

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

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Will This Opinion be Published? No

Bankruptcy Caption: In re Polo Builders, Inc., *et al.*

Bankruptcy No. 04 B 23758

Adversary Caption: David R. Brown, Trustee v. Khuzem Merchant

Adversary No. 06 A 1176

Date of Issuance: September 24, 2010

Judge: A. Benjamin Goldgar

Appearance of Counsel:

Attorneys for plaintiff David R. Brown, Trustee: Michael J. Davis, Joshua D. Greene, Springer, Brown, Covey, Gaertner & Davis, LLC, Wheaton, IL

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

In re:)	Chapter 7
)	
POLO BUILDERS, INC., <i>et al.</i> ,)	No. 04 B 23758
)	(jointly administered)
Debtors.)	
_____)	
)	
DAVID R. BROWN, Trustee,)	
)	
Plaintiff,)	
)	
v.)	No. 06 A 1176
)	
KHUZEM MERCHANT,)	
)	
Defendant.)	Judge Goldgar

**ORDER IMPOSING SANCTIONS
FOR VIOLATION OF PRETRIAL ORDER**

This adversary proceeding is currently set for trial on September 30, 2010, at 9:30 a.m. The plaintiff is David R. Brown, chapter 7 trustee. The defendant is Khuzem Merchant. For the following reasons, both parties will be sanctioned for violating the final pretrial order. Brown's claims in Counts I-V of his complaint are deemed waived, and he is barred from presenting evidence on them. Trial will proceed only on Count VI. As for Merchant, he will be barred from presenting any evidence at trial.

The trial date in this matter was set on June 16, 2010, more than three months ago, when the court entered a final pretrial order in the form it customarily uses. On June 23, 2010, a copy of the final pretrial order was mailed to counsel for both parties at the addresses shown on the court's docket.

The final pretrial order set dates for the filing of pretrial materials. In particular, it

required each party to file and exchange a list of witnesses and a list of exhibits to be introduced at trial, and to exchange the exhibits themselves, no later than 21 days before the hearing date – by September 9, 2010. The final pretrial order also required each party to file a trial brief no later than 7 days before the hearing – by September 23, 2010.

The final pretrial order made clear that a failure to comply with its terms “*will* result in the imposition of appropriate sanctions.” Final Pretrial Order at ¶ 10 (emphasis in original). It specified what those sanctions would be. *Id.* Failure to file and exchange the list of exhibits and exchange the exhibits themselves would preclude a party from introducing any exhibits into evidence at trial. *Id.* at ¶ 10.a. Failure to file and exchange the list of witnesses would preclude a party from presenting any witnesses at trial. *Id.* at ¶ 10.b. Failure to raise and thoroughly discuss “[a]ny legal claim, theory or argument” in the trial brief would result in a waiver of the claim, theory or argument, and no evidence relating to it would be admitted. *Id.* at ¶ 10.c. Failure to file a trial brief at all would preclude a party from introducing any evidence at trial. *Id.* at ¶ 10.d.

Brown duly filed his lists of witnesses and exhibits on September 9, 2010, as the final pretrial order required. Merchant, on the other hand, filed nothing. Indeed, a review of the court’s docket shows that as of today, more than two weeks after the due date and less than a week before trial, Merchant still has filed and exchanged nothing: no list of witnesses, no list of exhibits, and no exhibits. Nor has any extension of time to file these materials been sought. Brown also filed his trial brief on September 23, 2010, as the final pretrial order required. However, the trial brief addressed only one count of Brown’s six-count complaint. Merchant

filed no trial brief.^{1/}

The requirements of the final pretrial order are clear. Despite their clarity, both Brown and Merchant have ignored them. There is no reason why Brown should be kept in the dark about Merchant's witnesses, exhibits, and legal arguments and have his own trial preparation impaired – especially when Merchant has had the benefit of Brown's pretrial materials to aid his preparation for more than two weeks. For his part, Brown has not bothered in his trial brief to address the vast majority of his claims. There is no reason why Merchant (assuming he intends to defend at trial) should be kept in the dark about Brown's legal theories. And there is no reason *at all* why the court's own preparation for trial should be impaired. (Judges prepare for trial, too, believe it or not.)

Pursuant to Rule 16(f) of the Federal Rules, Fed. R. Civ. P. 16(f) (made applicable by Fed. R. Bankr. P. 7016), and in keeping with this court's consistent practice, *see Bibby Fin. Servs. (Midwest), Inc. v. Weadley (In re Weadley)*, Nos. 06 B 1854, 07 A 683, 2008 WL 2397590 (Bankr. N.D. Ill. June 11, 2008); *First Equity Card Corp. v. Kleit (In re Kleit)*, 2006 WL 2792685, at *1 (Bankr. N.D. Ill. Sept. 28, 2006); *Michael v. Khan (In re Khan)*, 321 B.R. 709, 711 (Bankr. N.D. Ill. 2005); *Schechter v. McAniff (In re McAniff)*, 2004 WL 1630493, at *1 (Bankr. N.D. Ill. July 21, 2004); *Hartwick v. Craig (In re Craig)*, 2004 WL 1490427, at *2 (Bankr. N.D. Ill. June 29, 2004), sanctions will therefore be imposed on Brown and Merchant for their violations of the final pretrial order as follows:

^{1/} Occasionally, parties do not file pretrial materials because a settlement has been reached and no hearing is necessary. On those occasions, however, the parties have the courtesy to notify chambers. Since the parties here have not notified chambers of a settlement, and since one side obviously believes the trial is proceeding as scheduled, it is fair to assume there has been no settlement.

- Merchant is barred from introducing any evidence at trial. *See In re Maurice*, 21 F.3d 767, 773 (7th Cir. 1994); *see also Khan*, 321 B.R. at 711-12. His participation is limited to cross-examination and argument. *See Smith v. Chicago School Reform Bd. of Trustees*, 165 F.3d 1142, 1145 (7th Cir. 1999).

- Brown's claims in Counts I-V of his complaint are deemed waived, and he is barred from introducing any evidence on those claims. Because he bears the burden of proof on Counts I-V and cannot meet it, judgment on those claims will be entered in favor of Merchant and against Brown. Trial will proceed only on Count VI.

Dated: September 24, 2010

A. Benjamin Goldgar
United States Bankruptcy Judge