

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

DEBORAH R. DOLEN,

Plaintiff,

v.

Case No. 8:09-CV-02120-T-23AEP

JULIE RYALS, et al.,

Defendants.

ORDER

THIS MATTER comes before the Court on the Plaintiff's Objection to Magistrate for Report and Recommendation Re Doc 172 (Dkt. No. 174), which the Court construes as a Motion for Recusal (Dkt. No. 175). In her Motion for Recusal, the Plaintiff states that she "does not feel Magistrate Porcelli could go objectively from Mediator back to Magistrate and Plaintiff does object to Magistrate determining fees." (Dkt. No. 174 at 2.)

I. Background

On February 11, 2011, an unsuccessful mediation was held before the undersigned, during which the parties reached an impasse. (Dkt. No. 135.) During the mediation, and restated in a February 14, 2011 order, the undersigned directed the parties to file, by February 18, 2011, a notice with the Court expressing whether they object or consent to the undersigned's continued assignment as the Magistrate Judge in this case. (Dkt. No. 133 at 1-2.) In the February 18, 2011 order, the undersigned stated that he was "unaware of a reason to be disqualified from the case pursuant to 28 U.S.C. § 455(b). Although, during the mediation the parties discussed various

factual disputes with the undersigned, the undersigned does not have any personal knowledge of any disputed evidentiary facts.” (Dkt. No. 133 at 1.) Nevertheless, in an abundance of caution, the undersigned stated that “pursuant to 28 U.S.C. § 455(a), the undersigned would withdraw from the case if any party requested recusal.” (Dkt. No. 133 at 1.) On February 16, 2011, the Plaintiff filed a Stipulation for Magistrate to Stay on Post (Dkt. No. 136), in which the Plaintiff requested that “Magistrate Porcelli will stay on as [sic] Magistrate in this action, and make himself available again as mediator, as need arises, and in the best interest of this action case [sic], parties and court.” (Dkt. No. 136 at 2.) However, the Plaintiff noted that she would “oppose [sic] Magistrate acting as trial judge, due to the triad of conflicts [sic] that [it] would create, not to mention Defendants refused [sic] to elect a Magistrate during the entire life of this action.” (Dkt. No. 136 at 1.) The parties proceeded to trial in front of the Honorable Steven D. Merryday on April 19, 2011. (Dkt. No. 160.) Following the dismissal of the Plaintiff’s claims on oral motion during trial, the parties convened once again before the undersigned for a mediation on the Defendants’ claims. During this second mediation, the parties once again met an impasse, and the Defendants proceeded to trial on their claims against the Plaintiff.

On May 5, 2011, the Defendants filed a Motion for Attorney’s Fees (Dkt. No. 168), which was subsequently referred to the undersigned for a report and recommendation. Several months later, the Plaintiff filed the current Motion for Recusal, in which she argues that the undersigned could not “go objectively from Mediator back to Magistrate and Plaintiff does object to [sic] Magistrate determining fees.” (Dkt. No. 174 at 2.) In her Motion for Recusal, the Plaintiff falsely claims that, after being asked whether “she would agree to allow Magistrate Porcelli to resume

again as Magistrate [after the February 11, 2011 mediation] ... Plaintiff declined because of the prejudicial nature of the Defendants [sic] comments during [sic] Mediation and the impact Plaintiff felt it had on the mediator.” (Dkt. No. 174 at 1.) According to the Plaintiff, during the second mediation, the undersigned was “once again, in the Plaintiffs [sic] opinion, filled with the Defendants [sic] prejudicial comments that included child porn allegations and intent re one [sic] Defendants [sic] web site that were never true.”

On November 8, 2011, the parties appeared before the Court for a status conference on the Defendants’ Motion for Attorney’s Fees (Dkt. No. 168) and the Plaintiff’s Motion for Recusal (Dkt. No. 174). At the November 8, 2011 hearing, the undersigned reiterated that he was unaware of any information that was stated in the mediation that was not available in the public record in this case. As such, the Plaintiff specifically indicated at the November 8, 2011 hearing that she wanted the undersigned to remain the Magistrate Judge in this case. Nevertheless, in an abundance of caution, the undersigned provided the Plaintiff with an opportunity to supplement her Motion for Recusal with any evidence that would support the undersigned’s recusal. As of the date of this order, the Plaintiff has not filed any supplemental authority to support her Motion for Recusal.

II. Discussion

Under 28 U.S.C. § 455(a), “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” Any doubt “must be resolved in favor of recusal.” *See Murray v. Scott*, 253 F.3d 1308, 1310 (11th Cir.2001). When considering recusal, the potential conflict must be considered

as it applies to the entire case. *Id.* at 1310-11. A judge contemplating recusal should not ask whether he or she believes that he or she is capable of impartially presiding over the case, but whether “[the judge’s] impartiality might reasonably be questioned.” *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir.1988). However, 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.” *United States vs. Malmsberry*, 222 F. Supp. 2d 1345 (11th Cir.2002) (citing *United States vs. Greenspan*, 26 F.3d 1001 (10th Cir.1994)). After a thorough review of the record, the Court does not find any legitimate reason why the undersigned’s impartiality might reasonably be questioned. The Plaintiff, after being given ample opportunity to cite to facts that would suggest otherwise, has not put forth any evidence that would demonstrate the undersigned’s alleged partiality.

Section 28 U.S.C. 455(b) spells out certain situations in which partiality is presumed and recusal is required. *See* 28 U.S.C. 455(b)(1)-(5). In her Motion for Recusal, the Plaintiff has not alleged, nor does the Court find, that any of the circumstances warranting mandatory recusal exist in this case. Instead, the Plaintiff argues that the undersigned should recuse himself because of the “prejudicial nature of the Defendants [sic] comments [made] during [the] Mediation and the impact Plaintiff felt it had on the mediator.” As stated earlier, the Plaintiff contradicted her argument in this regard at the November 8, 2011 hearing when she was asked to specify these alleged prejudicial comments. The Plaintiff balked, however, and did not provide any factual support for this argument. Instead, the Plaintiff requested that the undersigned remain the Magistrate Judge in this case. The Plaintiff was even provided additional time in which she could supplement her Motion to Recusal, but chose not to do so. Thus, based on the Plaintiff’s lack of

factual support for her conclusory allegations and contradictory statements made on the record,

the Court finds no reason why the undersigned should recuse himself under 28 U.S.C. 455(b).

III. Conclusion

Accordingly, and after due consideration, it is **ORDERED** that the Plaintiff's Motion for Recusal (Dkt. No. 174) is **DENIED**.

DONE AND ORDERED at Tampa, Florida on this 10th day of February, 2012.



ANTHONY E. PORCELLI
United States Magistrate Judge

Copies furnished to:

Counsel of Record

Pro Se Parties