

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

THE DIOCESE OF ROCHESTER,

Debtor.

Case No. 19-20905 (CGM)

Chapter 11

**MEMORANDUM OF LAW IN OPPOSITION TO MOTION OF THE OFFICIAL
COMMITTEE OF UNSECURED CREDITORS FOR AN ORDER PURSUANT TO
FEDERAL RULE OF BANKRUPTCY PROCEDURE 2004 FOR DEPOSITION OF
BISHOP EMERITUS MATTHEW HARVEY CLARK**

INTRODUCTION

On January 24, 2020, the Official Committee of Unsecured Creditors (“CC”) filed a motion requesting an order of the Bankruptcy Court permitting it to serve upon third party Bishop Emeritus Matthew Clark (“Bishop Emeritus”) two subpoenas to conduct Rule 2004 discovery. The Rule 2004 discovery request consists of document discovery (neither specified nor identified) and deposition testimony about claims asserted by various individuals pursuant to the Child Victims Act (the “CC Motion”). [Dkt 380 filed January 24, 2020]. The CC Motion identifies various forms of relief that includes permission for conduct of a deposition by multiple legal counsel, including counsel to parties named in CVA litigation pending in New York State Supreme Court. [Dkt 380, ¶ 21 “Proposed Procedures”]. In this regard, the CC contends that the relief sought (issuance of subpoenas to compel document production and testimony under oath) is necessary to “create a record regarding the basis for the Diocese’s liability for sexual abuse claims.” [Dkt 380, ¶ 20].

The CC's legal support for the requested relief is 11 USC §§ 1103(c)(2) and 105, Federal Rule of Bankruptcy Procedure 2004 governing the conduct of examinations and four bankruptcy court decisions.

The Bishop Emeritus opposes the Motion because he suffers from Alzheimer's disease and is unable to competently testify. Facts about the progression of the illness such that he is not able to competently testify, and the associated "very likely" harmful consequences of being compelled to testify, are established by the medical opinion of Anthony M. Maroldo, M.D., who has provided medical care to Bishop Emeritus Clark since 2018. *See Declaration of Anthony M. Maroldo, MD.*

Also, the Bishop Emeritus opposes the Motion on the grounds that the CC has failed to establish good cause for the relief identified in the Motion because there are other, reliable means of obtaining information, either in testimonial and/or documentary format, to establish claims and, further, denial of the motion will not create undue hardship or injustice. *See In re Orion Healthcorp, Inc.*, 596 B.R. 228 (Bankr. E.D. N.Y. 2019) (recognizing that the party seeking Rule 2004 discovery has the burden to show good cause notwithstanding the broad scope of Rule 2004); *In Re: Transmar Commodity Group LTD*, 2018 WL 4006324 (Bankr. S.D.N.Y. 2018) (recognizing the movant's burden to establish good cause and further acknowledging the Court's duty to 'balance the competing interests of the parties, weighing the relevance of and necessity of the information sought by examination, but only if and when the movant has demonstrated good cause) ("*In Re: Transmar*").

RELEVANT FACTS

The CC requests permission to conduct Rule 2004 discovery of a third party even though it acknowledges and admits that the Bishop Emeritus has been retired for eight years, having served as Bishop of the Diocese of Rochester (“Debtor”) from 1979-2012; that his health is declining; that he suffers from Alzheimer’s disease and that the medical diagnosis of Alzheimer’s is a matter of public knowledge. [Dkt 380, ¶¶ 1,3 and fn. 3, 10].

Notably absent from the CC’s motion papers is any declaration establishing that Bishop Emeritus performs any duties for the Debtor; that he possesses and/or has control of or access to the Debtor’s documents or information; that the Debtor has objected to and/or refused to provide information relevant to the bankruptcy proceeding; or that the Diocese has refused to make available current employees with knowledge of the Debtor’s affairs.

The CC Motion relies only upon the general and unsubstantiated assertion that the Bishop Emeritus has “unique knowledge regarding facts pertaining to” complaints and other claims. [Dkt 380, ¶ 9]. And, while the CC Motion, some 314 pages in length, includes copies of CVA complaints (exhibits B-H), the CC has failed to show the manner in which the CVA complaints establish “unique knowledge” on the part of the Bishop Emeritus.

As acknowledged by the CC, the Debtor has “committed to provide documents pertaining to a variety of issues, including the Debtor’s financial condition and sexual abuse of minors within the Diocese.” [Dkt 380, ¶ 2]. Further, upon information and belief, the CC and the Debtor are about to or have entered into an agreement that calls for the production and exchange of information in response to stipulated document requests. [Atty Declaration, ¶ 20]. This development is consistent with the CC’s acknowledgment of the Debtor’s commitment to provide information in furtherance of mediation. [Dkt 380 ¶¶ 10,17].

Further, the Debtor has identified two key Diocese employees with knowledge about the Diocese in relationship to the bankruptcy proceeding, both of whom have submitted affidavits and/or declarations in support of the Debtor's First Day Pleadings. For example, there is the Affidavit of Daniel J. Condon filed on September 12, 2019 in support of the Chapter 11 Petition and First Day Pleadings ("Condon Aff") [Dkt 7], and the Affidavit of Lisa M. Passero Regarding the Debtor's Assets and Operations In Support of the Chapter 11 Petition and First Day Pleadings ("Passero Aff") [Dkt 6].

The Affidavits provide information about: Canon Law Structure and Organization, the Debtor, various non-debtor entities and reasons for the bankruptcy including without limitation the impacts of CVA claims. *See* Condon Aff ¶¶ 46-50 (regarding dissemination of publicly disclosed perpetrators; the making of criminal referrals; the Diocese's establishment of training and background assessment of all employees, clerics and volunteers who will likely interact with children and young people; the Diocese's objectives relative to fair and equitable compensation for victims of abuse by church personnel as well as other creditors), the Debtor's operations, budget and revenue information and the purpose and goals of the Chapter 11 filing. *See* Passero Aff ¶¶ 5, 6-7, 22-23. Notably, the CC Motion does not contend that current employees of the Debtor are unable to provide information useful for the evaluation of CVA claims in the Chapter 11 proceeding.

In addition to the foregoing, is the CC's acknowledgement of the 2012 testimony of then Bishop Matthew H. Clark. Relevant excerpts of the deposition testimony identify Diocesan employees, other than the Bishop Emeritus, as custodians for potentially relevant information. [Atty Declaration ¶¶ 14-18].

LEGAL ARGUMENT

The decision to grant or deny a request for discovery under Rule 2004 is within the sound discretion of the court. *In Re: Transmar* at *4 (*citations omitted*). “However, ‘in granting a Rule 2004 request, the bankruptcy court is required to make a finding of good cause for examination.’ (*citations omitted*). The party seeking discovery under Rule 2004 bears the burden of showing good cause for the examination it seeks (*citations omitted*). That burden will not be satisfied ‘merely by showing that justice would not be impeded by production of documents’ (*citations omitted*). Rather, the party seeking Rule 2004 must demonstrate either that the proposed examination is *necessary* to establish the claim of the party, or that denial of discovery would cause the party undue hardship or injustice” (*citations omitted*) (Emphasis added). *Id.*

The burden of showing good cause is an affirmative one that requires a showing of necessity to establishment of a claim or that denial would cause undue hardship. *See In Re the Drexel Burnham Lambert Group, Inc.*, 123 B.R. 702, 712 (Bankr. S.D.N.Y. 1991) (Considering Rule 2004 motion on the basis of factors such as practicality, fairness, the availability of means to investigate the parameters of claims) (“*Drexel*”).

Only when the movant satisfies the requisite burden may the Court engage in the balancing of the parties’ competing interests and/or weigh the relevance of and necessity of the information sought by examination. *In Re: Transmar*, at *4.

Third parties are subject to examination under Rule 2004 “if they possess knowledge of the debtor’s acts, conduct or financial affairs which relate to the bankruptcy proceedings.” *Id.*

In this case, the CC has failed to establish that the proposed 2004 discovery is directed to a third party capable of disseminating information about the debtor's acts, conduct or financial affairs; that the 2004 discovery is necessary and/or that denial of the Rule 2004 discovery would cause undue hardship or injustice.

Conduct of a Rule 2004 examination of a third-party witness not capable of testifying competently, is neither necessary nor fair. *See* Declaration of Anthony M. Maroldo, M.D. (establishing that the disabling aspects of Alzheimer's disease renders the witness unable to provide reliable information and that preparing for and participating in a deposition would very likely cause anxiety, frustration, stress and irritability, further impairing the Bishop Emeritus). Under these circumstances there is no basis for a finding that an examination of the Bishop would yield reliable information and the motion should be denied. *Cf. In re: Allen F. Bellville, Jr.*, 2002 WL 31761279 (Bankr. D. Vermont) (finding that movant failed to provide facts to permit a finding that a Rule 2004 examination of a third party would yield information relating to or effecting the administration of the chapter 13 estate).

Rather, the facts establish that compelling the testimony of the Bishop Emeritus would "very likely" be harmful. It is well established that Rule 2004 examinations may not be used if it will result in causing harm. *In Re: Orion Healthcorp, Inc.*, *supra* at 235; *In re Coffee Cupboard, Inc.*, 128 B.R.509, 514 (Bankr. E.D.N.Y. 1991).

Further, denial of the CC Motion as it relates to both the proposed Rule 2004 deposition and the subpoena *duces tecum*, does not create undue hardship or injustice. In this regard, the CC has failed to demonstrate that it is without means of conducting appropriate document/information discovery. Indeed, the facts of this matter establish that the CC has

multiple methods for obtaining reliable information from the Debtor through document production pursuant to an agreement and current Diocesan employees.

The decisional law cited by the CC does not support the requested relief. In fact, the decisions expressly recognize the movant's burden to establish good cause (*In Re the Drexel Burnham Lambert Group, Inc.*, 123 B.R. 702, 712 (Bankr. S.D.N.Y. 1991); that no relief is warranted when the relief would cause harm (*In re Table Talk, Inc.* 51 B.R. 143 (Bankr. D. MA 1985); that the purpose of Rule 2004 discovery is to gain a "clear picture of the condition and whereabouts of the bankrupt's estate (*In re Johns Manville Corp.*, 42 B.R.362, 364 (U.S. Dist Ct. S.D.N.Y. 1984) (vacating bankruptcy court order for production of market-share information); and that the examination of third parties is permissible if the witness possesses knowledge of the debtor's affairs (*In re Valley Forge Plaza Associates*, 109 B.R. 669 (Bankr. E.D. PA 1990).

The CC Motion also relies upon U.S.C. § 105 for the requested relief without discussion and/or analysis. It is well settled that the Court's equitable power pursuant to 11 U.S.C. § 105 does not permit the Court to disregard the CC's burden of demonstrating good cause. *See In Re Smart World Technologies, LLC*, 423 F3d 166, 183-184 (2nd Cir. 2005) (recognizing that section 105 (a) limits the court's equitable powers, "which must and can only be exercised with the confines of the Bankruptcy Code").

CONCLUSION

On the basis of the foregoing, the CC Motion should be denied in its entirety.

DATED: February 7, 2020

ADAMS LECLAIR LLP

/s/ Mary Jo S. Korona

By: Mary Jo S. Korona, Esq.
Counsel to Bishop Emeritus Matthew H. Clark
28 E. Main Street, Suite 1500
Rochester, NY 14614
Tel: (585) 327-4100
Fax: (585) 327-4200
Email: mkorona@adamsleclair.law