

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	:	Chapter 11
	:	
RC SOONER HOLDINGS, LLC, <i>et al.</i> , ¹	:	Case No. 10-10528 (BLS)
	:	
Debtors.	:	(Jointly Administered)
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RC SOONER HOLDINGS, LLC, <i>et al.</i> and OLD SOUTH APARTMENTS, LLC,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Adv. Pro. No. 10-50723 (BLS)
	:	
REMYCO., INC., <i>et al.</i>	:	
	:	
Defendants.	:	

**DEBTORS’ RESPONSE TO MONTGOMERY MCCRACKEN WALKER & RHOADS
LLP’S MOTION FOR LEAVE TO WITHDRAW AS COUNSEL FOR THE REMY
ENTITIES PURSUANT TO DEL. BANKR. L.R. 9010-2(B) AND PLAINTIFFS’ MOTION
A) TO COMPEL DISCOVERY RESPONSES; B) FOR A FINDING OF CONTEMPT;
AND C) FOR ENTRY OF A SCHEDULING ORDER**

RC Sooner Holdings, LLC (“RC Sooner”) and its affiliated debtors and debtors in possession in the above-captioned cases (collectively, the “Debtors”) file this Response to Montgomery McCracken Walker & Rhoads LLP’s (“MMWR”) Motion for Leave to Withdraw as Counsel for the Remy Entities Pursuant to Del. Bankr. L.R. 9010-2(b), and, the Debtors and

¹ The Debtors and the last four digits of their taxpayer identification numbers are: RC Sooner Holdings, LLC (7904); RC Brixton Square Owner, LLC (8002); RC Cedar Crest Owner, LLC (7914); RC Fulton Plaza Owner, LLC (8011); RC Magnolia Owner, LLC (7998); RC Pomeroy Park Owner, LLC (7939); RC Salida Owner, LLC (7947); RC Savannah South Owner, LLC (7983); RC Southern Hills Owner, LLC (7958); Brixton Square Apartments, LLC (1844); CC Apartments, LLC (1798); Fulton Plaza Apartments, LLC (4344); Magnolia Manor Apartments, LLC (4486); Pomeroy Park Apartments, LLC (1649); Salida Apartments, LLC (1915); Savannah South Apartments, LLC (8586); and Southern Hills Villa Apartments, LLC (1721). The business address for each of the Debtors where notices should be sent is 1515 Broadway, 11th Floor, New York, New York 10036-8901.

Old South Apartments, LLC (together with the Debtors, the “Plaintiffs”)² file this Motion (the “Motion”) A) To Compel Discovery Responses; B) For a Finding of Contempt; and C) For Entry of a Scheduling Order against RemyCo, Inc., The Remy Companies, Inc., Home Realty Ventures, Inc., Bradford Creek Properties, LLC, Landrun Design and Development Co., Inc., Diamond Pointe, LLC, Bluechip Holdings, LP, Tim L. Remy, Tim J. Remy, Sherry E. Remy, L. Leon Remy, Robin E. Remy, Sherry E. Remy Revocable Trust DTD July 14, 1997, L. Leon Remy Revocable Trust DTD July 14, 1997, and Mona Remy Berke (collectively, the “Defendants”). Plaintiffs also seek by way of this Motion the entry of a scheduling order. In support of the Motion, the Plaintiffs represent as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The statutory predicate for relief is Bankruptcy Rule 7037 of the Federal Bankruptcy Rule of Bankruptcy Procedure (the “Bankruptcy Rules”).

BACKGROUND

2. On or about February 22, 2010 (the “Petition Date”), each of the Debtors filed their respective voluntary petitions for relief under the Bankruptcy Code. The Debtors thereafter continued to manage their business and properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

² Throughout this Motion the term “Plaintiffs” shall be used to speak for the Debtor-respondents given the coextensive relationship between the Debtors and the Plaintiffs and given the fact that MMWR represents the Defendants in Adversary No. 10-50723. The withdrawal of MMWR from the case will further delay the discovery sought by the Plaintiffs as described more fully in this Motion .

3. On February 24, 2010, the Plaintiffs filed their complaint (the “Complaint”) to bring the instant adversary proceeding (the “Adversary Proceeding”) against the Defendants and other parties asserting breach of contract, fraud, RICO, and rescission claims.

4. As of the Petition Date, the Debtors owned, operated and maintained a portfolio of 796 multi-family residential units divided among eight (8) separate apartment complexes (collectively, the “Apartments”) for lease in Tulsa, Oklahoma. RC Sooner is the direct parent of eight (8) Oklahoma limited liability companies (collectively, the “RC LLCs”³), and together with RC Sooner, the “Purchasers”) that were formed in October 2009 for the purpose of acquiring 100% of the membership interests of eight (8) existing Oklahoma limited liability companies that own the Apartments (collectively, the “Apartment LLCs”⁴). The purchase price of the acquisition included the assumption of approximately \$27 million in outstanding loans and mortgages (the “Loans and Mortgages”) held by the Federal National Mortgage Association (“Fannie Mae”). The sale closed on October 29, 2009 (the “Closing Date”).

5. During a transition period that lasted from the Closing Date to on or about December 31, 2009 (the “Transition Period”), certain of the Defendants remained in possession of, and continued to operate, the Apartment LLCs on behalf of the Purchasers for the purpose of facilitating the transition of the business to the Purchasers.

³ The RC LLCs consist of the following co-debtor subsidiaries of RC Sooner: Brixton Square Owner, LLC; RC Cedar Crest Owner, LLC; RC Fulton Plaza Owner, LLC; RC Magnolia Owner, LLC; RC Pomeroy Park Owner, LLC; RC Salida Owner, LLC; RC Savannah South Owner, LLC and RC Southern Hills Owner, LLC. RC Sooner is also the direct parent of non-filing entity RC Old South Owner, LLC, whose real estate assets are not subject to loans held by the Federal National Mortgage Association.

⁴ The Apartment LLCs consist of the following co-debtor indirect subsidiaries of RC Sooner: Brixton Square Apartments, LLC; CC Apartments, LLC; Fulton Plaza Apartments, LLC; Magnolia Manor Apartments, LLC; Pomeroy Park Apartments, LLC; Salida Apartments, LLC; Savannah South Apartments, LLC and Southern Hills Villa Apartments, LLC. RC Sooner is also the ultimate parent of non-filing entity Old South Apartments, LLC, whose loan is not held by the Federal National Mortgage Association.

6. Unbeknownst to the Purchasers, however, the Defendants and their brokers had engaged in a pattern of intentional misconduct and fraudulent misrepresentation from the very outset of negotiations for the sale of the Apartments and the Apartment LLCs, which misrepresentations included the failure to inform the Purchasers that the Loans and Mortgages had been in default since approximately September 2, 2009, and remained in default as of the Closing Date.

7. RC Sooner was not made aware of the existence of the defaults under the Loans and Mortgages until late January, 2010, the Defendants having actively concealed such facts.⁵

8. Moreover, the information, books, and records received at the close of the sale of the Apartment LLCs may not have been complete or wholly accurate.

9. Because the Defendants continued to exercise significant control over the business and the Apartments during the Transition Period, substantial information concerning the Debtors' finances and business operations remain in the possession of the sellers and other third parties. Moreover, due to the significant disputes that arose during the Transition Period between the Purchasers and the Defendants with respect to both the sale and the continued operation of the business, the Debtors believe that the sellers may be in possession of substantial additional information relevant to the Debtors' operations and financial condition.

⁵ In connection with the sale of the Apartments to the Apartment LLCs, on March 30, 2010, Fannie Mae filed its Motion for Relief from the Automatic Stay Pursuant to 11 U.S.C. § 362(d) and Rule 4001 of the Federal Rules of Bankruptcy Procedure (the "Lift Stay Motion"). The Debtors subsequently reached an agreement with Fannie Mae consenting to the relief requested by Fannie Mae in the Lift Stay Motion upon the terms and conditions set forth in a Stipulation and Consent Order Granting the Lift Stay Motion [Docket No. 146] (the "Lift Stay Order") entered by this Court on April 27, 2010. Pursuant to the Lift Stay Order, among other things, Fannie Mae was granted relief from the automatic stay imposed by Section 362(a) of the Bankruptcy Code to seek the appointment of a receiver by a competent court of the State of Oklahoma to manage and operate the Apartments and to exercise its other state law rights and remedies against the Apartments, including, without limitation, foreclosing upon the same.

10. In order to obtain complete and accurate information regarding their finances and operations, on March 2, 2010, Debtors' counsel sent a letter to Michael T. Keester ("Keester"), counsel for the Defendants at that time, requesting the production of documents and the deposition of a representative (the "Informal 2004 Request"). A true and correct copy of the Informal 2004 Request is attached hereto as Exhibit A. The Debtors requested that the Defendants produce the requested documentation by March 5, 2010.

11. By letter dated March 4, 2010, Keester rejected the Debtors' Informal 2004 Request (the "March 4, 2010 Letter"). A true and correct copy of the March 4, 2010 Letter is attached hereto as Exhibit B.

12. On March 8, 2010, the Debtors filed their Motion for an Order Authorizing Production of Documents and Examination of a Representative Pursuant to Bankruptcy Rule 2004 [Docket No. 44] (the "Rule 2004 Motion") requesting production of documents regarding: 1) the operation of the Apartment LLCs prior to the Closing Date and during the Transition Period; 2) the Loans and Mortgages; 3) claims, loans, and any disbursements made on the part of the Apartment LLCs; and 4) any financial records and tax records generated regarding the Apartment LLCs (the "Rule 2004 Requested Documents").⁶

13. On March 25, 2010, Noel Burnham, Esquire, attorney for the Defendants in regards to the Rule 2004 Motion, filed the Defendants' Response to Motion of the Debtors for an Order Authorizing Production of Documents and Examination of a Representative Pursuant to Bankruptcy Rule 2004 [Docket No. 85].

14. On March 29, 2010, the Debtors filed a Certification of Counsel Regarding Motion for an Order Authorizing Production of Documents and Examination of a

⁶ A more detailed list of the Debtors' areas of inquiry can be found in Exhibit A of the Bankruptcy Rule 2004 Motion.

(continued...)

Representative Pursuant to Bankruptcy Rule 2004, which was intended to consensually resolve the Rule 2004 Motion (the “Rule 2004 Certification”). Pursuant to the Rule 2004 Certification, the Defendants agreed to initially produce on a rolling basis all Rule 2004 Requested Documents that the Defendants believed were unrelated to the Adversary Proceeding and that the Debtors were entitled to pursuant to Bankruptcy Rule 2004. This initial production was to be completed no later than April 9, 2010.

15. Implicit in the Rule 2004 Certification is that at least some of the Rule 2004 Requested Documents would be produced.

16. However, rather than producing any of the Rule 2004 Requested Documents, on April 8, 2010, the Defendants mailed the Debtors their Supplemental Response to Debtors' Request for Production of Documents (the “Supplemental 2004 Response”). The Supplemental 2004 Response was not filed with the Court, and the notice of service was not filed until April 9, 2010, meaning that the Debtors first learned that the Defendants would not be producing any documents on the day that the documents were due.⁷ A true and correct copy of the Supplemental 2004 Response is attached hereto as Exhibit C.

17. On April 15, 2010, MMWR entered its appearance on behalf of the Defendants. MMWR represents the Defendants with regard to the Adversary Proceeding.

18. At the hearing held on April 19, 2010 (the “April 19, 2010 Hearing”), this Court ruled, due to the pendency of the Adversary Proceeding and due to the delays in discovery under Bankruptcy Rule 2004, that discovery would proceed under the adversary proceeding discovery Bankruptcy Rules (i.e., Bankruptcy Rules 7000, *et seq.*). The thirty (30) day deadline

(...continued)

⁷ The Defendants did state that they would produce the pleadings filed in the pre-petition eviction proceedings if requested.

for the Defendants to respond would begin as of April 19, 2010, making responses due by May 19, 2010. See April 19, 2010 Hearing Transcript, pg 45, ln 23-24; pg. 47, ln. 3-4 (“Today is the 19th. The clock starts today on your discovery requests. Thirty days from today is the 19th of May. And that will be their response date.”). The Plaintiffs were required to serve discovery requests by April 26, 2010, which would provide greater detail than the Rule 2004 Motion provided.

19. At the April 19, 2010 Hearing, the Court also instructed the parties to cooperate in preparing a scheduling order for the Adversary Proceeding. See April 19, 2010 Hearing Transcript, pg. 50, ln. 6-8 (“I would like to see from the parties a proposed scheduling order going forward. So try to work one out.”).

20. On April 26, 2010, the Plaintiffs served their First Set of Requests for Production on the Defendants (the “Request for Production”). The Request for Production sought documentation related to the factual allegations in the Complaint (the “Requested Documents”). A true and correct copy of the Request for Production is attached hereto as Exhibit D.

21. In an e-mail dated April 28, 2010, counsel for the Plaintiffs e-mailed counsel for the Defendants, as well as counsel for the broker and for Bank of the West (a defendant in the separate adversary, Adversary Number 10-10719) to arrange a time to discuss a scheduling order consistent with this Court’s instructions at the April 19, 2010 Hearing.

22. In an e-mail dated April 29, 2010, Plaintiffs’ counsel again sought to arrange a time to discuss a scheduling order.

23. In an e-mail dated May 4, 2010, Plaintiffs’ counsel reiterated the need to have discussions with counsel for the Defendants with regard to a scheduling order.

24. On May 7, 2010, Plaintiffs' counsel e-mailed the Defendants a proposed scheduling order (the "Proposed Scheduling Order") for review and discussion.

25. On May 7, 2010, Defendants' counsel discussed the terms of the Proposed Scheduling Order with Plaintiffs' counsel.

26. On May 10, 2010, Plaintiffs' counsel again e-mailed Defendants' counsel the Proposed Scheduling Order asking for the Defendants comments. A true and correct copy of the Proposed Scheduling Order is attached hereto as Exhibit E. Defendants' counsel never responded.

27. On May 11, 2010, Plaintiffs' counsel sent another follow-up e-mail to Defendants' counsel regarding the Proposed Scheduling Order. Defendants' counsel never responded.

28. On May 17, 2010, Plaintiffs' counsel again e-mailed Defendants' counsel to remind them that it had been a full ten (10) days since their last discussion regarding the Proposed Scheduling Order, and that Plaintiffs had yet to hear from the Defendants on the proposed revisions. True and correct copies of the e-mails referenced in paragraphs 21-24, 26-28 are attached hereto as Exhibit F.

29. On May 18, 2010, MMWR filed its Motion for Leave to Withdraw as Counsel for the Remy Entities Pursuant to Del. Bankr. L.R. 9010-2(b) [Docket No. 166] (the "Withdrawal Motion"). Pursuant to the Withdrawal Motion, MMWR seeks to withdraw as counsel for the Defendants due to the non-payment of its retainer and legal fees and a lack of cooperation in MMWR's representation of the Defendants. Pursuant to the Withdrawal Motion, MMWR was assisting the Defendants with their responses to the Request for Production.

30. According to the Withdrawal Motion, the Defendants refuse to cooperate with their own attorneys in responding to the First Request for Production, despite continual reminders to do so. See Withdrawal Motion ¶¶ 11-13; Declaration of Mark B. Sheppard ¶ 9.

31. In an e-mail sent after business hours on May 19, 2010, counsel for the Defendants informed Plaintiffs' counsel that the Defendants have authorized the production of certain of the Requested Documents on a preliminary rolling basis.

32. Pursuant to this Court's instructions at the April 19, 2010 Hearing, the Requested Documents were due on or before May 19, 2010. Defendants have failed to formally respond to the First Request for Production. Defendants have produced some, but admittedly not all, of the relevant documents called for in the First Request for Production.

33. As of the date of this Motion, the Defendants have not responded to or agreed to the Proposed Scheduling Order.

RELIEF REQUESTED

34. The Plaintiffs have no objection to the withdrawal of MMWR as counsel for the Defendants. However, as this will further delay the discovery process and result in additional harm to the Plaintiffs, the Plaintiffs seek an order: 1) compelling the Defendants to have substitute counsel enter an appearance within five (5) days of the entry of an order granting this Motion; 2) compelling the Defendants to comply with the First Request for Production and to produce all relevant documents and to respond to the First Request for Production within five (5) days of the entry of appearance of the Defendants' new counsel; 3) granting a default judgment as to liability if the Defendants fail to have new counsel enter an appearance and/or fail to produce all relevant documents and to respond to the First Request for Production; 4) scheduling an evidentiary hearing within thirty (30) days the entry of a default judgment against the Defendants to allow the Plaintiffs to establish and prove damages; 5) finding the Defendants

in contempt and awarding attorneys' fees in connection with Debtors' Rule 2004 efforts and in bringing the instant Motion due to the Defendants' (i) failure to comply with the Rule 2004 Motion; and (ii) failure to comply with the Court's instructions regarding the Request for Production and the Proposed Scheduling Order; and 6) entering the Proposed Scheduling Order as a final order of this Court.

BASIS FOR RELIEF

35. Rather than comply with the Court's instructions at the April 19, 2010 Hearing, which required the Defendants to produce the Requested Documents on or before May 19, 2010, the Defendants delayed until just hours before midnight of the deadline to inform Plaintiffs that the Defendants had authorized a preliminary rolling production of some of the Requested Documents. In other words, over two months since the Defendants became aware of the types of documents the Plaintiffs were seeking, and a month after the Court established May 19, 2010 as the deadline to respond, the only action the Defendants have taken is to instruct their counsel to produce some of the Requested Documents. While certain documents have been produced, Defendants have not provided any formal response to the First Request for Documents.⁸ Moreover, what is made clear from Defendants' counsel's Withdrawal Motion is that Defendants are not even cooperating with their own lawyers to comply with this Court's April 19, 2010 ruling.

36. The Plaintiffs respectfully request that this Court grant this Motion and enter an order compelling the Defendants to have their new counsel enter an appearance within five (5) days of the entry of the order. In addition, pursuant to Bankruptcy Rule 7037(a)(1) and

⁸ Even if the Defendants' authorization to release some preliminary documents subsequent to the deadline constituted a partial response, it would be completely insufficient, and should be treated as a full failure to disclose, answer, or respond in full. *See* FED. R. BANKR. P. § 7037(a)(4).

(3), Plaintiffs respectfully request that the Court enter an order compelling the Defendants to produce all relevant documents and otherwise formally respond to the Request for Production within five (5) days of the entry of the order.

37. In addition, the Plaintiffs respectfully request that this Court find that the Defendants in contempt of court for their: 1) refusal to obey the instructions of the Court insofar as they have not responded to the First Request for Production within the thirty days provided by this Court during the April 19, 2010 hearing; 2) refusal to cooperate in agreeing to a scheduling order as required by this Court; and 3) refusal to turn over all the Requested Documents as required by the Request for Production and Bankruptcy Rules 7026 and 7034. *See* FED. R. BANKR. P. 7037(b)(1). In connection with the Defendants' non-compliance with this Court's instructions and the Request for Production, the Plaintiffs respectfully request an order awarding Plaintiffs' attorneys' fees in connection with the discovery process beginning with their Rule 2004 efforts and in the bringing of the instant Motion. *See* FED. R. BANKR. P. 7037(b)(2)(C).

38. Plaintiffs respectfully request that this Court impose sanctions upon the Defendants for any violation of the order requested herein. Specifically, should the Defendants fail yet again to provide documents or responses to the First Request for Production, Plaintiffs request that this Court sanction the Defendants pursuant to Bankruptcy Rule 7037(b) by granting a default judgment against the Defendants in the Adversary Proceeding. *See* FED. R. BANKR. P. 7037(b)(2)(A)(vi).

39. In deciding whether to grant a default judgment for the violation of this discovery order, the Court must look at six factors:

- (1) the extent of the party's personal responsibility;
- (2) the prejudice the adversary caused by the failure to meet scheduling orders and respond to discovery;
- (3) a history of dilatoriness;
- (4) whether the conduct of the party or the attorney was willful or in bad faith;
- (5) the effectiveness of sanctions other than dismissal,

which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Dobin v. Taiwan Mach. Trade Cntr. Corp. (In re Victor Int'l.), 97 Fed. Appx. 365, 367 (3d Cir. 2003). Not all six factors are necessary for the entry of default. *Id.*

40. If the Court were to grant the requested order, the Defendants would bear full responsibility for any violation thereof. The Defendants have continually delayed providing any discoverable documents to the Plaintiffs and in fact have hindered MMWR's ability to respond to the Request for Production and to comply with the Court's instructions at the April 19, 2010 Hearing.

41. Regarding prejudice to the Plaintiffs, the Plaintiffs continue to suffer harm from the continued delay of both the production of documents and the resultant delay in prosecuting the Adversary Proceeding. This harm will only increase if the Defendants continue to disobey an order granted in connection with this Motion.

42. As is apparent from the history of this discovery, starting with the Rule 2004 Motion, the Defendants have purposely acted to hinder the discovery process and the efficient resolution of this dispute. The Defendants have systematically delayed Plaintiffs' every attempt to obtain these documents, starting with their position on the Rule 2004 Motion and their most recent disregard for the Court's May 19, 2010 deadline to respond to the First Request for Production. In light of the frequency of the delays, and the Defendants' inability to cooperate with their own counsel to finalize the discovery, it is clear that Defendants' conduct is willful and undertaken in bad faith. The aforementioned pattern of continuing and willful delay also strongly suggests that any sanction short of a default judgment will have no effect on the Defendants' behavior.

43. In short, the factors enunciated in *Victor Int'l.* are in favor of the Plaintiffs' contentions, and the Court should enter an order which provides for the granting of a default judgment if the order is not otherwise complied with.

44. Plaintiffs also request that the Court schedule an evidentiary hearing within thirty (30) days of the entry of the default judgment to prove damages.

45. Finally, Plaintiffs also request that this Court enter the Proposed Scheduling Order as a final order, in light of the Defendants' refusal to cooperate in reaching a mutually agreeable litigation schedule.

WHEREFORE, the Plaintiffs respectfully request that the Court enter an order:

1) compelling the Defendants to have new counsel enter an appearance within five (5) days of the entry of an order granting this Motion; 2) compelling the Defendants to comply with the First Request for Production and to produce all relevant documents and to respond to the First Request for Production within five (5) days of the entry of appearance of the Defendants' new counsel; 3) granting a default judgment as to liability if the Defendants fail to have new counsel enter an appearance and/or fail to produce all relevant documents and to respond to the First Request for Production; 4) scheduling an evidentiary hearing within thirty (30) days of the entry of a default judgment against the Defendants to allow the Plaintiffs to establish and prove damages; 5) finding the Defendants in contempt and awarding Plaintiffs attorneys' fees in connection with their Rule 2004 efforts and in bringing the instant Motion due to the Defendants' (i) failure to comply with the Rule 2004 Motion; and (ii) failure to comply with the Court's instructions regarding the discovery deadline and Proposed Scheduling Order; 6) entering the Proposed Scheduling Order as a final order; and 7) grant such other relief as the Court deems just and proper.

Dated: May 24, 2010
Wilmington, Delaware

Respectfully Submitted,

Ballard Spahr LLP

By: /s/ Sean J. Bellew

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