

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WISCONSIN

FILED  
MAR 20 1985  
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U.S. BANKRUPTCY COURT

In re:

Case Number:

JAMES L. KOLMER

WF7-84-01312

Debtor.

THE CITIZENS NATIONAL BANK  
OF STEVENS POINT; THE SPENCER  
STATE BANK; MARVIN J. DIETSCHÉ,  
AND KATHLEEN E. DIETSCHÉ,  
Plaintiffs,

Adversary Number:

84-0256-7

v.

DR. JAMES L. KOLMER,

Defendant.

FINDINGS OF FACT, CONCLUSION OF LAW  
AND  
ORDER DENYING MOTION TO DISQUALIFY<sup>1</sup>

The Citizens National Bank of Stevens Point (CNB), by Terwilliger, Wakeen, Piehler, Conway & Klingberg, S.C., Marvin J. and Kathleen E. Dietsche, 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 proceeding objecting to discharge; and Debtor James L. Kolmer, by

<sup>1</sup> An identical Order is entered this day in Citizens Nat'l. Bank v. Kolmer, Adv. No. 84-0225-7, Dietsche 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.

Louderman, Hayes, Van Camp, Priester, Strother & Schwartz, S.C., having filed a motion for disqualification;<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 Debtor James L. Kolmer 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. Mr. Kolmer is a general partner in Spencer Farms.

3. 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

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<sup>2</sup> A motion for a protective order pending a determination of the disqualification motion was filed in the CNB, et al. adversary proceeding but never brought on before the Court.

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).

4. The Debtor, in his Answer, denies material aspects of the Complaint's allegations and affirmatively alleges that, inter alia, he is entitled to the benefit of setoff or estoppel because he was misled and defrauded by Plaintiffs Marvin J. and Kathleen E. Dietsche and/or their agents, other Spencer Farms partners.

5. In 1982 and 1983, Terwilliger, Wakeen, Piehler, Conway & Klingberg, S.C., represented Spencer Farms partner Mark Brod during the formation of the Spencer Farms partnership and the concurrent purchase of the Dietsche farm by Spencer Farms. It appears that neither Mr. Kolmer nor the partnership had separate counsel.

6. The Terwilliger firm has withdrawn from representing CNB.

7. The Debtor has filed a motion to disqualify counsel for the Dietsches and for SSB because they "have filed a joint complaint with . . . the Terwilliger law firm. In so doing, they have joined in a co-counsel capacity as to such lawsuits [sic]

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<sup>3</sup> In the Dietsche adversary proceeding 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).

where the confidences of one client or of other clients as held by one attorney may or have become disclosed to such other attorneys either intentionally or inadvertently. If such conduct has not already occurred, at a minimum the appearance of grave improprieties exists." Affidavit of David J. Schwartz (filed in the CNB, et al. adversary proceeding December 17, 1984).

8. James B. Connell has informed this Court that "[a]ll information he has, to this date, received concerning the financial status of James L. Kolmer . . . has been obtained . . . by his own efforts." Affidavit of James B. Connell (filed in the SSB adversary proceeding Jan. 29, 1985; filed in the CNB et al. adversary proceeding Feb. 1, 1985).

9. "[D]isqualification is a 'drastic measure which courts should hesitate to impose except when absolutely necessary.'" Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983).

10. While this Court will disqualify counsel in an appropriate case, e.g., In re Goetz, 43 B.R. 849 (Bankr.W.D.Wis. 1984), the matter at bar does not require such a drastic measure: any appearance of impropriety springs from affirmative non-exculpatory allegations in the Answer (allegations which do not relate to SSB), the Terwilliger firm has withdrawn and the brief relationship of SSB and Dietsche counsel with the Terwilliger

firm was not of a nature which would result in shared confidences.<sup>4</sup>

CONCLUSION OF LAW

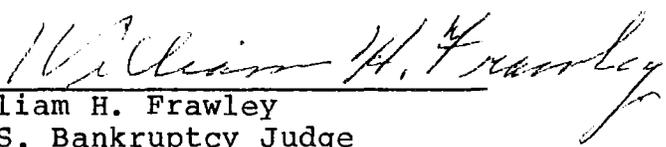
The Debtor has not shown grounds to disqualify counsel for SSB or for the Dietsches.

ORDER

IT IS ORDERED THAT the Motion for disqualification of counsel filed by James L. Kolmer be, and the same hereby is, DENIED.

Dated: March 20, 1985.

BY THE COURT:

  
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William H. Frawley  
U. S. Bankruptcy Judge

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<sup>4</sup> Consideration of a disqualification motion based upon parties joining in a common action must take into account strong policies in favor of resolving common factual disputes in a single proceeding. See Fed.R.Bankr.P. 7020 (applying Fed.R.Civ.P. 20, permissive joinder of parties, to bankruptcy adversary proceedings).

cc: Attorney C. Duane Patterson (Tinkham, Smith, Bliss, Patterson, et al.)  
Attorney James B. Connell (Crooks, Low & Connell, S.C.)  
Attorney Ann Stevning-Roe (Juneau, Johnston & Minder, S.C.)  
Attorney David J. Schwartz (Louderman, Hayes, Van Camp, et al.)  
Attorney Rhea A. Myers (Terwilliger, Wakeen, Piehler, Conway, et al)