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Briefs and Other Related Documents
Resolution Trust Corp. v. del re CastellettD.N.J.,1993.Only the Westlaw citation is currently available.

United States District Court, D. New Jersey.
RESOLUTION TRUST CORPORATION, Plaintiff,
v.
Marisa del re CASTELLETT, et al., Defendants.
Civ. A. No. 92-4635.

May 25, 1993.

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Roger B. Kaplan, Robert W. Smith, Wilentz, Goldman & Spitzer, P.C., Woodbridge, NJ, for defendants Stewart Gardner, Walter Long, Frederick Wilhelms
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Rafael Betancourt, Pisano & Triarsi, Cranford, NJ, for defendant George Roman.
William B. McGuire, Tompkins, McGuire & Wachenfeld, Newark, NJ, for defendant William Parker Seeley.
Walter John Fleischer, Jr., Shanley & Fisher, PC, Morristown, NJ, for defendant Pullman & Comley.
Thaddeus J. Hubert, III, Hoagland, Longo, Oropollo & Moran, New Brunswick, NJ, for defendants Stein & McGuire, Alfred A. Stein, III, John McGuire.
Seth David Levine, Roseland, NJ, for defendant United Evaluators, Inc.
Richard C. Rosen, Wilkie, Farr & Gallagher, New York City, for third party defendants BDO Seidman, Paul Garfinkle.

MEMORANDUM & ORDER

WOLIN, District Judge.

***1** Before the Court is the motion of defendants Stein & McGuire, Alfred E. Stein, III and John McGuire (collectively the "Stein & McGuire defendants"), by their counsel Hoagland, Longo, Oropollo & Morgan, seeking the disqualification of United States District Court Judge Alfred M. Wolin pursuant to 28 U.S.C. § 144. Having reviewed the written submissions of the parties and the affidavits of Mr. Stein and Mr. McGuire, for the reasons expressed below, the Court will deny defendants' motion.

The Resolution Trust Corporation, in its corporate capacity and as receiver for Colonial Federal Savings Association ("Colonial"), commenced this action on November 6, 1992 naming as defendants Colonial's majority shareholder and several directors, along with the lawyers and entities that advised them. Based on claims of negligence and self-dealing, it seeks to hold defendants responsible for the demise of the bank. Counts nine through

fifteen charge the Stein & McGuire defendants with various offenses including professional negligence, negligent supervision, unjust enrichment and breach of implied contract and fiduciary duty.

Section 144 governs challenges to district judges on grounds of bias.
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.

28 U.S.C. § 144. Motions submitted by parties relying on this provision must: (1) be timely filed; (2) contain a good faith certificate of counsel; and (3) include an affidavit stating material facts which, if true, would lead a reasonable person to conclude that the district judge harbored a special bias toward the movant. *See United States v. Rosenberg,* 806 F.2d 1169, 1173 (3d Cir.1986), *cert. denied,* 481 U.S. 1070, 107 S.Ct. 2465 (1987).

When measuring the timeliness of a section 144 motion the Court must focus on the delay which occurs between the events giving rise to the charge of bias and the filing of the recusal request. *See Smith v. Danyo,* 585 F.2d 83, 86 (3d Cir.1978). The actual time elapsed as well as the affiant's participation in matters before the Court are relevant. If in this interval the litigants take " significant steps ... to invoke the participation of the court," *id.; see Shank v. American Motors Corp.,* 575 F.Supp. 125, 128 (E.D.Pa.1983), the motion is untimely.

To support their instant motion defendants recount events which unfolded during the fall of 1976. As a result, from the time defendants received notice of assignment to Judge Wolin the clock on their recusal motion began to run. Plaintiff filed its complaint on November 6, 1992. That same day the Clerk of the Court filed a notice of allocation and assignment and issued summonses for the Stein & McGuire defendants. On March 18, 1993, defendants brought the instant motion.

***2** During this four-month period, the Stein & McGuire defendants answered the complaint, filed and answered crossclaims, and participated in two hearings before Magistrate Judge Pisano. In addition, during this interval, plaintiff moved to enforce a subpoena, defendant del Re Castellett sought a protective order and defendant Pullman and Comley filed a motion to dismiss to which plaintiff responded with a request for sanctions. Judge Wolin referred the motions for dismissal and sanctions to Judge Pisano for a report and recommendation which he filed on March 8, 1993.

Based on this activity, there can be no doubt that defendants participated in this case. Whether this involvement rises to the level of 'substantial' is a closer question. Defendants point out that they brought none of the motions heard by Judge Pisano. Further, they maintain, the issues involved therein " did not directly affect the interests of Stein & McGuire." Reply at 2.

The identity of the movant has little bearing on the timeliness determination. The steps taken to involve the Court are those "by either party." [FN1] *Smith,* 585 F.2d at 86. More helpful to their cause is defendants' claim that their interests were not at stake in the motions before Judge Pisano. As such, defendants rightly cannot be accused of concealing bias, while waiting hopefully for the Court to issue favorable rulings. Nor does it appear that defendants' instant motion is motivated by strategic concerns or a desire for delay. Although defendants could have sought recusal at an earlier date, the Court concludes that their motion is timely.

The Court now turns to the question of sufficiency. When evaluating a timely section 144 filing, the Court examines the legal sufficiency of the underlying affidavit, and must accept as true the factual allegations,[FN2] but may reject any conclusory statements. *See United States v. Vespe,* 868 F.2d 1328, 1340 (3d Cir.1989). Facts including the "time, place, persons and circumstances" must be set forth. *United States v. Townsend,* 478 F.2d 1072, 1074 (3d Cir.1973). "A court should grant recusal if the allegations give fair support to a charge of a bent of mind that might prevent or impede impartiality of judgment." *Jones*

v. Pittsburgh Nat. Corp., 899 F.2d 1350, 1356 (3d Cir.1990).

In the instant case, defendants' assertions reveal the following facts. Mr. Garrubbo, formerly associated with then Mr. Wolin in the firm of Wolin & Garrubbo, served a term in the New Jersey Assembly and sponsored an "open-shop" law that required financial institutions to allow borrowers to choose an attorney during mortgage closings. Formerly all real estate loans were closed by attorneys the banks chose.

***3** In the fall of 1976, Mr. Wolin and Alfred Stein met at the Essex County Courthouse and argued about a local bank's practice of waiving their review fee if mortgage seekers chose Mr. Stein's firm to represent them during closings. Mr. Wolin, then president of the Union County Bar Association, threatened Mr. Stein and his partners with "an action." Mr. Wolin contacted New Jersey Central Ethics ("Central Ethics") and an "ethics complaint was filed" against Mr. Stein and his partners and other small firms. Wolin attended the hearing. [FN3] For reasons unexplained by defendants, the complaint later was dismissed. Mr. Stein characterizes his subsequent exchanges with Mr. Wolin as brief and unpleasant and complains that Mr. Wolin never apologized for "initiating" the ethics complaint.

It is unlikely that these facts would lead a reasonable person to conclude that Judge Wolin harbors a special bias toward the Stein & McGuire defendants. [FN4] In reaching this conclusion the Court considers only the actions of Judge Wolin, since Mr. Garrubbo participated in the legislating activities of the New Jersey Assembly as an elected representative, not as an agent of Wolin & Garrubbo.

Before evaluating these events, it is important to describe the climate in which they occurred. As the legislature's consideration of the closed-shop policy indicates, at the time these events took place, this practice was an important, hotly-debated issue in the legal community. In addition, Judge Wolin was serving as president of the Union County Bar Association and thereby charged with the oversight of local members of the Bar and the corollary duty of reporting any suspected ethical shortcomings.

Turning to the events themselves, the degree of Wolin's involvement in the Stein complaint is far from unclear. Examining defendants' affidavits, the Court learns that Wolin contacted Central Ethics and that an "ethics complaint was filed." Defendants do not allege that these actions are causally related. Nor do they provide dates that would suggest a positive correlation between Wolin's criticism and the decision of Central Ethics to proceed formally against Stein. The Court is not empowered to reach this conclusion on its own. *See United States v. Dansker,* 537 F.2d 40, 53 (3d Cir.1976) (judge has duty to preside if affidavit legally insufficient to compel disqualification), *cert. denied,* 429 U.S. 1038, 97 S.Ct. 732 (1977).

Further, while Mr. Stein and Judge Wolin did discuss Stein's bank arrangement, because Stein's firm was only one of several "other small firms" named in the ethics complaint, it appears that the waiver policy, rather than individual lawyers, was the subject of scrutiny. Moreover, the age of the events underlying defendants' instant motion, now seventeen years old, greatly reduces the significance of defendants' charge.

Finally, the policy which sparked the disagreement of Messrs. Wolin and Stein is not the subject of the instant litigation. The importance of this consideration is highlighted by the Third Circuit's willingness to reverse district court judges who, after commenting directly on the issues before them for determination, deny subsequent disqualification motions. *See e.g., United States v. Furst,* 886 F.2d 558, 583 (3d Cir.1989) (remanding for resentence by different judge where sentencing judge, anxious for guilty plea, indicated to public defender that he would award defendant longer sentence to be served in unpleasant circumstances following conviction at trial), *cert. denied,* 493 U.S. 1062, 110 S.Ct. 878 (1990); *Townsend,* 478 F.2d at 1073-74 (reversing denial of recusal motion where district judge presiding over induction trial stated during pretrial conference that he sentences all conscientious objectors to 30 months to pressure them to submit to induction).

***4** For the reasons expressed above, it is on this 25th day of May, 1993,

ORDERED that defendants' motion for disqualification is denied.

FN1. Any other rule would frustrate the policy underlying the timeliness requirement. Suppose, for example, that plaintiff had successfully moved for summary judgment against defendants. Following the Court's ruling on the motion, defendants could not seek recusal on the basis that plaintiff "invoked" the participation of the Court.

FN2. This requirement, which assures that both the appearance of bias and actual bias are avoided, *see Hodgson v. Liquor Salesmen's Union Local No. 2,* 444 F.2d 1344, 1348 (2d Cir.1971), moots the Court's previous request for a hearing.

FN3. Defendant McGuire alleges that Judge Wolin "actively lend[ed] his support to the prosecution" during the hearing but provides no facts to support this assertion. *See* McGuire Affidavit ¶ 3.

FN4. Contrary to defendants assertion, *see* Defendants' Brief at 4, McGuire does not claim that Judge Wolin's bias reaches him. Indeed, McGuire characterizes their relationship as "cordial." McGuire Affidavit ¶ 4.

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