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AUG 09 2005

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	CASE NUMBERS
	:	
DENNIS DALE WRIGHT,	:	BANKRUPTCY CASE
	:	04-94519-WHD
	:	
DEBTOR.	:	
<hr/>		
CAROLE A. WRIGHT,	:	ADVERSARY PROCEEDING
	:	NO. 04-9156
Plaintiff,	:	
	:	
v.	:	
	:	
DENNIS DALE WRIGHT,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

On April 4, 2005, the Court entered an order granting in part the Plaintiff's motion for sanctions for the Defendant's failure to cooperate in discovery matters. The Court directed the Defendant to make a full response to each interrogatory and document request. The Court admonished the Defendant to be as specific as possible as to whether the requested documents exist and whether he is capable of producing them or whether a third party is in possession of the documents. Further, the Court directed the Defendant to file with the Court a certificate of service stating that he has served these materials upon the Plaintiff, the date of service, and the address to which the materials were mailed. The Court also provided the Plaintiff with a period of time to file a response to any such explanations

filed by the Defendant.

On April 27, 2005, the Defendant filed a certificate of service indicating service upon the Plaintiff of discovery responses. Along with the certificate of service, the Defendant has filed his second attempt to answer the Plaintiff's First Set of Interrogatories and his second attempt to respond to the Plaintiff's request for production of documents. The Defendant has stated that he hopes that the information provided will be sufficient to enable the Court to resolve the adversary proceeding. The Defendant misunderstands the purpose of the discovery propounded by the Plaintiff. The Court does not simply consider the Defendant's discovery responses at this stage of the proceeding and render a decision on the merits. The information is intended to lead the Plaintiff to additional sources of evidence and to help her prepare her case for either a summary disposition or trial. For this reason, it is not sufficient for the Defendant to produce what he believes the Court needs to see in order to render a decision. As the Court stated in its April 4th Order, the Defendant is required to provide the information and documents requested unless the Court determines that the information should not be provided. That being said, the Court will consider each of the Defendant's responses.

A. Responses to Interrogatories

The Defendant's responses to questions number 2, 3, 4, and 6 appear to be sufficient. Likewise, the Defendant's responses to questions number 8, 9, 10, 11, 12, 13, 14, 16, 21,

23, and 24 appear to be complete.

Question number 1 asked the Defendant to disclose his employment history, including employer's name, address, and phone number and a description of each job; his current annual gross earnings; additional forms of compensation; the reason for leaving each job; and the days of the week worked for each job. The Defendant has failed to list an address or phone number for each of his employers. **The Defendant shall amend his answer to include this information. Additionally, the Defendant shall clarify whether he was employed from July 2002 through January 2003.**

In response to questions number 5 and 20, which ask the Defendant to provide addresses and phone numbers for his sister and mother, the Defendant refused to produce that information, again asserting that the Plaintiff would use this information to harass his family. As stated in the Court's April 4th Order, the Defendant must produce this information unless the Court enters a protective order. The Defendant has failed to request such an order or to provide competent evidence to establish the need for such an order. **Accordingly, the Defendant shall provide that information to the Plaintiff, but need not file the information with the Court. The Defendant shall file an affidavit stating that he has provided this information to the Plaintiff.**

Question number 7 asks the Defendant for information about bank accounts. In response, the Defendant states that he has no such accounts. However, as the Plaintiff points out, the Defendant's Bankruptcy Schedules refer to two accounts, one at Wachovia and one

at the Bank of America. Even if these accounts are no longer open, the question asked about accounts held since 1997. **Accordingly, the Defendant shall amend his answer to provide information about these accounts, including account numbers and the dates the accounts were opened and closed.**

The Defendant was asked in question number 15 to provide the names of all physicians who have treated him since January 1997 and to disclose the nature of the complaint and the diagnosis received. The Defendant's response to this question does not appear complete, as he has listed only one physician and seems to indicate that there are other physicians. While the Court is reluctant to require the Defendant to disclose detailed information regarding his medical treatment, the Defendant's health at the time of the parties' divorce and at the present time is relevant to a determination of whether the obligation at issue is a non-dischargeable debt under section 523(a)(5) or 523(a)(15). **Accordingly, the Defendant shall provide information to the Plaintiff regarding his health at the time of the parties' divorce and at the present time, indicating what types of conditions he had and/or has and what types of treatments he underwent or continues to undergo. Once the Plaintiff has received such information, if she has a good faith reason to believe that the Defendant's answers are incomplete or untruthful, she can request additional information regarding the physicians the Defendant has consulted for particular conditions.**

The Defendant has objected to question number 17 as being unduly broad. The

Plaintiff has agreed that it was her intent to limit the time-frame to amounts greater than \$500 received from March 1, 1997 through the present time. The Court agrees with the Defendant that it would be difficult for the average person to recall such information, even for a time-frame of 8 years. **The Defendant is instructed to provide the Plaintiff with an account, to the best of his ability, of any funds received in an amount greater than \$1500, other than from regular and ordinary sources, such as wages or disability benefits, since January 2000. This would include tax refunds, proceeds from the sale of property, gifts, inheritances, and payments from insurance policies.**

The Defendant's response to question number 18 is too vague. **The Defendant shall expand upon his description of the guns and musical instruments sold and to state the approximate date of the sale and the amount received. If the Defendant has a recollection of which individual or sporting goods store purchased the items, he shall share that information with the Plaintiff.**

Question number 19 asks the Defendant to state the names of any witnesses that he may call at trial. The Defendant has answered that he does not intend to call any witnesses at this time. The Defendant is hereby advised that, if he decides to call a witness on his behalf without providing the Plaintiff sufficient time to prepare, the Plaintiff will either be allowed additional time to conduct discovery with regard to the witness, or the Court may bar the Defendant from calling the witness.

In response to question number 22, which asks the Defendant to disclose the name

of his present landlord, the Defendant refused to provide such information, stating that the individual at issue does not want to be named in this proceeding. Whether the Defendant's landlord would like this information disclosed is irrelevant. The Defendant has not sought or obtained a protective order as to this information, and the Plaintiff is entitled to discover the information. **The Defendant shall provide the Plaintiff with the name, address, and phone number of his present landlord. The Defendant need not file this information with the Court, but must file an affidavit with the Court stating that he has in fact provided such information to the Plaintiff.**

B. Responses to Document Requests

As to the Plaintiff's document requests, the Defendant first makes a general statement that many important papers have been discarded inadvertently over the years in the course of moves and house cleaning. It is unclear as to whether the documents are in the Defendant's possession. Rule 34 of the Federal Rules of Civil Procedure requires production of documents within the custody, possession, or control of the party to whom the request has been made. *See* FED. R. CIV. P. 34. "[F]ederal courts have consistently held that documents are deemed to be within the 'possession, custody or control' for purposes of Rule 34 if the party has actual possession, custody or control, or has the legal right to obtain the documents on demand." *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir.1995). "[C]ontrol is defined as 'the legal right, authority, or ability to obtain upon demand

documents in the possession of another.” *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633 (D. Minn. 2000) (quoting *Florentia Cont. Corp. v. RTC* , 1993 WL 127187 at *3 (S.D.N.Y. Apr. 22, 1993). “Therefore, ‘under Rule 34, control does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability, to obtain the documents from a non-party to the action.’”

The Defendant’s responses to requests number 8, 9, 10, 11, 12, 14, 16, 19, 20, 22, and 26 appear to be sufficient. As to request number 1, which seeks copies of all federal and state income tax returns filed for tax years 1989 through 2003, the Defendant has attached one responsive document (tax year 2002) and states that he has no other documents that are responsive. In response to request number 2, which asks for W-2 or 1099 forms for tax years 1989 through 2003, the Defendant states that he has no such documents. First, the Court finds it hard to imagine that the Defendant, who apparently worked at a steady job until recently has no copies of his state and federal tax returns and did not retain any W-2 or 1099 forms for fourteen years. Information regarding the Defendant’s financial condition at the time of the parties’ divorce and at the present time will be relevant to the Court’s resolution of this case. The Plaintiff is entitled to the information prior to that time. Even if the Defendant does not have his tax records in his possession, these records are within his control, as the Defendant has the ability to obtain copies of the records from the Internal Revenue Service. **Accordingly, the Defendant shall obtain copies or**

transcripts of his federal income tax returns from the Internal Revenue Service for tax years 1993 through 1997 and 2001 through 2004. Defendant shall provide these to the Plaintiff, but need not file them with the Court. The Defendant shall file an affidavit with the Court stating that he has provided the tax returns to the Plaintiff.

The Defendant's responses to requests number 3 and number 6 appear to be sufficient. In requests number 4 and 13, the Plaintiff is seeking copies of all pay check stubs and other evidence of any source of income. The Defendant attached a copy of his check for social security disability and states that he has no other pay stubs or evidences of payments of wages or other income at the current time. Given the fact that the Defendant claims to receive only disability income at this time and the fact that the Court is requiring the Defendant to provide the Plaintiff with copies or transcripts of his federal income tax returns for the relevant tax years, the Court finds that the requested documents are unnecessary and, even if the Defendant had access to obtain replacement copies of such records, production of the documents would be burdensome and duplicative. **If the Defendant receives any contributions to his household expenses from his roommate and has any documents that memorialize such contributions, he shall provide those documents to the Plaintiff.**

In response to request number 5, which seeks copies of bank records for accounts held since 1997, the Defendant states that he does not currently have a bank account. He also states that he had a bank account with Bank of America, which was closed in 2000. It is not clear to the Court that copies of the Defendant's bank statements for the period

following the parties' divorce until the year 2000 would be particularly relevant in this proceeding. The Plaintiff also points out that the Debtor's Bankruptcy Schedules contain a reference to a checking account at Wachovia Bank. **As directed above, the Defendant shall provide the Plaintiff was information regarding these and any other accounts held with ANY financial institution since the time of the parties' divorce (including the name of the financial institution and account numbers) to enable the Plaintiff to determine whether such statements would be relevant. If the Plaintiff desires copies of the statements, she will first have to explain to the Court why these statements are relevant and why the information contained within the statements cannot be obtained from another source.**

Request number 7 seeks copies of records relating to any IRA accounts or other accounts at any financial institution. The Defendant states that he does not have any of the listed documents in his possession. It is not clear whether the Defendant is saying that he does not have any such *accounts*, or whether he is saying that he does not have any of the *records* from these account. In response to the Plaintiff's interrogatory, the Defendant stated that he has no such accounts. **Again, if the Defendant has or had any such accounts at or since the time of the parties' divorce, the Defendant shall amend his interrogatory answer to provide the specifics regarding the account(s), including the name of the financial institution and an account number.**

In requests number 14 and 15, the Plaintiff seeks copies of a cell phone bill and a phone bill for what may be the Defendant's residence. The Defendant denies that he has a

cell phone, and the Plaintiff points out that the Defendant scheduled a debt to a cell phone company in his Bankruptcy Schedules. **The Defendant shall provide the Plaintiff with any phone bills that he has in his possession and file an affidavit stating that he has no other bills in his possession.** If the Plaintiff wants copies of bills that are no longer in the Defendant's possession, she will have to explain to the Court why the bills are relevant and why they contain information that she cannot discover from another source.

In request number 17, the Plaintiff seeks copies of any insurance policies in which the Defendant is the named insured or beneficiary, including health, life, dental, auto, or property, from August 2002 until the present. The Defendant has objected to providing these documents on the basis that they contain private information. Although this information may be private, it does not appear to be privileged. **Accordingly, the Defendant shall produce copies of any such policies. The Defendant need not file the documents with the Court, but shall file an affidavit stating that he has provided the documents to the Plaintiff.**

Through request number 18, the Plaintiff seeks a copy of the Defendant's credit report. The Defendant states that he does not have a copy of his credit report. The Plaintiff objects to the Defendant's response on the basis that the Defendant could obtain a report at little cost. The Court is hesitant to order the Defendant to have a credit report generated solely for the Plaintiff's use. The Plaintiff shall file a further explanation of why she needs the information contained in the Defendant's credit report, and the Court will consider whether the Plaintiff could obtain such information from another source.

In response to request number 21, the Defendant states that he probably will not use any documentary evidence at trial. Again, the Defendant is warned that if he does intend to offer any documents as evidence at trial, he must share those documents with the Plaintiff in advance of the trial and provide a list of those documents for inclusion in the consolidated pre-trial order.

In request numbers 23, 24, and 25 the Plaintiff seeks information regarding the income and assets of Constance Smith, a person who appears to reside with the Defendant. First, it is not likely that the documents requested are within the possession, custody, or control of the Defendant. He does not appear to be married to Ms. Smith, and it is unlikely that he has any legal or practical ability to require Ms. Smith to produce these documents. Second, Ms. Smith is not a party to this litigation. Pursuant to Rule 34(c) of the Federal Rules of Civil Procedure, a person not a party to an action may be compelled to produce documents only as provided in Rule 45, which requires the issuance of a subpoena. There is no indication that the Plaintiff obtained a subpoena or even served Ms. Smith with a request for the production of these documents.

In request number 27, the Plaintiff seeks copies of any canceled checks for payments made by the Defendant to the Internal Revenue Service in payment of the joint tax liability for tax years 1989, 1992, 1993, and 1995. In response, the Defendant states that he does not have any such canceled checks. **The Defendant shall clarify whether he wrote such checks to the IRS and does not have copies of the canceled checks, or whether he has never written any such checks. If the Defendant has written such checks, he shall**

obtain copies of the checks and provide them to the Plaintiff. The checks need not be filed with the Court, but the Defendant shall file an affidavit stating that he has provided the checks to the Plaintiff or that he is unable to obtain copies of such checks. If the Defendant has written no such checks, he shall file an affidavit stating that he has written no such checks.

Requests number 28 and 29 are not actually in the nature of document requests. The Plaintiff is actually asking the Defendant additional questions and demanding that he create a document to convey the answers to those questions. Rule 34 of the Federal Rules of Civil Procedure does not require the Defendant to create documents simply for the purpose of producing them to the Plaintiff. "Rule 34 cannot be used to require the adverse party to prepare, or cause to be prepared, a writing to be produced for inspection, but can be used only to require the production of things in existence." *Soetaert v. Kansas City Coca Cola Bottling Co.*, 16 F.R.D. 1, 2 (D. Mo. 1954). If Plaintiff wanted the answers to these questions, she should have used one of her 25 allotted interrogatories to ask them.

Again, request number 31 asks the Defendant to create a list itemizing his gun collection, but the Plaintiff should have covered this topic in her interrogatories. **The Defendant need not create such a list, but, if one happens to exist, it shall be produced.** Additionally, the Defendant states that he does not have any receipts regarding the sale of the guns. The Court has already directed the Defendant to respond more fully to the Plaintiff's interrogatory about the specific sales of the guns. If there are no receipts, the Defendant cannot produce them.

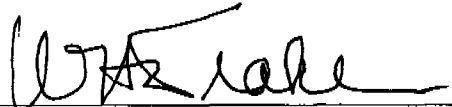
In request number 30, the Plaintiff seeks copies of any documents regarding the Defendant's application for disability with a government agency. In response, the Defendant states that he does not have any such documents and that the documents are in the possession of the federal government. **The Defendant shall inquire of the various agencies to which he has applied for benefits as to whether the agencies can provide the Defendant with copies of his applications. If the Defendant is unable to obtain the records, the Defendant shall file an affidavit so stating.**

The Defendant shall have until September 16, 2005 to comply with the terms of this Order (*i.e.*, to complete all of the tasks highlighted in bold print). The Defendant is reminded that, in those instances in which the Court has directed the filing of an affidavit, the statements made in the affidavit must be made under oath or penalty of perjury. If the Defendant fails to comply with the Order without reasonable justification, the Court will strike his answer and enter a default judgment in the Plaintiff's favor.

The Court will reserve ruling on the Plaintiff's request for further sanctions until the Court has determined whether the Defendant has made a good faith attempt to comply with the terms of this Order.

IT IS SO ORDERED.

At Atlanta, Georgia, this 8 day of August, 2005.



W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE