

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
INTERIORS BY PRISCILLA & PERRY, INC.) CASE NO. 04-15482
)
Debtor)

DECISION ON MOTION FOR 2004 EXAMINATION

At Fort Wayne, Indiana, on July 18, 2005.

This case was originally filed under chapter 11 of the United States Bankruptcy Code but was converted to chapter 7 on April 26, 2005. Yvette Kleven serves as the chapter 7 trustee. On July 11, 2005, Gary and Rebecca Frick, creditors of the debtor filed a motion asking the court’s permission to examine Karen Horvath pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure. Ms. Horvath was the debtor’s bookkeeper and the Fricks believe that her testimony “could be helpful in uncovering potential avoidance actions for the benefit of all creditors,” (§ 5), and that the examination will “substantiate or discover omitted and/or potentially mischaracterized transactions that could result in additional assets for the estate.” (§ 12)

Pursuant to Bankruptcy Rule 2004(a), “[o]n motion of any party in interest, the court may order the examination of any entity.” As a creditor of the debtor, the Fricks are obviously a “party in interest” qualified to seek the examination. It is equally obvious that the debtor’s bookkeeper qualifies as an “entity” that may be examined pursuant to the rule. See also, Fed. R. Bankr. P. Rule 2004(d). Furthermore, the scope of the desired examination is consistent with Rule 2004(b).

Despite the fact that the requested examination comes within the scope of the rule’s printed text, the court, nonetheless, declines to authorize the examination. In re Rosenberg, 303 B.R. 172 (8th Cir. BAP 2004) (motion for a 2004 examination is a matter committed to the court’s discretion).

This case is pending under Chapter 7 of the United States Bankruptcy Code and Yvette Kleven is the duly appointed and qualified trustee of the bankruptcy estate. As trustee, Ms. Kleven has the specific duty to “investigate the financial affairs of the debtor,” 11 U.S.C. §704(4), and the exclusive right to use property of the estate. 11 U.S.C. § 363. Thus, it appears that the requested examination will not only duplicate the trustee’s duty to investigate but, even if conducted, there is little, if anything, that the Fricks could do with the information they obtained. Matter of Perkins, 902 F.2d 1254 (7th Cir. 1990) (If a third party tries to prosecute a cause of action belonging to the trustee, the action should be dismissed). Although the court does not question the potential propriety of examining the debtor’s bookkeeper on the issues identified by the Fricks, it seems that any such examination should be conducted by the Chapter 7 trustee.

The examination under the Rule [2004] is technically available to ‘any party [in] interest.’... In a Chapter 7 case, the general administration is entrusted to the trustee and ordinarily it is the trustee who should conduct any further examination of the debtor or others who dealt with the debtor, and creditors should not be authorized to conduct examination of the debtor unless the request is made of the trustee and the trustee declines. Thus, while creditors have an absolute right to examine the debtor pursuant to Code §343 at the meeting of creditors called pursuant to Code §341. They do not have the same absolute right to conduct additional examination under this section which provides that the court ‘may order’ an examination. Norton Bankruptcy Rules 2004-2005 edition, ed. cmt. (c), at 110-11.

If the Chapter 7 trustee would like to use Rule 2004 to examine Ms. Horvath, the court is highly confident that she and her counsel know how to make that request and the court will consider it at that time. There does not, however, appear to be any reason to allow the Fricks to usurp the role of the trustee and conduct their own investigation into the debtor’s financial affairs. Their motion will be DENIED.

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