

UNITED STATES BANKRUPTCY COURT  
FOR THE  
WESTERN DISTRICT OF KENTUCKY

TRIPLE S. RESTAURANTS, INC.	)	
	)	
Debtor	)	Case No. 94-32848(3)7
	)	
J. BAXTER SCHILLING, TRUSTEE	)	
IN BANKRUPTCY FOR TRIPLE S	)	
RESTAURANTS, INC.	)	
	)	
Plaintiff	)	A.P. No. 96-3128 and
	)	96-3129
vs.	)	
	)	
DONALD M. HEAVRIN	)	
	)	
Defendant	)	
_____	)	

**MEMORANDUM**

This matter is before the Court on the Motions to Compel Deposition of Beverly Heavrin filed by J. Baxter Schilling, Trustee. The Trustee is seeking to depose Beverly Heavrin, the wife of the Defendant, Donald Heavrin. Both Mr. Heavrin and Mrs. Heavrin opposed the motion, arguing that Mrs. Heavrin's testimony is privileged under Kentucky state law. To consider this motion in the proper context, the Court offers a brief background.

The Trustee filed adversary proceedings against Mr. Heavrin on July 30, 1996, seeking disgorgement of all legal fees paid to Mr. Heavrin. The Trustee based his actions solely on federal law and the Bankruptcy Code. This Court entered judgments against Mr. Heavrin, which were appealed to the Sixth Circuit Court of Appeals, and are now final, non-appealable judgments. The Trustee is still seeking to collect on those judgments. To that end, the Trustee scheduled the

deposition of Mrs. Heavrin. Mr. Heavrin then notified the Trustee that he was exercising his privilege under Kentucky Rule of Evidence 504 to prevent his spouse from testifying. Mrs. Heavrin then notified the Trustee that she was also exercising her privilege not to testify against her husband.

The Trustee contends that because these cases are pending in federal bankruptcy court, and the underlying judgments are based upon federal claims, the Court should hold that the federal common law governs this issue rather than the state law. Federal Rule of Evidence 501 addresses how evidentiary privileges should be applied in federal courts. Rule 501 provides that:

(T)he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

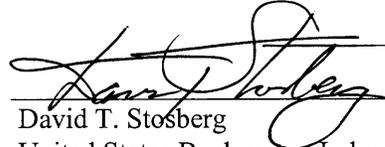
Fed. R. Evid. 501. Because state law did not provide the rule of decision, the Trustee contends that federal privilege law should govern rather than the Kentucky privilege law. The Heavrins contend, however, that this action is no longer an action under federal law, but is instead a collection action under state law. Because Mrs. Heavrin's testimony has nothing to do with the underlying bankruptcy judgments, but instead pertains only to the Trustee's collection efforts, the Heavrins contend Kentucky law governs. The Heavrins cite Federal Rule of Civil Procedure 69, which they state specifically incorporates state law governing the enforcement of money judgments.

Thus, the issue is whether the state privilege law governs, or if federal privilege law governs. For the following reasons, the Court finds that federal law governs. Federal Bankruptcy Rule of Procedure 7069 incorporates Fed. R. Civ. P. 69 and subsection (a)(1) provides: "The procedure on execution [of a money judgment] – and in proceedings supplementary to and in aid of judgment or

execution – must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." Fed. R. Bankr. P. 7069 (emphasis added). Thus, a money judgment holder may obtain discovery by either the Federal Rules or state practice. *See In re Duque*, 134 B.R. 679, 684 n.3 (S.D. Fla. 1991). *See also* 10 *Collier on Bankruptcy*, ¶ 7069.02 at p. 7069-4 (15th ed. 1994) ("Rule 69(a) gives the judgment creditor the choice of using federal discovery rules or state practice" to discover the existence of assets available to satisfy a judgment.) Under federal discovery rules, no blanket marital privilege exists.

Moreover, as stated above, Federal Rule of Evidence 501 provides that in actions where state law provides the rule of decision, state privilege law governs. Conversely, where federal law provides the rule of decision, federal privilege law governs. Here, there can be no question federal law provided the rule of decision. This action, brought in federal court and based upon federal law, did not transform into a state action after the Court entered the judgment and collection efforts began. The Court was able to locate one case which appears to be closely analogous. *In re Donald Sheldon & Co., Inc.*, 191 B.R. 39 (Bankr. S.D.N.Y. 1996). In that case, the Trustee obtained a judgment against Mr. Sheldon, a principal of the debtor. Thereafter, the Trustee scheduled a deposition of Mr. Sheldon, to ascertain the whereabouts of any assets Mr. Sheldon possessed to satisfy the judgment. Mr. Sheldon attempted to raise his spousal privilege. The Bankruptcy Court held "[this] proceeding involved execution of a judgment that was based on New York substantive law. The Judgment was based upon state causes of action (breach of fiduciary duty and breach of contract) and, thus, state law is controlling in this matter." *Id.* at 47. Conversely, if the action had been based upon federal causes of action, as the present action does, federal law would have governed. Here, federal law provided the rule of decision, not state law, and thus, the action is still

a federal action and federal privilege law applies. An Order consistent with this Memorandum will be entered this same date.



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David T. Stosberg  
United States Bankruptcy Judge

Dated: October 26, 2009

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DONALD M. HEAVRIN	)	
	)	
Defendant	)	
_____	)	

ORDER

Pursuant to the Court's Memorandum entered this date and incorporated herein by reference, and the Court being otherwise sufficiently advised,

**IT IS ORDERED** that the Trustee's Motions to Compel Deposition of Beverly Heavrin are **GRANTED**, and Beverly Heavrin shall appear and testify at her deposition in this matter. The Trustee shall reschedule a deposition at such time as the parties may agree.

  
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David T. Stosberg  
United States Bankruptcy Judge  
Dated: October 26, 2009