IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PURITAN INV. CORP.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
ASLL CORP. and	:	
ERIC BLUMENFELD	:	**NO. 97-1580**

MEMORANDUM ORDER

Presently before the court are defendants' alternative Motions for a Protective Order and to Quash Plaintiff's Subpoenas and defendants' Motion in Limine. Defendants challenge trial subpoenas served upon them by plaintiff for the production of an array of business, tax and financial records for use by plaintiff in attempting to sustain its alter ego liability theory against Mr. Blumenfeld. Defendants also seek by their motion in limine to preclude "any evidence or testimony of plaintiff's 'alter ego' theory." The only reason proffered is that plaintiff has no such evidence.

Plaintiff is suing for trademark infringement arising from defendants' failure to make required payments under a licensing agreement involving the operation of a comedy club. The discovery deadline was October 22, 1997, providing over eighteen weeks to conduct discovery. Plaintiff never requested an extension of the discovery deadline. The case has just entered the trial pool.

On November 24, 1997, plaintiff served subpoenas upon

defendants directing them to produce at trial the following documents:

> all documents concerning ASLL Corporation and its relation to Eric Blumenfeld, including but not limited to any documents proposing or relating to its formation in January 1995 or thereabouts, the bank records of ASLL Corporation from its formation to the present, the minute book and any other corporate records of ASLL Corporation showing meetings, resolutions, or any other activity by the corporation, all insurance documents issued to ASLL Corporation (including but not limited to declaration pages and invoices and checks paid) all tax returns filed by ASLL Corporation, all financial statements (audited or otherwise) concerning ASLL Corporation, and all other documents (including checks, notes, contracts, etc.) concerning transactions between Eric Blumenfeld and ASLL Corporation.

Defendants argue with some force that plaintiff is attempting to circumvent the discovery deadline. Defendants also claim that because the requested documents are voluminous and not all readily at their disposal, production would necessarily delay the trial of this action.

Plaintiff represents that no party propounded formal discovery requests, but instead met in May of 1997 to exchange informal discovery and that defendants knew since this meeting that such records might be used in court to support plaintiff's alter ego theory. Plaintiff does not represent, however, that defendants agreed at the May 1997 meeting to produce all of these records during the discovery period.

Trial subpoenas may be used to secure documents at trial for the purpose of memory refreshment or trial preparation or to ensure the availability at trial of original documents previously disclosed by discovery. See, e.g., Rice v. United States, 164 F.R.D. 556, 558 n.1 (N.D. Okla. 1995); BASF Corp. v. Old World Trading Co., 1992 WL 24076, *2 (N.D. Ill. Feb. 4, 1992).

Trial subpoenas may not be used, however, as means to engage in discovery after the discovery deadline has passed. See BASF Corp., 1992 WL 24076 at *2. See also Ghandi v. Police Dept. of Detroit, 747 F.2d 338, 354-55 (6th Cir. 1984)(trial subpoena duces tecum used to seek discovery just prior to trial properly quashed); Hatchett v. United States, 1997 WL 397730, *3 (E.D. Mich. Feb. 28, 1997)(trial subpoena cannot be used to obtain belated discovery after discovery period has ended); Pitter v. American Express Co., 1984 WL 1272, *5 (S.D.N.Y. Nov. 27, 1984)("shotgun" production demands through use of trial subpoenas are impermissible substitute for proper pre-trial discovery).

There is absolutely no indication that plaintiff knows what information is contained in the documents it seeks or that they would support plaintiff's theory of its case. A trial subpoena is not an appropriate means of ascertaining facts or uncovering evidence. This should be done through discovery in the manner and time provided by the Federal Rules and court

order.

Plaintiff does not explain why the desired records were not obtained through a proper Rule 34 document request before the discovery deadline. Plaintiff bears the burden of preparing its own case for trial. Any documents it wished to peruse which were not voluntarily disclosed should have been timely demanded through formal discovery procedures.

Plaintiff does not and credibly could not aver that it was unaware of the possible existence of the subpoenaed documents before the discovery deadline. See McNerney v. Archer Daniels Midland Co., 164 F.R.D. 584, 588 (W.D.N.Y. 1995)("when a [party] . . . is aware of the existence of documents before the discovery cutoff date and issues discovery requests including subpoenas after the discovery deadline has passed, then the subpoenas and discovery requests should be denied"). The documents plaintiff now seeks are standard records routinely maintained by corporations. Moreover, plaintiff's contention that defendants knew since the informal May 1997 meeting that such records might be used by plaintiff to support its alter ego theory shows that plaintiff itself was aware of the existence of such documents months before the close of discovery.

The only reasonable conclusion from the record presented is that plaintiff is attempting to use trial subpoenas improperly as a discovery device on the eve of trial. See,

Thompson v. Glenmede Trust Co., 1996 WL 529691, *1 (E.D. Pa. Sept. 16, 1996) (unjust and burdensome to require party on eve of trial to produce documents pursuant to subpoena served after discovery deadline).

Thus, defendants' motion to quash will be granted. Because efficiency in the resolution of litigation should be balanced with the objective of resolving legal claims to the extent possible on the basis of complete and accurate information, the motion will be denied without prejudice to plaintiff promptly to seek a continuance and extension of discovery if it can show good cause therefor. See Fed. R. Civ. P. 16(b). Because an order to preclude a party from presenting evidence on the ground that the party has no such evidence is needless and meaningless, defendants' motion in limine will be denied.

ACCORDINGLY, this day of December, 1997, **IT IS HEREBY ORDERED** that defendants' Motions for a Protective Order and to Quash Plaintiff's Subpoenas are **GRANTED** in that the trial subpoenas duces tecum issued to defendants are **QUASHED**, without prejudice to plaintiff promptly to seek a discovery extension upon a showing of good cause; and, **IT IS FURTHER ORDERED** that defendants' Motion in Limine is **DENIED**.

BY THE COURT:

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JAY C. WALDMAN, J.