In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

DONALD FOREMAN Debtor.	Bankruptcy No. 94-50433XS Chapter 7
WIL L. FORKER Plaintiff vs. WAGNER LIVESTOCK SALES AND COMPANY Defendant.	Adversary No. 96-5006XS

ORDER RE: DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S DESIGNATION OF EXPERT

Defendant Wagner Livestock Sales Co. moves to exclude from the trial the testimony of an expert witness designated by the plaintiff in the joint pre-trial statement. Hearing on the motion was held by telephone on February 14, 1997. David L. Reinschmidt appeared for defendant; Donald H. Molstad appeared for the plaintiff.

In this adversary proceeding, plaintiff-trustee Wil L. Forker seeks to avoid as preferential and to recover certain of debtor's payments to Wagner Livestock Sales Co. (WAGNER). This proceeding was filed January 16, 1996.

The trustee alleges that during late 1993 and early 1994, debtor executed and delivered three checks to Wagner to pay for cattle. The three checks totaled $1,102,683.89. He contends that the payments were preferences under 11 U.S.C. 547(b). Wagner filed its answer on March 11, 1996, denying all of plaintiff's allegations.

The trustee bears the burden of proving the avoidability of a transfer under 547(b) of the Bankruptcy Code. 11 U.S.C.

547(g). As Wagner is not alleged to be an insider, an essential element of the trustee's claim is that the debtor was insolvent at the times of the transfers. 11 U.S.C. 547(b)(3). In proving insolvency, the trustee enjoys a presumption of insolvency if the transfers were made within 90 days of the filing of the debtor's bankruptcy petition. He contends that they were.

Although in his complaint the trustee does not specifically allege insolvency at the time of the transfers, he does allege that the transfers were preferences as defined by 547 (Complaint, docket no. 1, 7). Defendant denies this, although it does not specifically deny the debtor was insolvent (Answer,

docket no. 11, 2). Nonetheless, the plaintiff should have been cognizant that solvency was an issue in the case. If he was not, his own complaint contributed to his misapprehension.

On April 19, 1996, counsel and I participated in a scheduling conference pursuant to Fed.R.Bankr.P. 7016. As a result of the conference, I issued a Scheduling Order (docket no. 6) which among other things set deadlines for designation of expert witnesses and the completion of discovery. The trustee was to disclose the identity of his experts by June 14, 1996. Wagner was to disclose its experts by July 15, 1996. The parties agreed, and the court ordered, that the experts' written reports as provided by Fed.R.Civ.P. 26(a)(2)(B) would not be required. By October 15, 1996, the parties were to complete discovery including the deposing of any experts. The parties were to meet within 20 days after the discovery deadline to prepare their joint pre-trial statement. The statement was to be filed within 15 days of their meeting.

With a permitted extension, the statement was filed December 13, 1996 (docket no. 10). Wagner listed Larry Harden as an accounting expert and indicated he would be called to testify as to debtor's solvency at the times of the transfers. It is undisputed that Wagner's counsel disclosed Harden as an expert in July 1996.

The trustee listed Craig Merry as an expert witness. The parties' attorneys executed the statement and filed it with the court, but Wagner's attorney subscribed on the pre-trial statement his objection to the trustee's designation. He also filed a Motion to Strike the trustee's expert witness designation as untimely (docket no. 11). The trustee resists the motion.

Hearing on the motion was held at the same time as a discussion with counsel on the selection of a trial date. Trial of this proceeding was set for April 23-25, 1997.

Wagner argues that the trustee's designation of an expert is untimely. It points out that Merry is a local certified public accountant who no doubt would testify on the insolvency issue. If his testimony is permitted, Wagner says additional, significant discovery would be necessary on its part. This would cause an inevitable delay in trial which Wagner can ill afford. Wagner says that the pendency of this $1.2 million dollar claim against it has detrimentally affected its ability to conduct its cattle business. Wagner argues that because insolvency has been a disputed issue in the case from the outset, the trustee should have designated Merry as a witness in his case-in-chief and that for his failure to timely do so, the appropriate sanction is exclusion of the witness.

Counsel for the trustee argues that because the trustee is entitled to a presumption of insolvency for transfers within 90 days of filing bankruptcy, he may rely on the presumption in his case-in-chief. Therefore, he argues, he need call Merry as a witness, if at all, in rebuttal only of the testimony of Wagner's expert. He says he was, therefore, not required to disclose Merry as a witness but did so to be fair. Counsel says the trustee will call Merry as a witness only if the presumption of insolvency is rebutted.

Discussion

The presumption of insolvency shifts to Wagner by the burden of the production of evidence on that issue. However, the ultimate burden of proof, or risk of non-persuasion, remains with the plaintiff. Fed.R.Evid. 301. Failure to rebut adequately the presumption permits the court to find in the trustee's favor on this issue without further evidence of insolvency. Fokkena v. Winston, Reuber, Byrne, P.C. (In re Johnson), 189 B.R. 744, 746 (Bankr. N.D. Iowa 1995).

If Wagner presents sufficient evidence to rebut the presumption, it would seem that the trustee would be able to introduce any relevant, and otherwise admissible evidence on the issue, and he would not be limited to expert testimony which merely attacks the testimony of Wagner's witness. In that sense, Merry would not be a rebuttal witness, but a witness in the trustee's case-in-chief. However, the trustee could limit his use of Merry to rebuttal if he chose.

Whether Merry should have been listed as an expert witness in the trustee's case-in-chief or in rebuttal is relevant to the time by which the trustee should have disclosed the witness. If a witness in the case-in-chief, as Wagner argues, the disclosure was due June 14, 1996. If Merry is offered merely in rebuttal, the witness should have been disclosed by no later than 30 days after Wagner's disclosure of Hardy as an expert. Fed.R.Civ.P. 26(a)(2)(C). I do not know the exact date of Wagner's disclosure, but it was certainly no later than July 15, 1996. It is arguable that the trustee was bound by the date set in the Scheduling Order for plaintiff's disclosure, notwithstanding the failure of the Order to mention rebuttal experts and notwithstanding the provisions of Fed.R.Civ.P. 26(a)(2)(C). I.B.M. Corp. v. Fasco Industries, Inc., 1995 WL 115421 at *3 (N.D. Cal. 1995).

I need not decide this as it is undisputed that however the witness was intended to be used by the trustee, the disclosure of the witness by the trustee was untimely. The court is faced with determining the appropriate consequences of the untimely disclosure.

The federal rules themselves provide the consequences. Rule 37(c)(1) states:

A party that without substantial justification fails to disclose information required by Rule 26(a) or 26 (e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. . . .

Fed.R.Civ.P. 37(c), as incorporated by Fed.R.Bankr.P. 7037.

The trustee offers no substantial justification for failing to disclose the identity of his expert until after the close of discovery. His contention is that he was not required to disclose the witness at all, which is patently wrong. The trustee must, therefore, show that the failure to disclose was harmless. He makes no argument in that regard.

Wagner's position is that Merry's testimony would inevitably delay trial which would cause harm to its business. As to delay, this is conjectural as Wagner's counsel does not know the nature or basis of Merry's testimony. As to the harm, it would seem difficult to gauge without knowing the extent of a delay, if any. No evidence was presented on the issue of delay or its consequences.

The court will permit Wagner's attorney to take Merry's deposition. Further hearing will be set to determine whether a delay would be occasioned by Merry's testimony at trial and the harm which would be caused by that delay. The cost of the deposition will be assessed against attorney Molstad personally.

IT IS ORDERED that attorney Molstad shall make Craig Merry available for Merry's deposition by Wagner's counsel by no later than March 7, 1997 or at a time otherwise agreed upon by counsel for the parties.

IT IS FURTHER ORDERED that continued hearing on the Motion to Strike shall come before the court at 9:00 A.M., March 20, 1997. At that time, the parties shall be prepared to submit evidence and further argument on the issue of delay and of harm to Wagner if Merry is permitted to testify at trial.

IT IS FURTHER ORDERED that Wagner's attorney fees for the actual taking of Merry's deposition and the cost of the transcript will be assessed against attorney Donald H. Molstad. The court will consider any other appropriate sanctions at the continued hearing.

SO ORDERED THIS 26th DAY OF FEBRUARY 1997.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order by U.S. mail to: Don Molstad, A. Frank Baron, David Reinschmidt, Wil Forker and U.S. Trustee (also by FAX to Baron, Reinschmidt and Molstad).