

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

ALLEN F. BELLVILLE, JR.,
Debtor

Case # 00-11144
Chapter 13



Appearances: *Rebecca Rice, Esq.*
Cohen & Rice
Rutland, VT
Counsel for Debtor

Jess T. Schwidde, Esq.
Glinka & Schwidde
Rutland, VT
Counsel for Movant

MEMORANDUM OF DECISION
DENYING MOTION FOR RULE 2004 EXAMINATION OF BRENT BAKER

The Court held a hearing on the motion of Thomson Kernaghan & Co., Ltd (hereinafter, “the movant”) for a Rule 2004 examination of Brent Baker [doc. # 36-1]. After considering the parties’ arguments and the papers submitted in this matter, the Court denies the movant’s motion for the reasons set forth below.

BACKGROUND

Debtor Allen F. Bellville, Jr. filed for chapter 13 bankruptcy relief on October 18, 2000. In his schedules, the debtor included the movant as an unsecured creditor with a contingent, unliquidated, disputed claim of \$68,000 [doc. #1-1, Schedule F, p.2 (“Claim, if any, of the Bankruptcy Estate of Southern Group, Inc. & LifeOne, Inc.”)]. The debtor submitted his chapter 13 plan (hereinafter “the plan”) on October 30, 2000, giving proper notice of the plan to all interested parties. The plan was confirmed without objection at a hearing held on December 21, 2000.

Approximately two months after the debtor’s plan was confirmed, the movant made its first request for a Rule 2004 examination, requesting permission to examine the debtor (see doc. #13-1). Soon thereafter, the movant filed a second motion seeking to examine Dunn Swan & Cunningham pursuant to Rule 2004 (see doc. #20-1). In order to place the second and third motions for a 2004 examination in context, the Court must provide a brief explanation of a chapter 11 case currently pending in the District of Maryland.

– *The Maryland Chapter 11 Bankruptcy Case* –

Prior to the debtor’s filing for chapter 13 bankruptcy relief in Vermont, The Southern Group and LifeOne, Inc. (hereinafter, the “SGLO-Debtor”) filed a chapter 11 bankruptcy case in the U.S. Bankruptcy Court for the District of Maryland. The movant was appointed to pursue actions on behalf of the SGLO-Debtor bankruptcy estate in that case, and had begun an adversary proceeding against various parties based upon a conspiracy and fraud claim. The debtor was one of the defendants in that adversary proceeding.

The movant alleges that the debtor had been an officer and employee of two companies, Raychest Corporation (“Raychest”) and Arvid, Inc. (“Arvid”), that were controlled by SGLO-Debtor. The movant also alleges that the debtor was directly involved in the daily affairs, management and financial transactions of SGLO-Debtor. Allegedly, as an officer and employee of Raychest and Arvid, the debtor participated in fraudulent transactions that allowed him and others to extract monies from SGLO-Debtor that they would not have been able to acquire but for the fraud. According to the movant, with the aid of the law firm Dunn Swan & Cunningham, the debtor and others hoodwinked a stock transfer company into allowing the sale of SGLO-Debtor’s otherwise restricted stock. The movant alleges that by procuring this sale, the debtor and others were able to liquidate and/or dissipate assets of SGLO-Debtor. The movant began the adversary proceeding against the debtor and others to recover these assets for SGLO-Debtor’s estate,

This Court has allowed a Rule 2004 examination of the debtor based upon the debtor’s consent (see doc. #35-1) and of Michael Dunn, an employee of Dunn Swan & Cunningham, in the absence of any objection, based upon an arguable showing that there was a connection between Dunn Swan & Cunningham and the administration of the instant chapter 13 estate (see doc. #22-1). During his Rule 2004 examination, Mr. Dunn apparently indicated that he and a Brent Baker “were together assisting the corporate debtor [SGLO-Debtor] with respect to the underlying transaction [i.e., enabling SGLO-Debtor’s restricted stock to be sold].” Movant’s Mem. Supp. Rule

2004 Exam. Brent Baker ¶8 (doc. #42-1). Based upon this allegation, the movant now seeks to conduct a third 2004 examination in the debtor's Vermont chapter 13 bankruptcy case, namely an examination of Brent Baker.

DISCUSSION

A. Rule 2004 Generally

Rule 2004 of the Federal Rules of Bankruptcy Procedure was designed to “show the condition of the estate and to enable the Court to discover its extent and whereabouts, and to come into possession of it, that the rights of the creditor may be preserved.” In re Drexel Burnham Lambert, Inc., 123 B.R. 702, 708 (Bankr. S.D.N.Y. 1991) [citing Cameron v. United States, 231 U.S. 710, 717 (1914) (discussing former § 21(a) of the Bankruptcy Act, from which former Bankruptcy Rule 205 and current Rule 2004 are in part derived)]. Thus, to meet this objective, discovery under Rule 2004 is broader than discovery under the Federal Rules of Civil Procedure; in fact, it is often compared to a “fishing expedition.” See In re Drexel, 123 B.R. at 711 (instructing that Rule 2004 examination “can be legitimately compared to a fishing expedition.” (citing In re Vantage Petroleum, Corp., 34 B.R. 650, 651 (Bankr. E.D.N.Y. 1983)); In re Ecam Publications, Inc., 131 B.R. 556, 559 [“In fact, the scope of a Rule 2004 examination is so broad that it can be in the nature of a ‘fishing expedition.’” (quoting In re Coffee Cupboard, Inc., 128 B.R. 509, 514 (E.D.N.Y. 1991))]; In re French, 145 B.R. 991, 992 (Bankr. D.S.D. 1992) (“Bankruptcy Rule 2004 is designed to be a quick ‘fishing expedition’ *into general matters and issues regarding the administration of the bankruptcy case . . .*” (emphasis added)). Thus, while Rule 2004 is generally used by a trustee to examine a debtor, it can be used: (1) by parties other than the trustee; and (2) to examine others besides the debtor. See Fed. R. Bankr. P Rule 2004(b) (Rule 2004 may be used by a party in interest); see also, In re Ecam, 131 B.R. at 559 (“Third parties are subject to examination pursuant to Rule 2004 *if they have knowledge of the debtor’s affairs.*”) (emphasis added); In re Valley Forge Plaza Ass’n, 109 B.R. 669, 674 (Bankr. E.D. Pa. 1990).

As broad as Rule 2004 is, however, there are limits to its use. For example, “examination of a witness about matters having no relationship or no effect on the administration of an estate is improper.” In re Ecam, 131 B.R. at 559 (citing In re Johns-Manville, Inc., 42 B.R. 362, 364 (S.D.N.Y. 1984)); see also, In re Dinublio, 177 B.R. 932, 940 (E.D. Cal. 1993) [instructing that, “Third parties subject to examination pursuant to Rule 2004 are ‘only [] those persons possessing knowledge of the debtor’s acts, conduct or financial affairs *so far as this relates to a debtor’s proceeding in bankruptcy.*” (quoting Matter of Wilcher, 56 B.R. 428, 434 (Bankr. N.D. Ill. 1985) (emphasis added) (further citation omitted)]. Additionally, Rule 2004 examinations “may not be used to annoy, embarrass or oppress the party being examined.” Id. (citing In re Drexel, 123 B.R. at 712). Moreover, “once an adversary proceeding or another contested matter has been initiated, parties must proceed with discovery for that litigation pursuant to the Federal Rules of Civil Procedure.” Id. (citing Valley Forge, 109 B.R. at 647, and In re Silverman, 36 B.R. 254, 258-59 (Bankr. S.D.N.Y. 1984)). Finally, in a post-confirmation situation, a Rule 2004 examination “is restricted to the administration of the case post-confirmation.” In re Cinderella Clothing Industries, 93 B.R. 373, 377 (Bankr. E.D. Pa. 1988) (“The [Rule 2004] examination . . . must be limited to issues which the court, at that time, still has the power to entertain.”); see also In re Express One International, Inc., 217 B.R. 215, 216-17 (Bankr. E.D. Tx. 1998) (instructing that in a post-confirmation situation, Rule 2004 examination is limited to matters relating to the administration of the case).

B. Applying Rule 2004 to the Instant Motion

In this instance, the Court has been informed that Brent Baker is a third party whose office is in Texas, but it has been provided no other information about the target of the subject motion. Apparently, the movant learned of Mr. Baker’s identity when it conducted a Rule 2004 examination of Mr. Michael Dunn. Allegedly, and according to the movant, Brent Baker assisted in the overall scheme that defrauded SGLO-Debtor. See Movant’s Mem. Supp. Rule 2004 Exam. Brent Baker ¶¶16, 29 8 (doc. #42-1), but, cf., Excerpt Michael E. Dunn Depo., attached to

Thomson Kernaghan's Mtn. Rule 2004 Exam. Brent Baker & Supp. Mem. (Doc #36-1) (indicating no such revelation). Given the scant information about Brent Baker, the Court has no basis to make a finding that a Rule 2004 examination of Mr. Baker about the alleged scheme committed against SGLO-Debtor would yield any information relating to or effecting the administration of the debtor's chapter 13 estate in Vermont.

Further, the Court finds the movant's claim that a Rule 2004 examination of Brent Baker might uncover assets that truly belong to the debtor's chapter 13 estate to be disingenuous: If the debtor has assets that were fraudulently acquired, they certainly would not belong to either the debtor or his chapter 13 estate. Moreover, the movant has not raised any claims of fraud in the debtor's chapter 13 case. Thus, the Court finds it would not serve the purpose of Rule 2004 to permit the movant to examine Brent Baker in the context of the debtor's chapter 13 case.

Once the Court has concluded that there appears to be no connection between the information Brent Baker might be able to provide and the administration of this chapter 13 estate, it must question what purpose, if any, such an examination would serve. It appears to the Court that the only purpose to be served is one which should not be served, namely, to enable the movant to procure information it cannot obtain through the discovery tools available to it in the chapter 11 adversary proceeding pending in Maryland. This Court will not enter an Order which permits the movant to thwart the adversary proceeding rules and obtain through a Rule 2004 examination of Mr. Baker in the debtor's chapter 13 case what it cannot obtain from Mr. Baker in the context of the discovery permitted in the adversary proceeding.

CONCLUSION

The Court finds that the movant has failed to make a sufficient showing that Brent Baker has knowledge of the debtor's acts, conduct or financial affairs, as these relate to the debtor's bankruptcy case and, more specifically, to the administration of the debtor's chapter 13 case, to warrant an Order allowing a Rule 2004 examination of Brent

Baker. Therefore, the movant Thomson Kernaghan's Motion for Rule 2004 Examination of Brent Baker in this case is denied.

August 9, 2002
Rutland, Vermont

A handwritten signature in black ink, appearing to read "Colleen A. Brown". The signature is fluid and cursive, with the first name "Colleen" and last name "Brown" clearly distinguishable.

Colleen A. Brown
United States Bankruptcy Judge