F. Supp.2d 869, 876 (E.D. Mich. 2008) (citing *United States v. Story,* 716 F.2d 1088, 1090 (6th Cir. 1983)).

Accepting the factual allegations of the Affidavit as true, defendant's § 144 affidavit is insufficient to show bias or prejudice on the part of the undersigned. First, none of the acts or omissions that defendant cites as evidence of bias remotely touch on alleged prejudice arising from an extrajudicial source. The Affidavit makes no mention of the undersigned's background or associations, and it does not refer to any other extrajudicial source of bias beyond the undersigned's participation in this litigation. To the contrary, defendant ascribes bias to the undersigned based primarily on procedural decisions she has made related to the judicial management of this lawsuit, as well as decisions on the merits of the case, with which defendant disagrees. Defendant has made no showing that these decisions have been informed by anything

other than the undersigned's understanding of the case and its rather involved procedural history. While defendant may disagree with the undersigned's view of the law, the facts of the case, and the appropriate manner for handling the numerous discovery and dispositive motions pending in this matter, a party's disagreement with a judge's decision or ruling is not a basis for disqualification of the judge. *Id.* at 876 (citing *Liteky*, 510 U.S. at 555-56). *See also Robinson*, 929 F. Supp. at 337 (courts have repeatedly made clear that judicial rulings alone almost never constitute a valid basis for disqualifying a judge). Defendant has not carried his substantial burden to prove bias on the part of the undersigned. *Scott,* 234 F. App'x at 352.

"Although a judge is obliged to disqualify himself when there is a close question concerning his impartiality, . . . he has an equally strong duty to sit where disqualification is not required." *United States v. Angelus,* 258 F. App'x 840, 842 (6th Cir. 2007) (inner quotations and citations omitted). *See also Fharmacy Records,* 572 F. Supp.2d at 876 ("[W]here the standards governing disqualification have not been met, disqualification is not optional; rather, it is prohibited."). As defendant Damon has shown no ground for disqualification, the undersigned is obligated *not* to recuse from this matter.

Defendant Damon's Affidavit of Bias and Prejudice requesting recusal of the undersigned from this matter pursuant to 28 U.S.C. § 144 (Doc. 84) is hereby **DENIED**.

IT IS SO ORDERED.

Date: 12/6/13

s/Karen L. Litkovitz
Karen L. Litkovitz
United States Magistrate Judge