

QUICKSILVER RESOURCES INC., Plaintiff, v. EAGLE DRILLING, LLC, Defendant.

CIVIL NO. H-08-0868

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

**April 26, 2010, Decided
April 26, 2010, Filed**

PRIOR HISTORY: *Quicksilver Res. Inc. v. Eagle Drilling, LLC*, 2010 U.S. Dist. LEXIS 39863 (S.D. Tex., Apr. 22, 2010)

COUNSEL: Blast Energy Services Inc, Debtor, doing business as Rocker & Spike Entertainment Inc, doing business as Reconstruction Data Group Inc, doing business as Verdisys Inc, In Re, Pro se, Houston, TX.

For Blast Energy Services Inc, Debtor, doing business as Rocker & Spike Entertainment Inc, doing business as Reconstruction Data Group Inc, doing business as Verdisys Inc, In Re: Michael John Maloney, LEAD ATTORNEY, Maloney Martin & Associates LLP, Houston, TX; H Rey Stroube, III, Attorney at Law, Houston, TX; Jonathan E Axelrad, The Axelrad Law Firm PLLC, Houston, TX.

Eagle Domestic Drilling Operations LLC, Pro se, Houston, TX.

For Eagle Domestic Drilling Operations LLC, Debtor, In Re: H Rey Stroube, III, Attorney at Law, Houston, TX; Jonathan E Axelrad, The Axelrad Law Firm PLLC, Houston, TX; Michael John Maloney, Maloney Martin & Associates LLP, Houston, TX.

For Quicksilver Resources Inc., Plaintiff: Daniel M McClure, LEAD ATTORNEY, Fulbright & Jaworski, Houston, TX; David A Palmer, LEAD ATTORNEY, Moses Palmer Howell LLP, Fort Worth, TX; J Robert Forshey, Jeffrey Philipp Prostok, LEAD ATTORNEYS, Forshey Prostok LLP, Fort Worth, TX; Matthew Garrett Maben, LEAD ATTORNEY, Forshey Prostok, Fort Worth, TX; Shayne D Moses, LEAD ATTORNEY, Moses, Palmer & Howell, LLP, Fort Worth, TX; Christopher R Hart, Fulbright & Jaworski LLP, Houston, TX.

For Eagle Drilling LLC, Defendant: Stanley M Ward, PRO HAC VICE, Woodrow K Glass, PRO HAC VICE, LEAD ATTORNEYS, Ward & Glass LLP, Norman, OK; Trey Andrew Monsour, LEAD ATTORNEY,

Haynes & Boone LLP, Dallas, TX; Kenneth Jones, Oklahoma City, OK; Kenneth I Jones, Jr, PRO HAC VICE, Kenneth Jones Attorney At Law, Oklahoma City, OK; Mark K Stonecipher, PRO HAC VICE, Fellers Snider et al, Oklahoma City, OK.

For Eagle Domestic Drilling Operations LLC, Defendant: H Rey Stroube, III, Attorney at Law, Houston, TX; Jonathan E Axelrad, The Axelrad Law Firm PLLC, Houston, TX; Kenneth Jones, Oklahoma City, OK; Michael John Maloney, Maloney Martin & Associates LLP, Houston, TX.

For Thomas F Darden, also known as Toby Darden, Glenn Darden, Defendants: Daniel M McClure, LEAD ATTORNEY, Fulbright & Jaworski, Houston, TX.

For Eagle Domestic Drilling Operations LLC, Counter Claimant: Jonathan E Axelrad, The Axelrad Law Firm PLLC, Houston, TX.

For Eagle Drilling LLC, Counter Claimant: Kenneth Jones, LEAD ATTORNEY, Oklahoma City, OK; Mark K Stonecipher, PRO HAC VICE, Fellers Snider et al, Oklahoma City, OK.

For Quicksilver Resources Inc., Counter Defendant: Daniel M McClure, LEAD ATTORNEY, Fulbright & Jaworski, Houston, TX; David A Palmer, LEAD ATTORNEY, Moses Palmer Howell LLP, Fort Worth, TX; J Robert Forshey, Jeffrey Philipp Prostok, LEAD ATTORNEYS, Forshey Prostok LLP, Fort Worth, TX; Matthew Garrett Maben, LEAD ATTORNEY, Forshey Prostok, Fort Worth, TX; Shayne D Moses, LEAD ATTORNEY, Moses, Palmer & Howell, LLP, Fort Worth, TX.

For Jeff Cook, also known as Paul J Cook, Counter Defendant: Daniel M McClure, LEAD ATTORNEY, Fulbright & Jaworski, Houston, TX; Christopher R Hart, Fulbright & Jaworski LLP, Houston, TX.

For Eagle Drilling LLC, LEAD ATTORNEY Counter Claimant: Kenneth I Jones, Jr, LEAD ATTORNEY, Kenneth Jones Attorney At Law, Oklahoma City, OK; Trey Andrew Monsour, LEAD ATTORNEY, Haynes & Boone LLP, Dallas, TX; Kenneth Jones, Oklahoma City, OK; Mark K Stonecipher, PRO HAC VICE, Fellers Snider et al, Oklahoma City, OK.

For Eagle Drilling LLC, Counter Defendant: Kenneth I Jones, Jr, PRO HAC VICE, LEAD ATTORNEY, Kenneth Jones Attorney At Law, Oklahoma City, OK; Trey Andrew Monsour, LEAD ATTORNEY, Haynes & Boone LLP, Dallas, TX; Kenneth Jones, Oklahoma City, OK; Mark K Stonecipher, PRO HAC VICE, Fellers Snider et al, Oklahoma City, OK.

JUDGES: Nancy K. Johnson, United States Magistrate Judge.

OPINION BY: Nancy K. Johnson

OPINION

ORDER

Pending before the court ¹ is Defendant's Motion to Disqualify the Honorable Gray H. Miller ("Judge Miller") (Docket Entry No. 162). The court has considered the motion, the responsive briefs, and the applicable law. For reasons explained below, the court **DENIES** Defendant's motion.

1 This case was referred to the undersigned magistrate judge pursuant to *28 U.S.C. § 636(b) (1) (A) and (B)*, the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and *Federal Rule of Civil Procedure 72*. Docket Entry No. 155.

This dispute was assigned to Judge Miller upon withdrawal of reference by the district court in March 2008. In November 2009, Daniel McClure ("McClure") of Fulbright & Jaworski, LLP, ("Fulbright") entered an appearance on behalf of Plaintiff. Since that time, other Fulbright attorneys also have entered appearances. Defendant filed the pending motion to disqualify Judge Miller on February 12, 2010.

Judge Miller joined Fulbright in 1978, when the firm had 270 attorneys total, 238 in Houston. ² He served as a partner from 1986 until he took the bench in 2006. ³ Judge Miller worked in the admiralty department from 1978 to approximately 2003, when the admiralty department merged into the litigation department. ⁴ By the time Judge Miller left Fulbright, the law firm had grown to nearly 1000 attorneys, 309 of whom were in Houston.

⁵ In 2009, Fulbright had nearly 6,000 clients who paid legal fees. ⁶

2 Plaintiff's Response to Defendant's Motion to Disqualify Judge Miller, Docket Entry No. 165, Ex. B, Affidavit of McClure, PP 3, 4.

3 *Id.* at P 3.

4 *Id.* at P 4.

5 *Id.*

6 *Id.* at P 2.

During his tenure, Judge Miller never worked on any matter for Plaintiff. ⁷ In fact, Fulbright handled only two matters for Plaintiff while Judge Miller was employed. ⁸ The first was a reserve acquisition transaction matter handled in 2002-03, and the other was a company acquisition in 2003. ⁹ Neither subject matter was at all related to drilling contracts, Defendant, or any other issue in this case. ¹⁰ Those two matters generated total fees that comprised less than one tenth of one percent of the total revenues of Fulbright for 2003. ¹¹

7 Plaintiff's Response to Defendant's Motion to Disqualify Judge Miller, Docket Entry No. 165, Ex. A, Affidavit of Deborah Gitomer, P 3.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

McClure joined Fulbright the same year as Judge Miller and became a partner in the same year as Judge Miller. ¹² Throughout McClure's employment, he has worked in the litigation department. ¹³ The two men knew each other as associates and partners, but they never worked on a matter or case together, did not office on the same floor, never went to the other's home, and never took any trips together. ¹⁴ The only social events they both attended were large, work-related activities. ¹⁵

12 Plaintiff's Response to Defendant's Motion to Disqualify Judge Miller, Docket Entry No. 165, Ex. B, Affidavit of McClure, P 2.

13 *Id.* at P 4.

14 *Id.*

15 *Id.*

The disqualification decision is within the "sound discretion" of the judge. *Chitimacha Tribe of La. v. Harry L. Laws Co.*, 690 F.2d 1157, 1166 (5th Cir. 1982); *see also Sensley v. Albritton*, 385 F.3d 591, 601 (5th Cir. 2004). Two statutes address the disqualification of a judge: 28 U.S.C. §§ ("Sections") 144 and 455. The statutes are substantively similar as they are both based on the concept that due process requires a fair trial overseen by an unbiased judge. *Chitimacha Tribe of La.*, 690 F.2d at 1165. Procedurally, they differ however. *See id.*

Section 144 requires that the movant submit a timely and legally sufficient affidavit showing that the presiding judge has a personal bias or prejudice against the movant or in favor of an adverse party. Defendant does not indicate that it is seeking disqualification based on *Section 144*. Moreover, the affidavit of counsel submitted by Defendant attests that he has personal knowledge that the facts stated in the motion are "true and correct to the best of [his] knowledge and belief."¹⁶ However, no evidence actually supports his assertion of personal knowledge about Judge Miller's relationship with McClure or about Fulbright's representation of Plaintiff. The sworn statements of Defendant's counsel simply fail to suggest personal bias or prejudice.

16 Defendant's Motion to Disqualify Judge Miller, Docket Entry No. 162, Ex. 9, Affidavit of Stanley Ward, P 3.

Section 455 directs a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a); see also Code of Conduct for U.S. Judges, Cannon 3; *Gomez v. St. Jude Med. Daig Div. Inc.*, 442 F.3d 919, 938 (5th Cir. 2006) (quoting 28 U.S.C. § 455 (a)). Certain specific circumstances require that the judge recuse, including any situation in which the judge, while in private practice, "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." 28 U.S.C. § 455 (b) ; see also Code of Conduct for U.S. Judges, Cannon 3C(1)(b).

The Code of Conduct for United States Judges ("Code") also directs judges to avoid impropriety and the appearance of impropriety. Code of Conduct for U.S. Judges, Cannon 2. Commentary on Cannon 2 explains, "An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired." *Id.* at Cannon 2A cmt. In particular, judges are cautioned against allowing social or financial relationships to influence their judgment. See *id.* at 2B.

However, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994); see also *Raborn v. Inpatient Mgmt. Partners, Inc.*, 352 Fed. App'x 881, 884 (5th Cir. 2009)(unpublished); *United States v. Mizell*, 88 F.3d 288, 299 (5th Cir. 1996). In the *Liteky* case, the United States Supreme Court found all of the grounds asserted for recusal to be inadequate because they consisted of "judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally sup-

portable) to counsel and to witnesses" and did not rely on extrajudicial material or display "deep-seated and unequivocal antagonism" making fair judgment impossible. *Liteky*, 510 U.S. at 556.

Defendant alleges that McClure disclosed "that he knew Judge Miller very well and had, in fact, enjoyed a long-standing close personal friendship and business relationship with him for over thirty years."¹⁷ Defendant attempts to bolster the assertion of partiality by noting that McClure and Judge Miller both joined Fulbright in 1978 and both became partners in 1986. Additionally, Defendant argues, Plaintiff was a client of Fulbright while Judge Miller was employed there. As a partner in the firm, Judge Miller received a financial benefit from fees Plaintiff paid, Defendant continues.

17 Defendant's Motion to Disqualify Judge Miller, Docket Entry No. 162, p. 7.

In addition to raising concerns about Judge Miller's connections to McClure and Fulbright, Defendant complains that neither McClure nor Judge Miller disclosed to Defendant that Plaintiff had been a Fulbright client while Judge Miller was a partner in the firm. Defendant also casts doubt on the impartiality of Judge Miller's prior rulings, specifically accusing him of ignoring the Oklahoma state court's decision on the interpretation of a clause in the relevant contracts and of vacating a prior finding of fact that favored Defendant in response to Defendant's discovery of Judge Miller's relationship with McClure and Fulbright.

Regarding the nature of Judge Miller and McClure's relationship, Defendant apparently has incorrect information. No evidence suggests that the two men are or were "close personal friends . . . for over thirty years"¹⁸ as Defendant asserts. Defendant attributes this characterization of the relationship to McClure; however, McClure stated in his affidavit that he would not characterize Judge Miller as a close personal friend and does not recall telling Defendant that he was. No doubt, Judge Miller and McClure have known each other for a very long time, but that fact is not basis for recusal. See *Henderson v. Dep't of Pub. Safety & Corr.*, 901 F.2d 1288, 1295, 1296 (5th Cir. 1990) (finding it insufficient to warrant recusal that the presiding judge had known one of the attorneys since he was a child and was friends with the attorney and the attorney's father).

18 Defendant's Motion to Disqualify Judge Miller, Docket Entry No. 162, p. 2.

Defendant's statement of facts regarding Fulbright's representation of Plaintiff is also exaggerated. Although it is true that Plaintiff was a client of Fulbright's while Judge Miller was employed there, neither of the two

matters handled by Fulbright during that time were even remotely related to the matter presently before the court or to any issue raised in this case. *Section 455* does not require recusal under these circumstances. Neither Judge Miller nor any attorney with whom he previously practiced law served as an attorney on this matter while Judge Miller was employed or shared in the profits of the firm from this action. Judge Miller did not work on any matter involving Plaintiff.

McClure disclosed his past association with Judge Miller, Judge Miller did not offer that information. Defendant also takes issue with the omission, by McClure and Judge Miller, of the fact that Plaintiff was a Fulbright client while Judge Miller was employed there. The court has located no specific requirement in the Code that requires such disclosure.

Even assuming an obligation to disclose information regarding his prior affiliation with Fulbright, Judge Miller did not withhold any material information. The identity of Judge Miller's former employer is public information, and McClure specifically disclosed to Defendant that he and Judge Miller had worked together. With regard to Plaintiff's association with the firm, nothing suggests that Judge Miller was aware or should have been aware that Plaintiff had been a Fulbright client during his tenure. *Cf. Henderson, 901 F.2d at 1295-96* (stating that a judge should recuse when he lacks actual knowledge of facts that suggest partiality only "if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge"). A partner of a firm with hundreds of attorneys and thousands of clients cannot reasonably be expected to be aware of all of the clients the firm has represented. Moreover, as that fact does not raise an implication of partiality or an of impropriety under the statute or the Code, it did not need to be disclosed.

Lastly, Defendant's discontent with Judge Miller's rulings is fodder for appeal, not disqualification. *See*

Raborn, 352 Fed. App'x at 884 ("An adverse ruling, by itself, is not evidence of bias.")(citing *Liteky, 510 U.S. at 555*). One of the rulings about which Defendant complains was Judge Miller's determination that the governing-law clause in the contracts at issue is a choice-of-law provision, not a forum-selection clause. Although the decision eventually may be subject to appeal, it is not so unreasonable as to suggest bias. In fact, the United States District Court for the Western District of Oklahoma, where Defendant sought to transfer the case, reached the same conclusion.

The other challenged decision by Judge Miller, reversing himself on a factual determination, stemmed from the court becoming aware of additional evidence that created a dispute. Juries, not courts, make factual determinations when the evidence reveals a dispute. Defendant presents no authority supporting any other decision under these circumstances.

Regardless of the correctness of the challenged decisions, both were "proper and appropriate opinion[s] acquired in the course of judicial proceedings, in reliance on information learned during the proceeding." *See Mizell, 88 F.3d at 300*.

The court finds that Defendant has stated nothing that would cause a reasonable person, knowing all the facts, to question the Judge Miller's impartiality. *See 28 U.S.C. § 455; Liteky, 510 U.S. at 556; Matassarini v. Lynch, 174 F.3d 549, 571 (5th Cir. 1999)*.

Based on the foregoing, the court **DENIES** Defendant's motion to disqualify.

SIGNED in Houston, Texas, this 26th day of April, 2010.

/s/ Nancy K. Johnson

Nancy K. Johnson

United States Magistrate Judge