

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 00-30531

DONALD A. TANGWALL

Debtor

**MEMORANDUM AND ORDER**

Before the court is the Motion to Quash Subpoena (Motion) filed March 26, 2002, by Thomas Hatcher. By this Motion, Mr. Hatcher asks the court to quash a subpoena served on him by the Debtor on March 22, 2002, seeking to compel his attendance at a deposition on March 28, 2002, at 10:30 a.m., at a facility known as Mack's Auto, 3019 E. Lamar Alexander Parkway, Maryville, Tennessee. The Motion is premised on three grounds: (1) the Debtor's failure to tender Mr. Hatcher witness and mileage fees as required by FED. R. CIV. P. 45(b)(1); (2) the Debtor's failure to allow Mr. Hatcher reasonable time for compliance with the subpoena as required by FED. R. CIV. P. 45(c)(3)(A)(i); and (3) the allegation that the subpoena subjects Mr. Hatcher to an undue burden in violation of FED. R. CIV. P. 45(c)(3)(A)(iv).

Because Mr. Hatcher is not required to comply with the subpoena, the court, for reasons hereinafter stated, will deny the Motion.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (O) (West 1993).

## I

Rule 45 of the Federal Rules of Civil Procedure provides in material part:

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law.

FED. R. CIV. P. 45(b)(1). "Before the court will order compliance with a subpoena, the party seeking such an order must establish that it has complied with the requirements of FED. R. CIV. P. 45. A party may only be compelled to comply with a properly issued and served subpoena." *Smith v. Midland Brake, Inc.*, 162 F.R.D. 683, 686 (D. Kan. 1995). "Failure to tender the witness fee and mileage allowance renders the subpoena invalid." *Id.* (citation omitted). *See also*, 10 KING, COLLIER ON BANKRUPTCY ¶ 9016.02, at 9016-3 (15<sup>th</sup> ed. rev. 2002) ("Witnesses are entitled to a tender of lawful mileage and one day's witness fees at the time of service of the subpoena. Without such tender, they are under no compulsion to attend.").

Section 1821(a) of title 28 of the United States Code provides in material part:

(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

....

(b) A witness shall be paid an attendance fee of \$40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

28 U.S.C.A. § 1821 (West 1994).

## II

In summary, the Debtor's failure to tender Mr. Hatcher the appropriate witness and mileage fees invalidates the subpoena.<sup>1</sup> Mr. Hatcher is accordingly not compelled to attend the March 28, 2002 deposition. The court need not consider the other grounds relied upon by Mr. Hatcher in support of the Motion. Because the Motion is unnecessary, and a hearing will serve no purpose, the court directs that Thomas Hatcher's Motion to Quash Subpoena is DENIED.

SO ORDERED.

ENTER: March 27, 2002

BY THE COURT

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

---

<sup>1</sup> At a hearing held on January 22, 2002, the court advised Mr. Tangwall that a nonparty witness subpoenaed to appear for a deposition must be tendered witness and mileage fees. That Mr. Tangwall has chosen to ignore this requirement causes the court considerable concern.