UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	**CASE NUMBER 04-41352**
RANDALL JOSEPH HAKE and	*	
MARY ANN HAKE,	*	**CHAPTER 11**
	*	
Debtors.	*	**HONORABLE KAY WOODS**
	*	

****
ORDER DENYING MOTION FOR RULE 2004 EXAM OF CHRISTOPHER HAKE
****

On February 14, 2006, Buckeye Retirement Co. L.L.C., Ltd. ("Buckeye") filed Motion for Rule 2004 Examination and Notice Regarding Christopher R. Hake and Affidavit of Peter T. Barta ("Motion for Rule 2004 Exam"). On February 22, 2006, Christopher R. Hake ("Chris Hake"), through counsel, filed Objection to Motion of Buckeye Retirement Co. L.L.C., Ltd. for Rule 2004 Examination of Christopher R. Hake ("Objection"). The Court set the matter for hearing on March 2, 2006.

By way of background, Debtors Randall J. Hake and Mary Ann Hake (collectively, "Debtors") filed a petition pursuant to Chapter 11 of the Bankruptcy Code on March 25, 2004 (the "Petition Date"). Chris Hake is Debtors' son. Buckeye is the largest creditor in Debtors' Chapter 11 case.

Buckeye's Motion for Rule 2004 Exam asserts that it is supported by the Affidavit of Peter T. Barta ("Barta Affidavit"), which is attached to the Motion. At the hearing, counsel for Buckeye conceded that Buckeye had previously deposed Chris Hake, but contended that Buckeye had not questioned him "extensively" on the topics identified as items 1, 2, 5 and 6 in paragraph 4 of the Motion for Rule 2004 Exam. Buckeye also argued that the examination

of Chris Hake would not be burdensome or oppressive because Buckeye (i) will take the examination in Indianapolis where Chris Hake resides[1] and (ii) will not require Chris Hake to produce any documents or be deposed as a representative of any entity.[2] Moreover, Buckeye asserts that it has not had an opportunity to question Chris Hake about two checking accounts to which Buckeye alleges Chris Hake and Debtor Mary Ann Hake had access, as set forth in paragraph 3 of the Motion for Rule 2004 Exam. However, there is no question that Buckeye has examined Debtor Mary Ann Hake about these checking accounts.[3]

In the Objection, Chris Hake asserts that the requested examination is "burdensome, unnecessary and contrary to the requirements of Bankruptcy Rules 9045."[4] Objection at 1. The Objection argues that the Motion for Rule 2004 Exam is "nothing more than an attempt to circumvent this Court's previous ruling that quashed a subpoena served on Mr. Hake in January." Buckeye previously deposed Chris Hake on August 20, 2004 in connection with a case in Trumbull County Court of Common Pleas, Case No. 2002-CV-1273 (the "State Court Action"), which was one of several lawsuits that

---

[1]Buckeye asserts that Chris Hake is beyond the subpoena power of this Court, so offering to take the examination in the geographic location where Chris Hake resides is nothing more or less than what is required. As a consequence, Buckeye's representation about the proposed location of the examination in this case carries little or no weight in determining whether the proposed examination is burdensome or oppressive.

[2]This Court fails to see – and Buckeye has offered no explanation – how the fact that the examination of Chris Hake is being proposed in his individual, rather than a representative, capacity impacts the issue of oppressiveness or burden.

[3]Buckeye cross-examined Debtor Mary Ann Hake about these accounts on February 9, 2006, which was the second day of the hearing on Debtors' amended disclosure statement.

[4]There is no Bankruptcy Rule 9045. The Court assumes that counsel meant Bankruptcy Rule 9016, which incorporates FED. R. CIV. P. 45 regarding subpoenas.

Buckeye had filed prior to the Petition Date in an effort to collect on a judgment that Buckeye had against Debtors.[5]

Rule 2004 of Federal Rules of Bankruptcy Procedure provides that the Court "may," upon motion of a party in interest, order the examination of any entity. FED. R. BANKR. P. 2004(a). As a consequence, granting a motion for a Rule 2004 examination is discretionary. *In re GHR Energy Corp.*, 1983 Bankr. LEXIS 6954 at 13 (Bankr. D. Mass. 1983) ("As it is within my discretion to permit a Rule 2004 examination to proceed, *see*, *e.g.*, *McLaughlin v. McPhail*, 707 F.2d 800 (4th Cir. 1983); *In re Rassi*, 10 B.C.D. 385 (7th Cir. 1983); and *In re Machek*, 368 F.Supp. 956 (M.D. Fla. 1973) (and cases cited therein), I decline to so exercise this discretionary power and instead follow the direction of *Travis v. United States*, 123 F.2d 268 [at 271] (10th Cir. 1941) wherein the Court stated 'unreasonable discursiveness should not be permitted; and frivolous or prolix examination should be stopped.'")

Although the scope of Rule 2004 is broad, it is not unlimited. FED. R. BANKR. P. 2004(b). *In re Georgetown of Kettering*, 17 B.R. 73, 75 (Bankr. S.D. Ohio 1981) ("Obviously, the breadth of the language employed in the Rules is so all encompassing as semantically to include and encourage harassment on every human subject. Nevertheless, abuse of propriety and the judicial process certainly was never contemplated.")

---

[5]The nature of the State Court Action was to collect (i) assets of the Debtors and/or (ii) upon alleged fraudulent transfer actions, to satisfy Buckeye's Judgment. On the Petition Date, any cause of action for alleged fraudulent transfer became property of the estate which - absent order of this Court - could only be pursued by the debtor in possession. As a consequence, this Court questions whether Buckeye violated the provisions of 11 U.S.C. § 362(a) by taking the deposition of Chris Hake in connection with the State Court Action, which was stayed as to Debtors and property of Debtors' estate. That question, however, is not before the Court.

The Motion for Rule 2004 Exam relies for support on the Barta Affidavit. The Barta Affidavit sets forth that Buckeye has a judgment against Debtors in the amount of One Million Eight Hundred Ninety-Four Thousand Five Hundred One and 97/100 Dollars ($1,894,501.97) as of the Petition Date (the "Judgment") and that the Debtors have not paid the Judgment.[6] Paragraph 7 of the Barta Affidavit states that "[m]ovant has good cause to seek information from Christopher R. Hake, son of Debtors, Randall J. Hake and Mary Ann Hake, *to assist with recovery on this claim on the Judgment*." (Emphasis added.) This is not a proper purpose for a Rule 2004 examination. Buckeye no longer has the right to recover on the pre-petition Judgment. Buckeye's right to recover on any allowed claim is limited to a distribution of estate assets pursuant to a confirmed Chapter 11 plan.[7] Although Buckeye repeats the language of Rule 2004 in paragraph 2 of the Motion for Rule 2004 Exam, Buckeye's express purpose for the examination, as set forth in the Barta Affidavit, is to seek information to "assist with recovery on this claim on the Judgment." The Barta Affidavit states Barta's beliefs (i) regarding two bank accounts and (ii) that Chris Hake purports to own certain entities under the control of Debtor Randall J. Hake. Barta does not reveal, however, that Buckeye has previously examined Chris Hake about these matters or that Buckeye has previously examined other entities, including the Debtors, about these matters.

---

[6]The Barta Affidavit further states in paragraph 6 that interest continues to accrue "at the rate of $599.88 per diem in accordance with the terms of the Judgment." It is not clear whether any interest continues to accrue since interest is only allowable to the extent the claim may be secured by property, the value of which is greater than the amount of the claim. 11 U.S.C. § 506.

[7]Debtors have filed an amended plan of reorganization, which is scheduled for a confirmation hearing on April 25, 2006. Until the Court conducts the confirmation hearing, it is not known whether the Debtors will be able to confirm a plan of reorganization.

Indeed, the Barta Affidavit makes no mention of any need for the examination of Chris Hake that comports with the purpose of Rule 2004.

Buckeye issued a subpoena for the deposition of Chris Hake in January 2006, which this Court quashed upon motion of Chris Hake on the grounds that, in light of the deposition Buckeye took of Mr. Hake in August 2004, the January 2006 subpoena was burdensome and unnecessary.[8] Buckeye apparently seeks to examine Chris Hake now – prior to and in connection with the confirmation hearing on April 25, 2006. Buckeye contends that it has not had an "opportunity to question Christopher R. Hake regarding the Debtors' First Amended Joint Disclosure Statement or the Amended Plan, particularly in regard to the $23,838 which Debtors are recalling into the estate, which Christopher R. Hake received from the Wishka Estate." Barta Affidavit at ¶ 7. In *In re Georgetown of Kettering*, the bankruptcy court determined that, even though the information was not included in the disclosure statement, a creditor did not have the right to use Bankruptcy Rule 205, the precursor to current Rule 2004, in order to "assess the feasibility of [debtor's] proposed plan as a partner without information regarding [debtor's] personal net worth, assets and liabilities . . . ." The court held, "The requirement of a disclosure statement, however, should not be read to infer a corresponding creditor right of a fishing expedition. Although the Debtor is required to disclose his finances in a formal written document, the role of creditors and

[8]Based upon representations of Buckeye's counsel at the hearing on Debtors' amended disclosure hearing on January 25, 2006, Buckeye intended to depose Chris Hake via videotape and use the videotape at the disclosure hearing. See *In re Georgetown of Kettering*, 17 B.R. at 75.

other parties in interest in the disclosure process is neither supervisory nor participatory." *Id.* at 75.

In view of the prior post-petition deposition that Buckeye took of Chris Hake, the opportunity that Buckeye had to question Mr. Hake as extensively as it chose, and because the case is set for a confirmation hearing, it appears neither necessary nor appropriate for Buckeye to depose Chris Hake at this time.[9] Buckeye deposed Chris Hake on August 20, 2004, nearly five (5) months after the Petition Date in connection with the State Court Action, the purpose of which was to recover on Buckeye's Judgment.[10] Buckeye's stated purpose for the proposed Rule 2004 examination is nearly identical to the purpose of the State Court Action and, thus, the purpose for which the deposition of Chris Hake was taken therein. Despite Buckeye's assertion that it did not question Chris Hake "extensively" about certain topics included in the Motion for Rule 2004 Exam, Buckeye has not alleged that it did not have the opportunity to question Chris Hake on these topics at the earlier deposition. The purpose of Rule 2004 is to inquire about a debtor's financial affairs; it is not properly invoked for other general inquiries. Buckeye seeks to question Chris Hake about his business dealings and the business entities with which Chris Hake is involved

---

[9]It appears that it may never be appropriate for one creditor to question another creditor about a disclosure statement or plan of reorganization drafted and filed by a debtor.

[10]This Court noted incorrectly at the hearing that this is Buckeye's second motion to examine Chris Hake pursuant to Rule 2004. On September 23, 2004, Buckeye filed Motion for Rule 2004 Examination and Notice (Christopher R. Hake Irrevocable Trust) rather than Chris Hake. At that same time, Buckeye filed motions for more than 40 Rule 2004 examinations. Buckeye and Debtors reached an agreement about the entities that would be examined, which entities did not include Christopher R. Hake Irrevocable Trust. The Court regrets this misstatement, but it does not impact the Court's decision that Buckeye's Motion for Rule 2004 Exam should be denied.

even though Buckeye has already deposed and examined the Debtors about these entities. Based upon the Motion for Rule 2004 Exam and the Barta Affidavit, Buckeye's purpose in seeking to examine Chris Hake is not appropriate.

In light of the purpose asserted by Buckeye for the Rule 2004 examination and the prior deposition of Chris Hake, this Court finds that Buckeye's Motion for Rule 2004 Exam is burdensome, oppressive and unnecessary and it fails to comport with the spirit and scope of FED. R. BANKR. P. 2004. As a result, the Motion for Rule 2004 Exam is hereby denied.

IT IS SO ORDERED.

_____
HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE