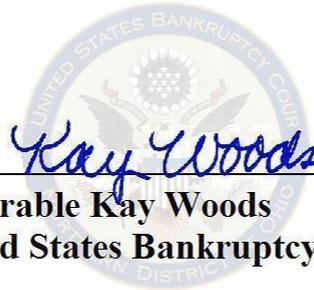


IT IS SO ORDERED.



Dated: May 30, 2007
02:22:27 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
RANDALL J. HAKE and	*	
MARY ANN HAKE,	*	CASE NUMBER 04-41352
	*	
Debtors.	*	
	*	
*****	*	
	*	
BUCKEYE RETIREMENT CO., LLC.,	*	
LTD.,	*	ADVERSARY NUMBER 06-04153
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
RANDALL J. HAKE and	*	
MARY ANN HAKE,	*	HONORABLE KAY WOODS
	*	
Defendants.	*	
	*	
*****	*	

O R D E R
NOT INTENDED FOR NATIONAL PUBLICATION

The following order is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnbuscourts.gov is not the result of direct submission by this Court. The opinion is

available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

This cause is before the Court on Motion to Show Cause as to Angelilli Builders, Inc., Memorandum and Notice ("Motion") filed by Buckeye Retirement Co. L.L.C., Ltd. ("Buckeye") on March 20, 2007 (Doc. # 56), in which Buckeye requests the Court to issue an order for Angelilli Builders, Inc. ("Angelilli") to appear and show cause why it should not be held in contempt for failing to respond to a subpoena duces tecum issued by Buckeye on January 8, 2007 ("Subpoena").

Buckeye served Angelilli's statutory agent, Brian Angelilli, with the Subpoena on January 8, 2007. The Subpoena was issued pursuant to FED. R. BANKR. P. 9016, which incorporates FED R. CIV. P. 45. The Subpoena requested Angelilli to produce on February 9, 2007: (i) "All documents and records regarding services rendered by Randall J. Hake PE, L.L.C., as paid by check number 013340, dated November 15, 2004 in the amount of \$4,790.00;" (ii) "All documents and records regarding any other services rendered from March 1, 2003 to present (sic) by Randall J. Hake PE, L.L.C. from March 1, 2003 to present (sic);" and (iii) "All documents and records regarding any services rendered from March 1, 2003 to present (sic) by Randall J. Hake or any entity owned, controlled or managed by Randall J. Hake." (Motion at Ex. A.)

Buckeye asserts that it filed the Motion because Angelilli failed to respond to the Subpoena. Buckeye further states that no party objected to the Motion. As a consequence, Buckeye argues that the Court should issue an order requiring Angelilli to show

cause why it should not be held in contempt. The Court conducted a hearing on the Motion on May 17, 2007. Victor O. Buente, general counsel for Buckeye, appeared on behalf of Buckeye; no party appeared on behalf of Angelilli. Although Angelilli failed to appear, the Court finds that the Motion is not well taken and denies such motion.

First, the Motion fails to comply with FED. R. CIV. P. 26(b)(1), which states in pertinent part: "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . ." FED. R. CIV. P. 26(b)(1)(emphasis added). As set forth below, the documents requested in the Subpoena are not relevant to this adversary proceeding. At the hearing, Buckeye argued that it needs the documents requested in the Subpoena to verify the income of debtor Randall J. Hake ("Mr. Hake"), although Buckeye admits that it has income records, including tax returns, from debtors Mr. Hake and Mary Ann Hake (collectively "Debtors"). (Transcript of May 17, 2007 hearing at 5, 9.)

In the instant Adversary Proceeding, Buckeye seeks to deny Debtors a discharge on the basis that Debtors failed to disclose or adequately disclose certain assets and liabilities in their bankruptcy schedules, statement of financial affairs, and/or concealed assets in the one year prior to March 25, 2004 ("Petition Date"). As a consequence, the relevant period for Debtors' income is the one year prior to March 25, 2004.¹ The Subpoena seeks

¹ Debtors originally petitioned for relief pursuant to chapter 11 of title 11 of the United States Code. This case was converted to a case under chapter 7 of the Bankruptcy Code on April 26, 2006. The conversion to chapter 7 does not change the date of the order for relief, which remains March 25, 2004. 11 U.S.C.

documents "from March 1, 2003 to present (sic)." Hence, the period of time included in the Subpoena is overly broad and covers more than three years that have no relevance to this Adversary Proceeding.

The Subpoena is overly broad in scope as well as time. Buckeye seeks "all documents and records" relating to Randall J. Hake PE, L.L.C. or entities owned by Mr. Hake. Despite Buckeye's stated need for the Angelilli records, the Subpoena encompasses more than documents relating to income (*i.e.*, checks or invoices), but also includes all work product produced by Mr. Hake and/or the entities he owns (*i.e.*, blueprints, emails or letters). Moreover, Buckeye's counsel consistently stated that Buckeye was seeking documents relating to or covering "services" performed by Mr. Hake and/or related entities. If, as Buckeye alleges, it is only the amount paid by Angelilli to Mr. Hake (*i.e.*, income) for which Buckeye seeks documentation, the "services" rendered by Mr. Hake and/or related entities to Angelilli are not relevant or necessary. Because the Subpoena requests documents and records that are outside the scope of what is needed to determine Mr. Hake's income, the Subpoena is overly broad in scope.

To the extent Angelilli paid Mr. Hake or a related entity for any service(s), this income would have been reported to the Internal Revenue Service. Buckeye admits that it has been provided with Debtors' tax returns for the relevant time periods. Debtors' tax returns provide Buckeye with Mr. Hake's income. Since Buckeye admittedly already has documentation detailing Mr. Hake's income,

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the Subpoena to Angelilli is duplicative and serves no purpose. Indeed, Buckeye's "need" for any documents from Angelilli is suspect because Buckeye failed to identify Angelilli in the Proposed Discovery Plan as a non-party from which it required discovery. Buckeye listed forty parties on the List for Non-Party Discovery and has subpoenaed approximately 143 non-parties for documents in this Adversary Proceeding to date. (See Doc. ## 16, 18, 23, 28, 30, 32, 36, 42, 50, 53 and 80, setting forth Buckeye's certificates of service of approximately 143 subpoenas.) Despite listing forty (40) non-parties in its Proposed Discovery Plan, Buckeye did not include Angelilli on that list. (See List for Non-Party Discovery incorporated into the answer of question 3(g) of the Proposed Discovery Plan jointly filed by Buckeye and Debtors on October 25, 2006 (Doc. # 13).) Although not determinative, Buckeye's failure to include Angelilli on its List for Non-Party Discovery militates against granting the Motion.

Furthermore, the Subpoena does not comply with FED. R. CIV. P. 1, which states in pertinent part: "These rules govern the procedure of the United States district courts in all suits of civil action whether cognizable as cases at law or in equity. . . . They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Justice would not be served by granting the Motion. Buckeye seeks to have this Court find Angelilli in contempt for not responding to the Subpoena. Buckeye, however, has not demonstrated any need for the documents requested in the Subpoena, which is overly broad in scope and time. The Subpoena does not appear to request relevant

documents. Hence, there is no basis to grant the Motion because it does not comply with FED. R. CIV. P. 1.

Additionally, because Angelilli is not a party to this Adversary Proceeding, Buckeye is required to follow FED. R. CIV. P. 45(c)(1), incorporated by FED. R. BANKR. P. 9016(c), which states in pertinent part:

A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

Rule 45(c)(1) required Buckeye to "take reasonable steps to avoid imposing undue burden or expense" on Angelilli and requires the Court to ensure the Subpoena does not impose such a burden. Because the Subpoena is overly broad, as stated above, Buckeye has not complied with the duty to take reasonable steps to avoid imposing undue burden on Angelilli.

Although Buckeye is entitled to take discovery, such right is not boundless. In light of the excessive number of subpoenas Buckeye has issued in this case (143 to date), it appears that Buckeye may be abusing the discovery process in this adversary proceeding to obtain information not available to it in its state court collection actions. Misuse of the discovery process seemed confirmed by Buckeye's counsel at the May 17, 2007 hearing.

THE COURT: But all of that income would have been disclosed on the tax returns which you have. You don't need to know the source of the income in order to determine whether the Debtors have been truthful about their

disclosure of income. You just need to know the total income.

MR. BUENTE: Well, we believe, Your Honor, that we need to look at the sources as well to make sure that the Debtors had reported it and what their activities were to generate the income because again we believe that the reporting had not been accurate.

THE COURT: But if the tax returns are filed and the tax returns don't match up with the 1099s, et cetera, that the Debtors have received, the IRS is going to question that so tax returns have facial validity because they'll match up with what the documents that the Government receives independently or there will be action taken by the Government.

MR. BUENTE: Yes, Your Honor, understood. However, we would use the same information for purposes of the non-dischargeability action for the remedies which we seek.

(Transcript of May 17, 2007 hearing at 9. (emphasis added).) Buckeye's use of the phrase "for the remedies which we seek" is telling. The one and only remedy available to Buckeye in this action is the denial of Debtors' discharge. "Remedies" (plural) refers to Buckeye's pending alleged fraudulent conveyance actions in Trumbull County Court of Common Pleas. To the extent Buckeye is using discovery in this adversary proceeding to obtain information not available to it the state court actions, such conduct constitutes an abuse of the discovery process.

Finally, it is within the Court's discretion to enter an order to appear and show cause. Buckeye is not entitled to the issuance of such order merely because Angelilli has not complied with the Subpoena. Fed. R. Civ. P. 45(e) does not require the Court to issue an order to show cause, rather it provides, in pertinent part: "Failure of any person without adequate excuse to obey a

subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued." Fed. R. Civ. P. 45(e).

Based upon the totality of the record before this Court, including the docket, the Motion, and Buckeye's representations at the hearing, Court finds that (i) the Subpoena is overly broad in scope and time, and (ii) Buckeye has not complied with Rules 1 and 26(b)(1). In accordance with the Federal Rules of Civil Procedure, this Court exercises its discretion and will not issue an order to appear and show cause. For the reasons stated above, the Motion is denied.

IT IS SO ORDERED.

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