IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

In the Matter of	)	BK 78-0-26
	)	BK 78-0-25
HY-GAIN ELECTRONICS CORP.,	)	BK 78-0-81
	)	
HY-GAIN DE PUERTO RICO, INC.,	)	
	)	CIVIL NO. 78-0-437
HY-GAIN ELECTRONICS SYSTEMS,	)	
	)	
Bankrupts.	)	

MEMORANDUM

APPEARANCES: For Appellants - J. Ronald Trost, Mark A. Levinson and Sally A. Neely, Los Angeles, California

For Appellees - Arnold M. Quittner and Lawrence Bass, Los Angeles, California

DENNEY, District Judge

This matter comes before the Court upon appeal from the Bankruptcy Court's order of August 1, 1978, denying the application of the appellants for authority to conduct examinations of various officers or agents of Citibank, N.A., Citibank-Los Angeles, Security Pacific National Bank and Columbia Union National Bank & Trust Company [hereinafter referred to as "the Banks"] pursuant to Bankruptcy Rule 205.

On June 12, 1978, Theodore Andros and Andrew Andros filed an application to take Rule 205 examinations on behalf of the bankrupt, Hy-Gain Electronics Corporation, and as shareholders, officers, directors thereof, and as general unsecured creditors of the bankrupt. The banks opposed the application, contending that the Androses were not parties in interest, and thus not entitled to conduct discovery pursuant to Rule 205. On August 1, 1978, the Bankruptcy Judge entered his memorandum opinion, finding that Joseph H. Badami, the Trustee in Bankruptcy, was the proper party to conduct the Rule 205 examination to ascertain whether any causes of action existed for the benefit of the estate. Accordingly, an accompanying order was entered denying the application. From that order, an appeal was taken to this Court.

Bankruptcy Rule 205a provides in pertinent part as follows:

> Examination on Application. Upon application of any party in interest, the court may order the examination of any person. The application shall be in writing unless made during a hearing or examination or unless a local rule otherwise provides.

This rule is an adaptation from Bankruptcy Act, Section 21a [11 U.S.C. §44a].[1]

The case law construing section 21a has made it clear that the decision to permit an examination rests within the sound discretion of the Bankruptcy Court. In re Machek, 368 F.Supp. 958 (M.D. Fla. 1973); United States v. Seiffert, 357 F.Supp. 80 807 (S.D. Tex. 1973), aff'd and remanded on other grounds, 501 F.2d 974 (5th Cir. 1974); In re Union Mortgage Investment Co., 25 F.Supp. 468, 472 (D. Del. 1938). Absent an abuse of dis cretion, the Bankruptcy Judge's decision "as to discretionary matters should be unfettered." In re Wooding, 390 F.Supp. 451 453 (D. Kan. 1974).

A review of the record in this case convinces the Court th the Bankruptcy Judge did not abuse his discretion in denying th appellants' application and determining that the trustee was th proper party to conduct the Rule 205 examination.

Section 21a expressly states that an "officer, bankrupt, creditor" may be entitled to conduct an examination pursuant t that section. The term "officer", as that term is defined in section 1(22) [11 U.S.C. §1(22)], does not include an officer director of a bankrupt corporation. Therefore, an officer or director of a bankrupt corporation is not expressly entitled t conduct an examination, at least in the absence of a designati by the bankrupt corporation to initiate such examination. No designation has occurred here.

Moreover, section 21a does not expressly refer to a stock holder in a bankrupt corporation. Nor is a stockholder entitl to conduct an examination pursuant to that section. In re Mor White Properties Corp., 21 F.Supp. 635, 635 (E.D. N.Y. 1937).

The appellants, however, contend that as general unsecure creditors they are entitled to conduct a Rule 205 examination. A review of the case law in this area convinces the Court that this contention must fail.

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[1] Section 21a provides in part as follows:

> The court may, upon application of any officer, bankrupt, or creditor, by order require any designated persons, including the bankrupt . . . to appear before the court . . . to be examined concerning the acts, conduct, or property of a bankrupt; . . . .

Any person who has a provable debt and who demonstrates that he is actually a creditor of the bankrupt, by either being named as a creditor in the bankrupt's schedule or by other evidence deemed satisfactory to the bankruptcy judge, may conduct a Rule 205 examination, although he has not formally proved his claim. In re Samuelson, 174 F.911, 912 (W.D. N.Y. 1909); In re Jehu, 94 F. 638, 638 (N.D. Ia. 1899). In the present case, the record indicates that the appellants have not shown that they are actually creditors of the bankrupt or that a provable claim exists. Instead, the appellants allege various causes of action without any real basis. At most, the majority of these allegations seems to represent a pure tort claim for unliquidated damages caused by fraudulent misrepresentation, which is not a provable claim in this context. In re Strauss, 67 F.2d 605, 607 (2d Cir. 1933); see 2 COLLIER ON BANKRUPTCY ¶21.06 at 283 (14th ed. 1976). In addition, the appellants have not filed proofs of claim in this proceeding.

Furthermore, the Court questions the motivation underlying the appellants' attempt to conduct these examinations of the banks. To this Court, and to the Bankruptcy Court, it seems that the appellants have requested the examination in order to discover matters pertinent only to claims which they may assert outside of this proceeding or at least aid in the development of a defense to protect them from liability to the banks. A creditor may not use Rule 205 examinations to prepare his own defense to matters unconnected with the administration of the estate. Wilcox v. Goess, 79 F.2d 546, 547 (2d Cir. 1935); see 2 COLLIER ON BANKRUPTCY ¶21.06 at 283 (14th ed. 1976). This Court will not permit the purposes underlying section 21a and Rule 205 to be undermined.[2]

The fact that the banks have been entitled to conduct examinations does not convince the Court that the appellants should be entitled to their own. In comparison to the unproven claims of the appellants, the banks, as the Bankruptcy Judge noted, have enormous secured and unsecured claims which give them a significant economic interest in the estate.

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[2] The objects of such a proceeding are, of course, to assist the Trustee to discover concealed assets of the Bankrupt, to ascertain whether the Bankrupt has given preference to any of his creditors, to learn whether the Bankrupt has been guilty of acts which would prevent him from obtaining his discharge in bankruptcy, and, in general, to aid the Trustee to recover, for the creditors, any property to which they are entitled, to protect their rights in the bankruptcy proceedings, and to assist the Court in administering the estate of the Bankrupt.

Matter of Prussian, 255 F. 857, 858 (E.D. Mich. 1919).

Accordingly, the Court finds that the Bankruptcy Judge did not abuse his discretion in denying the appellants' application. The trustee, who was appointed on April 1, 1978, is the proper party to conduct the Rule 205 examinations of the banks. This privilege belongs to the trustee. See In re Maurer Trading Corp., 29 F.Supp. 495, 496 (S.D. N.Y. 1939).

An order shall issue contemporaneously with this memorandum opinion.

Dated this 23rd day of January, 1979.