

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

IN RE:) CASE NO. 87-10311-INH
)
WILFRED REINBOLD,) CHAPTER 7
)
) MEMORANDUM DECISION RE:
) MOTIONS FOR ORDER
Debtor.) COMPELLING DISCOVERY
)

The matters before the Court are the motions filed by Chapter 7 Trustee Peter J. Buttaro to compel Debtor Wilfred Reinbold and his wife to comply with certain discovery orders and the responses thereto filed by Debtor and his wife. These are core proceedings under 28 U.S.C. § 157(b)(2). This ruling shall constitute Findings and Conclusions as required by Bankr. R. 7052.

I.

Debtor Wilfred Reinbold (Debtor) filed a Chapter 12 petition for debt adjustment on October 15, 1987. The case was converted to a Chapter 7 proceeding on February 5, 1990. Debtor appealed the conversion order to the District Court. Peter J. Buttaro was appointed the Chapter 7 Trustee. Trustee scheduled the § 341 meeting of creditors for April 2, 1990. Debtor did not appear and the meeting was rescheduled to May 7, 1990. On May 7, 1990, Debtor appeared at the meeting but was not cooperative. Trustee again continued the meeting pending resolution of Debtor's appeal of the conversion order.

The District Court¹ affirmed this Court's conversion order on

¹ The Honorable Richard J. Beatty presiding.

December 18, 1990. Debtor appealed the District Court's decision to the Court of Appeals for the Eighth Circuit on January 11, 1991. That appeal is pending.

On January 16, 1991, Trustee filed a Motion for Examination of Debtor and a Motion for Examination of Margaret Reinbold, Debtor's wife. By Orders entered January 17, 1991, both Motions were granted. One Order provided that Debtor was to appear before Trustee on January 29, 1991 for an examination and to

produce for purposes of said examination, all accounts, records, checks, check book receipts, bills of lading, receipts of grain storage or sale, and other evidence of receipts from programs administered by the United States Department of Agriculture, and other documents pertaining to the operation of Wilfred Reinbold, d/b/a a farmer, Reinbold Grain Farms, Inc., or any other farming entity, as well as any other business operations during 1990.

The other Order provided that Margaret Reinbold was to appear on the same date for an examination before the Trustee and to produce², in addition to the materials stated above,

all accounts and statements for Margaret Reinbold, both business and personal, for 1990.

Trustee subpoenaed both Debtor and Margaret Reinbold.

On the day of the scheduled examination by Trustee, Debtor filed a "Motion for Objection for Examination of Debtor, Discharge of Trustee" in which Debtor objected to the Motion for Examination and stated:

That, I Wilfred Reinbold did not farm in 1990, there were no ASCS payments made to me.

² Trustee has not sought turnover from Margaret Reinbold of any estate records or documents. That action would be "[s]ubject to any applicable privilege." 11 U.S.C. § 542(e).

I further state that the proceeds from the sale of millet in 1990 is not part of the Bankruptcy estate.

That I, Wilfred Reinbold demand Immunity under Title 11 Section 334 Self-incrimination immunity.

Debtor also asked that Trustee be discharged "for interfering with [Debtor's] well being, mental anxiety and harassment which is far and beyond his duties."

Also on January 29, 1991, Margaret Reinbold filed a "Motion for Order to Show Cause and Continuance of Hearing for January 29, 1991 at 2:00 P.M." Therein, she asked the Court to enter an order requiring Trustee to show why she, as a "disinterested party," should be required to "present records of her private business in a bankruptcy proceeding of which she is not a party...." She also asked that Trustee be removed and, similar to her husband's contentions, she alleged harassment and violation of her civil rights by Trustee. The Court denied Debtor's and Margaret's motions/objections.

On January 29, 1991, Debtor and Margaret Reinbold appeared for Trustee's examination. Initially, Trustee, Debtor and Margaret Reinbold disagreed about the compensation to which Debtor and Margaret Reinbold were entitled for their appearance. Debtor stated his name and address for the record and admitted he was a debtor under Chapter 7. He gave Trustee a copy of his "Motion for Objection for Examination of Debtor, Discharge of Trustee," which was filed that same day with the Court, and stated that the answers he was willing to give were set forth on it. Thereafter, relying on 11 U.S.C. § 344 and the Fifth Amendment, he refused to answer

any more questions. When Trustee asked what was the factual basis for his reliance of the Fifth Amendment, Debtor replied, "We are in criminal court right now." Although Debtor refused to answer any more of Trustee's questions, he continued to ask to be paid for his appearance by a cashier's check and stated, "Until that is paid for, we are not going to talk about anything." Thereafter, Debtor essentially answered "Three forty-four" to all questions asked, including those related to production of documents. Trustee terminated the examination of Debtor.

Next, Margaret Reinbold was sworn to testify. She stated her name and address. When asked where she was employed, Margaret Reinbold handed Trustee a copy of her "Motion for Order to Show Cause and Continuance of Hearing for January 29, 1991 at 2:00 P.M." Thereafter, she too pleaded the Fifth Amendment and claimed her civil rights were violated. She said, "I plead the Fifth Amendment to all of your questions. Let's just go." Both Debtor and Margaret Reinbold then departed.

On February 7, 1991, Trustee filed Motions for Order Compelling Discovery in which he asked the Court to compel Debtor and Margaret Reinbold to answer his questions and to produce the requested 1990 business/financial records. Debtor filed a response on March 19, 1991. He challenged the Court's jurisdiction due to the appeal of the conversion order and asked that Trustee's Motion be denied. Margaret Reinbold also filed a response. She argued the Court no longer had jurisdiction and she questioned the efficacy of an examination of her or a production of documents by

her since she is not a debtor.

A hearing on Trustee's Motion for Order Compelling Discovery was held March 19, 1991. Trustee and Debtor both appeared pro se. After arguments by both parties, the Court concluded that Debtor and Margaret Reinbold must appear before Trustee in a rescheduled 2004 examination. At that time, Debtor and Margaret will have to exert their privilege under the Fifth Amendment to each question asked by Trustee that they consider may incriminate them if answered, rather than making a blanket refusal to answer all questions. Thereafter, the Court may determine -- on a question by question basis -- whether Debtor and Margaret Reinbold have properly exerted their privilege.

The Court took under advisement the questions of if and when Debtor and Margaret Reinbold may exert their Fifth Amendment privilege in resistance to Trustee's request for production of documents.

II.

The primary duty of a Chapter 7 Trustee is to collect and reduce to money the assets of the estate and make appropriate distribution of the proceeds to creditors. 11 U.S.C. §§ 704(1) and 726. Toward that goal, § 704(4) and Bankruptcy Rule 2004 authorize a Chapter 7 Trustee to examine "any entity" on "the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge...." Bankr. R. 2004 (in pertinent part). The primary purpose of a Rule

2004 examination is to permit the Trustee, or another party in interest, to ascertain quickly the extent and location of the debtor's assets. In re Fearn, 96 B.R. 135, 138 (Bankr. S.D.Ohio 1989) (cites omitted); In re Valley Forge Associates, 109 B.R. 669, 674 (Bankr. E.D. Pa. 1990); see also In re Drexel Burnham Lambert Group, Inc., 123 B.R. 702, 708-09 (Bankr. S.D.N.Y. 1991 (cases cited therein). The scope of a 2004 examination is "very broad and great latitude of inquiry is ordinarily permitted." Fearn, 96 B.R. at 137. It may be in the nature of a "fishing expedition." Valley Forge Associates, 109 B.R. at 674. Documents are subject to discovery under Bankr. R. 2004(c). Fearn, 96 B.R. at 138.

An examination may be made not only of the debtor but also of those who have had dealings with the debtor or those who have knowledge of the debtor's affairs. In re Financial Corp. of America, 119 B.R. 728, 733 (Bankr. C.D. Cal. 1990); Valley Forge Associates, 109 B.R. at 614; Fearn, 96 B.R. at 138. A 2004 examination, while subject to applicable evidentiary privileges, may "cut a broad swath through the debtor's affairs, those associated with him, and those who might have had business dealings with him." Fearn, 96 B.R. at 138 (quoting In re Mantolesky, 14 B.R. 973, 976 (Bankr. D. Mass. 1981)); Financial Corp., 119 B.R. at 733.

A Chapter 7 debtor's duties include surrendering "to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to

property of the estate, **whether or not immunity is granted under section 344 of this title.**" 11 U.S.C. § 521(4) (in pertinent part) (emphasis added). Legislative history indicates Congress intended that a debtor turn over all property of the estate. Stoecker, 103 B.R. at 185 (citing H.R.Rep. NO. 95-595, 95th Cong., 1st Sess. 176 (1977)), U.S.Code Cong. & Admin. News 1978, p. 5787; Litton, 74 B.R. at 559.

Moreover, the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Publ.L. No. 98-353) added the [phrase "whether or not immunity is granted under section 344 of this title"] so that no question remains but that Congress intended the turnover of such material by the debtor.

Stoecker, 103 B.R. at 185 (cite omitted).

A Chapter 7 debtor may be denied discharge if he improperly invokes his privilege against self-incrimination. 11 U.S.C. § 727(a)(6)(C). The privilege against self-incrimination is set forth in the Constitution.

No person shall ... be compelled in any criminal case to be a witness against himself[.]

U.S. Const. amend. V. (in pertinent part). A proper assertion of the Fifth Amendment privilege has three prerequisites: The disclosure at issue must be (1) compelled, (2) testimonial, and (3) incriminating. In re ICS Cybernetics, Inc., 107 B.R. 821, 827 (Bankr. N.D.N.Y. 1989) (cites omitted); Baltimore City Department of Social Services v. Bouknight, 493 U.S. ____, ____, 107 L.Ed.2d 992, 999 (1990). A communication, including a document, is **testimonial** if it explicitly or implicitly relates a fact or discloses

information. Doe v. United States, 487 U.S. 201, 210 (1988). A communication is **incriminating** if there is a reasonable possibility that the communication will be used against the witness in any way in a criminal prosecution but not if there is only a mere imaginary, remote, or speculative possibility of prosecution. In re Endres, 103 B.R. 49, 53 (Bankr. N.D.N.Y. 1989) (cite omitted); In re J.M.V., Inc., 90 B.R. 737, 740 (Bankr. E.D. Pa. 1988). Reasonable cause is established if there is a nexus between the risk of prosecution and the communication requested. Endres, 103 B.R. at 54. A communication is **compelled** if "physical or moral compulsion" is exerted on the person asserting the privilege. Fisher v. United States, 425 U.S. 391, 397 (1976) (cites omitted).

The privilege is personal and cannot be used to shield others from prosecution. Id. at 398; In re Litton, 74 B.R. 557, 559 (Bankr. C.D. Ill. 1987) (citing United States v. Mandujano, 425 U.S. 564, [572] (1976), and In re Grand Jury Subpoena, 739 F.2d 1354, [1359] (8th Cir. 1984)). Further, "the Fifth Amendment protects against "compelled self-incrimination, not [the disclosure of] private information." Fisher, 425 U.S. at 401 (quoting United States v. Nobles, 422 U.S. 225, 233 n.7 (1975)). No "blanket" Fifth Amendment privilege may be claimed in noncriminal proceedings; the witness must assert the privilege on a question by question (or document by document) basis. Hoffman v. United States, 341 U.S. 479, 486-87 (1951); Capitol Products Corp. v. Hernon, 457 F.2d 541, 542 (8th Cir. 1972).

Unless it is readily apparent that the communication sought is incriminating, the witness bears the burden of showing that the privilege was properly invoked. Ueckert v. C.I.R., 721 F.2d 248, 250 (8th Cir. 1983). See generally Hoffman, 341 U.S. at 486-87.

The [witness] need not incriminate himself in order to invoke the privilege, but if the circumstances appear to be innocuous, he must make some positive disclosure indicating where the danger lies.

Ueckert, 721 F.2d at 250. The Court must make a factual inquiry into the legitimacy and scope of the claimed privilege, In re Stoecker, 103 B.R. 182, 188 (Bankr. N.D. Ill. 1989); Endres, 103 B.R. at 54, and then clearly state the basis on which it sustains or rejects the witness's assertion of the privilege to a particular question or document requested. Capitol Products Corp., 457 F.2d at 544. Any benefit of doubt is resolved in favor of upholding the privilege. Stoecker, 103 B.R. at 188.

Records of any collective entity, corporation, or partnership are not privileged and an insider, employee, or other agent in possession of those documents must produce them even if the documents are incriminating [the "collective entity rule"]. ICS Cybernetics, Inc., 107 B.R. at 828-30 (cites omitted); Stoecker, 103 B.R. at 186-87 (cite omitted). Records that the government requires a person or entity to keep as part of a regulatory scheme are also not protected. Stoecker, 103 B.R. at 186. Under this "required records doctrine," the records are not protected from disclosure under the Fifth Amendment privilege because the documents have assumed public aspects that render them analogous to

public documents. Id. (cites omitted).

Generally, a person cannot claim Fifth Amendment protection based on incrimination that may result from the contents or nature of a requested document. U.S. v. Wujkowski, 929 F.2d 981, 983 (4th Cir. 1991) (citing Bouknight, 493 U.S. at ____, 107 L.Ed.2d at 1000)). This is so because the only thing being compelled is the act of producing the item, not the contents. Id. (citing Bouknight, 493 at ____, 107 L.Ed.2d at 1000, and Fisher, 425 U.S. at 410 n.11)); United States v. Mason, 869 F.2d 414, 416 (8th Cir. 1989) (cites omitted). Moreover, "[t]he fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege." Fisher, 425 U.S. at 411 n.11 (citing Wilson v. United States, 221 U.S. 361, 378 (1911)).

The **act** of producing a document may be protected if that act would testify to the document's authenticity, existence, or possession by the witness. Wujkowski, 929 F.2d at 983 (citing Fisher, 425 U.S. at 410)); United States v. Rue, 819 F.2d 1488, 1492 (8th Cir. 1987). "Physical acts will constitute testimony if they probe the state of mind, memory, perception, or cognition of the witness." Braswell v. United States, 487 U.S. 99, 126 (1988) (Kennedy, J., dissenting) (cited in ICS Cybernetics, Inc., 107 B.R. at 828)). It is the witness's burden to show that the act of producing the requested document may jeopardize him; the examining party may rebut that claim by "producing evidence that possession, existence, and authentication [of the documents sought] were a

`foregone conclusion.'" Wujkowski, 929 F.2d at 985 (quoting Doe, 465 U.S. at 614 n.13)); Rue, 819 F.2d at 1492. The resolution of these questions will depend on the facts and circumstances of each case. Wujkowski, 929 F.2d at 985 (citing Fisher, 425 U.S. at 410)). The authenticity of the requested documents may be established independently without reference to the witness's act of producing them. Id. at 1494.

A witness may lose his Fifth Amendment privilege by making prior statements on the same subject although such a waiver is not lightly inferred. Stoecker, 103 B.R. at 187 (cites omitted). Once a witness has freely testified to incriminating facts, he may not refuse to impart details. Id. (cites omitted). Likewise, if a person has previously produced some documents of the type requested, he cannot claim the privilege and refuse to produce any more. Id. at 188 (cite omitted). He must claim the privilege at the outset or not at all. Id.

Once a witness pleads guilty to or is convicted of an offense, his privilege against self-incrimination is generally lost unless the communication sought would reveal other crimes. Litton, 74 B.R. at 559 (cites omitted).

III.

At the hearing on Trustee's Motions to Compel Discovery, it was not readily apparent to the Court that a reasonable possibility existed that the documents sought by Trustee could be used against Debtor or Margaret Reinbold in any way in a criminal prosecution. Consequently it was Debtor's and Margaret Reinbold's burdens to

show that they properly invoked their Fifth Amendment privilege against the documents' production. Those burdens were not met.

First, Debtor and Margaret Reinbold refused to produce **any** documents. Such a blanket assertion of their privilege did not recognize that the content of the documents is not protected from discovery because, inter alia, the content was not compelled, the documents are property of the estate, they are corporate or other business entity records, or they are records required by law to be kept. The Court's review of its Order for Examination of Debtor (Rule 2004) entered January 17, 1991 and the Court's Order for Examination of Margaret Reinbold (Rule 2004) entered January 17, 1991 indicates that all of the documents ordered to be produced are business records or financial documents prepared or received by Debtor, Margaret Reinbold, or a corporate entity in the normal course of their farming business. Neither Debtor nor Margaret Reinbold offered the Court any information with which the Court could otherwise characterize the documents.

Second, Debtor and Margaret Reinbold did not clearly claim their privilege against self-incrimination on the grounds that the **act** of producing any of the requested documents would incriminate them. Neither Debtor nor Margaret Reinbold made any showing on which the Court could conclude that the act of producing the documents would constitute incriminating testimony about the documents' possession, existence, and authenticity.

An order will be entered granting Trustee's Motions for Order

Compelling Discovery. The order also will impose certain restrictions to insure a timely resolution of this matter.

Debtor and Margaret Reinbold are cautioned that every effort should be made to comply with the Court's Order for Examination of Debtor (Rule 2004) entered January 17, 1991, Order for Examination of Margaret Reinbold (Rule 2004) entered January 17, 1991, and the Order to be entered in conjunction with this Memorandum. Any attempts by Debtor or Margaret Reinbold to circumvent these Orders or further the delay these proceedings through spurious assertions of their Fifth Amendment privilege are subject to appropriate sanctions. See Bankr. Rs. 7037 and 9014.

Dated this 19th day of July, 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. 87-10311-INH
WILFRED REINBOLD,)
) CHAPTER 7
)
) ORDER GRANTING TRUSTEE'S
Debtor.) MOTIONS FOR ORDER COMPELLING
) DISCOVERY

In recognition of and compliance with the Memorandum of Decision Re: Motions for Order Compelling Discovery entered this day,

IT IS HEREBY ORDERED that Chapter 7 Trustee Peter J. Buttaro's Motions for Order Compelling Discovery are GRANTED; and

IT IS FURTHER ORDERED that Debtor and Margaret Reinbold shall appear before Trustee within forty-five days, upon twenty days notice by Trustee of the date, time, and place for the examination, and shall produce for Trustee on or before that examination date all documents set forth in the Court's Order for Examination of Debtor (Rule 2004) entered January 17, 1991 and the Court's Order for Examination of Margaret Reinbold (Rule 2004) entered January 17, 1991.

So ordered this _____ day of July, 1991.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)