UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

IN RE:	)	CASE NO. 87-10032-INH
	)	
JUNIOR SEBASTIAN HAMMRICH and JOYCE MARIE HAMMRICH,	)	CHAPTER 12
	)	
	)	
	)	MEMORANDUM OF DECISION
Debtors.	)	RE: MOTION TO COMPEL
	)	DISCOVERY

The matter before the Court is the Motion to Compel Discovery filed by Farm Credit Bank of Omaha. It is a core proceeding under 28 U.S.C. § 157(b)(2). This ruling shall constitute Findings and Conclusions as required by Bankr. R. 7052.

I.

On December 5, 1990, Debtors Junior S. and Joyce M. Hammrich were subpoenaed under Bankr. R. 2004 by Chapter 12 Trustee A. Thomas Pokela (Trustee). They were directed to appear at the offices of Ronayne and Richards in Aberdeen, South Dakota, on December 18, 1990 at 1:30 p.m. and to bring with them "[a]ll books, records, checks, cattle sale receipts, grain receipts and trucking receipts." At Debtors' request, the depositions were rescheduled for the afternoon of January 22, 1991. New subpoenas were not served. No motion for a Bankr. R. 2004 examination was ever filed.

On January 22, 1991, Debtors appeared with counsel, William J. Pfeiffer, at the scheduled place and time. Initially, Mr. Pfeiffer questioned Trustee about the purpose of the examination. Trustee responded that he wanted to assess Debtors' financial status. Trustee further stated that Robert M. Ronayne, counsel for Farm Credit Bank of Omaha (FCBO), would conduct the main examination and

that Trustee would ask additional questions as needed.

Mr. Pfeiffer acknowledged that he knew Mr. Ronayne would be attending the examination but he challenged the appropriateness of Mr. Ronayne conducting it. Mr. Pfeiffer further argued that Debtors should be told the purpose of the examination. After a few general, preliminary questions by Mr. Ronayne, Debtor Junior Hammrich refused, as directed by his counsel, to answer any more questions by Mr. Ronayne. Trustee thereafter conducted the examination.

On January 31, 1991, FCBO filed a Motion to Compel Discovery under Fed.R.Civ. P. 37 and requested an expedited hearing thereon. FCBO argued that since the January 22, 1991 deposition was by agreement of the parties a new subpoena was unnecessary and that FCBO was entitled to participate as a party in interest, whether the deposition was formally noticed or set by agreement of parties. FCBO requested sanctions of $682.00 against Debtors for attorney fees of $540.00 and travel expenses of $142.00 for Wayne Williamson of FCBO who attended the January 22, 1991 examination.

In their response, Debtors stated that they and their counsel did not understand that FCBO wanted to participate until the day of the deposition. They acknowledged that they had agreed to an examination by Trustee but Debtors characterized the questioning by FCBO without appropriate notice as "harassment or a fishing expedition, at best," since no contested matter or adversary proceeding existed between FCBO and Debtors. Debtors further argued that their refusal to answer questions by Mr. Ronayne was

not a sanctionable act. Debtors requested sanctions of $150.00 for their attorney's fees.

A telephonic hearing was held February 5, 1991. The matter was taken under advisement and counsel were given ten days to file simultaneous briefs. FCBO filed a Statement of Authorities on February 19, 1991. By letter filed March 4, 1991, Debtors responded that the cases and law cited by FCBO were not on point. They urged this Court to follow In re Gross, 121 B.R. 587 (Bankr. D.S.D. [Southern Division] 1990).

II.

A 2004 examination is conducted by order of the court upon a motion by any party in interest. Bankr. R. 2004(a). Production of documents may be compelled by subpoena under Bankr. R. 9016. Bankr. R. 2004(c). The time and place of a debtor's attendance may be imposed by order. Bankr. R. 2004(d).

Discovery under Bankr. R. 2004 is generally considered broader than that permitted under the Federal Rules of Civil Procedure. In re Valley Forge Plaza Associates, 109 B.R. 669, 674 (Bankr. E.D. Pa. 1990). However, once a contested matter or adversary proceeding is commenced, discovery in furtherance of litigation is subject to the more particular Federal Rules of Civil Procedure rather than the broader Bankr. R. 2004. Bankr. Rs. 9014 and 7001; Valley Forge Plaza, 109 B.R. at 674.

Bankruptcy Rule 7029, which applies to adversary proceedings and, pursuant to Bankr. R. 9014, to contested matters, states that

parties **in writing** may agree that depositions will be taken and may modify other discovery procedures.

III.

There is no adversary or contested matter pending between Debtors and FCBO that triggered the application of discovery procedures under Bankr. Rs. 7027 through 7037. Further, there is no written agreement under Bankr. R. 7029 between Debtors and FCBO that established a deposition procedure. Finally, there was no motion by FCBO nor an Order by the Court under Bankr. R. 2004 that directed Debtors to appear for an examination by FCBO. Consequently, the Court concludes that Debtors were not obligated to respond to questions by FCBO's counsel at the deposition on January 22, 1991.

FCBO argues that any error in noticing the deposition should not preclude its participation. Under these facts, the Court cannot agree. The subpoenas obtained by Trustee and served on Debtors stated the depositions were to be taken pursuant to Bankr. R. 2004 but Trustee did not obtain an order under Bankr. R. 2004. The Trustee did not employ regular discovery procedures under Bankr. Rs. 7027 through 7037 and Trustee and Debtors did not have a written agreement for discovery under Bankr. R. 7029. No other parties were given notice of the examination.

While it is true that Bankr. R. 7032 (Fed.R.Civ.P. 32(d)(1)) requires a written objection to errors in the notice of a deposition, Debtors apparently had no objection to Trustee's

irregular noticing procedure until they learned at the examination that counsel for FCBO was going to conduct it. Debtors' refusal to answer questions by FCBO at that juncture was not inappropriate or subject to sanctions. Moreover, Fed.R.Civ.P. 32(d)(1) only contemplates that a written objection to irregular notice be served upon the party giving the notice, so FCBO was not entitled to service of a written objection in any event. The Court may have reached a different conclusion if an appropriate party had obtained an order for a Bankr. R. 2004 examination, had correctly noticed a deposition pursuant to a pending adversary proceeding or contested matter, or had obtained from Debtors a written agreement for a deposition under Bankr. R. 7029.

An order denying FCBO's Motion to Compel Discovery will be entered. Attorneys' fees and costs will not be awarded to either party.

Dated this 14th day of March, 1991.

BY THE COURT:

_____
Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

IN RE:	)	CASE NO. 87-10032-INH
	)	
JUNIOR SEBASTIAN HAMMRICH and JOYCE MARIE HAMMRICH,	)	CHAPTER 12
	)	
	)	ORDER DENYING
Debtors.	)	MOTION TO COMPEL
	)	DISCOVERY AND DENYING
	)	REQUESTS FOR SANCTIONS

In recognition of and compliance with the Memorandum of Decision Re: Motion to Compel Discovery entered this day,

IT IS HEREBY ORDERED that the Motion to Compel Discovery filed by Farm Credit Bank of Omaha is DENIED; and,

IT IS FURTHER ORDERED that requests by Farm Credit Bank of Omaha and Debtors Junior S. and Joyce M. Hammrich for sanctions in the form of costs associated with this matter are DENIED.

So ordered this _____ day of March, 1990.

BY THE COURT:

_____
Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)