

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 GRANTING LIMITED TRIAL DEPOSITION OF CHRISTOPHER R. HAKE

On April 6, 2006, Buckeye Retirement Co., L.L.C., Ltd. ("Buckeye") filed Buckeye's Motion and Memorandum for Leave to Take the Trial Deposition of Christopher R. Hake and Notice ("Motion to Take Deposition"). On April 13, 2006, Christopher R. Hake ("Chris Hake") filed Objection of Christopher R. Hake to Motion of Buckeye Retirement Co., L.L.C. for Leave to Take the Trial Deposition of Christopher R. Hake ("Hake Objection"). By Order dated April 14, 2006, this Court stated that it would make a ruling on the Motion to Take Deposition based upon the papers submitted by the parties and without a hearing in light of prior hearings that have dealt with the same or similar arguments.

The Motion to Take Deposition represents the fourth time that Buckeye has either examined Chris Hake under oath or attempted to do so. Buckeye deposed Chris Hake on August 20, 2004 in connection with a state court action styled *Buckeye Retirement Co. L.L.C., Ltd. v. Randall J. Hake, et al.*, Case No. 2002-CV-1273, Trumbull County Court of Common Pleas (the "State Court Action"). On January 6, 2006, Buckeye issued a subpoena to Chris Hake to take his deposition on Friday, January 20, 2006, in connection with a hearing scheduled on January 25, 2006 to consider the amended disclosure statement filed

by Debtors Randall J. Hake and Mary Ann Hake ("Debtors"). In response, Chris Hake filed Motion of Christopher R. Hake to Quash Subpoena ("Motion to Quash"), which this Court granted on January 17, 2006. Next Buckeye filed Motion for Rule 2004 Examination and Notice Regarding Christopher R. Hake and Affidavit of Peter T. Barta ("Motion for 2004 Exam"), seeking to take the examination of Chris Hake pursuant to FED. R. BANKR. P. 2004 on March 15, 2006. Chris Hake opposed the Motion for 2004 Exam. On March 2, 2006, the Court held a hearing on the Motion for 2004 Exam. Thereafter, on March 7, 2006, this Court entered Order Denying Motion for Rule 2004 Exam of Christopher Hake.

In each of Buckeye's three attempts in 2006 to examine Chris Hake, Buckeye has conceded that it deposed Chris Hake in August 2004 (subsequent to the Debtors' filing their petition on March 25, 2004); however, Buckeye asserts that it did not question Chris Hake as extensively as it now would have liked. Buckeye's position concerning its alleged need to examine or depose Chris Hake continues to shift as this case wears on. In seeking to extend the time to object to the Debtors' amended disclosure hearing, Buckeye insisted that it "need[ed] the deposition[] . . . of Christopher Hake in order to adequately prepare Buckeye's objection to Debtors' Amended Disclosure Statement." (Memorandum to Buckeye's Unopposed Motion to Extend Objection Date and Continue Hearing on Debtors' Amended Disclosure Statement, ¶ 9, filed January 12, 2006.) In seeking the Rule 2004 exam, Buckeye alleged that the "proposed examination is necessary because Movant has not questioned Christopher R. Hake on Debtors' First Amended Joint Disclosure Statement and Amended Plan." (Motion for 2004 Exam, ¶ 4.) Now, Buckeye's proffered reason for needing

the testimony of Chris Hake is "to prove the merits of Buckeye's objections." (Motion to Take Deposition, ¶ 5.) One thing, however, is constant: although Buckeye has failed to articulate any reason why it has not obtained all of the evidence and information it needs to pursue its claims against the Debtors through the prior deposition of Chris Hake or through other discovery, Buckeye continues to press to examine Chris Hake under oath one more time.

Buckeye has objected to the Debtors' scheduled claim for Chris Hake and asserts that "the alleged debt by the Debtors to their son, Chris Hake, is a sham." (Motion to Take Deposition, ¶ 4.) The claim in question is based on the note and mortgage that were the subject of the State Court Action, in which Buckeye sought to recover on alleged fraudulent transfers. Indeed, Buckeye has admitted that it questioned Chris Hake about these matters during the August 2004 deposition, but Buckeye claims that this examination was not extensive.

Buckeye's current position regarding the proposed deposition of Chris Hake appears to be twofold. The first proffered reason for the need to now depose Chris Hake is that the "prior deposition taken of Chris Hake in the State Court Action may not be admissible on the merits in this bankruptcy proceeding." (Motion to Take Deposition, ¶ 6.) Buckeye has offered no case law or other reason why sworn testimony of Chris Hake might not be admissible at either the confirmation hearing or the hearing on Buckeye's objection to the claim of Chris Hake. Buckeye merely speculates that it "may" not be admissible. The second prong of the argument is that, because Chris Hake resides in Indianapolis, which is more than 100 miles from this Court, "Buckeye is entitled to take the trial deposition of Chris Hake

to prove the merits of Buckeye's objections." (Motion to Take Deposition, ¶ 7.) Buckeye relies on FED. R. CIV. P. 32(a)(3)(B) for this proposition. Rule 32, which is incorporated into these proceedings by FED. R. BANKR. P. 7032, reads, in pertinent part:

The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . .

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition[.]

FED. R. CIV. P. 32(a)(3). Buckeye misinterprets this rule. Rule 32, which is captioned "Use of Depositions in Court Proceedings" (emphasis added), does not provide that a party is entitled to take a deposition. Instead, the rule sets forth under what circumstances a party may use a deposition of a party or non-party. Rule 32, by providing when and under what circumstances a deposition may be used at trial, of necessity, requires that the deposition must already have taken place.

This Court has previously ruled, in quashing the subpoena issued by Buckeye in January 2006, that a second deposition is "burdensome and unnecessary." (January 17, 2006 Order.) As a consequence, the Court has previously ruled on Buckeye's argument that it is "entitled" to depose Chris Hake again. Despite the prior deposition and the fact that Buckeye has refused to articulate a reason for needing a second post-petition deposition of Chris Hake, Buckeye continues to make the conclusory argument that it needs to depose Chris Hake.

There is no dispute that Chris Hake resides in Indiana and is outside the subpoena power of this Court. Thus, Chris Hake is "at a greater distance than 100 miles from the place of trial or hearing," as set forth in FED. R. CIV. P. 32(a)(3)(B). There is also no dispute

that Buckeye has previously deposed Chris Hake on most - if not all - of the subjects for which it seeks further examination. Although Buckeye asserts that the prior deposition "may" not be admissible at the hearings before this Court, Buckeye does not appear to have researched this issue and has offered no rationale or basis for this assertion.

The Hake Objection asserts that the Motion to Take Deposition should be denied because it is "burdensome and unnecessary" and because the prior deposition of Chris Hake "revealed that he had precious little knowledge of this claim." (Hake Objection, 1.) Chris Hake asserts that the reason for his lack of knowledge is that he was a child when the transaction involving the note and mortgage took place. The date of the transaction and Chris Hake's age at that time are factual matters not open to dispute.

Buckeye represented at the hearing on the Debtors' amended disclosure statement that it had intended to videotape the deposition of Chris Hake and play the entire deposition at the disclosure statement hearing. Buckeye further represents in the Motion to Take Deposition that it intends "to conduct the trial deposition of Chris Hake, and then use that deposition testimony in this bankruptcy proceeding to prove the merits of Buckeye's objections." (Motion to Take Deposition, ¶ 5.)

Because Buckeye has failed to articulate the reason it allegedly needs to depose Chris Hake, Buckeye has failed to demonstrate that it will be prejudiced if Buckeye is not permitted to further depose him. Despite Buckeye's failure to establish - or even allege - prejudice, this Court will permit Buckeye leave to take a limited deposition of Chris Hake, as set forth below.

Buckeye has not indicated how long it anticipates the proposed deposition of Chris Hake will be. Buckeye's depositions of the Debtors in this case have spanned as many as nine hours per deponent in a single day. This Court has the right and obligation to control its docket and the proceedings before it. The Court will not and cannot permit precious court time to be filled with repetitious or irrelevant deposition testimony. Because Buckeye has consistently refused to detail the reason it needs additional testimony from Chris Hake (see above for Buckeye's ever-shifting "reasons" for the deposition) or to articulate any prejudice if this leave is denied, it is proper to limit any deposition of Chris Hake that Buckeye intends to use at hearing before this Court both in subject matter and in duration.

Although Buckeye has no entitlement to take an additional deposition of Chris Hake, this Court will permit Buckeye leave to take a limited deposition of Chris Hake under the following conditions:

1. Any further deposition of Chris Hake shall be conducted at a time and place of the deponent's choosing and at deponent's convenience (including that such deposition may be taken in the evening or a weekend, if that suits the convenience of deponent and/or his counsel).
2. Any further deposition of Chris Hake is limited to one (1) hour in duration. Deponent and/or his counsel may terminate the deposition after one (1) hour whether or not Buckeye has concluded with its questioning.
3. Buckeye is limited to inquiring about (i) the claim asserted by or on behalf of Chris Hake that is the subject of Buckeye's

pending objection and/or (ii) Buckeye's objections to confirmation as they specifically relate to Chris Hake. Buckeye is prohibited from inquiring into areas that were the subject of the prior deposition unless Buckeye subsequently obtained information that it did not have at the time of the prior deposition that prevented Buckeye from asking questions for which it now seeks answers.

4. This Court retains jurisdiction over this matter to enforce the terms of this Order and to impose sanctions in the event that the terms of this Order are violated.

Accordingly, this Court grants the Motion to Take Deposition for the limited purpose and within the parameters, set forth above.

IT IS SO ORDERED.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**