UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

TREMONT CORPORATION — Case No. 89-12201 k

Debtor

DOUGLAS W. MARKY, Trustee of
TREMONT CORPORATION

Plaintiff

-vs- — AP 91-1341 K

FLEET BANK OF NEW YORK

Defendant

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MEMORANDUM AND ORDER

The background and history of this litigation thus far is fully set forth in this Court's decisions of January 5, 1993 and August 26, 1992. There the Court addressed, inter alia, the Defendant's discontent with the Plaintiff's Responses to Interrogatories and in its January 5, 1993 decision the Court

essentially condoned the Plaintiff's claimed inability, as of the date of the Responses (November 2, 1992), to fully respond to Interrogatories pertaining to proof of the debtor's insolvency at pertinent points in time. The Plaintiff's promise to supplement the Responses was, essentially, approved by the Court.

While the court was deliberating upon the matter addressed in its January 5, 1993 Order, the time was running under the Court's Rule 16 (F.R.Civ.P.) Scheduling Order.

The discovery deadline had been set initially for June 30, 1992, but it was extended by Orders, first to July 15, 1992, then to September 15, 1992, and ultimately to November 30, 1992 and "no further extension [would] be granted." Dispositive motions, if any, were to be filed and served no later than December 15, 1992.

By December 15, 1992 the Plaintiff had not supplemented his Responses as he had promised to do in the Responses that were the object of this Court's January 5, 1993 Order. Consequently, the Defendant on December 15, filed the present motion seeking an order dismissing or precluding further evidence of insolvency and then summary judgment.

Because of various intervening events that could have resolved this litigation, the parties agreed to adjourn the present matter from time to time from December, 1992 until it was heard by the Court on July 7, 1993. Further letter briefs were filed and the matter was taken under submission on July 26, 1993.

In the meantime, on or about January 8, 1993, the

Plaintiff purported to supplement his responses by delivering more than 400 documents to Defendant's counsel. Counsel "rejected" the documents "because they were submitted over five (5) weeks after the November 30, 1992 discovery deadline." Counsel also notes that the documents were deficient as Responses in that there was no indication of the specific portions that purported to respond to the Interrogatories.

The Plaintiff responds, inter alia, that the material was Rule 26(e) material and that the Rule 26(e) duty survives the Court's Scheduling Order. The Court agrees that Rule 26(e) is not cut off by a Rule 16 Scheduling Order's discovery deadline, even where, as here, the Rule 16 Order recites that no further extension will be granted. No Rule 16 Order may be more inflexible than a "final pretrial order" and according to Rule 16(e), even a final pretrial order may be modified to prevent "manifest injustice."

Since preclusion is frowned upon even when disclosures are first made at trial, it is best to encourage compliance with Rule 26(e) to minimize disruptions. But Rule 26(e) might be inapposite here because by its own terms, that Rule applies only with regard to "a response that was complete when made." Arguably, a response which promises further information could not have been "complete when made," at least where, as here, the information to be provided later concerns documents on hand, but not yet analyzed.

Even so, the relief sought by the Defendant is denied. This Court's January 5, 1993 recitation of the law in this Circuit

regarding the sanction of preclusion seems to have fallen on deaf ears, as far as the Defendant is concerned. Again counsel for the Defendant Bank argues that cases from the Eastern District of Pennsylvania, from the District of Colorado, from a Montana Bankruptcy Court and a Pennsylvania Bankruptcy Court, and the Seventh Circuit Court of Appeals compel preclusion. And again counsel ignores the Second Circuit Court of Appeals cases disapproving such harsh sanctions under Rule 37 (or Rule 11) except in extreme circumstances and then only when a court finds "wilfulness, bad faith, or any fault" as opposed to "an inability to comply."

Bank counsel's initial arguments in this regard were submitted before counsel might have read this Court's January 5, 1993 decision. However, counsel's July 20, 1993 submission reasserts the earlier, inapposite "authority" and ignores the teachings of the Second Circuit and of this Court's earlier ruling. The Defendant's Request for a Preclusion Order under Rule 37(d) is denied for failure to address the appropriateness of such an Order under the facts of this case and under the governing decisions of the Second Circuit Court of Appeals. Consequently Summary Judgment is also denied.

This still leaves the matter of the asserted non-compliance with the Rule 16 Order setting a firm discovery cutoff of November 30, 1992.

When the November 30, 1992 deadline passed without the

Trustee's supplementary responses, the Defendant should have moved for an Order Compelling Discovery (under Rule 37(a)(2), (3)) instead of a preclusion order under Rule 37(d).

The Trustee's argument regarding Rule 26(e) would have been entertained at that time.

The Trustee should not have merely served 450 documents after the deadline had passed and a Rule 37 Motion had been made.

Nonetheless, the Defendant had no authority to "reject" the attempt to provide discovery.

Again, both sides have handled this discovery in an atrocious manner and continue to place needless burdens upon the Court.

No matter how rigid this Court's Scheduling Order purported to be, it could not be any less flexible than a "final pretrial order" under Rule 16(e), which may be "modified only to prevent manifest injustice."

To prevent manifest injustice, it is now

ORDERED, that the Defendant's Motion of December 15, 1992 is denied;

That no later than 4:30 p.m. on August 14, 1993, the Trustee shall serve all supplemental Responses to Interrogatories and to the Demand for Production and shall organize and label the documents to clearly identify the portions of each document that are responsive to each Interrogatory or Demand; and

That if the materials provided so necessitate (or appear

to so necessitate), then no later than 4:30 p.m. on August 20, 1993, the Defendant shall request the reopening of discovery and, if necessary, the rescheduling of trial.

Counsel for the Defendant is warned that if another motion seeking dismissal or preclusion is filed without addressing the appropriateness of same under the authorities governing such remedies in this Circuit, sanctions will issue sua sponte. Counsel for the Plaintiff is warned that failure to comply with this Order without leave of Court may result in dismissal, sanctions, and possible surcharge of the Trustee or his counsel.

SO ORDERED.

Dated: Buffalo, New York
August 5, 1993

U.S.B.J.