UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:
James W. Kelley
Linda M. Kelley,
Debtors.

Case #01-11686
Chapter 7

James W. Kelley and
Linda M. Kelley,
Plaintiffs,

v.

Adversary Proceeding
#02-1013

Earnest LaBrie and
Linda LaBrie,
Defendants

MEMORANDUM OF DECISION
GRANTING CREDITOR'S MOTION TO COMPEL OR IN THE ALTERNATIVE REQUEST FOR SUBPOENA

On April 18, 2003, Earnest LaBrie and Linda LaBrie (hereinafter, "Creditors") filed a Motion to Compel Or In The Alternative Request for Subpoena (doc. #73) seeking the Court's intervention regarding certain discovery requests made upon James W. Kelley and Linda M. Kelley (hereinafter, "Debtors"). The Debtors have not filed a response to said Motion to Compel. Specifically, eight of the Creditors' interrogatories remain unanswered and the Debtors have invoked their attorney-client privilege regarding four requests to produce.

This Court has jurisdiction over this proceeding under 28 U.S.C. §§157 and 1334.

I. BACKGROUND

On February 28, 2002, Debtors commenced the instant adversary proceeding against the Creditors, seeking declaratory relief; monetary, actual and statutory damages; and costs and attorney's fees. Debtors claim that Creditors, in selling them a mobile home, violated the: (1)Vermont Motor Vehicle Retail Installment Sales Financing Act, 9 V.S.A § 2351 et seq.; (2) Vermont Retail Installment Sales Act, 9 V.S.A. § 2401 et seq.; and (3) Vermont Consumer Fraud Act, 9 V.S.A. § 2451 et seq. As a result, Debtors' claim

they are entitled to reasonable attorney's fees pursuant to Fed. R. Bankr. P. Rule 7008(b). The Creditors denied these claims and filed a counter claim, alleging violation of 9 V.S.A. § 2453 (part of Vermont's Consumer Fraud Act). See Defendants' Answer and Counterclaim (doc. #19). Subsequently, the Defendants sought discovery of certain documents and information pursuant to Fed. R. Bank. P. Rule 7026(b). This is the Creditors' third Motion to Compel.* Creditor's current Motion to Compel (doc #73) highlights seven interrogatories for which no answers have been supplied and four requests to produce upon which the attorney-client privilege has been invoked. The Creditors still seek answers to these interrogatories and challenge the invocation of the attorney-client privilege. Creditors are entitled to a resolution of these outstanding discovery issues.

II. LEGAL ANALYSIS

A. Discovery

Rule 26 of the Federal Rules of Civil Procedure, applicable to bankruptcy proceedings through Fed. R. Bankr. P. Rule 7026, promotes liberal discovery of non-privileged material relevant to the litigation so that opposing parties will be better prepared and, in some instances, more likely come to a settlement. See Vargas v. Yale- New Haven Hosp., Inc., 768 A.2d 967, 969 (Conn. Super 2000). The United States Supreme Court has also opined on this issue:

> We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession . . . . [except] when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.

Hickman v. Taylor, 329 U.S. 495, 501 (1947). The Court further stated that "the deposition-discovery rules are to be accorded a broad and liberal treatment . . . advanc[ing] the stage at which disclosure can be

* Creditors' first Motion to Compel (doc. #42) was filed August 14, 2002. An hearing was held August 27, 2002 on the Motion. At the hearing, the parties represented to the Court that their discovery issues were resolved. Apparently, however, this was not the case since the Creditors' filed a second Motion to Compel (doc. #53) on November 12, 2002. In response, the Debtors filed a Response (doc. #56) and a Motion for Protective Order (doc. #57). The Court was prepared to rule on the papers, but due to a change in counsel for the Debtors and a representation of the parties that they were attempting to resolve their differences, see doc. #69 and doc. #70, no decisions or orders were issued on those motions. In its discretion, the Court construed the parties' stipulation, see doc. #69 and doc. #70, as a withdrawal of the outstanding discovery motions.

compelled . . . thus reducing the possibility of surprise." Id. at 501. Other courts within the Second Circuit have touched on this fundamental principal. "[L]iberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise." Stenovich v. Wachtell, Lipton, Rosen & Katz, 2003 WL 139543 (N.Y. Sup. 2003). Further, this material does not need to be admissible at trial; it need only be "reasonably calculated to lead to the discovery of admissible evidence." Herman v. Crescent Publishing Group, Inc., 2000 WL 1371311 (S.D.N.Y 2000).

Numerous cases have relied on and expanded this well-settled law. "Where, as here, the documents at issue consist of factual materials and analyses of facts, the Rules' policy of liberal discovery weighs more heavily in favor of allowing discovery, since production of documents is less likely to inhibit a party's preparation for litigation." Weber v. Paduano, 2003 WL 161340 (S.D.N.Y. 2003); see also Upjohn Co. v. United States, 449 U.S. 383, 398-401 (1981). "This simplified notice pleading relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." Swierkiewicz v. Sorema, 534 U.S. 506, 512 (2002); see also Conley v. Gibson, 335 U.S. 41, 47-8; Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168-9 (1993). "Although tax returns are not privileged, their disclosure in civil action requires 'a balancing of the policy of liberal discovery against the policy of maintaining the confidentiality of tax returns.'" Lemanik, S.A. v. McKinley Allsopp, Inc., 125 F.R.D. 602, 609 (S.D.N.Y. 1989) (quoting SEC v. Cymaticolor Corp., 106 F.R.D. 545, 547 (S.D.N.Y.1985)). "Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement of litigated disputes." Welch v. Welch, 2003 WL 944430 (Conn. Super. 2003).

B. Attorney-Client Privilege

The attorney-client privilege has been a recognized privilege for confidential communications since the late 19th century. See Upjohn Co. V. United States, 449 U.S. 383, 389, 101 S.Ct. 677, 682 (1981); Hunt v. Blackburn, 128 U.S. 464, 470, 9 S.Ct. 125, 127(1888). Its purpose is to promote "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." Upjohn, 449 U.S. at 389.

Generally, a lawyer's interviews, statements, memoranda, correspondence, briefs, mental impressions and personal beliefs fall outside the attorney-client privilege when they reflect the attorney's legal theories and strategies. See Hickman 329 U.S. at 510 ("Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impression of an attorney.") The Hickman Court further

stated:

> Proper preparation [requires that a lawyer] prepare his legal theories and plan his strategy without undue and needless interference . . . [in order] to promote justice and to protect clients' interests . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. . . . Inefficiency, unfairness and sharp practices would inevitably develop . . . [and] the effect on the legal profession would be demoralizing.

Id. at 511.

Generally, however, billing records are not confidential attorney-client communications. See In re Grand Jury Subpoena Served upon Doe, 781 F.2d 238, 247-48 (2d Cir. 1985). "To the extent that any of these documents requested here [billing records] happen to reveal client confidences, that information may be narrowly redacted." Meranus v. Gangel, 1991 WL 120484 (S.D.N.Y. (1991); but cf., Chaudhry v. Gallerizzo, 174 F.3d 394, 402 (4th Cir. 1999) ("the attorney-client privilege does not extend to billing records and expense reports."). However, "correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege." Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992). In Rattner v. Netburn, 1989 WL 223059 (S.D.N.Y. 1989), the court held that diary entries, time sheets, billing reports and telephone logs did not fall under the attorney-client privilege or Rule 26(b) work product protection. The court affirmed the lower court's order directing that the documents be submitted for *in camera* review. Further, the Creditors' discovery requests do not fall within the attorney-client privilege because they do not contain any of the Debtor's attorney's mental impressions, conclusions, opinions or legal theories and strategies.

III. THE INSTANT CASE

A. Interrogatories

The Creditors have issued seven interrogatories that remain unanswered. The information requested includes: (1) Debtor James W. Kelley's understanding of the Creditors' representations about the mobile home; (2) Debtor James W. Kelley's salary between May 2001 and December 2001 to confirm a representation made by him to Creditor Linda LaBrie; (3) a description of how and when Debtor James W. Kelley put the Creditors on notice that he did not want to sign the purchase paperwork on the mobile home; (4) a description of how and when the Creditors threatened the Debtors with eviction; (5) copies of documents

sent by Debtors or Debtors' counsel to Creditors putting them on notice of concerns regarding the financing of the mobile home purchase; (6) a list of how many secured or unsecured loan contracts Debtors' entered into over their lifetime; and (7) a list of dates when the Debtors contacted their attorney in May 2001. The Court will address each interrogatory separately.

1. Interrogatory 1.: Debtor James W. Kelley's Understanding of the Creditors' Representations About the Mobile Home

The Creditors request details as to Debtor James W. Kelley's impressions of the Creditors's representations regarding the mobile home. Debtors have not given a response or offered an explanation for not responding. The Court finds this is discoverable information as it may help the Creditors form a proper defense to the Debtors' causes of action. Debtor James W. Kelley's understanding of representations about the Creditors' role should be thoroughly explained so that the Creditors may adequately prepare their defense.

2. Interrogatory 2: Debtor James W. Kelley's Salary Between 5/01 and 12/01 to Confirm a Representation Made by him to Creditor Linda LaBrie

Creditors' claim that Debtor James W. Kelley has denied that sometime prior to May 24, 2001 he represented to Creditor Linda LaBrie that he worked at least 50 hours per week and sometimes 60 hours per week. Creditors requested that Debtor James W. Kelley provide copies of payroll stubs or time cards showing the hours that he worked for the period of May 1, 2001 through December 2001. The Court finds payroll stubs, time cards and other documentation showing income received is discoverable. Based upon the Creditor's Motion to Compel or in the Alternative Request for Subpoena (at p.4), it is the Court's understanding that Debtor James W. Kelley has provided a signed and witnessed Authorization of Employment Information, authorizing the release of this information from Mr. Kelley's former employer. Further, Creditors have requested the information from Mr. Kelley's former employer, Neagly and Chase Construction. Debtor James W. Kelley's compliance with Creditors' request shows that he is attempting to satisfy their demand. If Debtor James W. Kelley's employer does not provide Creditors with this information, the Creditors may return to this Court for assistance on this matter.

3. Interrogatory 3: A Description of How and When Debtor James W. Kelley Put the Creditors on Notice That He Did Not Want to Sign the Purchase Paperwork on the Mobile Home

Debtors assert in their Complaint that they felt they had no choice but to purchase the mobile home because of their fear of eviction. Interrogatory #3 seeks further, specific information regarding this claim. To date, however, Creditors have not received a response to this interrogatory. The Court finds this is discoverable information, as it will assist the Creditors in forming a defense to the Debtors' Complaint. Therefore, the Debtors must answer this interrogatory.

4. Interrogatory 4: A Description of How and When Creditors Threatened Debtors with Eviction

Debtors' allege in their Complaint that their fear of eviction induced them into signing the purchase contract. Again, the Court finds Interrogatory #4 requests discoverable information. This question is simply an inquiry by the Creditors into the facts underlying the Debtors' case. The Court finds a response to this interrogatory is necessary for assisting the Creditors in their preparation of trial.

5. Interrogatory 5: Copies of Documents Sent by Debtors or Debtors' Counsel to Creditors Putting Them on Notice of Concerns Regarding the Financing

The Debtors allege the Creditors had not given them a chance to consult their counsel. Interrogatory #5 seeks to test this claim. The Court finds the Creditors request for copies of any documentation sent by Debtors or Debtors' counsel putting the Creditors on notice of any of the Debtors' financing concerns is relevant to the Debtors' causes of action. Moreover, if the Creditors are not provided such documents before trial, they could be unduly surprised at trial. The Courts' broad discovery policy is meant to avert such an event. Thus, in order for the Creditors to be able to adequately form a defense and not be surprised at trial, the Debtors must respond to this interrogatory as well.

6. Interrogatory 6: A List of How Many Secured or Unsecured Loan Contracts Debtors' Entered into During Their Marriage

The Debtors have represented that they failed to fully understand the terms of the contract. The Court finds Interrogatory #6 to be relevant to the Debtors' allegation that they did not understand the terms of the subject contract. However, the Court also finds this request may be over-broad. If the Debtors have been married for a period of more than ten years, the scope of the inquiry may lead to discovery that is irrelevant. Therefore, the Court finds the information requested to be discoverable for up to a period of the last ten years, or as long as they have been married, whichever is shorter. The provision of this information by the Debtors can aid the Creditors in forming a proper defense to the Debtors' contention they did not have the requisite experience to understand the subject contract.

7. Interrogatory 7: A List of Dates That Debtors had Contacted Their Attorney in May 2001

The Debtors have alleged that the Creditors denied them access to counsel. However, the Creditors claim that the Debtors had ample time to consult with any counsel of their choice. Specifically, the Creditors allege that there was a 24-day period between the Debtors' first inquiry as to the home and the closing. Therefore, Creditors request a list of dates that the Debtors had contacted their attorney in May 2001, and if necessary, copies of telephone bills and letters so they can determine if the Debtors had in fact consulted with their counsel or had made an attempt to contact them. Again, the Court finds the Creditors' interrogatory to be relevant to the Debtors' causes of action. To avoid surprise at trial and to assist the Creditors in formulating their defense, the Creditors need the requested information. Therefore, this is discoverable information. If the Debtors believe any privileged information is found in corresponding documentation, it may be redacted to the extent necessary to avoid production of privileged information.

B. Requests to Produce

In the alternative, Creditors have requested a subpoena directing Attorney Sheilagh Smith Banks to produce: (1) a copy of her appointment calendar for May 2001, showing all appointments during that period with Debtors; (2) copies of telephone bills, personal and/or business, showing telephone contact with the Debtors during May 2001; (3) copies of all phone memos regarding the Debtors and the mobile home during

May 2001; and (4) detailed copies of time records during May 2001 regarding the Debtors. Attorney Sheilagh Smith Banks has claimed the attorney-client privilege and refused to produce these documents.

Since Attorney Sheilagh Smith Banks is not a named party in this adversary proceeding, the Creditors must serve Attorney Smith Banks with a subpoena in order to have the requests for admissions answered. Creditors must rely on Fed. R. Bank. P. Rule 7045 for issuance of a subpoena. See Hickman, 329 U.S. at 504 (instructing that where a party sought discovery from the other party's counsel, "[Petitioners] recourse was . . . to attempt to force [opposing counsel] to produce materials by use of a subpoena duces tecum in accordance with Rule 45."); see also In re Franklin National Bank Securities Litigation, 574 F.2d 662, 668 (2d Cir.1978) ("It was further pointed out that there already existed discovery remedies vis-a-vis non-parties, such as . . . the subpoena duces tecum pursuant to Federal Rule 45.").

The Court finds that the documents requested are discoverable. Administrative documents including billing records, expense reports, correspondence, bills, ledgers, statements, time records, diary entries, time sheets, billing reports and telephone logs fall under the attorney-client privilege *only if* they reveal litigation strategy or other confidential information. See Chaudhry v. Gallerizzo, 174 F.3d 394, 402 (4th Cir. 1999); see also Clarke v. American Commerce National Bank, 974 F.2d 127, 129 (9th Cir. 1992); In re Grand Jury Subpoena Served upon Doe, 781 F.2d 238, 247-48 (1985); Meranus v. Gangel, 1991 WL 120484, S.D.N.Y; Rattner v. Netburn, 1989 WL 223059, S.D.N.Y. (1989). If counsel feels information in the requested documents fall under the attorney-client privilege, such information should may be redacted.

IV. CONCLUSION

The liberal discovery policy set forth in Fed. R. Civ. P Rule 26, which applies to this adversary proceeding through Fed. R. Bankr. P. Rule 7026, acts to protect litigants and expedite the judicial process. The Creditors need the information requested so that they can prepare for the case and not be surprised at trial. Therefore, the Debtors must satisfy the Creditors' discovery requests. The Creditors' Motion to Compel and Alternative Motion for a Subpoena are granted. The Debtors are to respond to the subject interrogatories and produce the requested documents within two (2) weeks of entry of this decision.

This Memorandum of Decision constitutes the Court's findings of fact and conclusions of law.

April 24, 2003
Rutland, Vermont

Colleen A. Brown
United States Bankruptcy Judge