

**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, Chapter 7
Trustee of the Estates of the above-named Debtors,**

Plaintiff,

v.

Adv. Proc. No. 96-0274

**WILLIAM W. BUDROW; CELESTE LEONE
BUDROW aka CELESTE C. LEONE;
THE WCB FAMILY PRESERVATION TRUST;
CELESTE CARMEL LEONE, TRUSTEE; THE
AWCB FAMILY PRESERVATION TRUST;
CELESTE CARMEL LEONE, TRUSTEE;
THE CHRIS FAMILY PRESERVATION TRUST;
CELESTE CARMEL LEONE, TRUSTEE;
WILLIAM CHRISTOPHER BEAUDREAU; AND
WCB INDUSTRIES, INC.,**

Defendants.

**MEMORANDUM AND ORDER RE ABOVE-NAMED DEBTORS' "VERIFIED
MOTION FOR JUDICIAL NOTICE OF THE FIFTH AMENDMENT" COMBINED
WITH NOTICE OF THE ENTRY THEREOF**

These matters are before the court on consideration of a written motion filed by the defendants, the above-named debtors, William W. Budrow and Celeste Leone Budrow ("Mr. Budrow" or "Mrs. Budrow" or jointly as the "Budrows"), acting pro se, requesting this court (1) to take judicial notice of their Fifth Amendment rights; (2) to rule that discovery relative to the above-

captioned defendant-trusts is irrelevant; (3) to dismiss the above-entitled adversary proceeding; and (4) to dismiss their joint chapter 7 bankruptcy case.

By virtue of 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 157(a) and Miscellaneous District Court Order No. 84-30. Based on the record, statements of counsel and Mr. Budrow, and the sworn testimony of Mr. Budrow, the following shall constitute the court's findings of fact and conclusions of law in accordance with FED. R. BANKR. P. 7052.

The relevant background facts may be briefly summarized as follows. On December 19, 1994, the Budrows filed the above-captioned joint chapter 7 case. Subsequently, on March 15, 1996, the plaintiff, Edward L. Montedonico, Chapter 7 Trustee herein ("Trustee"), filed this adversary proceeding, being No. 96-0274, seeking, inter alia, a turnover of property held by defendants, The WCB Family Preservation Trust; Cesleste Carmel Leone, Trustee; The AWCB Family Preservation Trust; Celeste Carmel Leone Trustee; The Chris Family Preservation Trust; Celeste Carmel Leone, Trustee; The William Christopher Beaudreau; and WCB Industries, Inc.

On or about July 17, 1997, the Trustee propounded "Plaintiff's First Set of Interrogatories and Request for Production of Documents" to, among other defendants, Mr. Budrow and Mrs. Budrow, pursuant to Rules 33 and 35 of the Federal Rules of Civil Procedure, as adopted by the Federal Rules of Bankruptcy Procedure 7033 and 7035. The Budrows failed to timely answer or otherwise respond to these discovery requests. At the request of the Trustee, a hearing on notice was conducted on September 5, 1997, at which time the court ordered the Budrows to answer on or before October 3, 1997, the interrogatories propounded by the Trustee and also to produce documents requested by the Trustee pursuant to the discovery requests.

On September 5, 1997, Mr. and Mrs. Budrow each submitted responses to the Trustee discovery requests; however, none of the questions in the Trustee's interrogatories were answered and likewise none of the requests for production of documents were provided. Instead, the Budrows responded to each request contained in the Trustee's 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." For convenience, the court incorporates and adopts by reference the "Plaintiff's First Set of Interrogatories and Request for Production of Documents Propounded to William W. Budrow" along with the "Plaintiff's First Set of Interrogatories and Request for Production of Documents Propounded to Celeste Leone Budrow."

On April 15, 1998, a hearing on the motion was held; the court heard oral statements of the Trustee's attorney and Mr. Budrow, acting pro se. At this hearing, Mr. Budrow reasserted his Fifth Amendment privilege under oath to each discovery request contained in the Trustee's interrogatories and asserted for the first time under oath his Fifth Amendment privilege to each discovery request contained in the request for production of documents. Mr. Budrow essentially testified at the hearing that he could not go into any of the details due to his fear of subjecting himself (and Mrs. Budrow) to incrimination involving the Internal Revenue Service.

The Fifth Amendment of the United States Constitution provides, in relevant part here, that "no person . . . shall be compelled in any criminal case to be a witness against himself." This court indeed, as requested by the Budrows, takes judicial notice that 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). Furthermore, this 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). For example, a witness’ “say so” does not by itself establish the hazard of incrimination. *Hoffman*, 341 U.S. at 486. The invoker must show that the requested discovery will be incriminating. *Abbe*, 916 F.2d at 1076. 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.

Since Mr. Budrow apparently feels that he (and Mrs. Budrow) should not explain further how each of the Trustee’s discovery requests would be incriminating due to their fears involving the Internal Revenue Service and since Mrs. Budrow was not present to testify, the court will rule based on “its personal perception of the peculiarities of the case” as to whether a responsive answer to the

discovery requests would be incriminating or furnish a link in the chain of evidence needed to prosecute. Considering a totality of the particular facts and circumstances and applicable law, the court finds that a responsive answer by the Budrows to Interrogatory Nos. 1-2, 6, 8, 13, 15-17, 21-23, and 25 of the Trustee could result in an injurious disclosure; therefore, the Budrows' fears of self-incrimination as to those discovery requests are legitimate. As to Interrogatory Nos. 3-5, 7, 9-12, 14, 18-20, 24, and 26-29, the court finds that the discovery requests furnish no link in the chain of evidence needed to prosecute by the United States of America on behalf of the Internal Revenue Service and that there is no legitimate basis for the Budrows' fears of self-incrimination.

The court will now determine the Budrows' right to the Fifth Amendment privilege regarding the Trustee's request for production of documents. As previously noted, on July 17, 1997, the Trustee additionally propounded, along with the aforesaid interrogatories, a request for production of documents to Mr. and Mrs. Budrow. The Budrows failed to respond to the discovery requests within the thirty (30) days prescribed by Rule 34 of the Federal Rules of Civil Procedure, which applies here by virtue of the Federal Rules of Bankruptcy Procedure 7034. After notice and a hearing, the court ordered the Budrows to respond to the discovery requests of the Trustee. The Budrows each submitted responses on September 5, 1997.

In their September 5, 1997 responses to the Trustee's request for production of documents, with exception to Question No. 5, the Budrows did not plead the Fifth Amendment, but instead objected primarily based on relevancy and in some instances stated that they did not possess the requested documents. Finally, on April 14, 1998, in the Budrows' "Verified Motion for Judicial Notice Re: 5th Amendment," they asserted for the first time that their Fifth Amendment privilege also extends to the Trustee's request for the production of documents. It was not until April 15,

1998, that Mr. Budrow actually asserted the Fifth Amendment to each document request in the request for production of documents under oath. With exception to Question No. 5, Mrs. Budrow has yet to assert more than a mere “blanket” Fifth Amendment privilege to the Trustee’s request for production of documents.

Generally, in the absence of an extension of time or good cause, the failure to object to discovery requests within the time fixed by Federal Rules of Civil Procedure constitutes a waiver of any objection. This is true even of an objection that the information sought is privileged. See, for example, *Maness v. Meyers*, 419 U.S. 449, 466 (1975); *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981). See also *United States v. Hatchett*, 862 F.2d 1249, 1251-52 (6th Cir. 1988); *United States v. A & P Arora, Ltd.*, 46 F.3d 1152 (10th Cir. 1995); *Day v. Boston Edison Co.*, 150 F.R.D. 16, 21-25 (D. Mass. 1993); *United States v. 58.16 Acres of Land*, 66 F.R.D. 570 (E.D. Ill.1975).

This court, of course, is sensitive to the fact that a waiver of the Fifth Amendment should not be lightly inferred and cannot properly be found upon vague and uncertain grounds. *Emspak v. United States*, 349 U.S. 190, 195 (1955). At the same time, the privilege against self-incrimination "is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion." *Maness v. Meyers*, 419 U.S. 449 (1975). See also *Rogers v. United States*, 340 U.S. 367, 371 (1951) (rejecting defendant's claim of privilege as "pure afterthought"); *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981) (claimant waived Fifth Amendment privilege due to the “the timing and nature of appellant's objections, the dilatory and evasive tactics, and the intentional and willful flouting of the obligations of the discovery provisions”).

Here, the Budrows asserted the Fifth Amendment nine months after the Trustee’s request for production of documents was served and seven months after they had already filed late responses

objecting, not based on Fifth Amendment grounds, but as to the relevancy of the requested document production. The court notes that although acting pro se, the Budrows nonetheless were aware of their right to plead the Fifth Amendment since they asserted it in their response to each interrogatory and to Question No. 5 in the request for production of documents. Based on the foregoing circumstances of this adversary proceeding, the court finds that the Budrows not only “lost” their Fifth Amendment privilege, but “affirmatively waived” their Fifth Amendment privilege as to the document production in the request for production of documents, with the exception of Question No. 5.¹ See *United States v. Charles George Trucking Co.*, 642 F.Supp. 329, 334 (D. Mass. 1986) (privilege waived when defendants failed to assert it within thirty day period provided by government agency).

The Trustee also argues that the Budrows waived their Fifth Amendment privilege as to the interrogatories since their testimony at an earlier trial of the section 727(a) objection to discharge touched on several of the key questions in the interrogatories here. It indeed is true that a witness who has answered some questions may be held to have waived his or her Fifth Amendment privilege. See *Rogers v. United States*, 340 U.S. 367 (1951). On the other hand, if a witness has waived the privilege in one civil proceeding, this does not, ipso facto, act as a waiver in the current civil proceeding. See *Pillsbury Company v. Conboy*, 459 U.S. 248 (1983); *In re Morganroth*, 718 F.2d 161 (6th Cir. 1983). See also 28 U.S.C. § 1334(b). Since the current civil action is an adversary proceeding that is commenced by filing a complaint with the court, it is a separate and distinct civil

¹The court also notes that even had Mrs. Budrow not waived her Fifth Amendment right in the late-filed objections, her “blanket” assertion of the privilege in the “Verified Motion for Judicial Notice Re: 5th Amendment” was not a sufficient assertion of the Fifth Amendment. See *Hoffman v. United States*, 341 U.S. 479 (1951); *In re Morganroth*, 718 F.2d 161 (6th Cir. 1993).

proceeding from the hearing arising out of the general objection to discharge. See Fed. R. Bankr. P. 7003. The court, therefore, holds that the Budrows' prior testimony at the section 727(a) hearing was not an automatic waiver of their Fifth Amendment privilege in the instant adversary proceeding.

The Budrows argue that the interrogatories and request for production of documents, specifically those related to the "spend thrift trusts," are irrelevant. The scope of discovery under the Federal Rules of Civil Procedure traditionally is quite broad. See, among others, *Lewis v. ACB Business Svc.*, 135 F.3d 389 (6th Cir. 1998); *Mellon v. Cooper-Jarrett, Inc.*, 424 F.2d 499, 501 (6th Cir. 1970). The scope of examination permitted under Rule 26(b) is broader than that permitted at a trial on the merits. The test is whether the line of interrogation is reasonably calculated to lead to the discovery of admissible evidence. *Id.* See also *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978). The court, therefore, finds that the discovery requests in the Trustee's interrogatories and the request for production of documents are neither irrelevant nor overly broad.

The court also declines at this time to dismiss this adversary proceeding until adequate evidence has been presented to support the Budrows' allegations that the trusts in question are in fact spendthrift trusts or otherwise not subject to a successful attack by the Trustee. The Budrows' desire to dismiss this joint chapter 7 bankruptcy case will be addressed and determined in a separate proceeding, after notice to all parties in interest. See 11 U.S.C. § 707(a); FED. R. BANKR. P. 1017(a) and 2002(a)(5).

Based on the foregoing, Mr. and Mrs. Budrow are hereby ordered to answer on or before May 29, 1998, Question Nos. 3-5, 7, 9-12, 14, 18-20, 24, 26-29 (along with the subparts) of the Trustee's interrogatories and also to produce documents in Paragraph Nos. 1-4 and 6-9 of the Trustee's request for production of documents. Accordingly,

IT IS ORDERED AND NOTICE IS HEREBY GIVEN:.

BY THE COURT

David S. Kennedy
Chief United States Bankruptcy Judge

Dated: April 22, 1998

William W. Budrow & Celeste Loenoe Budrow
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cc: Mr. William W. Budrow and
Mrs. Celeste Leone Budrow
a/k/a Celeste C. Leone
P.O. Box 797
Senatobia, MS 38668

Mrs. Celeste Leone Budrow
a/k/a Celeste C. Leone
375 Ocean Drive West
Stamford, CT 06902

John E. McManus, Esquire
Attorney for Chapter 7 Trustee
100 North Main Building, Suite 2400
Memphis, TN 38103

Edward L. Montedonico, Esquire
Chapter 7 Trustee
200 Jefferson, Suite 1325
Memphis, TN 38103

Thomas H. Fulton, Esquire
165 Madison #2200
Memphis, TN 38103

U.S. Trustee
200 Jefferson, Suite 400
Memphis, TN 38103

xc: Robert E. Orians, Esquire
22 N. Front St., 11th floor
Memphis, TN 38103