

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

| | | |
|---------------------------------|---|-------------------------------|
| In re: |) | Chapter 11 |
| |) | |
| LTV STEEL COMPANY, INC., |) | CASE NUMBER 00-43866 |
| <i>et al.,</i> |) | |
| |) | JUDGE RUSS KENDIG |
| Debtors. |) | |
| |) | MEMORANDUM OF DECISION |
| |) | |

This matter comes before the court upon the motion of C&K Industrial Services, Inc. (hereafter "C&K") seeking to present an expert witness's testimony at the April 20, 2004 hearing regarding its administrative trade claim against LTV Steel Company, Inc. (Hereafter "LTV"). LTV responded to this motion.

ARGUMENTS

C&K urges the court to allow it to present the testimony of an expert witness, Phillip Rye. C&K asks that the court direct that Federal Rule of Bankruptcy Procedure 7026 shall apply. This expert would present testimony on the benefit conferred by C&K to LTV's estate. The expert would place an objective value on the services provided by C&K which represents the fair allotment to which C&K is entitled for its goods and services. C&K contends that although Civil Rule 26 requires that experts be disclosed 90 days before trial, LTV was informed of the expert's proposed testimony for more than 60 days and fairness to all parties requires that the expert's testimony be heard.

LTV counters with three arguments. First, the disclosure of the expert is not timely. Second, the expert's proposed testimony violates this court's January 6th Order which levied sanctions against C&K. Finally, LTV argues that the expert's testimony has no probative value.

JURISDICTION

The court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(b) and the General Order of Reference entered in this district on July 16, 1984. This is a core proceeding over which the court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(B).

ANALYSIS

The court finds that C&K may not offer the testimony of Phillip Rye into evidence at the

hearing for the following reasons:

A. The Expert Was Not Timely Disclosed

The disclosure of this expert is untimely for two reasons. First, the discovery period for this hearing is closed and has been closed for some time. LTV states that the discovery cut-off was September 25, 2001 pursuant to a stipulation between the parties. However, LTV filed a Scheduling Notice on December 5, 2002 which set forth the case schedule established during a status conference held on November 26, 2002. The notice states: “LTV Steel and the Claimants may conduct discovery in respect of the Trade Claims during the period from November 27, 2002 through January 31, 2003” The fact that the discovery cut-off had passed is also reflected in the court’s Scheduling and Trial Order issued on February 26, 2004 which stated that “[d]iscovery is closed.” Accordingly, the discovery deadline has passed and C&K is not permitted to conduct further discovery.

Second, Bankruptcy Rule 7026, which incorporates Federal Rule of Civil Procedure 26, states as follows”

(a)(2) Disclosure of Expert Testimony

. . . .

- (C) These disclosures *shall be made* at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures *shall be made* at least 90 days before the trial date or the date the case is to be ready for trial . . .

Fed. R. Civ. P. 26(2)(C) (emphasis added). According to the rule, disclosure of an expert must be made by the time directed by the court or stipulated by the parties. This was not done. Even if the court had not set a discovery deadline, C&K would still have had to disclose its expert 90 days before trial. This was not done either.

Bankruptcy Rule 7037 incorporates Federal Rule of Civil Procedure 37, which states in pertinent part: “A party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.” Fed. R. Civ. P. 37(c)(1). The court cannot say that the failure to disclose is harmless. Due to the fact that discovery is closed and the trial date is fast approaching, LTV cannot conduct effective discovery to enable it to effectively rebut the testimony of this expert. Thus, LTV is prejudiced. See Hermeling v. Montgomery Ward & Co., Inc., 851 F. Supp. 1369, 1376 (D. Minn. 1994). Additionally, C&K mentions in its motion that LTV’s counsel has the resources available to meet the challenge of a single expert witness.

However, the administratively insolvent estate of LTV does not have such resources. The discovery in this case is closed and shall remain so. The deadline imposed by Civil Rule 26 for disclosure of expert witnesses has passed. C&K's new counsel argues that fairness requires the court to allow this expert to testify. C&K's retention of new counsel does not give it the right to reformulate its case. Accordingly, the court must deny C&K's motion.¹

B. The Proposed Testimony of Expert Phillip Rye Violates This Court's January 6th Order

The January 6, 2004 order of this court instructed that C&K shall not "offer any evidence of its third party price rates at the hearing on the objection to its claim nor make any argument relating thereto or allege that LTV received favorable rates." Memorandum of Decision, Case No. 00-43866, Docket No. 7196.

C&K's expert will offer testimony as to the objective value of the services C&K provided. This value will then be used to determine what benefit the estate received from these services. The objective value would have to be determined by the value of these services in the market. The argument that LTV received a benefit would follow from its receiving services from C&K at below market value. This would mean that LTV received favorable rates. Pursuant to this court's order, C&K is foreclosed from making this argument.

CONCLUSION

For the foregoing reasons, the court will not allow C&K's expert Phillip Rye to testify at the April 20, 2004 hearing.

RUSS KENDIG

¹ The caption of C&K's motion reads "Motion of C&K Industrial Services, Inc. For Order Pursuant to Bankruptcy Rule 9014 Directing that Bankruptcy Rule 7026 Shall Apply Herein; Relief From Any Earlier Order Inconsistent With the Relief Sought Hereunder." In denying this motion, the court is not saying that Rule 7026 does not apply. According to the text of Bankruptcy Rule 9014, Rule 7026 does apply to this hearing since it is a hearing on a contested matter. The thrust of this motion is to ask the court to allow expert Phillip Rye to testify at the hearing. It is this request which the court denies.

UNITES STATES BANKRUPTCY JUDGE

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| |) | JUDGE RUSS KENDIG |
| Debtors. |) | |
| |) | ORDER |
| |) | |

For the reasons stated in the accompanying Memorandum of Decision, the Motion of C&K Industrial Services, Inc. for Order Pursuant to Bankruptcy Rule 9014 Directing That Bankruptcy Rule 7026 Shall Apply Herein; Relief From Any Earlier Order Inconsistent With the Relief Sought Hereunder is hereby **DENIED**.

So Ordered.

RUSS KENDIG
U.S. BANKRUPTCY JUDGE

SERVICE LIST

Shawn J. Organ

Jones Day
41 S. High St.
Suite 1900
Columbus, Ohio 43215-6113

Mark Schlachet

1700 North Point Tower
1001 Lakeside Avenue
Cleveland, OH 44114