22-90226-jm
September 20, 2023
Chief Judge

JUDICIAL COUNCIL OF THE SECOND CIRCUIT

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In re
CHARGE OF JUDICIAL MISCONDUCT Docket No. 22-90226-jm

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DEBRA ANN LIVINGSTON, *Chief Judge*:

In November 2022, the Complainant filed a complaint 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 (the "Rules"), charging a district judge (the "Judge") of this Circuit with misconduct.

BACKGROUND

In November 2021, the Complainant, who is a lawyer, initiated a civil action by filing a complaint on behalf of his client. The defendant, through counsel, filed an answer about six weeks later, in mid-December. The Complainant then moved to strike the answer as untimely (among other reasons).

A magistrate judge presided over a conference in early February 2022. Two days later, the Complainant filed a supplement to his motion to strike the answer, arguing, as relevant here, that he had discovered during the conference that "Defendant's counsel was not licensed to appear in this jurisdiction for this case and was practicing law without a license and authority . . . ." Defense counsel then moved for admission *pro hac vice* and the magistrate judge presided over another conference in which defense counsel participated; the magistrate judge then granted the *pro hac vice* motion in June 2022. The Complainant then filed a motion to vacate that order (i.e., the order granting defense counsel *pro hac vice* admission) arguing that the magistrate judge "erred when [he] allowed defendant's counsel . . . to appear *pro hac vice* after multiple Rules violations."

About five weeks later, while the motion to vacate the *pro hac vice* order was pending, the Judge dismissed the complaint, finding it was barred by the *Rooker-Feldman* doctrine and largely duplicative of two previous lawsuits. In the order dismissing the complaint, the Judge warned the Complainant and his client that their "attempt to resurrect previously-dismissed frivolous claims" raised Rule 11 concerns and that if they persisted in attempting to pursue such claims they may be sanctioned. In a footnote, the Judge noted that the

Complainant had previously been sanctioned in another federal district "for having frivolously attempted to remove the case a second time," and cited the case in which the Complainant had allegedly been sanctioned. The Judge denied various pending motions, including the motion challenging the *pro hac vice* order, as moot.

The misconduct complaint contains two allegations of misconduct. First, the Judge allegedly "failed to call to the attention of the circuit chief judge reliable information reasonably likely to constitute judicial misconduct." Specifically, the Complainant alleges that the magistrate judge committed misconduct by allowing "a non-authorized out-of-state attorney . . . to file a Rule 11 pleading and to participate in two scheduling conferences"—and that the Judge in turn committed misconduct by failing to report the magistrate judge's underlying misconduct.

Second, the Complainant alleges that the Judge unfairly impugned him and harmed his reputation by stating in a footnote that the Complainant had been sanctioned in a previous case. The Complainant states that he has "never been sanctioned, censored, reprimanded, suspended or disbarred for any reason by any court," and that the Judge's assertion to the contrary was willfully false,

"with the intent to cause professional harm." The Complainant contends that in the decision the Judge cited, he was not sanctioned; rather, the opposing party in that case was awarded about $8,000 in costs and attorney's fees, which was less than what had been requested. Further, the Complainant allegedly only became involved in that case "on a limited time-sensitive basis," after the conduct that gave rise to the award of attorney's fees.

A review of the decision in question, and the docket in that case, reveals the following. In August 2012, the Complainant, on behalf of his clients, removed a state court action with a document entitled "Second Notice of Removal" – the docket reflects that the Complainant both signed and filed the document electronically. A few days later, the Complainant filed a "Request [for] Emergency Court Order," seeking to temporarily restrain certain state court proceedings. The opposing party then moved to remand the matter to state court, and in so doing requested attorney's fees, arguing that the Complainant's attempt to remove the matter a second time "warrants sanctions."

The next day, a federal district judge remanded the case. The remand order, which was captioned "Order Remanding Case . . . And Granting Plaintiff's Request For Sanctions," found, among other things, that there was no valid basis

for a second removal; that the second notice of removal was "frivolous" and "designed solely to avoid an emergency state court contempt hearing"; that the Complainant's tactics were "vexatious and delay-inducing"; and that "an award of costs and fees" was warranted. The order directed the moving party to submit an application for costs and fees. The movant then requested $8,233 in costs and fees associated with the frivolous second removal order. Neither the Complainant nor his clients responded to that motion, and the district judge then entered an order awarding $8,233 in attorney fees, to be paid by the Complainant's clients. The Complainant then sought relief from that order, arguing that his failure to respond should be excused because he had not received electronic docket notifications. The district judge denied that motion and reiterated that costs and fees of $8,233 would be awarded.

DISCUSSION

The complaint is dismissed.

The gravamen of the first allegation is that the Judge committed misconduct by failing to report the magistrate judge's alleged misconduct. To be sure, "[c]ognizable misconduct includes failing to call to the attention of the relevant chief district judge or chief circuit judge any reliable information

reasonably likely to constitute judicial misconduct or disability." Rule 4(a)(6). But the allegation is nonetheless dismissed because it rests on a false assumption, i.e., that the magistrate judge committed misconduct by allowing an attorney who was not admitted in the district to file an answer and participate in two conferences. That is not a cognizable claim that the magistrate judge committed misconduct; it is instead a claim that the magistrate judge erred—i.e., that he should have taken some other course of action, such as striking the non-admitted attorney's answer or sanctioning him, rather than granting his subsequent motion for *pro hac vice* admission and allowing the answer to remain on the docket.

Accordingly, the related misconduct claim against the Judge—that the Judge committed misconduct by failing to report the magistrate judge's misconduct—is dismissed as "lacking sufficient evidence to raise an inference that misconduct has occurred," Rule 11(c)(1)(D), because the underlying magistrate judge "misconduct" the Complainant identifies was not in fact misconduct. It is also dismissed as "directly related to the merits of a decision or procedural ruling." 28 U.S.C. § 352(b)(1)(A)(ii); Rule 4(b)(1) ("Cognizable misconduct does not include an allegation that calls into question the correctness

of a judge's ruling, including a failure to recuse."); 11(c)(1)(B). Purely merits-related allegations are excluded from the Act to "preserve[] the independence of judges in the exercise of judicial authority by ensuring that the complaint procedure is not used to collaterally call into question the substance of a judge's decision or procedural ruling." Rule 4 cmt. If the Complainant believes that the magistrate judge erred by allowing a non-admitted attorney to file an answer and participate in two conferences before moving for *pro hac vice* status, he can pursue a challenge, to the extent the law allows, only through normal appellate procedures.

The remaining claim is essentially that the Judge erred when he noted that the Complainant had been previously sanctioned. If this is a claim that the Judge unintentionally erred, it is an allegation that the Judge got it wrong, not that he engaged in misconduct, and accordingly is dismissed as merits-related, for the reasons given above. If, on the other hand, this is a claim that the Judge intentionally erred—i.e., that the Judge purposely misdescribed the Complainant's disciplinary history to impugn his professional reputation—the claim is dismissed as "lacking sufficient evidence to raise an inference that misconduct has occurred." Rule 11(c)(1)(D). As recounted above, the docket in

the case in question reflects that the attorneys opposing the Complainant requested a sanction in the form of attorney's fees, and the district judge's order noted that the request for sanctions was granted, in large part because the Complainant's second notice of removal was "frivolous" and the Complainant and his client had engaged in "vexatious and delay-inducing behavior." The Judge's footnote may not have finely parsed the distinction, if there was one, between a sanction of an attorney and an award of attorney's fees to be paid by that attorney's clients, but at bottom it was largely accurate and does not raise an inference of misconduct.

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