UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	
YOUNGSTOWN OSTEOPATHIC HOSPITAL ASSOCIATION,	)	CHAPTER 11
	)	CASE NO. 99-40663
Debtor.	)	JUDGE RUSS KENDIG
YOUNGSTOWN OSTEOPATHIC HOSPITAL ASSOCIATION,	)	ADV. PRO. NO. 02-6118
Plaintiff,	)	
vs.	)	**MEMORANDUM OF DECISION**
JAMES V. VENTRESCO, JR., D.O., et al.,	)	
Defendants.	)	

This matter is before the court upon the motion for leave to serve requests for production of documents filed by Defendants James V. Ventresco, Jr., D.O., Harold L. Sandrock, D.O., Ned A. Underwood, D.O., David R. DelliQuadri, D.O., Edward M. Hobbs, D.O., Tracy L. Neuendorf, D.O., Michael P. Stanich, D.O., Peter Bottar, D.O., Keith Henson, D.O., Richard Wise, D.O., Samuel H. Copperman, Esq., Steven B. Copperman, William B. Boyer, Rev. Morris W. Lee, Raymond Fine, Esq., Eugene B. Fox, Esq. and Joseph Ross (hereafter collectively "Board of Trustees")[1] directed to Plaintiff Youngstown Osteopathic Hospital Association (hereafter "YOHA"). YOHA filed a memorandum in opposition to Board of Trustees' motion. Subsequently, both parties and Defendants John C. Weir and Michael Suhadolnik (hereafter "Weir and Suhadolnik"), who support Board of Trustees' motion, filed memoranda in support of their respective positions.

PROCEDURAL HISTORY AND JURISDICTION

On March 9, 2001, YOHA commenced this action by filing a complaint against Board of Trustees, Weir and Suhadolnik, and Defendant Richard B. White (hereafter "White")[2] for

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On May 5, 2003, counsel for Board of Trustees filed a notice of suggestion of death of Defendant Hon. Joseph E. O'Neill. (Dkt. #96, Notice).

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White did not file a brief supporting or opposing Board of Trustees' motion for leave to serve

breach of fiduciary duty, negligence, negligent hiring, negligent supervision, negligent retention, fraud, fraudulent transfer, misappropriation, conversion, unjust enrichment, concert of action, conspiracy, misrepresentation, and violations of the Federal Racketeer Influenced and Corrupt Organizations Act (hereafter "RICO"). (Dkt. #1, Comp.).

Prior to its transfer to this court, the parties filed briefs on the propriety of the district court withdrawing the reference to the bankruptcy court to hear the claims contained in the complaint. (Dkt. #19, White's Mem., Dkt. #39, YOHA's Mem., Dkt. #40, Weir and Suhadolnik's Mem.). In an order entered September 10, 2001, Judge William T. Bodoh of the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division, Youngstown Court determined that the complaint contains a number of claims that are not core proceedings and that the RICO claim requires consideration of both Title 11 and other laws passed pursuant to the authority of the commerce clause. (Dkt. #41, Order). Accordingly, pursuant to 28 U.S.C. § 157, Judge Bodoh concluded that the action had to be tried before the United States District Court and so referred the case. (*Id.*). On June 28, 2002, Judge Peter C. Economus of the United States District Court for the Northern District of Ohio issued a memorandum opinion and order in which he denied the motion of the bankruptcy court to withdraw the reference pursuant to 28 U.S.C. § 157(d). (Dkt. #49, Mem. Opin. & Order).

Accordingly, this court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b), the general order of reference entered in this district on July 16, 1984, and the District Court order entered June 28, 2002. The following constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

FACTS

Upon YOHA's initiation of the within adversary proceeding, Judge Bodoh issued an adversary case management initial order within which was contained a discovery procedure to be engaged in by the parties. (Dkt. #2, Adv. Case Mgmt. Order). The discovery procedure anticipated that the parties would complete discovery within one hundred and twenty days after the filing of the complaint unless otherwise ordered by the court. (*Id.*). YOHA served a copy of this order on all the defendants. (Dkt. #3, Summons). Under this schedule, discovery should have been completed by July 6, 2001. (*Id.*).

At the status conference on April 30, 2001, Judge Bodoh orally extended the discovery deadline to August 28, 2001. (Dkt. #36, Jt. Mot.). The parties then jointly moved for an extension of the discovery deadline to December 20, 2001, (*id.*), which Judge Bodoh granted on August 14, 2001. (Dkt. #38, Order). The joint motion indicated that YOHA had served discovery requests on all the defendants and that in response to the document requests propounded upon YOHA, YOHA advised all the defendants, which included Board of Trustees and Weir and Suhadolnik, that all documents within YOHA's possession would be made

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requests for production of documents.

available at a mutually convenient time for all the parties. (*Id.*)

After Judge Bodoh's referral of the case to the District Court, the discovery deadline was extended three times. (Dkt. #100, Mem. in Opp. to Trustee Defs' Mot. for Leave). Two of these requests were pursuant to joint motions in which YOHA represented that the documents within its possession were available to Board of Trustees and Weir and Suhadolnik at a mutually convenient time. (*Id.*).

After Judge Economus refused to withdraw the reference, Judge Bodoh recused himself from the case, (Dkt. #50, Order of Recusal), and the proceeding was transferred to this court. (Dkt. #52, Order). Following the initial pretrial conference in this court on October 3, 2002, the court entered an order extending the discovery deadline to December 16, 2002. (Dkt. #57, Mem. Order). Prior to this deadline, the parties submitted a stipulated, proposed order extending the deadline to January 31, 2003, which the court entered on December 12, 2002. (Dkt. # 63, Order). After a status conference on February 6, 2003, the court issued an order extending the discovery deadline to March 28, 2003, making this the eighth and final time for the extension of the discovery deadline. (Dkt. #82, Mem. Order). The parties then filed a notice on May 6, 2003 of their agreement to enter mediation. (Dkt. #97, Stip. Agr.).

Several days prior to the mediation, YOHA served an eighty page mediation statement, with one hundred and four exhibits, on Board of Trustees. (Dkt. #99, Mot. for Leave). Included in this statement, was a report of Harvey S. Rosen, Ph.D. (hereafter "Rosen"), which opined as to the fair market value of Youngstown Osteopathic Hospital from 1995 through 1998. (*Id.*). The mediation was continued from May 1, 2003 to late August 2003 to enable Board of Trustees to review YOHA's mediation statement and expert report and submit its expert's report in response. (*Id.*).

Subsequently, Board of Trustees filed its motion for leave to serve requests for production of documents, which Board of Trustees alleges includes a request for two types of documents: those needed as a result of Rosen's report and those relating to the general economic condition of Youngstown Osteopathic Hospital over the last decade. (Dkt. #99, Mot. for Leave, Ex. C.). Specifically, Board of Trustees requests the following documents:

> 1. The Hospital Acquisition Reports (4th Edition, 1998, and 8th Edition, 2002) as referenced in Dr. Rosen's report;
> 2. YOH's[3] Federal Income Tax Returns for 1990 through 2000, in addition to any other tax records relied upon by Dr. Rosen;
> 3. The 1999 FBI investigation documents identified by Dr. Rosen;
> 4. All work files of Dr. Rosen, including an electronic copy of his valuation damage model;

[3]This is the abbreviation Board of Trustee's uses for YOHA.

5. Patient census data for YOH for 1991 through 2000;
6. Any documents identifying economic concessions provided by YOH, including rate reductions in contracts, and any concessions given to employees, labor unions, health and welfare funds, etc.;
7. YOH's audited financial statements from 1991 through 2000, to the extent that they have not already been put forth in this case;
8. YOH's internal audit reports for 1991 through 2000, to the extent that they have not already been put forth in this case.

(*Id*.). YOHA opposes this motion. (*See* Dkt. ## 100 and 104.). Weir and Suhadolnik support Board of Trustees in its quest. (*See* Dkt. #103).

A review of the docket indicates that during the two year period of discovery, YOHA and Weir and Suhadolnik each actively engaged in propounding discovery requests and responding to discovery requests. (*See*, *e.g.*, Dkt. ## 22, 26, 34, 45, 61, 64, 65, 66, 70, 73, 74, 76 and 90). Conversely, Board of Trustees did not serve discovery requests on YOHA. (Dkt. #100, Mem. in Opp. to Trustee Defs' Mot. for Leave).

ARGUMENTS

Board of Trustees argues that its motion for leave to serve requests for production of documents is necessary as the expert it has retained needs to review this information in order to issue its report. Board of Trustees argues that the mediation scheduled for May 1, 2003 was continued to the end of August in part for its expert to be able to review and respond to Rosen's report. Board of Trustees argues that without the requested information, its expert will be unable to value the case, and it will be unable to enter into a meaningful mediation of this matter.

In response, YOHA argues that the discovery period was extended numerous times over a two year period. YOHA argues that during this time, it made Board of Trustees aware of the thirty-five boxes of documents in its possession and their availability to Board of Trustees at a mutually convenient time. YOHA argues that to produce the documents now would cause great inconvenience as the documents are no longer located at Youngstown Osteopathic Hospital but are contained in a self-storage facility. YOHA argues that the boxes contain documents that would have satisfied most of Board of Trustees' document requests, including request numbers 2, 3, and 5-8. YOHA argues that with regard to number 1 of Board of Trustees' requests, the Hospital Acquisition Reports are copyrighted, publicly-available materials that YOHA is prohibited from reproducing but are available to Board of Trustees through other means. With regard to number 4 of Board of Trustees' requests, YOHA argues that it has provided what it was required to produce under Federal Rule of Civil Procedure 26(a)(2)(B), including its expert's report and information regarding its expert's qualifications and experience. YOHA argues that although it is not required to produce all prior drafts of its expert's reports, it is willing to do so. However, it argues that no further information regarding its expert's report is discoverable at this time.

YOHA argues that two legal grounds exist for denying Board of Trustees' motion. First, YOHA argues that Board of Trustees' motion for leave must be denied because Local Bankruptcy Rule 7026-1 of the United States Bankruptcy Court for the Northern District of Ohio bars the filing of a discovery dispute more than ten days after the discovery cut-off. Second, YOHA argues that Board of Trustees' motion for leave should be denied under the analogous Federal Rule of Civil Procedure 56(f), which authorizes a court to defer ruling on a motion for summary judgment, pending discovery, if the nonmoving party submits an affidavit stating that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition. In the application of Rule 56(f), YOHA argues that the Sixth Circuit Court of Appeals has developed a six-part test to determine whether additional discovery is warranted, which Board of Trustees cannot pass.

In response, Board of Trustees argues that Federal Rule of Civil Procedure 26(a)(1) requires YOHA's voluntary disclosure of many of the documents requested by Board of Trustees. Board of Trustees argues that its failure to formally request production of documents during the discovery period does not negate YOHA's obligation to comply with this rule. Additionally, Board of Trustees argues that to the extent that the documents are not required to be voluntarily disclosed under Rule 26(a)(1), they are required to be produced pursuant to Federal Rule of Civil Procedure 26(a)(2), which governs the disclosure of expert testimony. To counter YOHA's position, Board of Trustees argues that Local Bankruptcy Rule 7026-1 is inapplicable as its motion for leave to serve discovery is not a discovery dispute, as anticipated by that rule, but a de facto request for extension of the discovery deadline. Board of Trustees argues that assuming its motion is considered a discovery dispute under the requirements of Local Bankruptcy Rule 7026-1, it would have been impossible to file its motion within ten days of the March 28, 2003 discovery deadline as YOHA did not provide its expert report until April 28, 2003. Additionally, Board of Trustees argues that it was under the impression that "fact" discovery would end on March 28, 2003 but that "expert" discovery would not. Finally, Board of Trustees argues that Rule 56(f) is inapplicable as a mediation statement is dissimilar from a motion for summary judgment.

In support of Board of Trustees, Weir and Suhadolnik argue that in response to its discovery request regarding the identity of YOHA's expert, YOHA indicated that it would disclose its expert's identity at a future date. Weir and Suhadolnik argue that it was only on April 28, 2003, the date on which the mediation statement was produced, that YOHA disclosed any information as to its expert witness. Additionally, Weir and Suhadolnik argue that Rosen's report and YOHA's response to interrogatories regarding damages conflict. Therefore, Weir and Suhadolnik argue that Board of Trustees should be allowed to engage in further discovery to test the assumptions of Rosen. Without the additional discovery, Weir and Suhadolnik argue that mediation will fail.

Responding to both parties, YOHA argues that Judge Bodoh advised all the parties that voluntary disclosure under Rule 26(a)(1) was unnecessary. YOHA argues that it has complied with all the requirements of Rule 26(a)(2) with regard to "expert" discovery issues. It argues that

the theory of damages relevant to Rosen's report, as well as the value of the hospital, was made known to Board of Trustees throughout discovery in the case. YOHA argues that it was under no obligation to provide Rosen's report during the discovery period, as Rule 26(a)(2)(C) does not require the production of expert reports until ninety days prior to trial. YOHA argues as no trial date has been set, the deadline has not yet started to run. YOHA asserts that the expert's report was produced solely for mediation. Also, YOHA argues that while Board of Trustees characterizes the discovery requests as "expert" discovery it is really "fact" discovery in disguise. YOHA alleges that bifurcating the discovery process was never contemplated by the parties or suggested by the court. Finally, YOHA argues that YOHA's willingness to enter into mediation should not provide Board of Trustees with a second bite at the discovery apple. YOHA argues that allowing Board of Trustees to conduct discovery now would given it an unfair advantage against YOHA now that YOHA has put all its cards on the table during mediation.

In response, Board of Trustees counters that much of what YOHA argues is specious and circular.

ANALYSIS

I. Initial Disclosures of Discoverable Information

Federal Rule of Civil Procedure 26(a)(1), applicable to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7026, provides in relevant part:

> (a) Required Disclosures; Methods to Discover Additional Matter.
> (1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), **or to the extent otherwise stipulated or directed by order**, a party must, without awaiting a discovery request, provide to other parties:
> (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;
> (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;
> (C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature

> and extent of injuries suffered; and
> (D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.
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> . . .
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> These disclosures must be made at or within 14 days after the Rule 26(f) conference **unless a different time is set by stipulation or court order**.

Fed. R. Civ. P. 26(a)(1) (emphasis added). As this Rule clearly states, parties are to participate in the voluntary disclosure of discoverable information within fourteen days after a scheduling conference unless ordered otherwise by the judge. Apparently, at the initial case management conference with Judge Bodoh, he informed the parties that voluntary disclosure under this Rule would be inapplicable to the within proceeding. Even so, YOHA offered access to the documents to Board of Trustees and Weir and Suhadolnik at a mutually convenient time. The discovery deadline was extended eight times and lasted two years. This provided Board of Trustees ample time within which to review numbers 2, 3, and 5-8 of their document requests.[4] Board of Trustees made a calculated decision not to take YOHA up on its offer. Board of Trustees' argument that YOHA was under a duty to voluntarily disclose the documents and information within its possession, rather than in response to a formal discovery request, fails.

II. Disclosure of Expert Testimony

Rule 26(a)(2) provides in pertinent part:

> (2) Disclosure of Expert Testimony.
> (A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who **may be used at trial** to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.
> (B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared

[4] Additionally, document request number 1, being a published, copyrighted report, was discoverable during this time through other means.

> and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.
> (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** or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

Fed. R. Civ. P. 26(a)(2)(A) (emphasis added). YOHA is correct in its assertion that it does not have to produce its expert's report until ninety days before this matter is scheduled for trial. However, in an effort to participate in a meaningful mediation of this matter, it proffered Rosen's report to Board of Trustees prior to the mediation conference. In response to Board of Trustees' request number 4, although YOHA asserts that it is not required to do so, it offered to produce the prior drafts of Rosen's reports. Presumably this includes an electronic copy of his valuation damage model. Although not required to satisfy Rule 26(a)(2)(A) at this point in time, this is a good faith gesture toward engaging in a meaningful mediation of this matter.

Board of Trustees makes much ado regarding the difference between "fact" discovery and "expert" discovery, arguing that the documents it seeks are "expert" discovery because Rosen relied upon them in issuing his report. Not all documents examined by an expert fall into the realm of "expert" discovery. Board of Trustee's argument is akin to saying that a vehicular accident report relied upon by a doctor in issuing a medical opinion as to injuries constitutes expert discovery. That is plain old fact discovery, nothing more, nothing less. That is the discovery that should be engaged in as a normal part of the discovery process. There is no important distinction between factual and expert discovery in the documents Board of Trustee requests.

CONCLUSION

It is perplexing that Board of Trustees did not actively engage in any form of discovery

practice prior to the discovery deadline running, especially when the discovery period lasted for two years, YOHA's documents were made available to Board of Trustees, and there is a claimed $20,000,000.00 in damages at stake. The consequences of this inaction are now dire for Board of Trustees. Board of Trustees' motion for leave to serve requests for production of documents will be granted in part and denied in part.

An order in accordance with this memorandum of decision shall enter forthwith.

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RUSS KENDIG
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: YOUNGSTOWN OSTEOPATHIC HOSPITAL ASSOCIATION, Debtor. YOUNGSTOWN OSTEOPATHIC HOSPITAL ASSOCIATION, Plaintiff, vs. JAMES V. VENTRESCO, JR., D.O., et al., Defendants.	)))))))))))))))))))	CHAPTER 11 CASE NO. 99-40663 JUDGE RUSS KENDIG ADV. PRO. NO. 02-6118 **ORDER**

This matter came before the court on the motion for leave to serve requests for production of documents filed by Defendant Board of Trustees directed to Plaintiff Youngstown Osteopathic Hospital Association ("YOHA"). YOHA filed memoranda in opposition. For the reasons stated in the foregoing memorandum of decision, Board of Trustees' motion for leave to serve requests for production of documents is hereby **GRANTED IN PART** and **DENIED IN PART**. YOHA is hereby ordered to produce those documents requested in number 4 of Board of Trustees' motion for leave to serve requests for production of documents. Board of Trustees' motion for leave is otherwise denied.

It is so ordered.

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RUSS KENDIG
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of July 2003, the above Memorandum of Decision and Order were sent via regular U.S. Mail to:

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