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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
AMBER ANN RICKER) CASE NO. 11-12197
)
)
Debtor)

DECISION AND ORDER DENYING MOTION FOR 2004 EXAMINATION

At Fort Wayne, Indiana, on November 1, 2011.

In this chapter 7 case, Aitheras Aviation Group, LLC has filed a motion seeking the court's permission to conduct a Rule 2004 examination of the debtor with regard to a claim it has for services rendered.¹

Rule 2004 of the Federal Rules of Bankruptcy Procedure allows the court to authorize the examination of any entity as to "the acts, conduct, or property, or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate or to the debtor's right to a discharge." Fed. R. Bankr. P. Rule 2004(b). The opportunity for such an examination is available to "any party in interest," Fed. R. Bankr. P. Rule 2004(a), but whether or not the court allows the examination is a matter committed to its discretion, In re Rosenberg, 303 B.R. 172, 175 (8th Cir BAP 2004); In re Dinubilo, 177 B.R. 932, 939 (D. E. D. Cal. 1993), and requires a sufficient cause. Dinubilo, 177 B.R. at 943; In re Symington, 209 B.R. 678, 687 (Bankr.

¹It also served a notice of the motion and the opportunity to object thereto, but motions for a 2004 examination are not among those subject to the notice and opportunity to object procedure established by local rule B-2002-2. See, N.D. Ind. L.B.R. B-2002-2(a)(1)-(25). To the contrary, such motions are usually considered ex parte. See, In re Sheetz, 452 B.R. 746, 748-49 (Bankr. N.D. Ind. 2011) Since the notice was not authorized by the court or its local rules, neither it nor the deadline it purports to establish mean a thing. In re Pratt, 2007 WL 2413010 (Bankr. N.D. Ind. 2007).

D. Md. 1997); Matter of Wilcher, 56 B.R. 428, 434 (Bankr. N.D. Ill. 1985). See also, Norton Bankruptcy Rules, 2010-11 ed., Rule 2004 ed. comment (c), pp. 140-41 (Creditors do not have an absolute right to conduct examinations under rule 2004 “which provides that the court ‘may order’ an examination. One can readily visualize a situation where creditors may want to use this section to deal with their special problems and use the section as a substitute for discovery.”). Furthermore, in a chapter 7 case, such as this one, the rule is primarily investigatory device arising out of the needs of the trustee, and the further a particular request strays from that purpose the more closely it should be scrutinized. In re J & R Trucking, Inc., 431 B.R. 818, 821-22 (Bankr. N.D. Ind. 2010).

Rule 2004 examinations are not a substitute for discovery authorized in adversary proceedings or contested matters. See, William L. Norton, Jr., Norton Bankruptcy Law and Practice 2d: Bankruptcy Rules, Rule 2004, Editor’s Comment (b), at 142 (2005-2006 ed.). Neither are they vehicles by which parties can attempt to do a substantial portion of their discovery before initiating litigation. Instead, particularly in situations like this when a creditor is seeking the examination, Rule 2004 is properly used in order to determine whether there are sufficient grounds to commence an action. In re Bennett Funding Group, Inc., 203 B.R. 24, 28 (Bankr. N.D. N.Y. 1996); In re Handy Andy Home Improvement Centers, Inc., 199 B.R. 376, 380 (Bankr. N.D. Ill. 1996). Once the movant has that much information, any further inquiries should take place in the context of discovery after litigation has been commenced.

Since this is a chapter 7 case, the only purpose for the requested examination would be to determine whether the movant has some basis for objecting to the debtor’s discharge or seeking a determination of the dischargeability of debtor’s obligation to it. (Only the trustee would have standing to pursue any other claims; so for Aitheras Aviation to seek an examination of such claims

would serve no purpose since it could do nothing with the information it obtained. J & R Trucking, Inc., 431 B.R. at 822). Yet, the allegations in the motion suggest that it already has sufficient information to make an informed decision whether or not to file such an action. It wants to examine the debtor “with regards to the claim for services rendered to the Debtor, and the failure to remit payment thereon despite the fact Debtor received insurance proceeds with instruction that they were to be used to satisfy this particular debt.” Second Amended Motion, filed October 12, 2011. Consequently, it seems to know that it rendered services to the debtor, for which the debtor was reimbursed by some type of insurance, and that the debtor used those proceeds for some purpose other than to pay Aitheras Aviation. That should be enough to determine whether it has a colorable basis for filing an action under either § 523 or § 727. As a result, to conduct a 2004 examination under these circumstances would be using it as an inappropriate substitute for formal discovery. Aitheras Aviation Group’s motion for an examination under Rule 2004 is therefore DENIED.

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court