

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

In re:

Case No. 6:95-bk-03833-ABB  
Chapter 7

WILLIAM M. GURLEY,

Debtor.

GEORGE E. MILLS, JR., Chapter 7  
Trustee,

Plaintiff,

vs.

Adv. Pro. No. 6:05-ap-00169-ABB

CHERYL FOLLOWELL, as Personal  
Representative of the Estate of Betty  
Jean Gurley (Deceased),

Defendant.

**ORDER**

This matter came before the Court on the Motion of Defendant Seeking Recusal (“Motion”)<sup>1</sup> filed by Cheryl Followell, the Defendant herein (“Defendant”). The Defendant seeks recusal pursuant to 28 U.S.C. §§455(a) and 455(b)(5)(iv). A hearing was conducted on November 14, 2005 and counsel for both the Defendant and George E. Mills, Jr., the Plaintiff herein (“Plaintiff” or “Trustee”), presented argument. The Motion was denied based upon the following findings of fact and conclusions of law.

**FINDINGS OF FACT**

William Gurley and his wife Betty Gurley were both debtors in bankruptcy proceedings.<sup>2</sup> The

<sup>1</sup> Doc. No. 40.

<sup>2</sup> William M. Gurley filed a Chapter 7 bankruptcy case in this Court on July 26, 1995. George E. Mills, Jr. is the duly-appointed Chapter 7 Trustee of Mr. Gurley’s bankruptcy estate. Betty J. Gurley filed a Chapter 11 bankruptcy case in the United States Bankruptcy Court for

Defendant is the Personal Representative of Betty Gurley’s probate estate. The Defendant, citing 28 U.S.C. §§455(b)(5)(iv) and 455(a), contends recusal is required because Arthur B. Briskman is “likely to be a material witness . . . and/or because his impartiality might be reasonably questioned.”<sup>3</sup> Neither the Defendant nor the Plaintiff indicated the basis for any evidence or testimony I could present outside of my judicial capacity.

The Defendant argues certain actions establish lack of impartiality, including: (i) the setting of a hearing on the Defendant’s Motion to Dismiss or Suspend Proceedings; (ii) the entry of an order relating to the Plaintiff’s Motion for Protective Order and communications from Chambers relating to the order; and (iii) a statement made by the Court regarding the credibility of witnesses and rulings issued by the Court. The Defendant provided no substantiation for her allegations at the hearing.

The hearing on the Defendant’s Motion to Dismiss or Suspend Proceedings was set consistent with the Court’s normal procedures. A *contingent* order addressing the Trustee’s Motion for Protective Order, which left the underlying discovery issues open for final resolution, was entered on October 19, 2005. The order was entered without a hearing due to the Court’s inability to conduct a timely hearing. Chambers informed *both* parties of the entry of the order. The Defendant withdrew her discovery requests at the November 14, 2005 hearing, thereby making the Trustee’s Motion for Protective Order moot, after the Court stayed the main bankruptcy case and all related proceedings for ninety days. The comments relating to the Court’s observations of the witnesses’ credibility were made in open court at the conclusion of an evidentiary hearing and were based upon the witnesses’ testimony. All rulings were based upon evidence and arguments duly considered by the Court.

**CONCLUSIONS OF LAW**

The decision to recuse or not recuse is in the sound discretion of the judge being asked to recuse himself/herself. *In re Bernard*, 31 F.3d 842, 843 (9th Cir. 1994). Recusal of a judge is required when the judge “is to the judge’s knowledge likely to be a material witness in the proceeding.” 28 U.S.C. §455(b)(5)(iv). The purpose of this disqualification provision “is to prevent a judge from having to pass

the Western District of Tennessee, Western Division, on October 20, 1997.

<sup>3</sup> Recusal Motion at p. 9.

on the competence and veracity of his own testimony given with respect to a matter presently in controversy before him.” In re A.H. Robbins Co., Inc., 602 F.Supp. 243, 250 (D. Kan. 1985) (quoting In re Continental Vending Mach. Corp., 543 F.2d 986, 995 (2d Cir. 1979)). An assertion that a judge will be a material witness does not automatically require recusal. U.S. v. Rivera, 802 F.2d 593, 601 (2d Cir. 1986).

Dated this 6<sup>th</sup> day of December, 2005.

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

Neither party specified the basis for which I would be a material witness in this case. Neither party identified what subject matters I would be called upon to testify to, other than matters I was involved with in my judicial capacity. The Defendant presented no basis for recusal pursuant to §455(b)(5)(iv). In re A.H. Robbins Co., Inc., 602 F. Supp. at 251.

A judge’s recusal is required where “in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. §455(a). The standard for recusal under a claim of lack of impartiality is objective reasonableness. Carter v. West Publ’g Co., No. 99-11959-EE, 1999 U.S. App. LEXIS 38480, at \*6 (November 1, 1999). The recusal inquiry for a judge based upon perceived lack of impartiality must be made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances. Cheney v. U.S. Dist. Court for D.C., 124A S. Ct. 1391, 1400 (2004). Recusal is appropriate where a reasonable person with knowledge of all the facts would conclude that the judge’s impartiality might reasonably be questioned. Some reasonable doubt concerning a judge’s impartiality must actually exist. Carter v. West, at \*7.<sup>4</sup>

The Defendant did not address the reasonable observer standard. The Defendant did not present any substantiation for recusal pursuant to either 28 U.S.C. §455(a) or §455(b)(5)(iv). Accordingly, recusal is not called for pursuant to either 28 U.S.C. §455(a) or §455(b)(5)(iv).

It is therefore,

**ORDERED, ADJUDGED AND DECREED** that the Defendant’s Motion is denied.

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<sup>4</sup> Otherwise, litigants would be able to manipulate “the system for strategic reasons, perhaps to obtain a judge more to their liking.” Id., at \*7-8 (quoting FDIC v. Sweeney, 136 F.3d 216, 220 (1st Cir. 1998)).