

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
VAN ALPHEN DAIRY LEASING, LLC) CASE NO. 11-14256
)
)
Debtor)

DECISION AND ORDER DENYING MOTION FOR RULE 2004 EXAMINATION

At Fort Wayne, Indiana, on January 10, 2012.

In this chapter 11 case, AgStar Financial Services has filed a motion seeking the court’s permission to conduct a Rule 2004 examination of, and requiring the production of documents from, United Dairy Group, LLC. The request appears to have two components. The first concerns the debtor’s motion to borrow money from United Dairy Group, a motion to which AgStar has objected, and AgStar’s questions as to whether United Dairy “has the financial wherewithal to make the requested post-petition financing.”¹ Motion of AgStar, filed Jan. 6, 2012, ¶ 8. The second arises out of the debtor’s proposed plan, under which United Dairy will acquire an interest in the debtor, and AgStar’s resultant desire for information concerning that entity. See, Motion of AgStar, ¶ 10, 16.

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

¹This concern was not mentioned in AgStar’s objection to debtor’s motion.

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. In re J & R Trucking Inc., 431 B.R. 818, 821 (Bankr N.D. Ind. 2010); Dinubilo, 177 B.R. at 943; In re Symington, 209 B.R. 678, 687 (Bankr. D. Md. 1997); Matter of Wilcher, 56 B.R. 428, 434 (Bankr. N.D. Ill. 1985). See also, Norton Bankruptcy Rules, 2011-12 ed., Rule 2004, comment (c), pp. 142-43 (Creditors do not have an absolute right to conduct examinations under rule 2004 “which provides that the court ‘may order’ an examination.”). The request is usually considered ex parte. See, In re Sheetz, 452 B.R. 746, 748-49 (Bankr. N.D. Ind. 2011).

A 2004 examination is not a substitute for discovery; if the traditional discovery tools are available the potential examiner is required to use them and may not take advantage of Rule 2004. J & R Trucking, 431 B.R. at 821; Sheetz, 452 B.R. at 748. See also, Norton Bankruptcy Rules, Rule 2004, comment (b), (c) at 142-43. In this instance, the traditional discovery tools are available to AgStar, at least as to the first aspect of its desired inquiry. Debtor’s motion to incur post-petition financing from United Dairy and AgStar’s objection to that request constitute a contested matter, with the result that all of the usual discovery tools are already available to it. See, Fed R. Bankr. P. Rule 9014(a), (c). Consequently, “discovery sought in furtherance of [that] litigation is subject to the F. R. Civ. P. rather than the broader bounds of R2004.” In re Valley Forge Plaza Associates, 109 B.R. 669, 674-75 (Bankr. E.D. Pa. 1990). See also, In re Enron Corp., 281 B.R. 836 (Bankr. S.D. N.Y. 2002).

As for the second aspect of its motion – AgStar’s desire for information about United Dairy because of the terms of debtor’s proposed plan – that inquiry seems to be a bit premature. The plan

has only recently been filed² and the court has not yet scheduled any proceedings concerning either it or its associated disclosure statement, the approval of which is a prerequisite for considering confirmation. See, 11 U.S.C. § 1125(b); Fed R. Bankr P. Rules 3017(d), 3018(a).

The purpose of a disclosure statement is to provide creditors with the information they need in order to properly evaluate a proposed plan and make an informed decision concerning it. See, 11 U.S.C. § 1125. See also, Century Glove, Inc. v. First American Bank of New York, 860 F.2d 94, 100 (3rd Cir. 1988) (discussing the history and purpose of disclosure statements). Using the formalities of a disclosure statement avoids forcing creditors to choose between making a decision concerning confirmation without the information needed to do so or engaging in potentially expensive and repetitive individualized discovery in order to obtain that information.

The court will soon be scheduling a hearing to consider the adequacy of the proposed disclosure statement and any objections to it. See, Fed. R. Bankr. P. Rule 3017(a). Those proceedings will offer the court a better opportunity to consider the importance of the information AgStar seeks and how best to obtain it than does AgStar's ex parte motion for a 2004 examination.

For all of these reasons, the motion for a rule 2004 exam and production of documents filed by AgStar Financial Services is DENIED.³

²The plan was filed on December 30, 2011. The present motion was filed one week later, on January 6, 2012.

³The court notes that the proposed order AgStar tendered in connection with its motion is eleven pages long, three pages longer than the body of the motion. That order does not even begin to correspond with the orders this court issues when it authorizes 2004 examinations. See, Sheetz, 452 B.R. at 748-49; 748 n.2. (Bankr. N.D. Ind. 2011) (“Although 2004 motions often ask it to require specific things, this court does not use such language in its orders granting them and, instead, does nothing more than authorize the examination . . .”). AgStar has local counsel in this case and lead counsel may want to consider taking advantage of that localized knowledge in order to improve its filings. In a related vein, the court cannot help but notice that most (if not all) of AgStar's filings

SO ORDERED.

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

contain substantially the same multi-page history of the case and the various parties before getting to the point. (This type of introduction tends to become longer and longer as a case ages and accrues more history. AgStar's counsel is not alone in this and the style is becoming increasingly common.) Such lengthy and repetitive detail is unnecessary. It should rarely take more than a few simple lines to adequately describe the context of any particular filing, enabling counsel to quickly move on to something more interesting and more important.