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FEDERAL TRADE COMMISSION, Plaintiff - Appellee CLAUDE C LIGHTFOOT, JR, for the corporation, various entities and property in which America First Communications, Inc, Voice of America, Inc and Namer, Inc, own or control an interest, Receiver - Appellee v. ROBERT NAMER; NAMER INC; AMERICA FIRST COMMUNICATIONS INC; VOICE OF AMERICA INC; Defendants - Appellants

No. 06-30528

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

2007 U.S. App. LEXIS 24013

October 12, 2007, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

Appeals from the United States District Court for the Eastern District of Louisiana. USDC No. 2:89-CV-1740.
Lightfoot v. Miss Lou Props., L.L.C., 2006 U.S. Dist. LEXIS 75438 (E.D. La., Oct. 11, 2006)
FTC v. Nat'l Bus. Consultants, Inc., 2006 U.S. Dist. LEXIS 65804 (E.D. La., May 8, 2006)

COUNSEL: For FEDERAL TRADE COMMISSION, Plaintiff - Appellee: Eneid A Francis, Assistant US Attorney, Stephen A Higginson, Assistant US Attorney, Peter M Mansfield, US Attorney's Office, Eastern District of Louisiana, New Orleans, LA; Janice Charter, Federal Trade Commossion, Western Region, San Francisco, CA.

For CLAUDE C LIGHTFOOT, JR, for the corporation, various entities and property in which America First Communications, Inc, Voice of America, Inc and Namer, Inc, own or control an interest, Appellee: Emile Louis Turner, Jr, Law Office of Emile L Turner Jr, New Orleans, LA.

ROBERT NAMER, Defendant - Appellant, Pro se, New Orleans, LA.

JUDGES: Before JONES, Chief Judge, and STEWART and CLEMENT, Circuit Judges.

OPINION

PER CURIAM: *

* Pursuant to *5TH CIR. R. 47.5*, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in *5TH CIR. R. 47.5.4*.

Robert Namer ("Namer"), along with Namer, Inc., America First Communications, Inc., Voice of America, Inc., and other corporate entities (collectively, the "Corporations") appeal the [*2] district court's orders of April 5, 2006, April 26, 2006, and May 26, 2006, affirming ten orders of the magistrate judge and denying Namer's motion for recusal of the district court judge. We AFFIRM.

I. FACTS AND PROCEEDINGS

In 1989, the Federal Trade Commission ("FTC") filed a lawsuit against Robert Namer and National Business Consultants, Inc. ("NBC"), alleging violations of the Federal Trade Commission Act ("the Act"), *15 U.S.C. § 45(a)(1)-(2)*, and the "Franchise Rule," 16 C.F.R. Part 436. The Franchise Rule proscribes a variety of unfair or deceptive acts and practices by franchisors or franchise brokers in connection with the offering and sale of franchises and business opportunity ventures. *See* 16

C.F.R. Part 436. After a bench trial, the court found that "Namer was conducting a franchise operation in NBC and that Namer had violated the FTC's Franchise Rule by misrepresentations and omissions" to potential franchisees. *FTC v. Nat'l Bus. Consultants, Inc., No. 891740, 1990 U.S. Dist. LEXIS 3105, 1990 WL 32967, at *1 (E.D. La. Mar. 20, 1990)*. The court granted a permanent injunction, restraining Namer and NBC from further violations of the Act and the Franchise Rule. *1990 U.S. Dist. LEXIS 3105 [WL] at *9*

4 The district court's order of April 5, 2006 adopted two of the magistrate judge's reports and recommendations, granting the Receiver's motion to approve auction and bidding procedures for the sale of radio station assets and the form of an asset purchase agreement, and denying the Receiver's motion to exclude Namer from participating in depositions. The district court's April 5, 2006 order also denied Namer's motion for Judge Beer's recusal. The district court's April 26, 2006 order affirmed the following six orders of the magistrate judge: (1) denial of Namer's motions to vacate the order to appoint a receiver and to declare personal property exempt from seizure, (2) denial of Namer's motion to dismiss on the basis of accord and satisfaction and the Corporations' motion for an accounting, (3) denial of Namer's motion to remove the attorney for the Receiver, (4) [*7] denial of Namer's motion for stay of seizure and for access to all files and tapes, (5) grant of the Receiver's motion to appoint a certified public accountant to assist the Receiver, and (6) denial of Namer's motion for relief from judgment pursuant to *Rule 60(b)*. The district court's May 26, 2007 order affirmed the magistrate judge's order denying enrollment of Cary J. Deaton as counsel to Namer, Inc., America First Communications, Inc., and Voice of America, Inc. Namer timely appealed the district court's orders.

II. STANDARD OF REVIEW

This Court reviews *de novo* a district court's conclusions of law, and its findings of fact are reviewed for clear error. *Rimade Ltd. v. Hubbard Enters., Inc., 388 F.3d 138, 142 (5th Cir. 2004)*. We also review the denial of a motion to recuse for abuse of discretion. *Andrade v. Chojnacki, 338 F.3d 448, 454 (5th Cir. 2003)* (citing *Trevino v. Johnson, 168 F.3d 173, 178 (5th Cir. 1999)*; *United States v. Merkt, 794 F.2d 950, 960 (5th Cir. 1986)*.

III. DISCUSSION

A. Scope of Jurisdiction

The parties do not dispute the jurisdiction of this Court pursuant to *28 U.S.C. § 1291* to review all appeals from final judgments of district courts. We must, however, consider [*8] the scope of our jurisdiction in this case *sua sponte*

1. Motion to grant auction and bidding procedures

The district court adopted the magistrate judge's report and recommendation granting the Receiver's motion to approve auction and bidding procedures for Namer's radio station assets. Although Namer expressly stated his intent to appeal this decision in his notice of appeal, neither party briefed the issue. Because "[i]nadequately briefed issues are deemed abandoned," this Court will not consider this issue. *United States v. Charles, 469 F.3d 402, 408 (5th Cir. 2006).*

2. Judicial recusal

The district court also denied Namer's motion of March 31, 2006, requesting Judge Peter Beer to recuse himself pursuant to *28 U.S.C. § 455*. Before evaluating Namer's individual complaints regarding Judge Beer's conduct, it is important to provide context by examining the backdrop of events in the record that have occurred over the course of the last eighteen years.

This litigation started in 1989 and was assigned to Judge Veronica Wicker. During Judge Wicker's oversight of the case, [*11] Namer filed two motions to recuse the judge, resulting in the case's reassignment to Judge Charles Schwartz, Jr. in July 1991. [5] Judge Schwartz presided over the case until September 1992, when the case was reassigned to Judge Beer, who commented on the circumstances surrounding both of these recusals:

> This case has a long and acrimonious history starting with Namer's attacks on the Honorable Veronica Wicker and in like manner, upon the Honorable Charles Schwartz, Jr. The Court will spare the record of the details of those attacks, except to say that in each instance, they resulted in the judge taking himself or herself out of the case and sending it to the clerk's office for re-allotment.

questioned." *28 U.S.C. § 455(a)*. A judge must also disqualify himself under various circumstances enumerated in *§ 455(b)*, including situations "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." *Id. § 455(b)(1)*.

We have established three guidelines for interpreting *§ 455*. *See Andrade v. Chojnacki, 338 F.3d 448, 454-55 (5th Cir. 2003)*. First, we must use an objective standard for evaluating bias. *Id.* (citing *Vieux Carre Prop. Owners, Residents & Assocs. v. Brown, 948 F.2d 1436, 1448 (5th Cir. 1991))*. Next, our "review should entail a careful

> January 2003, instead of specific entries in courtroom transcripts or court orders.

Many of Namer's complaints can be classified as adverse rulings that also do not establish personal bias. The Supreme Court has explained:

> [J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal.

Id. at 555 (internal citation omitted). Therefore, Namer's claims that orders ruling in favor of the FTC or the Receiver reveal Judge Beer's bias against [*18] him are without merit.

Namer claims that he went to Judge Beer's chambers without notice on June 22, 2005 "to clarify his perceptions of the Judge's actions and to clear any misperceptions the Judge may have about him." He argues that Judge Beer was rude to him and that the judge's pointed and adamant refusal to meet with him provides evidence of the judge's partiality. The rules governing judicial ethics prohibit judges from engaging in substantive *ex parte* communications concerning pending matters. MODEL CODE OF JUDICIAL CONDUCT R. 2.9 (2007). Accordingly, we find this complaint is without merit.

Namer's final allegations of Judge Beer's bias are also insufficient. Namer claims that "he has been advised that Judge Beer will reverse any relief he gets from the Magistrate," and that "he has been advised that Judge Beer has stated that he wants to make sure Namer will never be able to broadcast or earn a living in New Orleans." Further, Namer contends that Judge Beer had ulterior motives for closing Namer's radio station that were "compounded by a decades' old vendetta against a long time broadcaster who worked at [Namer's radio station], Keith Rush, who . . . contradicted a statement [*19] [that Judge Beer] made during a political race." Namer, however, has not substantiated these claims nor demonstrated that Judge Beer's alleged actions were of extrajudicial origins by an objective observer's standard.

In addition to Namer's claims for recusal, he also argues that he should have been afforded a hearing to present evidence of Judge Beer's bias. We note that a party filing a motion for recusal does not have an automatic right to establish a record in open court or participate in an evidentiary hearing, nor does a need even exist for an evidentiary hearing if the facts presented by a party seeking recusal are insufficient on the face of the motion. *See United States v. Barnes, 909 F.2d 1059, 1072 (7th Cir. 1990)*. "*[S]ection 455* must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice." *United States v. Cooley, 1 F.3d 985, 993 (10th Cir. 1993)* (internal quotation omitted). A review of the record indicates that Namer's claims for recusal are either grossly unsubstantiated or, being of intrajudicial origin, do not qualify as a foundation for a finding of bias. [*20] We find that all of Namer's arguments for recusal are misplaced; therefore, we find that the district court did not abuse its discretion when it denied Namer an evidentiary hearing on the motion to recuse.

Lastly, we highlight the fact that *§ 455* "is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice." *Id.* (citing *United States v. Greenough, 782 F.2d 1556, 1558 (11th Cir. 1986)*; *In re United States, 666 F.2d 690, 694 (1st Cir. 1981))*. We find it quite clear from the

Namer has not demonstrated mutual consent between the parties to settle the debt, nor has he shown acceptance by the FTC of the meager amount paid by Namer as satisfaction of the judgment. Indeed, for what little monies have been received by the FTC, the means of collection have always been through continued litigation and the seizure and sale of Namer's assets through the U.S. Marshal's Office. As such, the magistrate judge's denial of Namer's motion to dismiss on the basis of accord and satisfaction and the district court's affirmance of this ruling was proper.

3. Motion to remove attorney for Receiver

On May 31, 2005, the district court appointed the Receiver to assume control over, manage, and investigate the financial affairs of the Corporations as Namer's cojudgment debtors. [11] On June 21, 2005, the district court granted the Receiver's motion to appoint Emile Turner, Jr. ("Turner") as his counsel to assist him in his duties regarding the assets of both Namer and the Corporations. Namer moved the magistrate judge to vacate the order of the [*30] district court appointing Turner as counsel to the Receiver, arguing that Turner owed a fiduciary duty to the Corporations and that he violated his fiduciary duty to protect their assets by not determining that they were mistakenly added as cojudgment debtors. Aside from the fact that the magistrate judge lacked authority to vacate an order of the district court, Namer's motion attempted to revisit the district court's decision naming the Corporations as cojudgment debtors, which was affirmed by this Court. *FTC v. Nat'l Bus. Consultants, Inc., 376 F.3d 317 (5th Cir. 2004), cert. denied, 544 U.S. 904, 125 S. Ct. 1590, 161 L. Ed. 2d 277 (2005)*. Namer did not move the district court to reconsider or vacate its order appointing counsel to the Receiver. Therefore, this motion is without merit.

> 11 On June 17, the district court amended this order to include Namer, Inc. as one of the entities for which the Receiver had been appointed and to change the value for which the Receiver would be bonded in accordance with the value of the assets.

4. Motion to stay seizure and sale of assets

The district court affirmed the magistrate judge's denial of Namer's motion to stay the seizure and sale of the Corporations. Although Namer expressly [*31] stated his intent to appeal this decision in his notice of appeal, he did not brief the issue. Because "[i]nadequately briefed

represented by counsel designated by the

judicial relief.