NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

- -X
In re:

ALFRED L. FAIELLA,

Debtor.

Chapter 7
Case No. 05-50986 (RTL)

- -X
NEW FALLS CORPORATION

Plaintiff,

Adversary Proceeding
Case No. 07-1470 (RTL)

v.

ALFRED L. FAIELLA,

Defendant.
- -X

OPINION

APPEARANCES:

David K. DeLonge, Esq.
Schumann Hanlon LLC
(Attorneys for the Plaintiff, New Falls Corporation)

Deirdre Woulfe Pacheco, Esq.
Wilentz, Goldman & Spitzer, P.A.
(Attorneys for Randy Faiella)

RAYMOND T. LYONS, U.S.B.J.

INTRODUCTION

Randy Faiella, a witness, filed a motion to be reimbursed for costs of producing an inventory log of subpoenaed documents. Additionally, Ms. Faiella objects to the award of costs to the Plaintiff, New Falls Corporation ("New Falls"), made by this court. Because the log of

Ms. Faiella's documents was made at the court's direction, not at the Plaintiff's request, and because creation of the log was meant to address the dilatory and obstructive tactics of Ms. Faiella and her attorney, her motion for reimbursement of costs is denied. For the same reason, her objection to the award of costs in favor of Plaintiff is overruled.

JURISDICTION

This court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a), and the Standing Order of Reference by the United States District Court for the District of New Jersey dated July 23, 1984, referring all proceedings related to a case under title 11 of the United States Code to the bankruptcy court. This is a core proceeding under 28 U.S.C. § 157(b)(2)(J) because Plaintiff's complaint objects to the Debtor's discharge.

FINDINGS OF FACT AND PROCEDURAL HISTORY

Alfred Faiella filed a voluntary petition under chapter 7 of the Bankruptcy Code on October 14, 2005. His was one of a flood of petitions filed just before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23. The complaint in this adversary proceeding objects to the Debtor's discharge on the grounds that he allegedly made false oaths on his bankruptcy schedules, transferred or concealed property of the estate, and failed to keep records. Relevant to the discovery dispute with the non-party witness, Randy Faiella, the complaint alleges that she and the Debtor entered into a sham divorce in 1992; that despite deeding his interest in the martial residence, Mr. Faiella continues to live there and, in fact, has a concealed interest in the residence; and, that the Debtor, a lawyer and real estate developer, created several business entities but listed his ex-wife, Randy Faiella, a teacher, as owner to conceal his interest.

Mr. Faiella's bankruptcy case has spawned two other adversary proceedings. In adversary proceeding number 06-1547, other creditors objected to the Debtor's discharge on the basis of false oaths alleging some of the same facts alleged by New Falls. The Debtor successfully defended that adversary proceeding resulting in a judgment finding no cause to deny his discharge. *Smith v. Faiella* (*In re Faiella)*, no. 06-1547, 2007 Bankr. LEXIS 2042 (Bankr. D.N.J. June 13, 2007), *aff'd*, no. 07-3473, 2008 U.S. Dist. LEXIS 10989 (D.N.J. Feb. 14, 2008). Randy Faiella testified at trial in that proceeding, was deposed, and responded to other discovery demands.

The other adversary proceeding, number 07-1559, was commenced by the Chapter 7 Trustee to avoid preferences and fraudulent transfers to Randy Faiella and her company. Among the Trustee's allegations are:

> Debtor has used a sham divorce as a vehicle for fraudulently diverting income to [Randy Faiella] under the guise of alimony and child support[; and]
>
> By virtue of Debtor's continued dominion and control over said property, businesses and assets, same are equitably owned by Debtor, notwithstanding that the legal title to the same were transferred to or acquired by [Randy Faiella].

Complaint, ¶ 16, p. 3; ¶ 101, p. 14, Docket No. 07-1559, Doc. 1-1, Apr. 23, 2007. The Trustee has sought discovery from Randy Faiella in that proceeding. If it goes to trial she can be expected to testify as a defendant.

This discovery dispute between the Plaintiff and Ms. Faiella has a long history extending back to state court proceedings that pre-date this bankruptcy case. Less than a month following the filing of the petition, the Debtor's former spouse, Randy Faiella, filed a motion to quash a subpoena for an examination pursuant to *Federal Rule of Bankruptcy Procedure* 2004 by New

Falls. The motion to quash disclosed that a protective order had been entered in the Superior Court of New Jersey regarding New Falls' requests for information in a pending state court suit where Randy Faiella was a non-party witness. The state court ordered that Randy Faiella's financial records and tax returns be kept confidential. The bankruptcy court did not quash the subpoena but temporarily limited the inquire to financial records for four years prior to bankruptcy and required her financial records to be kept confidential. New Falls appealed the order limiting discovery, and the district court affirmed

A year and a half after Alfred Faiella filed bankruptcy, New Falls filed a complaint objecting to his discharge. Again New Falls subpoenaed Randy Faiella for discovery. The subpoena asked Ms. Faiella to produce:

> Originals of all documents bearing signatures of Randy Faiella and Alfred Faiella including but not limited to property separation agreements and modifications of the same, cancelled checks, documents of assignment of judgment from Value Recovery Group, passports, leases mortgages, notes and other records bearing original signatures of said persons.

Aug. 8, 2007 Subpoena of Randy Faiella, ¶ 4, p. 3, Docket No. 07-1470, Doc. 10-3, Aug. 29, 2007. Apparently questions had arisen during a Rule 2004 examination about the authenticity of signatures on certain documents.

Randy Faiella moved to quash the subpoena on the grounds that she complied with Plaintiff's subpoena under Rule 2004 as limited by the court and argued that discovery in the adversary proceeding would be "duplicative burdensome, oppressive and plain nosy . . . ." Letter Memorandum, p. 2, Docket No. 07-1470, Doc. 11, Aug. 30, 2007. As to Plaintiff's demand for documents with original signatures, Randy Faiella objected that such documents were not relevant to New Falls' complaint objecting to discharge.

Plaintiff opposed the motion to quash alleging that nine business entities owned by Randy Faiella were operated by her ex-husband, that there were numerous loans from those entities to the Debtor, and that assets were co-mingled among the Debtor, his ex-wife, and her business entities. Plaintiff related that it planned to use a handwriting expert regarding checks bearing the purported signature of Randy Faiella that were suspected of having been signed by her ex-husband. In fact, both Randy Faiella and the Debtor admitted that on occasion he had signed her name to checks of the business entities. Plaintiff argued that all the discovery was relevant to its contention that the Debtor had failed to schedule assets that actually belonged to him. Randy Faiella's motion to quash was denied.

Following denial of Randy Faiella's motion to quash, the court invited Plaintiff and Ms. Faiella to submit any subsequent discovery disputes to the court informally by telephone conference. They did that three times between October and December 2007. On each occasion Ms. Faiella either complained that she had already produced voluminous documents relating to her business and should not have to do more or that she needed more time to come up with additional documents. Correspondingly, Plaintiff bemoaned Ms. Faiella's production of copies with no original signature and the slow pace at which the document production was going. To assist in resolving the dispute the court directed Plaintiff to make a detailed list of documents not yet produced and directed Ms. Faiella to create a log of all documents produced for inspection and copying. Also, Ms. Faiella was required to produce documents with original signatures or state that she did not have them.

These informal discovery telephone conferences and the procedures directed by the court did not fully resolve the issues between Plaintiff and Ms. Faiella. In a motion to compel

discovery filed February 5, 2008, Plaintiff cited not only delay but the continued absence of documents with original signatures. Plaintiff requested sanctions for contempt and reimbursement of its costs to obtain discovery from Ms. Faiella. Ms. Faiella opposed the motion citing a 90-page log of documents produced and claimed an inability to produce original signatures since her accountant had died. Plaintiff even requested the documents with original signatures that Ms. Faiella's attorney filed with the bankruptcy court in this case. She refused to produce them citing her understanding that discovery was limited to pre-petition materials. Ms. Faiella filed her own motion for reimbursement of the costs of creating a log of the fifteen boxes of documents produced by her.

Since the boxes of records were at Ms. Faiella's attorney's office, the court took the unusual step of meeting with Ms. Faiella at the office, along with the Plaintiff's attorney and the Trustee's attorney. A court reporter was present to make a record of what transpired. The court directed Ms. Faiella's attorney to hand over to Plaintiff's lawyer the certifications with Randy Faiella's original signatures that had been filed in the bankruptcy court. Three voided checks with Randy Faiella's original signature, that had been requested by Plaintiff, were quickly located among the fifteen boxes and, likewise, turned over. Randy Faiella brought with her the original of her will. That was turned over. Lastly, a carbon copy of an auto lease with Randy Faiella's signature was quickly located and delivered. In all, thirteen documents were located with Randy Faiella's original signature and ordered turned over.

The court wrote to counsel on February 29, 2008, finding that Randy Faiella, with the advice of her attorney, had failed to make disclosures and failed to cooperate in discovery. The court awarded Plaintiff its expenses for compelling discovery from Randy Faiella. Randy Faiella

objected to the court's award of expenses to the Plaintiff and pressed her own claim that Plaintiff should reimburse her for the expense of creating the document log as directed by the court. The court reserved decision on both issues.

Having heard several formal discovery motions and participated in several informal telephone conferences with the attorneys, the court finds that Randy Faiella, with the advice of her attorney, Wilentz, Goldman & Spitzer, P.A., has not fulfilled her duty to respond to a subpoena.

DISCUSSION

I. DISCOVERY

Discovery is a critical part of the civil litigation process because it "remove[s] surprise from trial preparation so that parties may obtain the evidence necessary to evaluate and resolve their dispute." 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 26.02 (3d. ed. 2008). "Discovery serves to narrow and clarify the issues and ascertain the facts that are actually in dispute and require trial." *Id.* "Parties engage in discovery to obtain unknown information or to supplement or corroborate information that is already known by the party." 2 JAMES WM. MOORE ET AL., MOORE'S MANUAL: FEDERAL PRACTICE AND PROCEDURE ¶ 15.01[1] (3d. ed. 2008).

"The Federal Rules of Civil Procedure adopt a liberal policy for providing discovery." *Jones v. Derosa,* 238 F.R.D. 157, 163 (D.N.J. 2006).[1] Rule 26 is the general provision governing discovery. Rule 26(b)(1) provides that a party may seek discovery of evidence "that is relevant

[1] "Liberal pretrial discovery tends to foster simplicity in pleading by permitting the pleadings to assume the form of generalized statements." MOORE, *supra*, ¶ 26.02.

to any party's claim or defense" or "the subject matter involved in the action." FED. R. CIV. P. 26(b)(1). This broad scope is warranted because the "[r]eview of all relevant evidence provides each party with a fair opportunity to 'present an effective case at trial.' " *Jones*, 238 F.R.D. at 163 (quoting *Caver v. City of Trenton*, 192 F.R.D. 154, 159 (D.N.J. 2000)).[2] In bankruptcy, discovery is governed by the *Federal Rules of Bankruptcy Procedure*, which for adversary proceedings generally track Rules 26 through 37.

II. RANDY FAIELLA'S MOTION TO REIMBURSE COSTS

Federal Rule of Civil Procedure 34 governs the production of documents, electronically stored information, and tangible things. Rule 34(c) applies specifically to non-parties and states: "As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection." FED. R. CIV. P. 34(c).

Rule 45(c) provides rules for the protection of individuals subject to subpoenas.[3] Rule 45(c)(1) "authorizes the court to impose an appropriate sanction against any party that issues a subpoena, but in doing so, fails to take reasonable steps to avoid imposing an undue burden on the subpoenaed party." *S.N. Phelps & Co. v. Circle K Corp. (In re Circle K Corp.)*, 199 B.R. 92, 102 (Bankr. S.D.N.Y. 1996).[4] The court has "discretion to impose sanctions which penalize the

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[2] The scope of discovery is not limitless. "A court resolving a discovery dispute on the ground of relevance must . . . focus on the specific claim or defense alleged in the pleadings. . . . [This] means that the fact must be germane to a specific claim or defense asserted in the pleadings for information concerning it to be a proper subject of discovery." MOORE, *supra*, ¶ 26.41[2][b] (3d. ed. 2008).

[3] Rule 45 applies in bankruptcy pursuant to *Federal Rule of Bankruptcy Procedure* 9016.

[4] Rule 45(c)(1) states:

> A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty

wrongdoer, deter future abuse and compensate the injured." *Id.* Possible sanctions include "lost earnings and a reasonable attorney's fee." FED. R. CIV. P. 45(c)(1). *See also Polo Bldg. Group, Inc. v. Rakita (In re Shubov)*, 253 B.R. 540, 547 (B.A.P. 9th 2000) ("Breach of the duty to avoid undue burden . . . is enforced by exposure to a sanction that may include, but is not limited to, lost earnings and reasonable attorney's fees.").

This rule requires the court to consider a two-part test: (1) "whether the subpoena imposed an undue burden" and (2) "if so, what, if any "reasonable steps" [where taken by the serving party] to avoid imposing such a burden." *Molefi v. Oppenheimer Trust*, no. 03 CV 5631, 2007 U.S. Dist. LEXIS 10554, at *7 (E.D.N.Y. Feb. 15, 2007). The burden falls "upon the serving party to prove that it has complied with this mandate." *Corporate Express Office Prods., Inc. v. Gamache (In re Wagar)*, no. 1:06-MC-127, 2006 U.S. Dist. LEXIS 90345, at *14 (N.D.N.Y. Dec. 13, 2006).

There is limited authority regarding the meaning of "undue burden" under Rule 45(c)(1).[5] The 1991 Advisory Committee Notes provide some guidance on the subject but in the context of discussing Rule 45(c)(3)(A)(iv):

> Illustratively, it might be unduly burdensome to compel an adversary to attend trial as a witness if the adversary is known to have no personal knowledge of matters in dispute, especially so if the adversary would be required to incur substantial travel burdens.

> and impose an appropriate sanction–which may include lost earnings and reasonable attorney's fees–on a party or attorney who fails to comply.

FED. R. CIV. P. 45(c)(1).

[5] The Eastern District of New York noted that "scant authority" exists in the Second Circuit "as to when and under what circumstances sanctions under Rule 45(c)(1) should be imposed." *Molefi*, 2007 U.S. Dist. LEXIS 10554, at *6. An inquiry into the law in other circuits reveals this finding to be universal.

FED. R. CIV. P. 45 advisory committee notes (1991).[6] In an unpublished opinion, the District of Massachusetts set out a non-exclusive set of factors to consider when determining whether an undue burden exists: " 'the relevance of the documents sought, the necessity of the documents sought, the breadth of the request . . . expense and inconvenience . . . .' " *Behrend v. Comcast Corp.*, no. 07-mc-10224, 2008 U.S. Dist. LEXIS 6827, at *5 (D. Mass. Jan. 16, 2008) (quoting *Demers v. LaMontagne*, no. 98-10762, 1999 U.S. Dist. LEXIS 17500, at *4-5 (D. Mass. May 5, 1999)).

Courts have found an undue burden existed where a subpoena should never have been issued. *See Shubov*, 253 B.R. at 547; *Molefi*, 2007 U.S. Dist. LEXIS 10554, at *12-14. An undue burden was also found to exist where a court determined a subpoena was overly broad because it "requir[ed] a non-party to sift through virtually every document in its files" instead of limiting the request to a more narrow inquiry. *Circle K Corp.*, 199 B.R. at 102. Additionally, an undue burden existed where a subpoena required the production of documents within 48 hours. *Digital Res., LLC v. Abacor, Inc. (In re Digital Res., LLC)*, 246 B.R. 357, 373 (B.A.P. 8th Cir. 2000).

Other considerations exist when the issue is whether a non-party has a right to costs associated with a subpoena for document production. Typically, "a non-party bears its own production costs . . . 'where the equities of a particular case demand it.' " *Behrend*, 2008 U.S. Dist. LEXIS 6827, at *6 (quoting *In re Honeywell Int'l., Inc. Sec. Litig.*, 230 F.R.D. 293, 302-03

[6] The Advisory Committee Notes make clear that " 'the rule's sanctions provision was intended to primarily protect 'a *non-party* witness as a result of a misuse of the subpoena.' " *Molefi*, 2007 U.S. Dist. LEXIS 10554, at *6 (quoting FED. R. CIV. P. 45 advisory committee notes (1991)).

(S.D.N.Y. 2003)). To determine the proper cost allocation, courts consider three factors: "(1) whether the non-party actually has an interest in the outcome of the case, (2) whether the non-party can more readily bear the costs than the requesting party, and (3) whether the litigation is of public importance." *Id.* at *6 (citing *In re Exxon Valdez*, 142 F.R.D. 380, 383 (D.D.C. 1992)).

In this case, Plaintiff alleged that the Debtor, a lawyer and real estate developer, used his ex-wife, Randy Faiella, a teacher with whom he still co-habits, to conceal his ownership of several businesses. Plaintiff requested all documentation related to these businesses, including cancelled checks. Randy Faiella's motion to quash the subpoena was denied. When questions arose as to whether Randy Faiella actually signed checks bearing her name, Plaintiff requested production of original documents with her signature for analysis by Plaintiff's handwriting expert. Several discovery conferences were held with the court where disputes arose over whether Ms. Faiella had adequately responded to the subpoena over a four-month period. To assist in resolving that dispute, the court directed Ms. Faiella's attorney to create a log of the documents that had been produced. Her lawyers created a 90-page log of everything in the fifteen boxes of documents and charged Ms. Faiella $16,092.00 in fees and $1,155.59 in photocopying charges for the work. She asks the court to order Plaintiff to pay for that.

Her request is denied because no undue burden existed in this case.[7] First of all, the court previously determined that the subpoena was not unduly burdensome when it denied Ms. Faiella's motion to quash. Secondly, the log was created at the court's direction as an aid to

[7] Since the court concludes that no undue burden existed, Ms. Faiella's motion is denied on this basis. It is not necessary for the court to address the second prong of the Rule 45(c)(1) analysis regarding whether Plaintiff took reasonable steps to easy Ms. Faiella's burden.

resolve squabbles over what had been produced and whether any documents with original signatures were among them. All of that could have been avoided if Ms. Faiella had produced documents quicker, including original signatures finally turned over after court intervention, and had she not resisted discovery per her lawyer's advice. Although Ms. Faiella is a non-party in this adversary proceeding, the allegations that the Debtor actually owns assets titled in her name makes her a key witness. Additionally, she is a defendant in the avoidance action brought by the Trustee, so she should expect that her financial entanglements with her ex-husband/housemate will be scrutinized. There is no reason to make Plaintiff pay for Ms. Faiella's dilatory behavior.

III. SANCTIONS AGAINST RANDY FAIELLA

Ms. Faiella objects to the court's award of costs to New Falls; however, Ms. Faiella's conduct throughout the discovery process warrants the imposition of such a sanction.

Under the *Federal Rules of Civil Procedure*, Rule 45(e) is the only authority " 'for the imposition of sanctions against a nonparty for failure to comply with a subpoena . . . .' " *Bender v. Del Valle*, no. 05 Civ. 6459, 2007 U.S. Dist. LEXIS 41493, at *6 (Bankr. S.D.N.Y. June 6, 2007) (quoting *Application of Sumar*, 123 F.R.D. 467, 473 (S.D.N.Y. 1998)).[8] Rule 45(e) provides:

> The issuing court may hold in contempt a person who, having been

[8] *See also Nat'l Labor Relations Bd. v. Midwest Heating & Air Conditioning, Inc.*, 528 F. Supp. 2d 1172, 1181 (D. Kan. 2007); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, no. 05-2164, 2007 U.S. Dist. LEXIS 19475, at *26 (D. Kan. Mar. 16, 2007); *James v. A.H. Marathon*, no. 1:04 CV 153, 2005 U.S. Dist. LEXIS 28311, at *7 (N.D. Ohio Nov. 17, 2005); *Davis v. Speechworks Int'l, Inc.*, no. 03-CV-533S(F), 2005 U.S. Dist. LEXIS 42527, at *12 (W.D.N.Y. May 20, 2005); *Cruz v. Meachum*, 159 F.R.D. 366, 368 (D. Conn. 1994). In its February 29, 2008 letter to counsel for Plaintiff and Ms. Faiella, the court incorrectly cited *Federal Rule of Civil Procedure* 37(a)(5)(A) as authority for imposing Plaintiff's expenses on Randy Faiella. Upon further inquiry it became clear that Rule 45(e) was the proper authority.

> served, fails without *adequate excuse* to obey the subpoena.

FED. R. CIV. P. 45(e) (emphasis added). A bankruptcy court is vested with the power "to enforce its subpoenas and orders by the power of civil contempt." *Riley v. Sciaba (In re Sciaba)*, 334 B.R. 524, 526 (Bankr. D. Mass. 2005) (citing 11 U.S.C. § 105(a); FED. R. CIV. P. 45(e); FED. R. BANKR. P. 9016, 9020). "The purposes of sanctions in a civil contempt proceeding are to coerce the contemnor into complying with an order of the court and to compensate the harmed party for losses sustained on account of the contempt." *Id.*

"[S]anctions are appropriate under Rule 45 only if a nonparty is declared in contempt on the basis of its failure to comply with subpoena." *Nat'l Labor Relations Bd. v. Midwest Heating & Air Conditioning, Inc.*, 528 F. Supp. 2d 1172, 1181 (D. Kan. 2007). *See also Bender*, 2007 U.S. Dist. LEXIS 41493, at *6 ("The Court has the power under this rule to impose contempt simply on the basis of failure to comply with a subpoena.").[9] Most courts require the violation of a prior court order "in addition to the failure to comply with the subpoena." *Bender*, 2007 U.S. Dist. LEXIS 41493, at *6-7. *See also Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, no. 05-2164, 2007 U.S. Dist. LEXIS 19475, at *27 (D. Kan. Mar. 16, 2007) ("However, courts construing the contempt provisions of Rule 45(e) have concluded that sanctions such as

[9] Some courts have found Rule 45(e) does not authorize the imposition of attorney's fees or costs. *See Peacock v. Merrill*, no. 08-01-B-M2, 2008 U.S. Dist. LEXIS 18337, at *16-17 n.11 (M.D. La. Mar. 20, 2008) ("Thus, while a non-party may be held in contempt of court for failure to comply with a subpoena, he or she is not subject to costs and attorney's fees for failure to comply with a subpoena under Rule 45."); *SEC v. Kimmes*, no. M18-304, 1996 U.S. Dist. LEXIS 19049, at *21-22 (S.D.N.Y. Dec. 24, 1996) ("There is no other provision within Rule 45 that authorizes a court either to award attorneys' fees against one who fails to comply with a subpoena *duces tecum*, or to turn to the terms of Rule 37(a) for such authorization."). These decisions are based on a very literal reading of Rule 45(e). This court does not believe such an interpretation is warranted.

costs, should not be imposed on a nonparty unless the court has already issued an order compelling discovery."); *Cruz v. Meachum*, 159 F.R.D. 366, 368 (D. Conn. 1994) ("Before sanctions can be imposed under Fed.Rule Civ.P. 45(e) [*sic*], there must be a court order compelling discovery.").[10]

However, "the court's civil contempt power is a potent weapon to be used with caution . . . ." *Barnes Found. v. Twp. of Lower Merion*, no. 96-372, 1997 U.S. Dist. LEXIS 4444, at *21 (E.D. Pa. Apr. 7, 1997). As made clear in the 1991 Advisory Committee Notes regarding Rule 45(e), " 'contempt should be very sparingly applied when the non-party witness has been overborne by a party or attorney.' " *James v. A.H. Marathon*, no. 1:04 CV 153, 2005 U.S. Dist. LEXIS 28311, at *7 (N.D. Ohio Nov. 17, 2005) (quoting FED. R. CIV. P. 45 advisory committee notes (1991)). Additionally, the basic requirements of due process must be met so that the non-party has sufficient notice and an "opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1343 (8th Cir. 1975) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

In determining whether civil contempt is appropriate, courts must "balance the need for discovery against the burden imposed on the person ordered to produce documents, and the status of a person as a non-party is a factor which weighs against disclosure." *James*, 2005 U.S. Dist. LEXIS 28311, at *7-8. The key to determining whether civil contempt has been committed

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[10] *But see* 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 45.62[3] (3d ed. 2008) ("Generally, the party serving the subpoena will file a motion that requests (1) an order compelling compliance with the subpoena; and (2) the imposition of contempt sanctions on the subpoena recipient. Because the subpoena is an order of the court (*see* § 45.02[1]), contempt sanctions are available merely for the initial disobedience of the subpoena, and a prior court order compelling compliance with the subpoena is not invariably required.").

is whether the non-party presented an adequate excuse for his or her failure to comply with a subpoena. Rule 45(e) provides only one example of adequate cause, stating: "A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place [that requires a nonparty 'to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person']." FED. R CIV. P. 45(e) (quoting FED. R. CIV. P. 45(c)(3)(A)(ii)). Beyond this excessive travel burden, the rule is silent.

In *Sciaba*, the Bankruptcy Court for the District of Massachusetts found a non-party in contempt pursuant to Rule 45(e). 334 B.R. at 525. The non-party failed to produce subpoenaed documents and did not comply with the court order requiring the same. *Id.* The non-party set forth several excuses for her failure to comply:

> that because of her age and infirmity, she is dependent on her son, the Debtor, to do the physical work of gathering and producing the documents; that the documents requested are numerous; that the Debtor prefers to wait until all documents are assembled before producing any portion to the Trustee; that her own counsel has been busy with other matters; and that Trustee's counsel has been impatient and has failed to attempt to resolve this matter informally.

Id. The court found these excuses were without merit and that the non-party "acted with intent to delay discovery and obstruct the Trustee in her prosecution of [the] adversary proceeding." *Id.* at 525-26.

In this matter the court denied Randy Faiella's motion to quash the subpoena, then attempted to facilitate her compliance through discovery conferences. That effort was not entirely successful because Plaintiff moved to compel compliance on February 5, 2008. It was not until the court convened another conference at her lawyer's office that she finally turned over documents with her original signatures. Ms. Faiella is in contempt of court for failure to comply

with Plaintiff's subpoena. Such contempt merits sanctions as Ms. Faiella has failed to provide an adequate excuse for this conduct. The court grants Plaintiff's motion to compel compliance and awards Plaintiff's attorney's fees of $5,510.00 plus $20.00 expenses.

CONCLUSION

Randy Faiella's motion for reimbursement of costs is denied. Her objection to the award of Plaintiff's costs is overruled.

Dated: April 18, 2008

/S/Raymond T. Lyons
United States Bankruptcy Judge