

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION  
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In re: Case No. 9:15-bk-04241-FMD  
Chapter 7

Benjamin H. Yormak,

Debtor.

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**ORDER DENYING DEBTOR'S  
EMERGENCY MOTION FOR LEAVE  
TO FILE FOURTH AMENDED  
WITNESS LIST *NUNC PRO TUNC***

THIS CASE came before the Court for hearing on March 26, 2020, to consider *Debtor's Emergency Motion for Leave to File Fourth Amended Witness List Nunc Pro Tunc* (the "Emergency Motion"),<sup>1</sup> the excerpt of Steven Yormak's March 11, 2020 deposition filed by Debtor in support of the Emergency Motion,<sup>2</sup> and Steven Yormak's response to the Emergency Motion (the "Response").<sup>3</sup>

The Emergency Motion relates to the upcoming trial of *Debtor's Second Amended Objection to Claim No. 4-1 of Steven R. Yormak* (the "Objection").<sup>4</sup> The Objection continues litigation that commenced in December 2013. Steven Yormak, then represented by Joseph Stewart, initiated the litigation by filing a complaint against Debtor (the "Original Complaint") in the Circuit Court for Collier County, Florida (the "State Court Lawsuit"). The Original Complaint is signed by Joseph Stewart as counsel for Steven

Yormak and does not appear to have been signed, verified, or sworn to by Steven Yormak.<sup>5</sup>

In the Original Complaint, Steven Yormak alleged the breach of certain "Consulting Agreements" relating to Debtor's Florida law practice. In Count I of the Original Complaint, Steven Yormak alleged the breach of an oral partnership agreement, including the allegation that "[t]he parties entered into an oral partnership to conduct a multijurisdictional law practice."<sup>6</sup> The Original Complaint also included separate counts for breach of consulting agreement, breach of fiduciary duty, specific performance, and quantum meruit.

In 2014, Debtor removed the State Court Lawsuit to the United States District Court for the Middle District of Florida, Fort Myers Division.<sup>7</sup> In 2015, Debtor filed this bankruptcy case. Steven Yormak timely filed a proof of claim in the amount of \$724,275.00 and other amounts,<sup>8</sup> and Debtor filed the Objection. A review of this Court's docket provides an explanation for why, nearly five years later, the Objection has yet to be adjudicated.

On June 12, 2019, the Court entered an *Order on Status Conference*<sup>9</sup> on the Objection and other related matters. The Court's order stated in part:

*No later than June 21, 2019, Debtor, Steven Yormak, and the Trustee shall file witness lists that disclose each of the individuals they intend to call as a witness at the trial of the Objection to*

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<sup>1</sup> Doc. No. 715.

<sup>2</sup> Doc. No. 720.

<sup>3</sup> Doc. No. 721.

<sup>4</sup> Doc. No. 397.

<sup>5</sup> U.S. District Court Case No 2:14-cv-00033-JES-CM, Doc. No. 2.

<sup>6</sup> *Id.* at p. 2, ¶ 8.

<sup>7</sup> *Id.* at Doc. No. 1.

<sup>8</sup> Claim No. 4-1. Steven Yormak later amended his claim to restate the amount as \$1,095,275.00 plus other amounts. (Claim No. 4-2.)

<sup>9</sup> Doc. No. 593.

Claim and the Trustee’s Motion. Debtor shall identify which of his witnesses are clients of his practice of law. *The parties’ witness lists may be supplemented only by order of this Court for good cause shown.*<sup>10</sup>

On June 21, 2019, Debtor filed Debtor’s Witness List,<sup>11</sup> and on the same date, Debtor’s Amended Witness List.<sup>12</sup> On August 19, 2019, without Court approval—but without drawing an objection from Steven Yormak—Debtor filed Debtor’s Third Amended Witness List.<sup>13</sup>

On October 23, 2019, the Court entered its *Order Scheduling Trial and Setting Associated Deadlines*, setting trial on the Objection and other matters for June 1, 2020.<sup>14</sup> On January 28, 2020, after discussion with the parties at a January 23, 2020 hearing, the Court entered its *Amended Order Scheduling Trial on UPL Issue and Setting Associated Deadlines* (the “Amended Trial Order”).<sup>15</sup> The Amended Trial Order limits trial on the Objection to the issue of whether Steven Yormak’s claim is unenforceable because the Consulting Agreements under which it arises provide for the unlicensed practice of law that are void as matter of public policy (the “UPL Issue”).<sup>16</sup> The Amended Trial Order also extends the fact discovery cutoff to March 28, 2020.<sup>17</sup>

Debtor initially deposed Steven Yormak in December 2015 (the “2015 Deposition”). In September 2019, Debtor, wishing to re-depose Steven Yormak, filed a *Motion for Leave to Take a Second Deposition of Steven R. Yormak*.<sup>18</sup> After a hearing, the Court granted Debtor’s request and entered an *Order*

*Granting Motion for Leave to Take a Second Deposition of Steven R. Yormak*.<sup>19</sup>

On February 18, 2020—over eight months after the June 21, 2019 deadline for the parties to file witness lists—Debtor filed the Emergency Motion seeking permission to file Debtor’s Fourth Amended Witness List. Debtor wishes to list Joseph Stewart, the attorney who represented Steven Yormak in the filing of the Original Complaint, as a witness and to depose him.

Debtor alleges that he should be allowed to depose Joseph Stewart because, he claims, at Steven Yormak’s 2015 Deposition, Steven Yormak disavowed knowledge of the allegations of the Original Complaint. Debtor further contends that Steven Yormak refused to answer questions on this subject when he was deposed for a second time in March 2020.<sup>20</sup>

Debtor contends that Steven Yormak’s knowledge of and participation in the drafting of the Original Complaint are relevant to the trial of the UPL Issue because after Debtor moved to dismiss the Original Complaint on the ground that a partnership formed with a non-Florida lawyer constituted the unlicensed practice of law, Steven Yormak filed an amended complaint that no longer included allegations regarding a partnership. Debtor argues that the Original Complaint constitutes Steven Yormak’s admission that his agreements with Debtor provided for the unlicensed practice of law.

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<sup>10</sup> Doc. No. 593, ¶ 4(emphasis added).

<sup>11</sup> Doc. No. 603.

<sup>12</sup> Doc. No. 605.

<sup>13</sup> Doc. No. 631.

<sup>14</sup> Doc. No. 647.

<sup>15</sup> Doc. No. 704.

<sup>16</sup> *Id.* at p. 2.

<sup>17</sup> *Id.*

<sup>18</sup> Doc. No. 645.

<sup>19</sup> Doc. No. 703.

<sup>20</sup> Doc. No. 720.

Based on Steven Yormak's deposition testimony, Debtor contends that it is necessary to depose Joseph Stewart

. . . as to how the pleading(s) were formed, whether [Steven Yormak] had knowledge of the substance of the original complaint before it was filed, whether Mr. Stewart filed the original complaint without authorization and what information was disclosed to Mr. Stewart that was intended to be included in the complaint and thus made public.<sup>21</sup>

In his Response, Steven Yormak contends that Debtor has failed to show good cause to justify the Court's allowing him to supplement his witness list. He further contends that because the Original Complaint included counts for breach of consulting agreement, breach of fiduciary duty, specific performance, and quantum meruit, Count I for breach of an oral partnership agreement was an alternative form of relief and cannot be considered a party admission.

The Court has considered the Emergency Motion, the record in this case, and the arguments of Debtor's counsel and Steven Yormak, and determines that Debtor has not shown good cause to supplement his witness list.

First, Debtor has always known that Mr. Stewart represented Steven Yormak in connection with the filing of the Original Complaint in 2013.<sup>22</sup> And as demonstrated by the questions posed to Steven Yormak at the 2015 Deposition, as early as 2015, Debtor considered Steven Yormak's participation in the drafting of and knowledge of the

allegations of the Original Complaint to be relevant to the UPL Issue.<sup>23</sup> At this late date—over six years after the filing of the Original Complaint and over five years since Debtor first deposed Steven Yormak—Debtor fails to show cause why he should be permitted to supplement his witness list to include Mr. Stewart.

Second, even if Mr. Stewart were to testify that Steven Yormak was aware that the Original Complaint included a claim for breach of oral partnership and had assisted in drafting the Original Complaint, the claim is not admissible as an admission. Under Florida law, unsworn complaints are not generally admissible in evidence to prove or disprove a fact in issue. For example, in *Fallon v. City Furniture, Inc.*, the court held that pleadings are inadmissible as evidence, and a “party may alter the position taken earlier as facts are developed through discovery and other means.”<sup>24</sup> Likewise, in *Straub v. Village of Wellington*, the court held that the rationale behind the rule rendering a complaint inadmissible as evidence is that a “complaint is seen as merely a tentative outline of the pleader's positions.”<sup>25</sup> And in *Barnes v. Thornton*,<sup>26</sup> the court, citing the Eleventh Circuit Court of Appeals in *McCaskill v. Ray*,<sup>27</sup> held that a litigant's unsworn allegations are not admissible.

Third, because Debtor proposes to have Mr. Stewart testify regarding his communications with Steven Yormak in preparation for the filing the state court complaint,<sup>28</sup> were the Court to allow Mr. Stewart's deposition, it is likely that the attorney-client privilege will be implicated. The court in *In re Seroquel Products Liability*

<sup>21</sup> Doc. No. 715, pp. 3-4.

<sup>22</sup> Exhibit A to Doc. No. 715.

<sup>23</sup> Exhibit B to Doc. No. 715.

<sup>24</sup> 959 So. 2d 306, 307 (Fla. 3d DCA 2007).

<sup>25</sup> 941 So. 2d 1269, 1270 (Fla. 4th DCA 2006).

<sup>26</sup> 2019 WL 4493594, at \*1 (M.D. Ala. Aug. 16, 2019).

<sup>27</sup> 279 F. App'x 913, 915 (11th Cir. 2008).

<sup>28</sup> Doc. No. 715, ¶ 5.

*Litigation*,<sup>29</sup> in recognizing that the purpose of the attorney-client privilege is to protect communications between a lawyer and a client where legal advice is sought, also recognized that a client may be entitled to the protection of the attorney-client privilege with respect to legal advice rendered in connection with the drafting of documents.<sup>30</sup>

Accordingly, for the foregoing reasons, it is

**ORDERED** that Debtor's Emergency Motion for Leave to File Fourth Amended Witness List *Nunc Pro Tunc* is DENIED.

**DATED:** March 30, 2020.

/s/ Caryl E. Delano

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Caryl E. Delano  
Chief United States Bankruptcy Judge

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<sup>29</sup> 2008 WL 1995058 (M.D. Fla. May 7, 2008).

<sup>30</sup> *Id.* at \*2 and \*9.