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.	:	
CAROLE A. WRIGHT,	:	ADVERSARY PROCEEDING NO. 04-9156
Plaintiff,	:	
v.	:	
DENNIS DALE WRIGHT,	:	
Defendant.	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

ORDER

Before the Court is the Motion for Sanctions, filed by Carole Wright (hereinafter the "Plaintiff") in the above-captioned adversary proceeding. This matter arises in connection with a complaint to determine dischargeability of a particular debt and constitutes a core proceeding within the subject matter jurisdiction of the Court. *See* 28 U.S.C. §§ 157(b)(2)(I); 1334.

On January 10, 2005, the Court entered an order granting the Plaintiff's motion to compel discovery. The Defendant failed to respond to the Plaintiff's motion, which alleged that the Defendant did not respond fully to her interrogatories and requests for production of documents and admissions. The Court ordered the Defendant to respond

to the discovery request by January 28, 2005 and, as required by Rule 37(a)(4) of the Federal Rules of Civil Procedure, granted the Plaintiff's request for attorney's fees and costs incurred in filing her motion to compel.

On January 24, 2005, the Plaintiff filed an affidavit in which she avers that she spent 3.5 hours preparing the motion to compel discovery and that she incurred costs of $13.95 for copies and $2.49 for postage in serving the motion. The Plaintiff also states in her affidavit that she is an attorney licensed to practice in Georgia and that her regular hourly rate is $175 per hour.

On January 24, 2005, over a month and half after the Plaintiff filed her motion to compel, the Defendant filed a response to the Court's January 10th Order. The Defendant states that: 1) he has provided to the Plaintiff, to the best of his ability, all documents and has answered all of her discovery requests by filing the responses with the Court; 2) many of the Plaintiff's questions are impossible to answer, such as provide a list of all days worked with start times and end times; 3) some information, such as the phone numbers of Defendant's family members has been withheld because the Plaintiff has harassed the Defendant's family in the past; 4) complete medical records have been withheld on the basis of privilege; and 5) proof of income has been provided, as the Defendant receives only social security and has no job or other source of income. Additionally, the Defendant contends that the Plaintiff's requests are intended to harass him and he urges the Court to make a determination of whether the Plaintiff's debt is dischargeable on the

basis of the information that is currently in the Court's records. In short, the Defendant asserts that his answers to the Plaintiff's discovery requests were complete and adequate and informs the Court that he is not prepared to provide additional information.

In response, the Plaintiff states that the Defendant had ample opportunity upon the filing of the motion to compel on December 9, 2004, to file a response and to dispute the Plaintiff's contention that the Defendant's answers to her discovery requests were incomplete. Further, the Plaintiff asserts that the Defendant should have known better than to not respond, as he has been involved in prior legal proceedings.

It is generally assumed that discovery will be conducted between the parties with little involvement by the Court. The Federal Rules of Civil Procedure contemplate that any relevant information that is "reasonably calculated to lead to the discovery of admissible evidence" and is not privileged will be turned over upon request. FED. R. CIV. P. 26(b)(1). If information is privileged, the party asserting the privilege is expected to "make the claim expressly" and to "describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege." FED. R. CIV. P. 26(b)(5). Additionally, if there is a reason for the Court to order that non-privileged information not be produced, the burden is on the party that asserts such reason for non-production to move the Court for a protective order or an order limiting the scope of production. FED. R. CIV. P. 26(b)(2); (c).

In this case, the Defendant did not object to the discovery requested by the Plaintiff and did not file a motion for a protective order or an order limiting the scope of discovery. In fact, he did not even file a response to the Plaintiff's motion to compel, at which time he could have raised all of his objections to her discovery requests and brought the matter before the Court. Now, after the Court has already entered an order compelling him to cooperate in discovery, the Defendant finally asks the Court to review his responses to determine whether they are sufficient. The Defendant has failed to direct the Court's attention to specific responses or to demonstrate why he believes that he has produced all responsive information within his ability. At the very least, the Defendant should have filed an affidavit in which he swears that he has produced all relevant information and documents. Otherwise, the Court has before it no competent evidence upon which to determine that the Defendant has done so.

In a case such as this, the Court understands the inability of the parties, who are both proceeding *pro se* and are former spouses, to confer in good faith about discovery matters. The Court also understands the reluctance of the Defendant to share with the Plaintiff information regarding his family members. However, this information is not privileged and should be provided, unless the Court makes a finding that the Plaintiff will use the information for an improper purpose. The Defendant has not provided the Court with any evidence, not even his own affidavit, that the Plaintiff has in fact harassed his family in the past. The Court cannot make a determination based on the Defendant's bare

allegations that the Plaintiff would use this information to harass him or his family. Similarly, the Defendant's medical records may in fact be privileged. However, until the Defendant has properly asserted the existence of such a privilege and provided the Court with specific information as to the nature of the records that exist, the Court cannot determine that the information should not be produced. The same holds true for the Defendant's argument that some of the Plaintiff's interrogatories are impossible to answer or that certain information is not relevant. The issue of whether the questions are unduly broad or the information is relevant is for the Court to decide after the issue has been properly presented.

The Defendant is not permitted to decide unilaterally to withhold certain information, but must make his assertions of privilege or other reasons why information should not be produced to the Court, rather than waiting until after the Plaintiff expends time and money to file a motion to compel production of this information. At the very least, the Defendant could have responded to the Plaintiff's motion to compel prior to the entry of the Court's January 10th Order. The Defendant has offered no reason why he failed to respond to the motion and simply asks the Court to reconsider its order. However, given the fact that the Defendant has not submitted any evidence to the Court to support his position, the Court is not inclined to do so. That being the case, and, since the Defendant has not objected to the Plaintiff's affidavit of fees and costs incurred, the Court will enter judgment in favor of the Plaintiff in the amount of $628.94.

Along with her objection to the Defendant's response to the Court's January 10th Order, the Plaintiff has also filed a Motion for Sanctions. First, she alleges that she scheduled and noticed the Defendant's deposition for December 16, 2004, but that the Defendant failed to appear for the deposition and did not notify her of his inability to appear. The Plaintiff has submitted a transcript taken by the Court reporter on the scheduled date for the deposition. Second, she alleges that the Defendant has failed to comply with the Court's January 10th Order by refusing to produce the additional discovery answers. Third, she asserts that the Defendant has attempted to engage in *ex parte* communications with the Court by filing his response to the Court's January 10th Order without serving it upon her. As a sanction for his conduct, the Plaintiff asks the Court to strike the Defendant's answer and any discovery responses that have been filed with the Court, and to award her additional fees and costs, including the $90 fee that she incurred for hiring the court reporter. The Defendant has not responded to the Motion.

Pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure, the imposition of sanctions is within the discretion of the Court. The Court is not willing to take the drastic step of striking the Defendant's answer at this time. The goal of the Court is to be able to reach the merits of the Plaintiff's claim. To that end, the Court will expect the Defendant to begin to cooperate fully in discovery. The Defendant shall consider this Order as a warning that more drastic sanctions will be employed if he fails to comply with this Order. Accordingly, the Plaintiff's Motion for Sanctions is hereby **GRANTED** in

part and **DENIED** in part.

Within the Plaintiff's Motion to Compel, which the Court assumes was served upon the Defendant, is a list of all discovery requests that the Plaintiff has made, along with an explanation of why she believes that the Defendant's answers are inadequate. On or before **April 29, 2005**, the Defendant shall either make a full response or production of documents requested by providing information to the Plaintiff and sending a copy to the Court, or, the Defendant shall file with the Court and serve upon the Plaintiff at the address located on her pleadings of record: 1) a listing of those requested documents that have been produced and those interrogatories or admissions that have been responded to fully since he received the Plaintiff's list; 2) any objections to any requested documents, interrogatories, or requests for admissions, as well as a ***complete*** explanation as to why he objects to providing such information, including any assertions of privilege; and 3) any affidavits or admissible evidence to support his assertions. The Defendant shall be as specific as possible as to whether the requested documents exist and whether he is incapable of producing them and why, or whether a third party is in possession of the documents. Additionally, the Defendant shall 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.

If the Defendant files such an explanation with the Court, the Plaintiff shall have **twenty (20) days** from the date upon which the Defendant served the explanation upon

the Plaintiff in which to file a response. In her response, the Plaintiff shall be as specific as possible as to the documents she believes remain to be produced and as to the admissions or interrogatories she believes have not been thoroughly responded to or answered, and shall respond to any assertions of privilege or any reason provided by the Defendant for non-production or non-disclosure.

Further, since the Defendant has not disputed the fact that he was notified of the Plaintiff's intent to take his deposition on December 16, 2004, or that he failed to appear, and has not presented the Court with any justification for his absence, the Court finds that the Defendant should pay the Plaintiff's reasonable attorney's fees and costs incurred in attempting to take the deposition. *See* FED. R. CIV. P. 37(d). The Plaintiff shall have **fifteen (15) days** from the date of the entry of this Order in which to file and serve upon the Defendant an affidavit of her fees and costs incurred for this purpose. The Defendant shall have **fifteen (15) days** from the date of service of the affidavit in which to contest the reasonableness or validity of the fees or costs incurred. Should the Defendant fail to do so, judgment in the amount of the fees requested may be entered without further notice or hearing.

IT IS SO ORDERED.

At Atlanta, Georgia, this 4 day of April, 2005.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE