UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	
	)	
VECTOUR INC., *et al.*,	)	Chapter 11
	)	Case No.01-10903 (JLP)
Debtors.	)	
	)	
	)	
ELLIS R. KIRBY, Litigation Trustee for the Chapter 11 Estates of VecTour Inc., et.al,	)	
	)	
Plaintiff,	)	Adv. No. 03-56814 (PBL)
v.	)	
	)	
U.S. BANCORP LEASING & FINANCIAL, and FIRSTAR EQUIPMENT FINANCE CORP. (n/k/a U.S. BANCORP LEASING AND FINANCIAL),	)	Related Documents: 16, 24, 25
	)	
Defendants.	)	

MEMORANDUM OPINION

The matter before the Court is the Motion in Limine to Preclude Defendants, U.S. Bancorp Leasing and Financial and Firstar Equipment Finance Corp, (hereafter collectively referred to as "Defendant") from Introducing at Trial Any Documentary or Testimonial Evidence Regarding Its Defenses ("the Motion") filed on December 22, 2004 by Ellis R. Kirby, the Litigation Trustee for the Chapter 11 Estates of VecTour, Inc. (hereafter referred to as "Plaintiff"). Upon consideration of the Motion and the supporting exhibits, the Opposition of

Defendant, and the Reply Brief of Plaintiff, the Motion in Limine will be denied for the reasons stated below.

I. Procedural and Factual Background

This adversary proceeding was instituted on October 13, 2003 to avoid and recover certain allegedly preferential transfers pursuant to §§ 547 and 550 of the Bankruptcy Code, in the amount of $213,379.41. Defense counsel entered his appearance and timely filed an Answer on November 10, 2003. The initial Scheduling Order in this, and numerous other VecTour, Inc. adversary proceedings, was entered on February 17, 2004 by Judge Charles G. Case, II, and provided for all fact discovery to be completed by September 24, 2004 and all expert discovery to be completed by December 1, 2004. Thereafter, at the conclusion of the discovery period, a final pretrial conference was to be scheduled and the adversary proceedings remaining, were to be set for trial.

This, and a number of other adversary proceedings in Vectour, Inc., was transferred to this Court on May 28, 2004 and a status conference was held on June 9, 2004. An Amended Scheduling Order was entered shortening the discovery deadlines, where the deadlines for fact and expert discovery were changed to August 20, 2004 and October 29, 2004, respectively. This adversary proceeding was originally set for trial on January 10, 2005 but was rescheduled to be heard on January 24, 2005 due to an "irreconcilable conflict" on the part of Defendant's counsel.

Plaintiff filed and served its first set of written discovery requests on April 6, 2004. After Defendant failed to respond by May 6, 2004, Plaintiff received correspondence on June 4, 2004 from Defendant's counsel and was promised that responses would be forthcoming within 10

days. Plaintiff did not receive the discovery but agreed to extend the time to respond until June 30, 2004. During this time the parties were engaged in settlement negotiations and Plaintiff, in good faith, again agreed to extend the deadline until August 6, 2004. Plaintiff then contacted Defendant numerous times in the subsequent months requesting the discovery, but received only promises or excuses. As is reflected on the docket, Defendant filed its first notice of service of discovery on December 6, 2004, nearly four months after the last extension to respond to discovery had been agreed to by Plaintiff and barely one month before trial. According to Plaintiff, even these late discovery responses were not received until well after December 6, were, at least in some respects unresponsive, incomplete, confusing, and the interrogatory responses were not verified.

III. Discussion

Plaintiff filed this Motion in Limine alleging that counsel for U.S. Bancorp has consistently failed to provide discovery despite numerous promises to do so throughout the course of this adversary proceeding. Plaintiff contends that by providing insufficient and late discovery responses, Defendant's counsel has effectively precluded meaningful discovery and has prejudiced Plaintiff with respect to its prosecution of this proceeding. Specifically, Plaintiff contends that because all discovery had been closed for well over a month and it received Defendant's responses only a month prior to trial, Plaintiff was unable to do any follow up discovery or clarification, or take expert depositions. Furthermore, Plaintiff asserts that it had insufficient time to review and synthesize the discovery responses after it received the "amended" responses from Defendant on December 15, 2004.

Federal Rule of Civil Procedure 37 provides remedies which a court may employ when a party or parties fail to comply with, or meaningfully participate in discovery. Plaintiff urges that the appropriate remedy in these circumstances is to preclude Defendant from introducing any evidence of its defenses at trial, pursuant to Fed. R. Civ. P. 37(b)(2)(B).[1] It provides that a court may make, "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence." Imposing such a sanction, as is sought here, would effectively provide Plaintiff with judgment in this adversary proceeding, since Defendant has conceded that each of the elements of § 547(b) have been satisfied, and is contending only that it has affirmative defenses under §§ 547(c)(2) and (c)(4).

The Court finds that sanctions under Rule 37 are justified and appropriate in this instance; however, the Court will not impose the specific sanctions which Plaintiff seeks. Defendant has not demonstrated good cause for the delay in responding to discovery and only now attempts to excuse its behavior by claiming that the transactions at issue are four or more years old and that several different entities are involved, which made responding to discovery requests unusually difficult. Any problems encountered by Defendant because of these factors, however, were seemingly never communicated to Plaintiff, and Defendant continually made promises to provide the untimely discovery, and assurances that the proceeding would be readily resolved.

Defendant further seeks to justify its own dilatoriness by arguing that Plaintiff could have

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[1] Subsections (c) and (d) of Rule 37, which provide sanctions for failure to disclose discovery or make admissions, and failure to serve answers to interrogatories or respond to requests for inspection, grant the court discretion to impose whatever sanctions are appropriate, including those under Rule 37 (b)(2), (A) – (E).

filed a motion to compel but did not do so and that "Bancorp provided Plaintiff with an exceedingly detailed and crystal-clear set of discovery responses, including all documents to be used at trial, a minimum of 34 days before trial."[2] (Defendant's Objection to Plaintiff's Motion in Limine to Preclude Defendant's Production of Evidence, at 2.) The filing of a motion to compel in these circumstances is the more favored approach, and would have brought the discovery impasse before the Court at a much earlier date. However, this Court will not fault Plaintiff for not filing a motion to compel here, given the innumerable assurances and reassurances of Defendant's counsel that the discovery responses were forthcoming. It is a sad commentary indeed that counsel for Plaintiff is being criticized for trusting the word of opposing counsel.

Finally, Defendant argues that if the Motion in Limine is granted, it will not be able to defend itself properly at trial and that the trial would be reduced to a mere "sham." Perhaps defense counsel should have considered this possibility during the months of delay and hollow assurances.

The leading case in this jurisdiction on Rule 37(b)(2)(B) exclusion sanctions is *Ware v. Rodale Press, Inc.*, 322 F.3d 218 (3rd Cir. 2003). In that case, the court notes that such sanctions are particularly extreme when the sanction is tantamount to dismissing the claim. Of course, the sanction is sought here against Defendant, and if granted would be tantamount to granting summary judgment. The *Ware* court referred to factors that should be taken into account when considering the imposition of such sanctions, as set forth in *Poulis v. State Farm Fire and Cas.*

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[2] Defendant's counsel makes much of the fact that trial was rescheduled because of a conflict that he had on that day, and that Plaintiff was given an additional 14 days to prepare as a result. The Court is unpersuaded by this justification.

Co., 747 F.2d 863 (3d Cir.1984): (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense. *Id.*, at 868.

Other than counsel's observation that the transactions in this case occurred some four years ago and that more than one entity was involved, there is no indication that Defendant itself, rather than Defendant's counsel, was responsible for the delays in this case. This factor therefore does not weigh in favor of the exclusion sanction.

Plaintiff has clearly been prejudiced by the delays in this case. It was not provided with the answers to interrogatories, or requests for admissions until very shortly before trial, and even then the interrogatory responses were not verified. Plaintiff as a result could not prepare for trial in any meaningful way, as it was not aware of what Defendant proposed to introduce or attempt to prove.

The record of delays, excuses and assurances in this case shows a history of dilatoriness and certainly would appear to support a determination of willful and bad faith conduct on the part of counsel for Defendant. It does not, however, indicate that Defendant itself was responsible for such conduct. Counsel for Defendant had ample time and opportunity to participate in discovery, or at least to explain his failure to do so, but chose to make hollow assurances and promises, thereby severely prejudicing Plaintiff in its preparation for trial.

This Court believes that Defendant's failure to timely respond to discovery was inexcusable but that granting the Motion in Limine would be unduly harsh in the circumstances

and the balancing of the factors set out in *Ware* seems to support such a result. The Court instead chooses to impose alternative sanctions.

It is manifest that the trial of this matter, now set for January 24, must be adjourned and discovery reopened in order for Plaintiff to address what it should have been able to address many months ago had Defendant responded to its discovery requests on a timely basis. Counsel for Defendant, remarkably, states that he has no objection to Plaintiff conducting further discovery, even though the Court's Scheduling Order closed fact discovery in October 2004. Since the continuing delays in this case appear to be the fault of counsel, and not of Defendant itself, it would seem appropriate that Defendant's counsel bear the cost of Plaintiff's filing and prosecuting the Motion in Limine, and of the further discovery which will be necessitated by the delays.

IV. Decision

The Motion in Limine as to the preclusion of evidence will be denied, albeit reluctantly. The trial in this matter will be adjourned, to be reset by further order of the Court. Discovery will be reopened, for Plaintiff only. Defendant will respond timely to any and all reasonable requests by Plaintiff for discovery necessary for the preparation of its case for trial. Discovery will close on March 21, 2005. Plaintiff will certify to this Court within 10 days of the date hereof the amount, costs and expenses, required to be expended by it in filing and prosecuting the Motion in Limine. Plaintiff will likewise maintain meticulous records of any and all costs and expenses incurred in conducting further discovery as permitted by this Memorandum Opinion and Order and will certify the same to the Court at least 10 days prior to trial.

At the conclusion of the trial in this matter, or upon resolution of the matter by settlement or other agreement of the parties, a hearing will be scheduled at which counsel for Defendant will be required to show cause why the total amount of such costs and expenses should not be assessed against him as sanctions for his conduct in the discovery portion of this proceeding.

An appropriate order follows.

Dated: January 20, 2005
Wilmington, DE

PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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VECTOUR INC., *et al.*,	)	Chapter 11
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Defendants.	)	

ORDER (I) DENYING PLAINTIFF'S MOTION IN LIMINE TO PRECLUDE DEFENDANT FROM INTRODUCING AT TRIAL ANY DOCUMENTARY OR TESTIMONIAL EVIDENCE REGARDING ITS DEFENSES, (II) ADJOURNING JANUARY 24, 2005 TRIAL AND REOPENING DISCOVERY, AND (III) IMPOSING SANCTIONS

For the reasons set forth in the Memorandum Opinion of even date herewith, it is hereby

ORDERED that Ellis R. Kirby's Motion in Limine to Preclude Defendant from Introducing at Trial Any Documentary or Testimonial Evidence Regarding Its Defenses is **DENIED**;

ORDERED that Trial in this matter, currently scheduled for January 24, 2005, is adjourned, pending further order of the Court;

ORDERED that discovery is reopened, for Plaintiff only, and Defendant will respond

timely to any and all reasonable requests by Plaintiff for discovery necessary for the preparation of its case for trial. Discovery will close on March 21, 2005; and

ORDERED that Plaintiff will certify to this Court within 10 days of the date hereof the amount, costs and expenses, required to be expended by it in filing and prosecuting the Motion in Limine. Plaintiff will likewise maintain meticulous records of any and all costs and expenses incurred in conducting further discovery as permitted by this Order and will certify the same to the Court at least 10 days prior to trial. At the conclusion of the trial in this matter, or upon resolution of the matter by settlement or other agreement of the parties, a hearing will be scheduled at which counsel for Defendant will be required to show cause why the total amount of such costs and expenses should not be assessed against him as sanctions for his conduct in the discovery portion of this proceeding.

BY THE COURT:

Dated: January 20, 2005
Wilmington, DE

PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE