

bring the suit. Thereafter, Plaintiff re-framed the suit, but this time he alleged that all of MSC's assets had been assigned to him.

On July 17, 2006, the Defendants removed the case to federal court. Now, four months later, Plaintiff seeks the recusal of Judge Gaitan.

LEGAL STANDARD

The test for disqualification or recusal under 28 U.S.C. § 455(a) is an objective test. *Fletcher v. Conoco Pipeline Co.*, 323 F.3d 661, 664 (8th Cir. 2003). Thus, a judge is disqualified or recused only if “the average person on the street, a reasonable man knowing all the circumstances ‘would harbor doubts about the judges impartiality.’” *Tyler v. Purkett*, 413 F.3d 696, 704 (8th Cir. 2005). However, in every case the presumption is that the judge is impartial. In order to overcome this presumption, the movant “bears the substantial burden of proving otherwise.” *Fletcher*, 323 F.3d at 664. The reason the movant bears the substantial burden is because a judge has “as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require. *Nicholls v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995). Importantly, a judge should not recuse himself when the request to do so is based on unsubstantiated suggestions of prejudice. *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 659-660 (10th Cir. 2002).

THE CASE

The basis for Plaintiff's motion is that Judge Gaitan is a member of the Board of Directors of St. Luke's Health System, Inc. (“St. Lukes”). St. Lukes, in turn, is a shareholder of VHA/Novation. Plaintiff makes the conclusory claim that as a result of Judge Gaitan's membership of the Board of St. Lukes, he is a “fiduciary” and there is an appearance of

impropriety both of which requires his recusal. Plaintiff's unsubstantiated conclusions of prejudice do not require a recusal.

28 U.S.C. 45(b)(4) states that a judge may recuse himself if “[h]e knows that he, individually or as a fiduciary . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interests that could be substantially affected by the outcome of the proceeding: . . .” *Id.* Here, the subject matter in controversy is a breach of contract case pertaining to real property and the funding of the purchase of the real property. The case is solely between the various GE Defendants and Plaintiff. Plaintiff does not allege, nor can he, that Judge Gaitan has a financial interest in this subject matter in controversy because he has no interest in the property at issue in this case. Nor can Plaintiff claim that Judge Gaitan has a financial interest in a party to the proceeding because neither St. Lukes, nor VHA, nor Novation, nor MSC are parties to this litigation. At best, Plaintiff must be arguing that somehow (he does not say how) Judge Gaitan's “other interest” “could be substantially affected by the outcome of the proceeding.” 28 U.S.C. 455(b)(4). Even if Plaintiff prevails in this case and is awarded damages for the alleged breach of contract, that will not affect Judge Gaitan's interest in St. Lukes.

The Court in *In Re Kansas Public Employees Retirement System*, 85 F.3d 1353 (8th Cir. 1996 (“KPERS Litigation”)), reached the same conclusion. In the KPERS Litigation, Judge Bartlett was assigned to handle the underlying litigation. After the case was removed to Judge Bartlett, several parties, including Boatmens First National Bank of Kansas City, Missouri (“Boatmens”), moved to intervene in the underlying action. Judge Bartlett disqualified himself from presiding over Boatmens' application to intervene because he owned stock in Boatmens' parent company. *Id.* at 1355. Thereafter, KPERS moved to recuse Judge Bartlett because of his

ownership interest in the parent company of Boatmens. Thus, the question before the Eighth Circuit was whether Judge Bartlett's ownership of stock in the parent company of Boatmens constituted a basis for disqualification in a case where neither Boatmens nor its parent company was involved. *Id.* at 1361. The Eighth Circuit held that Bartlett's alleged financial interest in the KPERS case was simply too remote, speculative and contingent to be an interest that could be substantially affected by the outcome of the proceeding before him. The Court went on to state that they were "reluctant to fashion a rule requiring judges to recuse themselves from all cases that might remotely affect non-party companies in which they own stock. We believe that such a rule would paint with too broad a stroke." *Id.* at 362.

Here, Judge Gaitan's position as a member of the Board of Directors of St. Lukes is even more remote, speculative and contingent than Judge Bartlett's interest in Boatmens. Judge Gaitan is a director, not a shareholder of St. Lukes. The likelihood that he will receive monetary remuneration is more remote than a shareholder such as Bartlett. Moreover, in the KPERS Litigation, the entity at issue, Boatmens, was a named party in a companion suit. Here, St. Lukes is not a named party in the proceeding currently before the Tenth Circuit. Rather, it is an entity in which St. Lukes owns stock that is a party in the Tenth Circuit proceeding. Thus, St. Lukes is not just once removed from the companion case (as the situation in the KPERS Litigation) but it is at least twice removed from the proceeding. To paraphrase the Court in the KPERS Litigation, the question is whether judge Gaitan's position as director in a company constitutes a basis for disqualification in a case where St. Lukes is not involved in *either the present case or the other proceeding*. Judge Gaitan's interest, such as it is, will not substantially affect the outcome of this proceeding. Plaintiff has failed to show that Judge Gaitan would be tempted to make adverse rulings against the Plaintiff so as to somehow, some way, indirectly assist St. Lukes.

Nor does Plaintiff's unsubstantiated conclusions of impropriety satisfy the obligations under 28 U.S.C. § 455. Here, it is difficult to see how an objective person could determine that Judge Gaitan is acting or will act with impartiality because he is sitting on the Board of Directors of a non-party in this or the other proceeding and all the participants in the alleged wrongdoing are not parties to this litigation. All the parties are asking Judge Gaitan to do in this case is to determine whether there was a breach of contract between the dissolved MSC and GE Defendants. It is undisputed that Judge Gaitan does not have an interest in any of those entities.

Plaintiff's motion should be denied for the additional reason that it is untimely brought. The Eighth Circuit has ruled that a claim for judicial recusal under Section 455 will not be considered unless timely made. *Fletcher*, 323 F.3d at 664. A party is obligated to raise a claim for judicial recusal at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim. *Id.* If a party fails to timely raise a recusal claim, that failure can result in the waiving or forfeiting of judicial review. *Id.* Here, this case has been before Judge Gaitan since July 17, 2006. Plaintiff had available to it Judge Gaitan's financial disclosure report since the removal of this action. Plaintiff's failure to raise this issue over the intervening months constitutes a waiver or forfeiture of the judicial review of this claim.

CONCLUSION

Plaintiff's bald assertions of prejudice, without more, do not satisfy the substantial burden he has in requesting the recusal of the Judge. Judge Gaitan's position as a Board of Director of a company that in turn owns interest in another company that in turn is a party in other litigation in another, different District Court is far too remote, speculative and contingent to satisfy the requirements of 28 U.S.C. § 455. As a result, Plaintiff's motion should be denied.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 20th day of November, 2006, by first class mail, postage prepaid to:

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064

/s/ John K. Power