

**FILED**

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WISCONSIN

FEB 5 1985

CLERK, U.S.  
BANKRUPTCY COURT  
CASE NO.

In re:

Case Number:

JAMES L. KOLMER

WF7-84-01312

Debtor.

THE CITIZENS NATIONAL BANK  
OF STEVENS POINT; THE SPENCER  
STATE BANK; MARVIN J. DIETSCH  
and KATHLEEN E. DIETSCH,

Adversary Number:

84-0256-7

Plaintiffs,

v.

DR. JAMES L. KOLMER,

Defendant.

FINDINGS OF FACT, CONCLUSION OF LAW  
AND  
ORDER DENYING MOTION FOR PROTECTIVE ORDER<sup>1</sup>

The Citizens National Bank of Stevens Point (CNB), by Terwilliger, Wakeen, Piehler, Conway & Klingberg, S.C., Marvin J. and Kathleen E. Dietsch, by Juneau, Johnston & Minder, Lawyers, S.C., and the Spencer State Bank (SSB), by Crooks, Low & Connell, S.C., having filed separate adversary proceedings to determine certain debts to be non-dischargeable and a joint adversary pro-

<sup>1</sup> An identical Order is entered this day in Citizens Nat'l. Bank v. Kolmer, Adv. No. 84-0225-7, Dietsch v. Kolmer, Adv. No. 84-0254-7, Spencer State Bank v. Kolmer, Adv. No. 84-0255-7, and Citizens Nat'l. Bank, et al. v. Kolmer, Adv. No. 84-0256-7. Hereinafter, these cases will be jointly referred to as the Kolmer adversary proceedings.

ceeding objecting to discharge; and Debtor James L. Kolmer, by Louderman, Hayes, Van Camp, Priester, Strother & Schwartz, S.C., having filed a motion for a protective order;<sup>2</sup> and a hearing having been held; and CNB appearing by Attorney Rhea A. Myers; and the Dietsches appearing by Attorney Ann E. Stevning-Roe; and SSB appearing by Attorney James B. Connell; and the Debtor appearing by Attorney David J. Schwartz; the Court, being fully advised in the premises, FINDS THAT:

1. Complaints filed in the Kolmer adversary proceedings allege that the Debtor engaged in a scheme to defraud his creditors which included a secret transfer of business assets and operations to Kolmer Chiropractic Corporation (KCC) which, in turn, was transferred to his wife, Carrie Kolmer, and operated as the alter ego of the Kolmers.

2. The Debtor is the president of KCC and its only chiropractor. KCC was incorporated by the Debtor on or about September 1, 1982, and gratuitously transferred to his wife on or about September 2, 1982. The Debtor's wife is also a KCC employee.

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<sup>2</sup> According to this Court's docket sheet, the Debtor's motion was filed in the CNB v. Kolmer matter. However, the parties have litigated the issues raised by the motion in all of the Kolmer adversary proceedings and, as a matter of judicial economy, this Court now resolves the issues raised by the motion as they apply to all of said proceedings. See Footnote 1 supra.

(The motion at bar requests protection against certain requests for documents. A separate motion for a protective order relating to the Debtor's motion to compel substitution of attorneys has been filed in CNB, et al. v. Kolmer and is not the subject of this decision.)

3. A review of the records in the above captioned bankruptcy proceeding and the Kolmer adversary proceedings demonstrates that the allegations in the Complaints are not based upon pure speculation or surmise.

4. In three separate adversary proceedings the Complainants assert that certain of Mr. Kolmer's debts are not dischargeable under 11 U.S.C. sec. 523(a)(2) (debt obtained or renewed by false pretenses, a false representation, actual fraud or a materially false written statement).<sup>3</sup> In a joint adversary proceeding the Complainants assert that Mr. Kolmer should be denied a discharge under 11 U.S.C. sec. 727(a)(2)-(5) (act to hinder, delay or defraud a creditor within one year before filing for bankruptcy, wrongdoing in connection a bankruptcy proceeding or unexplained losses).

5. The Debtor seeks relief from discovery requests for certain financial records of KCC and Ms. Kolmer.

6. "Parties may obtain discovery regarding any matter . . . which is relevant to the subject matter involved in the pending action . . ." Fed.R.Civ.P. 26(b)(1) (emphasis added) (applies in bankruptcy adversary proceedings by virtue of Fed.R.Bankr.P. 7026). Cf. Fed.R.Bankr.P. 2004 (examination of any person regarding matters relevant to bankruptcy proceeding).

7. Intent to deceive is an element of proof in all of the

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<sup>3</sup> In Dietsch v. Kolmer there is a further allegation of conversion of cattle and a resulting non-dischargeable debt. See 11 U.S.C. sec. 523(a)(6) (debt for willful and malicious injury).

Kolmer adversary proceedings. See In re Schnore, 13 B.R. 249, 252 (Bankr.W.D.Wis. 1981) (11 U.S.C. sec. 523(a)(2)(A)); 11 U.S.C. sec. 523(a)(2)(B)(iv); 11 U.S.C. sec. 727(a)(2) ("intent to hinder, delay or defraud").

8. Evidence that KCC was, from its inception, covertly operated as the alter ego of the Kolmers would be circumstantial evidence that the Debtor intended to deceive his creditors and relevant to the subject matter involved in the Kolmer adversary proceedings. See 37 Am.Jur.2d Fraud and Deceit sec. 450 (1968) (admissibility of circumstantial evidence). (Such evidence may also be direct evidence of other elements of the Complainants' cases. See e.g., 11 U.S.C. sec. 727(a)(2) (concealment of debtor property).)

9. Under Fed.R.Civ.P. 26(c), the court, for good cause shown, may protect a party against an abusive or unduly burdensome discovery request.

10. "Where a plaintiff has shown not even reasonable grounds to support his allegations . . . and where the discovery costs . . . are substantial, justice requires that a protective order be granted." Isaac v. Shell Oil Co., 83 F.R.D. 428, 432 (E.D.Mich. 1979). This is not such a case. See Paragraphs 2 & 3 supra.

11. It is axiomatic that a party can not be ordered to produce documents which are beyond his possession, custody and control. See Fed.R.Civ.P. 34(c) (permits independent action against a non-party for production of documents) (applies in

bankruptcy adversary proceedings by virtue of Fed.R.Bankr.P. 7034).

12. However, the Complainants' request for documents that may be available<sup>4</sup> to the Debtor is not abusive or burdensome: if the Debtor, in fact, does not have possession, custody or control of the requested documents he may so state in his response to the Complainants' request, Fed.R.Civ.P 34(b).

13. Whether a substantial cost of compliance is grounds for a protective order is measured by the nature, importance and complexity of the inquiry involved in a given case. Lehnert v. Ferris Faculty Ass'n., 556 F.Supp. 316, 318 (W.D.Mich 1983). Even assuming that the Debtor could substantiate his claim that the Complainants' request would involve a substantial cost of compliance, the inquiry involved in this case--which involves the determination of the Debtor's financial dealings--would appear to justify such costs.

14. If, in fact, certain documents are already in the possession of Complainant CNB, the Debtor may so state in response to any request for those documents by CNB. Cf. Paragraph 12 supra.

#### CONCLUSION OF LAW

The Debtor has not made a showing of good cause for a Rule 26(c) protective order.

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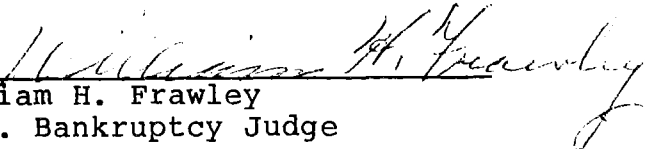
<sup>4</sup> See generally In re Folding Carton Antitrust Litigation, 76 F.R.D. 420, 423 (N.D.Ill. 1977) (a party with a significant ongoing relationship with a non-party in possession, custody or control of discoverable documents must, "at the very least", request those documents be made available for production).

ORDER

IT IS ORDERED THAT the Motion for Protective Order filed by James L. Kolmer in Adv. No. 84-0225-7 be, and the same hereby is, DENIED.

Dated: February 5, 1985.

BY THE COURT:

  
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William H. Frawley  
U. S. Bankruptcy Judge

cc: Attorney Rhea A. Myers (Terwilliger, Wakeen, Piehler, Conway & Klingberg, S.C.)  
Attorney Ann Steyning-Roe (Juneau, Johnston & Minder, S.C.)  
Attorney James B. Connell (Crooks, Low & Connell, S.C.)  
Attorney David J. Schwartz (Louderman, Hayes, Van Camp, Priester, Strother & Schwartz, S.C.)