

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

In re

**WILLIAM W. BUDROW and
CELESTE LEONE BUDROW aka
CELESTE C. LEONE,**

**Case No. 94-32974-K
Chapter 7**

Debtors.

EDWARD L. MONTEDONICO, TRUSTEE,

Plaintiff,

v.

**Adversary Proceeding
No. 96-0274**

**WILLIAM W. BUDROW,
CELESTE LEONE BUDROW aka
CELESTE C. LEONE; AWCB FAMILY
PRESERVATION TRUST; WILLIAM
CHRISTOPHER BEAUDRAU; CHRIS
FAMILY PRESERVATION TRUST;
KEITH PICKETT, and WCB FAMILY
PRESERVATION TRUST,**

Defendants.

**MEMORANDUM AND ORDER RE PLAINTIFF-BANKRUPTCY TRUSTEE'S
MOTION FOR SANCTIONS COMBINED WITH NOTICE OF FUTURE HEARING**

Introduction

The instant matter before the court arises out of a motion filed by the plaintiff, Edward L. Montedonico, Chapter 7 Trustee ("Bankruptcy Trustee"), by and through counsel of record, requesting this court to impose sanctions against the defendants, William W. Budrow and

Celeste Leone Budrow, the above-named chapter 7 debtors (the “Budrows”)¹ pursuant to Rule 37(b) of the Federal Rules of Civil Procedure which applies in bankruptcy adversary proceedings by virtue of Rule 7037 of the Federal Rules of Bankruptcy Procedure.

In accordance with 28 U.S.C. § 157 (b)(2)(A) this is a core proceeding. The court has jurisdiction of this action under 28 U.S.C. §§ 1334 (a)-(b) and Miscellaneous District Court Order No. 84-30 entered on July 11, 1984. Based on the pleadings, statements of counsel for the Bankruptcy Trustee and Mr. Budrow, acting pro se, and consideration of the entire case record as a whole, the following shall constitute the court’s findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

Background Facts

The relevant background facts may be briefly summarized as follows. On December 19, 1994, the Budrows filed this joint chapter 7 case under the Bankruptcy Code. On March 15, 1996, the Bankruptcy Trustee filed this adversary proceeding, being No. 96-0274, seeking, inter alia, a turnover of property held by WCB Family Preservation Trust, Celeste Carmel Leone, Trustee; AWCB Family Preservation Trust, Celeste Carmel Leone, Trustee; Chris Family Preservation Trust, Celeste Carmel Leone, Trustee; William Christopher Beaudreau; and WCB Industries, Inc.

On or about July 17, 1997, the Bankruptcy Trustee propounded “Plaintiff’s First Set of Interrogatories and Request for Production of Documents” to, among others, the Budrows, pursuant to Rules 33 and 35 of the Federal Rules of Civil Procedure, which apply here by virtue

¹The other defendants are dealt with in a separate order.

of the Federal Rules of Bankruptcy Procedure 7033 and 7035. The Budrows failed to answer or otherwise respond to these discovery requests. A hearing was conducted on September 5, 1997, wherein the court ordered the Budrows to answer all interrogatories propounded and also to produce documents requested pursuant to the Bankruptcy Trustee's discovery requests on or before October 3, 1997.

On or about September 5, 1997, the Budrows each submitted responses; however, none of the discovery requests in the "Interrogatories or Request for Production of Documents" were provided. Instead, the Budrows responded to each discovery request contained in the Interrogatories with the following answer: "[P]ursuant to my Fifth Amendment Rights under the Constitution, I refuse to answer this question on the grounds that the Plaintiff has shown that he will seek to use any answer I provide in an attempt to incriminate me."²

On or about October 20, 1997, the Bankruptcy Trustee filed this motion for sanctions asserting that the responses and objections were not signed under oath and contained absolutely no responsive answers or materials as requested. The Bankruptcy Trustee alleges that the failure of the Budrows to answer Interrogatories and provide requested documents pursuant to the "Requests for Production of Documents" and the Budrows' failure to subsequently comply with

² In addition, the Budrows objected to each interrogatory "on the grounds that the question is overbroad, vague, and addresses property that is not part of the Bankruptcy Estate." The court also notes that the Budrows did not assert the Fifth Amendment privilege with respect to the "Request for Production of Documents." Instead, the Budrows objected primarily based on relevancy.

the court's order of September 5, 1997, compelling the Budrows to answer interrogatories and produce documents, entitle the Bankruptcy Trustee to receive sanctions against the Budrows pursuant to Rule 37(b) of the Federal Rules of Civil Procedure.

On March 3, 1998, a hearing on this motion was held in which the court heard oral statements and arguments from the Bankruptcy Trustee's attorney and also Mr. Budrow, acting pro se. At that time, Mr. Budrow explained that he and Mrs. Budrow asserted their Fifth Amendment privilege in the interrogatories because they have been under investigation, although never indicted, by the Internal Revenue Service in the past and that the IRS could, at any time, "change its mind."

Discussion

The ultimate issue before the court here is whether an invocation of the Fifth Amendment privilege by the Budrows actually is justified and, if so, to what extent. The Fifth Amendment of the United States Constitution provides, in pertinent part, that "no person . . . shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment privilege against self-incrimination is available to any individual in any civil, administrative, or judicial proceeding, and can be asserted in the investigative as well as the adjudicative stage of that proceeding. *McCarthy v. Arndstein*, 266 U.S. 34 (1924); *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

The privilege extends not only to answers which would in and of themselves support a criminal conviction, but also to answers which would furnish a link in the chain of evidence needed to prosecute. *Hoffman v. United States*, 341 U.S. 479 (1951); *Maness v. Meyers*, 419 U.S. 449 (1975); *Kastigar v. United States*, 406 U.S. 441 (1972). See also *Bank One of*

Cleveland v. Abbe, 916 F.2d 1067 (6th Cir. 1990); *In re Morganroth*, 718 F.2d 161 (6th Cir. 1983). A witness must, however, show a “real danger,” and not a mere imaginary, remote or speculative possibility of prosecution. *Morganroth*, 718 F.2d at 167. See also *United States v. Apfelbaum*, 445 U.S. 115 (1980); *Rogers v. United States*, 340 U.S. 367 (1951). Furthermore, a witness’ mere “say so” does not by itself establish the hazard of incrimination. *Hoffman*, 341 U.S. at 486.

A person who seeks to avoid sanctions on Fifth Amendment grounds must show that the requested discovery will be incriminating. *Abbe*, 916 F.2d at 1076. For example, in *Morganroth*, the court held that the witness’ answer to each deposition question of “I refuse to answer on the ground that the answer might tend to incriminate me” was insufficient. 718 F.2d at 166-67. The Sixth Circuit Court of Appeals stated that the witness “must supply such additional statements under oath and other evidence to the District Court in response to each question propounded so as to enable the District Court to reasonably identify the nature of the criminal charge.” *Id.* at 167. A blanket assertion of the privilege by the witness is not sufficient; instead, the privilege must be asserted by the witness with respect to particular questions, and in each instance, the court must determine the propriety of the refusal to testify. *Id.* at 167.

In order to determine the sufficiency of the assertion, the trial court must examine the claimant-witness to determine the validity of the claim, and in appropriate cases, initiate a hearing to determine whether the alleged fears of self-incrimination actually are legitimate. *Abbe*, 916 F.2d at 1076. See also *Morganroth*, 718 F.2d at 169-70 (“a witness must supply personal statements under oath or provide evidence with respect to each question propounded to him to indicate the nature of the criminal charge which provides the basis for his fear of

prosecution”). For example, in *Abbe*, both pro se defendants relied on the general phrase: “I hereby invoke my fifth amendment privilege against self incrimination.” The Sixth Circuit held that the court should have (1) required the two witnesses to demonstrate that the requested answers would be incriminating; (2) made a determination as to the constitutional propriety of the refusal to answer the questions put to them; and (3) ordered them to answer such questions as were not privileged. *Abbe*, 916 F.2d at 1077.

The privilege claimant, however, does not initiate such activities; rather, it is “incumbent upon the trial court . . . to conduct a particularized inquiry . . .” *Abbe*, 916 F.2d at 1076 (citing *In re Endres*, 103 B.R. 49, 54 (Bankr. N.D.N.Y. 1989)). See also *Scarfia v. Holiday Bank*, 129 B.R. 671 (Bankr. M.D. Fla. 1990). Naturally, the claimant must cooperate in supplying the court with relevant information, to the extent consistent with preservation of the privilege. See, for example, *Hoffman*, 341 U.S. at 486-87. At the same time, if it is evident from the implications of a question that a responsive answer might be dangerous to the witness because an injurious disclosure could result, then the court need not inquire further. In other words, in appraising the claim, the court “must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.” *Hoffman*, 341 U.S. at 487.

Conclusions

The Budrows assert in their answers to the interrogatories that they invoked their Fifth Amendment privilege on grounds that the Bankruptcy Trustee has shown that he will seek to use the answers to incriminate them. Although the Budrows made an attempt to qualify their invocation of the privilege, the court finds the answer to be insufficient to reasonably identify the nature and probability of the criminal charge which the Budrows assertedly fear. Mr. Budrow

also stated in open court that he feared a resurgence of an IRS investigation if he were to answer the interrogatories propounded by the Bankruptcy Trustee. Even if Mr. Budrow's statements had been proffered under oath, the court nonetheless finds that Mr. Budrow's statements are insufficient for the court to make a ruling on the propriety of the invocation as to each and every interrogatory.

Since it is not the Budrows' burden to initiate a hearing to determine whether the alleged fears of self-incrimination are legitimate, it is incumbent upon this court to conduct a particularized inquiry. *Abbe*, 916 F.2d at 1076. In light of the foregoing circumstances and applicable case law, this court will schedule and conduct a hearing, whereby the Budrows will be examined under oath by the court. This is appropriate to determine on a question by question basis whether the Fifth Amendment assertions in the Budrows' answers to the Bankruptcy Trustee's interrogatories are justifiable.

The court notes and strongly cautions the Budrows that if it determines that a requested answer to any of the interrogatories would be incriminating, and thus the Budrows choose to assert their Fifth Amendment privilege, then the court may at its discretion draw adverse inferences against them. See, for example, *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (the Fifth Amendment does not forbid adverse inferences to be drawn against parties to a civil action when they claim the fifth amendment). Additionally, if the requested answer to any of the interrogatories would not be incriminating (that is, not privileged), then the Budrows will be ordered to answer such question(s) at the hearing or within the time fixed by the court at the hearing.

The court again suggests that the Budrows consult and employ an attorney of their choice

to represent them in this adversary proceeding.

Based on the foregoing and the case record as a whole,

IT IS ORDERED AND NOTICE IS HEREBY GIVEN that a hearing will be conducted in accordance with the foregoing on Tuesday the 7th of April, 1998 at 11:00 a.m. in the United States Bankruptcy Court, Courtroom No. 945, 200 Jefferson Street, Memphis, Tennessee.

BY THE COURT

David S. Kennedy
Chief United States Bankruptcy Judge

Dated: March 9, 1998