IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

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In re	)	Bankruptcy Case No. 83C-00598
	)	
FRIENDLY VALLEY CONDOMINIUMS & SHOPPING CENTERS, INC.,	)	
	)	
Debtor.	)	MEMORANDUM OPINION

SUMMARY

This matter comes on for hearing before this court on the motions of certain creditors seeking protective orders under Bankruptcy Rules 7026, 7028-37, 9016, and 7004(d).

FACTS

The debtor in this case, Friendly Valley Condominiums and Shopping Centers, Inc. ("Friendly") filed its petition under Chapter 11 on March 4, 1983. In October of that year, First Security Bank of Utah, N.A. ("FSB"), a secured creditor, filed a plan of reorganization, proposing immediate foreclosure of the sole asset of the estate, consisting of real property, valued by FSB at approximately $800,000.00 and located in the State of Utah. The debtor also filed a plan of reorganization allowing greater time in which to sell the property on the open market.

On December 12, 1983, Builders' Land and Construction Company ("Builders") filed its ballot, dated December 3, 1983, rejecting FSB's plan. On December 21, debtor amended its schedules to include Builders' $400,000.00 unsecured claim. On December 30, Builders filed a proof of claim in the amount of $400,000.00 and a ballot accepting debtor's plan as amended. On January 13, 1984, Builders filed its Motion to Extend Time or to Allow Amended Schedules. Accompanying this motion were the affidavits of Joe Belton, treasurer of Builders, and David Eddy, Builders' president.

On January 23, 1984, FSB filed its objection to Builders' motion on grounds (1) that Builders' claim had not been filed by the September 30, 1983 deadline set by the court, and (2) that the agreement between Builders and debtor, upon which the claim was predicated, lacked consideration, was subject to estoppel, was made in bad faith, and did not constitute an arm's-length transaction. FSB reserved the right to add additional grounds pending the outcome of discovery.

On January 27, 1984, Lyle A. Hale, another creditor, objected to Builders' claim on grounds that (1) it is the creditors' responsibility, under Rule 3003(c)(3), to determine if a claim is accurately listed on the debtor's schedule; (2) that Builders negligently failed to timely file its proof of claim by September 30, 1983; (3) that to allow Builders to file a late claim would encourage inexcusable neglect and that it would (4)

adversely effect Hale's secured interest, and (5) retard the expeditious resolution of the case. Hale also objected to the allowability of Builders' claim asserting the same grounds urged by FSB.

A hearing on these claim objections was scheduled for March 27, 1984, 11 days after a hearing scheduled for March 16 on FSB's Motion to Convert or Dismiss. In anticipation of these hearings, some of the parties commenced discovery under Rule 9014 and 7001. On January 30, 1984, FSB noticed the depositions of Builders' affiants, Joe Belton and David Eddy, and requested them to produce for their depositions (1) all documents on which Builders based its claim for $400,000.00; (2) all correspondence between Builders and the debtor; (3) all correspondence between Joe Belton and/or David Eddy and Paul Custer and/or Richard Yuill; (4) all agreements of Builders and the debtor and/or Breckenridge Resort Equities Corporation and/or Park Springs, Ltd.; (5) Builder's corporate minutes; (6) Builders' stock transfer books; and (7) Builders' Articles of Incorporation and By-laws, including any amendments thereto. All this was to be complied with within 14 days after service of the deposition notice (by February 15, 1984).

On January 31, 1984, Builders served its own set of Interrogatories and Requests for Production of Documents on FSB.

On February 2, FSB filed an objection to Builders' discovery and requested a protective order, under Bankruptcy Rule 7026, in

order to avoid answering Builders' Interrogatories 1-8, 15-18, 25 and 26, and 35-44, and Builders' Requests for Production of Documents 1, 5-8, and 15-18. FSB noticed its objection for hearing on February 8, 1984.

On February 6, 1984, Builders filed its Motion for Protective Order Limiting the Scope of Discovery, seeking to prevent FSB from deposing affiants Belton and Eddy and from obtaining answers to its Requests for Production of Documents; in the alternative, Builders sought an order limiting FSB's discovery to the issue of lack of consideration. Builders also demanded the full 30 days prescribed by Bankruptcy Rule 7034 in which to produce documents to FSB or, if Builders were required to respond within 14 days rather than 30, that FSB likewise be required to respond to Builders' discovery within the same time frame.

These motions and objections were argued before this court on February 8, 1984 ("the first hearing"), and the court took the matters under advisement.

On February 28, 1984, before a decision was rendered, Builders noticed up depositions for Joe Porter, an employee or agent of FSB, as well as Jerry Edgmon, Lyle A. Hale, Fox Edwards & Gardiner Pension Plan, and David Dixon of Dixon and Associates. The depositions were scheduled for March 7, 1984. Subpoenas duces tecum, on behalf of Builders, were issued on Lyle A. Hale, Jerry Edgmon, Fox Edwards & Gardiner Pension Plan, and David Dixon.

On March 5, Lyle A. Hale filed his motion for a protective order and scheduled a hearing for March 6, 1984 ("the second hearing"), at which time there appeared and argued Steven Gunn for FSB, David Wahlquist for David Dixon, Michael Murphy for Builders, Steven Hassing for Lyle A. Hale, Michael Emery for Jerry Edgmon, and William Thurman for the debtor. The court heard arguments and again took the matter under advisement.

On March 8, FSB filed yet another motion for a protective order to prevent Builders from acquiring, pursuant to a request for production of documents, a certain writing denominated by Builders a "secret document." On March 9, 1984 a hearing, ("the third hearing") was held on this last FSB motion for protective order at which Suzanne West appeared for Builders and Steven Gunn appeared for FSB.

ARGUMENTS

At the first hearing, February 8, 1984, FSB argued that this court should allow it to avoid certain of Builders' Interrogatories and Requests for Production of Documents on grounds that they are (1) irrelevant to any pending civil proceedings or contested matters between FSB and Builders; (2) that Builders' discovery relating to FSB's plan of reorganization is improper because the court, by its order approving FSB's disclosure statement, already found that FSB provided adequate

information and that determination is res adjudicata, and (3) that to the extent that Fox Edwards & Gardiner may be a customer of FSB, FSB may only disclose the requested information upon receipt of a subpoena.

At the first hearing also, Builders argued that this court should allow it to avoid FSB's discovery or to limit it to the issue of lack of consideration for the following reasons: (1) FSB is not a "party-in-interest" within the meaning of Section 502(c) of the Code and has no right to object to Builders' claim; (2) FSB has failed to make any factual allegations, has simply pleaded conclusions of law: lack of consideration, estoppel, bad faith, and absence of arm's-length transaction between debtor and creditor Builders, and since these are matters of law, no discovery is needed; (3) in the alternative, FSB, if found to be a party-in-interest, should be limited in its discovery to facts in support of its "lack of consideration" allegation -- the only one allowed under Section 502(c). Builders asserted that the other questions (i.e., bad faith, estoppel, lack of arm's-length dealing) must be adjudicated under Bankruptcy Rule 7001 in a civil proceeding which FSB had failed to commence. Builders further argued that FSB's discovery has been conducted to harass Builders, and FSB's request, coupled with its notice of deposition, that Builders produce documents within 14 days of service of the notice is improper under Bankruptcy Rule 7034.

At the second hearing, March 5, 1984, these and other parties asserted further arguments. Dixon and Hale sought protective orders against Builders to prevent depositions on too short a notice, but in open court these parties agreed with Builders to submit to deposition prior to March 27, 1984. FSB argued that Builders is not a party-in-interest, turning Builders' own argument against it. And Builders argued that the March 16th hearing on FSB's Motion to Convert or Dismiss should be continued and rescheduled to be held contemporaneously with the hearing on the allowability of Builders' claim (scheduled for March 27, 1984). Builders sought this continuance on grounds that if Builders' allowability hearing were held after the motion to convert or dismiss, certain of the creditors, including FSB, might object to Builders' participation in the conversion hearing on grounds that Builders was not a party in interest because its claim was yet disputed.

At the third hearing held on March 9, 1984, FSB sought a protective order under Bankruptcy Rule 7026, seeking to prevent Builders from obtaining a so-called "secret document." FSB represented that it would produce this writing at the deposition of Builders' agents scheduled for "the near future," but that if the writing were put into Builders hands prior to the depositions, Builders' agent would then have opportunity to fabricate a story to explain the document. FSB wants to retain a certain element of surprise at the deposition. Builders argued only that

FSB has no basis to ignore a valid request for production of documents.

ISSUE

The only questions before this court are those raised by these parties' motions for or objections to protective orders, sought pursuant to Bankruptcy Rule 7026 and the motion of Builders for a consolidation of the hearing on the allowability of its claim and the hearing on FSB's motion to convert or dismiss.

DECISION

The court will first consider the argument both of FSB and Builders, made by each against the other, that neither is a party-in-interest in this case. Builders' argument consists merely of a bare assertion. FSB's argument, on the other hand, is based on the fact that Builders was not included in debtor's original schedules and subsequently failed to file a proof of claim by the September 30, 1983 deadline fixed by the court. Both of these arguments are without merit. Debtor amended its schedules on December 21, 1983 to include Builders' $400,000.00 unsecured claim. This amendment was made pursuant to Bankruptcy

Rule 1009, which provides that "a voluntary petition, list, schedule . . . may be amended by the debtor as a matter of course at any time before the case is closed." Therefore, Builders as well as FSB are creditors of the debtor. According to Section 1109(b) of the Code, "a creditor" is a "party in interest." Though arguably Section 1109(b) may be limited to Chapter 11 application only, there does not appear to be -- and neither party gives -- any reason why this definition should not apply to Section 502(a), at least as that section applies in Chapter 11 cases. For these reasons, therefore, the court concludes that both FSB and Builders are parties-in-interest in this Chapter 11 case within the meaning of Sections 1109(b) and 502(a) of the Bankruptcy Code.

Builders asserts, as its second argument, that since FSB has only alleged lack of consideration, estoppel, bad faith, and absence of arm's-length transaction and since the question of the timeliness of Builders' claim is a matter of law, then no discovery is needed or, at most, discovery should be limited to FSB's lack of consideration issue, which Builders asserts is the only issue touching upon the allowability of Builders' unsecured claim.

The issue raised by FSB's objection to Builders' claim is, simply, whether or not the debtor owes money to Builders, and if so, how much. To answer this question, the court must hold a

hearing to ascertain the facts surrounding the basis of Builders' claim against the bankruptcy estate. This hearing is in the nature of a trial on a claim for a debt. Rule 9014 provides that in such "contested matters" the parties could avail themselves of the whole array of discovery devices provided for in Bankruptcy Rules 7026, 7028-37. This FSB and Builders have both sought to do. Rules 7026, 7028-37 are verbatim adoptions of Rules 26, 28-37 of the Federal Rules of Civil Procedure. The principles underlying and the cases interpreting Federal Rules 26, 28-37 apply as well to Bankruptcy Rules 7026, 7028-37 to the extent such underlying principles and interpretations do not conflict with contrary underlying principles and interpretations laid down in bankruptcy cases.

The policy of both the Federal Rules and Bankruptcy Rules governing discovery is to allow the parties as wide a scope as possible in obtaining facts germane to the subject matter of the case, unless there is a clear, legal argument to the contrary. Builders asserts no such argument. To say, as Builders does, that the issues raised by FSB's objection (i.e., lack of consideration, estoppel, bad faith, and lack of arm's-length transaction) are "matters of law" obviating the need for discovery is to assert as an argument the ultimate conclusion which Builders wishes this court to adopt. Whether or not Builders' allegations involve mere matters of law is a question that this court may be required to determine at some later time, but only

upon a proper motion and after discovery has been completed. FSB's allegations of lack of consideration, estoppel, bad faith, and lack of arm's-length transaction merely demarcate the issues in dispute between the parties. FSB is now entitled under the bankruptcy rules to discover all the facts bearing upon these allegations and all the facts which may lead to the discovery of other facts bearing upon these allegations.

For these same reasons, Builders' third argument to limit FSB's discovery to the question of allowability of and to prevent FSB from discovering facts relating to the subordination of Builders' claim is also without merit. There is nothing in the discovery rules that would support a limiting order such as that sought by Builders. The parties must be allowed to discover facts, regardless of the aspect of the case to which they may pertain. To prevent this would result in costly piecemeal discovery and would be a violation of the spirit and purpose of the discovery rules. The sooner all the facts are known the better for an expeditious and fair trial. To paraphrase the Roman Sybil: Let all that lurks in the mud hatch out.

Builders' fourth argument is that FSB is conducting discovery to harass Builders. The court has examined the discovery requested by FSB and finds that there is no evidence of such harassment.

Builders' fifth argument is that FSB's request, requiring that documents be produced within 14 days of the date of the

service of the notice of deposition with which it was coupled, is improper under Bankruptcy Rule 7030 and 7034. Bankruptcy Rule 7030(b)(5) provides that, in setting a time for a deposition, the "notice to a party deponent may be accompanied by a request" for production of documents made pursuant to Rule 7034. This latter rule provides that "the party upon whom the request is served shall serve a written response within 30 days after the service of process." Bankruptcy Rule 7034(b). It is clear from these rules that whenever a party couples a motion for the production of documents with a notice of deposition, that party must give the deponent at least 30 days to respond to the production request. If the day set for the deposition is less than 30 days from the time of service of the notice, the deponent, though required to appear at the deposition, would be entitled to do so without the requested documents since the time period to produce had yet not expired, a result that would undoubtedly be time consuming and frustrating for all the parties.

In the event a deposing party wished to conduct a deposition in a period less than 30 days, he is free to do so under Bankruptcy Rule 7030. He could even require the deponent to produce documents in less than 30 days at such a deposition by resorting to the use of a subpoena duces tecum. This tactic is provided for in Rule 7030, which provides that "if a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the

subpoena shall be attached to or included in the notice." In the present situation, there is no evidence that FSB resorted to a subpoena duces tecum; instead FSB attempted to require the production of documents of Builders' witnesses within 14 days by service of a notice of deposition and a request for production of documents. Though this tactic required Builders' witnesses to attend the deposition, they were entitled to do so without the requested documents because they were not given the full 30 days, provided by Bankruptcy Rule 7034, in which to respond to that request. Had FSB served a subpoena duces tecum with its notice of deposition, instead of a request to produce, then Builders would have been bound to comply or be liable to possible sanctions on an appropriate motion of FSB.

At the second hearing, March 5, 1984, Builders further urged the court to continue the hearing on FSB's Motion to Convert or Dismiss scheduled for March 16, 1984, and to reschedule it to coincide with the hearing on the allowability of Builders' claim scheduled for March 27, 1984. It appears that the rescheduling of hearings is a matter that falls well within this court's discretion and that a continuance in this matter would greatly facilitate the disposition of these matters in an orderly fashion while working no injustice to any party before the court.

The court now turns its attention to FSB's arguments, asserted in support of its objection to Builders' Interrogatories

and Requests for Production of Documents. At the first hearing on February 2, 1984, FSB first argued that Builders' Interrogatories and Requests are irrelevant to any pending civil proceedings or contested matters between FSB and Builders. Federal Rule 26(b)(1), incorporated by Bankruptcy Rule 7026, provides for discovery "regarding any matter, not privileged which is relevant to the subject matter involved in the pending action." However, the last sentence of this subdivision, added in 1946, provides: "It is not ground for objection that information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

The relevance requirement for discovery of evidence is not the same as the relevance requirement for the admissibility of evidence at a trial or hearing. In the context of discovery, relevance "is not measured by the precise issues framed by the pleadings, but by the general relevance to the subject matter." See Moore's Federal Practice Vol 4, ¶ 26.56(1), p. 26-121 to 26-122. This court adopts the interpretation of the majority of courts that the language of Rule 26 of the Federal Rules of Civil Procedure as applied by Bankruptcy Rule 7026, permits "examination before trial . . . not merely for the purposes of producing evidence to be used at trial, but also for discovery of evidence, indeed, for leads as to where evidence may be located." Engl v. Aetna Life Ins. Co., 139 F. 2d 469 (2d Cir. 1943) at 472.

In light of this conclusion, the court finds that the facts which Builders seeks to discover from FSB are, broadly speaking, relevant to the subject matter raised by FSB's objection to Builders' unsecured claim.

FSB's second argument is that the court, in its order approving FSB's disclosure statement, has already determined that FSB has provided adequate information to other creditors, and that finding is res adjudicata; therefore, Builders is not entitled to more information relating to FSB's plan of reorganization via the discovery process. FSB cites no law to support its theory and, therefore, this court must reject this assertion in light of the clear language of Bankruptcy Rules 9014 and 7001, allowing for discovery in contested matters. The court observes that its ruling upon the adequacy of FSB's disclosure statement does not constitute res adjudicata and in no way bars any other party to a civil proceeding or contested matter in this case from obtaining further information in any way pertinent to FSB's plan of reorganization (a creditor's plan) through the discovery procedures of Bankruptcy Rules 7026 and 7028-37.

FSB's third argument is that, to the extent that Fox Edwards & Gardiner ("Fox") may be a customer of FSB, FSB may only disclose the requested information upon receipt of a subpoena. Apparently, FSB does not wish to divulge information regarding Fox without a clear mandate from the court in order to protect itself from potential liability. FSB again cites no law in

support of its assertion that a "subpoena" is indispensable. The issuance of a subpoena is governed by Bankruptcy Rule 9016, which incorporates Rule 45 of the Federal Rules of Civil Procedure. Federal Rule 45 limits the subpoena power to the judicial district and to places outside the district which are within 100 miles of the place of trial or hearing. Bankruptcy Rule 7004(d) provides for nationwide service of process except for a subpoena. It appears to have been the intent of the rulemakers to restrict service of subpoenas, issued out of bankruptcy court, to the geographical limits outlined in Federal Rule 45.

A subpoena is in the nature of a court order. It is issued under seal of the court and failure to comply by the person named therein and properly served therewith is punishable as a contempt by the court issuing the subpoena. See generally, Moore's Federal Practice, Vol. 5A, ¶ 45(1)-(6).

The mandate sought by FSB with regard to production of information relating to its customer Fox, therefore, need not be in the form of a subpoena alone; it may come in the form of a direct court order compelling compliance with a discovery request under threat of a finding of contempt or of the sanctions provided for in Bankruptcy Rule 7037.

At the third hearing, March 9, 1984, FSB further argued for a protective order seeking to prevent Builders from obtaining from FSB a so-called "secret document" pursuant to Builders' discovery request. FSB did not argue that Builders' request was

improper but only that FSB be allowed to produce the document at the deposition of Builders' witnesses, scheduled in the near future, to prevent Builders' witness from obtaining the document in time to fabricate an explanation for it. Bankruptcy Rule 7026(c) provides that "the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place. . ." Builders made no representations that it would suffer any hardship if it is required to wait until the time of the deposition of its witnesses in order to obtain production of the so-called "secret document." On the other hand, FSB's representations that somehow the facts surrounding the "secret document" may be compromised if prematurely disclosed cause concern to the court. The court, therefore, in the exercise of its discretion under Bankruptcy Rule 7026 will fix the time of the production of the so-called "secret document" to occur at any time before the conclusion of the deposition of Builders' witnesses as presently scheduled.

The court in considering David Dixon's argument to quash FSB's subpoena duces tecum served upon him concludes that the subpoena was not served within the geographical limits required by Bankruptcy Rules 7004(d) and 9016. The court in considering Lyle A. Hale's argument to quash FSB's subpoena duces tecum

served on him concludes that the subpoena did not afford Hale sufficient notice in which to comply and, therefore, did not accord to him due process of law.

CONCLUSIONS

On the basis of the foregoing, the court concludes that FSB is a party-in-interest with standing to conduct discovery and is ordered to respond to all outstanding discovery requests before March 27, 1984. The court specifically orders FSB to respond to Builders' discovery with regards to Fox within this same time frame. Builders is also a party-in-interest with standing to conduct discovery and is likewise ordered to respond to all outstanding discovery requests before March 27, 1984. The court, in its discretion, strikes the March 16th hearing on FSB's Motion to Dismiss or Convert and orders said hearing to be consolidated with the hearing on the allowability of Builders' claim. Said hearing is set for April 2, 1984 at 1:30 p.m. The court orders the parties to allow 30 days for a party to respond to any request for production of documents served with notice of deposition unless the time is shortened by order of the court.

The subpoenas served upon David Dixon and Lyle A. Hale are quashed, the Dixon subpoena because it does not comply with the requirements of Bankruptcy Rules 7004(d) and 9016, and the Hale subpoena because it was issued on too short a notice and does not

comply with due process requirements. Inasmuch as Hale and Dixon, by and through their respective attorneys, stipulated in open court on March 5, 1984 that they would make themselves available for depositions prior to March 27, 1984, the court further orders them to submit to said depositions as agreed.

The protective order requested by FSB, allowing it to produce the so-called "secret document" before the conclusion of the depositions of Builders' witnesses is granted.

Discovery may continue until April 24, 1984, the date of the confirmation hearing on both the debtor's and FSB's plans of reorganization. Further discovery motions to the court may, at counsels' discretion, be dispensed with by telephone conference calls. No attorneys' fees are awarded.

DATED this 12 day of March, 1984.

BY THE COURT:

Glen E. Clark

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

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In re	)	Bankruptcy Case No. 83C-00598
	)	
FRIENDLY VALLEY CONDOMINIUMS & SHOPPING CENTERS, INC.,	)	
	)	
Debtor.	)	O R D E R

For the reasons stated in the memorandum opinion dated March 12, 1984, the court concludes that FSB is a party-in-interest with standing to conduct discovery and is ordered to respond to all outstanding discovery requests before March 27, 1984. The court specifically orders FSB to respond to Builders' discovery with regards to Fox within this same time frame. Builders is also a party-in-interest with standing to conduct discovery and is likewise ordered to respond to all outstanding discovery requests before March 27, 1984. The court, in its discretion, strikes the March 16th hearing on FSB's Motion to Dismiss or Convert and orders said hearing to be consolidated with the hearing on the allowability of Builders' claim. Said hearing is set for April 2, 1984 at 1:30 p.m. The court orders the parties to allow 30 days for a party to respond to any request for production of documents served with notice of deposition unless the time is shortened by order of the court.

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The protective order requested by FSB, allowing it to produce the so-called "secret document" before the conclusion of the depositions of Builders' witnesses is granted.

Discovery may continue until April 24, 1984, the date of the confirmation hearing on both the debtor's and FSB's plans of reorganization. Further discovery motions to the court may, at counsels' discretion, be dispensed with by telephone conference calls. No attorneys' fees are awarded.

DATED this 14 day of March, 1984.

BY THE COURT:

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE

Rule 5003(c) Designation
☐ The Clerk is directed to enter a copy of this order into the Court's Order Book.
☑ Entry into Order Book not necessary.