

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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STEVEN C. SOUERS and MARY C. SOUERS

Bankruptcy No. 93-00971C  
(Southern District of Iowa)

*Debtors.*

Chapter 7

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ROSEN'S, INC.

Adversary No. 93-93080

*Plaintiff*

vs.

STEVEN C. SOUERS and MARY C. SOUERS

*Defendants.*

Ancillary No. 94-2  
(Northern District of Iowa)

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### ORDER RE: PLAINTIFF'S MOTION FOR ORDER COMPELLING DISCOVERY

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Rosen's, Inc. moves for an order compelling the testimony of discovery witness Charles Levad and compelling turnover of documents. Hearing on the motion was held on July 20, 1994, in Mason City. James H. Cossitt appeared for Rosen's, Inc. Levad was present in the courtroom during the hearing, but he did not enter an appearance on defendants' behalf. Defendants did not file a resistance to the motion. They did not appear at the hearing nor were they represented by counsel.

This adversary proceeding was filed in the United States Bankruptcy Court for the Southern District of Iowa where the defendants' chapter 7 case is pending. The Motion to Compel was filed in this court pursuant to Fed.R.Civ.P. 37(a)(1). The plaintiff's claims are concerned with a conveyance of real estate from one corporation to another with both corporations being owned by one or both of the debtors. Rosen's, Inc. alleges that the transfer was fraudulent and that the debtors' schedules were knowingly false in failing to disclose the transfer. Plaintiff contends that the transferee corporation, Mid Iowa Flotation Equipment Company, was established and took title to the real estate in an attempt to defraud creditors of the transferor, Fernald Ag Supply. Rosen's, Inc. attempted to depose Charles Levad as the attorney hired by Souers to incorporate Mid Iowa Flotation Equipment Company. It also sought documents from Levad which its counsel believed were relevant to the fraudulent transfer.

Rosen's, Inc. served Levad with a subpoena requiring Levad's attendance at a deposition on May 2. The subpoena demanded the production of documents. Plaintiff also gave notice of the deposition to Levad and served a copy of the notice and subpoena on Jerrold Wanek, attorney for the Souers in the adversary proceeding. There is no evidence that Souers sought a protective order to prevent the deposition. Neither Souers nor Wanek attended Levad's deposition.

Levad attended the deposition. He answered various questions relating to his legal practice and personal background. He refused, however, to answer any of attorney Cossitt's questions relating to his work for Souers or Mid Iowa Flotation Equipment Company. Approximately 40 such questions were asked. In addition, Levad refused to describe generally the nature of the documents sought by Cossitt. Levad's refusals were based on the attorney-client privilege.

Except as to three questions, plaintiff's motion to compel will be granted because the defendants have failed to establish the applicability of the privilege to the questions asked. One claiming the attorney-client privilege has the burden of establishing it. Solomon v. Scientific American, Inc., 125 F.R.D. 34, 36 (S.D. N.Y. 1988). The claimant must show the following:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [the] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

U. S. v. Noriega, 917 F.2d 1543, 1550 (11th Cir. 1990) cert. denied by Cable News Network, Inc. v. Noriega, 111 S.Ct. 451 (1990). The claim of privilege must relate to communications between the client and attorney. Hardy v. New York News, Inc., 114 F.R.D. 633, 644 (S.D. N.Y. 1987).

Levad may assert the privilege as to his communications with Souers. However, as to nearly all of the questions asked, Levad failed to establish that the information requested from Levad was obtained by Levad through communications from Souers. Levad refused to answer questions which are clearly not subject to the attorney-client privilege. For example, Cossitt asked, "[w]hat was the purpose and the scope of your employment for Mr. Souers?" (page 11, line 13). Upjohn Co. v. U.S., 449 U.S. 383, 101 S.Ct. 677 (1981); Humphreys, Hutcheson and Moseley v. Donovan, 755 F.2d 1211, 1219 (6th Cir. 1985). Similarly, Levad improperly refused to answer a question as to who made the initial contact with him. Another question which clearly appeared not to invade the privilege was whether Levad prepared the documents to create Mid Iowa Flotation Equipment Company (page 4, line 4).

Levad was asked to describe generally the subpoenaed documents so that the plaintiff could assess the applicability of the privilege. Plaintiff was entitled at the very least to a verbal description pursuant to Fed.R.Bankr.P. 9016 as it incorporates Fed.R.Civ.P. 45(d)(2). Levad improperly refused to describe the documents.

It appears that the privilege was properly asserted as to three questions: (1) whether Steven Souers' testimony as to why he started the corporation was consistent with what Souers told Levad (page 36, line 16); (2) whether Levad's discussions with Souers were the normal sorts of discussions which a client would have with an attorney hired to form a corporation (page 41, line 18); and (3) whether Levad knew where the corporate bank account was, based on what Souers told Levad (page 46, line 8).

The Motion to Compel will be granted in part and denied in part. The deposition will be reconvened in the first floor library/witness room of the United States Bankruptcy Court for the Northern District of Iowa at the Courthouse and Federal Building, 320 Sixth Street, Sioux City, Iowa. The court finds it unfortunate that the attorneys must travel to Sioux City, but Levad has indicated to the court that even

if he is compelled to answer the questions already asked, he will more than likely assert the privilege as to any follow-up questions. Because this matter is subject to pretrial deadlines in the Southern District, it will be most efficient if the undersigned is available to rule on additional assertions of the privilege. Therefore, the undersigned judge will be available to the parties on the day of the deposition.

Levad shall produce the documents prior to the date of the deposition. Finally, because it appears that the privilege was asserted in an indiscriminate fashion and as to various questions, it was asserted without any colorable merit, plaintiff's motion for sanctions will be granted. The court will order Levad to pay Cossitt's round trip mileage from Ames to Mason City and from Ames to Sioux City. Levad will also be ordered to pay plaintiff's cost in preparing and arguing the Motion to Compel and Cossitt's travel time for the aforementioned trips. After completion of the deposition, Cossitt shall file an affidavit setting out such costs for the court.

IT IS ORDERED that Rosen, Inc.'s Motion to Compel discovery is granted in part and denied in part. The deposition of Charles Levad shall be reconvened in the first floor library/ witness room of the United States Bankruptcy Court, Courthouse and Federal Building, 320 Sixth Street, Sioux City, Iowa on one of the following dates to be selected by attorneys Cossitt and Levad: August 15, August 29, August 31, or September 9. The attorneys shall notify the court by telephone within seven days of the date of this order of the date and time selected.

At such deposition, Levad shall answer all of the questions asked him at the initial session of his deposition on May 2, 1994, with the exception of the three questions commencing at page 36, line 16; at page 41, line 18; and page 46, line 8. As to these questions, the Motion to Compel is DENIED.

IT IS FURTHER ORDERED that Levad shall produce the documents requested in the notice of deposition at least five business days prior to the deposition.

IT IS FURTHER ORDERED that plaintiff's request for sanctions is granted. Levad shall pay plaintiff's attorney's automobile mileage for his round trips from Ames to Mason City and from Ames to Sioux City at the rate of 25 cents per mile and shall pay plaintiff's counsel for travel time for these trips and for the time spent in preparing and arguing the Motion to Compel. Attorney Cossitt shall file an affidavit of costs after the conclusion of the deposition. If an objection to the costs is filed within 10 days of service of the affidavit of Levad, the amount of the award of sanctions shall be set for hearing.

SO ORDERED ON THIS 27<sup>th</sup> DAY OF JULY, 1994.

William L. Edmonds  
Chief Bankruptcy Judge

I certify that on \_\_\_\_\_ I mailed a copy of this order by U. S. mail to: James Cossitt, Gerald Wanek, Donald Nieman, William Talbot, Joseph Schaffer, Charles Levad and USTrustee.