

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

<b>JUDGE</b>	Janet S. Baer	<b>Case No.</b>	17 B 02284
<b>DATE</b>	March 30, 2021	<b>Adversary No.</b>	17 A 00437
<b>CASE TITLE</b>	Maria Keller v. Emil Esmail (In re Emil Esmail)		
<b>TITLE OF ORDER</b>	Order Granting Maria Keller’s Motion to Compel Trial by Zoom (ECF No. 134)		

**DOCKET ENTRY TEXT**

Plaintiff Maria Keller’s Motion to Compel Trial by Zoom is granted. At the next status hearing on April 7, 2021, the Court, in consultation with the parties, will set the date on which the trial will proceed via Zoom and establish corresponding dates for a pretrial technical conference and the submission of pretrial materials.

[For further details see text below.]

**STATEMENT**

This matter is before the Court on the motion of creditor-plaintiff Maria Keller (the “Plaintiff”) to compel trial by Zoom of the above-captioned adversary proceeding. For the reasons stated below, the motion is granted.

On August 22, 2017, the Plaintiff filed her initial adversary complaint, seeking: (1) revocation of the discharge of debtor-defendant Emil Esmail (the “Debtor”) pursuant to 11 U.S.C. § 727(d)(1) for failure to disclose an asset of the estate, and (2) a determination that a debt arising from a state court judgment, owed by the Debtor to the Plaintiff, is nondischargeable under 11 U.S.C. § 523 on the basis of fraud. On December 18, 2019, after several matters in the adversary proceeding had been addressed by the Court—including the parties’ cross-motions for summary judgment, which were both denied—the adversary was set for trial on April 14, 2020.

On March 18, 2020, due to the state of emergency declared in response to the spread of COVID-19 and because the Centers for Disease Control and Prevention urged reduced contact among people to slow the spread of the disease, the Bankruptcy Court for the Northern District of Illinois (the “Bankruptcy Court”) entered General Order No. 20-03, which provided that all court calls would be heard telephonically and that no personal appearances in court would be “necessary or permitted.” The order also provided that “[c]urrently scheduled trials and evidentiary hearings [could] be continued to new dates.” As a result, the trial in this adversary proceeding did not take place as scheduled.

Subsequently, on May 13, 2020, the Bankruptcy Court entered General Order No. 20-05. In that order, the Court, referring to Federal Rule of Civil Procedure 43(a) (made applicable by

Fed. R. Bankr. P. 9017), found “that the COVID-19 emergency constitutes good cause in compelling circumstances for taking testimony by contemporaneous transmission other than in open court” and that the order was being issued “to protect public health.” Importantly, General Order No. 20-05 provides that, “[e]ffective June 1, 2020, all trials and evidentiary hearings will be held by video using the Zoom for Government platform” and that “[n]o trials and evidentiary hearings will be held in the courthouse.” According to the order, the Bankruptcy Court “finds that Zoom for Government together with the Model Pretrial Order provide appropriate safeguards for taking testimony by contemporaneous transmission other than in open court.”

Although they have been slightly amended since their issuance, General Order Nos. 20-03 and 20-05 remain effective today, and in-person proceedings continue to be prohibited.

After cancellation of the original trial date, the parties appeared for status hearings before the Court—remotely by electronic means. At each hearing, the Court explained that, due to the continuing COVID-19 pandemic, it was not known when in-person proceedings could resume; as a result, the Court offered to reschedule the trial to be conducted by Zoom. While the Plaintiff agreed to proceed via Zoom, the Debtor refused to consent to a Zoom trial. The Court continued the adversary proceeding several times to see if either the parties could ultimately agree to a Zoom trial or the state of the COVID-19 emergency had improved such that an in-person trial could be safely held.

On February 15, 2021, the Plaintiff filed her motion to compel the trial by Zoom. She argues that the Court has the authority to compel the trial by electronic means pursuant to Rule 43(a) of the Federal Rules of Civil Procedure, which provides, in relevant part, that “[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.” Fed. R. Civ. P. 43(a). According to the Plaintiff, the COVID-19 health emergency constitutes good cause to compel the trial via Zoom, and appropriate safeguards are in place to do so. She also points out that this adversary has been ready for trial for almost a year, that there are several key facts that are not in dispute, and that, thus, the Court should not have any real difficulties judging the credibility of the witnesses in a Zoom trial.

In response to the motion to compel, the Debtor argues that the Plaintiff has not offered any “compelling circumstances” to justify ordering the trial to proceed by Zoom over his objection. Specifically, the Debtor contends that the length of time that the adversary proceeding has been pending is of little consequence, that there are no pressing issues, that the Clerk of the Court is holding the sales proceeds that are in dispute, that both parties must agree on the method of trial, and that he wants to present live testimony, in a face-to-face setting. As to the latter, the Debtor cites to an advisory note to Rule 43, which states that “[t]he opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition” and that “[c]ontemporaneous transmission of testimony from a different location . . . cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.” Fed. R. Civ. P. 43 advisory committee’s note to 1996 amendment. Thus, the Debtor argues, the Plaintiff cannot compel the trial by Zoom merely by showing that it is inconvenient for her to attend an in-person hearing.

The COVID-19 pandemic, as discussed in the General Orders, along with Rule 43(a), constitutes good cause in “compelling circumstances” for prohibiting all in-person court proceedings and requiring those proceedings to be conducted electronically. The Court has been operating under these General Orders for more than a year and has been able to function without interruption. Notwithstanding the Debtor’s desire to present live testimony and “our tradition” of judging a witness’s demeanor in a face-to-face manner, the Court has found that conducting proceedings via Zoom allows for such judging because a witness’s position in front of a video screen typically gives the Court a clear view of that witness. At the same time, conducting trials by Zoom provides appropriate safeguards for taking testimony other than in open court.

To date, this Court has conducted two multi-day Zoom trials—one in a complex commercial case and the other in an individual chapter 7 case in which the debtor’s discharge was being challenged, not unlike the adversary proceeding at bar. The Court did not encounter any limitations as to its ability to hear the witnesses or assess their credibility and demeanor by conducting those trials by Zoom.

Further, it is unknown at this time when the Court will be able to conduct in-person proceedings again. In the meantime, the Court must manage its docket of more than 3,200 pending cases and continue to conduct its business in the most efficient way it can under the circumstances. If the Court were to stop permitting matters to proceed via Zoom, the backlog would be overwhelming and the resulting delay a terrible injustice for parties attempting to have their matters adjudicated and concluded.

This adversary proceeding has been pending for over three-and-a-half years. It is ready to go to trial. The Zoom platform provides the appropriate safeguards for the Debtor to appear before and address both the Court and the Plaintiff face-to-face. The COVID-19 pandemic provides good cause in compelling circumstances to order that this trial proceed via Zoom.

For the foregoing reasons, the Plaintiff’s motion is granted. At the status hearing in this matter on April 7, 2021, the Court, in consultation with the parties, will set the date on which the trial will proceed via Zoom and establish corresponding dates for a pretrial technical conference and the submission of pretrial materials.

DATED: March 30, 2021

ENTERED:

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Janet S. Baer  
United States Bankruptcy Judge