

Not for Publication

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 09-15314)
)
INDIANA TROOPERS ASSOCIATION, INC.)
)
Debtor)
)
)
INDIANA TROOPERS ASSOCIATION, INC.)
)
Plaintiff)
)
vs.) PROC. NO. 09-1214
)
)
CAMPAIGN RESOURCES, INC.)
JAK PRODUCTIONS, INC.)
)
Defendants)

DECISION, ORDER AND NOTICE OF HEARING
CONCERNING MOTION TO WITHDRAW ADMISSIONS

At Fort Wayne, Indiana, on April 9, 2010.

This adversary proceeding was removed from the Allen Superior Court shortly after the plaintiff/debtor filed a petition for relief under Chapter 11. Prior to removal, the defendants had served discovery upon the debtor, including requests for admissions. The debtor did not respond to those requests within the time required because counsel thought the bankruptcy petition would be filed before the deadline for doing so expired, and the resulting automatic stay would obviate the need for a response. Unfortunately, filing the petition was delayed, with the result that the requested admissions have been deemed admitted. See, Fed. R. Civ. P. Rule 36(a)(3).¹ The plaintiff has now asked the court to withdraw those admissions. That motion, together with the defendants' objection

¹The court realizes that, at the time, this matter was governed by the Indiana Rules of Trial Procedure, see, Ind. T.R. 36, not the federal rules. Nonetheless, since there is no substantive difference between the two sets of rules in this area and the matter is now governed by the federal rules of procedure, the court cites to them out of convenience and consistency.

thereto, was taken under advisement after the expiration of the briefing schedule established by the court's local rules. See, N.D. Ind. L.B.R. B-7007-1, B-7007-2.

Requests for admissions are governed by Rule 36 of the Federal Rules of Civil Procedure. Rule 36 provides that a party may serve upon any other party a written request to admit the truth of any relevant, non-privileged matter. See, Fed. R. Civ. P. Rule 36; Fed. R. Civ. P. Rule 26(b)(1). Unless the parties agree, or the court orders a different timetable, a party receiving a request for admissions must respond within thirty days, either by objecting to the requests or answering them. Fed. R. Civ. P. Rule 36(a). The rule is self-executing. Requests are automatically admitted unless an objection or response is forthcoming within the time required.

The court can permit admissions to be withdrawn or amended. Fed. R. Civ. P. Rule 36(b). Whether or not it does so is a matter committed to its discretion. See, Banos v. City of Chicago, 398 F.3d 889, 892 (7th Cir. 2005); Kalis v. Colgate-Palmolive Co., 231 F.3d 1049, 1059 (7th Cir. 2000). The change should be allowed "if it would promote the presentation of the merits of the action and the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits." See, Fed. R. Civ. P. Rule 36(b). The rule, thus, contemplates a two-step analysis. First, the moving party has the burden of persuading the court that a presentation of the merits of the action would be served if it is permitted to withdraw or amend the admissions. Once that demonstration has been made, withdrawal or amendment should be allowed unless the non-moving party persuades the court that it would be prejudiced.² See, Perez v. Miami-Dade County,

²Some decisions will also consider other factors, not specifically mentioned in the rule, in their analysis, such as why the request was not responded to within the time required. See e.g., Conlon v. U.S., 474 F.3d 616, 624-25 (9th Cir. 2007); Commodity Futures Trading v. Intern. Fin. Servs., 323 F. Supp.2d 482510 (S.D. N.Y. 2004); In re Skyport Global Communications, Inc., 408 B.R. 687, 697-98 (Bankr. S.D. Tex. 2009); Matthews v. Homecoming Financial Network, 2006 WL 2088194 *3 (N.D. Ill. 2006). Contra, Perez v. Miami-Dade County, 297 F. 3d 1255, 1265-66 (11th Cir. 2002); F.D.I.C. v. Prusia, 18 F.3d 637, 640 (6th Cir. 1994); Dynasty Apparel Industries, Inc. v.

297 F. 3d 1235, 1264 (11th Cir. 2002); F.D.I.C. v. Prusia, 18 F.3d 637, 640 (8th Cir. 1994); Upchurch v. Ustnet, Inc., 160 F.R.D. 131, 132 (D. Ore. 1995).

Defendants “admit[] that allowing [plaintiff] to withdraw its admissions would promote the presentation of the merits” of the action. Response in Opposition, filed March 17, 2010, p.10. As a result, the only issue for the court to consider is the question of prejudice. Prejudice in this context does not mean the burden of having to prove the facts that would otherwise have been deemed admitted. Instead, for the purposes of Rule 36(b), prejudice focuses more on the issue of detrimental reliance on the admission.

[I]t relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the question previously answered by the admission. Brook Village North Associates v. General Electric Co., 686 F.2d 66, 70 (1st Cir.1982). See also, Perez, 297 F.3d at 1266; Hadley v. U.S., 45 F.3d 1345, 1348 (9th Cir. 1995); F.D.I.C. v. Prusia, 18 F.3d 637, 640 (8th Cir. 1994).

This is often a function of the stage of the proceedings at the time the admissions are sought to be withdrawn. The closer the matter is to trial, the greater the likelihood of prejudice. Conversely, the more time a party has to recover from the change the likelihood of prejudice will diminish.

Here, the defendants have failed to prove that they will be prejudiced by allowing the plaintiff to withdraw the admissions. Most of what they try to characterize as prejudice has nothing to do with the admissions and whether they stand or fall. For example, they argue that they have “revealed . . . litigation tactics and strategy.” Response, at p.11. Yet, such revelations have nothing to do with the admissions the plaintiff has made and much more to do with the position the defendants took and

Rentz, 206 F.R.D. 596, 602 n. 7 (D. S.D. Ohio 2002). To the extent the plaintiff’s failure to respond was a conscious decision, that would weigh against allowing the admissions to be withdrawn, see, O’Neill v. Medad, 166 F.R.D. 19, 23 (E.D. Mich. 1996), and might justify denying the motion, were the balance between merits and prejudice in equipoise. But the balance is not in equipoise, all other things are not equal, and so, the court need not consider the extent to which factors beyond those stated in the rule should influence the decision.

the arguments they advanced at hearings held in state court prior to removal – hearings held well before the admissions in question were ever served. Similarly, to the extent the defendants complain that the plaintiff now knows they vigorously oppose the plaintiff’s claims, expect the plaintiff to prove each element of its case, regard certain evidence as important, or have certain information, id. at 7-8, 11, little of that is surprising and none of it is a consequence of the plaintiff’s failure to respond to the requested admissions.

The closest the defendants have come to identifying anything that might be rise to the level of prejudice, should the admissions be withdrawn, is the argument that they chose not to take some depositions, and the scope of one deposition was limited, because of the admissions.³ Response, at p.11. Yet, the discovery deadline has not yet expired and so the defendants may still have sufficient time to complete the discovery they would otherwise have undertaken. If the time that remains is not sufficient for that purpose, the court should be able to ameliorate any prejudice the defendants might encounter by extending the deadline.⁴ See, Hadley, 45 F.3d at 1350; Mid Valley Bank v. North Valley Bank, 764 F. Supp 1377, 1391. See also, Howard v. Sterchi, 725 F.Supp 1572, 1577 (D. N.D. Ga. 1989); Dynasty Apparel Industries v. Rentz, 206 F.R.D. 596, 602 (D. S.D. Ohio, 2001) (requiring reimbursement of fees incurred in reliance upon withdrawn admissions).

Based upon the present record, it is not possible to determine what, if anything, might need to be done to ameliorate the little prejudice the defendants might suffer by allowing the admissions to be withdrawn. This is largely because the plaintiff has not clearly identified which of the seventy-

³Defendants also seem to suggest prejudice because they anticipated filing a motion for summary judgment based on the admitted facts. Yet, if actually filing such a motion does not constitute prejudice under Rule 36(b), see, Prusia, 18 F.3d at 640; Durability, 212 F. 3d at 556, simply ruminating about one cannot.

⁴To the extent the defendants suggest this will require “months, if not a year, of additional discovery and discovery battles,” Response, at p.13, the court will not let that happen.

two admissions in question it would like to withdraw. Many of them, such as the identity of the individual signing checks the plaintiff issued and that the defendants never had the authority to write checks on the plaintiff's accounts or issued checks on its behalf, see, Request Nos. 13, 14, 15, seem quite innocuous. Are all seventy-two admissions to be undone? If so, a greater amount of time might be required; but, if only one or two of them are to be changed, it is possible that no additional time would be needed. Unfortunately, it is not possible to tell because of the blanket approach the plaintiff has taken to the issue. Given the number and the nature of the admissions in question, a much more focused and surgical approach to their withdrawal would have been preferable.

IT IS THEREFORE ORDERED THAT:

1. Plaintiff's motion to withdraw admissions, filed on February 25, 2010, is GRANTED;
2. THE COURT WILL HOLD A HEARING on **April 23, 2010 at 2:00 p.m.** in Room 2127, Federal Building, 1300 South Harrison Street, Fort Wayne, Indiana to consider what might be necessary to ameliorate any prejudice to defendants caused by allowing the withdrawal of the admissions. Defendants' counsel, if they wish, may participate in this hearing by telephone. Plaintiff's counsel shall appear in person; and,
3. In order to better assess that issue, NO LATER THAN **April 19, 2010**, the plaintiff shall FULLY, see e.g., Fed R. Civ. P. Rule 36(a)(4), answer the defendants' request for admissions.⁵

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court

⁵The plaintiff represented that if the court permits the withdrawal, it can respond to the request "very quickly," Brief in Support of Motion, at p. 3. The court is taking counsel at their word and is accepting the offer.