



IT IS ORDERED as set forth below:

Date: September 13, 2016

**Barbara Ellis-Monro
U.S. Bankruptcy Court Judge**

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

IN RE:

JAMES B. NORTON, III
a/k/a JIM NORTON,
Debtor.

CASE NO. 15-67417-BEM

CHAPTER 7

LESLIE D. COFFEY,
Movant,

Contested Matter

v.
JAMES B. NORTON, III,
Respondent.

LESLIE D. COFFEY,
Plaintiff,

ADVERSARY PROCEEDING NO.
15-5444-BEM

v.
JAMES B. NORTON, III,
Defendant.

ORDER

Leslie D. Coffey's ("Coffey") Motion for Examination of Business Associates of Debtor/Owners of an Interest in 733 Glendale, LLC and CNR Holding, LLC (the "Examination

Motion”) [BK¹ Doc. 16]; Coffey’s Motion to Compel Debtor To Attend 204 (sic) Deposition (the “Motion to Compel”) [BK Doc. 17]; James B. Norton III’s (“Norton”) Motion for Protective Order and to Quash any Rule 7030 Examination² Notice or Subpoena (the “Debtor’s Motion”) [BK Doc. 19]; Coffey’s Motion to Extend Time to File Answer to Debtors Motion for Protective Order [BK Doc. 23]; 27 First Partners, LLC’s (“27 First”) Motion for Protective Order and to Quash any Rule 7030 Examination (the “27 First’s Motion” and with the Examination Motion, the Motion to Compel and the Debtor’s Motion (the “Motions”)) [BK Doc. 28]; and Coffey’s Response to Debtors Motion for Protective Order (the “Response”) [BK Doc. 30] came before the Court for hearing on May 18, 2016 (the “Hearing”). Michael D. Robl appeared on behalf of Norton and 27 First³ and Coffey appeared *pro se*. At the Hearing, the Court took the Motions and the Response under advisement to address the issues of whether Coffey has standing to pursue the discovery he seeks and whether judicial estoppel prevents him from asserting that he is an owner of CNR Holdings, LLC (“CNR”) and/or has a claim against Norton.

I. PROCEDURAL HISTORY

Norton filed a bankruptcy petition under chapter 7 on September 9, 2015. In his Statement of Financial Affairs (“SOFA”), Norton disclosed an interest in Norton Executive Search, LLC, Fiderion Group, LLC, Fiderion Executive Search, LLC, Norton Real Estate Group, LLC, 733 Glendale, LLC, and CNR. On Schedule F, Unsecured Non Priority Claims, Norton disclosed debts in the amount of \$1,700,000 to each of Coffey’s wife, Jill Coffey and Coffey’s daughter, Leslie Nicole Coffey, and referenced “Circuit Court for Hamilton County, Tennessee

¹ Despite a pending Adversary Proceeding, case number 15-5444, between Movant and Respondent the discovery at issue was filed the main bankruptcy case number 15-67417. Therefore, references to the adversary docket are denoted as “AP Doc.” and references the main case docket are denoted as “Bk Doc.”

² Coffey previously filed a Motion for 2004 Examination of Debtor which was granted without a hearing [BK Docs. 13, 14]. The Motion was construed by the Court as a Motion under Fed. R. Bankr. P. 7030.

³ Coffey alleges that CNR’s property was transferred to 27 First and seeks to obtain business records of, among other entities, 27 First. [Bk Doc. 16; Bk Doc. 30, p. 5].

at Chattanooga; Docket Number 15C931”. [Bk Doc. 1 p. 24]. There is no reference to this suit in Norton’s SOFA. Coffey was not scheduled as a creditor in this case, he has not filed a proof of claim,⁴ and he has not alleged in any of the pleadings he has filed that he is a creditor of Norton.

On November 24, 2015, Coffey initiated an adversary proceeding (the “Adversary Proceeding”) by filing an “Objection to Discharge of Debtor” (the “Complaint”) against Norton in which Coffey alleged, in conclusory fashion, that Norton is holding assets in others’ names, has disposed of assets and transferred assets. [AP Doc. 1]. On December 21, 2015, Norton filed a Motion to Dismiss Adversary Complaint (the “Motion to Dismiss”) [AP Doc. 3]. A hearing was held and the Court entered an Order granting the Motion to Dismiss in part because the Complaint did not contain sufficient facts to state a claim and denying the Motion to Dismiss in part to allow Plaintiff to amend the Complaint [AP Doc. 6].

On February 24, 2016 Coffey filed an Objection To Discharge Of Debtor Amended As Ordered By The Court (the “Amended Complaint”) [AP Doc. 8]. The Amended Complaint restates the allegations in the Complaint and further alleges that Norton transferred property in Newnan, Georgia and Chattanooga, Tennessee; that Norton is a co-conspirator with an individual named Trent Gaines, who has plead guilty to charges of mail fraud and real estate related fraud; that Norton used tactics that were used by Gaines; that Norton used assets of CNR to pay creditors without authority; and, that Norton participated in the transfer of no less than \$200,000 from CNR [AP Doc. 8]. Nothing further has been filed in the Adversary Proceeding.

In the meantime, on February 4, 2016, Coffey filed a Motion For 2004 Examination of Debtor, which the Court construed as a Motion under Fed .R. Bankr. P. 7030 and granted by order entered February 9, 2016 (the “Examination Order”) [BK Docs. 13, 14 and AP

⁴ The Trustee issued a notice that he is investigating potential assets in this case but no claims bar date has been set.

Doc. 5]. Thereafter, Coffey filed the Examination Motion and the Motion to Compel.⁵ In response, Norton and 27 First filed the 27 First Motion and Debtor's Motion.

I. ALLEGATIONS AND UNDISPUTED FACTS

In Debtor's Motion, Norton alleges that both he and Coffey, at one time, had an ownership interest in CNR. [BK Doc. 19 p. 2]. Norton alleges further that CNR purchased a promissory note on which Coffey was the obligor, that CNR allowed Coffey to reside in a house owned by CNR for some time conditioned on Coffey performing certain financial obligations, that Coffey failed to perform, and that CNR subsequently evicted Coffey. [Id.]. Norton also alleges that the eviction began a chain of events, including lawsuits, lien filings which were later canceled by judicial order, entry of an order banning Coffey from filing further pleadings, and Coffey's filing of a chapter 13 case and an adversary proceeding in the United States Bankruptcy Court for the Eastern District of Arkansas (the "Arkansas Case"). [Id. at 2-3].

Norton alleges further that, in the Arkansas Case, Coffey did not disclose ownership of any real estate or corporations (including limited liability companies) and did not disclose any claims against Norton. [Id. at 3, Exs. E, F]. The Arkansas Case and a related adversary proceeding against CNR, Bruce Hankinson, Trent Gaines, Hamilton County Tennessee Sheriff and Manpower Group of Chattanooga, TN were dismissed and a motion to reconsider the dismissal was denied. [Id., Ex. H].

In the Response, Coffey alleges that the manager of CNR, with the assistance or acquiescence of the owners other than Coffey, transferred real property owned by CNR for less than the property was worth. [BK Doc. 30 p. 5]. At the Hearing, Coffey alleged that 30% of CNR's capital came from his investment. It is unclear, however, whether this interest is currently

⁵ The Court notes that the Motion to Compel, 27 First's Motion and Debtor's Motion are all procedurally defective because none of the pleadings includes the good faith certification required by Fed. R. Bankr. P. 7037(a)(1) and Fed. R. Bankr. P. 7026(c)(1), respectively.

held by Coffey, an entity called Coherent, LLC or an irrevocable trust Coffey stated was established in 2009 for the benefit of his daughters and for which he is trustee. [Bk Doc. 23 ¶6, Ex. 1; BK Doc. 30, Ex. 14].

II. ANALYSIS

A. Standing

Coffey argues that, at minimum, he is a party in interest in this case and thus has standing to pursue examinations. Conversely, Norton argues that Coffey is neither a creditor nor a party in interest in this case because Coffey is not listed on Norton's schedules and because Coffey did not list a claim against Norton or an interest in CNR in the Statement Of Financial Affairs and Schedules filed in the Arkansas Case.

Rule 2004 authorizes the Court to order the examination of "any entity" upon motion of "a party in interest." Fed. R. Bankr. P. 2004(a). The term "party in interest" is not defined by the Bankruptcy Code. However, 11 U.S.C. § 1109 identifies those entities with a right to be heard in a Chapter 11 case and "contains a non-exclusive list of examples of what persons or entities may be considered to be a party in interest" including "the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee" *In re Tarrer*, 273 B.R. 724, 731 (Bankr. N.D. Ga. 2001) (Drake, J.); 11 U.S.C. § 1109(b). Although Chapter 7 of the Bankruptcy Code does not include a similar provision, "the right for a party in interest to be heard in a bankruptcy proceeding, as set out in Chapter 11, also applies in a Chapter 7 case." *Smith v. Atlantic So. Bank (In re Smith)*, 522 Fed. Appx. 760, 765 (11th Cir. 2013).

Examinations may be allowed under either Rule 2004 or Rule 7030. However, under the “pending proceeding” rule, in an adversary proceeding, the discovery system in the Federal Rules of Civil Procedure made applicable by Fed. R. Bankr. P. 7026 through 7037 “supplant[s] the applicability of Rule 2004” *Simms v. Deutsche Bank Nat. Trust Co. (In re Simms)*, No. 11-86981, AP No. 12-5035, 2012 WL 2930048, *1 (Bankr. N.D. Ga. May 11, 2012) (Diehl, J.) (quoting *In re M4 Enterprises, Inc.*, 190 B.R. 471, 475 (Bankr. N.D. Ga. 1995) (Drake, J.); *In re Washington Mutual, Inc.*, 408 B.R. 45, 49-51 (Bankr. D. Del. 2009)). Thus, “once the parties have commenced an adversary proceeding, they may not employ Rule 2004 as a discovery device by which to uncover evidence related to that proceeding.” *M4 Enterprises*, 190 B.R. at 475.

Coffey argues that the 2004 examinations he seeks are related to Norton’s bankruptcy case and not to the Adversary Proceeding. He argues further that in raising the litigation between Coffey and CNR, the Arkansas Case and claims by Coffey’s wife and child, Norton seeks to muddy the waters and further, has admitted that a tort was committed in conjunction with CNR’s eviction of Coffey from property in Tennessee [BK Doc. 23, p. 1; BK Doc. 30, p. 3]. However, in the the Examination Motion, the Motion to Compel, and the Response, Coffey seeks to investigate alleged transfers of assets involving many of the same entities and individuals identified in the Amended Complaint, namely Trent Gaines, James B. Norton IV⁶ and CNR [Id., BK Doc. 19]. Given that the discovery sought recites the same basis as the Amended Complaint and concerns the same entities and individuals, it is clear that the discovery relates to the Adversary Proceeding. That being the case, the Court concludes that the Examination Motion cannot be brought under Rule 2004, but must proceed, if at all, under Rule 7030. *See* Fed. R. Bankr. P. 7001.

⁶ James B. Norton, IV appears to be Norton’s son.

Rule 7030, which makes Fed. R. Civ. P. 30 applicable in adversary proceedings, provides that “a party may, by oral questions, depose any person, including a party....” Fed. R. Bankr. P. 7030(a). Thus, standing to take a deposition requires that the movant be a party to a lawsuit and a fortiori that the movant has standing to pursue the lawsuit. As a result, in order to determine whether Coffey has standing to pursue the discovery he seeks, the Court must first determine if he has standing to pursue the Adversary Proceeding.

The standing requirement is used to determine whether an actual case or controversy exists that is subject to adjudication by the Court. Analysis of standing to bring a cause of action requires that Coffey satisfy both constitutional requirements and prudential considerations. To satisfy constitutional requirements, Coffey must show that: (1) he has suffered an actual injury or such injury is imminent; (2) the injury is fairly traceable to the conduct at issue; and (3) the relief requested is likely to redress the injury. *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979, 984 (11th Cir. 1990). In addition, the Eleventh Circuit has recognized three prudential considerations that discourage judicial action: “(1) assertion of a third party’s rights, (2) allegation of a generalized grievance rather than an injury particular to the litigant, and (3) assertion of an injury outside the zone of interests of the statute or constitutional provision.” *E.F. Hutton*, 901 F.2d at 985.

In his pleadings and oral argument at the Hearing, Coffey has argued that he has standing because he and Norton are owners of CNR and because he is the obligor under the promissory note purchased by CNR that he alleges was wrongfully foreclosed. [Hearing Recording 12:04:06-12:04:13]. He argued further that he initially did not believe Norton was involved in the fraudulent acts of CNR, but because Norton scheduled claims for Coffey’s wife

and daughter Coffey now believes Norton was more than a passive investor and was involved with wrongful acts of CNR. [BK Doc. 30, p. 2; Hearing Recording 11:12:01:59-12:04:13].

If the interest in CNR represented by Coffey's 30% capital contribution is held by another LLC or a trust⁷ then the injury alleged – Norton's secreting of assets and diminution in value of CNR to the detriment of his creditors and investors in CNR and fraudulent acts precipitating the same – would be an injury to the entity owner not to Coffey. However, accepting the allegations regarding the use of the corporate form to commit tortious acts as true could support a finding of injury to those subject to the tortious acts, which potentially could include Coffey. And, if an objection to discharge were sustained, to the extent Coffey has a claim whether as an owner of CNR or based upon injury from wrongful actions by CNR related to the promissory note, Coffey could then seek redress against Norton.

In addition, with respect to the prudential considerations, Coffey made sufficient allegations at the Hearing to support a potential claim for injury suffered in his own right and not by the trust, another entity, or his family members. With respect to the zone of interests protected, because the Amended Complaint is styled as an Objection to Discharge and because a liberal construction of the statements made in the Amended Complaint as well as the Examination Motion could be construed as claims under 11 U.S.C. §§ 727(a)(2)(A) and (a)(4),⁸ the zone of interest protected by that statute is set forth in 11 U.S.C. §727(c).

Section 727(c) provides that only “the trustee, a creditor, or the United States Trustee” may file an objection to discharge under §727(a). Coffey has not alleged in any

⁷ Coffey's allegations regarding who owns the interest in CNR are seemingly inconsistent because he asserts that a trust holds the interest, but then states that “Mr. Norton and Mr. Coffey are partners in two entities CNR Holdings, LLC and 733 Glendale LLC...” [BK Doc. 30 p. 2]. While Coffey's Motion to Extend Time to File Answer to Debtor's Motion indicates that 70% of CNR stock was held by four individuals (not including Coffey), and 30% of CNR's stock was held by Coherent Investments, LLC [BK Doc. 23, p. 5].

⁸ The Court makes no determination here whether there are sufficient facts alleged in the Amended Complaint to state these claims.

pleading or at the Hearing that he is a creditor of Norton's. Rather he alleged a personal interest in CNR's actions and a potential claim against Norton on this basis. Thus, Coffey has articulated a theory that could support finding that Coffey has a claim against Norton. On the present record, with the inconsistencies regarding CNR's ownership and dearth of facts in the Amended Complaint, the Court cannot find that Coffey is a creditor of Norton in this case, and Coffey has not yet shown that he has standing to pursue the Adversary Proceeding. *Bischoff v. Osceola County, Florida*, 222 F.3d 874, 878 (11th Cir. 2000) (stating that a court on its own initiative can analyze standing and hold an evidentiary hearing even in the context of a motion to dismiss) (citing *Haase v. Session*, 835 F.2d 902, 904 (D.C. Cir. 1987)).

B. Judicial Estoppel

“The equitable doctrine of judicial estoppel . . . ‘precludes a party from asserting a . . . position that contradicts or is inconsistent with a prior position taken by the same party.’” *Slater v. U.S. Steel Corp.*, 820 F.3d 1193, 1195 (11th Cir. 2016). The Eleventh Circuit has adopted a two factor test to determine if judicial estoppel applies as follows: (i) it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding, and (ii) such inconsistencies must be shown to have been calculated to make a mockery of the judicial system. *Id.* at 1198 (quoting *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002)). The circuit court has applied judicial estoppel in cases when the debtor omitted a claim or cause of action from his bankruptcy filing and thereafter sought to prosecute the omitted claim in another court. In such cases, “[t]he factors that trigger the application of the doctrine are (1) an inconsistent position taken under oath in the Bankruptcy Court, and (2) advancing an inconsistent position . . . with the intent to make a mockery of justice.” *Id.* at 1210. To determine

whether an inconsistent position is intended to make a mockery of the judicial system requires intentional concealment measured at the time of the non-disclosure. *Id.* at 1199.

Norton argues that because Coffey did not schedule a claim against him in the Arkansas Case and did not disclose an interest in CNR in the Arkansas Case, he is judicially estopped from asserting any such claims in Norton's case.⁹ [BK Doc. 19, p. 6]. Coffey stated at the Hearing that at the time of the Arkansas Case he thought the bad acts of CNR were limited to members other than Norton. As a result, Coffey did not believe he had a claim against Norton and therefore, Norton was not named in the lawsuit filed by his family related to the foreclosure. Because Norton listed a claim by Coffey's wife and daughter,¹⁰ Coffey came to believe that Norton, too, was a party to the allegedly tortious acts of CNR. That being the case, the issue of Coffey's intent in omitting Norton and CNR from the Arkansas Case must be fully considered before the Court can determine whether judicial estoppel applies to bar Coffey from pursuing the Adversary Proceeding.

Accordingly, for the foregoing reasons, it is now hereby,

ORDERED that the Motion to Extend Time to File Answer to Debtor's Motion for Protective Order is GRANTED and the Response is deemed timely filed. It is further

ORDERED that discovery in the Adversary Proceeding is stayed until further order of the Court. It is further

ORDERED that all pleadings filed after the date hereof that relate to the Adversary Proceeding must be filed in the Adversary Proceeding. It is further

⁹ Copies of Coffey's Statement of Financial Affairs, Schedules and the Order Denying Coffey's request to reopen an adversary in the Arkansas Case were attached to Debtor's Motion. Coffey did not dispute the authenticity of these papers. No evidence was taken at the Hearing, however, such that the Court cannot take judicial notice of the pleadings. *Redwine v. Sholar*, Case No. 08-1013, 2008 Bankr. LEXIS 3830 *11-12, (Bankr. N.D. Ga. Sept. 4, 2008) (Drake, J.) (citing *Brown v. Brock*, 169 Fed. Appx. 579 (11th Cir. 2006)).

¹⁰ Norton's counsel stated at the hearing that it is his practice to list claims based on litigation against entities in which his clients have an interest such as the litigation against CNR pending in Tennessee.

ORDERED that an evidentiary hearing to determine (i) whether Coffey has standing to prosecute an objection to discharge and, (ii) if he has standing, whether he is barred from prosecuting the Adversary Proceeding by the doctrine of judicial estoppel will be scheduled by further order of the Court in the Adversary Proceeding.

END OF ORDER

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