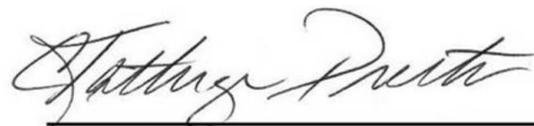


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: July 23, 2007



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C. Kathryn Preston  
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

In re : Case No. 06-51887  
Robert Jeffrey Johnson : Chapter 7  
Debtor(s) : Judge Preston

**ORDER ON MOTION IN LIMINE REGARDING  
2004 EXAMINATION OF ROBERT JOHNSON, JR.**

Under consideration is a *motion in limine* interposed by the Debtor at the final evidentiary hearing held June 22, 2007, on the Motion of Susan L. Rhiel, Trustee for an Order Requiring the Debtor to Turnover Property of the Estate and for Sequestration of Property of the Estate (Doc. #257). The Debtor asks the Court to prohibit the Trustee from using as evidence the testimony of Robert Johnson, Jr., the Debtor's father, elicited during an examination

conducted on September 18, 2006, pursuant to Bankruptcy Rule 2004. The Debtor stresses that, although his counsel had adequate notice and opportunity to attend the examination, he had no motive to develop Mr. Johnson's testimony inasmuch as neither the Trustee's Motion nor any similar motion was then filed and pending. The Trustee asserts that Mr. Johnson's testimony is admissible pursuant to Federal Rule of Civil Procedure 32(a)(3)(B), and additionally should be admissible in the interest of fairness and efficiency.

Admissibility of a deposition is governed by Federal Rule of Civil Procedure 32(a), made applicable to contested matters in bankruptcy pursuant to Bankruptcy Rules 7032 and 9014.

Federal Rule of Civil Procedure 32(a) provides in pertinent part:

**(a) Use of Depositions.** At the trial or upon the hearing of a motion ..., any part or all of a deposition ..., may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

...

(3) The deposition of a witness ... may be used by any party for any purpose if the court finds:

...

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States . . . [.]

Fed. R. Civ. P. 32(a).

While a 2004 examination is testimony given under oath, it differs greatly from a deposition: it is broader in scope and has fewer protections. *Moore v. Lang (In re Lang)*, 107 B.R. 130, 131 (Bankr. N.D. Ohio 1989). *See also Sweetland v. Szadkowski (In re Szadkowski)*, 198 B.R. 140, 141 (Bankr. D. Md. 1996)(citations omitted). A motion to conduct a 2004 examination "may be heard *ex parte* or it may be heard on notice." Fed. R. Bankr. P. 2004 advisory committee note (1983). Witnesses may be precluded from legal representation during the 2004 examination. *In re GHR Energy Corp.*, 33 B.R. 451, 454 (Bankr. D. Mass. 1983)

(quoting *In re Dupont Walston, Inc.*, 4 BCD 61, 63 (Bankr. S.D. N.Y. 1978)). Unlike a deposition, the right to object to questions may be denied and the right to cross-examine may be limited. *Id.* Those involved in a 2004 examination have no right to have the issues defined beforehand. See *In re Dinubilo*, 177 B.R. 932 (E.D. Calif. 1993). A 2004 examination is conducted for the purpose of, among other things, examining the acts, conduct or property of the debtor, any matter which may affect the administration of the Bankruptcy Estate or the debtor's right to a discharge. See Fed. R. Bankr. P. 2004(b). It is a wide-ranging "fishing expedition" that is intended to give parties in interest a tool to facilitate proper and efficient identification of assets of the estate and aid in its administration. For these reasons, a Rule 2004 examination normally is deployed only at the pre-litigation stages of a bankruptcy case. *Id.* It is well settled that once an adversary proceeding or contested matter is commenced, "the discovery devices provided for in [Bankruptcy] Rules 7026-7037 ... apply and Rule 2004 should not be used" as a substitute for a deposition. *In re Lang*, 107 B. R. 130, 131 (Bankr. N.D. Ohio 1989). See also *Sweetland v. Szadkowski (In re Szadkowski)*, 198 B. R. 140, 140-141 (Bankr. Md. 1996) (internal citations omitted). "Without any limiting principles on the use of Rule 2004 as a discovery tool, Rule 9014, adopting the Federal Rules of Civil Procedure for conducting discovery in contested bankruptcy matters, would be superfluous." *Id.* Therefore, the Court cannot treat depositions and 2004 examinations interchangeably.

While the cases cited herein stand for the proposition that a 2004 examination should not be used in lieu of a deposition for discovery purposes, none of these cases speak to the use of a 2004 examination as affirmative evidence in a trial. However, the principles remain the same.

Additionally, although the 2004 examination was conducted during the instant

bankruptcy proceeding, the Trustee's Motion for Turnover had not yet been filed. Therefore, the parties were not yet adversarial (or at least were less so) and the issues under the Trustee's Motion had not yet crystalized. It seems patently unfair to the Debtor to admit the 2004 testimony as evidence under these circumstances. The Court also notes that the drafters of Fed. R. Bankr. P. 9014 incorporated Fed. R. Bankr. P. 7032, which in turn incorporates Fed R. Civ. P. 32, without change; had they intended for a Rule 2004 examination, a tool special to bankruptcy proceedings, to fall within the parameters of Rule 32(a), they would have altered the application of the Rule 32(a) to do so. Accordingly, it appears that Fed. R. Civ. P. 32(a) is not applicable.

Next, the Court must determine whether the 2004 examination is admissible pursuant to the Federal Rules of Evidence. Federal Rule of Evidence 804(b) provides in pertinent part as follows:

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered,...had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

In the instant case, Mr. Johnson was out of the country before and during the hearing held June 22, 2007, and was therefore unavailable as a witness at the trial on the Trustee's Motion. Counsel for the Debtor had reasonable notice and opportunity to attend 2004 examination of Mr. Johnson, and in fact, did attend. The party against whom the testimony is now offered – the Debtor – therefore had opportunity to examine the witness. However, the

Debtor did not have sufficient motive to develop the testimony of Mr. Johnson at the 2004 examination. The Trustee's Motion for Turnover was not filed until some months after the 2004 examination was conducted; thus, the Debtor had no incentive to develop the testimony of a witness in anticipation of a motion not yet filed. The 2004 examination was conducted by an entity not even a party to the present dispute. Rule 804(b)(1) "allows admission of prior testimony *if the issues in both cases are sufficiently similar* so as to give the party against whom the testimony is offered . . . 'similar motive to develop the testimony.' " *United States v. Licavoli*, 725 F. 2d 1040, 1048 (6<sup>th</sup> Cir. 1984)(emphasis added).

The Trustee herself stated in her papers that the "specific matters at issue in the present Motion for Turnover are not addressed in the 2004 examination of Mr. Johnson." While the issues need not be exactly the same, here the issues relating to the Trustee's Motion were not even addressed in the prior testimony. Therefore, it cannot be said that the issues are sufficiently similar such that the Debtor had motive to develop Mr. Johnson's testimony.

Finally, the Trustee suggests that the 2004 examination testimony should be admitted on the basis that it enhances fairness and efficiency. However, the rules of evidence and the rules of civil procedure do not provide for admission of testimony based solely on this criteria, and the Trustee has cited no authority in support of her position.

Accordingly, it is ORDERED that the Debtor's *Motion in Limine* regarding the 2004 examination testimony of Robert Johnson, Jr. hereby is GRANTED and the 2004 examination of Mr. Robert Johnson is excluded as evidence on the Trustee's Motion.

**IT IS SO ORDERED.**

Copies to:

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Frederick M. Luper, Attorney for Debtor (Electronic Service)

Susan L. Rhiel, Chapter 7 Trustee (Electronic Service)

Brenda Bowers, Attorney for First Merit Bank (Electronic Service)

Office of United States Trustee (Electronic Service)

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