

In the United States Bankruptcy Court

for the Northern District of Iowa

SHERMAN PAUL HOGREFE
Debtor.

Bankruptcy No. 92-41695XM
Chapter 7

NORTH IOWA COOPERATIVE ELEVATOR
Plaintiff

Adversary No. 92-4266XM

vs.

SHERMAN PAUL HOGREFE
Defendant.

ORDER RE: PLAINTIFF'S MOTION TO COMPEL

Plaintiff North Iowa Cooperative Elevator (CO-OP) moves for an order compelling discovery and for sanctions. Defendant Sherman Hogrefe resists. Hearing was held March 22-23, 1994, in Mason City and Fort Dodge.

I.

This is the second motion regarding a request for production of documents served by plaintiff on defendant in April, 1993. Defendant objected to the request, and plaintiff filed a motion to compel production. Following hearing, the court issued an order on January 25, 1994, granting the motion to compel and ordering defendant to produce the documents for inspection by February 2, 1994. No sanctions were imposed.

Production was thereafter delayed by Hogrefe because his counsel, David M. Nelsen, wanted to determine whether Hogrefe should assert Fifth Amendment rights against production. Nelsen had learned at the time production was due that there was perhaps an ongoing criminal investigation against Hogrefe. Nelsen determined that Fifth Amendment rights would not be asserted against the request, and various documents were provided to plaintiff at Co-op's deposition of Hogrefe on February 14.

Co-op has again moved to compel production on its belief that Hogrefe has failed to turn over all documents outlined in its request (docket no. 54). In support of the motion, the court has considered the testimony at hearing, affidavits filed by Co-op's attorney John Duffy on February 14 and March 17, and the arguments of counsel.

Duffy's March 17 affidavit lists the documents which he believes Hogrefe has but has not produced. These documents include the following:

- 1991 bank statements, canceled checks and deposit tickets for Hogrefe's accounts at Albert City Savings Bank, Norwest Bank and Metropolitan Bank;

- 1992 bank statements, canceled checks and deposit tickets for Hogrefe's accounts at Norwest and Metropolitan;
- 1991 and 1992 state and federal income tax returns;
- various canceled checks or deposit tickets relating to specific banking transactions in 1991 and 1992;
- documents relating to Hogrefe's sales of his interests in H & H Development Corp. and Prairie Traders;
- various financial statements.

It is asserted by defendant that he has turned over all of the documents requested that he believes exist and that he can find. Except as to the tax returns, Co-op has no evidence that he has not. Hogrefe's counsel asserts that all of the above banking records can be obtained by plaintiff from the banks at plaintiff's cost.

It is undisputed that Hogrefe has located some bank records since the pending motion was filed. These include records from Norwest, Metropolitan and perhaps Albert City Savings Bank. Hogrefe turned these over to his attorney, but they have not as yet been made available to Co-op for inspection.

Debtor has 1991 federal and state tax returns. It is unclear as to whether there are such returns for 1992. Defendant has not turned over the 1991 returns on the ground that they are presently in possession of his accountant for purposes of Hogrefe's amending them. Hogrefe resists turning over the tax returns on the ground also that production violates 26 U.S.C. § 6103, a statute not raised by Hogrefe by formal objection at any time prior to hearing.

II.

Despite the fact that debtor did not produce documents until February 14, 1994, the court finds the excuse for the 12-day delay to be reasonable. Hogrefe's attorney was not aware of the possible criminal investigation of his client at the time he was initially required to respond to the request for production. A short period of time to determine whether Fifth Amendment rights would be asserted was reasonable. No sanctions will be imposed for the delay.

III.

Co-op has no evidence, other than as to the tax returns, that Hogrefe is withholding documents. Hogrefe was required to produce for inspection bank records which he reasonably should have. It is asserted he cannot locate most of these records. However, he has these records available to him by request to the banks. It may be that to obtain copies of his bank records, there will be an expense, but Hogrefe has not sought a protective order asking that he not have to bear the expense. He contends only that Co-op should have to pay it. To the extent it may be more expensive to produce the records than to copy existing records, Hogrefe has offered no good reason why Co-op should pay that expense because of Hogrefe's inability to locate his banking records for the year of and the year prior to his bankruptcy filing. The court will order that Hogrefe sign a consent permitting the Co-op to obtain his 1991 and 1992 records at the three banks and that the cost of reproduction will ultimately be borne by Hogrefe.

IV.

Neither Hogrefe nor David M. Nelsen, his attorney, has asserted a reasonable ground for refusing to turn over the 1991 federal and state tax returns. That either or both returns may be amended is no justification whatsoever for refusing to turn them over or for delaying turnover. If they are in the possession of Hogrefe's accountant, they may be obtained by Hogrefe. It is unclear to the court why counsel is unsure as to whether 1992 returns exist. Hogrefe should know the answer to that and Hogrefe's counsel should have conveyed the answer to Co-op. The refusal to turn over the 1991 tax returns was not substantially justified, and there is no reason why sanctions should not be awarded against Hogrefe and his counsel.

V.

The court has examined the exhibit itemizing attorney's fees paid by Co-op in prosecution of its motion. The court finds there is no reason to go back to the work done on the initial motion. The court will award attorney's fees for work done after the turnover of documents on February 14. This included time billed in the amount of \$237.50 for Duffy's meeting with Nelsen on February 24. The court will also award attorney's fees for the hearing on this matter including Duffy's travel time to Fort Dodge. The time allowed for the hearing and travel time on March 22-23 will be eight hours. Time will be compensated at the rate of \$95.00 per hour. Total sanctions awarded against defendant and his counsel will be \$997.50.

The court finds that Co-op is not entitled to sanctions on the issue of the cost of the copies of documents turned over on February 14.

ORDER

IT IS ORDERED that the plaintiff's motion to compel and motion for sanctions is GRANTED. Defendant Sherman Hogrefe shall provide a written consent to counsel for North Iowa Cooperative Elevator to permit Co-op to obtain Hogrefe's 1991 and 1992 bank records from Norwest Bank, Metropolitan Bank and Albert City Savings Bank. Co-op may request copies of Hogrefe's records from the banks. Co-op shall initially pay banks for the cost of production. Co-op shall file an affidavit with the court on the cost of production. These costs will be assessed to Hogrefe except to the extent that Co-op obtains records from the banks which Hogrefe has turned over to Co-op.

IT IS FURTHER ORDERED that Hogrefe shall forthwith permit Co-op and its counsel to inspect 1991 state and federal tax returns, and if they exist, 1992 state and federal tax returns.

IT IS FURTHER ORDERED that sanctions are awarded in favor of Co-op and against Sherman Hogrefe and David M. Nelsen, jointly and severally, for attorney's fees in the amount of \$997.50. Sanctions shall be paid by no later than May 13, 1994.

SO ORDERED ON THIS 28th DAY OF MARCH, 1994.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and a judgment by U. S. mail to: John Duffy, David Nelsen, and U. S. Trustee.