

SEP 01 2009

SALT LAKE COUNTY

By _____ Deputy Clerk

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IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

A. DAVID BARNES, M.D., P.C.,

Plaintiff,

vs.

FFCF INVESTORS, LLC, et al.

Defendants.

FFCF INVESTORS, LLC,

Plaintiff,

vs.

RICHARD SMITH, et al.

Defendants.

**RECEIVER'S MOTION TO COMPEL
DEPOSITION OF RICHARD SMITH
AND IMPOSE SANCTIONS;
MEMORANDUM IN SUPPORT**

Case No. 080922273

Judge: Denise P. Lindberg

R. WAYNE KLEIN, the Court-appointed Receiver in this matter, hereby moves, pursuant to Rule 37(d), for an order compelling defendant Richard Smith to submit to a deposition to be taken by the Receiver and other parties in this consolidated action.

FACTUAL BACKGROUND

1. The current action is a consolidation of two different cases. The original action was filed by Dr. Barnes on October 15, 2008 and names Richard Smith as one of the defendants.
2. A complaint was filed by Sara Pfrommer, purportedly on behalf of FFCF Investors, on or about December 16, 2008. This complaint names Richard Smith as a defendant and seeks recovery for fraud, conversion, breach of fiduciary duty, and other misconduct. On March 11, 2009, an amended complaint added a claim of fraudulent transfer.
3. On July 31, 2009, this Court consolidated the two actions.
4. At a hearing on July 20, 2009, this Court granted the Receiver the ability to issue subpoenas and take depositions without being required to conduct an attorney planning meeting and make initial disclosures.
5. On August 5, 2009, the Receiver served on Smith a subpoena duces tecum. Because Smith is unrepresented, the Receiver opted to formally serve Smith with a subpoena rather than simply mail a notice of deposition. The subpoena identified documents Smith was to bring with him to the deposition. Smith signed a copy of the subpoena, acknowledging receipt. A copy of the subpoena served on Smith is attached as Exhibit A. Notice of the deposition was mailed to all parties in the consolidated action as well as some other interested persons.
6. The Receiver intended to use the deposition to understand the financial transactions in which the Receivership Entities engaged. The Receiver seeks to determine what assets can be recovered to the Receivership Estate for distribution to investors.

7. The deposition was scheduled for August 27, 2009 in Provo, to be convenient for Smith.
8. The Receiver spent several days preparing for the deposition by identifying payments made by entities in receivership, including Ascendus Capital Management, FFCF Investors, and Smith Holdings. These include payments by these Receivership Entities to Smith, family members of Smith, and over 100 other entities. Many of these payments were made by checks signed via Smith.
9. On the afternoon of August 26, 2009, the day before the scheduled deposition, the Receiver received in the mail an objection to the subpoena, signed by Smith. The objection had been mailed August 25, 2009. A copy of the envelope showing its mailing date is attached as Exhibit B.
10. The objection by Smith claims that complying with the subpoena would subject him to an undue burden because he does not have the requested documents in his possession and because he does not have funds to hire an attorney. A copy of Smith's objection is attached as Exhibit C.
11. After receiving the objection from Smith, the Receiver called Smith's home (the afternoon of August 26, 2009). No one answered the telephone so the Receiver left a voice mail message explaining that a) even though Smith said he did not have documents, the Receiver would bring documents to the deposition to use in questioning Smith and b) because Smith is a party, his objection was not well founded. The Receiver's voice mail message indicated that Smith was still expected to appear at the deposition the next morning.

12. On August 27, 2009, the Receiver went to Provo for the scheduled deposition. Smith did not appear and has not contacted the Receiver in response to messages left at his home.
13. The Receiver has expended significant time in preparation for the deposition and expense in appearing at the scheduled time. This time and expense is a cost borne by the investors in this case.
14. On August 31, 2009, the Receiver again called Smith's home in an effort to see whether Smith would consent to setting a new date and time for his deposition. Smith was not home and the Receiver left a message asking that Smith call the Receiver. The Receiver certifies that he has, in good faith, attempted to confer with Smith in an attempt to avoid the need to ask the Court's help (see Rule 37(a)(2)(B)).

ARGUMENT

Standard for Failing to Appear at Properly Noticed Deposition

Civil Procedure Rule 37(d) prescribes the consequence of a party's failure to appear.

If a party . . . fails [] to appear before the officer who is to take the deposition, after being served with a proper notice, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule [ordering facts admitted, denial of defenses, or striking pleadings]. In lieu of any order or in addition thereto, the court shall require the party failing to act . . . to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an aware of expenses unjust.

Utah appeals courts have consistently emphasized the duties of cooperation owed by parties and explained the role of district courts in managing the litigation.

Coxey v. Fraternal Order of the Eagles, Aerie 2742, 2005 UT App 185, 112 P.3d 1244 (Utah App. 2005) affirmed a trial court's dismissal of a case where the plaintiff failed to produce a videotape requested by defendants. The Court of Appeals noted that under Rule 37, the case can be dismissed even "when no discovery order existed." *Id.* at ¶1, 112 P.3d at 1246. "It is enough that a notice of the taking of a deposition or a set of interrogatories or a request for inspection has been properly served on the party." *Id.*

In order to impose sanctions, the court "must find on the part of the noncomplying party, wilfulness, bad faith, or fault." *Id.* (citations omitted). The court noted: "Willful failure has been defined as any intentional failure as distinguished from involuntary compliance. No wrongful intent need be shown." *Id.* (citations omitted); *Aurora Credit Services v. Liberty West Dev.*, 2006 UT App. 48 at ¶9.

Objections Raised by Smith

The question of what constitutes "undue burden" was raised in *Tuck v. Godfrey*, 1999 UT 127, 981 P.2d 407 (Utah App. 1999). That case has many parallels to the instant action. In *Godfrey*, a nursing home resident provided \$380,000 in investments and loans to a retirement center. Plaintiff (Tuck) scheduled a deposition of Godfrey, an employee of the retirement center. After Godfrey failed to appear at the scheduled deposition, Tuck filed a motion for sanctions. Godfrey opposed the motion for sanctions and sought a protective order, claiming an "undue burden, expense and oppression [of] having to appear at his deposition as Noticed by plaintiff." *Id.* at ¶6, 981 P.2d at 409. The court noted that Godfrey's "motion did not provide any factual

background explaining why Godfrey would experience any undue burden” *Id.*

The court imposed sanctions, ordering Godfrey to pay attorneys fees to Tuck for the cost of the motion for sanctions. *Id.* at ¶7. The appeals court affirmed.

Smith’s claim that he cannot hire an attorney, as justification for failing to appear at his deposition, also lacks merit. In civil cases, such as this, a defendant has no right to a court-appointed counsel. “[D]efendant has no right to counsel in a civil case.” *State v. Young*, 853 P.2d 327, 354 (Utah 1993); *State v. One 1980 Cadillac*, 2001 UT 26 at ¶14, 21 P.3d 212, 216 (Utah 2001). *See also In the Matter of Adoption of C.R.M.*, 2009 UT App. 114 at n. 1 (no statutory right to the appointment of counsel or a transcript at public expense in this civil case). His claimed inability to hire an attorney does not constitute an undue burden.

Sanctions Requested

The Receiver believes that Smith’s failure to appear at the deposition represents bad faith, especially in light of his decision to give notice to the Receiver of his intent not to appear only the afternoon before the scheduled deposition. Smith waited three weeks after being served with the subpoena to notify the Receiver of his objections. Smith’s other assertions that he lacks counsel and has no documents in his possession are not legitimate grounds for failing to appear – additional indications of bad faith.

Regardless, the Court can grant sanctions even without finding bad faith on Smith’s part. The Court need only find that Smith’s failure to appear was willful, a decision he made intentionally rather than involuntarily. *See Coxey*, 2005 UT App. 185 at ¶6.

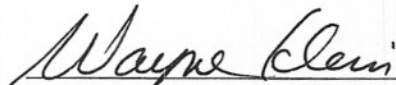
Requested Relief

The Receiver asks the Court to order:

1. That Smith appear at a deposition at a date and time set by the Receiver.
 - a. That in connection with his deposition, Smith appear in Salt Lake for his deposition, at a location to be determined by the Receiver.
 - b. That Smith make himself available for up to three days of testimony, to permit the Receiver to question him about the many payments and financial transactions that occurred while he was in control of the Receivership Entities and to allow other parties to ask questions.
2. That Smith use his best efforts to recover documents responsive to the subpoena duces tecum that he previously has delivered to the possession or control of others.
3. That Smith pay the costs and expenses of the Receiver in traveling to Provo for the scheduled deposition and the expenses of making this motion. If Smith asserts an inability to pay, he should be required to provide the Receiver with a sworn statement of assets and liabilities.

A proposed order is attached.

Respectfully submitted this 27 day of September, 2009.



R. WAYNE KLEIN #3819
Receiver for FFCF Investors, Ascendus
Capital Management, and Smith Holdings

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, 2009, true copies of the foregoing

Receiver's Motion to Compel and for Sanctions, and Proposed Order, were mailed to:

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