



Dated: November 02, 2017
The following is SO ORDERED:


David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

No Place Like Home, Inc.,

Case No. 15-31133-K

Debtor.

Chapter 11

Tax ID: 62-1800046

**MEMORANDUM AND ORDER RE DEBTOR'S MOTION TO COMPEL CLAIMANTS
TO PRODUCE LIMITED TAX RETURNS COMBINED WITH NOTICE OF THE
ENTRY THEREOF**

INTRODUCTION

On March 22, 2016, No Place Like Home, Inc. ("Debtor") filed an objection to claims nos. 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48. (Doc. no. 120.) Matters related to determining the allowance or disallowance of claims against

the bankruptcy estate are core proceedings under 28 U.S.C. § 157(b)(2)(B). This objection has now been set for a consolidated trial on February 14, 2018. Before these matters can proceed to trial, the Court must decide Debtor's motion to compel Claimants to produce limited tax returns that was filed on October 18, 2017. (Doc. no. 381.) A response was filed by Claimants on October 25, 2017. (Doc. no. 383.) A hearing on the Debtor's motion to compel was held in open court on October 27, 2017. Each party provided thoughtful oral statements on behalf of their respective positions.

The sole question before the Court here is whether Debtor is entitled to discover the tax returns of Claimants when those tax returns have no relevance to the substance of the underlying dispute between Debtor and Claimants other than as evidence which *might* impugn Claimants' credibility.

As noted this is a core proceeding under 28 U.S.C. § 157(b)(2)(B). The Court has the statutory and constitutional authority to hear and determine this particular matter subject to the parties' right to appeal under 28 U.S.C.S. 158(a). All parties have consented to the Court's jurisdiction.

BACKGROUND INFORMATION AND PROCEDURAL HISTORY

While the Court is not in a position at this time to make findings of fact as to the pre-petition situation which existed between Debtor and Claimants, the basis of their dispute seems to be as follows.

Before filing bankruptcy, Debtor was engaged in the business of pairing nurses with pediatric patients needing in-home care. (Doc. no. 120.) Prior to November, 2015, Debtor employed these nurses as independent contractors. (*Id.*) As independent contractors, nurses were not paid more for overtime; every hour they worked was paid at their usual hourly rate. (*Id.*)

The Fair Labor Standards Act ("FLSA") regulates overtime pay. (*Id.*) The FLSA sets a minimum rate (1.5 times the usual hourly rate) an employee must be paid for time worked beyond 40 hours in a week. 29 U.S.C. § 207(a)(1). If an employer fails to do so, the FLSA sets out a formula for determining what the underpaid employee is entitled to. 29 U.S.C. § 216(b). The statute of limitations under the FLSA is two years. *See* 29 U.S.C. § 255(a).

While the FLSA does not apply to independent contractors, *Werner v. Bell Family Med. Ctr., Inc.*, 529 F. App'x 541, 546 (6th Circ. 2013), Claimants believe they were misclassified as independent contractors and were, in fact, employees under the FLSA. (Doc. no. 120.) While Debtor is careful not to admit fault in the matter, it has offered to pay Claimants damages in accordance with the formula found in the FLSA for a two-year period. (*Id.*) Claimants, however, have filed claims for damages for a third year plus attorney's fees, interest, and costs. (*Id.*) It is this additional amount that will be the subject of the trial to be held on February 14, 2017.

That is the main dispute existing between the parties. During discovery on these issues, Debtor made the following request:

For any calendar year in which Nurse Creditors are seeking damages in this matter, produce copies of Nurse Creditors' federal and state tax returns for those year(s), as well as the immediately preceding and following years.

(Doc. no. 381.) Claimants objected to this request as irrelevant and disproportionate to the needs of the case. (Doc. no. 383.) The court notes that the request appears to ask for tax returns for each of the Claimants, but at the hearing on this matter, counsel for the Debtor indicated that it only wished to receive tax returns for any Claimant who planned to testify.

Debtor has only provided the Court with one explanation as to how Claimants' tax returns are relevant to this dispute. Debtor argues that the tax returns are relevant to Claimants' credibility. In short, Debtor knows what each Claimant was paid during the years in question

and wants to check if each Claimant reported that amount correctly to the IRS. If a Claimant reported a different amount on her tax return, then Debtor can use the tax returns to attack that Claimant's credibility. It is important to note that Debtor has not actually claimed that any of the Claimants misrepresented her income on her tax return, but that it will be able to check for such a misrepresentation once it has reviewed Claimants' tax returns.

DISCUSSION

The ultimate question before the Court is whether a party may obtain the tax returns of another party when those tax returns have no real relevancy to the underlying matter beyond simply possibly impeaching the credibility of that party. This is an issue of first impression for this Court.

Trial courts have broad discretion in determining the proper scope of discovery. *See, for example, Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998). Discovery is traditionally quite broad. *Id.* at 402. Federal Rule of Civil Procedure 26(b)(1) makes discoverable “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case. . . .”

Both parties agree that tax returns are not privileged and are discoverable in cases where the information they contain (for example a party’s income) is relevant to the issues being litigated. *See, for example, Credit Life Ins. Co. v. Uniworld Ins. Co.*, 94 F.R.D. 113, 119 (S.D. Ohio 1982); *Premium Serv. Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 229 (9th Cir. 1975); *Uto v. Job Site Servs. Inc.*, 269 F.R.D. 209, 209 (E.D.N.Y. 2010). Where the parties disagree is on the question of if tax returns are discoverable when the only value they contain in the current litigation is an attack on credibility.

Neither party has provided, nor has the Court been able to find, a decision by the Sixth Circuit Court of Appeals that is directly on point. The Debtor has provided the Court with an unpublished Sixth Circuit Court of Appeals opinion which states that tax returns can be used to impugn a party's credibility. The Claimants have provided several citations to district court decisions in other circuits which hold that tax returns are not discoverable without a compelling need. The Court will now consider each of these in turn.

First, in *Hunter v. General Motors Corp.* General Motors attacked the credibility of Mr. Hunter by entering into evidence a copy of his tax returns on which he claimed no income despite having received a substantial salary for that year. 149 Fed. Appx. 368, 372-73 (2005) (unpublished). The Sixth Circuit held that admitting the tax returns for the sole purpose of impeaching Mr. Hunter's credibility was not an abuse of discretion by the trial judge. *Id.*

Debtor argues that if tax returns are admissible for impeachment purposes alone, they must also be discoverable for such purposes. However, in the Sixth Circuit, unpublished opinions are not binding authority, only persuasive authority. *Crump v. Lafler*, 657 F.3d 393, 405 (6th Cir. 2011); *see also Sheets v. Moore*, 97 F.3d 164, 167 (6th Cir. 1996) (stating that unpublished opinions "carry no precedential weight . . . [and] have no binding effect on anyone other than the parties to the action"). The Court notes that *Hunter* is distinguishable from the current situation in one notable and highly important regard: Mr. Hunter had not objected to providing his tax returns to General Motors Corp. during discovery, only to how they were later used in court. The Sixth Circuit did not have to decide if tax returns were discoverable for the sole purpose of attacking credibility because it did not have that issue before it. While this Court is sympathetic to Debtor's position that if this evidence is admissible, it must also be

discoverable, such a rule could lead to very troublesome, even absurd discovery requests. It is these types of problems that the cases cited to by Claimants seek to avoid.

There can be little argument that the credibility of a party or witness is relevant. Yet, "defining the scope of discovery related to impeachment is troublesome: the areas to be probed to test a witness' credibility are virtually limitless." *Davidson Pipe Co. v. Laventhol & Horwath*, 120 F.R.D. 455, 462 (S.D.N.Y. 1988). As one court put it, "if usefulness for purposes of impeachment were accepted as the criterion of relevancy, the relevancy test would for all practical purposes be worthless." *Burns v. Phillips*, 50 F.R.D. 187, 188 (N.D. Ga. 1970). In *Davidson Pipe Co.* the court outlined five factors to consider when determining if credibility evidence should be discoverable. The first four factors simply go to whether the evidence is even relevant to the current dispute, but the fifth factor limits what a party may seek notwithstanding its relevancy.

The final factor in determining whether credibility-related discovery is appropriate is whether the party seeking disclosure has a foundation for its inquiry. This consideration is not concerned with the admissibility of the evidence sought; rather, it involves the question of whether there is a reasonable likelihood that any pertinent evidence will be elicited. It would obviously be intolerable for the party seeking disclosure to embark on an examination of every statement ever made by a witness in the hope of unearthing a falsehood. See *In re Fontaine*, 402 F. Supp. 1219, 1221 (E.D.N.Y. 1975); *Dolgow v. Anderson*, 53 F.R.D. 661, 663-64 (E.D.N.Y. 1971). To justify an inquiry into facts relevant solely to credibility, the party seeking discovery must therefore have a factual basis for believing that prior acts of deception will be revealed.

Davidson Pipe Co. at 463.

While the Court acknowledges that discovery under the Rules is meant to be broad, it is not meant to be limitless. In this case, Debtor's only rationale for seeking Claimants' tax returns is that *if* there is a discrepancy in what a particular Claimant reported to the IRS and what Debtor knows Claimant actually earned that year, the tax return will impugn that Claimant's credibility.

Implicit in Debtor's argument is that Claimants' tax returns have no bearing on the substance of this matter and are only relevant as to credibility. However, Debtor has not provided any information to lead the court to believe that Claimants have failed to disclose income on their tax returns. Instead, counsel for Debtor stated at the hearing on this motion that they know what should have been reported to the IRS and they wish to see if that is actually what was reported.

When prompted by counsel for the Claimants as to why Claimants should not be entitled to the tax returns of the Debtor or its principals, Debtor's counsel merely responded by stating that the Claimants did not know how much either Debtor or its principals should have reported. The Court believes this distinction is illusory. If Debtor can discover Claimants' tax returns in the name of credibility without providing a basis for why it believes Claimants misrepresented their income on those returns, why can't Claimants discover Debtor and its principals' tax returns *and* documents that might conflict with the amounts reported on those returns, such as bank statements or W-2s. If the Court allows Debtor to fish or hunt for credibility issues where it has not provided any foundation for believing that such issues exist, it must also allow Claimants to do so. In fact, the Court would have to allow all parties in all cases before it to do so and the potential for abuse of the discovery process would be great. It would hamper the judicial goal set forth in Federal Rule of Bankruptcy Procedure 1001 "to secure the just, speedy, and inexpensive determination of every case and proceeding.

This is why the Court is persuaded by those courts that have chosen to limit the scope of discovery for items solely meant to attack credibility. To allow parties to broadly request information, that admittedly has no bearing on the substance of the case, simply because it might call into question the credibility of another party or witness, would potentially be to open the flood-gates. For example, every party in every case could request myriad documents: credit

applications, job applications, even personal correspondence, etc. All in the hope of finding an untruthful statement – that the receiving-party was unaware of when he requested the documented – to impeach the other side. Rule 26(b)(1) is broad, but it was not meant to allow such a situation.

The Court will adopt the fifth prong of the test in *Davidson Pipe Co.* If a party wishes to discover information that has no bearing on the substantive issues of the case and will be used solely to impugn credibility, then the requesting-party must be able to provide a foundation for why the party believes the requested information will reveal a past deception. Debtor in this case has merely stated that it wants to examine Claimants' tax returns for *possible* unreported income. Debtor has failed to provide the Court with any real reason to believe that Claimants failed to report their income correctly. Therefore, Debtor has failed to provide a sufficient foundation to warrant discovering Claimants' tax returns. Accordingly, Debtor's motion to compel is denied.

CONCLUSION

Debtor seeks to discovery Claimants' tax returns for the sole purpose of attacking the credibility of Claimants. Debtor has not provided the Court with any sufficient reason to believe that the Claimants' tax returns will contain any information that will allow it to make such an attack. At the hearing on this matter, Debtor's counsel stated that it wanted to check the tax returns against information it already had in its possession. In essence, Debtor is fishing with no knowledge as to if there are even fish in the pond. The Federal Rules of Civil Procedure do not allow such a broad expedition. Accordingly, IT IS ORDERED AND NOTICE IS HEREBY GIVEN that:

1. Debtor's Motion to Compel Claimants to Produce Limited Tax Returns is **DENIED**.

2. The Bankruptcy Court Clerk shall cause a copy of this Memorandum, Orders, and Notice of the entry thereof to be sent to the following interested entities:

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