

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re:

Case No. 6:01-bk-00533-ABB
Chapter 11

EVERGREEN SECURITY, LTD.,

Debtor.

ORDER

This matter came before the Court on the Motion Requesting the Honorable Arthur Briskman Make Certain Disclosures on the Record and Accompanying Memorandum of Law (Doc. No. 1694) ("Motion") filed by Peter R. Ginsburg and Peter R. Ginsburg, P.C. (collectively, the "Movant") requesting the undersigned Judge make certain disclosures on the record. Two Sanctions Motions (Doc. Nos. 1542 and 1624) and an Order to Show Cause (Doc. No. 1700) are pending against the Movant in connection with the Movant's signing, filing, and advocating of the Recusal Motion.¹ The Movant filed the Motion apparently in connection with its defense of the Sanctions Motions.

A final evidentiary hearing on the Sanctions Motions was held on August 28, 2007. The Movant made an *ore tenus* motion at the commencement of the hearing to have the Court disclose on the record:

. . . whether or not the Court was aware of a complaint being filed, and if so, when, and the extent to which the complaint involved any counsel in connection with this matter . . .
But in order for us to proceed in fact with this recusal motion sanctions hearing, we believe that the information is necessary and we would respectfully

¹ The Movant and others filed a Motion for Recusal, Motion to Disqualify, Disclosure of All Ex Parte Communications and Revocation of All Prior Orders (Doc. No. 1508) ("Recusal Motion") on July 27, 2006 seeking, among other things, recusal of the undersigned Judge from further involvement in this case and various other cases involving the Movant.

request under the Cheeves decision . . . we would respectfully request the Court place on the record the Court's knowledge of the complaint and other matters.²

The Movant characterized the *ore tenus* motion as a "renewed motion," apparently considering it a renewal of his written Motion.³ The Movant established no basis for the relief requested and the *ore tenus* motion was denied.

The Movant seeks to obtain information from the undersigned relating to certain alleged actions taken by attorney Phillip M. Hudson, III ("Hudson") and the alleged existence of a judicial investigation of the undersigned. The Motion sets forth four items the Movant "requests" the Court address on the record, contending it "does not intend to seek testimony" from the undersigned. The Movant further contends ". . . such information would be an indispensable part of the record for an independent, non-conflicted appellate court."

The Movant, despite titling the Motion a "request" and asserting testimony is not being sought, is seeking to have the undersigned testify and/or to contribute to the record. The Motion, utilizing new semantics, is the Movant's fourth attempt to compel the undersigned to give evidence regarding certain alleged actions taken by Hudson. The Motion is due to be denied on several bases.

The information sought is irrelevant to the hearing on the Sanctions Motions. The cornerstone issue relating to the Sanctions Motions is whether the Recusal Motion was filed in bad faith.⁴ That issue turns upon the *Movant's*, and not the Court's, knowledge, information,

² Aug. 28, 2007 Hr'g Tr. vol.1, pp. 47-8.

³ The Movant filed a Request for Hearing (Doc. No. 1710) requesting the Motion be heard at the hearing on the sanctions motions.

⁴ The Movant's counsel recognized the cornerstone issue in open Court: "The question now before Your Honor is the good faith in bringing the motion . . . The issue here is whether or not there was a good faith belief to file the motion." July 26, 2007 Hr'g Tr. p. 10, ll. 23-24; p. 21, ll. 8-10.

belief, and intent relating to the signing, filing, presenting, and advocating the Recusal Motion.

The Movant, through counsel, asserted at the July 26, 2007 status conference it did not intend to relitigate issues relative to the Recusal Motion.⁵ The Motion, however, is an attempt to relitigate issues previously decided. The Movant and others sought to compel discovery from the undersigned during the Recusal Motion hearings. An Order was entered on October 30, 2006 (Doc. No. 1550) excluding the undersigned as a witness. The Movant challenged the October 30, 2006 Order through an appeal and various petitions seeking writs of mandamus.

The appeal was dismissed by the United States District Court for the Middle District of Florida, Orlando Division (“District Court”) on the basis the October 30, 2006 Order was interlocutory and none of the three criteria for allowance of an interlocutory appeal had been satisfied.⁶

The Movant and others filed a Petition for Writ of Mandamus on August 14, 2006 instituting Mataeka, Ltd., et al. v. United States District Court, et al., Case No. 6:06-cv-01210-JA-KRS and a Supplemental Petition for Writ of Mandamus. The petitioners asserted throughout their pleadings the undersigned was “under investigation by the 11th Circuit Court of Appeals” relating to a case in which Hudson was involved.

They sought a writ of mandamus requiring the undersigned’s recusal from the Evergreen case and all related proceedings and to refrain from ruling on the Recusal Motion because the Movants intended on calling the undersigned as a witness at the final evidentiary hearing on the Recusal Motion.⁷ They requested the District Court issue a writ of mandamus “to reconsider and reverse” the October 30, 2006 Order.

The District Court, by Order entered on September 20, 2006, denied the Petition and Supplemental Petition:

If, upon entry of the order
[ruling on the Recusal Motion],
Petitioners believe the

⁵ Id. at p. 12, ll. 9-11.

⁶ See Case No. 6:06-cv-1867-Orl-28-KRS, Doc. No. 8.

⁷ Id. Doc. No. 3.

bankruptcy judge’s decision to be erroneous, they have the readily available remedy of appealing the decision.

Petitioners also allege a basis for recusal that the Eleventh Circuit Court of Appeals has undertaken an investigation of the bankruptcy judge for engaging in ex parte communications during the course of another proceeding. Notwithstanding these allegations, there is no evidence before this court that such an investigation has been undertaken, let alone that there has been a finding of wrongdoing on the part of the judge. If there is such an investigation, and it results in a finding that the bankruptcy judge engaged in ex parte communications relevant to these proceedings, Petitioners may bring the matter to the attention of this court by renewing their Petition for Writ of Mandamus.⁸

The petitioners (including the Movant) filed a third mandamus petition in Case No. 6:06-cv-01210-JA-KRS requesting the District Court issue a writ of mandamus directing the undersigned to appear as a witness in the Recusal Motion trial and at deposition.⁹ The petition was denied because the petitioners were required to initiate a new case and Case No. 6:06-cv-01210-JA-KRS was closed.¹⁰

The petitioners re-filed the petition as a new case, Case No. 6:06-cv-01807-JA-JGG. The District Court denied the petition by the Order on December 26, 2006.¹¹ The District Court, citing

⁸ District Court Case No. 6:06-cv-01210-JA-KRS Doc. No. 23.

⁹ District Court Case No. 6:06-cv-01210-JA-KRS Doc. No. 24.

¹⁰ Id. Doc. No. 25.

¹¹ District Court Case No. 6:06-cv-1807-Orl-28JGG Doc. No. 3 at p. 3 (*internal citations omitted*): “In the instant petition, Petitioners seek a writ compelling Judge Briskman to reverse himself and rule in their favor on a motion which they suggest he should not

Cheeves v. Southern Clays, Inc., 797 F. Supp. 1570 (M.D. Ga. 1992), advised the petitioners as to their right to file a petition seeking a writ of mandamus *after* the issuance of a ruling on the Recusal Motion: “The bankruptcy judge has not yet ruled on the Petitioners’ recusal motion. Once a ruling is issued on that motion, Petitioners are not without a remedy.”¹²

Ginsberg submitted a letter to the Court dated January 19, 2007 (Doc. No. 1628) requesting the undersigned make disclosures and stating:

If disclosure is made, the parties thereupon can simply file legal submissions arguing for an appropriate remedy or, alternatively, withdrawing the Motion, depending upon the disclosures themselves.

This Court entered an Order on February 27, 2007 (Doc. No. 1643) denying the Recusal Motion. The Movant, if dissatisfied with the results of the Recusal Motion hearing, could have appealed the Order or filed a renewed petition for writ of mandamus, as the District Court discussed in its September 20, 2006 Order. No appeal or petition for a writ of mandamus (renewed or otherwise) was sought regarding this Court’s February 27, 2007 Order. The Order is a final, non-appealable order. The Movant waived its remedy to seek discovery from the Court and is estopped from seeking discovery from the undersigned regarding the recusal matters. Cheeves, 797 F. Supp. at 1583.

The undersigned may not be called as a witness, subjected to discovery, or called upon to give evidence regarding the sanctions matters pursuant to the Federal Rules of Evidence and case law authority. Legal and policy considerations prevent a judge who is presiding over a trial from being called as a witness or subjected to discovery. Cheeves, 797 F. Supp. at 1580-81. “The legal obstacle is Rule 605 of the Federal Rules of Evidence.” Id. “The judge presiding at the trial may not testify in that trial as a witness.

have ruled on in the first instance. Their position is both inconsistent and wholly lacking in merit.”

¹² Id. at p. 3.

No objection need be made in order to preserve the point.” FED. R. EVID. 605.

“Trial” as used in Rule 605 encompasses any evidentiary hearing. Cheeves, 797 F. Supp. at 1582. Policy considerations prohibit a presiding judge from being called as a witness or subjected to discovery. Id., at 1582-83. “Embroiding the presiding judge in the adversarial process of any case is not only unseemly,” . . . but it will lead to the “manipulated harassment” of the judiciary. Id.¹³ “The functions of a judge and a witness are incompatible and it is utterly impossible for one to exercise the rights of a witness and to perform the duties of a judge at one and the same time.” Cline v. Franklin Pork, Inc., 313 N.W.2d 667, 671 (Neb. 1981).

The information sought through the Motion is irrelevant to the final evidentiary hearing on the sanctions matters. The Movant, by failing to appeal the February 27, 2007 Order or to file a petition seeking a writ of mandamus with the District Court challenging that Order, waived its ability to seek discovery from the undersigned and is estopped from seeking any discovery regarding the Hudson or recusal matters. Statutory law, case law, and fundamental policy considerations governing the judiciary prevent the undersigned from being called as a witness or subjected to discovery regarding the sanctions matters.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Movant’s Motion (Doc. No. 1694) and *ore tenus* motion made on August 28, 2007 are hereby **DENIED**.

Dated this 2nd day of January, 2008.

/s/Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge

¹³ The core policy considerations in excluding a presiding judge from the adversarial process are “accurate fact-finding and preserving the appearance of fairness even where accuracy is not seriously threatened.” 27 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6062, at 342 (1990); *see also* CODE OF CONDUCT FOR UNITED STATES JUDGES, CANON 2 (“[A] judge . . . should not lend the prestige of his office to advance the private interests of others. . . .”).