



IT IS ORDERED as set forth below:

Date: August 21, 2009

W. H. Drake
U.S. Bankruptcy Court Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
	:	
LAMAR NOBLE	:	BANKRUPTCY CASE
JANET NOBLE,	:	07-10268-WHD
	:	
Debtors.	:	
_____	:	
	:	
GRIFFIN HOWELL, III,	:	
Chapter 7 Trustee,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 07-1060
v.	:	
	:	
JOSH R. NOBLE	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Amended Motion to Compel Appearance at

Deposition filed by Griffin Howell, III (hereinafter the “Trustee”). The Motion seeks an order compelling Josh Noble (hereinafter the “Defendant”) to appear at a deposition. The Defendant opposes the Motion. This matter arises in an adversary proceeding filed by the Trustee to avoid and recover a fraudulent conveyance and, accordingly, constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(H); § 1334.

PROCEDURAL HISTORY

On February 2, 2007, Mr. and Mrs. Lamar Noble (hereinafter the “Debtors”) filed a voluntary petition under chapter 11 of the Bankruptcy Code. The United States Trustee filed a motion to convert the Debtors’ case to one under chapter 7. The Court entered an order converting the Debtors’ case to chapter 7 on July 24, 2007. The Trustee was appointed as Chapter 7 Trustee on July 27, 2007.

On October 19, 2007, the Trustee filed a complaint against the Defendant. In the complaint, the Trustee seeks the avoidance and recovery of certain interests in real property allegedly transferred to the Defendant. On February 11, 2008, the Trustee filed a motion to compel the Defendant’s appearance at a deposition and for payment of expenses. In this motion, the Trustee alleged that, after repeated, failed attempts to schedule a deposition with Defendant’s counsel by telephone,

the Trustee served upon the Defendant a notice scheduling a deposition for Tuesday, February 5, 2008. The Trustee further contended that, after the close of business on Friday, February 5, 2008, the Defendant's counsel informed the Trustee's counsel by facsimile that the Defendant would not be able to attend the scheduled deposition due to a conflict of Defendant's counsel involving a deposition scheduled for Monday, February 4, 2008. According to the Trustee, he was unable to reschedule the deposition because the Defendant's counsel determined that the Defendant's deposition would be premature and refused to discuss alternative dates. The Trustee sought an order compelling the Defendant to attend a deposition and payment of \$570 in attorney's fees for the two hours' time the Trustee's counsel spent preparing for the Defendant's deposition.

In an order dated May 5, 2008, the Court denied the Trustee's motion to compel and request for payment of expenses on the basis that the Trustee failed to attach a separate statement regarding his efforts to resolve the discovery dispute in good faith prior to filing his motion to compel, as required by the local rule and by Rule 37 of the Federal Rules of Civil Procedure, made applicable to this matter by Rule 7037 of the Federal Rules of Bankruptcy Procedure. On April 23, 2009, the Trustee filed the instant amended motion to compel. The amended motion reiterates the Trustee's position that his counsel made repeated attempts to

schedule the Defendant's deposition with Defendant's counsel by telephone, but received no response, subsequently scheduled a deposition for Tuesday, February 5, 2008, and was not notified until after the close of business on Friday, February 1, 2008, that the Defendant's counsel would not be able to attend the deposition due to a conflict. As in the original motion, the Trustee asserts that the Defendant's counsel refused to provide alternative dates based on his unilateral conclusion that the deposition would be premature.

In addition, the Trustee states that, following the denial of the Trustee's original motion, the parties resolved to conduct the deposition on May 28, 2008. On or about the date of the scheduled deposition, the Defendant's counsel advised the Trustee's counsel that the Defendant would not be able to appear for the deposition due to the death of his father. According to the Trustee, the Defendant's counsel provided no alternative dates at that time, despite both written and telephone requests for such dates. The Trustee claims that his counsel tried to resolve this discovery dispute by sending a written request for three alternative dates for a rescheduled deposition, but received no response. Thereafter, the Trustee filed his amended motion to compel.

In response, the Defendant relies on the fact that, in accordance with BLR 7026-2, the discovery period ended on March 30, 2008 without any timely request

made by the Trustee to extend the period. Further, the Defendant points to the fact that the Trustee failed to prosecute the case for over a year and a half and, when the Trustee did decide to pursue the Defendant's failure to provide alternative date for the deposition, he did not communicate with the Defendant's counsel prior to filing his motion to compel, indicating a lack of good faith in resolving this ongoing dispute. This allegation may be contrary to the certification filed by the Trustee's counsel, which states that the Trustee's counsel attempted to confer with the Defendant's counsel to arrange for an agreeable day for the deposition, but received no response from the Defendant's counsel.

CONCLUSIONS OF LAW

Discovery in this adversary proceeding is controlled by Rule 7037 of the Federal Rules of Bankruptcy Procedure, which incorporate Rule 37 of the Federal Rules of Civil Procedure. Rule 37(a) provides that, "[o]n notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery." FED. R. CIV. P. 37(a)(1). Such a motion "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." *Id.* Otherwise, the rule simply requires that the movant file its

motion to compel “in the court where the action is pending.” FED. R. CIV. P. 37(a)(2). Further, Rule 37(d) provides that the “court where the action is pending may, on motion, order sanctions if . . . a party . . . fails, after being served with proper notice, to appear for that person's deposition.” FED. R. CIV. P. 37(d)(1)(A)(i). A motion for such a sanction must “include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.” FED. R. CIV. P. 37(d)(1)(B). Further, Bankruptcy Local Rule 7037-1(b) requires that the moving party “attach to the motion a statement certifying that counsel for movant, or the movant, if unrepresented, has in good faith conferred or attempted to confer with the party not making disclosure or discovery in an effort to secure disclosure or discovery by agreement but that such efforts were not successful.”

The Trustee has satisfied the procedural requirements of Rule 37 and BLR 7037-1(b). It is abundantly clear to the Court that the Trustee is entitled to take the Defendant's deposition. It is also clear that either the Defendant or his attorney, or both, has not been cooperative in setting a date to conduct this deposition. By the same token, the Trustee has paid insufficient attention to this case, and it has languished for some time. While the Court recognizes that the discovery period was not formally extended, the Court finds that not allowing the

Trustee to take the Defendant's deposition, after the Trustee made two attempts to do so and the Defendant's counsel failed to cooperate in providing alternative dates, would not serve justice and would unnecessarily penalize the creditors of the estate for whose benefit this action was initiated. For this reason, the Court will *sua sponte* extend the discovery period until November 13, 2009 and will grant the Trustee's motion to compel the Defendant to attend a deposition. The Trustee has not sought payment of his expenses and, if he had, the Court would have found that the Trustee's failure to pursue this matter in a more timely fashion makes "an award of expenses unjust" within the meaning of Rule 37(a)(5)(A)(iii). The Trustee is further placed on notice that, in the future, he must pursue this matter with reasonable speed.

CONCLUSION

For the reasons stated above, the Court finds that the Trustee's Amended Motion to Compel should be and hereby is **GRANTED**.

IT IS FURTHER ORDERED that **Josh R. Noble** shall attend a deposition conducted by counsel for Griffin Howell, III in the office of Smith Diment Conerly, LLP, 402 Newnan Street, Carrollton, Georgia on **September 23, 2009 at 10:00 a.m.** If either party has a conflict with this date, it may be altered only

by the filing of a motion for a continuance. Any such motion shall be filed at least five (5) days prior to the deposition date and shall provide three alternative dates upon which the party will be available to attend the deposition. Failure to attend the deposition without obtaining the permission of this Court shall constitute a sanctionable contempt of court.

END OF DOCUMENT