UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

JERI ANN DANIELSON,

Plaintiff,

v.

DAVID M. HULCE and WENDY K. HULCE,

Defendants.
_____/

Misc. Proceeding: 12-71003
Hon. Scott W. Dales

MEMORANDUM OF DECISION
AND ORDER REGARDING CONTEMPT MOTIONS

PRESENT: HONORABLE SCOTT W. DALES
United States Bankruptcy Judge

The court held a hearing in this miscellaneous proceeding by telephone on May 14, 2013, regarding numerous motions relating to the chapter 13 bankruptcy proceedings of David M. Hulce and Wendy K. Hulce (the "Debtors"), pending in the Eastern District of Wisconsin. *See In re Hulce*, Case No. 12-36672 (Bankr. E.D. Wisc.). Specifically, according to the court's docket, the Clerk court opened the present miscellaneous proceeding to permit Attorney Allan J. Rittenhouse to issues subpoenas directing Leigh Begres, Michael Begres and Nancy Hulce (the "Witnesses"), to produce documents and submit to examination, in the Western District of Michigan. *See* Fed. R. Civ. P. 45(a)(2).[1] At the telephone hearing, Mr. Rittenhouse appeared for Jeri Ann Danielson and Daniel Rittenhouse; Attorney E. Jay Olivares appeared for the Witnesses.

[1] The subpoenas, found on the docket for this miscellaneous proceeding at DN 2, 3 & 4, also direct the Witnesses to appear at a trial in Green Bay, Wisconsin, on April 19, 2013, contrary to Fed. R. Civ. P. 45(a)(2)(A).

The parties agreed that the various motions relating to discovery in connection with the Debtors' case were rendered moot by the Order Approving Stipulation signed by the Honorable Susan V. Kelley, United States Bankruptcy Judge for the Eastern District of Wisconsin. The only remaining issue is whether the court should hold the Witnesses, or perhaps their counsel, in contempt for failing to appear for examination, and produce documents, on March 27, 2013.

The federal court that issues a subpoena—the United States Bankruptcy Court for the Western District of Michigan in this case— "may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena." Fed. R. Civ. P. 45(e); Fed. R. Bankr. P. 9016. Here, according to the proofs of service filed as DN 2, DN 3 & DN 4, a deputy served the subpoenas on the Witnesses, not their counsel. Accordingly, to the extent that Mr. Rittenhouse seeks to hold Mr. Olivares in contempt, the applicable rule does not, by its terms, apply. Even if it did, the court would not be inclined to hold Mr. Olivares in contempt, given the steps he took in advance of the March 27, 2013 depositions to advise Mr. Rittenhouse that neither he nor the Witnesses would appear. As for the Witnesses, who were served with the subpoenas, the circumstances described without contradiction during today's telephone hearing similarly persuade the court to refrain from holding them in contempt. Certainly with respect to the document production, the record permits the court to find a written objection, which shifted the burden of going forward to Mr. Rittenhouse's clients. *See* Fed. R. Civ. P. 45(c)(2)(B). And with respect to the command to testify at the depositions, the court concludes that the Witnesses' reliance on counsel's advice, even if that advice were mistaken,[2] qualifies as an adequate excuse for not appearing.

[2] The parties agreed that the Witnesses' counsel filed motions to quash in the Eastern District of Wisconsin, although the Western District of Michigan was the "issuing court." Fed. R. Civ. P. 45(c)(3) (authorizing the *issuing* court to quash or modify its subpoena). Judge Kelley evidently concluded that the Western District of Michigan was the appropriate forum to resolve the subpoena-related controversies, and this court agrees.

Finally, the court notes that its contempt authority is limited to civil contempt, the object of which is to coerce compliance or compensate for disobedience, not to punish. *In re Burkman Supply, Inc.*, 217 B.R. 223, 225 (W.D. Mich. 1998). Given the settlement that Judge Kelley approved, there is no need to coerce the examination or document production, as counsel agreed during the hearing. And, because Mr. Rittenhouse was aware on March 26, 2013 that the Witnesses would not be attending on March 27, 2013, the court sees no need to compensate him or his clients for forging ahead with the depositions. Indeed, Mr. Rittenhouse's arranging a court reporter and appearing for the depositions despite Mr. Olivares's email smacks of gamesmanship that the court will not reward by exercising its limited contempt powers.

NOW, THEREFORE, IT IS HEREBY ORDERED that the contempt motions (DN 5 & DN 7) are DENIED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Memorandum of Decision and Order Regarding Contempt Motions pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Allan J. Rittenhouse, Esq., and E. Jay Olivares, Esq.

END OF ORDER

IT IS SO ORDERED.

Dated May 14, 2013

Scott W. Dales
United States Bankruptcy Judge