

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

In re:

No. 00-13668
Chapter 7

CHOO CHOO CUSTOMS GROUP, INC.

Debtor

JERRY FARINASH, TRUSTEE

Plaintiff

v.

Adversary Proceeding
No. 01-1032

ROSS N. FAIRES,

Defendant

MEMORANDUM AND ORDER

The court must decide whether to grant or deny the plaintiff's motion for a protective order. The motion seeks to prevent the deposition of the plaintiff's witness on the date scheduled by the defendant and also asks the court to set a date for disclosing the identity of expert witnesses.

The defendant is the holder of subordinated debentures issued by the debtor, Choo Choo Customs Group. The plaintiff's complaint alleges that the debentures are not true debts and should be treated as giving the defendant an equity

(ownership) interest in the debtor. The capitalization of the debtor and its solvency are relevant to whether the debentures can be characterized as equity.

The defendant filed a motion for summary judgment supported by the affidavit of a certified public accountant, George Crews. Mr. Crews expresses the opinion that the debtor was adequately capitalized and solvent at the beginning of its business. The plaintiff's response to the summary judgment motion included the affidavit of a certified public accountant, D. Michael Costello. He expresses the opinion that, if the defendant's first and second debentures are treated as debt, then the debtor was undercapitalized at its inception and was insolvent shortly afterward. He also expresses opinions about the debtor's capitalization at other times from its inception until its bankruptcy.

The defendant seeks to depose Mr. Costello on August 15, 2001. The plaintiff's motion for a protective order is based on the requirements of Rule 26(a)(2) and (b)(4). *Fed. R. Bankr. P. 7026; Fed. R. Civ. P. 26(a)(2) & (b)(4)*. The plaintiff contends that Mr. Costello is an expert witness whose identity must be disclosed and who is required to furnish a written report at the time his identity is disclosed. *Fed. R. Bankr. P. 7026; Fed. R. Civ. P. 26(a)(2)(A) & (B)*. The defendant does not dispute these contentions.

Rule 26(b)(4)(A) provides that when Rule 26(a)(2) requires an expert witness to furnish a written report, then the opposing party cannot take the expert

witness's deposition until after the report has been furnished. *Fed. R. Civ. P.* 26(b)(4)(A). The plaintiff has not disclosed Mr. Costello as an expert witness and he has not furnished the written report that must accompany the disclosure. The plaintiff's motion for a protective order asks the court to enforce Rule 26(b)(4)(A) by prohibiting the defendant from taking Mr. Costello's deposition on August 15, because Mr. Costello has not been identified as an expert witness and has not furnished his written report.

The plaintiff's motion for a protective order also asks the court to set a date certain for disclosing the identity of expert witnesses and furnishing their written reports, which must be furnished at the same time the witnesses are identified. *Fed. R. Civ. P.* 26(a)(2)(A) & (B). The court has not set a disclosure date, and the parties have not stipulated to one. As a result, the disclosure date is the date set by the rule – not later than 90 days before the trial date. *Fed. R. Civ. P.* 26(a)(2)(C). Since the trial date is December 3, 2001, this means that the identity of expert witnesses must be disclosed and their reports furnished not later than September 3, 2001.

The defendant seems to argue that the rule against taking an expert witness's deposition before the report has been furnished does not apply until the person's identity as an expert witness has been disclosed. The court rejects this argument; the report requirement is meaningless if the opposing party can take the deposition of any expert witness it discovers before the opposing party discloses his identity and furnishes the report that must accompany it. *Fed. R. Civ. P.* 26(a)(2)(A)

& (B). The court assumes, however, that it can allow a deposition before the report is furnished if the opposing party proves good reasons for an earlier date.

In this regard, the existence of the summary judgment motion does not necessarily justify a departure from the time restriction of Rule 26(b)(4)(A). The defendant has not argued that he must take Mr. Costello's deposition early in order to supplement his summary judgment motion with an attack on Mr. Costello's expert opinions, as stated in his affidavit. In the circumstances of this case, such an argument would probably be unconvincing. The defendant apparently wants nothing more than the opportunity to take Mr. Costello's deposition in preparation for trial. The plaintiff does not oppose this. He opposes the time chosen by the defendant because it is not consistent with Rule 26(b)(4)(A).

The plaintiff also wants the court to set a different, and doubtlessly later, time for disclosing the identity of expert witnesses and furnishing their written reports. The scheduling order was entered on April 2, 2001. That order and Rule 26(a)(2)(C) had the effect of setting the disclosure deadline on September 3, 2001. Mr. Costello's affidavit was filed on May 29, 2001, several months before the September deadline. The court is not aware of any expert witnesses for the plaintiff other than Mr. Costello. The plaintiff should have ample time to meet the deadline. The plaintiff's motion does not state any reasons for setting a later deadline. Accordingly,

It is ORDERED that the defendant is prohibited from taking the deposition of D. Michael Costello until after the plaintiff has disclosed his identity as an expert witness and furnished the defendant with the report required by Rule 26(a)(2)(B);

It is FURTHER ORDERED that the plaintiff's motion for a protective order is denied to the extent it requests the court to set a different disclosure date from the date now set by Rule 26(a)(2)(C).

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P.* 7052.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

[entered 8-10-01]