

ORDERED.

Dated: May 16, 2023

  
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Grace E. Robson  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION  
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In re	)	
	)	
Smart Baking Company, LLC,	)	Case No. 6:22-bk-02365-GER
	)	Chapter 11
Debtor.	)	
_____	)	

**ORDER SUSTAINING OBJECTION TO USE OF  
DEPOSITION TESTIMONY OF LEONARD TOMACELLI**

This case came on for a trial on May 10, 2023 at 10:00 a.m. (the “Trial”) upon *Powers Industrial LLC’s Motion to Compel Debtor’s Compliance with Confirmation Order and Plan* (Doc. No. 124) and the Supplement<sup>1</sup> (Doc. No. 129) filed by Powers Industrial LLC (“Powers”) and the Response<sup>2</sup> (Doc. No. 157) thereto filed by Debtor Smart Baking Company, LLC (the “Debtor”). Prior to the Trial, the Debtor filed its *Notice of Filing Designations of Deposition of Leonard Tomacelli* (Doc. No. 171). At the Trial, the Debtor stated that it served a trial subpoena on Leonard Tomacelli (“Mr. Tomacelli”) on May 8, 2023 by electronic mail but that he was out

<sup>1</sup> *Powers Industrial LLC’s Supplement to its Motion to Compel Debtor’s Compliance with Confirmation Order and Plan* (the “Supplement”).

<sup>2</sup> *Debtor’s Response in Opposition to Powers Industrial, LLC’s Motion to Compel Debtor’s Compliance with Confirmation Order and Plan* (the “Response”).

of town and unable to appear. The Debtor therefore requested that the Court admit Mr. Tomacelli's deposition testimony in lieu of his live testimony. Powers objected.

Federal Rule of Civil Procedure 32 governs the use of depositions in court proceedings.<sup>3</sup> Rule 32(a)(4)(D) provides that "[a] party may use for any purpose the deposition of a witness, whether or not a party, if the court finds: . . . (D) that the party offering the deposition could not procure the witness's attendance by subpoena."<sup>4</sup> "Implicit in this provision is an obligation on the part of the proponent to first exercise 'reasonable diligence' to procure the witness's attendance by subpoena."<sup>5</sup> "Before examining the specific application of the Rule, it is important to note that 'live witness testimony is axiomatically preferred to depositions.'"<sup>6</sup> Because there is a "clear preference for live testimony, the party seeking to substitute deposition bears the burden of establishing the exception."<sup>7</sup> If a party desires "to use the deposition of a person *other than* an adverse party for substantive evidence . . . the conditions of Rule 32(a)(4) must be satisfied."<sup>8</sup> The trial court is granted considerable discretion in determining whether to admit deposition testimony.<sup>9</sup>

The Debtor argued that Mr. Tomacelli is an "unavailable witness" under Rule 32(a)(4)(D) based on the representation that Mr. Tomacelli accepted service of the notice of deposition via an email address and the deposition was unable to be conducted until Friday, May 5, 2023. The Debtor then sent the subpoena to compel attendance at the Trial via email either the evening of Monday,

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<sup>3</sup> Rule 32 is made applicable to this contested matter by Federal Rules of Bankruptcy Procedure 7032 and 9014.

<sup>4</sup> Fed. R. Civ. P. 32(a)(4)(D).

<sup>5</sup> *Williams v. Johnson*, 278 F.R.D. 1, 5 (D.D.C. 2011) (first citing *Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 308 (7th Cir. 2010); and then citing *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 963 (10th Cir. 1993)).

<sup>6</sup> *Kraese v. Jialiang Qi*, No. CV417-166, 2020 WL 4016250, at \*2 (S.D. Ga. July 16, 2020) (quoting *McDowell v. Blankenship*, 759 F.3d 847, 852 (8th Cir. 2014)).

<sup>7</sup> *Id.* (citing *Swearingen v. Gillar Home Health Care, L.P.*, 759 F. App'x 322, 324 (5th Cir. 2019)).

<sup>8</sup> *Id.* (alteration in original) (quoting 8A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2146 (3d ed. 2020)).

<sup>9</sup> *Id.* at \*3 (citing *McDowell*, 759 F.3d at 851).

May 8 or the morning of Tuesday, May 9. Mr. Tomacelli told counsel for the Debtor that he was “out of town” and “simply could not make it.”<sup>10</sup>

The trial in this matter has been rescheduled twice. On January 10, 2023, the Court scheduled a trial for March 8, 2023.<sup>11</sup> On February 24, 2023, the Debtor filed a motion to continue,<sup>12</sup> stating that the Debtor needed additional time to schedule depositions of witnesses; the Court granted the motion on February 27, 2023, and the trial was rescheduled for April 18, 2023.<sup>13</sup> On April 14, 2023, Powers filed a motion to continue the trial date,<sup>14</sup> stating it was unable to complete the deposition of one of its witnesses; the Court granted the motion on April 17, 2023, and the trial date was rescheduled for May 10, 2023.<sup>15</sup> Therefore, at a minimum, the Debtor has had since April 17, 2023 to subpoena Mr. Tomacelli for the Trial; however, the Debtor chose to wait until a day or two before the Trial to issue the trial subpoena. While the Debtor stated it took time to schedule the deposition, the Debtor did not need to wait until after the deposition to subpoena Mr. Tomacelli for the Trial. In fact, Mr. Tomacelli was identified on the Debtor’s witness list filed on February 22, 2023.<sup>16</sup> Therefore, the Court finds that the Debtor failed to carry its burden of showing that it exercised reasonable diligence in attempting to secure Mr. Tomacelli’s attendance by subpoena.<sup>17</sup>

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<sup>10</sup> Furthermore, the Debtor did not establish that Mr. Tomacelli was unavailable under the Rule’s “exceptional circumstances.” Fed. R. Civ. P. 32(a)(4)(E).

<sup>11</sup> *Order (1) Scheduling Evidentiary Hearing and Directing Parties and Witnesses to Appear in Person and (2) Setting Deadlines* (Doc. No. 126).

<sup>12</sup> *Smart Baking Company, LLC’s Expedited Unopposed Motion to Continue Trial Scheduled for March 8, 2023* (Doc. No. 143).

<sup>13</sup> *Order Granting Smart Baking Company, LLC’s Expedited Unopposed Motion to Continue Trial Scheduled for March 8, 2023* (Doc. No. 144).

<sup>14</sup> *Powers Industrial, LLC’s Expedited Unopposed Motion to Continue Trial Scheduled for Tuesday April 18, 2023* (Doc. No. 159).

<sup>15</sup> *Order Granting Powers Industrial, LLC’s Expedited Unopposed Motion to Continue Trial Scheduled for April 18, 2023* (Doc. No. 160).

<sup>16</sup> *Smart Baking Company, LLC’s Witness List* (Doc. No. 141).

<sup>17</sup> *See Williams*, 278 F.R.D. at 9 (“Once a trial date has been set, a party should promptly and diligently make efforts to subpoena witnesses if their attendance is not readily procured through other means.”).

For the foregoing reasons, it is

**ORDERED:**

1. Powers' objection is **SUSTAINED**.
2. The Court will not admit the deposition testimony of Leonard Tomacelli as part of the evidence at Trial.

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Attorney Justin M. Luna is directed to serve a copy of this order on interested parties who do not receive service by CM/ECF and file a proof of service within three days of entry of this order.