UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re: **CASE NO. 94-20569**

RAMA ORIENTAL CARPETS, **DECISION & ORDER**

Debtor.

BACKGROUND

On March 21, 1994 the Debtor, Rama Oriental Carpets, Inc. (the "Debtor"), filed a petition initiating a Chapter 11 case.

On March 29, 1994 the Office of the United States Trustee (the "U.S. Trustee") filed a Motion (the "U.S. Trustee Motion") to Prohibit Going-Out-of-Business Sale and to Prohibit Bankruptcy Sale or Sale Out of the Ordinary Course of Business Without Court Authority. The U.S. Trustee Motion was made returnable on March 31, 1994 pursuant to an Order of the Court shortening time under Rule 9006(c) of the Rules of Bankruptcy Procedure.

The U.S. Trustee Motion alleged that: (1) upon information and belief, the Debtor had obtained a license for a going-out-of-business sale from the Town of Brighton and had conducted a going-out-of-business sale for a period of in excess of sixty days, the maximum time period allowed under New York State law; (2) the Debtor had advertised in a local newspaper a bankruptcy (Chapter 11) sale; (3) the U.S. Trustee was not aware of any order of the Court pursuant to Section 363 authorizing a bankruptcy or Chapter 11 sale or a sale outside the ordinary course of business, so that such advertising was misleading to the public and in violation of Section 363; and (4) "It is the position of the Office of the United States Trustee that no sale should be conducted by the Debtor without Court approval, particularly when the advertisements make reference to 'bankruptcy' or 'Chapter 11'" (U.S.T. Motion at ¶ 9).

The U.S. Trustee Motion also included a paragraph which set forth a brief history of Darvish Oriental Rugs, Inc. ("Darvish"), a corporation which is alleged to have been owned by Ruth Gecas

("Gecas"), a principal of the Debtor, which also did business at 1465 Monroe Avenue where the Debtor does business and which filed a Chapter 11 case in this Court on September 2, 1988.

On the March 31, 1994 return date of the U.S. Trustee Motion, the U.S. Trustee appeared, the Debtor was represented by Hugh S. Silberstein, Esq. ("Attorney Silberstein"), and the Town of Brighton appeared by its attorney. The U.S. Trustee advised the Court that it had concerns about whether the Debtor's filing of a Chapter 11 case was in good faith given its prior decision to go out of business and its conduct of a state licensed going-out-of-business sale for in excess of the maximum time provided for by the applicable state laws. The Court, pursuant to Sections 105, 1107 and 363, ruled that no further sales of any kind could be made by the Debtor unless and until a proper motion on notice was made by the Debtor pursuant to Section 363. The Court found that in view of the Debtor's prior decisions to go out of business and obtain a license to conduct a going-out-of-business sale and its conduct of a going-out-of-business sale, the Court could not determine without a detailed motion what sales the Debtor could now make which would be considered to be in the ordinary course of business within the meaning and intent of Section 363.

During the course of oral argument on March 31, 1994, when the Gecas name was brought up, I did state that I was familiar with the Darvish Chapter 11 case and Gecas in connection with that case and believed that her husband was a school teacher at the time of the Darvish Chapter 11 case.

In the afternoon of March 31, 1994, the Court received a letter from Attorney Silberstein (the "Silberstein Letter"). The Silberstein Letter indicated that upon his return to his office after the hearing on the U.S. Trustee Motion he was advised by his client that I had been the attorney for Citibank at the time of the Darvish Chapter 11 case. The Silberstein Letter asserted that I should have recused myself and should have revealed my connection with the Darvish case. The letter requested that I recuse myself prior to the signing of any order granting the relief requested in the U.S. Trustee Motion so that the Debtor's case could be assigned to a Judge "who does not have any

prior connection."[1]

Upon receipt and review of the Silberstein Letter, Attorney Silberstein was advised that the Court would meet with him and the U.S. Trustee that afternoon to discuss the contents of the Letter. In the afternoon of March 31, 1994, a meeting was held among Attorney Silberstein, the U.S. Trustee, the Court and the Court's Law Clerk. At the meeting, I indicated that I did not believe that the allegations in the Silberstein Letter warranted the Court recusing itself, but that if the Debtor and Attorney Silberstein wished to pursue the matter, the Debtor should file a written motion for the Court to recuse itself which should set forth with specificity the matters which the Debtor believed warranted the Court's recusing itself. I indicated that I did not believe that the mere fact that prior to taking the bench in January, 1992 I had represented a secured creditor in 1988 and 1989 in connection with a corporation of which the principal of the Debtor had also been a principal and a guarantor of my client's debt constituted proper grounds for me to recuse myself from hearing the Chapter 11 case of the Debtor, especially when that former client had been paid in full and no debt to it now existed. I further indicated that I did not believe that the mere fact that I may have effectively or aggressively, as a private attorney, represented my former client, constituted proper grounds for me to recuse myself.

At the March 31, 1994 meeting, the Court signed an Order setting forth its ruling made on the U.S. Trustee Motion that morning. I also indicated to Attorney Silberstein that I would sign an order shortening time so that any motion that the Debtor might wish to make to sell inventory pursuant to Section 363 or to have me recuse myself could be heard as soon as reasonably possible.

---

[1] The alleged grounds for recusal in the Silberstein Letter were that: (1) "Judge Ninfo had been the attorney for Citibank/Citicorp in the bankruptcy of the prior corporation, Darvish;" (2) "I am advised further, that Judge Ninfo, then a private attorney, was adamant on behalf of his client, Citicorp/Citibank, that certain personal mortgages be foreclosed, that a certain house or houses be sold and that the prior corporation be shut down. The fact that it has now happened by an order of Judge Ninfo raises serious issues, which I believe can be taken care of adequately by the court voluntarily recusing itself in this matter without the necessity of raising the issue any further."

Thereafter, on April 1, 1994, the Debtor filed a Notice of Motion (the "Sale and Recusal Motion")[2] to Permit and to Conduct Sales and For the Recusal of Judge Ninfo, which was made returnable on April 6, 1994 pursuant to an Order of the Court shortening time pursuant to Rule 9006(c).

On the April 6, 1994 return date of the Sale and Recusal Motion, Attorney Silberstein was ill and the Debtor appeared by Sidney Heyman, Esq. ("Attorney Heyman"). At the beginning of the hearing the Court requested, since it was unclear from the Motion, that Attorney Heyman advise it whether the Debtor was electing to proceed on the Recusal Motion under 28 U.S.C. § 144 or 28 U.S.C. § 455. After reviewing the statutes in detail during an adjournment, Attorney Heyman advised the Court that the Debtor had determined that it would be proceeding in its request for the Court to recuse itself under 28 U.S.C. § 144. At that point, there having been no affidavit filed by the Debtor or a certificate of counsel of record stating that the affidavit was made in good faith as required by 28 U.S.C. § 144, the Court advised Attorney Heyman that such papers could be filed within such time as the Debtor deemed appropriate so that the Debtor could perfect its election to proceed under § 144. As to the Debtor's motion to sell inventory and an oral application made by

---

[2] The alleged grounds for recusal in the Recusal Motion were that: (1) "Judge Ninfo, while a private attorney, had been the attorney for a major creditor in a predeceasor [sic] corporation in which Ruth Gecas had been the principal officer and stockholder;" (2) ". . . Attorney Ninfo, was extremely vigorous in enforcing foreclosure actions against her personal property, as part of his representation of, or conjunction with his representation of the then corporate creditor, Citibank/Citicorp;" (3) "Judge Ninfo in his remarks from the bench on March 31, 1994, . . . made reference to his being familiar with my client, her family, and the past history of the matter, although he indicated that he in fact had not read the papers;" (4) "It is difficult to imagine that the Court, given statements on the record made and given his past involvement with Ruth Gecas in a prior bankruptcy, can avoid the appearance of an impropriety, since the Court is thoroughly familiar with the activities of the predeceasor [sic] corporation and of Mrs. Gecas and the operation of the same;" (5) "There is hope that Judge Ninfo is not now suggesting the we must prove a personal bias on his part by going into the operation of his mind or seven year old closed court records. Should that become a requirement, they will be addressed at the appropriate time and if necessary in the appropriate forum."

Attorney Heyman to have the Court vacate its March 31, 1994 Order, the Court, on the assumption that the affidavit required under § 144 would be "sufficient," advised Attorney Heyman that such a request would be addressed either after the determination of the Recusal Motion by an assigned Judge or at the election, in his sole discretion, of a different Judge of the Bankruptcy Court for the Western District of New York.

On April 6, 1994, an Order prepared by me was entered covering the ruling since I was scheduled to be out of the District from that afternoon until April 11, 1994. The Order required that Chief Judge Michael J. Kaplan be advised of the matter if and when the required affidavit and certificate were filed.

On April 7, 1994, an affidavit, dated April 6, 1994 by Gecas (the "Gecas Affidavit")[3] was filed with the Bankruptcy Court along with a Certification by Attorney Silberstein (collectively the "§ 144 Application"). The § 144 Application requested that I be removed from the bankruptcy case of the Debtor pursuant to 28 U.S.C. § 144.

Upon reviewing the Gecas Affidavit on April 11, 1994 and researching the applicable law regarding the "sufficiency" of the Gecas Affidavit, I determined that as the trial judge it was my responsibility to rule on the sufficiency of the Gecas Affidavit.

DISCUSSION

---

[3] The alleged grounds for recusal in the Gecas Affidavit were that: (1) "That there is a definite conflict of interest on the part of Judge Ninfo as to his being the judge handling our bankruptcy and his ability to be impartial with regard to my bankruptcy/business matters. He was the attorney for Citibank on a foreclosure proceeding against me when he was a private attorney, approximately five years ago. He vigorously pursued that action against us in that other bankruptcy of Darvish;" (2) "He stated at court sessions that he was familiar with the name "Gecas" and that he remembered the history of the family in connection with Darvish, a corporation with which I was previously associated;" (3) "That Judge Ninfo's order shutting down the business was without notice of motion and without a hearing and such relief as [sic] never requested in any such motion;" (4) "The Trustee made a motion to stop the Chapter 11 or going out of business sale, but the judge sua sponte ordered the business closed as per attached order."

The Second Circuit Court of Appeals has set forth guidelines for a trial judge to determine the legal sufficiency of grounds set forth in an affidavit of prejudice or bias filed pursuant to 28 U.S.C. § 144[4] or § 455(b) or where the impartiality of the judge might reasonably be questioned pursuant to 28 U.S.C. §455(a).[5]

---

[4] 28 U.S.C. § 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

[5] 28 U.S.C. §455(a) and (b) provide that:

(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, adviser 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

In *Apple v. Jewish Hospital and Medical Center,* 829 F.2d 326, 333 (2d Cir. 1987), the Second Circuit indicated that the filing of an affidavit under § 144 does not automatically disqualify a judge. "The affidavit must be 'sufficient,' to provide 'fair support' for the charge of partiality," and the decision of "whether to grant or deny a recusal motion -- i.e., whether the affidavit is legally sufficient -- is a matter" to be determined in the trial court's discretion. *Apple*, 829 F.2d at 333. The determination of bias under this section must be based on extrajudicial conduct. *Apple*, 829 F.2d at 333.

The Second Circuit indicated in *Hodgson v. Liquor Salesman's Union Local No. 2 of the State of New York*, 444 F.2d 1344, 1348 (2d. Cir. 1971), that the purpose of 28 U.S.C. § 144 is to avoid the appearance as well as the actual existence of bias or prejudice on the part of the trial judge so that the facts stated in the affidavit as the basis for the belief that bias or prejudice exists must be accepted as true by the judge, even though he or she knows the statements to be false. However, the trial judge must at the outset determine whether the facts so stated constitute legally sufficient grounds for recusal and "if the affidavit is insufficient, he is under just as much of a duty to deny the application as he would be to recuse himself if it were sufficient." *Hodson*, 444 F.2d at 1348. To be sufficient, the affidavit must set forth facts, including the time, place, persons and circumstances. *Id.*

As United States District Judge Curtin for the Western District of New York has indicated the standard for recusal under both Section 144 and 455 is "whether a reasonable person, knowing all the facts, would conclude that the Court's impartiality might reasonably be questioned." *Person v. General Motors Corp.*, 730 F.Supp. 516, 518 (W.D.N.Y. 1990). Judge Curtin continued by stating, "an attorney cannot be allowed to pick and to choose which judge shall hear his or her cases simply by making unfounded and conclusory accusations of bias or prejudice." *Person*, 730 F.Supp

---

of the proceeding;

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

at 520. Litigants are only entitled to an unbiased judge, not to a judge of their choosing. *Id.* Generally, unsubstantiated suggestions of personal bias or prejudice do not mandate recusal. *Id at 519.* Further, the District Court indicated in *Person* that recusal is not compelled unless a party is thereby adversely affected. *Id. at 520.*

When all of the factual allegations contained in the Gecas Affidavit, the Silberstein Letter and the Sale and Recusal Motion are read together and taken as true, they do not, in my opinion, warrant a conclusion or even an inference that I am biased or prejudiced toward either the Debtor or its principal, Gecas, or that the Debtor or the administration of its case would in any way be adversely affected by the contacts or knowledge I had as a private attorney in 1988 and 1989 in connection with Darvish or Gecas as a guarantor of its debt to my former client which was paid in full in 1989. Therefore, such allegations are not "sufficient" within the meaning and intent of § 144. Furthermore, such factual allegations when read together and taken as true by a reasonable person knowing all of the facts would not be sufficient for that person to conclude that my impartiality might reasonably be questioned. Therefore, such allegations do not warrant recusal under § 455.

When taken together the factual allegations of Gecas and Attorney Silberstein say nothing more than that as a private attorney in 1988 and 1989 I previously enforced a secured claim against Darvish and Gecas, as a guarantor, and that as a result I had some contacts with and some knowledge about Gecas and her husband. These contacts and this knowledge, although admittedly extrajudicial, do not in any way by themselves indicate any bias or prejudice within the meaning and intent of either Sections 144 or 455, and would not of themselves lead a reasonable individual with knowledge of these facts to conclude that my impartiality might reasonably be questioned within the meaning and intent of Sections 144 or 455.

The allegations in the Gecas Affidavit that I shut down the Debtor's business and that I granted relief not requested are not factual allegations which the Court believes it must accept as true under the *Hodgson* decision. These allegations are simply untrue conclusions and characterizations.

The U.S. Trustee Motion was captioned in part "Motion to Prohibit . . . Sale Out of the Ordinary Course of Business Without Court Authority," and my March 31, 1994 Order granted that relief after I found that, given the Debtor's recent history of conducting a licensed going-out-of-business sale for more than the allowed statutory time, no sale could now be in the ordinary course of business within the meaning and intent of Section 363 and no sales could be made without a proper hearing on notice as provided for by that section. Furthermore, such a ruling does not constitute shutting down the Debtor's business, whatever that business may be.

CONCLUSION

In my opinion, the Gecas Affidavit is not "sufficient" under 28 U.S.C. § 144 and the admitted contacts with and knowledge of Gecas, her husband and Darvish in 1988 and 1989 do not constitute grounds for me to recuse myself either under 28 U.S.C. § 144 or 28 U.S.C. § 455. Therefore, the Debtor's requests for recusal are in all respects denied.

Notwithstanding the denial of the Debtor's Recusal Motion and § 144 Application, Chief Judge Michael J. Kaplan has become aware of the case, the Sale and Recusal Motion and the § 144 Application because of the unusual procedural development of this case and has agreed to have this case assigned to him so that the Debtor and Attorney Silberstein will be able to focus their attention on the real issues in the case rather than on groundless allegations that I am biased or prejudiced. Therefore, the Debtor's Chapter 11 case will be assigned to Chief Judge Kaplan to be heard by him in Buffalo by a separate order to be entered by him unless by 4:30 p.m. Monday, April 18, 1994 the Debtor files a written consent to have the case continue to be heard by me.

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY COURT JUDGE

Dated: April 14, 1994