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signed 8-21-00

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**MICHAEL RYSER,
CAROL ANN RYSER,**

DEBTORS.

**CASE NO. 93-40188-7
CHAPTER 7**

**ORDER ON DEBTORS' ASSERTION OF FIFTH AMENDMENT
PRIVILEGE AGAINST SELF-INCRIMINATION**

This matter is before the Court for a determination of the general parameters of the debtors' ability to refuse to answer questions asked and to produce documents sought by the trustee of their chapter 7 bankruptcy estate. The debtors appear by counsel Robert N. Calbi. Trustee Darcy D. Williamson appears *pro se*. The Court has reviewed the relevant materials and is now ready to rule.

Several years ago, the debtors settled an adversary proceeding the trustee had brought against them. The settlement gave their bankruptcy estate a judgment against them for \$100,000 that they were to pay through monthly installments, and required them to do certain other things. The debtors failed to comply with the terms of the settlement. The trustee asked the Court to require the debtors to show cause why they should not be held in contempt for their failures. Mr. Ryser appeared at a hearing on the trustee's motion and presented a financial statement that purported to show why the debtors could not make the required payments. The matter was continued so the trustee could investigate the debtors' financial situation.

Pursuant to Federal Rule of Bankruptcy Procedure 2004, the trustee obtained an order for an examination of the debtors that also required them to produce various documents, including records kept by entities they control. The debtors were then and continue to be the subjects of a criminal investigation. Only Mr. Ryser appeared for the exam, and he produced only one document. Nevertheless, he answered questions about various financial matters without asserting his Fifth Amendment privilege against self-incrimination.

Another show cause hearing was held on May 3, 2000, and both debtors then claimed that answering the trustee's questions and producing the requested documents would violate their privilege against self-incrimination. The parties have now submitted briefs about the debtors' privilege claims.

DISCUSSION AND CONCLUSIONS

In the debtors' brief, they now concede, as they must, that Mr. Ryser has waived his Fifth Amendment privilege with respect to the subjects and areas covered in the 2004 exam at which he testified without invoking the privilege. *See Rogers v. United States*, 340 U.S. 367, 370-75 (1951). They argue, however, that he may still assert the privilege in response to questions covering other subjects and areas, and that Mrs. Ryser has not waived her privilege at all. The Court agrees. Mr. Ryser may validly claim the privilege now, but only if the trustee's questions venture into new areas. Mr. Ryser will also have to produce any requested documents he may have that concern the areas covered in the 2004 exam. Mrs. Ryser, on the other hand, not having previously testified, has not waived her privilege and can raise it in a 2004 exam where appropriate.

An individual's private papers are generally protected from forced disclosure by the Fifth Amendment privilege, although the Supreme Court has ruled that it does not protect "records required

by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established.” *Shapiro v. United States*, 335 U.S. 1, 33 (1948) (quoting *Davis v. United States*, 328 U.S. 582, 590 (1946)). The Court is uncertain whether other exceptions may exist as well.

Neither of the debtors can claim a personal privilege against self-incrimination to avoid producing records of entities for which they are the records custodians. *Braswell v. United States*, 487 U.S. 99, 104-19 (1988). The cases the debtors rely on to support their position were overruled by *Braswell*. See 487 U.S. at 102, n. 2 (citing *In re Grand Jury No. 86-3 (Will Roberts Corp.)*, 816 F.2d 569, 573 (11th Cir. 1987) and *United States v. Lang*, 792 F.2d 1235, 1240 (4th Cir.), cert. denied 479 U.S. 985 (1986) as cases recognizing privilege in such circumstances). In this situation, the Supreme Court’s ruling means that the debtors are considered to be mere representatives of the entities, which have no privilege against self-incrimination that would permit them to refuse to produce their records. The debtors’ representative capacity precludes them from asserting their personal privilege to bar forced production of the entities’ records.

In sum, then, Mr. Ryser must answer the trustee’s questions and produce any requested private papers of his that concern any subjects or areas covered in his earlier 2004 exam. Mrs. Ryser retains her full privilege not to give incriminating testimony or produce her private papers that might incriminate her. Any of either debtor’s private papers to which the *Shapiro* exception applies must also be produced, if requested. Both debtors must produce any records the trustee has requested that they hold in a representative capacity for an artificial entity. These general parameters should guide the parties during the trustee’s future discovery efforts.

If any more disputes arise about the extent of the privilege that is available to the debtors, the parties will need to identify the specific questions or documents about which they cannot agree and present those disputes to the Court for decision.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this ____ day of August, 2000.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE