

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DIVISION OF TENNESSEE
WESTERN DIVISION**

JULIA GREER and CARRIE MOORE,

Plaintiffs,

v.

No: 07-2639-SHM-egb
JURY DEMANDED

HOME REALTY COMPANY OF
MEMPHIS, INC.; HOME FINANCIAL
SERVICES OF MEMPHIS, INC.; YALE
MORTGAGE CORPORATION; CHARLES
E. MOORE; DAVID MOORE and
LAWRENCE W. KERN,

Defendants.

**ORDER DENYING MOTION FOR CONTEMPT OF COURT
FOR FAILURE TO COMPLY WITH SUBPOENA**

This matter is before the Court on Defendants' Motion for Contempt of Court for Failure to Comply with Subpoena (Docket No. 83), which Judge Mays referred to the undersigned for determination (Docket No. 84). Defendants ask this Court to find Linda Greer and counsel for plaintiffs, acting as Linda Greer's agent for acceptance of service of subpoena, to be in contempt of court pursuant to 28 U.S.C.S. §1826 for failing to comply with a subpoena because Linda Greer failed to appear for her deposition. Additionally, Defendants request that the Court "impose such sanctions and other relief as this Court deems proper" and request the Court to compel Linda Greer's appearance to give a deposition at a time convenient to counsel. Plaintiffs' counsel has responded (Docket No. 85). Linda Greer, who is not a party to this litigation, has failed to respond.

Initially, the Court notes that Defendants have not submitted a supporting Memorandum of Law or a Certificate of Consultation, as required by Local Rule 7.2. For this reason alone, the Motion should be DENIED.

Rule 45(e) provides, “[t]he issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty’s failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).” Fed. R. Civ. P. 45(e). Here, Defendants have failed to demonstrate that Linda Greer was “without adequate excuse” to obey the subpoena. *See Norris v. Innovate, Inc.*, 2007 U.S. Dist. LEXIS 8549 (M.D. Tenn. Jan. 4, 2007) (where party failed to demonstrate non-party witness was without adequate excuse when he did not show up for deposition, court could not find that non-party was in contempt under Rule 45). Likewise, Defendants have failed to demonstrate that Linda Greer is not outside the limits of Rule 45(c)(3)(A)(ii). Consequently, Defendants have not met their burden under Rule 45 and the Court cannot make a finding of contempt.

Additionally, in order to impose sanctions on a nonparty, violation of a court order is generally required in addition to the failure to comply with the subpoena. *See, e.g., Cruz v. Meachum*, 159 F.R.D. 366, 368 (D. Conn.1994) (“Before sanctions can be imposed under [FRCP] 45(e), there must be a court order compelling discovery.”); *Taylor v. Hart*, 2007 U.S. Dist. LEXIS 47385 (S.D. Ohio June 29, 2007); *Norris*, 2007 U.S. Dist. LEXIS 8549. Because the Court had not previously ordered Linda Greer to respond to the notice for deposition, the imposition of sanctions is not warranted.

The Court further notes that Defendants fail to discuss why a finding of contempt under 28 U.S.C.S. §1826 is appropriate and fail to provide any caselaw supporting their statement that

sanctions are appropriate in this case. *See Norris*, 2007 U.S. Dist. LEXIS 8549 at 4 (explaining the distinction between civil and criminal contempt and noting that the burden is on the party presenting the motion for contempt “to explain their position in detail, with appropriate citations to controlling authorities”).

Defendants further ask the Court to compel Linda Greer’s appearance to give a deposition. That request is DENIED without prejudice subject to Defendants re-filing their Motion with a Certificate of Consultation reflecting counsels’ good faith efforts to resolve this issue and a Memorandum of Law in support of their Motion.

IT IS SO ORDERED.

s/ Edward G. Bryant
EDWARD G. BRYANT
United States Magistrate Judge

April 8, 2009
Date