

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

	§	
E.A. RENFROE & COMPANY, INC.,	§	
Plaintiff,	§	
v.	§	No: 2: 06-cv-1752-WMA
CORI RIGSBY, et al.,	§	
Defendants.	§	

**DEFENDANTS' MEMORANDUM OF LAW SUPPORTING
MOTION TO DISQUALIFY THE COURT PURSUANT TO 28 U.S.C. § 455**

Defendants Cori and Kerri Rigsby, by counsel, submit this memorandum to support their disqualification motion filed pursuant to 28 U.S.C. § 455. In addition to the authority and argument submitted in support of a similar motion filed on behalf of Richard Scruggs and the Scruggs law firm, which we adopt and incorporate to avoid needless repetition, we show the following.

A. The Facts

In its June 15, 2007 order, the Court found probable cause to believe Mr. Scruggs had committed criminal contempt with respect to an earlier injunction. The Court found that there was no evidence to prove that the Rigsbys had committed criminal contempt. The Court left open the question whether Mr. Scruggs and the Rigsbys were liable for civil contempt compensatory sanctions.

The Court concluded that its consideration of criminal contempt as to Scruggs had placed it in the functional position of a grand jury assessing probable cause, and so determined that that another Judge would be assigned the criminal contempt case. Thereafter, the criminal case was assigned to Judge Coogler.

The executive branch declined to prosecute. This Court appointed private lawyers to prosecute. It appears that the Court thereafter met with the appointed private prosecutors to frame the charge against Mr. Scruggs. We do not know if additional discussions have occurred after the criminal charges were filed.

Amending its June 15th order, the court entered an order on August 13, 2007, stating:

Not being sure of the exact relationship that existed between the Rigsbys, on the one hand, and Scruggs, on the other, either at the time of the data dump or when the injunction was issued, the court hereby amends its memorandum opinion and order of June 15, 2007, insofar as they purport to exonerate the Rigsbys from criminal contempt. The question remains open. Further exploration into the subject will be required before a final determination of whether or not probable cause for criminal contempt by the Rigsbys exists.” The Court apparently has not concluded its further investigation of the Rigsbys’ liability for criminal contempt.

About two weeks later, on August 31, 2007, the court wrote to the Eleventh Circuit with respect to the criminal prosecution of Mr. Scruggs: “I am not involved in that case, but confess to having an interest in its outcome.”

Plaintiff E.A. Renfroe & Co., Inc. chose not to file a motion for compensatory sanctions for civil contempt. On November 6, 2007, this Court

ordered Renfroe to file such a motion promptly or waive the right to file one at all. Renfroe then filed the motion. The motion seeks an order imposing joint and several liability on the Rigsbys and their attorneys, Richard Scruggs and the Scruggs Law Firm, for payment of a large amount of Renfroe's attorneys' fees. Throughout the motion, almost all conduct that is criticized is alleged to have been committed by "the Rigsbys and Scruggs," "the Rigsbys and their attorney and agent" or "Scruggs and the Rigsbys." E.g., Motion, at 6-7. There are nearly too many such references in the motion to the Rigsbys and Scruggs jointly to count.

On November 14, 2007, Judge Coogler disqualified himself and all other judges in this District in connection with the criminal case against Mr. Scruggs.

On November 25, 2007, Mr. Scruggs and his law firm moved to disqualify this Court with respect to consideration of Renfroe's civil contempt motion.

Mr. Scruggs' criminal trial has not been scheduled. The Rigsbys may be witnesses in that trial.

Trial has not been scheduled in this case, but discovery is proceeding on Renfroe's contractual breach of confidentiality claim and on its trade secrets claim. In its initial disclosures, Renfroe listed Mr. Scruggs as a witness concerning the claims and defenses in this case, and Renfroe asserts that the Rigsbys are liable for Mr. Scruggs' use of documents. Renfroe has noticed Mr. Scruggs' deposition.

Renfroe's amended complaint bases its claims on the Rigsbys' disclosure to Mr. Scruggs of evidence regarding State Farm Fire & Casualty Co. *See* Amended Complaint, ¶¶ 21-24. Renfroe alleges that the Rigsbys are liable for Mr. Scruggs' use of the documents provided to him, resting much of the Rigsbys' liability on an identity between them and their lawyer/employer. As to its trade secrets claim, Renfroe alleges that, in addition to the Rigsbys, Mr. Scruggs is "profiting and intending to profit" from misuse of trade secrets. Amended Complaint, ¶60. Renfroe's prayer for relief includes disgorgement of profits the Rigsbys allegedly derived from misuse of trade secrets – which, in discovery, Renfroe has clarified to mean the salaries that Mr. Scruggs is paying to the Rigsbys.

Pending before the Court is Renfroe's motion for summary judgment on its contractual claim. That motion premises liability on allegations regarding the Rigsbys' interaction with Mr. Scruggs, his use of documents in connection with civil litigation and the identity of interest between the Rigsbys and Scruggs. "The Rigsbys, however, turned the documents over to Richard Scruggs, the Scruggs Law Firm and the Scruggs Katrina Group (collectively 'Scruggs') to use for their own profit against State Farm and Renfroe. In addition to giving the misappropriated documents to Scruggs, the Rigsbys went to work as consultants for the Scruggs Katrina Group to assist Scruggs and his colleagues. . . ." Motion, at 4. "The Rigsbys were not justified to give the Documents to Scruggs." Motion,

at 11.¹ Further, the permanent injunction sought by Renfroe is intended to affect Mr. Scruggs, in that it seeks to keep documents out of Mr. Scruggs' hands and to prevent use of the documents to prove State Farm's liability for fraud.

Finally, last week State Farm deposed Cori and Kerri Rigsby in connection with litigation in Mississippi. State Farm inquired whether they understood that Mr. Scruggs or his law firm would indemnify them for attorneys' fees in this case and for any money judgment imposed. Taking their testimony together, they testified that they understood or expected Mr. Scruggs or his firm to pay for both.

B. Disqualification

Disqualification here is required as to consideration of Renfroe's motion for civil contempt sanctions and also as to the rest of this case.

It is required by 28 U.S.C. § 455(a) because, in the circumstances of this case, the Court's "impartiality might reasonably be questioned," a conclusion that is independent of the existence of any actual bias or prejudice. *Parker v. Connors*

¹Although this Court and the Eleventh Circuit were unaware of the qui tam case filed by Scruggs on behalf of the Rigsbys shortly after they provided documents to him, the qui tam complaint now has been unsealed. Pursuant to public policy and the False Claims Act, the Rigsbys will defend their provision of documents to Mr. Scruggs to further the filing of a qui tam case to recover for fraud on the federal government. That qui tam case, once filed, would lead to the inevitable disclosure of the documents in issue in this case. That has already happened, as a review of the amended complaint, available on Pacer, will show. Further, independent of the qui tam case, the Rigsbys had a right to tell the policyholders what had happened. *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850 (10th Cir. 1972); *Vermillion v. AAA Pro Moving & Storage*, 704 P.2d 1360 (Ariz. App. 1985); see *Bartnicki v. Vopper*, 532 U.S. 514, 539 (2001) (Breyer, J., concurring). No contractual provision can be interpreted to require concealment from policyholders of fraud on them, and no civil judgment requiring State Farm to pay to policyholders what it owes them can be said to have damaged State Farm or Renfroe.

Steel Co., 855 F.2d 1510, 1523-34 (11th Cir. 1988) (appearance, not existence, of bias or prejudice is what matters); *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1112 (5th Cir. 1980) (should err on side of caution where a reasonable man might harbor doubts). *In re United States of America*, 441 F.3d 44, 64-68 (1st Cir. 2006), provides an apt example; the appellate court issued a mandamus compelling recusal of judge who was investigating misconduct by a party to the case.

Disqualification also is required by 28 U.S.C. § 455(b)(4) because the Court has an “interest that could be substantially affected by the outcome of the proceeding[s]” in this case. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (judge’s interest in other litigation involving a party was disqualifying); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) (indirect interest in litigation can be disqualifying). That interest is the Court’s interest as the complaining party and prosecutor in the criminal prosecution of Mr. Scruggs.

And disqualification is required by the Court’s disqualification in that criminal case. Decisions in this case regarding, for example, justification of the Rigsbys and Mr. Scruggs for their use of certain documents and the relationship and interaction between the Rigsbys and Mr. Scruggs in connection with this Court’s injunction regarding the return of documents could have a powerful effect on the Scruggs prosecution. The Court should not act in related litigation that can affect the outcome of litigation in which the Court has been disqualified.

In all these circumstances, “[i]t is enough that the average layperson would have doubts about any judge’s impartiality.” *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989).

1. Disqualification as to the Rigsbys if the Court Grants Disqualification as to Mr. Scruggs and His Firm on Renfroe’s Civil Contempt Motion

If the Court were to grant the disqualification motion filed on behalf of Mr. Scruggs and his law firm with respect to consideration of Renfroe’s motion for civil contempt sanctions, it would follow that the Court should enter a similar order with respect to the Rigsbys. Such disqualification would be required for reasons of judicial economy; it makes no sense for two judges to consider a motion based on a unitary set of facts and seeking imposition of a specific money judgment against Mr. Scruggs and the Rigsbys jointly and severally. It is not realistic to divide the case into two for separate consideration, particularly given Renfroe’s argument that liability for civil contempt sanctions is based on joint conduct as among the Rigsbys and Mr. Scruggs and on a principal-agency relationship. Motion, at 6-7.

2. Disqualification as to the Rigsbys on the Civil Contempt Motion and as to the Rest of this Case for Reasons Independent of Any Ruling as to Mr. Scruggs and His Firm

The Court should disqualify itself with respect to consideration of the civil contempt motion and with respect to the entire case.

First, the Court has an interest in the Scruggs prosecution, and Renfroe's civil contempt motion involves matters that can affect the criminal prosecution. The issues presented in the civil contempt motion concern exactly the same set of facts involved in the criminal prosecution. Among other things, Mr. Scruggs has argued in the criminal case, based on a principal-agent analysis, that he cannot be liable for contempt unless the Rigsbys are liable. Such an argument makes relevant any finding of the Court on the civil contempt motion as to whether the Rigsbys committed a contempt regarding the same injunction that Mr. Scruggs stands accused of violating.²

Second, the Court has indicated that it functioned as a grand jury with respect to evaluation of probable cause to charge the Rigsbys and Mr. Scruggs with criminal contempt. The Court also has been clear that this grand jury function is unfinished, in that investigation of the Rigsbys for criminal contempt is continuing. That investigation puts the Court in a continuing role as adversary to the Rigsbys. Further, the Court has functioned as complaining party and prosecutor in framing and signing the criminal charges in the Scruggs prosecution. The Court should not at the same time be fulfilling a judicial role in this case and a prosecutorial role in a related case. The problem is particularly acute because Renfroe is likely to argue

²The Court recognized that the facts are all bound together, finding (subject to later reconsideration) that the Rigsbys were not guilty of criminal contempt because, in part, "they were, in effect, controlled by him [Mr. Scruggs]." June 15, 2007 Order, at 23-24.

that there should be no jury trial in this case and that the Court should act, not only as judicial referee, but also as factfinder, based on an alleged jury waiver in the form contracts that Renfroe has offered as the basis for its contract claims. While we will file a motion for a jury trial, the alleged waiver notwithstanding, that issue has not been decided – and, indeed, the Court should not be in the position of deciding whether it will judge the facts as well as the law in a case involving defendants the Court is investigating with respect to criminal charges, a case that is closely related to a criminal prosecution in which the Court is fulfilling the role of complaining witness and prosecutor. *In re United States of America*, 441 F.3d 44, 64-68 (1st Cir. 2006) (issuing mandamus ordering recusal of judge who was investigating misconduct by a party to the case).

Third, the Rigsbys may be witnesses in the Scruggs prosecution. The Court, which has expressed its interest in that prosecution, should not sit in judgment of witnesses whose testimony may not be helpful to the prosecution. Moreover, Mr. Scruggs has been listed by Renfroe as a witness with relevant knowledge in this case. Renfroe is seeking to depose Mr. Scruggs. In view of the Court's multiple roles, described above, the Court should not function as judge or factfinder with respect to facts that Mr. Scruggs ultimately may be required to testify about.

Fourth, Mr. Scruggs will pay the attorneys' fees and any judgment in this action. Thus, any decision in this action affects him. For the same reasons that led

the Court to disqualify itself as to the criminal prosecution, it should disqualify itself in this case because its resolution directly affects Mr. Scruggs' interests.

Fifth, it appears that the private lawyers appointed to prosecute Mr. Scruggs continue to investigate Mr. Scruggs and the Rigsbys. The Department of Justice has received a request by those lawyers for the documents that this Court referred to in its August 13, 2007 order re-opening the possibility of criminal liability. It may, moreover, be that the private lawyers speak with the Court regarding their investigation. In view of the contact with the private lawyers who are acting as prosecutors, and in light of their investigation of the Rigsbys pursuant to the Court's control, the Court should not sit as judge in this case.

Finally, on the merits in this case, disputes about the nature of Mr. Scruggs' conduct in taking and handling State Farm documents are everywhere. The Amended Complaint makes two things crystal clear: Renfroe seeks to impose liability on the Rigsbys for Mr. Scruggs' use of documents to vindicate the rights of State Farm policyholders, and Renfroe wants a judgment that will operate as against Mr. Scruggs and will require him to divest himself of certain documents permanently and not to use them. In these circumstances, it is impossible to act as judge in this case without having to pass on the motives and the conduct of Mr. Scruggs and the appropriateness of relief affecting Mr. Scruggs' rights. In short, Renfroe's suit is constructed to draw on an alleged identity of interest between Mr.

Scruggs and the Rigsbys, which Renfroe characterizes in its summary judgment motion as involving the status of principal and agent. It is, therefore, impossible to judge the Rigsbys' conduct without evaluating Mr. Scruggs' conduct, as he acted as their lawyer in the matters Renfroe asserts to be liability-creating, and it is his conduct as their lawyer that Renfroe seeks to control via a permanent injunction.

C. The Other Judges of this District

The other judges of this District have been disqualified with respect to the Scruggs prosecution. They should not consider this case for the same reasons that they should not consider the criminal case. As explained above, this case can affect and be affected by the criminal case, and Renfroe has intertwined facts and conduct regarding the Rigsbys and Mr. Scruggs, and relief as well, to such an extent that it is impossible to resolve this case independently of Mr. Scruggs.

D. Deferring Oppositions to Civil Contempt and Summary Judgment Motions

In the disqualification motion filed on behalf of Mr. Scruggs and his firm, the Court was requested to rule prior to the due date for an opposition to Renfroe's civil contempt motion. Instead, the Court ordered that the due date for the opposition be deferred until the Court has ruled on the disqualification motion. We request similar relief, deferring the due date for the Rigsbys' oppositions to Renfroe's motions for civil contempt sanctions and for summary judgment.

November 28, 2007

Respectfully submitted,

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Certificate of Service

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