UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

CONLON CORPORATION (THE) Case No. 84-20421 K

Debtor

DECISION AND ORDER

In response to this Court's Scheduling Order of June 14, 1993 and its Amended Scheduling Order of July 1, 1993, the Court has received three documents:

(1). The sworn affidavit of John W. Conlon, Jr., dated July 29, 1993.

(2). The sworn affidavit of Joan B. Conlon, dated July 30, 1993.

(3). The unsworn Supplemental Motion of the Conlon Corporation by its attorney Richard Baxter, Esq. (undated).

As a threshold matter the Court notes that John W. Conlon, Jr. attests that he "believe[s]" that he is " creditor and party in interest and an equity holder or shareholder in the matter of the Conlon Corporation." It is "law of the case" that neither he nor Joan B. Conlon are creditors of Conlon Corporation. Judge Hayes so found and that finding was a part of a decision upheld on appeal.

The papers affirmed by Mr. Conlon ask the Court to let its imagination take flight. Mr. Conlon states that what he claims

to be "the fact" that Richard Vullo was not disinterested "may explain some" of seventeen enumerated allegations, of which ten are made "upon information and belief" (May 28, 1993 Motion ¶ 6(b), (e), (f), (g), (h), (i), (k), (m), (p), (r)) and others are contrary to findings made by the Court (¶ 6(d)) or to law (¶ 6(j)). See also Mr. Vullo's "Supplemental Reply" which responds to ¶ 6 in detail. In his thirty-two paragraph Affidavit of July 29, 1993, Mr. Conlon continues the imaginative flight. He asserts that it is "reasonable to assume" that Mr. Vullo required the good graces of Nixon, Hargrave, et al. to obtain R.G.&E. work (¶'s 11, 12). "Upon information and belief," the A-3 schedule was the product of Mr. Vullo working together with Nixon, Hargrave lawyers and Chase Lincoln Bank officers (¶ 16) and so on, as described later.

The simple question before the Court (and it is the only question before the Court) is whether Mr. Vullo's appearance on behalf of R.G.&E. and the failure to disclose same eight and one-half years ago or since warrants, requires, or should result in his removal at this time.

Thus framed, it is also necessary that this Judge of the Court decide whether the matter should be transferred to another Judge or another district as the corporate debtor (by Mr. Conlon) requests.

There being no affidavit of bias or prejudice under 28 U.S.C. § 144, this Judge may pass upon his own ability to decide this as a 28 U.S.C. § 455 matter. I find that it would not be

improper for me to decide the motion to remove Mr. Vullo.

The recusal request is based upon the fact that I was the Clerk of the United States Bankruptcy Court at the time Mr. Vullo was appointed to serve as Trustee in this case and until April of 1988. Administrative supervision, monitoring, and oversight of this Trustee has been the responsibility of the Clerk of the Court and his deputy clerks, rather than of the U.S. Trustee.

To the best of my knowledge and recollection I had no actual involvement in Judge Hayes' decision to appoint Mr. Vullo, and if any person reporting to me at any time played any role in Judge Hayes selection of Mr. Vullo, I have no personal knowledge of it. Furthermore, to the best of my knowledge and recollection, I had no actual involvement in monitoring, advising, or supervising Mr. Vullo in his role as Trustee of Conlon Corporation. If, and to the extent that, anyone reporting to me ever influenced or sought to influence Mr. Vullo's actions or judgment as Trustee of Conlon Corporation in any fashion other than as to normal procedures, I have no knowledge thereof. Mr. Vullo's appearance on behalf of R.G. & E. was duly reflected by the Clerk's office on the docket, and was evident to any who examined it; the Clerk's office is not accused of any concealment or other wrongdoing.

When an administrative officer had no actual involvement in the process of the case and normally would have had no such role (selection of a trustee being the prerogative of the Judge and routine oversight being a matter of established procedures), the

fact that one not familiar with the actual interplay of roles might erroneously speculate that the administrator's involvement was more than figurative,[1] is too slender a reed to support a claim of the type of "appearance of impropriety" that would warrant recusal if the administrator later becomes a Judge. The motion to recuse or transfer is denied.

Now to address the merits of the motion to remove the Trustee.

Firstly, the Court rejects the Trustee's argument (June 4, 1993 Reply, ¶ 2) that the disinterestedness requirement applies only to the "interim trustee" and not to the Trustee when he becomes the "permanent" trustee as a consequence of failure of creditors to elect someone else.

Next, this Court turns for guidance to the informative decision of the Third Circuit Court of Appeals in the case of *In re BH & P, Inc.*, 949 F.2d 1300 (3rd Cir. 1991). In that case the Court addressed the meaning of the phrase "materially adverse" as it appears in the definition of "disinterestedness" contained in 11 U.S.C. § 101 (13)(e), in the context of a claim that a Trustee in bankruptcy of a subchapter S corporation was (as a result of that service) not disinterested and could not accept appointment as

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[1]Unlike the U.S. Trustee, the Clerk has never had any standing to "raise, appear and be heard" in any bankruptcy case, nor any authority to appoint the trustee. Moreover, the Clerk serves at the pleasure of the Court, unlike the U.S. Trustee, and thus merely supports the Judge.

Trustee in bankruptcy of the estates of the principals of the subchapter S corporation. The request to remove the Trustee and his counsel, and to deny them compensation for failure to disclose the conflict, was made by the Bank of New York, the corporation's primary secured lender. The Bank's motion was granted by the Bankruptcy Court, which ruling was upheld in part by the District Court. In affirming the District Court's analysis, but not the Bankruptcy Court's analysis, the Circuit stated, "We are reluctant to endorse the view taken by the Bankruptcy Court, and by the District Court as well, that a finding of a lack of disinterest within the meaning of section 101(4)(E) automatically mandates removal of a Trustee for cause under section 324(a)." (The Court upheld the ruling of the Bankruptcy Court as one which was committed to the discretion thereof, and concluded that although it might not agree with the reasoning of the Bankruptcy Court, it could not find that the Bankruptcy Court had abused its discretion.)

The Court placed considerable emphasis on the analysis provided by another Circuit Court, that of the First Circuit, in the case of *In re Martin*, 817 F.2d 175 (1st Cir. 1987).

That case examined the propriety of an attorney's representation of a Chapter 11 Debtor-in-Possession after taking a mortgage on certain of the debtor's real estate. The Court stated, "the potential for conflict and the appearance of conflict, without more, can justify cancellation of such a security interest. Yet

horrible imaginings alone cannot be allowed to carry the day. Not every conceivable conflict must result in sending counsel away to lick his wounds. [But] when all is said and done, doubts are to be resolved in favor of invalidation [of the mortgage]." *Id.* at 183. The Court concluded that the grant of the mortgage to the law firm as security for the payment of its fees was not impermissible per se, and remanded the matter to the Bankruptcy Court for an assessment of the appropriateness of the mortgage against the backdrop of the case and for a decision in the exercise of the Bankruptcy Court's sound discretion.

Here we find that no creditor had asserted any harm, actual or perceived, arising out of Mr. Vullo's limited involvement in this case on behalf of R.G.&E. while the case was proceeding in Chapter 11.[2] We have only Mr. Conlon's "horrible imaginings." Mr. Conlon alleges that "it is reasonable to assume that Nixon, Hargrave, Devans & Doyle has considerable influence with Rochester Gas and Electric as to which firms they use for purposes of collection and other general legal work of the company" because that firm is general counsel to R.G.& E. He claims it is "further reasonable to assume that if Mr. Vullo or his firm was uncooperative with either Nixon, Hargrave, Devans & Doyle or

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[2]This case is thus distinguishable from that of *In re Microtime Management Systems, Inc.*, 102 B.R. 602 (Bankr. E.D. Mich. 1989) wherein the Trustee was engaged in an ongoing relationship with a major creditor in the case and in which the complaining party was a creditor of the Debtor (and the U.S. Trustee).

Rochester Gas and Electric his services would no longer be required as a collection attorney so as to reasonably reduce his income and fees." He alleges that what he claims to be a "vicious, fraudulent document" listing the unpaid obligations of the Conlon Corporation was, "upon information and belief ... prepared with the assistance of, the knowledge and the approval of the Trustee, Richard P. Vullo and" certain specified attorneys from the firm of Nixon, Hargrave as well as certain specified persons from Chase Lincoln First Bank, who is the major lender in the present case, and who is represented by Nixon, Hargrave in this case.

He speculates that the "U.S. Bankruptcy Court, the U.S. District Court and the U.S. Court of Appeals would not have placed ... confidence in the Trustee's recommendations if those courts had been aware of his conflicts of interest with Rochester Gas and Electric and Nixon, Hargrave, Devans & Doyle." (Each of those Courts favored the Trustee's business judgment and legal judgment over Mr. Conlon's.)

If one were to momentarily set aside Mr. Vullo's limited representation of R.G.&E. (the "disinterestedness issue") and consider only Mr. Conlon's assertion that Mr. Vullo sought to please ~~his~~ Conlon's major lender's counsel (Nixon, Hargrave) in order to enhance his position relative to the firm's "other" client, R.G.&E., Conlon raises a typical "conflict of interest" argument. Such an argument, if sustained, would require that trustees not be permitted to earn their living in the locale in which they serve as

trustee. Further, to sustain it would be to hold that oaths have no meaning, when in fact professionals zealously represent clients in opposition to those who they might wish to be their own clients tomorrow. It is part of their stock in trade. A trustee swears fidelity to his or her estate. Lawyer-trustees "change hats" from day to day, representing today a bank or retailer whose claim they defeated yesterday. The intellect, skill and zeal with which they defeat an opponent is often what later leads the opponent to seek their counsel in another matter.

Thus it has been said by the Second Circuit Court of Appeals, whose decisions bind this Court, that in matters of alleged conflict of interest, actual harm must be demonstrated[3] before the allegation may be sustained. Mr. Conlon's imaginings fail of such demonstration.

The motion to remove Mr. Vullo must, therefore, rise or fall on the fact that in 1985 he told the Court that there was no reason he could not accept appointment as trustee, when in fact he had represented R.G. & E. in the case seven months earlier.

During the eight years since, the only person who has complained of the fidelity of Mr. Vullo to his trust is Mr. Conlon. Mr. Conlon controlled the debtor corporation and vigorously opposed the decision to convert the case to a liquidation case. The docket

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[3]*Freeport Italian Bakery, Inc.*, 340 F.2d 50 (2d Cir. 1965), and see *In re Peckinpaugh*, 50 B.R. 865 (Bankr. N.D. Ohio 1985).

reflects that he has second-guessed the Trustee ever since, without success before this Court and reviewing Courts. His submissions now reflect a certain glee in discovering Mr. Vullo's 1985 non-disclosure, as it permits him to posit that omission as a "missing link" in his theories. Less than a "missing link," the omission appears only to be a "chink" in Mr. Vullo's otherwise fine performance in this case.

Mr. Conlon's surmise, speculation and imaginings are not sufficient to convince the Court that Mr. Vullo is guilty of anything more than the mistake of neglecting to check his records as to minor involvement before accepting Judge Hayes' invitation to serve as Trustee in a major case in which he knew he had had no memorable involvement. He made a mistake. The Court is not pleased with the mistake and would not condone it but for eight years of diligent effort, which Mr. Vullo should now be permitted to complete. "Not every conceivable conflict must result in sending counsel away to lick his wounds." *Martin* at 183.

The motion to remove the Trustee is denied.

SO ORDERED.

Dated: Buffalo, New York
October 26, 1993

U.S.B.J.