

15-90057; 15-90058
September 30, 2015
Chief Judge

**JUDICIAL COUNCIL OF THE
SECOND CIRCUIT**

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In re
CHARGES OF JUDICIAL MISCONDUCT

Docket Nos. 15-90057-jm
15-90058-jm

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ROBERT A. KATZMANN, *Chief Judge*:

On July 8, 2015, the Complainant filed two complaints with the Clerk's Office of the United States Court of Appeals for the Second Circuit pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364 (the "Act"), and the Rules for Judicial-Conduct and Judicial-Disability Proceedings, 249 F.R.D. 662 (U.S. Jud. Conf. 2008) (the "Rules"), charging a district judge ("Judge A") and a magistrate judge ("Judge B") of this Circuit with misconduct.

BACKGROUND

The Complainant filed a pro se action against her landlords. Judge A dismissed the case on the defendants' motion, finding that the Fair Housing Act ("FHA") claim had been raised and resolved in state housing court, and that the

district court lacked federal question or diversity jurisdiction over the other claims.

In October 2013, the court of appeals remanded the FHA claim because the state court could not have granted the Complainant all the relief she was seeking in federal court. The Complainant amended her complaint in November 2013.

In January 2014, after an extension of time from Judge A, the defendants moved to dismiss; the Complainant opposed that motion. In July 2014, Judge A denied the motion, and the defendants filed an answer. In October 2014, the case was referred to Judge B, who scheduled a conference for October 30. The scheduling order permitted the Complainant to appear by telephone if she was not in New York (she had moved from New York to Ghana and then to Zimbabwe).

The Complainant wrote to Judge A asking that the case be referred to another magistrate judge because she believed that the defendants specifically wanted Judge B. She also requested an adjournment due to an unidentified medical condition and high blood pressure caused by the stress of the delay in the litigation. Judge A declined to remove Judge B, and Judge B denied an adjournment, finding that the Complainant's condition would not prevent her from calling in. The Complainant did not call in to the conference. Judge B

ordered the Complainant to explain and warned that a failure to do so adequately could result in a dismissal for failure to prosecute. The Complainant did not respond, and Judge B ordered her to show cause why a sanction should not be imposed, and further ordered her to appear in person or by telephone for the next conference. The Complainant made a letter request for a six-month adjournment to build up her finances, lower her blood pressure, and hire an attorney. She told Judge B that she would answer his questions via email or text message.

Judge B scheduled a conference for January 2015, warning the Complainant that her case would be dismissed if she failed to call in. The Complainant appeared by telephone and the case proceeded to discovery. In March, April, and August 2015, Judge B ordered the Complainant to respond to discovery requests. The case remains pending.

The misconduct complaints note that the court of appeals remanded to the district court in October 2013 but that no hearing was held until October 2014. The Complainant alleges that this delay made her ill, so she left the country. She contends that the long delay followed by “unusual urgency” to move the case along frightened her and caused her to feel “set up” by the court. The complaints also take issue with Judge B’s denial of an adjournment for medical reasons and

seek an investigation.

DISCUSSION

The complaints are dismissed.

The gravamen of the complaints concerns delay. However, the rules and guidance implementing the Act make clear that an allegation of delay is ordinarily not the proper subject of a judicial misconduct complaint, and should be dismissed as “directly related to the merits of a decision or procedural ruling,” absent a supported allegation of improper motive or habitual delay. 28 U.S.C. § 352(b)(1)(A)(ii); Rule 3(h)(3)(B) (excluding from cognizable misconduct “an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases”); Rule 3 cmt. (“[A] complaint of delay in a single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge—in other words, assigning a low priority to deciding a particular case.”).

The allegation concerning adjournment seeks to challenge the correctness of Judge B’s denial, and is there also dismissed as merits related. Rule 3(h)(3)(A) (“An allegation that calls into question the correctness of a judge’s ruling . . .

without more, is merits-related”). Purely merits-related allegations are excluded from the Act to “preserve[] the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge’s ruling.” Rule 3 cmt. Such challenges can be pursued, to the extent the law allows, only through normal appellate procedures.

Any allegation concerning bias or improper motive is wholly unsupported, and is therefore dismissed as “lacking sufficient evidence to raise an inference that misconduct has occurred.” 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D). A decision for or against a party is not evidence of improper motive or bias.

The Clerk is directed to transmit copies of this order to the Complainant and to the Judge.