UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

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IN RE:

HOTEL SYRACUSE, INC. CASE NO. 90-02921

Debtor Chapter 11

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This contested matter is before the Court by way of various motions made by the parties. Debtor moved for an Order to Show Cause to compel compliance with subpoenas issued

in connection with Court-ordered examinations and for contempt, which was met with motions for protective orders, or in the alternative, to quash subpoenas.

## JURISDICTION

The Court has jurisdiction over the parties and subject matter of this core proceeding by virtue of 28 U.S.C.A. §§ 1334 and 157(a), 157(b)(1) and (b)(2)(A,O). (West Supp. 1991).

## FACTS

The preliminary facts are not in dispute. The Debtor, owner and operator of a 725 room hotel in Syracuse, New York, has been in reorganization proceedings under Chapter 11 of 11 U.S.C. §§101-1330 (the "Code") since it filed a voluntary petition pursuant thereto on October 26, 1990. Debtor's chief creditors include Manufacturer's Hanover Trust Company ("MHTC"), which holds a first mortgage on the Debtor's property, the City of Syracuse, Syracuse Industrial Development Agency, and Syracuse Economic Development Agency (collectively the "City"). The genesis of the instant dispute between the parties can be traced to two discovery Orders which were issued by this Court pursuant to Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") 2004.

On July 26, 1991, this Court entered an ex-parte Order (the "July 26 Order") authorizing the Debtor to examine MHTC pursuant to Fed.R.Bankr.P. 2004(a). That Order directed MHTC to appear for the 2004 examination on August 13, 1991, and further directed MHTC to produce at least five business days prior to such examination any and all documents described in the subpoena which was issued by the Clerk of Court on July 26, 1991 in connection with the Order. MHTC was duly served with the subpoena and the Order on July 30 and July 31, 1991 respectively.

By letter dated August 7, 1991 and received by the Debtor that same day, MHTC informed Debtor that it objected to certain of its discovery requests as being over-broad. Debtor did not respond to the August 7, 1991 letter, and MHTC failed to produce the bulk of the documents which were required by the July 26 Order and accompanying subpoena. On August 13, 1991 the deposition of MHTC was convened as scheduled, however, due to MHTC's failure to supply all of the documents required by the subpoena, Debtor adjourned the deposition to a later date[1].

Facts virtually identical to those recited above surround a second Order issued by this Court on July 30, 1991 (the "July 30 Order"). This Order also issued following Debtor's ex-parte application to the Court, and mandated the examination of and production of documents by the City pursuant to Fed.R.Bankr.P. 2004(a). This Order was duly served on the City on July 31,1991. Subpoenas were issued by the Clerk of Court and duly served upon the Director of Development of the City and the Corporation Counsel on July 30, 1991 and July 31, 1991, respectively. These subpoenas commanded the two City officials to appear for examination on August 14, 1991 and also commanded them to produce documents listed in the subpoena no later than five business days prior to the August 14, 1991 examinations.

On August 8, 1991 Debtor received a letter from the City in which the City outlined its objections to the discovery requests contained in the subpoena. Debtor did not formally respond to this letter. On August 14, 1991 the depositions were convened as scheduled, but did not go

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[1]. On August 6, 1991 this Court granted MHTC's motion to compel a 2004 examination of Debtor's principals, and such examination was scheduled for August 15, 1991. The Court later stayed that Order pending resolution of the instant dispute. Within Debtor's present Order to Show Cause is a request for a protective order requesting that the 2004 examination of Debtor's principals be adjourned to a date subsequent to the examinations of the City and MHTC, so as to maintain the original priority of the respective examinations. For the reasons set forth herein, Debtor's request is granted.

forward. The Debtor informed the City that it regarded its failure to produce any documents in compliance with the July 30 Order and accompanying subpoena as an act of contempt.

Meanwhile, in the early afternoon of August 13, 1991 Debtor notified the City and MHTC by telephone that it had scheduled a conference call with the Court for August 14, 1991 at 12:00 p.m., at which time Debtor would ask the Court to entertain an Order to Show Cause (1) to compel compliance with the July 26 and July 30 Orders and accompanying subpoenas; (2) for an order of contempt pursuant to Fed.R.Bankr.P. 9020; and (3) for a protective order pursuant to Fed.R.Civ.P. 26(c). The City countered late on the afternoon of August 13, 1991 by serving Debtor with a motion for a protective order, or in the alternative, to quash the subpoenas. The City's motion was made returnable in Utica, New York on August 14, 1991 at 12:00 p.m.

The conference call on August 14 resulted in the Court's signing of the Debtor's Order to Show Cause, and arguments regarding that Order and the City's motion were adjourned until August 20, 1991 in Syracuse. On or about August 19, 1991 MHTC filed its own motion for a protective order and/or to quash the subpoena issued pursuant to the July 26 Order, effectively joining with the City in opposition to the Debtor's Order to Show Cause.

Thus, the fortunes of the City and MHTC in this matter are largely intertwined, and hinge primarily upon assertions by each party that proper and timely objections to their respective subpoenas were made pursuant to Fed.R.Civ.P. 45(d)(1). The City and MHTC each maintain that, having made such proper and timely objections, they are now entitled to a protective order and/or to have the subpoenas quashed since the discovery requests contained in the subpoenas are overly broad and burdensome.

In support of its Order to Show Cause, Debtor maintains that the City and MHTC each failed to object to the subpoenas in timely fashion, that each failed to comply with the Court's Orders and

accompanying subpoenas, and that each should therefore be subject to the contempt sanction allowed by Fed.R.Bankr.P. 9020.

## DISCUSSION

### THE MOTIONS FOR A PROTECTIVE ORDER

Fed.R.Bankr.P. 2004(a) allows for discovery to be had in certain instances under the Code by providing that a court may "order the examination of any entity." Under Fed.R.Civ.P. 26(c), as referenced by Fed.R.Bankr.P. 7026, a party from whom discovery is sought may move the court, for cause shown, for a protective order prohibiting or limiting the discovery sought. Case law construing Fed.R.Civ.P. 26(c) has clearly and consistently held that motions for protective orders are untimely when they are filed after the compliance date specified in the subpoena. See In re Air Crash Disaster at Detroit Metro. Airport, 130 F.R.D. 627 (E.D.Mich. 1989); Mitsui & Co. (U.S.A.), Inc. v. Puerto Rico Water Resources Authority, 93 F.R.D. 62 (D.P.R. 1981); United States v. Int'l Business Machines Corp., 70 F.R.D. 700 (S.D.N.Y. 1976); Dictograph Products, Inc. v. Kentworth Corp., 7 F.R.D. 543 (W.D.KY. 1947). Moreover, a party moving for a protective order is not excused from producing documents or appearing at a deposition unless such an order is actually obtained before the time set for discovery. King v. National Bank of Baton Rouge, 712 F.2d 188, 191 (5th Cir. 1983) (per curiam), cert. denied, 465 U.S. 1029 (1984); Batson v. Neal Spelce Associates, Inc., 112 F.R.D. 632, 647 (W.D.Tex. 1986);

In the instant case neither the City nor MHTC moved for or obtained a protective order before the compliance dates contained in the subpoenas. The subpoenas required that MHTC and the City produce certain documents no later than five business days before the dates of their

respective examinations. Thus, five days prior to the examination dates were the dates for compliance.[2] The City brought its motion for a protective order one day before the examination of its representatives was to take place, well past the date by which it was to have produced the necessary documents. MHTC filed its motion with even more disregard for the compliance date than did the City. It did not seek any protective order until nearly a week after it was to have been examined, and nearly two weeks after it was to have produced the documents required by the subpoena. Nor was there any excuse for the City's or MHTC's failure to timely seek a protective order.

The parties maintain that the character, volume and time frame regarding production of the documents made compliance with the subpoenas a practical impossibility. They place considerable emphasis on this and would excuse a portion of their conduct based upon the discovery burden. However, this does not explain nor excuse the fact that at no time prior to the dates set for production of the documents did either party move for a protective order pursuant to Fed.R.Bankr.P. 7026 and Fed.R.Civ.P. 26(c).

Based upon the foregoing, the motions of both the City and MHTC for protective orders are time-barred, and, therefore, denied.

THE MOTIONS TO QUASH THE SUBPOENAS

Fed.R.Bankr.P. 2004(c) provides that the attendance and the production of documentary evidence in connection with a court-ordered examination may be compelled in the

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[2]. At oral argument, the City questioned the propriety of having what it termed "two return dates" within a subpoena. However, it cites no authority which suggests that this is improper, nor does the Court find any.

manner provided by Fed.R.Bankr.P. 9016. Fed.R.Bankr.P. 9016 simply states that Fed.R.Civ.P. 45 applies to cases under the Code.

Fed.R.Civ.P. 45(b) provides that the court, "upon motion made ... at or before the time specified in the subpoena for compliance therewith, may quash or modify the subpoena if it is unreasonable or oppressive ..."

Fed.R.Civ.P. 45(d)(1) provides in pertinent part:

> The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued.

With respect to their claim that objections were timely made, the City and MHTC advance an argument which is twofold. First, each maintains that Fed.R.Civ.P. 45(d)(1) grants to a party to whom a subpoena is directed a ten day period after service is made within which to object to the subpoena. It is their position that since they both raised objections by letter within 10 days after service of the subpoenas, their objections were timely made under Fed.R.Civ.P. 45(d)(1).

This reasoning is based on a partial reading of the rule. It is true that both the City and MHTC objected to the subpoenas within 10 days after service. However, when compliance with the subpoena is set for a date which is less than 10 days after service, Fed.R.Civ.P. 45(d)(1) requires any objections to be made on or before such date. The rule allows objections to be made "within 10 days after service ... <u>or</u> on or before the time ... for compliance if such time is less than 10 days after service."

The Court has found no authority for the proposition that the conjunctive "or" in this

instance allows a party to freely utilize the 10 day time frame where compliance with the subpoena is to take place less than 10 days from the date of service. Rather, the Court believes that the rule more accurately envisions two alternative scenarios, for which separate time frames are established within which to object.

The City and MHTC maintain that even if this is the case, they nevertheless objected on or before the date set for compliance with the subpoena. Both subpoenas required that the parties produce documents no later than five business days prior to the dates set for their respective examinations. MHTC was scheduled to be examined on August 13, 1991 and the City was to be examined on August 14, 1991.

The City argues that its date for compliance was August 8 (and implicitly that MHTC's compliance date was August 7). This is based upon an erroneous reading of Fed.R.Bankr.P. 9006(a). The City maintains that the date of the examination is to be included in the computation of the five day period prior to which the documents were to be produced. This reasoning is clearly at odds with Fed.R.Bankr.P. 9006(a), which states:

> In computing any period of time prescribed or allowed by (the Bankruptcy rules) ... the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included ...

In this case the days of the events from which the five business day periods began to run were the dates of the examinations, August 13 and August 14. Under Fed.R.Bankr.P. 9006(a) these dates are not to be included when counting five business days backward to the date when documents were to be produced. Thus the compliance dates for MHTC and the City were August 6 and August 7, respectively. Under Fed.R.Civ.P. 45(d)(1), MHTC and the City were required to object on or before these dates. MHTC objected by letter on August 7 and the City objected by

letter on August 8, in each case one day after their respective compliance dates.

Representatives from both MHTC and the City were present and prepared to be examined on August 13 and 14, respectively. However, the Courts find that the failure of each to produce documents five days before these respective dates was a violation of the Court's July 26 and July 30 Orders and the subpoenas which accompanied them. Neither MHTC nor the City moved to quash the subpoenas until after the compliance dates had passed, and thus their motions to quash are time barred by Fed.R.Civ.P. 45.

## FAILURE TO COMPLY WITH THE COURT'S ORDERS

The question remains what remedy the Court should select for failure to comply with the ordered examinations. Where there has been a failure to comply with a court order regarding discovery, Fed.R.Civ.P. 37(b) provides that a court, in its discretion, may enter such orders as are just.[3] Fed.R.Bankr.P. 7037 makes Fed.R.Civ.P. 37 applicable in bankruptcy proceedings. King v. Nat. Bank of Baton Rouge, 712 F.2d 188 (5th Cir. 1983) (stating that Fed.R.Civ.P. 37 is applicable to a Bankr.R. 205 examination in a case involving a contested petition)[4]; In re Rubin, 37 B.R. 232, 237 (Bankr. 9th Cir. 1984); In re Rice, 14 B.R. 843, 845 (Bankr. 9th Cir. 1981). Moreover, Rule 37(b)(2) is not limited to enforcement of orders made pursuant to Fed.R.Civ.P. 37(a). Rule 37 authorizes enforcement of all orders relating to discovery. See Chism v. National Heritage Life Ins. Co., 637 F.2d 1328 (9th Cir. 1981); In re Rubin, 37 B.R. at 237. In the instant case, the original

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[3]. A subpoena issued in connection with discovery is a Court order for purposes of Fed.R.Civ.P. 37. King v. Fidelity National Bank of Baton Rouge, 712 F.2d at 191; Batson v. Neal Spelce Associates, Inc., 112 F.R.D. at 647.

[4]. Rule 205 was the precursor of Rule 2004 under the former Bankruptcy Act.

order did not emanate pursuant to Fed.R.Civ.P. 37(a), but rather from Fed.R.Bankr.P. 2004(a). Nevertheless, and as the foregoing indicates, the Debtor is entitled to imposition of Rule 37(b)(2) sanctions against the City and MHTC.

Courts applying Rule 37(b)(2) for failure to participate in the discovery process have in various instances imposed sanctions ranging in the extreme from the entry of a default judgment to a less stringent award of attorneys' fees. However, the harsher sanctions such as entry of a default judgment or a finding of contempt have generally only been imposed when a party has continuously flouted a court's repeated orders over a period of time. See, e.g., Bank One of Cleveland, N.A. v. Abbe, 916 F.2d 1067, 1073 (6th Cir. 1990) (entry of default judgment where parties failed to appear at various scheduled depositions); Farnsworth v. City of Kansas City, Mo., 863 F.2d 33, 34 (8th Cir. 1988) (case dismissed after failure to comply with series of discovery orders, where less stringent sanctions were initially imposed); United States v. Martin-Trigona, 759 F.2d 1017, 1026 (2d Cir. 1985) (sanction of contempt imposed for repeated failure to comply with court-ordered 2004 examination); Matter of Berryhill, 127 B.R. 427 (Bankr. N.D.Ind. 1991) (repeated failures to comply with orders concerning prosecution of Chapter 11 case warranted dismissal); In re Sofro, 117 B.R. 745, 752 (Bankr. S.D.Fla. 1990) (pleadings stricken in adversary proceeding where party had repeatedly failed to comply with court-ordered 2004 examination). But cf. In re Standard Metals Corp., 817 F.2d 625, 629 (10th Cir. 1987) (dismissal warranted for willful or bad faith violation of single discovery order).

Here, the Debtor requests that the Court find both the City and MHTC in contempt of the July 26 and July 30 Orders. This Court possesses the power to issue civil contempt orders. In re Patterson, 111 B.R. 395 (Bankr. N.D.N.Y. 1989). See also In re Walters, 868 F.2d 665 (4th Cir. 1989). However, contempt is a sanction which is not to be taken lightly. In re Hulon, 92 B.R. 670,

676 (Bankr. N.D.Tex. 1988) (citing In re Smith and Son Septic and Sanitation Services, 88 B.R. 375, 379 (Bankr. D.Utah 1988). It is "a serious sanction that should only be exercised in the most egregious of circumstances and primarily for the purposes of controlling cases and proceedings and the behavior of the parties before the court." Id. See also United States v. Martin-Trigona, 759 F.2d at 1026.

The facts involved in the present case do not lend themselves to a finding of contempt on the part of either the City or MHTC. For although both parties have violated Orders of this Court, they have done so in single, isolated instances. Nor does the Court have any reason to suspect that they will continue to defy future Orders which will emanate from this Court. However, the Court recognizes that the Debtor here is entitled to the imposition of just sanctions under Fed.R.Bankr.P. 7037 and Fed.R.Civ.P. 37. Here the Debtor incurred expenses in attending two futile examinations, in addition to the expenses incurred in prosecuting this motion. Therefore, the Court believes that it should award the Debtor costs and expenses, to include reasonable attorneys' fees, that it has incurred in this regard, to be apportioned appropriately between the City and MHTC.

## SCOPE OF DISCOVERY

Although neither the City nor MHTC moved in a timely fashion, the Court is constrained to finally note that even if they had, their motions would not necessarily have been granted. Both parties focus their objections primarily on paragraph 13 of the Debtor's request for documents, which asks for "all documents relating to transactions between (MHTC and the City) and the Debtor." The City and MHTC maintain that such a request is overly broad and burdensome and, as such, prohibited under the Federal Rules of Civil Procedure. They cite case law to that effect, however it addresses the breadth of discovery under the Federal Rules of Civil Procedure,

and is thus misplaced.

As stated earlier, the Order granting the present discovery requests was entered pursuant to Fed.R.Bankr.P. 2004(a), and not the Federal Rules of Civil Procedure. An examination pursuant to Bankr.R. 2004 is broader in scope than that allowed under the Federal Rules of Civil Procedure, and may legitimately be in the nature of a "fishing expedition." In re Fearn, 96 B.R. 135, 138 (Bankr. S.D.Ohio 1989) (citing In re Vantage Petroleum Corp, 34 B.R. 650, 651 (Bankr. E.D.N.Y. 1983). The boundaries of a 2004 examination are not limitless, however, and matters having no relationship to the affairs of the subject of the examination, or to the administration of the bankruptcy estate are not proper subjects of a 2004 examination. In re Financial Corp. of America, 119 B.R. 728, 733 (Bankr. C.D.Cal. 1990).

Debtor's request of "all documents relating to transactions between (MHTC and the City) and the Debtor," seemingly involves documents relating exclusively to both the City's and MHTC's affairs, and in all probability are relevant to the administration of the Debtor's estate. In view of the foregoing, and without specifically deciding the question, it does not appear that the City's and MHTC's objections are sufficiently grounded in law, regardless of the fact that they are procedurally defective.

For the reasons stated above, it is

ORDERED, that pursuant to Fed.R.Bankr.P. 2004(a), both the City and MHTC shall submit to separate examinations as previously ordered, to be rescheduled on at least twenty (20) days notice to the City and MHTC from the date of this Order, and that both the City and MHTC will furnish documents described in the subpoenas issued in connection with the July 26th and July 30th Orders no later than five (5) business days prior to such examinations; and it is further

ORDERED, that City and MHTC shall pay to the Debtor costs and attorneys' fees

incurred relative to these motions, including the costs to the Debtor of being represented at the Fed.R.Bankr.P. 2004 examinations, limited to the sum of $500.00 each; and it is further

ORDERED, that the stay regarding the Fed.R.Bankr.P. 2004 examination of the Debtor's principals be vacated, upon the condition that such examination shall take place after completion of the examinations of both the City and MHTC and in accordance with the Court's Order of August 6, 1991.

Dated at Utica, New York

this day of September l99l

STEPHEN D. GERLING
U.S. Bankruptcy Judge