In the United States Bankruptcy Court

for the Northern District of Iowa

FORT DODGE CREAMERY CO.	Bankruptcy No. X88-0155OF
Debtor(s).	Chapter 7

ORDER RE: TRUSTEE'S SECOND MOTION TO COMPEL TURNOVER OF PROPERTY OF THE ESTATE

The matter before the court is the trustee's "Second Motion to Compel Turnover of Property of the Estate," filed November 7, 1989. The motion was resisted by First American State Bank. Hearing was held in Fort Dodge, Iowa on January 19, 1990. James H. Cossitt appeared as attorney for trustee and trustee; Kurt Wilke, attorney, appeared on behalf of Allen Loomis, the Robert Loomis estate, and the Bennett & Wilke law firm. David Davitt appeared on behalf of Central States Southeast and Southwest Areas Health and Welfare and Pension Funds, creditors. Neven Mulholland appeared for the Johnson, Erb, Latham, Gibb & Carlson, P.C. law firm.

The court now issues its ruling which includes findings and conclusions as required by Bankr. R. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

As a result of an involuntary petition filed against the debtor, an order for relief under chapter 7 of the Code was filed February 8, 1989 and entered February 9, 1989. James H. Cossitt was appointed as trustee, and on September 8, 1989, he filed a motion to compel turnover of property of the estate against various professional entities which had allegedly previously provided legal or accounting services to the debtor. One of those against whom the motion was filed was the law firm of Johnson, Erb, Latham, Gibb & Carlson, P.C. (JOHNSON LAW FIRM). The motion sought a court order requiring the firm to turn over or disclose to the trustee "all recorded information relating to the debtors property of (sic) financial affairs within thirty days from the date of the order;

Resistances were filed to the motion by professional firms other than the Johnson law firm. A hearing was held on the motion on October 19, 1989 in Fort Dodge. At that time, Neven Mulholland, an attorney with the Johnson law firm, appeared on its behalf. As a result of the hearing, an order, which was originally drafted as a consent order, was executed by the court with some modification. The result, however, was to direct those firms identified in the motion to turn over or to disclose to the trustee the information requested in the motion. That order was filed on October 20, 1989. Shortly thereafter, trustee filed a second motion to compel turnover. This motion is directed at the Johnson law firm and alleges that on October 20, 1989, the trustee was given the opportunity to review and to copy some of the contents of the files of the Johnson law firm relating to the debtor. By the second motion, however, trustee's seeks turnover of certain documents contained in the Johnson law firm file not provided to him upon the initial inspection. He is particularly concerned with "handwritten notes of conversations, meetings, etc." and alleges that these are property of the bankruptcy estate and that the Johnson law firm should be required to turn over or to disclose these documents to him.

On December 13, 1989, First American State Bank filed a resistance to the second motion to compel. [(1)] At the hearing on the motion and resistance, Neven Mulholland of the Johnson law firm appeared on behalf of the Johnson firm and resisted the trustee's motion on two grounds. First, Johnson law firm contends that the bankruptcy court does not have jurisdiction to determine the issue of title to its work product created during its representation of the debtor corporation. The Johnson law firm asserts this jurisdiction to be in the state court. Furthermore, Johnson law firm resists the motion on the merits on the ground that the handwritten notes are the property of the law firm and not that of the debtor or the estate.

The trustee asserts that he needs to examine these documents as part of his investigation into the property and financial affairs of the debtor. He says that he is pressured by a state statute of limitations which would require him to act on his investigation on or before February 11, 1990. Because of the trustee's concern over the limitations period, this court has promised an early decision on the trustee's motion. The court commends counsel on the admirable effort they have made to provide citations and briefs to the court by January 20, 1990.

FINDINGS OF FACT

1. Prior to the entry of the order for relief against Fort Dodge Creamery Co., the Johnson law firm had acted as its legal representative in a case entitled Loran W. Robbins, et al. v. Fort Dodge Creamery Co. During the course of that representation, the Johnson law firm created a substantial number of pages of handwritten notes.

2. These handwritten notes contain mental impressions, conclusions, opinions, or legal theories of attorneys who are members by partnership or association with the law firm. However, the evidence is insufficient for this court to find that these written documents contain only such information. Neither the trustee nor counsel for the law firm believed it was necessary for the court to consider the documents in camera.

3. The Johnson law firm has been fully paid for its representation of Fort Dodge Creamery and claims no attorney's lien against these papers.

4. James H. Cossitt is the duly appointed and acting trustee in the bankruptcy case of Fort Dodge Creamery Co.

DISCUSSION

The Johnson law firm contends that the issue before the court reduces itself to a determination of who holds title to the written documents. It claims title to the documents and argues, therefore, that the trustee has no right to them. Moreover, the law firm argues that the bankruptcy court has no jurisdiction to determine title to these documents and that the appropriate forum to do so is the state court.

The trustee asserts, however, that it is the client who is entitled to such documents and as the representative of the bankruptcy estate he succeeds to that entitlement. In asserting his entitlement, the trustee relies on EC 4-6 of the Iowa Code of Professional Responsibility for Lawyers and upon opinion 87-22 issued February 12, 1988 by the Committee of Professional Ethics and Conduct of the Iowa State Bar Association.

The former states as follows:

> **EC 4-6.** The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets. A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

(Emphasis added.) Iowa Code of Professional Responsibility for Lawyers EC 4-6 (1989).

The Bar Association's Committee of Professional Ethics and Conduct opinion was a response to an attorney's question as to whether the attorney was under an ethical duty to provide his former client with copies of the contents of his file or whether the attorney might insist that such a request be routed through successor counsel. The Committee responded that in its opinion "the files do belong to the client."

The Committee, however, cited other opinions including 85-2 (August 19, 1985) and 82-23 (December 6, 1982) which seem to call into question whether the attorney's working papers belong to the attorney or to the client.

Both the trustee and the Johnson law firm agree that the dispute before the court is not one of privilege or of work product within the meaning of F.R.C.P. 26(b) (3) (as incorporated by Bankr. R. 7026).

Nor, despite the arguments of the parties, does this court believe it to be an ownership issue. Therefore, the court need not involve itself with a determination as to who owns the work papers--the law firm or the client.

The case trustee has based his motion on 11 U.S.C. § 542(e) of the Bankruptcy Code. This section states as follows:

> (e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

Consideration of this federal statute resolves at once both the turnover/disclosure issue and the issue as to this court's jurisdiction. This broad provision permits this court to require turnover or disclosure of recorded information relating to the debtor's property or financial affairs. A determination of a turnover proceeding, whether contested or adversary, is not predicated on ownership of the recorded information.

The Johnson law firm in its supplemental brief argues that the legislative history shows Congress' intention not to take proprietary rights from the attorney but merely to override an attorney's claim under state lien law. While this may have been an impetus to § 542(e), the statute itself is not so

narrow. The breadth of the Code section is discussed in the well regarded treatise, 4 Collier on Bankruptcy (15th edition) § 542.06. There it is stated:

> Documents or books belonging to the debtor and of value or benefit to the estate must be turned over as property of the estate under section 542(a). If the documents or books are not property of the estate, this subsection applies to require disclosure of the information in such books or records.

4 Collier on Bankruptcy (15th edition) § 542.06 at page 542-24.

Further discussion in the treatise is as follows:

> Section 542(e) was intended to prevent attorneys, accountants, and others similarly protected by state law, from asserting a lien on the debtor's property to obtain repayment of their fees "in full ahead of other creditors." It would apply if the documents were not property of the estate, or if the documents were property of the estate, but adequate protection of the entity's interest could not be provided under section 542(a), as long as the documents relate "to the debtor's property or financial affairs."

(Footnotes omitted.) 4 Collier on Bankruptcy (15th edition) 542.06 at page 542-28.

The trustee's obligation to investigate the property and financial affairs of the debtor is clearly established by the Bankruptcy Code. 11 U.S.C. § 704(4). The trustee's ability to carry out this obligation would be greatly impeded if the debtor's pre-bankruptcy attorneys could effectively resist the disclosure or turnover of information prepared by the attorneys on debtor's behalf prior to the bankruptcy filing. The Code has given to the court the authority to order turnover or disclosure of such work product in terms that do not depend on the ownership of the work product.

CONCLUSIONS OF LAW

1. The bankruptcy court has jurisdiction to hear and determine the trustee's motion seeking from debtor's prebankruptcy counsel a turnover or disclosure of attorney work product created or amassed during the attorney's representation of the debtor.

2. Pursuant to 11 U.S.C. § 542(e), the trustee is entitled to the turnover or disclosure of the work product of the law firm of Johnson, Erb, Latham, Gibb & Carlson, P.C. as created by such law firm during its representation of the Fort Dodge Creamery Co.

ORDER

IT IS THEREFORE ORDERED that the trustee's motion is granted. The law firm of Johnson, Erb, Latham, Gibb & Carlson, P.C. is ordered to permit James H. Cossitt, trustee, to examine and copy work product created by said firm in its representation of Fort Dodge Creamery Co.

SO ORDERED ON THIS 22nd DAY OF JANUARY, 1990.

William L. Edmonds
Chief Bankruptcy Judge

---

1. Although the formal resistance to the trustee's motion was filed by the Johnson law firm on behalf of the bank and not by the firm itself, the court will consider the resistance as one filed by the law firm. This is how the resistance was argued at the hearing. Moreover, the court does not understand how First American State Bank would be in a position to resist the turnover motion.