

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAN 04 2017

FIFTH CIRCUIT
LYLE W. GAYCE, CLERK

Complaint Number: 05-17-90036

MEMORANDUM

In October 2015, a company [“the debtor-company”] filed a voluntary Chapter 11 bankruptcy petition, thereby staying a foreclosure by a creditor on a 1000 acre property. The subject United States Bankruptcy presided over the bankruptcy proceeding, and a related adversary proceeding the debtor-company filed against the creditor.

Complainant, the sole owner of the debtor-company, has filed a judicial misconduct complaint alleging that the judge made erroneous decisions, demonstrated racial animus in decisions and comments, tampered with the record to conceal one such comment, and “willfully and maliciously” conspired with the debtor-company’s counsel and the creditor’s counsel to “financially ruin” complainant, his wife, and the debtor-company.

- **Improper prejudgment of matter in favor of creditor**

Complainant complains that prior to a hearing on a motion to lift the bankruptcy stay, the judge told the debtor-company’s counsel “that [we] should just give the property back to the creditor and go back [home].” This statement is construed as an allegation that the judge had prejudged the matter in favor of the creditor before the hearing.

As described in the company’s counsel’s response to a state bar complaint complainant filed against him, the judge did convey to counsel that he was inclined to grant the creditor’s motion to lift the stay. However, complainant fails to mention that the judge also stated that he would afford the company an extra two months to raise the money to pay the creditor or to sell the property.

Regardless, there was nothing improper about the judge's conferring pre-hearing with counsel for both parties to advise them that, based on the pleadings, the court was inclined to rule in favor of the creditor absent some type of agreement between the parties. The allegation relates directly to the merits of the judge's decision, and is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii).

- **Erroneous decisions**

Complainant complains about various decisions made by the judge during a hearing on the debtor-company's motion for a preliminary injunction. For example:

- The judge "made incorrect assumptions and/or statement[s] of fact from the Bench," e.g. a "totally incorrect" finding that the debtor-company "did not pay insurance on the property in question over the past year."
- The judge "denied a Letter of Commitment from a highly accredited investment capital firm ... as not being valid."
- The judge failed to make a ruling on how much actual debt was owed to the creditor by the debtor-company.

These allegations relate directly to the merits of the judge's decisions, and are therefore also subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii).

Complainant further claims that the judge, the creditor's counsel, and the debtor-company's counsel "colluded ... to minimize constructive evidence" when the debtor-company's counsel "tore off the [investment capital firm's] references as he walked up to introduce the [Letter of Commitment] into evidence."

A review of the transcript shows that throughout the hearing, witnesses, counsel, and the court explicitly and repeatedly referred to the investment capital firm as having issued the Letter of Commitment. The allegation is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant also alleges that the judge “willfully and maliciously ... participated in a sophisticated Bank Fraud Scheme” that resulted in “financial ruin” for the complainant, his wife, and the debtor-company.

To the extent that the allegation relates directly to the merits of the judge’s adverse ruling, it is subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(ii). In other respects, such a conclusory assertion is insufficient to support a finding of judicial misconduct and is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

- **Racial animus in comments made during May 12, 2016 hearing, and tampering with audio recording and transcript**
- **Racist motives in denying relief**

Complainant alleges that the judge made comments that demonstrate racial animus which, combined with the adverse rulings, constitute “heavy circumstantial evidence” that the judge and the creditor “had a mutual interest in seeing [complainant and his wife] out of the Big White House.”

For example, complainant asserts that the judge made a “salacious and inflammatory statement in the form of a question: “[Sir], I bet you regret ever investing in [the county], don’t you?” Afterwards, [the judge] laughed/chuckled.” Complainant further claims that when he ordered a copy of the audio-recording of the hearing, he was provided with a version that omitted the comment at issue. He further asserts that after complaining about the incomplete recording, he was provided with a version in which the comment was changed.¹

A review of the existing audio-recording shows that the creditor’s counsel questioned complainant about the proposed municipal development “corridor” in association with which the debtor-company represented to the court that it had secured funding to pay the creditor, and to develop the debtor-company’s property. In support of this claim, the debtor-company presented a Letter of Commitment from the investment

¹ Complainant claimed to have a copy of the incomplete recording but, when asked by the Clerk to provide a copy, he responded that he had lost it.

capital firm. The creditor's counsel argued that the Letter of Commitment did not constitute proof of secured funding, and questioned complainant about how long the proposed development corridor had been planned but not developed. Complainant testified that he first heard about the development corridor in 2005 when he purchased the property. The judge responded, "Do you wish you had never heard of it?" Complainant replied, "No, sir, I don't." A man can be heard laughing briefly.

Complainant claims that the judge tampered with the original recording to substitute the question "[Complainant], I bet you regret ever investing in [the development corridor], don't you?" with "Do you wish you had never heard of it?" In support of this claim, he points out that in responding to the State Bar complaint, debtor-company's counsel confirmed that "[the judge] did ask [complainant] if he regretted investing in [the development corridor]." He fails to note, however, that counsel was paraphrasing complainant's recollection of the judge's comment, and emphatically disputed complainant's contention that the judge's comment was "tainted by racial motives."

There is no evidence that the judge made the comment complainant attributes to him, and later tampered with the audio-recording to omit and/or amend the comment. Such conclusory assertions of racial animus and record tampering are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Complainant notes that towards the end of the hearing, when the judge was summarizing why he was inclined to deny the debtor-company's motion for a preliminary injunction, the judge commented that, based on cases that had come before him previously, it appeared extremely difficult for developers to get Public Improvement District plans approved. The judge referred to a neighboring county as an example.

Based on these comments, complainant submits:

It wasn't clear if [the judge's] rationale was that if smart lawyers and doctors was [sic] having difficulty getting PIDs approved with a majority racially white Board in [a] majority racially white county or that if a racially black man would have

[an] equally or more difficult time getting a PID approved in with [sic] majority racially black Board in a majority racially black county.

Complainant concludes that given that the development corridor is in a county where “[the] area headquarters for the Ku Klux Klan (KKK)” are based, the subtext of the judge’s comments and decisions “became crystal clear.”

Such conclusory assertions of racial animus are insufficient to support a finding of judicial misconduct and are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

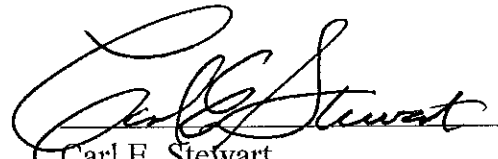
- **Deliberate exclusion from hearing on counsel’s application for fees**

Complainant states that he and his wife “drove all the [way] from [another state] to attend” the hearing on the debtor-company’s counsel’s application for fees, and complains that the judge “showed the disdain and lack of respect” by not letting them “participate” in the hearing. The undersigned notes that, according to the record, complainant and his wife did not file an objection to the application for attorney’s fees.

There is no evidence to support the contention that the judge deliberately excluded complainant and his wife from the in-chambers conference, or that they suffered prejudice from being unable to participate, and the allegation is therefore subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

Judicial misconduct proceedings are not a substitute for the normal appellate review process, nor may they be used to obtain reversal of a decision or a new trial.

An order dismissing the complaint is entered simultaneously herewith.


Carl E. Stewart
Chief Judge

December 18, 2016