

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

EDWARD LUCERO,

Plaintiff,

v.

Adversary No. 20-1013-j

RICHARD L. LUCERO and
BOY SCOUTS OF AMERICA,

Defendants.

**ORDER GRANTING MOTION OF PLAINTIFF EDWARD LUCERO
FOR EXPEDITED DISCOVERY**

Plaintiff Edward Lucero requests the Court to order Defendant Richard Lucero to complete responses to written discovery and attend a deposition on an expedited basis.¹ By separate motion, Plaintiff requests the Court to remand the claims against Richard Lucero in this removed proceeding to state court.² Defendant Richard Lucero's sole ground for his response in opposition to the Motion for Expedited Discovery is that the Motion for Expedited Discovery "is moot" until the Court rules on the Motion to Remand.³ Because Defendant has not contested the merits of the Motion for Expedited Discovery, the Motion for Expedited Discovery is not moot, and it appears there is a risk that evidence may be lost if the requested discovery is not obtained soon, the Court will grant the Motion for Expedited Discovery.

¹ See Motion of Plaintiff Edward Lucero for Expedited Discovery ("Motion for Expedited Discovery") – Docket No. 10.

² See Motion of Edward Lucero to Remand Claims Against Richard Lucero to State Court ("Motion to Remand") – Docket No. 9.

³ See Defendant Richard Lucero's Response to Motion of Plaintiff Edward Lucero for Expedited Discovery ("Response") – Docket No. 15.

BACKGROUND AND PROCEDURAL HISTORY

Defendant Boy Scouts of America (“BSA”) filed a voluntary petition under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware on February 18, 2020 as Case No. 20-10343. Before the bankruptcy filing, Plaintiff Edward Lucero filed a complaint against BSA and Richard Lucero in the Second Judicial District Court, State of New Mexico, County of Bernalillo as Case No. D-202-CV-2019-055558 (the “State Court Action”).

BSA removed the State Court Action to this Court on February 18, 2020, initiating this adversary proceeding. In BSA’s bankruptcy case, the bankruptcy court entered a consent order enjoining the prosecution of certain claims in pending actions against BSA and others, including the claims against BSA in the State Court Action. *See* Consent Order Pursuant to § 105(a) and 362 Granting the BSA’s Motion for a Preliminary Injunction (“Consent Order”) – Docket No. 11, Exhibit A. The Consent Order does not enjoin the prosecution of Plaintiff’s claims against Defendant Richard Lucero.

Plaintiff represents in the Motion for Expedited Discovery that the parties scheduled Defendant Richard Lucero’s deposition in the State Court Action in December of 2019, but that the deposition was vacated at Defendant’s request due to his counsel’s representation that Defendant is “well into his 80’s” and that counsel has “serious concerns with regard to his stamina and his ability to concentrate for a long period of time.” *See* Motion for Expedited Discovery, Exhibit 1.⁴ In January of 2020, Defendant’s counsel informed Plaintiff’s counsel that Defendant “fell twice over the holidays, with one fall resulting in multiple stitches to his head

⁴ Because Richard Lucero has not denied or contested any of the assertions in the Motion for Expedited Discovery relating to the procedural history of discovery sought or Richard Lucero’s medical condition, the Court takes them as true for purposes of ruling on the Motion for Expedited Discovery.

and he had a mild concussion from the fall” See Motion for Expedited Discovery, Exhibit 2. Plaintiff attempted to reschedule Defendant Richard Lucero’s deposition, but was not able to depose Defendant before the removal of the State Court Action to this Court. Plaintiff also represents in the Motion for Expedited Discovery that he served written discovery on Defendant Richard Lucero in the State Court Action on January 21, 2020, that Plaintiff granted Defendant’s request for a short extension to complete written discovery responses, and that as of the date of removal of the State Court Action, Defendant had not served his completed responses to Plaintiff’s written discovery requests.

On March 16, 2020, this Court held a status conference. Following the status conference, the Court entered an Order Staying Adversary Proceeding which stayed this adversary proceeding pending the outcome of a nationwide transfer motion filed by BSA in the United States District Court for the District of Delaware seeking to transfer venue of all pending abuse actions to that court, including the removed State Court Action. See Docket No. 7. This Court excepted from the stay of this adversary proceeding the nationwide transfer motion, a motion to remand claims against Defendant Richard Lucero, or a motion for expedited discovery from Defendant Richard Lucero. *Id.* Plaintiff filed the Motion for Expedited Discovery on March 25, 2020.

DISCUSSION

Defendant’s only ground for opposing the Motion for Expedited Discovery is that the motion is “moot” until the Court rules on the pending Motion to Remand. This is not a valid objection for two reasons. First, the automatic stay does not apply to Plaintiff’s claims asserted against Defendant Richard Lucero, who is not a debtor in a bankruptcy case.⁵ Nor is Defendant

⁵ See *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1330 (10th Cir. 1984) (“There is nothing in the statute which purports to extend the stay to causes of action against solvent co-defendants of the debtor.”); *Agrawal v.*

Richard Lucero one of the “BSA Related Parties” against whom claims are stayed under the terms of the Consent Order. *See* Consent Order, Docket No. 11, Exhibit A. Second, because the claims against Richard Lucero are not subject to the automatic stay or the Consent Order, this Court has the authority to rule on any motion seeking relief from Defendant Richard Lucero in the properly removed adversary unless and until the claims are remanded. *Cf. Farris v. City of Garden City, Kan.*, No. 15-1078-MLB, 2015 WL 1978442, at *3 n.5 (D. Kan. May 1, 2015) (“[A]fter removal, the federal court merely takes up where the state court left off.”) (quoting *Flying Cross Check, L.L.C. v. Cent. Hockey League, Inc.*, 153 F.Supp.2d 1253, 1256 (D. Kan. 2001), opinion modified (March 8, 2001)). Defendant’s objection is overruled.

Even though the pendency of the Motion to Remand does not moot the Motion for Expedited Discovery, this Court ordinarily would defer ruling on matters until after it decides the Motion to Remand. However, where, as here, time is of the essence, the Court will rule.

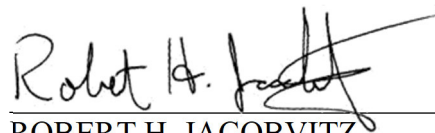
Good cause exists to allow Plaintiff to depose Defendant Richard Lucero sooner, rather than later. Defendant Richard Lucero is elderly. His deposition was vacated previously because he fell and injured himself. If his testimony is not obtained in the near future, there is a danger that evidence could be lost. *Cf. Metal Bldg. Components, L.P. v. Caperton*, No. CIV-04-0256 MF/DJS, 2004 WL 7337726, at *4 (D.N.M. Apr. 2, 2004) (good cause for granting a plaintiff’s request for expedited discovery under Fed. R. Civ. P. 26(d) can be found “when physical evidence may be consumed or destroyed with the passage of time, thereby disadvantaging one or more parties to the litigation.”); *Kabyesiza v. Rodriguez*, No. 10-cv-00216-MSK-KLM, 2010 WL

Ogden, 753 F. App’x 644, 648 (10th Cir. 2018) (“[Section] 362(a) automatically stays proceedings *against the debtor only . . .*”) (quoting *Otoe Cnty. Nat’l Bank v. W & P Trucking, Inc.*, 754 F.2d 881, 883 (10th Cir. 1985)); *Teachers Ins. & Annuity Ass’n of Am. v. Butler*, 803 F.2d 61, 65 (2d Cir. 1986) (“It is well-established that stays pursuant to 362(a) are limited to debtors and do not encompass non-bankrupt co-defendants.”); *In re Expert South Tulsa, LLC*, 506 B.R. 298, 302 (Bankr. D. Kan. 2011) (“Generally, the stay applies only to the debtor and not to non-debtor co-defendants.”).

3923093, at *3 (D. Colo. Oct. 1, 2010) (“The courts have found good cause for expedited discovery when physical evidence may be destroyed with the passage of time . . .”).⁶ It is important for Plaintiff to obtain Defendant Richard Lucero’s deposition testimony while he is still able to do so. Due to Defendant’s age and health, delaying discovery for a significant period places Plaintiff at risk of not obtaining meaningful discovery. For the same reasons, Defendant Richard Lucero should be required to complete his responses to the written discovery requests that were served on him nearly four months ago. Finally, Plaintiff’s need to obtain discovery from Defendant Richard Lucero in the near future outweighs any prejudice or hardship to the Defendant by giving a deposition or providing written discovery responses.

WHEREFORE, IT IS HEREBY ORDERED that the Motion for Expedited Discovery is GRANTED as follows:

1. Defendant Richard Lucero shall serve complete responses to the written discovery served on his counsel on January 21, 2020 no later than **Thursday, May 28, 2020**.
2. Defendant Richard Lucero shall appear and be deposed at a deposition noticed to take place in the period between two and four weeks after service of the written discovery responses, but no later than **June 26, 2020**.


ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: May 15, 2020

⁶ It does not appear that Fed. R. Civ. P. 26(d) is the proper procedural vehicle for Plaintiff’s Motion for Expedited Discovery. New Mexico Local Bankruptcy Rule 7026-1(a) excepts Fed. R. Civ. P. 26(d) and (f) from application to adversary proceedings before this Court, unless the Court orders otherwise. *See* NM LBR 7026-1(a). In addition, Plaintiff has already served written discovery requests on Defendant Richard Lucero and sought to schedule his deposition. Requests to compel discovery are governed by Fed. R. Civ. P. 37, made applicable to adversary proceedings by Fed. R. Bankr. P. 7037. Regardless of whether the Motion for Expedited Discovery relies on the proper procedural rule, Defendant’s objection to the Motion for Expedited Discovery did not contest the merits of the motion.

COPY TO:

James A Askew
Attorney for Plaintiff Edward Lucero
Askew & White, LLC
1122 Central Ave SW, Ste. 1
Albuquerque, NM 87102

John Tiwald
Attorney for Plaintiff Edward Lucero
Tiwald Law, PC
6121 Indian School Road NE, Suite 210
Albuquerque, NM 87110-3179

Jason Bowles
Attorney for Defendant Richard Lucero
Bowles Law Firm
4811 Hardware Drive N.E., Suite D-5
Albuquerque, NM 87109

Robert J. Gorence
Attorney for Defendant Richard Lucero
Gorence & Oliveros, P.C.
300 Central Avenue SW, Suite 1000E
Albuquerque, NM 87102

Kurt Wihl
Cassandra Ruble Malone
Attorneys for Defendant Boy Scouts of America
Keleher & McLeod PA
PO Box AA
Albuquerque, NM 87103