



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
September 07, 2019

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

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In re:)	Case No.: 13-12466-MKN
)	Chapter 13
WILLIE N. MOON and ADNETTE M.)	
GUNNELS-MOON,)	Date: September 6, 2019
)	Time: 10:30 a.m.
Debtors.)	

ORDER ON MOTION TO CONTINUE HEARING ON DEBTORS' MOTIONS FOR SANCTIONS¹

On September 6, 2019, the court heard the Motion to Continue Hearing on Debtors' Motions for Sanctions ("Motion") brought on behalf of creditor, Rushmore Loan Management Services, LLC. The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On March 26, 2013, a voluntary Chapter 13 petition was filed by Willie N. Moon and Adnette M. Gunnels-Moon ("Debtors"). (ECF No. 1). Debtors listed their address as 3391 Eagle Bend Street, Las Vegas, Nevada 89122. On the same date, a Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines was entered in the case. (ECF No. 3).

¹ In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to "FRBP" are to provisions of the Federal Rules of Bankruptcy Procedure. All references to "Local Rule" are to the bankruptcy provisions of the Local Rules of Practice for the District of Nevada.

1 On May 6, 2013, Debtors filed their schedules of assets and liabilities, as well as their
2 statement of financial affairs. (ECF No. 14).

3 September 25, 2013, Debtors filed a Motion to Value Collateral and Avoid Second Deed
4 of Trust of Rushmore Mortgage (account ending in 1649) Pursuant to 11 U.S.C. §506(a), § 1322
5 and Sustaining Objection to Claim Pursuant to F.R.B.P. 3007 (“Valuation Motion”). (ECF No.
6 29).

7 On December 5, 2013, an order was entered granting the Valuation Motion. (ECF No.
8 34).

9 On April 7, 2014, an order was entered confirming the Debtors’ Chapter 13 Plan #2.
10 (ECF No. 49).

11 On September 28, 2016, an Order of Discharge was entered in favor of the Debtors.
12 (ECF No. 76).

13 On January 4, 2019, an order was entered granting the Debtors’ motion to reopen their
14 bankruptcy case. (ECF No. 81).

15 On January 18, 2019, Debtors filed a Motion to Hold Creditor, Rushmore Loan
16 Management in Contempt for Violation of the Automatic Stay Under §362(a) and for Violation
17 of the Discharge Injunction Under 11 U.S.C. § 524(a)(2) and to Hold Creditor SN Servicing
18 Corporation in Contempt for Violating the Discharge Injunction under 11 U.S.C. § 524(a)(2) and
19 for Actual Damages, Emotional Distress Damages, Punitive Damages and Attorney Fees, and
20 Sanctions Against Both Creditors, Rushmore Loan Management and SN Servicing Corporation
21 (“Contempt Motion”). (ECF No. 84). Attached to the Contempt Motion are various documents
22 identified as Exhibits 1 through 27. Debtors noticed their Contempt Motion to be heard on
23 February 20, 2019. (ECF No. 85).

24 On February 6, 2019, an opposition to the Contempt Motion was filed on behalf of SN
25 Servicing Corporation (“SNS”). (ECF No. 88).
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1 On February 8, 2019, a response to the Contempt Motion was filed by the law firm of
2 McCarthy & Holthus, LLP (“M&H”) on behalf of Rushmore Loan Management Services, LLC
3 (“Rushmore”). (ECF No. 90).

4 On February 20, 2019, counsel for the Debtors, SNS, and Rushmore appeared at the
5 scheduled hearing and agreed that an evidentiary hearing on the Contempt Motion (“Evidentiary
6 Hearing”) would be held on September 16 and 17, 2019, using the Alternate Direct Testimony
7 (“ADT”) procedure under Local Rule 9017. Counsel also agreed to various deadlines for the
8 submission of ADT declarations, documents, exhibits, and additional briefs. A further status
9 hearing was scheduled for July 10, 2019.

10 On March 6, 2019, a scheduling order for the Evidentiary Hearing was entered
11 (“Scheduling Order”). (ECF No. 94). The Scheduling Order sets the Debtors’ ADT declarations
12 to be submitted to counsel for SNS and Rushmore no later than August 27, 2019. It also requires
13 SNS and Rushmore to submit their ADT declarations to counsel for the Debtors no later than
14 September 5, 2019. The Scheduling Order further requires the Debtors, SNS, and Rushmore to
15 file and serve any exhibits and additional briefs no later than September 5, 2019. Finally, it
16 requires the Debtor, SNS, and Rushmore to submit all required documents to the courtroom
17 deputy in compliance with Local Rule 9017(3) no later than September 9, 2019.

18 On March 28, 2019, Rushmore filed a Substitution of Counsel for the Akerman LLP law
19 firm (“Akerman”) to replace M&H. (ECF 102).

20 On April 15, 2019, an order was entered authorizing the substitution of the Akerman firm
21 in place of M&H. (ECF No. 103).

22 On May 17, 2019, Debtors filed a Motion to Compel Discovery of Rushmore Loan
23 Management Services, LLC, and that Debtors Request for Production Responded to Properly and
24 for Attorneys Fees (“Discovery Motion”). (ECF No. 106). The Discovery Motion sought to
25 compel Rushmore to respond to a document request that was included in various discovery that
26 had been propounded to the M&H firm on February 8, 2019. See Discovery Motion at 2:3-5.
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1 On June 24, 2019, Rushmore filed an opposition to the Discovery Motion as well as an
2 Agreed Motion for Entry of Agreed Protective Order. (ECF Nos. 113 and 114).

3 On July 9, 2019, a Stipulated Protective Order was entered (ECF No. 116) that apparently
4 resolved the Discovery Motion.

5 On July 29, 2019, an order was entered approving a stipulation to withdraw the Contempt
6 Motion as to SNS. (ECF No. 119).

7 On August 27, 2019, Debtors filed a document entitled Proof of Compliance with the
8 Courts Order Scheduling Evidentiary Hearing (Dkt.#94) – Filing Declarations. (ECF No. 120).
9 Attached to the Proof of Compliance are three documents identified as Exhibits 14, 15, and 16.

10 On August 28, 2019, Rushmore filed the instant Motion seeking to continue the
11 Evidentiary Hearing, attaching four exhibits that include the Affidavit of William S. Habdas of
12 the Akerman firm (“Habdas Affidavit”). (ECF No. 121). Also included in those exhibits are
13 two separate receipts from Debtors’ counsel acknowledging that on August 13, 2019, counsel
14 was served with Rushmore’s notices to take the depositions of both Debtors, and that on August
15 14, 2019, counsel was served with Rushmore’s requests for admissions, first set of
16 interrogatories, and requests for production of documents.

17 On August 29, 2019, an order was entered shortening time to permit the Motion to be
18 heard on September 6, 2019. (ECF No. 123).

19 On September 4, 2019, Rushmore filed an adversary complaint against the Debtors,
20 commencing Adversary Proceeding No. 19-01090-MKN. (ECF No. 126).

21 On September 4, 2019, Debtors filed opposition to the Motion. (ECF No. 127).

22 On September 5, 2019, Rushmore filed a reply. (ECF No. 128). On the same date,
23 Debtors filed an additional brief in support of the Contempt Motion as well as a list of exhibits.
24 (ECF No. 129).

25 On September 6, 2019, the court heard arguments on the Motion and took the matter
26 under submission. After the hearing, Rushmore filed its Proof of Compliance with the Court’s
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1 Order Scheduling Evidentiary Hearing as well as a separate witness and exhibit list. (ECF Nos.
2 130 and 131).

3 **DISCUSSION**

4 The court having considered the written and oral arguments of counsel, as well as the
5 record, concludes that the instant Motion should be denied.

6 The Evidentiary Hearing date has been known since the February 20, 2019, initial
7 hearing on the Contempt Motion at which Rushmore appeared through counsel. The compliance
8 deadlines also have been known. The hearing date and the compliance deadlines were
9 memorialized in the Scheduling Order. Rushmore's current counsel filed its substitution on
10 March 28, 2019. There is no reason to believe that the Akerman firm had not reviewed the
11 Scheduling Order before substituting into the case or otherwise was taken by surprise.

12 That discovery may be taken in a contested matter pursuant to FRBP 9014(c) is well
13 known. As previously mentioned, Debtors' counsel propounded discovery on February 8, 2019,
14 and Rushmore's prior counsel initially responded. Rushmore's current counsel resolved the
15 subsequent Discovery Motion. Despite the Debtors' urgency to complete discovery well in
16 advance of the Evidentiary Hearing, the record indicates that Rushmore did not serve written
17 discovery on the Debtors until August 14, 2019. Unless otherwise ordered by the court, the time
18 to respond to a request for admissions is thirty days after being served under FRCP 36(a)(3).
19 The same thirty-day response deadline applies to interrogatories under FRCP 33(b)(2) and
20 requests for production of documents under FRCP 34(b)(2)(a). No written request, and not even
21 an oral request at the hearing on the instant Motion, has been made by Rushmore to reduce the
22 thirty-day response deadlines for its own discovery. As a result, Debtors are not required to
23 respond to Rushmore's written discovery until September 13, 2019.

24 That FRBP 9014(c) expressly excludes the initial disclosure requirements under FRCP
25 26(a)(1) in contested matters as well as the expert disclosure requirements under FRCP 26(a)(2)
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1 also is well known.² Rushmore's counsel argues that Debtors' counsel stonewalled its request
2 for initial disclosures, see Habdas Affidavit at ¶¶ 4 and 6 and Exhibit "B" thereto, but clearly
3 those disclosures were never required, nor was there ever a request made under FRBP 9014(c) to
4 require initial disclosures.

5 Based on this record, it appears that any prejudice to Rushmore resulting from a lack of
6 discovery, including any alleged inability to effectively depose the Debtors, is entirely its own
7 making. Whether there has been a failure of communication or cooperation between the law
8 firms representing Rushmore in this matter is not known, but certainly it cannot be ascribed to
9 the Debtors or their counsel.

10 The court separately has considered whether the recent commencement of Rushmore's
11 adversary proceeding should result in a postponement of the Evidentiary Hearing. Because it
12 would cause greater prejudice to the Debtors and may simply reward Rushmore for its apparent
13 lack of timely preparation, its commencement is not persuasive as a reason to grant the Motion.
14 Moreover, if Rushmore prevails in the adversary proceeding, there appears to be no reason that it
15 cannot seek relief from any order entered in connection with the Contempt Motion.
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17 The court also has considered Rushmore's desire to ensure that lead counsel from the
18 Akerman firm is available to represent its interests at the Evidentiary Hearing. That hearing date
19 was known to all parties since February 20, 2019, however, and a request to continue the
20 scheduled hearing could have been made many weeks in advance. No suggestion is made that
21 counsel cannot appear, but only that lead counsel will be inconvenienced due to their
22 representation of other clients in other complex matters during the week prior to the Evidentiary
23 Hearing. Being busy may be a reason, but it is not an excuse.

24 The record indicates that the Debtors have complied with the deadlines set forth in the
25 Scheduling Order and that Rushmore may have complied, perhaps one day late, with the
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27 ² FRBP 9014 addresses contested matters. Subsection (c) expressly provides that "The
28 following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a
contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2)
(disclosures regarding expert testimony) and (26(a)(3) (additional pretrial disclosure)..."

1 deadlines set forth in the same order. Both parties are obligated to comply with the September 9,
2 2019, deadline to provide the required documents to the courtroom deputy.

3 Based on the foregoing, the court concludes that Rushmore has failed to meet its burden
4 of demonstrating cause to continue the Evidentiary Hearing.

5 **IT IS THEREFORE ORDERED** that the Motion to Continue Hearing on Debtors'
6 Motions for Sanctions, brought by Rushmore Loan Management Services, LLC, Docket No.
7 121, be, and the same hereby is, **DENIED**.

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9 Copies sent via CM/ECF ELECTRONIC FILING

10 Copies sent via BNC to:
11 WILLIE N. MOON
12 ADNETTE M. GUNNELS-MOON
13 3391 EAGLE BEND STREET
14 LAS VEGAS, NV 89122

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