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U.S. BANKRUPTCY COURT
New Mexico

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Docket Text:
Memorandum Opinion (RE: related document(s)[27] Motion to Recuse Judge filed by Plaintiff Farmers & Stockmens Bank, [25] Motion to Set Aside filed by Plaintiff Farmers & Stockmens Bank) (jeb)

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Document description: Main Document
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
SHERRY L. CARTER,
Debtor. No. 7-06-10213 SS

FARMERS & STOCKMENS BANK,
Plaintiff,
v. Adv. No. 06-1132 S

SHERRY L. CARTER,
Defendant.

MEMORANDUM OPINION IN SUPPORT OF ORDER DENYING MOTION TO SET ASIDE ORDER APPOINTING SETTLEMENT ADVISOR AND FOR RECUSAL

On February 21, 2007, the Court entered its Order Appointing Settlement Advisor and Postponing Trial Currently Set for March 8, 2007 ("Order") (doc 23). Plaintiff timely filed its Motion to Set Aside Order Appointing A Settlement Advisor (doc 25) which also requested the Court to recuse itself (doc 27).[1] For the reasons listed, the Court denies the requested relief.[2]

Background

[1] The Case Management/Electronic Case Filing ("CM/ECF") system the Court now uses requires that for the most part a motion which requests two different types of relief is docketed as two motions. The Court will therefore refer to the "Motion to Set Aside" and to the "Recusal Motion" (or collectively the "Motions"), even though they are in fact the same document.

[2] The Court has subject matter and personal jurisdiction pursuant to 28 U.S.C. §§1334 and 157(b); this is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (I) and (O); and these are findings of fact and conclusions of law as may be required by Rule 7052 F.R.B.P. The Court is also acting under the authority of 11 U.S.C. § 105(a).

Farmers & Stockmens Bank ("Bank") filed this action (complaint – doc 1) to hold nondischargeable a debt of $9,100 in connection with a proposed vehicle financing. The defendant/debtor ("Debtor") filed an answer (doc 11). The Court conducted an initial pretrial conference, set a discovery period, and then conducted a final pretrial conference. Both pretrial conferences were conducted by telephone. Whenever the Debtor appeared by telephone, she exhibited significant stress and emotional turmoil. As the Order recites, the stress and turmoil was particularly evident at the final pretrial conference, in which among other things the Debtor asked if she would go to jail as a result of the complaint (the Court assured her that she would not) and during which the Debtor was weeping.[3] (Minutes – doc 21.)

At one time relatively early in the adversary proceeding the Debtor had asked on the record whether settlement was a possibility; subsequently settlement negotiations took place which prompted the Debtor to file what likely was a response to an offer from the Bank (doc 20).[4] After the final pretrial

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[3] The hearing was recorded, as are all of the hearings conducted by the Court. 20070129 FTR tr. at 10.04.15 - 10.23.00. The portion of this transcript which particularly evidenced the Debtor's distress was from 10.17.30 - 10.22.45.

[4] The docket text for doc 20 reads "Response from Sherry L. Carter to Letter from Jennie Behles dated 1/16/07. RE: Sherry Carter can not commit to $275.00 per month. Filed by Defendant (continued...)

conference, in an e-mail to the Court, the Bank's counsel informed the Court that the parties had reached a settlement.

Throughout this process the Debtor was not, before the entry of the Order, represented in any respect by an attorney.[5] As the Order also recites, the Court obtained the appointment of an attorney to counsel the Debtor in connection with the proposed settlement agreement because of the Court's concerns about the Debtor's emotional competence to look out for her own best interests in negotiating a settlement.[6]

The Bank promptly filed the Motions asking the Court to set aside the order appointing the settlement advisor and also asking the Court to recuse itself (presumably from the adversary proceeding).

Analysis

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[4](...continued)
Sherry L. Carter(bjp) (Entered: 01/26/2007)". The Court has not read the document itself (nor has the Court's law clerk), nor have any of the Court's decisions hinged on the contents of the docket entry itself except that the docket entry shows that settlement negotiations have been taking place. That piece of information – that settlement negotiations have taken place – has also been communicated to the Court by the Bank's counsel.

[5] The Debtor's answer (doc 11) does say that the Debtor consulted a bankruptcy law firm, which advised her to file bankruptcy. However, that firm did not file the case for her, and the Court has no reason to believe the firm represented the Debtor in any other way. The Debtor filed her case without the assistance of counsel, and has repeated that she cannot afford an attorney to defend herself in this adversary proceeding.

[6] The Court has since learned that Mr. Velarde procured the services of Michael K. Daniels.

The Record

The Court will first address certain factual allegations in the Motions which are incorrect. Contrary to the allegations that the Court sought a hearing to review the settlement, the Court had no intention of reviewing the settlement agreement. Rather, having determined to appoint a settlement advisor for the Debtor, the Court sought to inform the parties of that decision orally (in addition to entering a written order). As is reflected in the audio transcript[7], nothing about the announcement was intended to permit the parties to discuss or debate the Court's decision; instead the Court intended to inform the parties as quickly as possible of its decision so that the parties could take that into account in their negotiations. The Court considered that this would be useful in light of the fact that the Debtor received her copies of court orders via the United States Postal Service in Clayton, New Mexico.[8]

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[7] 20070221 FTR tr. at 10.46.24 - 11.02.51. The actual announcement of the Court's decision begins at 10.57.28 of the recording; the preceding portion records the attempts to reach counsel's office.

[8] In addition, although this was not part of the Court's thinking at the time, the Bank's counsel had previously complained of not receiving notices from the Court via the standard e-mail process. See In re Jantz (Case no. 13-06-11751 SF, United States Bankruptcy Court, District of New Mexico), Motion to Set Aside Order Resulting from Preliminary Hearing on Motion for Sanction [sic] and Motion for Conditional Use of Cash Collateral (doc 43, filed January 31, 2007) (alleging no record in counsel's office of receipt of electronic transmission of

(continued...)

That day (February 21, 2007) the Court instructed its staff to determine if the parties were available on an impromptu basis to hear of the Court's decision. It appeared that they were, and so the Court shortly called the parties. The Debtor answered her phone. Despite several attempts to reach either Bank's counsel or her assistant, no one answered (Bank's counsel has explained that it was because both she and her assistant were on other telephone calls). Since the Court anticipated no input from the parties, the Court made its announcement to the Debtor and to Bank's counsel via her voice messaging system. It invited no response or other comment during its announcement, and promptly concluded the hearing at the conclusion of the announcement. At 3.59 pm that same day the Court entered the Order.

Motion to Set Aside

The Bank makes several arguments for setting aside the Order, none of them valid. The hearing on February 21 was not conducted in private with the Debtor. The Debtor had no input and, for what it is worth, no opportunity to do anything in reaction to the announcement before the Order was entered. The hearing was effectively not an ex parte hearing.[9]

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[8](...continued)
notice from Court).

[9] The Bank asserts that it has complained about previous ex parte contact by the Debtor. The Bank did not specify any details by which the Court could confirm the allegation. In any
(continued...)

The Court also has no recollection, even after reviewing the audio record of the January 29 hearing, of stating that it would not approve a reaffirmation of the debt.[10] Since the audio transcripts of all hearings are so easily available to any person who wants one[11], the Court suggests that Bank's counsel review the transcript to confirm the accuracy of her statements.

Because the Court has issued this order on its own motion pursuant to § 105, and because the Court is not reviewing the settlement agreement, there is no need for a further hearing.

It may be that discovery has shown that the complaint, if tried on the merits, will result in the debt being declared nondischargeable; however, that is irrelevant. It may be relevant but certainly not dispositive if, as the Bank alleges,

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[9](...continued)
event, while the Debtor's filings have been somewhat unorthodox (see, for example, doc 20, described in note 4 above), the Court is not aware of any unethical behavior by the Debtor. What the Debtor's efforts suggest is the need for counsel.

[10] Perhaps what the Bank's counsel is referring to is that the Court frequently refuses to approve reaffirmation agreements between self-represented debtors and automobile finance companies, and the Court's discussion generally of reaffirmation agreements entered into by debtors represented by inexperienced counsel. See, e.g., ¶5 of Year in Review 2003 and ¶9 of Part 1 of Year in Review 2002 on the Court's web page ("Judge Starzynski's homepage" on the "Bankruptcy Court" web page at nmcourt.fed.us). That is not the situation in this case.

[11] A complete audio recording of each day's hearings is available to any person (party or not) on a compact disk from the Clerk's office. One need merely accompany the request with payment of $26.00.

Debtor is an "educated, employed surgical/emergency room nurse."[12] (During the January 29 hearing, however, the Debtor said that she was losing her job.) The fact is that litigation can be extraordinarily stressful, even for sophisticated persons, and this Court interpreted Debtor's behavior as suggesting that she might not be emotionally competent to look out for her own interests. In such a circumstance, the Court is certainly entitled to assure that with one party so well represented, the other party also have at least some minimum help to ensure a modicum of fairness in the judicial process.

What the Court has done – asking a member of the State Bar of New Mexico Bankruptcy Law Section Board of Directors who has previously found attorneys to volunteer their time for indigent clients in other cases to find such a volunteer to advise the Debtor – is similar to what other courts have done.[13] Indeed,

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[12] Debtor's answer (doc 11) raises questions about, among other things, the sufficiency of Debtor's income in light of damage to her hands from a lawnmower accident. In any event, the Court did not issue its Order in order to "make the bank give her lower monthly payments", as the Bank alleges.

[13] See, e.g., Rashid v. McGraw, Not Reported in F.Supp.2d, 2002 WL 31427349, n. 1 (S.D.N.Y. 2002):

> In a civil case, such as this, the Court cannot actually "appoint" counsel for a litigant. Rather, in appropriate cases, the Court submits the case to a panel of volunteer attorneys. The members of the panel consider the case and each decides whether he or she will volunteer to represent the plaintiff. If no panel member agrees to represent the plaintiff, there is nothing more the Court can do.

(continued...)

federal law explicitly permits United States district courts to "request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1).[14] See also Zarnes v. Rhodes, 64 F.3d 285, 288 (7th Cir. 1995) (28 U.S.C. § 1915 authorizes district courts to request counsel to represent indigent defendants). What the Court has done does not legally prejudice the Bank.[15]

The Court does agree with one of the Bank's assertions. The Bank is absolutely correct in saying that

> pursuant to the terms of the note which is the subject of the underlying action, debtor should be advised as

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[13](...continued)
(42 U.S.C. § 1983 plaintiff seeking appointment of counsel in forma pauperis). (Citation omitted.)

[14] "It is unclear whether the provisions under § 1915(d) for appointment of counsel apply to bankruptcy proceedings." Eilertson v. United States (In re Eilertson), 211 B.R. 526, 531 (D.S.C. 1997). (Footnote omitted.) Compare Jones v. Bank of Santa Fe (In re Courtesy Inns Ltd., Inc.), 40 F.3d 1084, 1086 (10th Cir. 1994)(prohibition contained in 28 U.S.C. § 1927 against vexatiously multiplying litigation is not applicable to non-Article III courts). But whether the statute applies to bankruptcy courts is irrelevant, since the statute is cited merely as an example of a court's commonly accepted authority to appoint counsel for those who cannot afford it.

[15] To be clear, and contrary to the Bank's suggestions or assertions, the Court has not made any determinations about the actual facts of the case, whether in favor of the complaint or the answer. Similarly, the Court is not suggesting that the Bank or its counsel have in any way improperly pressured the Debtor; so far as the Court knows, the Bank has merely pursued its legal remedies in good faith and engaged in settlement discussions, both of which it is entitled (and in the case of the latter, encouraged) to do.

> to adverse effects of this process on the debt; i.e. costs and fees increase the debt.

Motion to Set Aside, ¶8. That is an accurate statement of part of the function of the Order.

Motion to Recuse

The Motion to Recuse (doc 25, ¶13) is supported by nothing in addition to what is in the Motion.[16] The Court finds that nothing in the record, or elsewhere, requires or even permits recusal.

Title 28 U.S.C. § 455(a)[17] provides:

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

Under this statute, a judge has a continuing duty to recuse before, during, or, in some circumstances, after a proceeding if the judge concludes that sufficient factual grounds exist to cause an objective observer reasonably to question the judge's impartiality. United States v. Cooley, 1 F.3d 985, 992 (10th Cir. 1993). The judge's actual state of mind or lack of

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[16] Paragraph 13 contains the sole explicit allegation concerning recusal: "The court should, in light of its previous pronouncements, recuse itself." The prayer for relief recites simply "Wherefore, bank seeks an order setting aside the Order appointing settlement advisor and such other further relief as is proper."

[17] 28 U.S.C. § 144, a similar statute, does not apply to Bankruptcy Judges. See Williams v. Southwestern Gold, Inc. (In re Williams),99 B.R. 70, 71 n.1 (Bankr. D. N.M. 1989).

partiality is not the issue.[18] Id. at 993. The test in the Tenth Circuit is "whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." Id. (citing United States v. Burger, 964 F.2d 1065, 1070 (10th Cir. 1992)).

> [T]he hypothetical reasonable observer is not the judge himself or a judicial colleague but a person outside the judicial system. Judges, accustomed to the process of dispassionate decision making and keenly aware of their Constitutional and ethical obligations to decide matters solely on the merits, may regard asserted conflicts to be more innocuous than an outsider would. On the other hand, a reasonable outside observer is not a person unduly suspicious or concerned about a trivial risk that a judge may be biased. There is always some risk of bias; to constitute grounds for disqualification, the probability that a judge will decide a case on a basis other than the merits must be more than "trivial."

United States v. DeTemple, 162 F.3d 279, 287 (4th Cir. 1998)(citing In re Mason, 916 F.2d 384, 386 (7th Cir. 1990)).

> The standard is purely objective. The inquiry is limited to outward manifestations and reasonable inferences drawn therefrom. In applying the test, the initial inquiry is whether a reasonable factual basis exists for calling the judge's impartiality into question.

Cooley, 1 F.3d at 993. (Emphasis in original.) Section 455(a) must not be construed to require recusal on the "merest unsubstantiated suggestion" of bias or prejudice. Id. "The statute is not intended to give litigants a veto power over

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[18] Although of course if the judge in fact has a personal bias against a party, he or she should recuse.

sitting judges, or a vehicle for obtaining a judge of their choice." Id. Finally, there is as much of an obligation for a judge not to recuse when there is no ground to do so as there is for the judge to do so when there are grounds. Id. at 994; In re Bennett, 283 B.R. 308, 322 (10th Cir. BAP 2002).

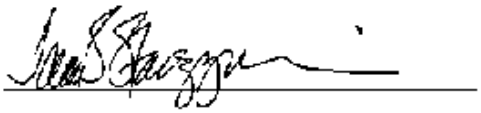
From what has been said concerning the Motion to Set Aside, it should be clear that no neutral observer could believe that the Court is biased against the Bank. Indeed, the request to recuse appears to have been inserted in the Motion to Set Aside almost as an aside itself. In any event, without any factual showing whatever that compels or even suggests recusal, the Court is obligated to continue to preside over this adversary proceeding.

Conclusion

The flimsiness of the Motions, comprised as they are of only partially accurate factual allegations and no legal basis, suggest that they were filed without any real deliberation. If that is the case, the Bank's counsel is reminded that, regardless of how little time it takes to prepare and file such motions, it often takes the Court considerably longer to prepare a written decision explaining its reasons for denying the motions. In short, counsel should not casually file such motions.

For the reasons cited above, there is no basis for setting aside the Order Appointing Settlement Advisor and Postponing

Trial Currently Set for March 8, 2007 (doc 23), or for the Court to recuse itself (doc 25). Orders to that effect will be entered.



Honorable James S. Starzynski
United States Bankruptcy Judge

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