

United States Court of Appeals for the 10th Circuit

Medical Supply Chain, Inc.)	
Samuel K. Lipari)	
<i>Appellant</i>)	
v.)	Case No. 08-3187
)	
Neoforma, Inc., <i>et al</i>)	
<i>Defendants</i>)	

**MOTION TO REMAND THE APPEAL
FOR RULING ON OPEN 28 USC § 144 AFFIDAVIT**

Comes now the plaintiff/appellant Samuel K. Lipari and makes the following motion to remand the appeal for the limited purpose of allowing the trial court to rule on its open 28 USC § 144 Affidavit.

STATEMENT OF FACTS

1. The plaintiff/appellant had good cause to file an affidavit of prejudice on August, 18, 2008 related to the continuing exercise of trial court jurisdiction over substantive issues of the matter or controversy currently on appeal.

2. *Lipari v. US Bancorp et al.* KS. Dist. Court Case no. 07-cv-02146-CM-DJW is the concurrent jurisdiction state court proceeding removed to the US District Court for the Western District of Missouri and transferred to the Kansas District Court over the timely objections of the plaintiff and while this court exercised exclusive federal jurisdiction over the same matter or controversy styled as *MSCI v. Neoforma Inc. et al*, Tenth Circuit Case No. 06-3331.

3. The plaintiff/appellant did not have knowledge of the trial court’s extra-judicial bias and prejudice that met the evidentiary standard to substantiate a 28

USC § 144 affidavit until actions and conduct of the trial court occurred beginning at 6:30 am on August 18, 2008, injuring the plaintiff/appellant.

14. The plaintiff/appellant filed a timely 28 USC § 144 affidavit of bias and prejudice describing in detail those events and conduct, serving the affidavit on the Clerk of the Kansas District Court and the *Lipari v. US Bancorp et al* defendants at the end of the business day on August 18, 2008.

15. The trial court judge Hon. Carlos Murguia has not yet ruled on the sufficiency of the affidavit.

16. The Chief Judge of the Kansas District Court Judge Kathryn H. Vratil appears to have recused herself in this matter or controversy (05-cv-02299-CM-GLR) on October 20, 2005:

“61 ORDER REASSIGNING CASE. Case reassigned to Judge Carlos Murguia for all further proceedings. Judge Kathryn H. Vratil no longer assigned to case. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry)(ls) (Entered: 10/20/2005)”

MEMORANDUM OF LAW

Lipari v. US Bancorp et al. KS. Dist. Court Case no. 07-cv-02146-CM-DJW is the same “matter or controversy” as *MSCI v. Neoforma Inc. et al.* KS. Dist. Court Case no. 05-cv-02299-CM-GLR (under the matter or controversy standard in *Little Rock School District v. Armstrong*, No. 02-3867EA (8th Cir., 2004)). In *Little Rock School District v. Armstrong*, the Eighth Circuit was required to determine if a “mandamus proceeding in 1987 involved the same ‘matter in controversy’ as the present questions before us for purposes of 28

U.S.C. § 455(b)(2)” *Id* at 4-6. The Eighth Circuit’s analysis would find that because the state law claims are consistent and unchanged (and as yet never ruled on), *Lipari v. US Bancorp et al.* KS. Dist. Court Case no. 07-cv-02146-CM-DJW is the same “matter or controversy” as *MSCI v. Neoforma Inc. et al.* KS. Dist. Court Case no. 05-cv-02299-CM-GLR which is now Tenth Circuit Court of Appeals Case no. 08-3187.

The trial court was deprived of jurisdiction over this matter in controversy on July 11, 2008 under controlling precedent of the Tenth Circuit in *United States v. Prows*, 448 F.3d 1223, 1228 (10th Cir. 2006) (recognizing the general rule that a notice of appeal divests the district court of jurisdiction over substantive claims). See also *Garcia v. Burlington Northern R.R. Co.*, 818 F.2d 713, 721 (10th Cir.1987).

Section 144 requires that where an affidavit of personal bias or prejudice is filed, the trial judge must cease to act in the case and proceed to determine the legal sufficiency of the affidavit. *Bell v. Chandler*, 569 F.2d 556, 559 (10th Cir.1978).

In the present matter or controversy the trial court has not ruled on the sufficiency of the affidavit of prejudice. This Circuit has determined partial remand is appropriate for the purpose of allowing the trial court to rule on the affidavit. See *Hall v. Maynard*, 968 F.2d 20 (Unpublished) (C.A.10 (Okla.), 1993) and a copy of which is incorporated into this filing under local rule as exb 1.

Conclusion

Whereas for the above stated reasons the plaintiff respectfully requests that the court remand the present appeal for the limited purpose of allowing the trial judge to rule on the sufficiency of the plaintiff's 28 USC § 144 affidavit.

Respectively submitted,

S/Samuel K. Lipari

Samuel K. Lipari

Pro se

CERTIFICATE OF SERVICE

I certify that in addition to the service requirements of the Federal Rules of Appellate Procedure and Tenth Circuit Rules, identical copies of the materials submitted to the Clerk in Digital Form were simultaneously provided to counsel for all other parties hereto by e-mail on Aug. 24, 2008.

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NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

Kenneth E. HALL, Jr., Plaintiff-Appellant,

v.

Gary MAYNARD, Director of Oklahoma Department of Corrections; James Saffle, Warden, O.S.P.; Bobby Boone, Deputy Warden; Dan Reynolds, Warden, M.A.C.C.; Laura Maxwell, Case Manager, M.A.C.C.; Billy Keys, Law Library Supervisor, Defendants-Appellees.

No. 91-7110.

United States Court of Appeals, Tenth Circuit.

June 26, 1992.

Before STEPHEN H. ANDERSON and BALDOCK, Circuit Judges, and CONWAY, * District Judge.

ORDER AND JUDGMENT **

STEPHEN H. ANDERSON, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff Kenneth E. Hall, Jr., appeals from a district court order dismissing his 42 U.S.C. § 1983 complaint. Plaintiff, a prisoner, filed a complaint alleging that Defendants confiscated his tobacco ties, which are of religious significance, without due process; cut his hair in violation of his religious beliefs and then failed to respond to his appeal from the denial of an exemption to the prison grooming requirement; and retaliated against him for filing a previous lawsuit.

Twenty days after filing the complaint, Plaintiff filed a motion for recusal and disqualification of the judge pursuant to 28 U.S.C. §§ 144 and 455. The grounds for the

motion were that the district court judge had ruled against other prisoners bringing similar claims against the Oklahoma Department of Corrections. In response, the court issued an Order Requiring Special Report (ORSR). The ORSR ordered Defendants to file a special (Martinez) report. It further provided that all pending motions were stricken without prejudice to their being reasserted after the Martinez report was filed. Plaintiff never refiled his motion for recusal and disqualification, and the judge never ruled on it. After reviewing the Martinez report, the court dismissed the complaint as frivolous under 28 U.S.C. § 1915(d) pursuant to Defendants' motion.

Plaintiff argues that the district court judge erred in failing to rule on the motion for recusal and disqualification before proceeding to decide the case. 1 Section 144 requires that when an affidavit of personal bias or prejudice is filed against a judge, he or she must cease to act in the case and proceed to determine the legal sufficiency of the affidavit. *Bell v. Chandler*, 569 F.2d 556, 559 (10th Cir.1978). We therefore conclude that the district court erred in striking the motion for recusal and disqualification without first determining its legal sufficiency. Because this court cannot determine whether the district court would have granted the motion had it ruled, we partially remand the case for the sole

purpose of permitting the district court to determine the legal sufficiency of the motion. The district court shall set forth its reasons for its decision on the motion. See *Hinman v. Rogers*, 831 F.2d 937, 938-40 (10th Cir.1987) (considerations in ruling on motion for recusal and disqualification). We retain jurisdiction of the appeal and will dispose of it after the district court acts on remand. See *Easley v. University of Michigan Bd. of Regents*, 853 F.2d 1351, 1358 (6th Cir.1988) (appellate court retains jurisdiction of appeal and remands case to district court for further ruling on motion for disqualification of judge).

We RETAIN JURISDICTION and REMAND the case for further proceedings consistent with this order and judgment.

* Honorable John E. Conway, District Judge, United States District Court for the District of New Mexico, sitting by designation.

** This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir.R. 36.3.

1 Plaintiff filed a proceeding in the nature of mandamus with this court to compel the district court to hear and decide the motion for recusal and disqualification. We denied his request because he had not shown he was entitled to mandamus relief. *Hall v. United States Dist. Court*, No. 91-586 (10th Cir. June 27, 1991).