

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

In re

AVN CORPORATION,

Case No. 98-20098-L

Chapter 11

Debtor.

Samuel K. Crocker, Chapter 11 Trustee of the
estate of the above-named debtor,

Plaintiff,

v.

Adv. Proc. No. 98-0434

AVN Corporation, Grace Y. Russo,
David Namer, and Sandra Namer,
Defendants.

**MEMORANDUM AND ORDER ON “MOTION AND MEMORANDUM FOR
RECUSAL OF JUDGE LATTA FROM HEARING ANY MATTER RELATED TO
DAVID NAMER” COMBINED WITH NOTICE OF THE ENTRY THEREOF**

The instant proceedings arise out of a motion filed by the movant-defendant, David Namer, acting pro se, styled “Motion And Memorandum For Recusal of Judge Latta From Hearing Any Matter Related to David Namer,” and the objection thereto filed by Sentinel Trust Company, an asserted creditor of the above-named debtor and the original plaintiff herein. Essentially, the movant-defendant, David Namer (“Mr. Namer”), seeks a recusal or disqualification order involving United States Bankruptcy Judge Jennie D. Latta from exercising jurisdiction over this adversary proceeding. In accordance with the November 24, 1998 Order herein and Local Bankruptcy Rule 1073-1, the undersigned Bankruptcy Judge is exercising jurisdiction over this particular proceeding (i.e., Mr. Namer’s instant motion).

By virtue of 28 U.S.C. § 157(b)(2)(A), this is a core proceeding.

Based on oral statements of Mr. Namer and other interested persons made in open court on December 7, 1998, and after careful consideration of the adversary proceeding and case records as a whole, the following shall constitute the court's findings of fact and conclusions of law in accordance with FED. R. BANKR. P. 7052.

Mr. Namer, the president of the above-named debtor corporation, primarily suggests a pattern of conduct on Judge Latta's part that under the cumulative circumstances warrants her recusal or disqualification in this adversary proceeding. More specifically, Mr. Namer asserts, inter alia, that Judge Latta was "repeatedly partial, rude, harsh, and disrespectful" to him and further that she "has threatened, attempted to trick, intimidate, and trampled" over his 4th and 5th Amendment rights.

Indeed, pursuant to 28 U.S.C. § 144 or 455, a party may move to disqualify a judge before whom a matter is pending. Presumably, Mr. Namer seeks to disqualify Judge Latta pursuant to either or both of these statutes. The Court will separately consider the statutory mandates of both sections 144 and 455 of title 28.

Section 144 of title 28¹ allows for disqualification of a judge in instances of bias or prejudice. By its terms, however, this statute apparently applies only to district judges. Numerous courts have

¹ 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, or good cause shall be shown for failure to file it within such time. A party may file only

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examined the language of the statute, and it appears that 28 U.S.C. § 144 is not applicable to bankruptcy judges. *See, for example, In re Norton*, 119 B.R. 332, 334 (Bankr. N.D. Ga. 1990); *Hepperle v. Johnston*, 590 F.2d 609, 613 (5th Cir. 1979)(section 144 not applicable to circuit judges); *Ginger v. Cohn*, 255 F.2d 99 (6th Cir. 1958)(section 144 does not apply to a referee in bankruptcy, an appellate judge, or a territorial court); *Dubnoff v. Goldstein*, 385 F.2d 717, 720 (2d Cir. 1967)(section 144 does not apply to disqualification proceedings brought against bankruptcy referees); *Pilla v. American Bar Ass’n*, 542 F.2d 56, 58 (8th Cir. 1976)(section 144 is not applicable to circuit judges or Supreme Court justices); and *In re Foster Iron Works, Inc.*, 3 B.R. 715, 718 (S.D. Tex. 1980)(section 144 is not applicable to bankruptcy judges or federal appellate judges). Compare 28 U.S.C. §§ 151, 152(a)(1), 1334(a)-(b), and 157(a). For the reasons mentioned hereinafter and assuming arguendo that 28 U.S.C. § 144 derivatively applies to bankruptcy judges, its application here clearly would not result in Judge Latta’s recusal or disqualification.

As noted, Mr. Namer’s recusal or disqualification motion also is before the court pursuant to 28 U.S.C. § 455, which expressly is made applicable to bankruptcy judges by virtue of FED. R. BANKR. P. 5004(a).² Section 455(a) of title 28 provides, in relevant part, as follows: “Any justice,

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.

²FED. R. BANKR. P. 5004(a) provides in its entirety as follows:

DISQUALIFICATION OF JUDGE. A bankruptcy judge shall be governed by 28 U.S.C. § 455, and disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstances arises or, if appropriate, shall be disqualified from presiding over the case.

judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). In addition, 28 U.S.C. § 455(b)(1) provides that a judge shall disqualify himself “where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding”

Under 28 U.S.C. § 455(a), the test to apply is whether another person with knowledge of all the circumstances might reasonably question the judge’s impartiality. See, for example, *McBeth v. Nissan Motor Corporation U.S.A.* 921 F. Supp. 1473, 1477 (D. S.C. 1996)(citing *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1987) and *United States v. Martorano*, 866 F.2d 62, 67 (3rd Cir. 1989)). See also *United States v. Norton*, 700 F.2d 1072, 1076 (6th Cir. 1983). “This is an objective standard and is not to be construed to require recusal on spurious or loosely based charges of partiality.” *Id.* In considering the facts supporting a motion to recuse or disqualify under section 455(a), the source and the character of the basis of recusal must be taken into account. “The disqualifying bias must stem from an extrajudicial source and result in an opinion on the merits in the instant action based on something other than what was learned during participation in the case.” *Id.* (emphasis added) See also *Foster Iron Works, Inc.*, 3 B.R. at 718 (Disqualification under section 455 will result only from extrajudicial conduct and not from conduct within a judicial context.); and *Liteky v. United States*, 510 U.S. 540, 553 (1994) (the extrajudicial source doctrine governs section 455(a)).

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Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. See, for example, *Commercial Paper Holders v. R.W. Hine (Matter of Beverly Hills Bancorp)*, 752 F.2d 1334, 1341(9th Cir. 1984)(“Unfavorable rulings alone are legally insufficient to require recusal, even when the number of such unfavorable rulings is extraordinarily high on a statistical basis.”) Unfavorable rulings, in and of themselves, cannot demonstrate reliance upon an extrajudicial source and when the alleged source of bias arises in the context of judicial proceedings, recusal requires a showing that the bias arises from knowledge acquired outside such proceedings. *Id.* Thus, it is incumbent that Mr. Namer, as the moving party, show that a reasonable person would have doubts concerning the impartiality of Judge Latta based upon some fact or circumstance *outside* the judicial proceeding. This Mr. Namer has completely and woefully failed to do. From a legal perspective, Mr. Namer has not presented this court with any actual support, factual or legal, that would provide an underlying basis for Judge Latta’s recusal or disqualification in this adversary proceeding.

Reliance on an extrajudicial source also must be demonstrated under 28 U.S.C. § 455(b)(1). See, for example, *Liteky*, 510 U.S. at 553. In *Liteky*, the Court noted that section 455(a) not only expands the protection of section 455(b), but also duplicates some of its protection as well. Thus, much of the analysis employed under section 455(a) applies equally under section 455(b)(1). The issue to be determined under section 455(b)(1) is whether the judge is prejudicial with respect to a particular party or has knowledge of disputed facts. Under 28 U.S.C. § 455(b)(1), as under 28 U.S.C. § 455(a), inferences drawn from prior judicial determinations concerning a party in the case

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in which recusal is sought are insufficient because it is the duty of the judge to rule upon issues of fact and law and questions of conduct which form part of the proceedings before him. *See Martin v. Farley*, 872 F. Supp.551, 555 (N.D. Ind. 1993)(quoting *United States v. Partin*, 312 F. Supp.1355,1358 (E.D. La. 1970). A reasonable person standard applies with regard to bias and prejudice concerning a particular party as well as impartiality in general.

As under 28 U.S.C. § 455(a), Mr. Namer's allegations, considering a totality of the particular facts and circumstances, are legally insufficient to demonstrate bias or partiality and cannot support a motion for recusal or disqualification of Judge Latta under 28 U.S.C. § 455(b)(1). Mr. Namer has presented this court with no lawful reason or basis for recusal or disqualification of Judge Latta other than his own subjective reasons or perhaps displeasure with the judicial rulings and her demeanor in the case. Although understandably sensitive to Mr. Namer's perceptions, the court nonetheless finds here that absolutely no legal conditions or reasons exist to warrant recusal or disqualification of Judge Latta in this adversary proceeding. Unfavorable rulings, although subject to the appellate process, do not, in and of themselves, indicate a personal bias or prejudice concerning a party such as to justify recusal or disqualification. Furthermore, erroneous perceptions of reality and loosely based charges of partiality based on personal perceptions likewise do not warrant or justify recusal or disqualification.³ The court additionally notes that pursuant to 11 U.S.C. § 1109(b) the attorneys

³In *In re Wisconsin Steel Corp.*, 48 B.R. 753, 762 (N.D. Ill. 1985), the court stated:

Every experienced lawyer and judge knows how important it is that litigants believe in the fairness of the process. No one likes to lose, but if an unfavorable

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decision is perceived to be the result of any impartial consideration, it is usually bearable. What cannot be tolerated is an unfavorable decision that is seen as not simply wrong, but unfair.

The *Commentary* accompanying Canon 3A(3), *Code of Conduct for United States Judges*, provides as follows:

Canon 3A(3). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

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for Sentinel Trust Company and the defendant, Sandra Namer, along with the plaintiff-chapter 11 trustee, Mr. Samuel K. Crocker, appeared in open court at the hearing held on December 7, 1998, and voiced objections to Mr. Namer's motion. Accordingly, Mr. Namer's motion for recusal or disqualification of Judge Latta in this adversary proceeding is hereby denied.

Based on the foregoing, **IT IS ORDERED** that Mr. Namer's motion for recusal or disqualification of Judge Latta is hereby denied; and the Bankruptcy Court Clerk shall promptly send a copy of this Order and Notice to the persons listed below.

The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judges' adjudicative and administrative responsibilities. For example, the duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias towards another on the basis of personal characteristics like race, sex, religion, or national origin.

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BY THE COURT

DAVID S. KENNEDY
CHIEF UNITED STATES BANKRUPTCY JUDGE

DATED: December 8, 1998

cc: Mr. David Namer, Defendant-Movant, Pro Se
Samuel K. Crocker, Chapter 11 Trustee
Sean M. Haynes, Staff Attorney, Office of U.S. Trustee
Joseph R. Prochaska, Esquire, Attorney for Sentinel Trust Company
Larry D. Austin, Esquire, Attorney for Debtor
Ms. Grace Y. Russo, Defendant
Earl C. Buckles, Esquire, Attorney for Chapter 11 Trustee
Jack F. Marlow, Esquire, Attorney for Defendant, Sandra Namer
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