

In the United States Bankruptcy Court

for the Northern District of Iowa

BOCKES BROTHERS FARMS, INC.
Debtor(s).

Bankruptcy No. 93-60881KW
Chapter 11

BOCKES BROTHERS FARMS, INC.
Plaintiff(s)

Adversary No. 93-6104KW

vs.

FARMLAND FINANCIAL SERVICES
COMPANY, et al
Defendant(s)

ORDER RE: MOTION FOR PROTECTIVE ORDERS RE: DEPOSITIONS OF ATTORNEYS

The above-captioned matter came on for hearing on February 24, 1994 on Farmland Financial Services Company's Motion for Protective Orders re: Depositions of Attorneys. Participating in this telephonic hearing were Rod Kubat for Farmland, Eric Lam for Ag Services of America and Dan Childers for Debtor Bockes Brothers Farms, Inc.

Farmland seeks a protective order under Rule 26(c) quashing deposition notices and forbidding Ag Services from deposing Dennis Alt, Farmland's in-house counsel, and Rod Kubat, Farmland's litigation attorney. Debtor filed a conditional joinder. It requests similar protection from Farmlands' request to depose its corporate attorney, Scott Bannister, or other Bockes attorneys.

Ag Services asserts that it has cause to request depositions of Alt and Kubat. It seeks information regarding a mediation session attended by Attorney Alt in June 1992 and discussions between Alt and Norwest's attorney in April 1992. Ag Services wishes to depose Attorney Kubat regarding non-privileged settlement negotiations he attended on May 13, 1993 and conversations between Kubat and Bannister in May 1992. Ag Services asserts that testimony regarding these meetings and discussions is conflicting and Alt's and Kubat's knowledge as participants cannot be ascertained by any other means.

The general philosophy of courts considering this issue is succinctly stated as follows:

Deposing an opponent's attorney is a drastic measure. It not only creates a side-show and diverts attention from the merits of the case, its use also has a strong potential for abuse. Thus, a motion to depose an opponent's attorney is viewed with a jaundiced eye and is infrequently proper.

M & R Amusements Corp. v. Blair, 142 F.R.D. 304, 305 (N.D. Ill. 1992). Nevertheless, Federal Rules do not specifically prohibit the deposition of an attorney. Shelton v. American Motors Corp., 805 F.2d

1323, 1327 (8th Cir. 1986); Hay & Forage Indus. v. Ford New Holland, Inc., 132 F.R.D. 687, 689 (D. Kan. 1990). However, if allowed, such depositions should be employed only in limited circumstances and carefully circumscribed as to appropriate areas of inquiry.

[T]hose circumstances should be limited to where the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.

Shelton, 805 F.2d at 1327.

The Court has reviewed the cases cited by the parties. As Ag Services points out, the deposition of an attorney may be appropriate where the attorney is a fact witness, such as an actor or viewer. Johnston Dev. Group, Inc. v. Carpenters Local Union, 130 F.R.D. 348, 352 (D.N.J. 1990). Also, concerns of privilege or confidentiality are unwarranted where third parties are present at conversations for which deposition testimony is sought. Id.

The Court concludes that Ag Services has shown sufficient need for the depositions to allow limited inquiry into the areas outlined in its objection. In light of existing conflicting testimony regarding what occurred at the June 1992 and May 13, 1993 negotiations, the testimony of Alt and Kubat arising from their presence at the meetings is significant. Information regarding Alt's discussions with Norwest's attorney in April 1992 and Kubat's conversations with Bannister in May 1992 does not appear to be available through other means. Therefore, the Court will not issue a protective order regarding these specific matters.

Even though the Court has not issued a protective order as it is this Court's determination that the matters sought are appropriately subject to the taking of depositions, the Court advises all parties and counsel that the general philosophy of reluctance to allow this type of deposition remains intact. As such, the Court asks counsel to keep this in mind when conducting the deposition and asks counsel not to attempt to go outside the limited areas authorized by this ruling.

WHEREFORE, Farmland's Motion for Protective Orders is DENIED.

FURTHER, Ag Services' depositions of Dennis Alt and Rod Kubat are limited to the matters described on pages 4 through 7, sections I and II of its Objection.

SO ORDERED this 4th day of March, 1994.

Paul J. Kilburg, Judge
U.S. Bankruptcy Court