



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
February 03, 2023

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:)	Case No.: 18-12734-MKN
)	
SCHULTE PROPERTIES LLC,)	Chapter 11
)	
Debtor.)	
)	Date: February 2, 2023
)	Time: 11:00 a.m.
)	

**ORDER ON NEWREZ LLC DBA SHELLPOINT MORTGAGE SERVICING’S
MOTION FOR SANCTIONS¹**

On February 2, 2023, the court heard NewRez LLC dba Shellpoint Mortgage Servicing’s Motion for Sanctions (“Sanctions Motion”). The appearances of counsel were noted on the record. After arguments were presented by counsel, the matter was taken under submission.

BACKGROUND

On May 10, 2018, a voluntary Chapter 11 petition for reorganization was filed by Schulte Properties LLC (“Debtor”). (ECF No. 1)

On September 30, 2022, an order was entered scheduling a trial on confirmation of the Debtor’s proposed Plan of Reorganization #3. (ECF No. 1123). The trial was scheduled to be held virtually on February 6, 7, 13, 14, 16 and 21, 2023, as well as March 6, 2023. A pretrial

¹ In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the above-captioned Chapter 11 proceeding as they appear on the docket maintained by the clerk of court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure. All references to “FRCP” are to the Federal Rules of Civil Procedure. All references to “Local Rule” are to the Local Rules of Practice of the Bankruptcy Court.

1 conference was scheduled for January 25, 2023. Parties were required to file alternate direct
2 testimony (“ADT”) declarations of their witnesses no later than January 27, 2023.

3 On January 4, 5 and 6, 2023, Shellpoint took the deposition of the Debtor’s principal,
4 Melani Schulte, as the person most knowledgeable under FRCP 30(b)(6) (“PMK Deposition”).²

5 On January 25, 2023, the pretrial conference was held in conjunction with a motion
6 brought by certain creditors (ECF No. 1188) requesting that the confirmation trial be conducted
7 through in-person testimony rather than virtually using the Zoom platform.

8 On January 27, 2023, various ADT declarations were filed, including by Melani Schulte
9 (“Schulte Declaration”). (ECF No. 1249).³

10 On January 30, 2023, an order was entered granting the motion to require in-person
11 testimony of all witnesses for whom cross-examination may be requested of their prior alternate
12 direct testimony. (ECF No. 1252). The order includes a witness schedule for seven days of trial,
13 with Melani Schulte to be cross-examined and re-examined on February 6, 7, 13 and 14, and the
14 creditors’ witnesses to be cross-examined and re-examined on February 16 and 21, as well as on
15 March 6.

16 On January 30, 2023, Shellpoint filed the instant Sanctions Motion supported by the
17 Declaration of Nicholas E. Belay, Esq. (“Belay Declaration”). (ECF Nos. 1255 and 1256).
18 Attached to the Sanctions Motion is a copy of the amended notice of the PMK Deposition
19 (“Amended Notice”) served on December 7, 2022, to which is attached a list of 19 deposition
20 topics. Also attached to the Sanctions Motion are copies of certified transcripts of the PMK
21 Deposition. Along with the Sanctions Motion, Shellpoint filed an ex parte motion to have the
22 matter heard on shortened time. (ECF No. 1257).

23 On January 30, 2023, joinders to the Sanctions Motion were filed by Nationstar Mortgage
24 LLC (“Nationstar”) and Fifth Third Bank, National Association (“Fifth Bank”). (ECF Nos. 1262
25

26 ² FRCP 30 is incorporated by FRBP 7030, which applies in contested matters under
27 FRBP 9014(c).

28 ³ No parties filed a statement of intent to offer deposition testimony at trial by designation
of specific portions of any transcripts under Local Rule 7032.

1 and 1263).

2 On January 31, 2023, joinders to the Sanctions Motion were filed by Wells Fargo Bank,
3 N.A. (“Wells Fargo”), JPMorgan Chase Bank, National Association (“Chase Bank”), along with
4 a supporting declaration of Regina A. Habermas, Esq., and The Bank of New York Mellon f/k/a
5 The Bank of New York successor in interest to JP Morgan Chase Bank, N.A., successor in
6 interest to Bank One, National Association, as Trustee for CSFB Mortgage-Backed Pass-
7 Through Certificates, Series 2003-27 (“BONY”), along with a supporting declaration of Regina
8 A. Habermas, Esq. (ECF Nos. 1266, 1269, 1270, 1272, and 1273).

9 On February 1, 2023, joinders to the Sanctions Motion were filed by U.S. Bank Trust
10 National Association as Trustee of the Lodge Series III Trust, U.S. Bank Trust National
11 Association as Trustee of the Chalet Series III Trust, and U.S. Bank Trust National Association
12 as Trustee of the Bungalow Series IV Trust (“U.S. Bank”), and Selene Finance LP as servicer
13 and attorney-in-fact for Wilmington Savings Fund Society, FSB, dba Christiana Trust
14 (“Selene”). (ECF Nos. 1282 and 1284).

15 On February 1, 2023, an order shortening time was entered setting a hearing for the
16 following day as well as an expedited deadline for the Debtor to file opposition. (ECF No.
17 1279).

18 On February 2, 2023, Debtor filed a response (ECF No. 1291) and the Sanctions Motion
19 was heard by the court virtually through Zoom and telephonic appearances.⁴

20 DISCUSSION

21 The Sanctions Motion seeks relief available through FRCP 37 as well as the inherent
22 powers of the court. Three alternative sanctions are requested: (1) an order striking the Debtor’s
23 only ADT declaration as well as all of the Debtor’s exhibits, (2) an order limiting the Debtor’s
24 evidence to the testimony presented at the PMK Deposition taken on January 4, 5 and 6, 2023, or
25 (3) an order requiring further deposition testimony by the Debtor’s principal and postponement
26

27 ⁴ After conclusion of the hearing, the court ordered trial counsel to appear in the
28 courtroom the following day to view the volume of exhibits submitted for trial. The appearances
are required for counsel to discuss the logistics of managing the documents during trial for
presentation to the court and the witnesses.

1 of trial. Shellpoint agrees that the first two alternatives are likely case-terminating sanctions
2 because either option will prevent the Debtor from confirming a plan of reorganization.
3 Shellpoint and the creditors joining in the Sanctions Motion agree that these are the alternative
4 forms of relief currently before the court.

5 Not surprisingly, Debtor opposes the Sanctions Motion entirely. As a threshold matter,
6 Debtor also maintains that Shellpoint failed to comply with FRCP 37 and Local Rule 7037 by
7 neglecting to “meet and confer” with opposing counsel before seeking judicial intervention.⁵
8 Substantively, Debtor argues that its principal testified to the best of her ability during the three-
9 day PMK Deposition. Debtor acknowledges that as a result of the PMK Deposition, she revised
10 certain “spreadsheets” containing information relevant to plan confirmation, but which
11 information was not accessible to her during at least parts of the three-day deposition. During
12 the hearing on the Sanctions Motion, Debtor represented that the spreadsheets referenced during
13 the PMK Deposition were revised by Melani Schulte afterwards and that copies are attached to
14 the Schulte Declaration filed on January 27, 2023.⁶

15 _____
16 ⁵ Ironically, in this Chapter 11 proceeding, the Debtor previously filed a discovery
17 motion against Shellpoint seeking to compel the production of additional documents. (ECF No.
18 1008). Shellpoint responded by asserting, *inter alia*, that Debtor’s counsel had failed to meet and
19 confer before seeking judicial relief. (ECF Nos. 1019 and 1020). An interim order was entered
20 requiring counsel to personally meet to review the documents produced in discovery. See Order
21 on Motion to Compel Shellpoint to Respond to Discovery Requests and to Extend Deadline to
22 File a New Plan and Disclosure Statement (“Interim Discovery Order”). (ECF No. 1034)
23 Thereafter, counsel for both parties personally met before a final order on the discovery motion
24 was entered. See Order on Motion to Compel Shellpoint to Respond to Discovery Requests.
(ECF No. 1106). Thereafter, Shellpoint sought relief from the final order. (ECF No. 1173). An
25 additional order was entered vacating an award of attorney’s fees but otherwise requiring
26 Shellpoint to provide further discovery. See Order on Newrez LLC dba Shellpoint Mortgage
27 Servicing’s Motion to Alter or Amend Order Granting Schulte Properties, LLC’s Motion to
28 Compel. (ECF No. 1173).

25 ⁶ At the hearing on the Sanctions Motion, the court inquired as to why a PMK Deposition
26 of the Debtor was not taken much earlier during this lengthy Chapter 11 proceeding rather than a
27 month before a highly contested plan confirmation trial. Given the number of real property
28 parcels and real property loans at stake, the multiple transfers of loan servicing involved, and the
prior bankruptcy proceedings encompassing all of those elements, it is shocking that a PMK
Deposition of the Debtor’s sole official (or even an examination under FRBP 2004) was not
taken years ago. No doubt in good faith, numerous explanations were given by counsel, but

1 The PMK Deposition transcripts reveal that 110 separately marked exhibits were
2 discussed. Marked as Exhibits 54, 59, 59A, 62, 66, 72, 73, 85, 89, 90, 91, 92, 93, 95, 102, 103,
3 104, 105, 106, 107, 108, and 109 were documents identified as “spreadsheets” concerning certain
4 properties, but which may have been referred to as “payment histories” during the deposition.
5 Some of the spreadsheets or payment histories apparently were created as Excel spreadsheets or
6 were generated by a program identified as AppFolio. The deposition testimony reflects the
7 spreadsheets were used in part to pinpoint dates and amounts for which the Debtor may have
8 made payments on various properties, as well as times during which the Debtor did not make
9 payments.

10 In contrast, the apparently updated “spreadsheet” attached as an exhibit to the Schulte
11 Declaration is entitled “Master Property List of All Servicers.” The document appears to be
12 arranged, *inter alia*, by real property addresses, applicable interest rates and loan balances, proof
13 of claim numbers and bankruptcy docket entries, applicable loan servicing entities, and legal
14 contentions of the Debtor. It does not appear to identify any payments made, any fees or charges
15 assessed, or any other information suggesting the Debtor’s proposed analysis of the correct
16 amount that would be due and owing on the various loans as of the effective date of its proposed
17 Chapter 11 plan. The court previously characterized the Debtor’s primary objective as seeking
18 to “resolve its disputes over the servicing of the former loans by adjudicating the various charges
19 and loan balances, and memorializing the final results through superseding promissory notes,
20 deeds of trust, and payment schedules.” See Order Regarding Disclosure Statement to
21 Accompany Debtor’s Plan of Reorganization #3, at 13:1-4, entered July 6, 2022. (ECF No.
22 1090). Debtor suggests that the spreadsheet attached to the Schulte Declaration somehow
23 militates against the relief requested by the Sanctions Motion, but it is not clear why.

24 The court having considered the materials presented and the bankruptcy history of the
25 Debtor, as well as the written and oral arguments presented, concludes that limited relief is
26 appropriate. The case terminating alternatives, i.e., striking the Schulte Declaration and exhibits
27

28 none of them satisfactory. In other words, the urgency of the instant Sanctions Motion easily
could have been avoided.

1 in support of plan confirmation, or, limiting the Debtor's plan confirmation evidence to the PMK
2 Deposition transcript⁷, is excessive both under FRCP 37 and under the court's inherent authority.
3 The non-terminating alternative of permitting a further and limited examination of the Debtor's
4 principal, however, is warranted.

5 It is clear that notice of the topics of the PMK Deposition was provided well in advance
6 of its agreed scheduling date. Shellpoint and the joining parties suggest that the Debtor's sole
7 member and only designated representative was unprepared for the PMK Deposition. FRCP
8 30(b)(6) provides in relevant part that the "persons designated must testify about the information
9 known or reasonably available to the organization." FED.R.CIV.P. 30(b)(6). The deposition
10 transcripts reflect that on several occasions "updated" spreadsheets or payment histories would
11 be provided between deposition sessions. By their very nature, the provision of updates infers
12 that additional information was known or reasonably available to the Debtor's representative but
13 had not been provided initially.⁸ Even now, Debtor suggests that an updated spreadsheet is
14 attached to the Schulte Declaration, but the court simply does not know its purpose.

15 Under these circumstances, the court overrules the Debtor's threshold objection that there
16 was a prejudicial failure to meet and confer.⁹ A further PMK Deposition will be permitted for a
17 time not exceeding five hours of sworn testimony by Melani Schulte. The deposition will be
18 limited to the updated spreadsheet attached to the Schulte Declaration and any topics set forth in
19

20 ⁷ The PMK Deposition transcripts are especially puzzling because it appears that during
21 portions of the testimony the witness was interposing legal objections to certain questions rather
22 than allowing Debtor's counsel to intercede. Additionally, the witness and counsel periodically
23 engaged in argument with one another rather than eliciting admissible testimony. Such conduct
24 typically would not be permitted at trial.

25 ⁸ Debtor as well as all other parties that have responded to discovery, of course, is under a
26 continuing duty to supplement its prior discovery responses. See FED.R.CIV.P. 26(e)(1). The
27 court does not know if the various spreadsheets and payment histories constituted supplements to
28 prior discovery responses.

⁹ Given the evolving nature of spreadsheet information provided at the PMK Deposition
and the urgency of its completion, the court concludes that the efforts of counsel to meet and
confer before the filing of instant Sanctions Motion were less than ideal but otherwise sufficient.
Compare Interim Discovery Order at 4:1-2 & n. 7.

1 the Amended Notice. No other topics may be raised unless agreed by the Debtor. A limited
2 postponement of the trial will be required, but the first four days have been reserved for the
3 examination of Melani Schulte who apparently resides in the judicial district.

4 **IT IS THEREFORE ORDERED** that NewRez LLC dba Shellpoint Mortgage
5 Servicing's Motion for Sanctions, Docket No. 1255, be, and the same hereby is, **GRANTED IN**
6 **PART AS FOLLOWS:**

- 7 1. Counsel for Shellpoint and the creditors joining in the Sanctions Motion may
8 complete the deposition under FRCP 30(b)(6) for a period not exceeding five hours,
9 subject to the topics and limitations set forth in this order. Creditors who have not
10 joined in the Sanctions Motion are not permitted to question the witness at the
11 deposition.
- 12 2. The schedule for the plan confirmation trial is modified. The trial is vacated for
13 February 6 and February 7, 2023. The remaining trial dates are reserved. Counsel
14 shall meet and confer to schedule the completion of the deposition and to arrange for
15 additional trial dates. The reserved trial dates also may be vacated as necessary. No
16 relief is granted from the court's prior order requiring the examination of any witness
17 to be conducted in person. Counsel are directed to contact Cathy Shim, courtroom
18 deputy, to obtain additional trial dates.

19 **IT IS FURTHER ORDERED** that all other relief sought in the Sanctions Motion is
20 **DENIED.**

21 Copies sent via CM/ECF ELECTRONIC FILING

22 Copy sent via BNC to:

23
24 SCHULTE PROPERTIES LLC
25 ATTN: OFFICER OR MANAGING AGENT
26 9811 W. CHARLESTON BLVD STE 2-351
LAS VEGAS, NV 89117

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