In an action filed by a lender against a Chapter 7 debtor, the Court quashed a deposition subpoena issued by the debtor to the CEO of the lender because the subject matter of the proposed deposition was irrelevant to the merits of the case and duplicative of other depositions taken by the Debtor.

Harbor Bank of Maryland v. Anderson (In re Anderson)*, 2016 Bankr. Lexis 2668 (Bankr. D. Md. July 21, 2016*), (Lipp, J.).

Summary by Justin P. Fasano, McNamee, Hosea, Jernigan, Kim, Greenan & Lynch, P.A.

The debtor was the sole owner and president of Waterland Fisheries, Inc. ("Waterland"), which owned an indoor aquaculture center. Harbor Bank (the "Lender") lent Waterland approximately $1 million, which the debtor personally guaranteed. The loan was secured by a deed of trust on Waterland's real property. That deed of trust contained customary requirements that Waterland maintain insurance on its real property naming the Lender as a loss payee. In December 2012, Waterland suffered a roof collapse and filed a claim with its insurer. Litigation ensued, and Waterland settled the claim for $800,000.00. The Lender alleged that the proceeds of the litigation settlement were improperly paid to the Debtor's wife. The Lender filed a confessed judgment action in the Circuit Court for Dorchester County. The debtor filed a motion to vacate the confessed judgment based on the Lender's failure to mitigate damages, which was denied. The debtor thereafter filed for Chapter 7 bankruptcy and the Lender filed a complaint objecting to the debtor's discharge and the dischargeability of the debtor's personally guaranteed debt.

During the lawsuit, the debtor noticed depositions of the Lender's corporate designee, two officers of the Lender, and the Lender's president. The Lender did not object to the first three depositions but objected to the deposition of its president. The debtor argued that he personally made the Lender's president aware of the imminent loss of $500,000 in fish inventory and that the Lender failed to mitigate damages. After the Lender pointed out that this argument had already been litigated, the debtor said he actually wanted to depose the Lender's president about why he did not accept a proposal to purchase Waterland's real property and chose instead to foreclose. The debtor also stated he wanted to ask the Lender's president about alleged threats made by the president to levy on the debtor's personal property. The Lender moved for a protective order, arguing that the deposition of the Lender's president was duplicative and irrelevant to the matter before the Court.

While the Fourth Circuit has not adopted an apex deposition rule (a rule that would forbid depositions of high level executives of parties when such executives lack unique knowledge of the matters in dispute), the Bankruptcy Court could still consider whether the burden of the deposition on the lender would be undue. The Bankruptcy Court found that the Debtor's argument for a setoff based on the failure to accept a proposed purchase offer was legally unpersuasive. Further, the Bankruptcy Court found that the deposition would be duplicative of the depositions of the other officers of the Lender, who were both present at all meetings between the debtor and the Lender's president. Finally, the Bankruptcy Court found that the changing nature of the debtor's proposed inquiry indicated that the debtor only sought to annoy the Lender, and not to actually obtain discoverable information. Based on the lack of relevance of the subject matter of the deposition, the duplicativeness of other depositions and the changing nature of the proposed inquiry, the Bankruptcy Court entered a protective order forbidding the deposition of the Lender's president.