



SO ORDERED.

SIGNED this 10 day of March, 2006.

**THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.**

**John C. Cook
UNITED STATES BANKRUPTCY JUDGE**

**IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE**

In re:)	
)	
Cary Marshall Dotson)	No. 03-10116
Gigi Maria Dotson)	
)	Chapter 7
Debtors)	
_____)	
)	
K.K.I., LLC)	
)	
Plaintiff)	
)	
v.)	Adv. No. 03-1022
)	
Cary Marshall Dotson)	
)	
Defendant)	

MEMORANDUM AND ORDER

This matter is before the court on the plaintiff's motion to compel that was filed on January 11, 2006. The motion seeks an order compelling the defendant to respond to and comply

with K.K.I., LLC's requests for production that the plaintiff served on the defendant on October 24, 2005. For the reasons set forth below, the court will deny the motion.

The plaintiff filed the complaint initiating this adversary proceeding on February 3, 2003. Because the transactions or occurrences that are the subjects of the complaint are also the subjects of a criminal prosecution of the debtor initiated by an indictment for theft issued on October 8, 2002, the court entered an order on March 1, 2004, staying this proceeding. That order was consistent with the court's practice in adversary proceedings related to criminal prosecutions: if the criminal prosecution ends in an acquittal, the adversary proceeding will resume and the privilege against self-incrimination may not be asserted; if the criminal prosecution ends in a conviction, the conviction gives rise to collateral estoppel establishing most or all of the facts pertinent to the adversary proceeding. When the court entered the stay order in this proceeding two years ago, it contemplated that the criminal prosecution would be completed within a few months. *See* U.S. CONST. amend. VI; TENN. CONST. art. 1, §§ 9, 35; T.C.A. § 40-14-101; Tenn. R. Crim. P. 48(b) (all granting criminal defendants a right to a speedy trial).

On September 13, 2005, the plaintiff filed a motion for a partial lifting of the March 2004 stay and, on October 20, 2005, the court granted the motion in part, permitting the plaintiff "to serve requests for discovery seeking information or documentation pertinent to the defendant's bank accounts and to file a motion to compel with respect thereto if necessary or appropriate." As indicated above, the plaintiff served discovery requests on the defendant four days later. The defendant did not respond thereto and, on January 11, 2006, the plaintiff filed the motion to compel presently before the court.

At the initial hearing on the motion on February 2, 2006, the court denied the plaintiff's motion with respect to Paragraphs 1, 5, 6, 7, 8, and 12 of the discovery request, concluding that those items were beyond the scope of the October 2005 order. The court also denied the motion with respect to Paragraphs 9 and 10, because they sought documents not within the defendant's possession, custody, or control. The court continued the hearing with respect to the remainder of the discovery request, but limited the time frame of the documents sought by Paragraphs 2-4 to the period 1999 to the present.

On March 8, 2006, the defendant responded to those paragraphs of the discovery request, objecting thereto on the ground of the privilege against self-incrimination. The defendant does not contend that the contents of the bank records are protected by the privilege, as they were not prepared by him and do not, therefore, constitute his testimony. *See, e.g., Fisher v. United States*, 425 U.S. 391, 409 (1976). Rather, the defendant asserts that the act of producing the bank records is privileged because that act would be testimonial and incriminating. *See, e.g., United States v. Doe*, 465 U.S. 605, 612-13 (1984). After reviewing the discovery requests and considering the arguments of counsel, the court agrees. The plaintiff alleges in this proceeding that the defendant should be denied a discharge because he failed to disclose his ownership of embezzled funds in his bankruptcy schedules. Not only may such conduct result in a denial of discharge, *see* 11 U.S.C. § 727(a)(2), (4)(A), but it may also result in a criminal conviction, *see* 18 U.S.C. § 152(1), (2), (3); *see also id.* § 157(1), (2). The criminal statutes require that the concealment or false oath be made knowingly and fraudulently, and a debtor's possession of bank records reflecting ownership of undisclosed assets would bear directly on his or her knowledge of the assets. Thus, the defendant's production of the bank records in this case would

appear to be testimonial, as it would constitute the acknowledgment of the existence of the documents and the debtor's control thereof, which would directly implicate an essential element of bankruptcy crime. Accordingly, an order compelling compliance with Paragraphs 2-4 of the discovery requests would have the effect of compelling the defendant to be a witness against himself in violation of the Fifth Amendment to the Constitution of the United States.

For the foregoing reasons, the court will deny the plaintiff's motion to compel discovery. However, since it appears that the criminal prosecution has not progressed in the manner that the court anticipated despite the defendant's right to a speedy trial, the court finds it appropriate to lift the stay of proceedings before this court. Accordingly, it is hereby ORDERED that the motion to compel (doc. no. 67) is DENIED, and it is further ORDERED that the order entered on March 1, 2004, staying this adversary proceeding is VACATED. It is further ORDERED that the court will conduct a telephonic scheduling conference in this proceeding at 2:30 p.m. on March 27, 2006, for purposes of setting this proceeding for trial. The court will initiate the telephone call on that date and time.

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