

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION  
[www.flmb.uscourts.gov](http://www.flmb.uscourts.gov)

In re: Case No. 9:14-bk-00965-FMD  
Chapter 7

William P. McCuan,

Debtor.

Regions Bank and  
Robert E. Tardif, Jr.,  
Trustee,

Plaintiffs,

v. Adv. Pro. No. 9:14-ap-402-FMD

MDG Lake Trafford, LLC, et al.,

Defendants,  
and

Jill McCuan, et al.,

Impleaded Third-Party Defendants.

Robert E. Tardif, Jr.,  
Trustee,

Plaintiff,

v. Adv. Pro. No. 9:16-ap-080-FMD

Jill McCuan, et al.,

Defendants.

**ORDER DENYING IMPEADED  
DEFENDANTS' MOTION TO QUASH**

THIS PROCEEDING came before the Court, without a hearing, on Impleaded *Defendants' Objection to and Motion to Quash Trustee's Subpoena Duces Tecum Directed to Brown Investment and Advisory Trust Company* ("Motion") (Doc. No. 226) and the *Trustee's Response in Opposition to Motion to Quash* (Doc. No. 227). The Impleaded Defendants seek to quash Trustee's subpoena duces tecum served on Brown Investment and Advisory Trust Company ("Brown"), and seek attorney's fees and sanctions. Having considered the Motion, the Trustee's response, and applicable law, this Court will deny the Motion.

On March 8, 2018, the Trustee served the subpoena ("Subpoena") on Brown. The Subpoena seeks the production of all account opening documents, initial signature cards, account agreements, account applications, correspondence, and other documents reflecting account opening information, including the date of opening, for three accounts that are the subject of this litigation ("Brown Accounts").<sup>1</sup> On March 9, 2018, the Trustee filed his notice of service of Subpoena,<sup>2</sup> and the return of service.<sup>3</sup> The Subpoena requires Brown to produce responsive documents by March 23, 2018.

The Impleaded Defendants seek to quash the Subpoena on three grounds. The Court will address each argument in turn.

First, the Impleaded Defendants contend that the Trustee issued the Subpoena after the discovery cutoff in this case in contempt of this Court's prior order. The discovery cutoff to which Impleaded Defendants refer is set forth in the Court's *Order Setting Trial and Related Deadlines*<sup>4</sup> in Adversary Case No. 9:14-ap-402-FMD ("First Scheduling Order"). The First Scheduling Order set the trial for March 29, 2017, and set a discovery cutoff for five days prior to the date set for trial.

On March 8, 2017, the Impleaded Defendants filed a Motion to Continue Trial,<sup>5</sup> which was granted by order entered on March 29, 2017.<sup>6</sup> The

<sup>1</sup> Doc. No. 223, p. 9.

<sup>2</sup> Doc. No. 223.

<sup>3</sup> Doc. No. 224.

<sup>4</sup> Doc. No. 179.

<sup>5</sup> Doc. No. 188.

<sup>6</sup> Doc. No. 201.

order granting the Motion to Continue Trial did not extend the original discovery cutoff date. However, on May 10, 2017, the Court entered the parties agreed order consolidating Adversary Proceeding No. 9:14-ap-402-FMD and Adversary Proceeding No. 9:16-ap-080-FMD for purposes of trial and discovery.<sup>7</sup> The Court had not previously scheduled trial or a discovery cutoff in Adversary Proceeding No. 9:16-ap-080-FMD. The Brown Accounts are a subject of both adversary proceedings. Trial in the consolidated adversary proceedings is now scheduled for June 5, 2018.<sup>8</sup>

Thereafter, the Court entered its *Order Setting Trial and Pretrial Deadlines*, drafted by the counsel for the parties (“Second Scheduling Order”).<sup>9</sup> Although the Second Scheduling Order does not include a discovery cutoff date, the Court concurs with the Trustee that the discovery cutoff date should be five days prior to trial, as was agreed by the parties in the First Scheduling Order. Accordingly, the Court finds that the discovery cutoff with respect to Adversary Proceeding No. 9:16-ap-080-FMD is Thursday, May 31, 2018, and both parties may continue conducting discovery.

Second, the Impleaded Defendants argue that they were not given prior notice of the issuance of the Subpoena as required by Federal Rule of Civil Procedure Rule 45(a)(4), incorporated by Federal Rule of Bankruptcy Procedure 9016.

Rule 45(a)(4) requires that a subpoena seeking the production of documents from a third party must be served on each party to the litigation prior to service on the person to whom the subpoena is directed. The Trustee does not dispute that the required notice was not given, but argues that if the opposing party had an opportunity to object before the response to the subpoena was obtained, there is no prejudice to the opposing counsel and a motion to quash should not be granted.<sup>10</sup> Here, the subpoena was executed and served on March 8,

2018, with notice given one day later on March 9, 2018. Although the Trustee failed to comply with the technical requirements in Rule 45(a)(4), production of the requested documents has not been made and there has been no prejudice to the Impleaded Defendants.

Last, the Impleaded Defendants argue that the Subpoena seeks the production of documents that has already been produced by them to the Trustee. Rule 26(b)(1) permits discovery regarding any non-privileged matter that is relevant to a party’s claim. Here, the Trustee’s claim hinges upon the Debtor’s alleged transfer of the interest in the Brown Accounts to himself and his wife. Therefore, the requested documents are relevant and within the scope of discovery and absent an applicable privilege should be produced. The Court finds that the Trustee is entitled to the production of those documents directly from Brown.

Accordingly, it is

**ORDERED** that the Motion to Quash is DENIED in its entirety.

**DATED:** March 20, 2018.

/s/ Caryl E. Delano

---

Caryl E. Delano  
United States Bankruptcy Judge

---

<sup>7</sup> Doc. No. 202. The Court notes that Adversary Proceeding No. 9:14-ap-402-FMD is the removed proceeding supplementary and Adversary Proceeding No. 9:16-ap-00080-FMD is the fraudulent transfer action.

<sup>8</sup> Doc. No. 225.

<sup>9</sup> Doc. No. 225.

<sup>10</sup> *In re Willingham*, 493 B.R. 628, 633 (Bankr. M.D. Fla. 2013) (citing *McCurdy v. Wedgewood Capital Mgmt. Co.*, Case No. Civ. A. 97-4304, 1998 WL 964185, at \*7 (E.D.Pa. Nov. 16, 1998)) (denying motion to quash where no prior notice was given but opposing party objected before response was obtained).