

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
DONALD EDWIN MAY and)	CASE NO. 13-32459 HCD
SERITA MAY,)	CHAPTER 7
)	
DEBTORS.)	
)	
SUN ENTERPRISES, INC.,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 13-3064
)	
DONALD EDWIN MAY,)	
)	
DEFENDANT.)	

Appearances:

Michael K. Banik, Esq., counsel for plaintiff, Banik & Renner, 217 South Fourth Street, Elkhart, Indiana 46516; and

Mark P. Telloyan, Esq., counsel for defendant, O'Brien & Telloyan, P.C., Post Office Box 449, South Bend, Indiana 46624-0449.

MEMORANDUM OF DECISION

At South Bend, Indiana, on July 9, 2014.

During discovery, the defendant Donald Edwin May (“defendant” or “debtor”) issued a subpoena to depose Robert Bell, Jr. (“Bell”), Vice President of the plaintiff Sun Enterprises, Inc. (“plaintiff” or “Sun”). Before the court is the plaintiff’s “Motion to Quash Subpoena of Robert Bell, Jr.,” supported by the “Declaration of Robert Bell, Jr.” The defendant filed a “Debtor/Defendant’s Objection to Plaintiff’s Motion to Quash and Debtor/Defendant’s Motion to Reconsider.” (*See* R. 25, 26, 32.) For the reasons that follow, the court grants the plaintiff’s Motion to Quash Subpoena and overruled the debtor’s Objection.¹

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (I).

BACKGROUND

The relevant factual background concerning this deposition challenge is not in dispute. On April 10, 2014, the defendant served upon Bell a deposition subpoena. The subpoena required Bell to appear and to be deposed on May 19, 2014, at 1:00 p.m., in the offices of counsel for the defendant in South Bend, Indiana.

On May 12, 2014, Sun moved to quash the subpoena. In the Motion and his sworn Declaration supporting it, Bell, as Sun's Vice President and spokesman in this adversary proceeding, stated that Sun is a Kentucky corporation located in Boone County, Kentucky; that Bell resides in Boone County, as well; and that Boone County is more than 100 miles from South Bend, Indiana. He further pointed out that Sun does not regularly conduct business in Indiana. Bell asserted that, because his residence and place of employment are approximately 250 miles away from the deposition location, his attendance at the scheduled deposition in South Bend would place a substantial burden on him by requiring him to miss two days of work and to incur travel and lodging expenses. Bell offered to appear telephonically or to testify through Skype for the deposition. Acknowledging that the defendant had declined to accept that compromise, Bell requested that the court either quash the subpoena or modify its terms.

In light of the imminently scheduled deposition the court, by its Order of May 19, 2014, allowed the modification proposed by the plaintiff that the deposition be held telephonically. *See* R. 29, Order.² The defendant now objects to the plaintiff's Motion to Quash and also asks the court to reconsider its Order.

DISCUSSION

The defendant, by objecting to the plaintiff's Motion to Quash and by seeking reconsideration of the court's Order of May 19, 2014, includes more than one request for relief, in violation of the

² The court notes that the bankruptcy judge was away from court on official court business at the time the plaintiff's Motion to Quash was filed with the court. It also believes, although neither party so stated in the record, that the deposition did not occur.

requirements of local bankruptcy rule B-9013-1(a). *See* N.D.Ind. L.B.R. B-9013-1(a) (“[E]very application, motion, or other request for an order from the court . . . shall be filed separately.”). Normally, when reviewing such a motion, the court takes no further action on the pleading as filed; it requires the movant to refile separate requests for relief. In this case, however, two facts lead the court to consider the defendant’s objection: first, the discovery deadline now has passed without resolution of Bell’s deposition; and second, the court’s Order modifying the deposition was not carried out.³ For those reasons, the court reviews the plaintiff’s Motion and the defendant’s Objection to Plaintiff’s Motion to Quash, which was a request named in the caption and supported by argument. *See id.* (“All such requests shall be named in the caption [and] shall state with particularity the order or relief sought and the grounds for the motion.”).

Federal Rule of Civil Procedure 45, made applicable to bankruptcy cases pursuant to Federal Rule of Bankruptcy Procedure 9016, governs the requirements for subpoenas and the means by which a subpoenaed recipient can protect himself from complying with a subpoena by moving to quash or modify it. The burden of persuasion, however, is on the subpoenaed deponent, the party requesting the quashing of the subpoena, to show that he is entitled to protection from the subpoena by demonstrating privilege or undue burden. *See, e.g., Compass North Indus. LLC v. Taylor*, 2014 WL 2779175 at *1 (D. Ariz. June 19, 2014); *Vukadinovich v. Griffith Public Schools*, 2008 WL 5191451 at *1 (N.D. Ind. Dec. 10, 2008). Bell’s justifications for seeking to quash the subpoena are (1) that he lives and works in Kentucky, 250 miles from South Bend, Indiana, the deposition site; (2) that travel to South Bend would be unduly burdensome, time-consuming, and expensive; and (3) that Sun does not regularly conduct business in Indiana.

Rule 45 was amended effective December 1, 2013, for the purpose of clarifying and simplifying the rule. Under subsections (a) and (b), the court where the action is pending or an attorney authorized to practice in that court may serve a subpoena anywhere in the United States. However, subsection (c) of the

³ The court’s Scheduling Order established that discovery must be completed by April 21, 2014. *See* R. 15. The court approved the parties’ request to extend that deadline 60 days, to June 21. *See* R. 21. The deposition was scheduled to be held on May 19, 2014, well within the discovery period.

amended rule now limits the travel distance required of a party or party's officer subpoenaed to appear. *See Havens v. Maritime Commc'ns/Land Mobile, LLC*, 2014 WL 2094035 at *2 (D.N.J. May 20, 2014) (noting that Rule 45's amendments "were intended to circumscribe the Court's authority to compel parties and officers to travel to faraway trials").

Rule 45(c)(1), which governs the "place of compliance," pertains to this adversary proceeding:

(1) A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person, or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

Fed. R. Civ. P. 45(c)(1).

Rule 45(d)(3) is equally relevant herein. It requires a subpoena to be quashed or modified under these circumstances:

(d)(3)(A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, . . . ; or

(iv) subjects a person to undue burden.

Fed. R. Civ. P. 45(d)(3)(A). When any one of the four categories is shown, the objecting subpoenaed party is protected and the court must quash or modify the subpoena.

In this case Bell, a party's officer, sought protection from the subpoena under that section's subparts (ii) and (iv). He first declared that he was commanded to attend a deposition outside the state and more than 100 miles from where he resides, is employed, and regularly transacts business in person. *See* Fed. R. Civ. P. 45(d)(3)(A)(ii). The defendant did not disagree with the facts. Pursuant to this newly amended rule, therefore, the subpoena cannot require Bell's attendance in South Bend, Indiana, which is

neither within the state of Kentucky nor within 100 miles of Bell's residence, employment, or personal business transactions, and thus beyond the rule's geographical limits. This court therefore must quash or modify the subpoena. *See Roundtree v. Chase Bank USA, N.A.*, 2014 WL 2480259 at *2 (W.D. Wash. June 3, 2014) (concluding that court is not authorized to compel attendance of subpoenaed deponent, whether party or nonparty, who is in another state and more than 100 miles from deposition location); *Dietz v. Spangenberg*, 2014 WL 537753 at *4 (D. Minn. Feb. 11, 2014) (concluding that court must quash or modify subpoena requiring person to attend trial, hearing, or deposition beyond the geographical limits); *VirtualAgility, Inc., v. Salesforce.com, Inc.*, 2014 WL 459719 at *4 (E.D. Tex. Jan. 31, 2014) (noting that subpoena is not quashed when deposition location is within 100 miles of deponent's residence or business).

Bell also asserted that his attendance at the scheduled deposition in South Bend would be unduly burdensome, requiring absence from his place of employment for two days and travel and lodging expenses. *See Fed. R. Civ. P. 45(d)(3)(A)(iv)*. He declared, as well, that Sun does not regularly conduct business in Indiana. The defendant responded that Bell made at least 4 trips to Elkhart, Indiana, in conjunction with Elite's repair work for Sun, and would not be subjected to an undue burden by being required to attend a deposition in South Bend, Indiana. However, the court finds that the defendant did not demonstrate that Sun or Bell, Sun's officer, regularly transacted business in person in Indiana. *See Dietz*, 2014 WL 537753 at *5 (concluding that three business trips to the deposition state in a year by party's officer were insufficient to demonstrate the frequency and duration that count as "regularly conducted business" in that state). The court must conclude that the subpoena issued to Bell would, if enforced, violate the geographical limits set out in Rule 45(c)(1) and would be unduly burdensome under Federal Civil Rule 45(d)(3)(A)(ii) and (iv).

Rule 45(d)(3)(A) requires this court, on "timely motion," to quash or modify the subpoena in such circumstances. Bell proposed either quashing or modifying the defendant's subpoena by allowing a telephonic or Skyped deposition. The court, recognizing the time constraints, the mandate of Rule 45(d)(3) to quash or modify the subpoena, and its own broad discretion to control discovery, permitted a telephonic

deposition. *See Jones v. City of Elkhart, Ind.*, 737 F.3d 1107, 1115 (7th Cir. 2013) (describing court’s “extremely broad discretion”). The defendant objected that Sun’s Motion to Quash, filed more than 14 days after the subpoena was served, was untimely. The record demonstrates that the subpoena was served on April 10, 2014, and the Motion was filed on May 12, 2014, 32 days later.

Under Rule 45(d)(3), a motion to quash a subpoena commanding the appearance of a deponent or witness must be filed “timely.” Under Rule 45(d)(2)(B), however, an objection to a subpoena compelling discovery or inspection of designated materials must be served “before the earlier of the time specified for compliance or 14 days after the subpoena is served.” Fed. R. Civ. P. 45(d)(2)(B). It is clear that the 14-day rule found in Rule 45(d)(2)(B) is not present in Rule 45(d)(3). District courts within the Seventh Circuit have held that “a motion to quash is timely when made at or before the time of compliance.” *Woodward v. Victory Records, Inc.*, 2014 WL 2118799 at *4 (N.D. Ill. May 21, 2014); *see also Enargy Power (Shenzhen) Co. Ltd. v. Xiaolong Wang*, 2014 WL 2048416 at *3 n.5 (D. Mass. May 15, 2014); *City of St. Petersburg v. Total Containment, Inc.*, 2008 WL 1995298 at *2 (E.D. Pa. May 5, 2008). Because Sun’s Motion to Quash was filed a week before the time specified for Bell to comply with the subpoena by being deposed, the court finds that the Motion was timely.

For the reasons given in this Memorandum of Opinion, therefore, the Plaintiff Sun Enterprises, Inc.’s Motion to Quash Subpoena of Robert Bell, Jr. is granted, and the subpoena served upon Robert Bell, Jr. is quashed. The Debtor/Defendant’s Objection filed by the defendant Donald Edwin May is overruled.

SO ORDERED.

Harry C. Dees, Jr., Judge
United States Bankruptcy Court