

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re:

No. 99-11907
Chapter 7

SOUTHERN INDUSTRIAL MECHANICAL
MAINTENANCE CORPORATION,

Debtor

In re:

No. 99-11908
Chapter 7

SIMMCO L.P. GAS TANK CO., INC.,

Debtor

In re:

No. 99-11909
Chapter 7

DAVID R. BLURTON
VIRGINIA E. BLURTON

Debtors

TED HUNDERUP, United States Bankruptcy
Trustee,

Plaintiff

v

Adversary Proceeding
Nos. 00-5166
00-5168
00-5169

BENNY FESMIRE, WILLIAM WILHITE,
CRAIG LAMAN, ROBERT EDWARDS,
CLAUDE CONLEY, BANK OF ALAMO,
JOHN DOES I, II, III, IV AND V, W.F.L.,
LLC and F.W.L., LLC

Defendants

MEMORANDUM AND ORDER

The plaintiffs have filed a motion to compel the defendants, Bank of Alamo and Claude Conley, to produce documents in response to the plaintiffs' first set of interrogatories and first request for production of documents. The bank and Mr. Conley responded to the interrogatories and request for production by asserting that banking regulations and a Tennessee statute prevent it from disclosing the records. They did not cite any particular banking regulations, but they did cite the Tennessee statute, the Financial Records Privacy Act. *Tenn. Code Ann.* 45-10-101 – 45-10-118.

If the procedural rules and evidence law that apply in the litigation do not prevent disclosure of a party's bank records, then the Financial Records Privacy Act does not prevent their disclosure. *Tenn. Code Ann.* §§ 45-10-104(a)(2), 45-10-106(1), 45-10-107(a). If the litigation is pending in a Tennessee state court, the Act requires the issuance of a subpoena to the bank in accordance with the Tennessee Rules of Civil Procedure and service of a copy of the subpoena on the customer.

The subpoena must also meet the requirements of § 45-10-107(a). It requires the subpoena to include the name and address of the customer, the name or functional description of the records, the time period covered by the records, and any additional information needed to identify the records. It also requires that the bank be given at least 15 days to produce the records. These requirements are for the convenience of the bank in producing the records; they are not for the customer's protection.

The statute's broad definition of "subpoena" should include include a request for production. *Tenn. Code Ann.* 45-10-102(8); *Tenn. R. Civ. P.* 34. Thus, when the bank's customer

is a party to litigation in a Tennessee state court, the statute imposes additional procedural requirements on a request to the bank to produce the customer's records.

The statute does not create an evidentiary privilege that allows disclosure of a litigant's bank records only if the litigant consents. The statute merely adds to the procedure required by the Tennessee Rules of Civil Procedure. Additional procedural requirements such as these do not apply to discovery in a federal court proceeding. See *Jackson v. County of Sacramento*, 175 F.R.D. 653, 655 (E. D. Cal. 1997); *Mercado v. Division of New York State Police*, 989 F.Supp. 521 (S. D. N. Y. 1998). The federal procedural rules provide the bank with methods of protecting itself from requests to produce that are too broad or too indefinite or that do not allow enough time to respond. *Fed. R. Bank. P.* 7026; *Fed. R. Civ. P.* 26.

Even if the statute is viewed as creating a privilege, it may not apply in this proceeding. Though the underlying theme of the complaint is fraud, this is not simply a diversity action under Tennessee law. Jurisdiction is based on federal bankruptcy law, and the plaintiffs allege violations of the federal RICO Act. See *Delozier v. First National Bank*, 109 F.R.D. 161 (E. D. Tenn. 1986).

In summary, the plaintiffs are not required to comply with the Tennessee Financial Records Privacy Act in order to discover the records of the bank's customers who are parties to this proceeding.

The statute may allow the bank to produce the customer records of the other parties because the bank is also a party. *Tenn. Code Ann.* § 45-10-103(9). The statute is unclear on this point. It allows the bank to include the records as part of an answer or other pleading. This raises the question of whether a response to a request for production is a "pleading" as used in the

statute. Whether this exception applies is more important when the bank is a party to the litigation, but the customer is not. In that situation, the procedure added by the statute may benefit the customer. In this proceeding, however, both the bank and the customers are parties. As a result, there is little reason to require compliance with the additional procedures imposed by the Financial Records Privacy Act.

In any event, the court has already decided that the plaintiffs need not comply with the Financial Records Privacy Act in order to discover the bank's records as to customers who are parties to this proceeding.

The Financial Records Privacy Act does not protect the bank, as a defendant, from producing its own records that are not customer records. *Tenn. Code Ann.* §§ 45-10-103(9) & 45-10-104(a). Thus, the bank is required to produce any such records that are requested by the plaintiffs subject to the limitations imposed by this order. Accordingly,

It is ORDERED that—

The Tennessee Financial Records Privacy Act does not prevent the Bank of Alamo and Claude Conley from producing the records or other information requested by the plaintiffs in their first set of interrogatories and first request for production of documents.

The Bank of Alamo and Claude Conley have not cited any banking laws or regulations that prevent production of the requested records, and therefore the court holds that banking laws or regulations do not prevent production of the records.

The Bank of Alamo and Claude Conley shall produce the requested records within 30 days after the date of this order *except* that they are not required to produce records that

contain the names of customers who are not parties to this proceeding; as to those records, however, they shall provide the plaintiffs with a list identifying the records that have not been produced.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

[entered 6/25/01]