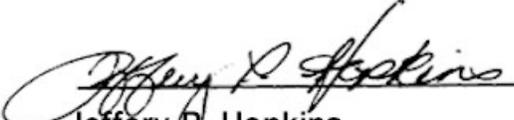


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: October 16, 2006


Jeffery D. Hopkins
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In Re :
 :
DONALD V. YEAGER : Case No. 05-24818
 : Chapter 7
 : Judge Hopkins
Debtor :

MEMORANDUM ON MOTION FOR SANCTIONS

Presently before the Court is a Motion For Sanctions For Contempt Of Debtor, Donald V. Yeager, For Failure To Comply With Order Of The Court ("Sanctions Motion") (Doc. 35) filed by Tuffy Associates Corp. ("TAC"). By its Sanctions Motion, TAC seeks a contempt order for the Debtor's alleged failure to abide by a Court order directing the Debtor to appear for a Fed. R. Bankr. P. 2004 examination and to produce certain documents associated with the Debtor's bankruptcy. A hearing on the Sanctions Motion was held on July 24, 2006.

FACTS

On December 28, 2005, the Court entered an order ("2004 Order") (Doc. 16) granting TAC's motion for a Rule 2004 examination of the Debtor ("2004 Motion") (Doc. 13). The 2004 Order directed the Debtor to appear for a January 16, 2006 examination and produce certain documents identified in an exhibit attached to the 2004 Order. The 2004 Order further provided that "[s]uch examination shall continue from day-to-day until completed."

The Debtor appeared at the January 16, 2006 examination, but did not produce documentation regarding: (1) the Debtor's 401(k) plan with General Motors; (2) bank records; (3) insurance policies; and (4) 2003 tax returns for a corporate entity related to the Debtor. The examination was continued to February 17, 2006. Again, the Debtor appeared without producing all of the required documents. The examination was continued to March 20, 2006, at which time the Debtor failed to appear entirely. The examination was again continued to March, 27, 2006. The Debtor appeared at the fourth exam, but has yet to provide TAC with certain of the previously requested documents. The record from the July 24, 2006 hearing reflects that TAC still has not received documentation regarding: (1) the Debtor's 401(k) plan with General Motors; and (2) records of cash receipts and cash disbursements.

LAW

Bankruptcy courts possess the power to enter civil contempt orders. *See Elder-Beerman Stores Corp. v. Thomasville Furniture Indus. Inc. (In Elder-Beerman Stores Corp.)*, 197 B.R. 629, 632 (Bankr. S.D. Ohio 1996). This includes the power to hold a debtor in civil contempt for failure to comply with an order governing a Rule 2004 examination. *See In re McCaulley*, 218 B.R. 866 (Bankr. N.D. Ohio 1998).

ANALYSIS

TAC argues that the Debtor is in contempt because: (1) he has not provided all of the required documentation; and (2) he failed to appear at the March 20, 2006 examination. These issues will be addressed in order.

I. Production of Documentation

At the July 24, 2006 hearing, the Debtor did not dispute that he failed to produce all of the required documentation at the January 16, 2006 examination. Additionally, the Debtor did not dispute that TAC has yet to receive the 401(k) documentation or records of cash receipts. Instead, the Debtor argued that the documentation was not produced on January 16, 2006, because either: (1) the documentation did not exist; or (2) the Debtor could not locate the documentation.

It goes without saying that one cannot produce a document that does not exist or cannot be located. Nevertheless, that is an issue that should have been raised, in the first instance, in the response to TAC's 2004 Motion. *See* 8A Charles Alan Wright et al., *Federal Practice and Procedure* § 2289 (2d ed. 1994) ("The propriety of the discovery sought is not in issue at the time sanctions are being imposed under Rule 37(b). That question will have been decided when the court ordered the discovery."); *accord Constitution Bank v. Levine*, 151 F.R.D. 278, 279 (E.D. Pa. 1993).

In this case, the Debtor did not object to the 2004 Motion. Moreover, almost four months passed between the filing of the Sanctions Motion and the hearing on the same. During that time, the Debtor never moved to amend or vacate the 2004 Order nor did the Debtor move for a protective order, asserting that he could not find any documents contemplated by the 2004 Order, which seems to belie his present claims to the contrary.

II. Failure to Attend March 20, 2006 Examination

At the July 24, 2006 hearing, the Debtor argued that it was not clear that he had to attend the March 20, 2006 examination. According to the Debtor's understanding, the March 20, 2006 examination was to be held only if TAC chose to go forward with the same by notifying the Debtor and his attorney. The record of the February 17, 2006 examination does not reflect such a conditional agreement. Instead, the record reflects the following:

Mr. Alexsy: We've agreed to resume the rule 2004 exam, Monday, March 20 at 10:30 here in Mr. Slutsky's office.

(Doc. 46, Ex. C at 17.) Neither the Debtor nor his attorney qualified this statement to reflect that the March 20th examination was contingent upon further notice from TAC.¹

CONCLUSION

Because the Debtor has not provided a valid defense to explain his failure to comply with the 2004 Order, the Sanctions Motion will be **GRANTED**. A judgment will be entered awarding TAC its attorney's fees and costs in the amount of \$4,290.² However, to the extent of TAC's sanctions Motion seeks dismissal of the Debtor's bankruptcy case that the portion of the Sanctions Motion is **OVERRULED** without prejudice.

¹ Even if the continuation was conditional, the record at the March 20, 2006 examination reflects that TAC exercised its alleged option to continue the examination.

Mr. Slutsky: [T]his 2004 continuation was if necessary, if felt necessary by counsel for Tuffy's [sic]. No question they felt it necessary. They notified me they wanted to go forward. I have been trying to reach my client to no avail, so I have no idea where he is[.]

(See Doc. 47, Ex. D at 2.)

² On March 30, 2006, counsel for TAC filed an affidavit setting forth TAC's attorney's fees and costs related to the three continued Rule 2004 examinations and the preparation of the Sanctions Motion. See Doc. 35 at Ex. D. The Debtor has never contested the propriety of the affidavit.

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