

Dated: April 06, 2011
The following is ORDERED:



Jennie D. Latta

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UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re RODNEY LESLIE ROBINSON,
Debtor.

Case No. 10-24596-L
Chapter 13

BAC Home Loans Servicing, LP
Movant

v.

Motion to Quash Subpoena

Daniel M. McDermott,
United States Trustee for Region 8,
Respondent

ORDER DENYING, IN PART, MOTION TO QUASH SUBPOENA

Does the United States Trustee have standing to examine the representative of the holder of an allowed secured claim when no objection has been filed with respect to the claim by the Chapter 13 Trustee or anyone else? That is the question submitted to the court by BAC Home Loans Servicing, LP (“BAC”) in connection with its motion to quash the subpoena issued by Daniel M.

McDermott, United States Trustee for Region 8 (“UST”). BAC argues that the UST lacks standing for three reasons specified below. The court, however, believes that there is a more fundamental question that must first be answered: can a party who failed to timely object to a motion for Rule 2004 examination raise the issue of standing in response to the subpoena issued in furtherance of the order for examination?

This court granted the UST’s motion for 2004 examination of BAC’s representative (“Rule 2004 Motion”) *without objection* by order entered on January 11, 2011. (Doc. No. 43.) The UST caused a Subpoena for Rule 2004 Examination to be issued by the Bankruptcy Court Clerk on January 20, 2011. (Doc. No. 45.) BAC responded by filing its motion to quash on February 3, 2011. (Doc. No. 48.) The court heard oral argument on March 3, 2011, and agreed to consider only the question of standing as an initial matter. In its review of the court file, however, it became apparent that BAC waived its right to question the authority of the UST to conduct the Rule 2004 examination when it failed to object to the motion for examination.

Rule 2004 (a) governs the availability of this special form of examination available only in bankruptcy cases. It provides: “On motion of any party in interest, the court may order the examination of any entity.” Fed. R. Bankr. P. 2004(a). The UST filed its Rule 2004 Motion on December 7, 2010. (Doc. No. 40.) The motion was scheduled for hearing on January 6, 2011, and notice of the motion and hearing were served upon BAC.¹ (Doc. Nos. 40, 41 and 42.) Pursuant to local rule, BAC could have filed a written objection to the motion or could have appeared at the

¹The Rule 2004 Motion contains a certificate of service wherein the UST’s counsel certifies that she e-mailed or mailed a copy of the motion to BAC and to Shapiro & Kirsch on December 7, 2010. (Doc. No. 40.) The Certificate of Notice filed on December 10, 2010, reflects that the Bankruptcy Noticing Center sent copies of the notice of hearing to BAC and Shapiro & Kirsch via regular first class mail on December 10, 2010. (Doc. No. 42.)

scheduled hearing to voice its objection.² It did neither, and the motion was granted without objection.

The UST caused a subpoena to be issued in furtherance of the order granting its motion for examination of BAC. (Doc. No. 45.) BAC then filed a motion to quash the subpoena, raising for the first time the authority and/or standing of the UST to conduct a Rule 2004 examination under the facts and circumstances of this case. Specifically, BAC argues that the UST, as a federal agency, is without authority to take the examination of its representative for three reasons:

(1) The UST may only undertake those actions which are approved and designated by Congress. The authority of the UST is set forth in two sections of the United States Code, 28 U.S.C. § 586 and 11 U.S.C. § 307, neither of which specifically authorizes the UST to take the Rule 2004 examination of BAC's representative.

(2) Rule 2004 specifies that a party in interest may take the examination of any entity, but the UST is not a party in interest.

(3) The UST's motion and subpoena impermissibly encroach upon the province of the standing Chapter 13 trustee.

The UST is given specific statutory authority to raise and appear and be heard on any issue in any case or proceeding under title 11 (but may not file a Chapter 11 plan). 11 U.S.C. § 307.

The Sixth Circuit Court of Appeals has held that the UST, "an officer of the Executive Branch," represents a "public interest." *In re Revco, D.S., Inc.*, 898 F.2d 498, 499 (6th Cir. 1990). Two other courts of appeal have indicated that this authority is to be broadly construed. *In re Columbia Gas*

² Local Bankruptcy Rule 9013-1 provides the procedures for filing motions and objections. By its express terms, this local rule does not apply to motions for examinations of *debtors* pursuant to Rule 2004.

Systems, Inc., 33 F.3d 294, 297 (3d Cir. 1994) and *In re Donovan Corp.*, 215 F.3d 929, 930 (9th Cir. 2000). There is no question that the UST has the requisite standing to appear and be heard in this bankruptcy case. BAC's objection is more narrow and is directed to the UST's authority to undertake a specific act: the examination of a party. BAC raised this issue for the first time in response to the subpoena. BAC has not sought relief from the prior order permitting the UST to examine its representative.

A motion to quash a subpoena is governed by Rule 45(c)(3) of the Federal Rules of Civil Procedure, made applicable in bankruptcy cases pursuant to Rule 9016. That rule is rather narrow.

It provides:

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that :

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information;
- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or
- (iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

Fed. R. Civ. P. 45(c). BAC has raised certain matters that do fall within the permissible grounds for a motion to quash, but lack of authority of the examining party to conduct the examination is not one of them. That issue should have been raised in response to the Motion for Rule 2004 examination. As it was not, it is deemed to be waived. *See Thurman v. Yellow Freight Systems, Inc.*, 97 F.3d 833, 835 (6th Cir. 1996)(The plaintiff waived an issue by not “presenting it squarely before the trial court.” The plaintiff did not litigate the issue at trial; the trial court did not address it; and the plaintiff raised the issue for the first time in his motion to alter or amend the judgment.).

Accordingly, the motion to quash, in so far as it objects to the standing of the UST to examine BAC, is **DENIED**. The court will conduct a hearing on **Thursday, April 28, 2011 at 10:00 a.m.** to consider the remaining matters raised by BAC in its motion to quash.

cc: United States Trustee
BAC
Chapter 13 Trustee
Counsel for these parties