

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of:	:	Chapter 11
	:	
WILLIAM K. HOLMES,	:	
	:	
Debtor	:	Case No. 02-52793 RFH
	:	
WILLIAM K. HOLMES and	:	
AIRTREK, LLC,	:	
	:	
Plaintiffs	:	
	:	
vs.	:	
	:	
GENERAL ELECTRIC CAPITAL	:	
CORPORATION,	:	
	:	
Defendant	:	Adversary Proceeding
	:	No. 03-5280

BEFORE

ROBERT F. HERSHNER, JR.
CHIEF UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

Plaintiffs:	Mr. Joseph J. Burton, Jr. Ms. Rosemary Armstrong Two Ravinia Drive Suite 1750 Atlanta, Georgia 30346
Defendant:	Mr. John F. Isbell Mr. Mark M. Maloney 191 Peachtree Street, N.E. Suite 4900 Atlanta, Georgia 30303-1763

MEMORANDUM OPINION

William K. Holmes and Airtrek, LLC, Plaintiffs, filed a “Complaint” on October 10, 2003. General Electric Capital Corporation, Defendant, filed a response and asserted a counterclaim on May 10, 2004. Plaintiffs filed a response to the counterclaim on May 27, 2004.

This adversary proceeding came on for trial on April 10, 2006. The Court heard some four and one-half days of testimony. At the conclusion of the trial, Defendant sought to tender into evidence a sealed deposition titled “30(b)(6) Deposition of William K. Holmes.”¹ Plaintiffs objected to the tender. The Court, having considered the arguments of counsel and the relevant law, now publishes this memorandum opinion on whether to admit into evidence the deposition.

Defendant relies upon Federal Rule of Civil Procedure 32(a)(2)² which provides:

Rule 32. Use of Depositions in Court Proceedings

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the

¹ Defendant’s Exhibit 71.

² Federal Rule of Civil Procedure 32(a)(2) applies in this adversary proceeding. Fed. R. Bank. P. 7032.

witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

...

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

Fed. R. Civ. P. 32(a)(2)

Airtrek, LLC is a party in this adversary proceeding. Mr. Holmes is the sole shareholder of Airtrek, LLC. Mr. Holmes controls the operations of Airtrek, LLC. Mr. Holmes is the person that Airtrek, LLC designated to testify on its behalf at the deposition. See Fed. R. Civ. P. 30(b)(6). Mr. Holmes testified at trial and was present at all times during the trial of this adversary proceeding.

“[Rule 32(a)(2)] permits a party to introduce the deposition of an adversary as part of his substantive proof regardless of the adversary’s availability to testify at trial.” Coughlin v. Capitol Cement Co., 571 F.2d 290, 308 (5th Cir. 1978).

“The trial court has discretion to exclude parts of the deposition that are unnecessarily repetitious in relation to the testimony of the party on the stand, but it may not refuse to allow the deposition to be used merely because the party is available

to testify in person.” 8A Federal Practice And Procedure: Civil 2d § 2145 (1994).

“However, the admission of deposition testimony still remains subject to the sound discretion of the trial court, and [the trial court] has a perfect right to limit the use of the material if [the deposition] is repetitious or immaterial.” Coletti v. Cudd Pressure Control, 165 F.3d 767, 773 (10th Cir. 1999).

“The district court, notwithstanding Fed. R. Civ. P. 32(a)(2), may reject repetitious testimony.” Gauthier v. Crosby Marine Service, Inc., 752 F.2d 1085, 1089 (5th Cir. 1985).

The Court is persuaded that it should admit into evidence the “30(b)(6) Deposition of William K. Holmes.” The Court, after it receives the post-trial briefs from counsel, may exclude parts of the deposition that are unnecessarily repetitious.

An order in accordance with this memorandum opinion shall be entered this date.

DATED this 27th day of April 2006.

/s/ Robert F. Hershner, Jr.
ROBERT F. HERSHNER, JR.
Chief Judge
United States Bankruptcy Court