

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
FILED

MAR 06 1998

CHARLENE J. PENNINGTON, CLERK
BY _____ DEPUTY

IN RE:
BUTLER, INC.

CASE NO. 8709191SEG

EDDIE BUTLER

CASE NO. 8809267SEG

VS.

ADVERSARY NO. 890939SC

MERCHANTS BANK AND TRUST COMPANY

Eddie C. Butler
P.O. Box 1404
Gulfport, MS 39502

Pro Se Debtor

Robert A. Byrd
P.O. Box 1939
Biloxi, MS 39533

Attorney for Chapter 7 Trustee

George E. Estes, Jr.
P.O. Box 88
Gulfport, MS 39502

Attorney for Merchants Bank and Trust Company

Ronald McAlpin
100 West Capitol St.
Suite 706
Jackson, MS 39269

Assistant U.S. Trustee

Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This matter is before the Court on the *Motion for Change of Venue* filed by Eddie Butler and Butler, Inc. ("Butler"). In his *Motion*, Butler alleges that this Court cannot render a fair and equitable judgment. This Court determines that based upon this allegation, the *Motion* should be treated as a motion for recusal rather than a motion for change of venue. After considering the matter, I hold that recusal is not mandated by 28 U.S.C. § 455; therefore, the *Motion for Change of Venue* should be denied.

DISCUSSION

The disqualification of a judge is governed by 28 U.S.C. § 455(a) which provides in pertinent part:

§ 455. Disqualification of justice, judge or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

....

(d) For purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

After reviewing § 455, the only two possible grounds on which the Debtor could base his request for recusal would be under either § 455(a) or § 455(b)(1). Both of these subsections pertain to bias or prejudice of a judge in a proceeding before him.

Although both § 455(a) and § 455(b)(1) require disqualification of a judge who holds a bias or prejudice in a case over which he is presiding, the two subsections differ in scope. Section 455(a) concerns the objective appearance of partiality. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860, 108 S.Ct. 2194, 2203, 100 L.Ed.2d 855 (1988). "[W]hat matters is not the reality of bias or prejudice but its appearance." Liteky v. United States, 510 U.S. 540, 548, 114 S.Ct. 1147, 1154, 127 L.Ed.2d 474, 486 (1994). Whereas, § 455(b)(1) addresses actual bias or prejudice of a judge. United States v. York, 888 F.2d 1050, 1053 (5th Cir. 1989). Section 455(b)(1) is narrower in scope than subsection (a) because it deals specifically with bias or prejudice that can only be determined subjectively. In fact, much of the protection afforded by § 455(b)(1) is duplicated and expanded by § 455(a). Liteky, 114 S.Ct. at 1153.

In one of its opinions in the Continental Airlines bankruptcy case, the Fifth Circuit Court of Appeals defined the objective standard of § 455(a) as follows: "The standard for recusal is an objective one, that if a 'reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality.'" A.L.P.A. v. Continental Airlines (In re Continental Airlines), 901

F.2d 1259, 1262 (5th Cir. 1990), *reh'g denied*, 918 F.2d 177 (1990), *cert. denied*, 50 U.S. 828 (1992)(citation omitted). See also U.S. v. Mizell, 88 F.3d 288 (5th Cir. 1996).

In reference to § 455(b)(1), the United States Supreme Court stated:

[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Liteky, 510 U.S. at 555.

In Butler's *Motion*, he does not state or allege anything that would make a "reasonable man . . . [to] harbor any doubts about [my] impartiality," Continental Airlines, 901 F.2d at 1262, as required by the Fifth Circuit in order for recusal to be proper pursuant to § 455(a). Nor does Butler state or allege any actual bias or prejudice on my account as required for recusal pursuant to § 455(b)(1). Rather, in his *Motion*, Butler appears to be requesting my recusal because on March 1, 1995, I denied Butler's *Motion for Relief from Judgment* filed in his adversary proceeding. I denied this motion because it was time barred by the one year limitation contained in Federal Rule of Civil Procedure 60(b), made applicable to bankruptcy adversary proceedings by Federal Rule of Bankruptcy Procedure 9024.¹ It appears from Butler's *Motion* that he simply does not agree with

¹ Butler appealed this Court's decision to the United States District Court for the Southern District of Mississippi. The District Court affirmed this decision on January 24, 1996, and dismissed Butler's appeal. In re Butler, Inc. (Butler v. Merchants Bank and Trust Co., No. 1:95CV402RR (S.D. Miss. Jan. 24, 1996). Butler then appealed to the Fifth Circuit Court of Appeals, which on August 8, 1996, affirmed the District Court's decision. In re Butler, Inc. (Butler v. Merchants Bank and Trust Co.), 95 F.3d 1148 (5th Cir. 1996). Subsequently, Butler petitioned the United States Supreme Court for a writ of certiorari, which was denied. In re Butler, Inc. (Butler v. Merchants Bank and Trust Co.), ___ U.S. ___, 117 S.Ct. 1448, 137 L.Ed.2d 553, *reh'g denied*, ___ U.S. ___, 117 S.Ct. 2473, 138 L.Ed.2d 228 (1997).

my prior decision. Accordingly, I do not believe that these reasons meet the requirements for my recusal pursuant to § 455(a) and § 455(b)(1).

Even in the absence of a motion brought by a party involved in a proceeding before the Court, I have the obligation to recuse myself from a proceeding where I perceive the existence of any of the situations set forth in § 455. Liteky, 510 U.S. at 546. I am unaware of any facts or opinions that I may have obtained either outside of or during the course of this bankruptcy proceeding that would render me biased or prejudiced in the performance of my duties as the bankruptcy judge in the present case. I also do not hold any bias toward Merchants Bank and Trust Company nor prejudice against Mr. Butler because he filed a request for my recusal or for any other reason. Therefore, in accordance with § 455 and as mandated by the United States Supreme Court in its opinion in Liteky, I have examined myself to the best of my ability, and I do not believe that I should recuse myself in the present case.

Based on the foregoing, I find no reason for my recusal in the above styled bankruptcy proceedings. Accordingly, Butler's *Motion* is hereby denied.

A separate order consistent with this opinion will be entered in accordance with the ruling of this Court as stated above.

THIS the 6th day of March, 1998.


UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
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ORDER ON MOTION FOR CHANGE OF VENUE

Before the Court for its consideration was the *Motion for Change of Venue* filed by Eddie Butler and Butler, Inc. In accordance with the opinion rendered by this Court on this date, the *Motion* should be treated as a motion for recusal. Consistent with this Court's opinion, the Court finds that the *Motion* is not well taken and should be denied.

IT IS THEREFORE ORDERED that the *Motion for Change of Venue* is hereby denied.

SO ORDERED this the 6th day of March, 1998.


UNITED STATES BANKRUPTCY JUDGE