

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

MAIN STREET USA, INC.,

Debtor.

**Case No. 6-06-BK-02582-ABB
Chapter 7**

In re:

PYC DEVELOPMENT ONE, LLC,

Debtor.

**Case No. 6-06-bk-02583-ABB
Chapter 7**

LEWIS B. FREEMAN,
Chapter 7 Trustee for the estate of
MAIN STREET USA INC.,

Plaintiff,

Adv. Pro. No. 07-13

v.

FSC/LAKE FREDRICA ASSOCIATES, LLC,

Defendant.

**DEFENDANT'S MOTION FOR CONTINUANCE OF
BRIEFING AND HEARING ON PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT TO CONDUCT DISCOVERY**

Defendant, FSC/Lake Fredrica Associates, LLC ("FSC"), pursuant to Bankruptcy Rule 7056 and Federal Rule Of Civil Procedure 56(f), files this its Motion for Continuance of Briefing and Hearing on Plaintiff's Motion for Partial Summary Judgment to Conduct Discovery.

I. PRELIMINARY STATEMENT

Plaintiff filed its first Complaint in this action on February 14, 2007 [DKT 1]. In May 2007, FSC served its First Request for Production and First Set of Interrogatories ("Defendant's

Discovery”) on Plaintiff. Since shortly after FSC served its discovery, the parties have been discussing settlement and Plaintiff has indicated that it needed to amend his Complaint. Accordingly, the parties agreed to put Plaintiff’s responses to Defendant’s Discovery on hold while the parties attempted to negotiate an amicable resolution. On November 13, 2007, after settlement attempts failed, FSC served its Amended First Request for Production Directed to Plaintiff (“**Request for Production**”) and Amended First Interrogatories Directed to Plaintiff (“**Interrogatories**”). Copies of the Request for Production and the Interrogatories are attached hereto as **Exhibit A** and **Exhibit B**, respectively.

Without responding to Defendant’s Discovery, Plaintiff filed its Corrected Amended Complaint to (I) Recover Fraudulent Transfers and (II) Recover Property on November 30, 2007 [DKT 23], and, on December 4, 2007, filed its Motion for Partial Summary Judgment [DKT 24] (“**Motion**”), seeking summary judgment on Counts I, III, VI, VII, IX and XII in its Amended Complaint. Treating the failure of settlement discussions and the filing of the Amended Complaint as the *de facto* beginning of the case, Plaintiff filed the Motion before any discovery was conducted, and only a few days after the case really began.

On December 6, 2007, the Court directed Defendant to file its Opposition to the Motion by January 3, 2008. [Dkt. 25]. On December 12, 2007, the Court entered its Notice of Evidentiary Hearing providing notice to the parties that it would conduct an evidentiary hearing on Plaintiff’s Motion on January 14, 2008. [Dkt. 28].

II. ARGUMENT

Plaintiff filed the Motion without providing FSC any significant discovery responses. FSC is entitled to conduct discovery in order to determine how it can oppose the Motion and the affidavit filed in support of the Motion. *See Morrow v. Israel Aircraft Industries, Ltd.*, Slip

Copy, 2007 WL 2826148, *4 - 5 (M.D.Fla.) (denying defendant's motion(s) for summary judgment because plaintiff had not had an adequate opportunity to conduct discovery relevant to a rebuttal of defendant's arguments). Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A motion for continuance under Rule 56(f) should be granted where a party is reasonably conducting discovery and the facts necessary to oppose a motion for summary judgment are in the opposing party's control. *See Hickman v. Wal-Mart Stores, Inc.*, 152 F.R.D. 216, 224 (M.D. Fla. 1993) (granting motion for continuance where parties disputed adequacy of discovery responses and facts were in control of party moving for summary judgment).

Essential to Plaintiff's arguments are its allegations that Debtor Main Street USA, Inc., Debtor PYC Development One, LLC (collectively "**Debtors**"), and PYC Development Two, LLC ("**PYC Two**") are separate and distinct corporate and legal entities and that the Debtors received nothing from the sale of certain real property involved in this action. *See Motion*, ¶ 1. In the Affidavit of Lewis B. Freeman ("**Freeman Affidavit**") filed in support of the Motion, Plaintiff repeatedly asserts the distinction between the Debtors and PYC Two and the rights held by the parties. *See Freeman Affidavit*, ¶¶ 6 – 8. Additionally, Plaintiff makes several contentions regarding the origin and transfer of the funds used for the acquisition of the property. *See Freeman Affidavit*, ¶¶ 10 – 12. Relying on the Freeman Affidavit, Plaintiff argues in the Motion that each of the parties are distinct legal entities and that FSC "has not and cannot demonstrate otherwise." *See Motion*, ¶ 1.

FSC diligently attempted to conduct relevant discovery in this action. In the Request for Production and Interrogatories, FSC requested information relating specifically to the corporate structure of, financial activities of, and communications and relationships between the Debtors and PYC Two.¹ FSC also requested information relating to the origin and transfer of funds used for the acquisition of the property.² Plaintiff relies on this information in the Motion, and this information is essential in determining facts necessary to oppose the Motion and Freeman Affidavit. *See* Affidavit of Marc Swerdlow, attached hereto as **Exhibit C**.

In response to the Request for Production, Plaintiff generally objected to *all* of the requests and directed FSC to a warehouse in Miami where documents in the possession of the Plaintiff are stored. *See* Plaintiff's Response to FSC's First Request for Production of Documents, a copy of which is attached hereto as **Exhibit D**. While Plaintiff provided FSC with a "catalog of available documents (the "Document Lists") which," according to Plaintiff, "categorize *all* of the documents in the possession, custody and control of the trustee," the "Document Lists" do not identify what documents, or document ranges are responsive to the particular requests of FSC. *See id.* (emphasis supplied); "Document Lists," a copy of which are attached hereto as **Composite Exhibit E**.³ This "Response" is insufficient and will be the subject of a motion to compel discovery should Plaintiff persist in its unreasonable "you go find it" position.

Plaintiff, in its Response to the Interrogatories, repeatedly asserts that it has no personal knowledge of the information requested and again directs FSC generally to the warehouse of

¹ *See e.g.*, Request for Production Nos. 1, 2, 3, 6, 7 and 9.

² *See e.g.*, Request for Production Nos. 1, 3, 4, 5, 6, 7 and 9.

³ The 65-pages of "Document Lists" appear to be an index of nearly 43,000 pages of documents collected by Plaintiff as the Trustee for the Debtors in this case and as Trustee for Debtors in related bankruptcy cases, which documents apparently include, according to the Document Lists, sponsorship agreements for the Orlando Magic and Jacksonville Jaguars. *See* Ex. D.

documents. *See* Plaintiff's Response to FSC's Interrogatories, a copy of which is attached hereto as **Exhibit F**. In the response to the Interrogatories, Plaintiff also acknowledges that discovery is ongoing. *See* Plaintiff's Response to FSC's Interrogatories, ¶¶ 6, 14. These responses are evidence enough that discovery needs to be carried out to ascertain information relevant to this dispute. Moreover, Plaintiff's non-responsive "responses" to the Interrogatories are particularly offensive given that Plaintiff was hired as the estate's forensic accountant, Plaintiff makes relevant affirmative and negative statements in the Complaint and in his Affidavit, and Plaintiff has spent a substantial amount of the estate's funds to become familiar with Debtor's records. Again, FSC reserves the right to move to compel substantive answers to the Interrogatories should Plaintiff persist in this discovery charade.

Before summary judgment should be considered, FSC is entitled to conduct sufficient discovery to determine the facts necessary to dispute Plaintiff's allegations, and to this point, Plaintiff has failed to reasonably provide those facts. That discovery should take 90 to 120 days, shall include depositions (after Plaintiff responds to the Requests for Production and Interrogatories) and may include expert testimony.

III. CONSULTATION WITH PLAINTIFF'S COUNSEL

Immediately upon receiving the Motion, counsel for FSC contacted Plaintiff's counsel to request consent to continuing the summary judgment briefing schedule to allow discovery. Plaintiff's counsel is still considering that request, and has neither agreed nor refused to agree to it.

IV. CONCLUSION

Pursuant to Bankruptcy Rule 7056 and Federal Rule of Civil Procedure 56(f), for the reasons set forth above and to permit FSC to conduct discovery essential to defending the

allegations made by Plaintiff in this action, FSC respectfully requests that the Court continue consideration of Plaintiff's Motion, the date by which FSC is required to serve its opposition to

Plaintiff's Motion and, the evidentiary hearing on Plaintiff's Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of December, 2007, the foregoing was served on the following via United States Mail:

Brian G. Rich
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