UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

TAYLOR, BEAN & WHITAKER
MORTGAGE CORPORATION,

CASE NO.: 3:09-bk-7047-JAF
Chapter 11

Debtor.
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ORDER DENYING MOTION FOR ENTRY OF ORDER AUTHORIZING AND DIRECTING RULE 2004 EXAMINATION OF TAYLOR, BEAN & WHITAKER MORTGAGE CORPORATION

This case is before the Court on Dean and Marcielle Jacobs' (collectively, the "Movants") motion to authorize Rule 2004[1] examination of Taylor, Bean & Whitaker Mortgage Corporation ("TBW") (Doc. 6034, the "Motion"). The Motion additionally seeks Court authorization for the Movants to engage in certain discovery, and to compel discovery responses (Doc. 6034 at 4-5). The Court has jurisdiction pursuant to 28 U.S.C. § 1334(b). This is a core matter pursuant to 28 U.S.C. § 157(b)(2)(A). For the reasons stated below, the Motion is denied to the extent set forth herein.

The Movants are creditors of TBW. The Movants originally filed a proof of claim in the amount of $3,442.68 (Claim No. 1484); to which, TBW filed an objection (Doc. 5390, the "Objection"). The Movants filed a response in opposition to the Objection (Doc. 5531, the "Response"). Subsequent to filing the Response, the Movants amended their claim to reflect a claim in the amount of $202,023,443.00 (Claim No. 3514).

By way of the Motion (Doc. 6034), the Movants request the Court to: (1) authorize a Rule 2004 examination of TBW; (2) authorize service of the Request for Production (attached to the Motion as

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[1] Unless otherwise indicated, all references to a "Bankruptcy Rule" or "Rule" are to the Federal Rules of Bankruptcy Procedure and all references to the "Bankruptcy Code" or "Code" are to 11 U.S.C. § 101 *et seq.*

Exhibit A); (3) authorize notices of deposition; (4) authorize "subpoenas and other process to compel a response to the Request for Production"; (5) compel a response to the Request for Production within thirty (30) days; and (6) compel attendance of current and former employees of TBW at one or more oral examinations (Doc. 6034 at 4).

Rule 2004 of the Federal Rules of Bankruptcy Procedure provides: "[o]n motion of any party in interest, the court may order the examination of any entity." FED. R. BANKR. P. 2004(a). The scope of an examination permitted by Rule 2004 may relate only to the acts, conduct, property, or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the bankruptcy estate. FED. R. BANKR. P. 2004(b). The Court has discretion with respect to whether to grant a request for a Rule 2004 examination.

An examination under Rule 2004 of the Federal Rules of Bankruptcy Procedure is not a substitute for discovery under Rule 26 of the Federal Rules of Civil Procedure. *In re 2435 Plainfield Ave., Inc.*, 223 B.R. 440, 455 (Bankr. D.N.J. 1998). The majority of courts prohibit Rule 2004 examinations "of parties involved in or affected by an adversary proceeding [or contested matter] while it is pending." *Id.* at 456; *see also In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002) (noting "the well recognized rule that once an adversary proceeding or contested matter is commenced, discovery should be pursued under the Federal Rules of Civil Procedure and not by Rule 2004"); *In re Bennett Funding Group, Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996) (noting once an adversary proceeding or contested matter has been commenced, discovery is made pursuant to the Federal Rules of Bankruptcy Procedure 7026 *et seq.*, rather than by a Rule 2004 examination).

The basis for this proscription "lies in the distinction between the broad nature of the Rule 2004 exam and the more restrictive nature of discovery under the Federal Rules of Civil Procedure." *In re Enron Corp.*, 281 B.R. at 840-41 (internal quotations omitted). Rule 2004 necessarily permits a broad

investigation into the financial affairs of debtors to assure the proper administration of bankruptcy estates. *In re Symington*, 209 B.R. 678, 683-84 (Bankr. D.Md. 1997). By contrast, Rule 26 of the Federal Rules of Civil Procedure provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1).

Under the Federal Rules of Bankruptcy Procedure, the filing of an objection to a proof of claim gives rise to a contested matter. *Georgia Dept. of Rev. v. Mouzon Enters. (In re Mouzon Enters.)*, 610 F.3d 1329, 1333 (11th Cir. 2010). TBW has objected to the Movants' proof of claim; therefore, the dispute is a contested matter. As such, the Movants are not entitled to a Rule 2004 examination of TBW, and the motion to permit the same is denied.

The Movants, however, additionally request that the Court authorize them to conduct discovery (Doc. 6034 at 4). As noted previously, the parties' dispute is a contested matter. Many aspects of the discovery process provided for under Federal Rules of Bankruptcy Procedure 7026 *et seq.* and the Federal Rules of Civil Procedure are made applicable in contested matters pursuant to Rule 9014. Court authorization is therefore not required for the Movants to engage in appropriate discovery. The Movants may conduct discovery in accordance with the Rules. Even though the Movants are litigating their claim(s) *pro se*, they remain subject to the relevant laws and rules of the Court, including the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure. *Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989).

The Movants additionally request that the Court compel a response to the Request for Production (attached as Exhibit A) within thirty (30) days of service (Doc. 6034 at 4, Ex. A). The Movants' request in this regard is premature and unnecessary.

More particularly, the Rules "require that discovery be accomplished voluntarily; that is, the parties should affirmatively disclose relevant information without the necessity of court orders

compelling disclosure." *Bush Ranch, Inc. v. E.I. DuPont De Nemours & Co.*, 918 F. Supp. 1524, 1542 (M.D. Ga. 1995), *rev'd on other grounds*, 99 F.3d 363 (11th Cir. 1996). Discovery is intended to operate with minimal judicial supervision unless a dispute arises and one of the parties files a motion requiring judicial intervention. In this case, the Movants have yet to seek discovery from TBW in accordance with the Rules.[2] As such, any motion to compel a response is nonsensical. Moreover, the Rules provide that any response to a request for production be made within thirty (30) days of service. FED. R. BANKR. P. 7034; FED. R. CIV. P. 34. Thus, the requested relief in this regard is superfluous.

Again, the Court would note that the Movants may engage in appropriate, relevant discovery. If a dispute later arises, a motion to compel discovery may be appropriate. Until such time as TBW fails to respond to a particular discovery request, however, any motion to compel a response thereto is premature. In addition, the Court would point out to the Movants that any motion to compel discovery must be accompanied by a certification that the movant has in good faith conferred, or attempted to confer, with the person or party failing to provide discovery in an effort to obtain it without court action. FED. R. BANKR. P. 7073; FED. R. CIV. P. 37. No such certification is attached to the Motion. Based on the foregoing, the Movants' motion to compel discovery is denied.

The Movants also request the Court to compel the attendance at deposition(s) of TBW and current and former employees (Doc. 6034 at 4). Generally, Rule 30 of the Federal Rules of Civil Procedure (made applicable by Rule 7030 of the Federal Rules of Bankruptcy Procedure) provides the method by which the Movants may seek to depose witnesses. The Movants, however, have not sought to depose any witnesses pursuant to the Rules. As such, any motion to compel attendance is premature, and will be denied as such.

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[2] It appears the Movants sought certain information from TBW prior to the filing of the Petition (*see* Doc. 6034 at 12, 16).

With respect to deposing former employees of TBW, it may be necessary for the Movants to issue subpoena(s). Issuance of subpoenas to non-parties is governed by Rule 45 of the Federal Rules of Civil Procedure (made applicable by Rule 9016 of the Federal Rules of Bankruptcy Procedure). The Movants are advised that they must comply with all the requirements of Rule 45 if they desire to subpoena non-party witnesses to appear for deposition. If a party uses a subpoena to command a witness' appearance, he or she will be required to pay the witness' fees and mileage as allowed by law. Fed. R. Civ. P. 45(b)(1). Additionally, a subpoena must be served by a non-party, so the party may incur the costs of a process server. Litigants must bear their own litigation expenses.

Based on the foregoing, it is **ORDERED**:

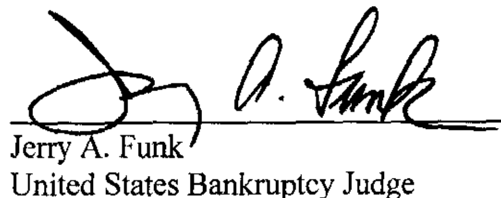
1. The motion to authorize Rule 2004 examination of Taylor, Bean & Whitaker Mortgage Corporation (Doc. 6034) is denied to the extent provided herein.

2. The Movants' request to conduct a Rule 2004 examination of Taylor, Bean & Whitaker Mortgage Corporation is denied.

3. The Movants may conduct appropriate, relevant discovery in accordance with the Federal Rules of Civil Procedure, made applicable by the Federal Rules of Bankruptcy Procedure.

4. The Movants' motion to compel discovery responses is denied as premature.

DATED this 1st day of October, 2012 in Jacksonville, Florida.



Jerry A. Funk
United States Bankruptcy Judge

Copies to:
Alisa Paige Mason, attorney for Debtor;
Dean and Marcielle Jacobs, Creditors;
All other interested parties