

Dated: September 11, 2023
The following is ORDERED:



A handwritten signature in black ink, appearing to read "Denise E. Barnett".

Denise E. Barnett
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
Shannetria Renee Newberry,
Debtor.

Case No. 23-20515
Chapter 7

ORDER DENYING IN PART AND GRANTING
IN PART THE UNITED STATES TRUSTEE'S MOTION TO
COMPEL RESPONSES TO DISCOVERY (LIMITED TO REQUEST 8)

This case came before the Court on August 29, 2023, at 9:30 a.m., on the United States Trustee's ("Movant") Expedited Motion to Compel Responses to Discovery pursuant to Rule 37, Federal Rules of Civil Procedure, made applicable in contested matters pursuant to Bankruptcy Rules 7037 and 9014, Federal Rules of Bankruptcy Procedure.¹ Movant's motion to examine attorney's fees pursuant to section 329(a) of the Bankruptcy Code is the underlying motion that

¹ ECF No. 70, United States Trustee's Mot. to Compel, at 1.

gave rise to Movant’s request for production of documents and this motion to compel.² At issue is request for production of document number 8, (“Request 8”), which asks Shannetria Renee Newberry’s (“Debtor’s” or “Ms. Newberry’s”) counsel to turn over all evidence of communication about the meeting of creditors. Debtor’s attorney, Curtis Johnson (“Mr. Johnson”), proffered at the hearing that the text messages between he and Ms. Newberry are protected under the attorney-client privilege, and submitted screenshots of the text messages to the Court for in-camera review. The Court took the matter under advisement.

On January 31, 2023, Mr. Johnson filed a Chapter 7 petition on behalf of Ms. Newberry. A meeting of creditors was first scheduled on March 1, 2023, but was continued to March 15, then to March 29, April 26, May 10, and finally to June 7, 2023.

On May 11, 2023, Movant emailed Mr. Johnson its First Requests for Production of Documents.³ Discovery responses were due by June 12, 2023, pursuant to Fed. R. Civ. P. 34 (b)(2)(A).⁴

On June 5, 2023, Mr. Johnson asked Movant for additional time to respond: “I am in need of 21 additional days to respond to your discovery request on behalf of the debtor and myself. Let me know whether you can consent to this extension of time or whether I need to file a motion.”⁵ The same day, Movant’s ’s counsel emailed Mr. Johnson, stating that: “I understand

² ECF No. 33, Motion to Examine Attorney’s Fees Pursuant to 11 U.S.C. § 329 (stating that counsel inadvertently filed a disclosure of compensation form that lists attorneys in the amount of the “no look” chapter 13 fee and has not amend the disclosure of compensation as of the date the motion to examine fees was filed).

³ ECF No. 70, United States Trustee’s Mot. to Compel, at 1.

⁴ *Id.*

⁵ *Id.*

your request to be seeking to and through July 3, 2023, to comply with discovery. That is agreeable with the understanding that all documents and written responses to the document requests will be emailed to me by July 3, 2023; and that it may be necessary to schedule one or more depositions after that depending on what the documents indicate. Thanks.”⁶

On July 11, 2023, Movant followed up with Mr. Johnson inquiring about the discovery responses and documents.⁷

On July 18, 2023, Mr. Johnson served his response to the U.S. Trustee’s Request for Production of Documents objecting to Request 8 on the basis of attorney-client privilege.⁸

On July 20, 2023, Movant called Mr. Johnson, and could not reach him.⁹

On August 7, 2023, Movant filed its expedited motion to compel discovery responses.¹⁰

At the hearing conducted on August 29, 2023, Movant explained that Mr. Johnson provided documents to Movant, but there is a dispute regarding Request 8 which reads:

Produce all documents and communications that mention, refer, or relate to the Debtor’s appearance at the Meeting of Creditors including whether the Debtor should or would appear at the Meeting of Creditors, whether the Debtor should not or would not appear at the Meeting of Creditors, and whether or why the Debtor’s Meeting of Creditors would not proceed on any date.¹¹

Mr. Johnson did not file a response to the motion to compel discovery but appeared at the hearing and proffered that he had responded and produced documents except a set of specific

⁶ *Id.* at 2.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ ECF No. 70.

¹¹ *Id.*, Exh. 1.

documents (involving counsel’s communication with his client). Mr. Johnson objected to the turnover of this specific set of documents, contending that the documents are not relevant and protected by the attorney-client privilege. Movant argued that the objection was not timely, and the attorney-client privilege was waived because of failure to comply with Bankruptcy Rule 7026(b)(5)(a). To resolve the discovery dispute, Mr. Johnson submitted forty-two (42) pages of screenshots of text messages to the Court for in-camera review.¹² The Court received the documents and took the matter under advisement.

DISCUSSION

Communications are protected by attorney-client privilege if: “(1) [] legal advice of any kind is sought (2) from a professional legal adviser in [the adviser’s] capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are . . . permanently protected (7) from disclosure by [the client] or by the legal adviser, (8) unless the protection is waived.”¹³ The burden rests with the party asserting the privilege.¹⁴

Federal Rule of Evidence 502 outlines the parameters of attorney-client privilege.¹⁵ The attorney-client privilege protects the relationship between attorneys and their clients, allowing

¹² On August 29, 2023, Mr. Johnson served another response to the U.S. Trustee’s Request for Production asserting that “the Debtor has no additional documents to produce in response to this request in addition to those produced by her counsel” in regard to Request 8.

¹³ *Reed v. Baxter*, 134 F. 3d 351, 355-56 (6th Cir. 1998) (citing *Fausek v. White*, 965 F.2d 126, 129 (6th Cir. 1992)) (listing the elements of the attorney-client privilege).

¹⁴ *United States v. Dakota*, 197 F.3d 821, 825 (6th Cir. 1999) (citing *In re Grand Jury Investigation*, No. 83–2–35, 723 F.2d 447, 450 (6th Cir. 1983)) (“The burden of establishing the existence of the privilege rests with the person asserting it.”)

¹⁵ Fed. R. Evid. 502.

for open and honest discussions in confidence.¹⁶ The privilege does not protect general communication between an attorney and client that falls outside elements of the attorney-client privilege.

The Court reviewed the forty-two (42) pages of screenshots of the text messages submitted for in-camera review. Of the forty-two pages, only two pages falls within the scope of Request 8. The two pages contain information about the time of a creditors' meeting, connecting online, and the type of document required to be presented at the meeting of creditors, and contain no legal advice. The Court concludes that the two pages are not protected by attorney-client privilege because they contain basic information about the meeting of creditors. The two pages of text messages regarding the meeting of creditors do not satisfy the elements of attorney-client privilege. The remaining forty (40) pages are outside the scope of Request 8 and shall not be turned over to Movant.¹⁷ Accordingly, it is **ORDERED**:

1. The Motion to Compel Responses to Discovery regarding Request for Production of Document Number 8 is denied in part and granted in part.

2. The relevant two (2) pages of text messages that mention the meeting of creditors shall be produced to the United States Trustee.

3. The remaining forty (40) pages of text messages fall outside the scope of Request for Production of Document 8 and shall not be turned over to the United States Trustee.

¹⁶ See *In re French*, 162 B.R. 541, 545 (D. S.D. 1994) (“Fed. R. Evid. [502] applies to all states of all actions and proceedings, including bankruptcy court actions such as a Bankruptcy Rule 2004 examination.”).

¹⁷ The Court will not decide whether the attorney-client privilege was waived because only two pages of the documents submitted are responsive to Request 8, and those two pages do not satisfy the elements of attorney-client privilege.

cc: Debtor
Chapter 7 Trustee
United States Trustee
All Creditors on the Matrix