



SO ORDERED,

A handwritten signature in blue ink that reads "Neil P. Olack".

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: January 12, 2017

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**KENNY C. WEBSTER, JR. AND
HELENA M. WEBSTER,**

CASE NO. 15-03467-NPO

DEBTORS.

CHAPTER 7

MCCOMB FINANCIAL, INC.

PLAINTIFF

VS.

ADV. PROC. NO. 16-00013-NPO

**HELENA MCDANIEL WEBSTER AND
KENNY CHARLES WEBSTER, JR.**

DEFENDANTS

ORDER DENYING PLAINTIFF'S SECOND MOTION TO COMPEL DISCOVERY

This matter came before the Court for hearing on January 9, 2017 (the "Hearing"), on the Plaintiff's Second Motion to Compel Discovery (the "Second Motion to Compel") (Adv. Dkt. 57)¹ filed by McComb Financial Inc., the plaintiff in the Adversary (the "Plaintiff"), and the Defendants' Response in Opposition to Plaintiff's Second Motion to Compel (the "Response") (Adv. Dkt. 63) filed by the defendants, Helena McDaniel Webster ("Helena Webster") and

¹ The docket in the above-styled adversary proceeding (the "Adversary") will be cited as "(Adv. Dkt. ____)." The docket in the related bankruptcy case, Case No. 15-03467-NPO (the "Bankruptcy Case"), will be cited as "(Bankr. Dkt. ____)."

Kenny Charles Webster, Jr. (together with Helena Webster, the “Defendants”) in the Adversary. At the Hearing, L. Jackson Lazarus (“Lazarus”) represented the Plaintiff and Arnold D. Lee (“Lee”) represented the Defendants. After fully considering the matter, the Court denied the Second Motion to Compel from the bench. This Order memorializes and supplements the Court’s bench ruling.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Adversary pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). Notice was proper under the circumstances.

Facts

1. The Defendants filed a joint petition for relief pursuant to chapter 7 of the Bankruptcy Code on November 6, 2015 (Bankr. Dkt. 1).

2. The Defendants filed their statements and schedules (Bankr. Dkt. 3) on November 6, 2015. On Schedule F - Creditors Holding Unsecured Nonpriority Claims, the Defendants listed the Plaintiff as having a claim in the amount of \$12,792.00. (Bankr. Dkt. 3 at 14).

3. The Plaintiff filed the Complaint to Declare Certain Debt Non-Dischargeable (the “Complaint”) (Adv. Dkt. 1) on March 6, 2016. In the Complaint, the Plaintiff alleged that it loaned money to Helena Webster on August 23, 2011, and that she pledged her “1995 MAGNA Pole Trailer” (the “Trailer”) as collateral. (Compl. at 1). When Helena Webster obtained the loan, she allegedly informed the Plaintiff that she possessed the Trailer, but “the [T]railer had actually been intentionally destroyed, cut into small pieces and sold as scrap metal as early as

2009, by the debtor's own admission."² (*Id.* at 2). According to the Plaintiff, when it advanced the original sum of \$3,500.00 to Helena Webster, it had relied on her representation that "she had valid and existing collateral, and advanced funds based upon said collateral. Without said collateral, [the Plaintiff] would not have made the loan." (*Id.*). The Plaintiff argued that each element of 11 U.S.C. § 523(a)(2)³ is satisfied and that it "suffered financial loss due to the substantial misrepresentation of [Helena Webster]." (*Id.*). After making the initial loan to Helena Webster, the Plaintiff made two (2) additional loans to her: (1) a loan in the amount of \$2,000.00 on July 8, 2013, secured by the Trailer; and (2) a loan in the amount of \$3,000.00 on August 12, 2014, also secured by the Trailer. (*Id.* at 3-4).

In the Complaint, the Plaintiff alleged that all three (3) loans to Helena Webster are non-dischargeable under § 523(a)(2) because she obtained each loan through a false representation. (*Id.* at 4). According to the Plaintiff, Helena Webster owes a total amount of approximately \$9,545.71. (*Id.*). Helena Webster "is guilty of [] obtaining [] money by false pretenses or representations and actual fraud, as defined by 11 U.S.C. Section 523." (*Id.*). The Plaintiff further argued in the Complaint that although Helena Webster appeared for a "Rule 2004 Examination," she "has been evasive and has refused to answer certain questions. In addition, [the Defendants] and those operating in concert with them have failed or refused to supply essential information in order for this creditor to complete its investigation and reach those conclusions which might be helpful to the court." (*Id.* at 4-5).

² In the Complaint, the Plaintiff took issue with the fact that the Defendants have "refused to supply the date of the destruction and sale of the collateral, except to say that it was in '2009.'" (Compl. at 5).

³ Hereinafter, all code sections refer to the Bankruptcy Code found in title 11 of the U.S. Code unless indicated otherwise.

4. The Defendants filed the Answer (Adv. Dkt. 9) on March 30, 2016, denying that the debt is non-dischargeable under § 523(a).

5. The Court entered the Scheduling Order (the “Scheduling Order”) (Adv. Dkt. 10) on April 1, 2016. Pursuant to the Scheduling Order, “[a]ll fact discovery shall be completed no later than ninety (90) days from the date of this Scheduling Order.” (Scheduling Order at 2). The Scheduling Order further provided that the deadlines could be extended by the Court “only upon written motion for good cause shown.” (*Id.* at 3).

6. While the Adversary was pending, the Order of Discharge (Bankr. Dkt. 45) was entered in the Bankruptcy Case on April 11, 2016.

7. On April 29, 2016, the Plaintiff filed the Plaintiff’s First Set of Interrogatories and Requests for Production Propounded to Defendant (the “First Set of Discovery”) (Adv. Dkt. 13).

8. The Plaintiff filed the Plaintiff’s Motion to Extend the Time for Discovery (Adv. Dkt. 18) on June 27, 2016, which the Court granted on June 27, 2016 (Adv. Dkt. 20), thereby extending discovery to October 9, 2016.

9. On July 29, 2016, the Defendants filed the Notice of Service of Defendants’ Discovery Responses to Plaintiff’s Discovery Requests (Adv. Dkt. 31).

10. After obtaining Court approval (Adv. Dkt. 27), the Plaintiff filed the Amended Complaint to Declare Certain Debt Non-Dischargeable (Adv. Dkt. 33) on August 4, 2016,⁴ which the Defendants answered in the Answer to Amended Complaint (Adv. Dkt. 34).

11. The Plaintiff filed the Plaintiff’s Second Motion to Extend the Time for Discovery (the “Motion to Extend”) (Adv. Dkt. 36) on September 28, 2016. In the Motion to Extend, the Plaintiff provided that “[c]onsiderable discovery” had been completed, but “considerable

⁴ From this point forward, the Court will refer to this pleading as the “Complaint.”

discovery” remained to be completed. (Mot. to Extend at 1). Accordingly, the Plaintiff requested an additional ninety (90) days in which to complete discovery. (*Id.* at 2). The Defendants filed the Defendants’ Response in Opposition to Plaintiff’s Second Motion to Extend the Time for Discovery (Adv. Dkt. 41) on October 10, 2016, arguing that the Plaintiff was “just unreasonably delaying this case” and it “offer[ed] no explanation why it has not been able to complete discovery in the original time set by the Court and in the first extension of time.” (Adv. Dkt. 41 at 1). After holding a hearing on the matter, the Court entered the Order Extending Time for Discovery (Adv. Dkt. 59) on December 1, 2016, extending the discovery deadline contained in the Scheduling Order to November 30, 2016.

12. On October 7, 2016, the Plaintiff filed the Plaintiff’s Motion to Compel Complete Discovery (Docket #28) (the “First Motion to Compel”) (Adv. Dkt. 37). In the First Motion to Compel, the Plaintiff argued that the Defendants submitted “casual responses” to the First Set of Discovery, and although it requested that they answer them fully and completely, the Defendants have failed to do so. (First Mot. to Compel at 1). According to the Plaintiff, it “is entitled to have its discovery fully answered to the extent that the Defendants have knowledge of the answers and/or access to the documents and things requested.” (*Id.* at 2). The Defendants filed the Defendants’ Response in Opposition to Plaintiff’s Motion to Compel (Adv. Dkt. 46) on October 26, 2016, simply requesting that the First Motion to Compel be denied because it “lacks merit and is deficient.” (Adv. Dkt. 46 at 1).

13. The Court held a hearing on the First Motion to Compel on October 31, 2016 (the “October Hearing”). At the October Hearing, Lazarus argued that the Defendants’ responses to the First Set of Discovery were either ambiguous or non-existent. He requested that the Court order the Defendants to provide more thorough responses and cooperate in the discovery process.

Lee argued at the October Hearing that the First Motion to Compel was procedurally improper because the Plaintiff did not comply with Federal Rule of Bankruptcy Procedure 7037 or Rule 7037-1 of the Uniform Local Rules of the United States Bankruptcy Courts for the Northern and Southern Districts of Mississippi (the “Local Rules”). Subsequent to the October Hearing, the Court entered the Order (Adv. Dkt. 49) denying the First Motion to Compel.

14. The Plaintiff filed the Plaintiff’s 2nd Set of Interrogatories Propounded to the Defendants (the “Second Set of Interrogatories”) (Adv. Dkt. 39) and the Plaintiff’s 2nd Set of Requests for Production of Documents Propounded to Defendants Kenny and Helena Webster (the “Second Set of Requests”) (Adv. Dkt. 40) on October 9, 2016.⁵ The Defendants filed the Notice of Service of Defendants’ Discovery Responses to Plaintiff’s 2nd Set of Discovery Requests (the “Defendants’ Second Discovery Responses”) (Adv. Dkt. 50) on November 10, 2016.

15. On November 30, 2016, the Plaintiff filed the Second Motion to Compel. In the Second Motion to Compel, the Plaintiff argued that the Defendants’ “responses to discovery are incomplete, evasive, and obstructive,” and that “[t]he Defendants should be required to fully respond.” (Mot. at 1). According to the Plaintiff, it “made a good faith effort to obtain its discovery, and is entitled to have its discovery fully answered to the extent that the Defendants have knowledge of the answers and/or access to the documents and things requested.” (*Id.* at 2). In the Second Motion to Compel, the Plaintiff alleged that the Defendants refused to answer the Second Set of Interrogatories for reasons not sufficiently stated. (*Id.* at 2). As to the Second Set of Requests, the Plaintiff described each request and the Defendants’ response and explained why it believed the response was inadequate, but it did not quote verbatim each request and

⁵ The Court will refer to the Second Set of Interrogatories and the Second Set of Requests collectively as the “Second Set of Discovery.”

response in dispute. (*Id.* at 2-4). The Defendants filed the Response on December 27, 2016, denying the allegations in the Second Motion to Compel and arguing that they “stand by their original responses as they are accurate.” (Resp. at 1).

16. At the Hearing, Lazarus argued that unlike the First Motion to Compel, which was denied for being procedurally improper, the Second Motion to Compel specified each response the Plaintiff believed constituted a failure to respond adequately to the Second Set of Requests. Additionally, although he claimed to have made a good faith effort to resolve the discovery dispute, the Defendants still have not provided complete discovery or any documents. Although Lazarus conceded that he did not attach to the Motion to Compel a certificate that he conferred in good faith with opposing counsel, he stated that he made several good faith attempts to resolve the current dispute.

17. Lee argued at the Hearing on behalf of the Defendants that the Second Motion to Compel should be denied because Rule 7033-1 of the Local Rules (“Local Rule 7033-1”) provides that the Plaintiff was only permitted to propound one set of discovery unless it obtained leave of the Court, and the Plaintiff did not obtain the Court’s permission to propound the Second Set of Discovery. Lee also argued that in the Second Motion to Compel, the Plaintiff did not quote verbatim the responses to the Second Set of Requests it believed the Defendants inadequately answered. Lee argued that even if the Court reached the merits of the Second Motion to Compel, the Defendants fully responded to the Second Set of Requests, and they do not have any records in their possession that they refused to produce.

Discussion

Before the Court will consider the merits of the Second Motion to Compel, it will first determine whether the Second Motion to Compel complied with the Local Rules. If the Second

Motion to Compel did comply with the Local Rules, the Court will discuss the merits. If the Second Motion to Compel failed to comply with the Local Rules, however, it will be unnecessary for the Court to address the merits.

I. Local Rule 7037-1(a) – Good Faith Certificate

Rule 7037-1 of the Local Rules (“Local Rule 7037-1”) imposes a duty upon counsel to confer with opposing counsel in good faith prior to filing a motion to compel discovery. “Prior to service of a motion to compel discovery for whatever reasons, all counsel shall be under a duty to confer in good faith to determine to what extent discovery disputes can be resolved before presenting the issue to the bankruptcy judge.” MISS. BANKR. L.R. 7037-1(a). Local Rule 7037-1(a) further provides that a bankruptcy judge will not hear a motion “unless counsel for the moving party shall incorporate in the motion a certificate that counsel has conferred in good faith with opposing counsel in an effort to resolve the dispute and has been unable to do so.” *Id.*

The only allegation in the Second Motion to Compel that could be construed as addressing counsel’s duty to confer in good faith is that the “[P]laintiff made a good faith effort to obtain its discovery” (Mot. at 2), but Lazarus conceded at the Hearing that he did not actually attach a good faith certificate to the Second Motion to Compel. No additional details regarding Lazarus’s attempts to resolve the discovery dispute with Lee were included in the Second Motion to Compel. The Court, therefore, finds that the Second Motion to Compel did not comply with Local Rule 7037-1(a) and should be denied.⁶ Although it is unnecessary, the Court will next address the Plaintiff’s alleged failure to comply with Local Rule 7037-1(b).

⁶ This Court held in an adversary in the Northern District of Mississippi that counsel satisfied Local Rule 7037-1(a) even though she did not attach a certificate of good faith to the motion by specifically outlining in the motion to compel her attempts to confer in good faith and attaching a good faith letter to the motion to compel. *Day v. B & B Auto Sales, LLC*, Adv. No. 16-01022-NPO, slip op. at *5 (Bankr. N.D. Miss. Dec. 7, 2016). Unlike counsel in *Day*, Lazarus

II. Local Rule 7037-1(b) – Quoting Verbatim Disputed Language

Pursuant to Local Rule 7037-1(b), “[m]otions raising issues concerning discovery, in accordance with Fed. R. Civ. P. 33, 34, 36 and 37, as adopted by Fed. R. Bankr. P. 7033, 7034, 7036 and 7037, shall quote verbatim each interrogatory, request for production or request for admission to which the motion is addressed” MISS. BANKR. L.R. 7037-1(b). After quoting each interrogatory or request addressed in a motion, the movant must also state “(i) the specific objection, (ii) the grounds assigned for the objection (if not apparent from the objection itself), and (iii) the reasons assigned as supporting the motion, and shall be written in immediate succession to one another.” *Id.* “Such objections and grounds shall be addressed to the specific interrogatory, request for production or request for admission and may not be general in nature.” *Id.*

Although the Plaintiff described the specific requests and responses to the Second Set of Requests to which it objected, it did not quote them verbatim. For example, in the Second Motion to Compel, the Plaintiff argued that the Defendants should be compelled to respond to Request No. 2, which requested Helena Webster’s last pay stub, Requests Nos. 4, 5, and 7, which sought documentary evidence, Request No. 9, which sought copies of three (3) tag receipts, Request No. 21, which sought the address and telephone number of Michael Webster, Request No. 22, which sought documentary proof of Kenny Webster’s disability, and Request No. 23, which was “the customary request asking the party opposite that, if they object to providing documents or if they withhold documents, they should expressly state the reasons for their objections and describe the documents withheld” (Mot. at 2-4). Although the Plaintiff

did not outline his attempts to resolve the discovery dispute and did not attach a good faith letter to the Second Motion to Compel. The only evidence of his alleged attempt to resolve the dispute in good faith was his bare assertion in the Second Motion to Compel that he attempted to do so. (Mot. at 2).

identified each request in the Second Set of Requests to which it believed the Defendants should be compelled to respond, it did not quote each request verbatim. The Court, therefore, finds that the Plaintiff did not comply with Local Rule 7037-1(b) and the Second Motion to Compel should be denied for this additional reason. Having reached this finding, the Court finds it unnecessary to address the merits of the Second Motion to Compel.⁷

Conclusion

The Second Motion to Compel should be denied because Lazarus did not attach a good faith certificate to the Second Motion to Compel or otherwise show that he conferred in good faith with Lee in an effort to resolve the discovery dispute as required by Local Rule 7037-1(a). Additionally, because the Plaintiff did not quote each request verbatim as required by Local Rule 7037-1(b), the Second Motion to Compel should be denied.

IT IS, THEREFORE, ORDERED that the Second Motion to Compel is hereby denied.

##END OF ORDER##

⁷ At the Hearing, Lee argued that the Second Set of Interrogatories was barred by Local Rule 7033-1. Although unnecessary because the Court has found that the Second Motion to Compel should be denied for the aforementioned reasons, the Court will briefly address this argument to provide instruction in future cases. Local Rule 7033-1 provides that interrogatories propounded by any party to another “shall be limited to 1 set of questions, not to exceed 25 in number, except by order of the court for good cause shown.” MISS. BANKR. L.R. 7033-1. The Plaintiff filed the First Set of Discovery, which included its first set of interrogatories, on April 29, 2016, and filed the Second Set of Interrogatories on October 9, 2016, without first obtaining leave of the Court to do so. Accordingly, the Second Set of Interrogatories was procedurally improper.