docket no. 03-5023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION

In re Premier Van et al.

FOR PANEL REHEARING
AND
HEARING EN BANC

RICHARD CORDERO,
Cross and Third party plaintiff-Appellant

v.

KENNETH GORDON,
Cross defendant-Appellee,

and no. 03cv6021L, WDNY

DAVID PALMER,
Third party defendant-Appellee
no. 03mbk6001L, WDNY

Dr. Richard Cordero respectfully petitions that this Court's order of January 26, 2004, (Appendix 876=A:876) dismissing his appeal from orders issued by the U.S. Bankruptcy and District Courts for the Western District of NY be reviewed by the panel and in banc on the following factual and legal considerations:

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I. Why this Court should hear this petition en banc

1. This petition should be heard an banc because it is the collective responsibility of the members of this Court to safeguard the integrity of judicial process in this

circuit and ensure that justice is not only done, but is also seen to be done. The threshold for their intervention has been met more than enough since there is so much more than "the appearance of impropriety" *Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, at 859-60, 108 S. Ct. 2194; 100 L. Ed. 2d 855 (1988): There is abundant material evidence that judges, administrative personnel, and attorneys in the bankruptcy and district courts in Rochester have disregarded the law, rules, and facts so repeatedly and consistently to the detriment of Dr. Cordero, the sole non-local party, who resides in New York City, and the benefit of the local ones in Rochester as to form a pattern of non-coincidental, intentional, and coordinated acts of wrongdoing and of bias against him (A:674).

2. The resulting abuse and that yet to be heaped on remand on Dr. Cordero, a pro se litigant, can wear him down until he is forced to quit his pursuit of justice (para. 22, infra). The reality that everybody has a breaking point should be factored in by every member of this Court when deciding whether to hear this appeal. It was dismissed on the procedural ground that the appealed orders lack finality. Under these circumstance, the Supreme Court would depart from a requirement of strict finality "when observance of it would practically defeat the right to any review at all," *Cobbledick v. United States,* 60 S.Ct. 540, 540-41, 309 U.S. 323, 324-25, 84 L.Ed. 783, 784-85 (1940). Hence, Dr. Cordero appeals to the commitment to justice and professional responsibility of the Court's members to review this case so that they may relieve him of so much abuse and ensure that he has his day in a

court whose integrity affords him just and fair process.

3. If doing justice to one person were not enough to intervene, then this Court should do so to ensure just and fair process for all similarly situated current and future litigants and to protect the trust of the public at large in the circuit's judicial system that this Court is charged with protecting (A:847§I). Resolving conflicts of law among panels or circuits cannot be a more important ground for a hearing en banc than safeguarding the integrity of the judicial process while aligning itself with Supreme Court pronouncements. Without honest court officers, the judicial process becomes a shell game where the law and its rules are moved around, not by respect for legality and a sense of justice, but rather by deceit, self-gain, and prejudice. To which are you committed?

II. The appealed order dismissing a cross-claim against Trustee Gordon is not just that of the bankruptcy court, but also the subsequent order of the district court holding that Dr. Cordero's appeal from that dismissal was, although timely mailed, untimely filed, which is a conclusion of law that cannot possibly be affected by any pending proceedings in either court, so that the order is final and appealable

4. Bankruptcy Judge John C. Ninfo, II, dismissed (A:151) the cross-claims against Trustee Kenneth Gordon (A:83) on the latter's Rule 12(b)(6) FRCP motion, while disregarding the genuine issues of material fact that Dr. Cordero had raised (Opening Brief=OpBr:38). This dismissal is final, just as is the dismissal of a complaint unless leave to amend is explicitly granted. *Elfenbein v. Gulf & Western Industries, Inc.*, 90 F.2d 445, 448 n. 1 (2d Cir. 1978).

5. Dr. Cordero appealed to the district court (A:153), but the Trustee moved to dismiss alleging the untimeliness of the filing of the appeal notice, never mind that it was timely mailed. Dr. Cordero moved the district court twice to uphold his appeal (A:158, 205). Twice it dismissed it (A:200, 211). Likewise, twice he appealed to the bankruptcy court to grant his timely mailed motion to extend time to file notice to appeal (A:214, 246). Twice the bankruptcy court denied relief (A:240, 259), alleging that the motion too had been untimely filed, although even Trustee Gordon had admitted that it had been timely *filed* (OpBr:11).
6. Consequently, there is no possibility in law whereby Dr. Cordero could for a fifth time appeal the issue of timelines to either court. Nor is it possible, let alone likely, that either will sua sponte revise their decisions and reverse themselves. As the bankruptcy put it, 'the district court order establishing that Dr. Cordero's appeal was untimely' "is the law of the case" (A:260). Thus, res judicata prevents any such appeal or sua sponte reversal. Similarly, it is not possible for Dr. Cordero, well over a year after the entry in 2002 of the underlying order dismissing his cross-claims, to move the bankruptcy court to review it and reinstate them; nor could that court sua sponte review it and reverse itself.
7. Due to these orders, Trustee Gordon is beyond Dr. Cordero's reach in this case, and since the Trustee settled with the other parties, he is no longer a litigating party. No pending proceedings in the courts below could ever change the legal relation between Dr. Cordero and the Trustee. Each order is final because it "ends

the litigation on the merits and leaves nothing for the court to do but execute the judgment", *Catlin v. United States,* 65 S.Ct. 631, 633, 324 U.S. 229, 233, 89 L.Ed. 911 (1945). Their legal relation can only change if this Court reviews either or both of those orders and determines that they are tainted by bias against Dr. Cordero (OpBr:9, 54); and that they are unlawful because the bankruptcy court disregarded the law applicable to a 12(b)(6) motion (OpBr:10, 38) and to defamation (OpBr:38); and both courts disregarded the Bankruptcy Rules, such as 9006(e) complete-on-mailing and (f) three-additional-days (OpBr:25). What else could possibly be necessary to make an order final and appealable to this Court?

8. This Court can reach the bankruptcy court order (A:151) dismissing the cross-claims because 1) it was included in the notice of appeal to this Court (A:429), and 2) in *In re Bell,* 223 F.3d 203, 209 (2d Cir. 2000) it stated that in an appeal from a district court's review of a bankruptcy court ruling, the Court's review of the bankruptcy court is "independent and plenary." Thus, through its review of the district court order dismissing the appeal for untimeliness, the Court can reach the underlying bankruptcy court order dismissing the cross-claims.

III. The district court order remanding to the bankruptcy court the application for default judgment is:

1) final because the further proceedings ordered by the district court were in fact ordered by the bankruptcy court on April 23 and undertaken on May 19, 2003, and

2) appealable because such proceedings were ordered in disregard of the express provisions of Rule 55 FRCP and

without any other legal foundation, an issue of law raised on appeal to, and rehearing in, the district court, and reviewable by this Court since the unlawful obligation imposed on Dr. Cordero to participate in the proceedings and the grounds for it cannot possibly be changed by future developments in those courts

9. Dr. Cordero brought third party claims against Mr. David Palmer, the owner of the moving and storage company Premier Van Lines, for having lost his stored property, concealed that fact, and committed insurance fraud (A:78, 87, 88). Although he was already under the bankruptcy court's jurisdiction as an applicant for bankruptcy, Mr. Palmer failed to answer. Dr. Cordero timely applied for default judgment for a sum certain under Rule 55 FRCP. (A:290, 294) Yet, the court belatedly (A:302) recommended to the district court (A:306) that the default judgment application be denied and that Dr. Cordero be required to inspect his property to prove damages, in total disregard of Rule 55 and without citing any legal basis whatsoever for imposing that obligation on him (OpBr:13).

10. Dr. Cordero submitted to the district court a motion presenting factual and legal grounds why it should dismiss the recommendation and enter default judgment (A:314). However, District Judge David Larimer accepted the recommendation without even acknowledging his motion and required that he "still establish his entitlement to damages since the matter does not involve a sum certain" (A:339). But it did involve a sum certain! (A:294) By making this gross mistake of fact, the district court undercut its own rationale for requiring that Dr. Cordero

demonstrate his entitlement in "an inquest concerning damages" to be conducted by the bankruptcy court. Moreover, it cited no statutory or regulatory provision or any case law whatsoever as source of its power to impose that obligation on Dr. Cordero in contravention of Rule 55, which it did not even mention (OpBr:13).

11. Dr. Cordero discussed that outcome-determinative mistake of fact and lack of legal grounds in a motion for rehearing (A:342; cf. OpBr:16). In disposing of it, the district court not only failed to mention, let alone correct, its mistake, or to provide any legal grounds, but it also failed to provide any opinion at all, just a lazy and perfunctory "The motion is in all respects denied." (A:350; cf. A:211, 205; Reply Brief=ReBr:19) That is all that was deemed necessary between judges that so blatantly disregard law, rules, and facts (OpBr:9-C; 48-53). They have carved their own judicial fiefdom of Rochester out of the territory of this circuit (A:813§E), where they lord it over attorneys and parties by replacing the laws of Congress with the law of the locals, based on close personal relations and the fear of retaliation against those who challenge their distribution of favorable and unfavorable decisions (A:804§IV).

12. Although the bankruptcy court recommended to the district court that Dr. Cordero's property in storage be inspected to determine damage, it allowed its first order of inspection to be disobeyed with impunity by Plaintiff James Pfuntner and his Attorney David MacKnight to the detriment of Dr. Cordero and without providing him any of his requested compensation or sanctions (OpBr:18).

As a result, the inspection did not take place.

13. Then precisely at the instigation of Mr. Pfuntner and his attorney, it ordered at a hearing on April 23, 2003, that Dr. Cordero travel to Rochester to inspect his property, which Mr. Pfuntner said had been left in his warehouse by his former lessee, Mr. Palmer, the owner of the storage company Premier. Although this inspection was the "inquest" for whose conduct by the bankruptcy court the district court denied Dr. Cordero's application for default judgment against Mr. Palmer and remanded, the bankruptcy court allowed this order to be disobeyed too: None of the necessary preparatory measures were taken (A:365) and neither Mr. Pfuntner, nor his attorney or storage manager even showed up at the inspection. Yet, Dr. Cordero did travel to Rochester and the warehouse on May 19, 2003.

14. At a hearing on May 21 attended by Mr. Pfuntner's attorney, Dr. Cordero reported on the inspection. It had to be concluded that some of his property was damaged and other had been lost (Mandamus Brief:34; Mandamus Appendix= MandA:522-H). Yet, the biased bankruptcy court neither sanctioned the locals that showed but contempt for its orders nor had them compensate Dr. Cordero.

15. It follows that as a matter of fact, the further proceedings for which the case was remanded by the district to the bankruptcy court took place; and as a matter of law, they should never have taken place because requiring them and compelling Dr. Cordero's participation violated Rule 55 FRCP and neither of those courts offered any other legal grounds whatsoever for denying his default judgment

application and imposing such requirements. No number of further pro-ceedings will undo the consequences and cancel the implications of the district and bankruptcy rulings. Both must be considered final and appealable (A:851§II).

16. How could it be said that this Court was dedicated to dispensing justice if it concerns itself with just operating the mechanics of procedure by delivering Dr. Cordero back into the hands of the district and bankruptcy courts for them to injure him with their bias and deprive him of his rights under the law, the sum certain he sued for, and his emotional wellbeing? Meanwhile, those courts have continued protecting Mr. Palmer, another local party, even after he was defaulted by the Clerk of Court (MandA:479). Thus, he has been allowed to stay away from the proceedings despite being under the bankruptcy court's jurisdiction, whereby he shows nothing but contempt for judicial process. With whom do the equities lie? The procedure of final rulings should not be rolled out if it also allows biased courts to crush Dr. Cordero, for it also crushes the sense of equity that must make this Court recoil at the injustice of this situation. Rather than deliver him to them for further abuse, this Court should take jurisdiction of their rulings to establish that they wronged him and prevent them from doing so again by removing the case to a court unrelated to the parties and unfamiliar with the case.

IV. Bankruptcy court orders were appealed for lack of impartiality and disregard for law, rules, and facts to the district court, which was requested to withdraw the case from the bankruptcy court but refused to do so, whereby the district court did

review those orders and the issue of bias so that its order of denial is final and appealable to this Court

17. The legal grounds and factual evidence of partiality and disregard for legality on which the district court was requested (A:342, 314) to withdraw the case from the bankruptcy court were swept away with a mere "denied in all respects" without discussion by a district court's order (A:350), one among those appealed to this Court. Hence, Dr. Cordero went back to the bankruptcy court and invoked those grounds and evidence to request that it disqualify itself under 28 U.S.C. §455(a) (A:674). The bankruptcy court denied the motion too.

18. Consequently, there was no justification either in practice or in logic to resubmit the substance of those grounds and evidence in order to appeal that denial to the district court. How counterintuitive it is to expect that what Dr. Cordero's initial attack on the bankruptcy court could not move the district court to do, the bankruptcy court's own subsequent defense, if appealed to its defending district court, would cause the latter to disqualify the bankruptcy court and remand the case! A reasonable person is expected to use common sense.

19. That reasoning is particularly pertinent because the district court was requested not once, but twice (A:331, 348) to withdraw the case from the bankruptcy court to itself under 28 U.S.C. §157(d) "for cause shown". Yet, it did not even acknowledge the request, let alone discuss it in its "denied in all respect" fiat or its earlier perfunctory order predicated on an outcome-determinative mistake of

fact (para. 10, 11, supra). Thus, it would be counterintuitive to expect that if Dr. Cordero appealed to such district court the bankruptcy court's refusal to disqualify itself and remove the case to another district, the district court would roll up its sleeves and write a meaningful opinion to affirm, not to mention reverse, a decision concerning contentions by Dr. Cordero that it has disregarded twice before. And what a waste of judicial resources!, and of Dr. Cordero's time, effort, and money. Does he matter?

20. The counterintuitive nature of this expectation is also supported by practical considerations: The district court showed the same lack of impartiality toward Dr. Cordero and the same disregard for law, rules, and facts that the bankruptcy court had showed so that their conduct formed a pattern of non-coincidental, intentional, and coordinated acts of wrongdoing (OpBr:9, 54; ReBr:19). A reasonable person, upon whose conduct the law is predicated, may rightly assume that if after the bankruptcy court refused to recuse itself and remove, Dr. Cordero had appealed to the district court, the latter could not reasonably have been expected to condemn the bankruptcy court, for in so doing it would have inevitably indicted itself; and what could conceivably be even riskier, it would have betrayed its coordination with the bankruptcy court. For that too, an appeal that endangered those vested interests would have been a wasteful exercise in futility.

21. There is no justification in practice for this Court to require a litigant to engage in such futility and endure the tremendous aggravation concomitant with it. The

unreflective insistence on procedure should not be allowed to defeat substance and establish itself as the sole guiding principle of judicial action, the adverse consequences to those who appeal for justice to the courts notwithstanding. On the contrary, the Supreme Court sets the rationale for pursuing the objective of justice ahead of operating the mechanics of procedure: "There have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing"; *Republic Natural Gas Co. v. Oklahoma,* 68 U.S. 972, 976, 334 S.Ct. 62, 68, 92 L.Ed.2d 1212, 1219 (1948). Those words are squarely applicable here.

22. Dr. Cordero was drawn into this Rochester case as the only non-local defendant. He must prosecute it pro se because a Rochester attorney would hardly risk, for the sake of a one-time non-local client, antagonizing the judges and officers of the fiefdom of Rochester and it would cost him a fortune that he does not have to hire an NYC attorney. So he performs all his painstakingly conscientious legal research and writing at the expense of an enormous amount of time, money, and effort. Under those circumstances, when courts drag this case out, either intentionally to wear him down or unwittingly by subordinating justice to its procedure, they inflict on him irreparable injury. This effect must be taken into account in deciding whether to hear this appeal because determining finality requires a balancing test applied to several considerations, "the most important of

which are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other", *Dickinson v. Petroleum Conversion Corp.,* 70 S.Ct. 322, 324, 338 U.S. 507, 511, 94 L.Ed. (1950).

23. Preventing anymore irreparable injury to Dr. Cordero and ensuring the integrity of its circuit's judicial system are grounds for the Court to take jurisdiction of this appeal by using the inherent power that emanates from the potent rationale behind its diversity of citizenship jurisdiction: the fear that state courts may be partial toward state litigants and against out-of-state ones, thus skewing the process and denying justice to all its participants as well as detracting from the public's trust in the system of justice. Here that fear has materialized in federal courts that favor the locals at the expense of the sole non-local who dared challenge them.

24. Whether the cause of lack of impartiality is diversity of locality or personal animus and self-gain, it has the same injurious effect on the administration of justice. Section 455(a) combats it by imposing the obligation on a judge to disqualify himself whenever "his impartiality might be reasonably questioned". The Supreme Court has interpreted this language to mean that for disqualification under §455(a) it suffices that there be a situation "creating an appearance of impropriety"; *Liljeberg, 486 U.S. 847, at 859-60,* para. 1, supra.

25. Given the high stakes, to wit, a just and fair process, §455(a) sets a very low threshold for its applicability: not proof, not even evidence, just 'a reasonable question'. Yet, Dr. Cordero has presented a pattern of disregard of laws, rules,

and facts so consistently injurious to him and protective of the local parties as to prove the bias against him of both courts and court officers therein. So why would this Court set the triggering point for its intervention at such high levels as an appeal by Dr. Cordero from the bankruptcy to the district court despite the pro-forma character and futility of that exercise under the circumstances?

26. Intervening only at such injury-causing high level contradicts the principle that the Court recognized in *Ginett v. Computer Task Group, Inc.*, 962 F.2d 1085, 1097 (2d Cir. 1992), of avoidance of the hardship that appellant would sustain if review was delayed. Requiring an intervening appeal to the district court is most unwarranted here because the bankruptcy court, who decided not to disqualify itself as requested by Dr. Cordero, submitted sua sponte its decision to this Court on November 19, 2003, whereby it in practice requested its review by the Court.

27. Instead of reviewing it, the Court dismissed Dr. Cordero's appeal. Thereby it has exposed him to more blatant bias from the bankruptcy court and its partner in coordinated acts of wrongdoing, the district court (ReBr:19). Indeed, it is reasonable to fear that those courts will interpret the Court's turning down the opportunity, offered on that November 19 'platter', to review the decision refusing recusal as its condonation of their conduct. Will this Court leave Dr. Cordero even more vulnerable to more and graver irreparable injury from prejudiced courts that disregard legality while applying the law of the locals?

28. This interpretation is all the more likely because to support its refusal to take

jurisdiction of Dr. Cordero's appeal and its requirement that he first appeal from the bankruptcy to the district court, this Court could find no stronger precedent than a non-binding decision from another circuit, namely, *In re Smith*, 317 F.3d 918, 923 (9th Cir. 2002). Its value is even weaker because Dr. Cordero already submitted to the district court grounds and evidence for disqualifying the bankruptcy court and withdrawing the case, but it disregarded them. Thus, it already had its opportunity to review the matter. Now it is this Court's turn.

V. Relief sought

29. Dr. Cordero respectfully requests that this Court:

a. take jurisdiction of this appeal, vacate the orders tainted by bias or illegality, and "in the interest of justice" remove this case under 28 U.S.C. §1412 to a court that can presumably conduct a just and fair jury trial and is roughly equidistant from all parties, such as the U.S. district court in Albany;

b. launch, with the assistance of the FBI (A:840§C), a full investigation of the lords of the fiefdom of Rochester and their vassals, guided by the principle 'follow the money' of bankruptcy estates and professional persons fees (11 U.S.C. §§326-331), and intended to bring them back into the fold of legality;

c. award Dr. Cordero costs and attorney's fees and all other just compensation.

Respectfully submitted under penalty of perjury,

Dr. Richard Cordero

March 10, 2004

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(entries from the Appendix sought to be attached as exhibits)

1. Motion of August 8, 2003, for Bankruptcy Judge John C. Ninfo, II, to recuse himself and remove the case.....A:674
2. Motion of November 3, 2003,for leave to file an updating supplement of evidence of bias A:801
3. Outline of oral argument delivered by Dr. Cordero on December 11, 2003 .....A:837
4. Motion of December 28, 2003, for leave to brief the issue of jurisdiction.....A:844
5. Order of January 26, 2004, of the Court of Appeals for the Second Circuit dismissing the appeal.....A:876

Proof of Service

I, Dr. Richard Cordero, hereby certify under penalty of perjury that I served by fax or United States Postal Service on the following parties copies of my petition for panel rehearing and hearing en banc:

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