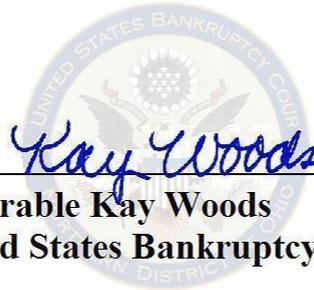


IT IS SO ORDERED.



Dated: December 09, 2009
04:14:35 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

JOHN P. SCOTT and
HOLLY M. SCOTT,

Debtors.

* * * * *

JOHN SCOTT and
HOLLY M. SCOTT,

Plaintiffs,

v.

WELLS FARGO HOME MORTGAGE, INC.,
et al.,

Defendants.

CASE NUMBER 03-41596

ADVERSARY NUMBER 08-4092

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING DEFENDANT'S MOTION
FOR RULE 35 MEDICAL EXAMINATION

This cause is before the Court on Defendant's Motion for

Rule 35 Medical Examination ("Rule 35 Motion") (Doc. # 43) and Memorandum of Law in Support of Defendant's Motion for Rule 35 Medical Examination ("Memo in Support") (Doc. # 44) filed by Wells Fargo Bank., N.A. ("Wells Fargo") on November 11, 2009. The Rule 35 Motion proposed to take the examination of Plaintiff Holly M. Scott ("Mrs. Scott") on November 20, 2009, in Cleveland, Ohio. Because the proposed date of the examination was prior to the date Plaintiffs/Debtors John P. Scott and Mrs. Scott (collectively, "Debtors") had to oppose or respond to the Rule 35 Motion, the Court held a telephonic status conference to discuss the Rule 35 Motion on November 13, 2009, at which Scott King, Esq. represented Wells Fargo and Phillip Zuzolo, Esq. represented Debtors.

At the conclusion of the conference call, the Court ordered Wells Fargo to supplement the Rule 35 Motion no later than November 17, 2009. Debtors were ordered to respond to the Rule 35 Motion no later than November 20, 2009. As a consequence, on November 17, 2009, Wells Fargo filed Wells Fargo Bank, N.A.'s Supplemental Memorandum in Support of Motion for Rule 35 Medical Examination ("Supplemental Memo") (Doc. # 46). Debtors filed Plaintiffs' Opposition to Defendant's Rule 35 Request for an Independent Medical Examination of Plaintiff, Holly Scott ("Debtors' Opposition") (Doc. # 48) on November 20, 2009. Without leave of the Court, on November 23, 2009, Wells Fargo filed Wells Fargo Bank, N.A.'s Reply Memorandum in Support of Motion for Rule 35 Medical Examination (Doc. # 49).

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

I. PROCEDURAL POSTURE OF CASE

Debtors commenced this Adversary Proceeding on May 7, 2008. Pursuant to this Court's Adversary Case Management Initial Order ("Case Management Order") (Doc. # 3), all discovery was to be completed by the 120th day following service of the Summons unless the parties jointly agreed to a discovery plan with a different discovery completion date. (Case Mgt. Order at 2-3.) In compliance with the Case Management Order, on July 29, 2008, the parties filed Pre-Trial Report of the Parties ("Report") (Doc. # 15), which provided for discovery to be completed no later than January 30, 2009, with the parties to be ready for trial by April 1, 2009. As part of the discovery plan, Debtors proposed to disclose experts by October 1, 2008, and Wells Fargo was to identify any expert by December 1, 2008. Debtors indicated in the Report that they contemplated discovery "involving . . . Expert forensic accountant [and] Medical Testimony regarding stress[.]" (Report ¶ 3(g).) In addition, the Report stated, "The parties agree to work

out all of the deposition dates and times by agreement of the parties." (*Id.* ¶ 6(d).)

The parties did not complete discovery by the end of January 2009. Instead, the parties filed four joint motions to extend discovery (Doc. ## 17, 20, 30 and 38). The Court entered three orders granting the requested time to complete discovery (Doc. ## 18, 21 and 31). When the Court entered Order Granting Third Motion to Extend Discovery (Doc. # 31) on July 24, 2009, it added the following decretal language: "No further extensions of the discovery period will be granted. All discovery must be completed by November 4, 2009." Despite the Court's explicit order concerning the completion of discovery, on November 2, 2009, the parties filed Joint Motion to Extend Discovery ("Fourth Motion") (Doc. # 38), which sought an additional seven weeks to complete discovery. The Fourth Motion stated that the parties requested additional time because (i) "Defendant's counsel has only recently been retained to defend this case;"¹ (ii) Wells Fargo had just delivered some documents to Debtors that were "overdue;" (iii) the parties were "attempting to resolve discovery disputes without court intervention;" and (iv) the parties were working on mutually convenient dates/times for Debtors to depose representatives and an employee of Wells Fargo. The Fourth Motion failed to indicate that Wells Fargo would seek a medical examination of Mrs. Scott or that

¹ Wells Fargo has been represented by legal counsel at all stages of this Adversary Proceeding. The fact that Wells Fargo chose to change attorneys at a time when the final court-ordered discovery period was about to close did not and does not warrant an extension of the discovery period.

Wells Fargo intended to file the Rule 35 Motion. On November 3, 2009, the Court entered Order to Extend Discovery Until 12/22/09 (Doc. # 40), which included the following language: "On November 3, 2009, the Court held a telephonic hearing on the Joint Motion to Extend Discovery (Doc. # 38). The Court stated that it would grant the Joint Motion and extend the discovery period for the fourth time; provided, however, (i) all discovery must be completed no later than December 22, 2009; and (ii) NO further extensions of the discovery period will be granted."

II. RULE 35 MOTION

Wells Fargo argues that it needs to have a psychologist examine Mrs. Scott because the Complaint (i) alleges that the conduct of Wells Fargo caused Mrs. Scott to seek medical counseling and that she was prescribed medication as a result of that treatment; and (ii) seeks non-economic damages for mental anguish. (Memo in Supp. at 1.) The Rule 35 Motion requests that Mrs. Scott undergo a "medical examination" with Michael B. Leach, Ph.D. In the Supplemental Memo, Wells Fargo explains that Dr. Leach is a licensed psychologist. Wells Fargo also postulates that it is not unduly burdensome for Mrs. Scott to travel to Cleveland Heights for the examination because Dr. Leach's office is "less than 60 miles" from the Debtors' residence. (Suppl. Memo at 8.)

Wells Fargo contends that it is entitled to take the Rule 35 examination of Mrs. Scott because (i) Mrs. Scott has placed her mental condition in controversy and (ii) good cause exists for such

examination. Thus, Wells Fargo argues that it meets the legal standard for a court-ordered mental examination, as set forth in *Schlagenhauf v. Holder*, 379 U.S. 104, 118-119 (1964).

Despite the written submissions by Wells Fargo, however, the event that appears to have triggered the Rule 35 Motion is the receipt by Wells Fargo on October 14, 2009, of a "copy of a report prepared by [Debtors'] expert economist," Stan V. Smith, Ph.D. ("Smith Report"). (Suppl. Memo at 2.) Wells Fargo attached the Smith Report to its Supplemental Memo as Exhibit A. After stating that the Smith Report "values [Mrs. Scott's] 'loss in enjoyment of life' between \$424,441 and \$631,750[,]" Wells Fargo goes on to state, "At this point, Ms. Scott has placed her mental condition at issue." (*Id.*)

Debtors argue that "[r]equesting an independent medical examination ("IME") at this late date is unreasonable." (Debtors' Opp. at 3.) Debtors further state that the Rule 35 Motion is incomplete because it fails to describe the manner and/or procedures that will be used during the IME. (*Id.*) Debtors counter that Mrs. Scott has not put her mental condition at issue merely by requesting damages for emotional distress. In addition, Debtors assert that an IME is not needed to refute the Smith Report because such Report only deals with a calculation of damages, not causation or the existence of any damages. (*Id.* at 7.)

III. LEGAL ANALYSIS

As set forth in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964),

there are two questions for this Court to resolve: 1.) have Debtors placed the mental condition of Mrs. Scott at issue? and 2.) if Debtors have put Mrs. Scott's mental condition at issue, has Wells Fargo demonstrated good cause to require Mrs. Scott to undergo a Rule 35 examination? In *Schlagenhauf*, the Supreme Court analyzed when and under what circumstances a medical examination pursuant to Federal Rule of Civil Procedure 35 can be ordered.

In the *Schlagenhauf* case, bus passengers were injured when a bus struck a tractor-trailer. These passengers sued the bus owner, the bus driver, the tractor-trailer owners and the tractor-trailer driver. The bus driver did not assert his mental or physical condition either in support of or in defense of a claim; however, the tractor-trailer owners alleged in their answer to a cross-claim that the bus driver was not mentally or physically capable of operating the bus at the time of the accident. The tractor-trailer owners moved for an examination of the bus driver under Rule 35, which included an attorney affidavit concerning the bus driver's eye sight. After the District Court granted the motion for several physical examinations, the bus driver sought a writ of mandamus to set aside the District Court order. The Seventh Circuit Court of Appeals denied the writ, after which the Supreme Court vacated the appellate order and remanded the matter to the District Court.

The Supreme Court held that (i) Rule 35 was constitutional; (ii) a district court has the power to order the examination of a party defendant under Rule 35, even on the application of a co-

defendant, but lacked power to order examination of non-parties; and (iii) the tractor-trailer owners failed to make the necessary showing that the bus driver's physical or mental condition was in controversy or that good cause was shown for the examination, as required by Rule 35.

The Supreme Court held:

Rule 35 therefore, requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the rule's requirements of "in controversy" and "good cause," which requirements, as the Court of Appeals in this case itself recognized, are necessarily related.

Id. at 118-19.

This Court will first address whether Wells Fargo has adequately demonstrated that Mrs. Scott's mental condition is in controversy. In the instant case, Debtors allege that Mrs. Scott sought medical counseling and was prescribed medication (Compl. ¶ 49).² Debtors contend that, although Mrs. Scott sought medical treatment in 2004 and 2005, at which time she was prescribed medication, Mrs. Scott "is not treating now." (Debtors' Opp. at 8.) Debtors argue, "Just because [Debtors] seek substantial damages for emotional distress does not convert the claim's 'garden variety' nature into one 'in controversy' under Rule 35." (*Id.* at 7.)

The Supreme Court noted that there are situations where the

² Interestingly, Wells Fargo does not contend that Mr. Scott has put his mental condition at issue even though the Complaint alleges that Mr. Scott "was unable to perform his duties from the worry and anxiety of not being able to help and the additional fear that their house would be taken. As a result, John Scott sought counseling while in Iraq from the PTSD counselors." (Compl. ¶ 49).

pleadings alone are sufficient to meet the requirement that a party's mental or physical condition is in controversy. "A plaintiff in a negligence action who asserts mental or physical injury places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury." *Schlagenhauf*, 379 U.S. at 119 (citations omitted). The Court went on to say, however, that where a party's condition is sought to be placed at issue by another party, the party who requests the examination is required to make an affirmative showing that the mental or physical condition of the party to be examined is in controversy and that there is good cause for the requested examination.

Wells Fargo postulates that Mrs. Scott's mental condition is in controversy because Debtors "allege that they are entitled to noneconomic damages for mental anguish suffered as a result of Wells Fargo's alleged conduct." (Suppl. Memo at 2.) Wells Fargo quotes from paragraphs 3, 48, 49 and 50 of Debtors' Complaint in support of this assertion.

Debtors counter, "The mere fact that the Plaintiff is requesting damages for emotional distress does not place her mental condition at issue." (Debtors' Opp. at 5.)

Many of the statements in Debtors' Complaint (see ¶¶ 3, 48 and 50) are generalized statements relating to mental anguish that do not specifically place Mrs. Scott's mental condition at issue.

A claim for damages in [excess of one million dollars], without more, does not alter this court's conclusion that Turner's claim for damages for emotional distress is basically a 'garden-variety' one, and therefore does not warrant an independent mental examination. . . . This court concludes that "emotional distress" is not synonymous with the term "mental injury" as used by the Supreme Court in *Schlagenhauf v. Holder* for purposes of ordering a mental examination of a party under Rule 35(a) and specifically disagrees with those few cases holding that a claim for damages for emotional distress, without more, is sufficient to put mental condition "in controversy" within the meaning of the Rule. If this were the law, then mental examinations could be ordered whenever a plaintiff claimed emotional distress or mental anguish. Rule 35(a) was not meant to be applied in so broad a fashion.

Turner v. Imperial Stores, 161 F.R.D. 89, 97 (S.D. Cal. 1995).

That being said, however, Debtors have put Mrs. Scott's mental condition in controversy based on paragraph 49 of the Complaint, wherein Debtors allege: "The actions by the Defendant caused Holly Scott to seek medical counseling and she was prescribed medication as a result of the treatment from the Defendant." (Compl. ¶ 49.) This allegation goes beyond a generalized statement of mental anguish. In addition, in the Report, Debtors indicated the case would involve discovery regarding "Medical Testimony involving stress." (Report at ¶ 3(g).) Accordingly, this Court finds that Debtors have placed Mrs. Scott's mental condition in controversy, which satisfies the first prong of the two-part test in *Schlagenhauf*.

The second question to be answered is whether Wells Fargo has established good cause to conduct a psychological examination of Mrs. Scott. As set forth above, Debtors indicated early on in the

case that they intended to introduce medical testimony in support of their case. This Adversary Proceeding was filed in May 2008. Despite the lapse of the initial discovery period and three subsequent extensions of the discovery period, Wells Fargo did not seek an examination of Mrs. Scott until last month - more than eighteen (18) months after the case was commenced and approximately five weeks before the close of discovery. Moreover, Debtors represent that Mrs. Scott has not sought medical treatment since 2005.

Wells Fargo acknowledges that "[a]mong the factors looked to by courts to determine the existence of good cause are the availability of the desired information from other sources, and its necessity to determine important factual issues in the case." (Suppl. Memo at 5, citing *Mohamed v. Marriott Int'l, Inc.*, 1996 U.S. Dist. LEXIS 2788, *11-12 (S.D.N.Y. 1996).) Despite this acknowledgment, Wells Fargo fails to state whether it has (i) requested and/or obtained copies of Mrs. Scott's medical records; (ii) sought to depose the physician who treated Mrs. Scott in 2004 and 2005; and/or (iii) sought to depose Stan Smith about the Smith Report. In fact, Wells Fargo fails to state whether it made any effort to obtain information concerning Mrs. Scott's emotional distress, as alleged in the Complaint, prior to filing the Rule 35 Motion.

In *Mohamed v. Marriott*, the defendant resisted a mental examination of an American Sign Language (ASL) interpreter on

several grounds, including that the interpreter had not had any ASL training in the two year period since the meeting with the plaintiff and that her skills had "atrophied." As a result, the defendant argued that "any evaluation today would not be probative of [the interpreter's] skill at the time in question." *Mohamed*, 1996 U.S. Dist. LEXIS 2788 at *12. The Court found, however:

Whether or not the results of the test will be admissible at trial - or the context within which the results would have to be presented to be admissible - are not at issue here. At this juncture, it is merely necessary to determine if good cause exists for examination. Even if a belated evaluation will be imperfect, it will provide more information than no evaluation at all and will at least serve to establish a base level of skill which the finder of fact could confidently deem to be the lowest ebb of Collins' skills.

Id. at *13.

Debtors may attempt to use the Smith Report to establish that Mrs. Scott has or will have diminished enjoyment of life based on the alleged conduct of Wells Fargo. Wells Fargo has demonstrated good cause for a Rule 35 examination in order to determine its position concerning such alleged damages.

The last argument made by Debtors is that the proposed examination is unreasonable and that Wells Fargo has failed to describe the manner and/or procedures that will be used in the proposed IME. (Debtors' Opp. at 3.) The Court agrees that Mrs. Scott should not be compelled to travel sixty (60) miles one way in order for Wells Fargo to have a psychologist of its choosing examine her. Debtors do not dispute Dr. Leach's qualifications, but do object that the method of the proposed examination has not been

disclosed. The Court will fashion an order to protect Mrs. Scott while allowing Wells Fargo to conduct the Rule 35 examination.

The Court will permit Wells Fargo to conduct a psychological examination of Mrs. Scott, but only to the extent and upon the conditions set forth below:

1. The examination will be conducted in Warren, Ohio, or at such other location as may be mutually agreed upon by the parties.
2. The examination will be conducted at a mutually agreeable date and time, no later than December 31, 2009.
3. The examination will be concluded in one hour; provided, however, that Mrs. Scott may agree to be examined for a longer period of time.
4. The scope of the examination will be limited to (i) matters alleged by Debtors in the Complaint; and/or (ii) mental and/or emotional injury and damages resulting from the alleged misconduct by Wells Fargo.
5. Any report and/or other information resulting from or in connection with the examination of Mrs. Scott shall be covered by the Stipulated Protective Order dated November 16, 2009 (Doc. # 45).
6. Wells Fargo shall provide a copy of Dr. Leach's report regarding the examination to Debtors' counsel

no later than thirty (30) days after completion of the examination.

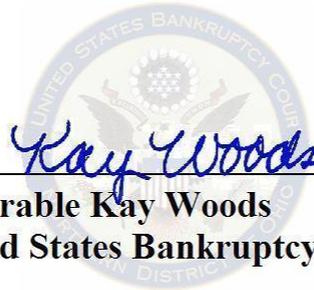
7. In the event that Debtors desire to depose Dr. Leach after receiving a copy of his report, the parties will cooperate to schedule such deposition, which deposition shall be concluded no later than thirty (30) days after receipt by Debtors' counsel of Dr. Leach's report.

The Court will extend the discovery period until March 1, 2010, in order to provide the parties with additional time to complete all discovery, including the discovery set forth above.

An appropriate order will follow.

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IT IS SO ORDERED.



Dated: December 09, 2009
04:14:35 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

JOHN P. SCOTT and
HOLLY M. SCOTT,

Debtors.

* * * * *

JOHN SCOTT and
HOLLY M. SCOTT,

Plaintiffs,

v.

WELLS FARGO HOME MORTGAGE, INC.,
et al.,

Defendants.

CASE NUMBER 03-41596

ADVERSARY NUMBER 08-4092

HONORABLE KAY WOODS

ORDER (i) CONDITIONALLY GRANTING DEFENDANT'S MOTION FOR RULE 35
MEDICAL EXAMINATION AND (ii) EXTENDING DISCOVERY PERIOD

This cause is before the Court on Defendant's Motion for

Rule 35 Medical Examination ("Rule 35 Motion") (Doc. # 43) and Memorandum of Law in Support of Defendant's Motion for Rule 35 Medical Examination (Doc. # 44) filed by Wells Fargo Bank., N.A. ("Wells Fargo") on November 11, 2009. On November 17, 2009, Wells Fargo filed Wells Fargo Bank, N.A.'s Supplemental Memorandum in Support of Motion for Rule 35 Medical Examination (Doc. # 46). On November 20, 2009, Debtors John P. Scott and Holly M. Scott ("Debtors") filed Plaintiffs' Opposition to Defendant's Rule 35 Request for an Independent Medical Examination of Plaintiff, Holly Scott (Doc. # 48).

For the reasons given in the Court's Memorandum Opinion entered this date, the Court grants the Rule 35 Motion. Debtor Holly M. Scott ("Mrs. Scott") is ordered to submit to a psychological examination with Michael B. Leach, Ph.D., to the extent and upon the conditions set forth below:

1. The examination will be conducted in Warren, Ohio, or at such other location as may be mutually agreed upon by the parties.
2. The examination will be conducted at a mutually agreeable date and time, no later than December 31, 2009.
3. The examination will be concluded in one hour; provided, however, that Mrs. Scott may agree to be examined for a longer period of time.
4. The scope of the examination will be limited to (i)

matters alleged by Debtors in the Complaint; and/or
(ii) mental and/or emotional injury and damages
resulting from the alleged misconduct by Wells
Fargo.

5. Any report and/or other information resulting from
or in connection with the examination of Mrs. Scott
shall be covered by the Stipulated Protective Order
dated November 16, 2009 (Doc. # 45).
6. Wells Fargo shall provide a copy of Dr. Leach's
report regarding the examination to Debtors' counsel
no later than thirty (30) days after completion of
the examination.
7. In the event that Debtors desire to depose Dr. Leach
after receiving a copy of his report, the parties
will cooperate to schedule such deposition, which
deposition shall be concluded no later than thirty
(30) days after receipt by Debtors' counsel of Dr.
Leach's report.

The Court extends the discovery period until March 1, 2010, in
order to provide the parties with additional time to complete all
discovery, including the discovery set forth above.

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