UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

DWIGHT W. MATHUSA — CASE NO. 01-11350

Debtor — Chapter 7

TIMOTHY M. PALEY, LAWRENCE SPRARAGEN DONALD RAHM AND DONALD HART, as Trustees of the Local 724 International Brotherhood of Electrical Workers Pension Plan and Trust, TIMOTHY M. PALEY, LAWRENCE SPRARAGEN DONALD HART, JOSEPH GROSS, PHILLIP GARAFALO and PHILLIP PACIFICO, as Trustees of the International Brotherhood of Electrical Workers Local 236 Health and Benefit Fund and Plan and the International Brotherhood of Electrical Workers Local 236 Annuity Fund and Plan, TIMOTHY M. PALEY, LAWRENCE SPRARAGEN, JOSEPH GROSS and PHILLIP GARAFALO, as Trustees of the Local 236 International Brotherhood ofElectrical Workers Pension Plan and Trust, and International Brotherhood of Electrical Workers Local 236

Plaintiffs

vs. — ADV. PRO. NO. 01-90263

DWIGHT W. MATHUSA

Defendant

APPEARANCES:

POZEFSKY, BRAMLEY & MURPHY — WILLIAM POZEFSKY, ESQ.
Attorneys for Plaintiffs — Of Counsel
90 State Street
Albany, New York 12207

ROBERT S. CATAPANO-FRIEDMAN, ESQ.
Attorney for Plaintiffs
744 Broadway
Albany, New York 12207

O'CONNELL AND ARONOWITZ
Attorneys for Debtor
100 State Street
Albany, New York 12207-1885

MICHAEL D. ASSAF, ESQ.
Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND SCHEDULING ORDER

Under consideration by the Court is a motion filed by Plaintiffs[1] on September 16, 2002, on shortened notice, seeking to compel discovery and extend the discovery period in an adversary proceeding commenced by them on June 11, 2001, against Dwight W. Mathusa ("Debtor"). The Court heard oral argument on the motion on September 26, 2001, at its regular motion term in Binghamton, New York. At that time, the Court agreed to issue a decision concerning the discovery demands.[2]

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[1] Plaintiffs are identified as Timothy M. Paley, Lawrence Spraragen, Donald Rahm and Donald Hart as Trustees of the Local 724 International Brotherhood of Electrical Workers Pension Plan and Trust, Timothy M. Paley, Lawrence Spraragen, Donald Hart, Joseph Gross, Philip Garafalo and Phillip Pacifico, as Trustees of the International Brotherhood of Electrical Workers Local 236 Health and Benefit Fund and Plan and the International Brotherhood of Electrical Workers Local 236 Annuity Fund and Plan, Timothy M. Paley, Lawrence Spraragen, Joseph Gross and Phillip Garafalo, as Trustees of the Local 236 International Brotherhood of Electrical Workers Pension Plan and Trust and International Brotherhood of Electrical Workers Local 236 ("Plaintiffs" or "Funds")..

[2] The Court adjourned the motion to October 24, 2002, for control purposes and acknowledged that the scheduling order would have to be amended. It expressed uncertainty whether or not the trial, scheduled for December 5, 2002, would have to be adjourned.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(I) and (J).

FACTS

The Debtor filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), on March 12, 2001. Debtor was the co-founder, president, CEO and sole shareholder of Dwight Electric, Inc. ("DEI"). Allegedly, Manufacturers and Traders Trust Company ("M&T") foreclosed on the assets of DEI constituting its collateral and auctioned them off in March 2001, leaving M&T with a deficiency claim of over $1 million. *See* Affirmation of Debtor's counsel, Michael Assaf, Esq. ("Assaf"), filed on September 26, 2002.

Debtor indicates that in January 2001, he withdrew $25,000 in life insurance proceeds and invested the monies in SL Enterprises, Inc ("SLE"), a shell corporation owned by his wife. He received a 14% stock interest in SLE and his father, William Mathusa, received 84% based on his contribution of "an extensive collection of business assets and electrical supplies from his existing business."[3] William Mathusa serves as president of SLE; Debtor serves as vice president. SLE allegedly began operating on or about February 15, 2001. The stock in SLE was listed in the Debtor's petition as an asset in his case.

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[3] Debtor alleges that the business assets and electrical supplies had a value of approximately $180,000. *See* ¶ 15 of Debtor's Answer, filed September 10, 2001.

Plaintiffs were awarded default judgments against DEI in the amount of $37,783.78 and $233,853.06 in the U.S. District Court, N.D.N.Y., on March 23, 2001, and June 4, 2001, respectively, based on allegations that DEI failed and refused to remit certain monies deducted from employees' wages that were to be contributed to the Funds. Plaintiffs commenced the adversary proceeding in this Court on June 11, 2001, having been granted an extension to file their complaint. In their complaint, the Plaintiffs assert that the Debtor, although minority shareholder and vice president of SLE, is actually the one in control of the corporation. Plaintiffs allege that Debtor transferred former employees and customers of DEI to SLE and that SLE is conducting the same or similar electrical contracting business as DEI had operated. It is the Plaintiffs' contention that the Debtor transferred those assets to SLE to put them outside the reach of DEI's and Debtor's creditors. Furthermore, Plaintiffs assert that SLE should not be able to solicit former customers of DEI.

Plaintiffs' first cause of action alleges fraudulent transfer of the business of DEI and its employees and customers to SLE without adequate consideration prior to the cessation of DEI's operations, thereby defeating Plaintiffs' ability to collect on their judgments.[4] Plaintiffs seek the denial of the Debtor's discharge pursuant to Code § 727(a)(2). They allege that the Debtor was the alter ego of DEI and as an officer and controlling shareholder was responsible for the transfers. They seek to pierce the corporate veil of DEI and hold the Debtor liable.

Plaintiffs' second cause of action alleges fraud and defalcation by the Debtor as a

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[4] In objecting to Plaintiffs' request for information concerning DEI and SLE's employees and customers, the Debtor argues that customers and employees are not assets. At least one court has concluded that employees and customers may under certain circumstances constitute "property" for purposes of Code § 727(a)(2). *See Groman v. Watman (In re Watman)*, 301 F.3d 3, 7 (1st Cir. 2002).

fiduciary under ERISA pursuant to Code § 523(a)(4). Plaintiffs' third cause of action, based on Code § 523(a)(6), alleges conversion of dues/assessments deducted by DEI from the wages of it employees which were to be paid into the Funds.

In addition to seeking a denial of the Debtor's discharge and a denial of the dischargeability of the debt, Plaintiffs also request judgment against the Debtor for the amount of the two judgments awarded against DEI by the U.S. District Court, N.D.N.Y. "and the other amounts owing for the year 2000."

Presently, Plaintiffs are requesting that the Court compel the production of certain documents in connection with allegations in their first cause of action. These requests are summarized in a letter addressed to Debtor's counsel, dated August 12, 2000, from Robert S. Catapano-Friedman, Esq., Plaintiffs' counsel as follows:

1. Names of the customers, customer contacts and business of DEI that became customers, customer contacts or business of SLE (Interrogatory No. 8);

2. Documents relating to the hiring of employees by SLE (Document Request No. 4);

3. Documents showing the corporate hierarchy and reporting relationships at SLE (Document Request No. 5);

4. Documents showing the names of SLE's employees (Document Request No. 6);

5. Documents showing the names of SLE's customers and clients (Document Request No. 7);

6. Documents showing SLE's financial results or statements and tax returns (Document Request Nos. 8, 9, 15 and 18); and

7. Documents regarding transactions, including loans, gifts, sales or other transfers

between SLE and Debtor, William Mathusa or Sharon Mathusa (Debtor's wife) or a controlled entity of any of them (Document Request Nos. 10 and 11).

See Exhibit D of Plaintiffs' Motion to Compel Discovery.

DISCUSSION

Request for Documents concerning SLE

Among the arguments made by the Debtor in opposing Plaintiffs' motion is the assertion that as minority shareholder in SLE, he does not have access to the information concerning the corporation and that his father, as majority shareholder living in Georgia, is outside the reach of any subpoena. Pursuant to Rule 45 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), incorporated by reference in Rule 7045 of the Federal Rules of Bankruptcy Procedure, "a non-party may be required to produce for discovery materials which are in the non-party's 'possession, custody, or control.'" *Securities and Exchange Commission v. Credit Bancorp, Ltd.*, 194 F.R.D. 469, 471 (S.D.N.Y. 2000). Fed.R.Civ.P. 45(d) covers subpoenas for taking depositions and permits them to require the production of designated documents which are within the scope of the examination permitted by Fed.R.Civ.P. 26(b), subject to the provisions of Fed.R.Civ.P. 30(b) and Fed.R.Civ.P. 45(b). Accordingly, if the documents are relevant and are sought for good cause they should be produced, unless the documents are privileged or the subpoenas are unreasonable, oppressive, annoying or embarrassing. *See Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 997 (10th Cir. 1965).

In determining whether to compel the production of the documents requested in a

subpoena *duces tecum*, the Court should determine (1) whether it has jurisdiction over the corporation by service of a subpoena on an agent or officer of the corporation,[5] (2) whether SLE controls the documents and (3) whether an order to produce the subpoenaed documents is appropriate under the facts of the case. *See In re Jee*, 104 B.R. 289, 293 (Bankr. C.D. Cal. 1989).

If SLE is doing business in this judicial district, it is subject to the Court's jurisdiction. "[S]ervice on an agent of a corporation is sufficient, even though the agent on whom service is made does not have control of the books and records required to be produced, since it is not the agent who is to respond but the corporation, and the agent in such a situation is merely the vehicle for reaching the corporation." *Vaughan Furniture Co., Inc. v. Featureline Manufacturing, Inc.*, 156 F.R.D. 123, 126 (M.D.N.C. 1994), citing C.Wright & A. Miller, 9 FEDERAL PRACTICE AND PROCEDURE, § 2461 at 447 (1971). In this case, it does not appear that any request for document production was made to the corporation in the form of a subpoena *duces tecum* served on the Debtor as an officer of SLE.

Specific Requests opposed by Debtor

1. The Fourth and Sixth Document Requests ask for the names of the employees of SLE and any and all documents relating to the hiring of employees by SLE, including resumes, employment applications and employment contracts.

   Debtor's Response: Objection as neither SLE nor its employees are parties to the

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[5] Personal jurisdiction over a non-party served with a subpoena *duces tecum* is obtained by a court pursuant to Rule 45(c). If the non-party named in the subpoena is a corporation, as opposed to an individual, that corporation is amenable to service in any forum within which the corporation has sufficient minimum contacts.

lawsuit and employment records are privileged and confidential and would require releases from the employees. With respect to DEI, Debtor indicates that the records are in storage and shall be made available to the Plaintiffs.

As the Court has already indicated, such information would have to be sought from SLE concerning its employees. At this juncture providing a list of the names, addresses and telephone numbers, as well as their dates of employment, is sufficient unless Plaintiffs are able to provide the Court with a reason why additional information contained in the employees' personnel files is necessary and relevant to the issues raised in their complaint.

2. The Fifth Document Request seeks any and all documents showing the corporate hierarchy, including drafts and notes, of DEI and SLE.

Debtor's Response: Debtor does not possess any documents responsive to the request.

At the hearing on September 26, 2002, Plaintiffs' counsel indicated that with respect to the information the Debtor had indicated he did not possess, they were withdrawing their request for that particular information.

3. The Seventh Document Request, as well as the Eighth Interrogatory, seeks a list of the names of former customers, customer contacts and business of DEI that became customers, customer contacts or business of SLE and all documents showing such name, including the names of SLE's current customers and clients.

Response: Disclosure of information is confidential and in the nature of trade secrets. Debtor asserts that its production would cause irreparable harm to SLE, and derivatively to the Debtor, given that the "Board of Plaintiff" is comprised of

Debtor's direct competitors.

As an initial matter, this Court notes that these requests should be made to the corporations. Furthermore, "'[a] customer list developed by a business through substantial effort and kept in confidence may be treated as a trade secret and protected at the owner's instance against disclosure to a competitor, providing the information it contains is not otherwise readily ascertainable.'" *North Atlantic Instruments, Inc. v. Haber*, 188 F.3d 38, 44 (2d Cir. 1999) (citation omitted). The court in *North Atlantic Instruments* went on to note that "[n]umerous cases applying New York law have held that where . . . it would be difficult to duplicate a customer list because it reflected individual customer preferences, trade secret protection should apply." *Id.* at 46 (citation omitted). In determining whether or not a customer list should be treated as a trade secret, the courts examine the time and effort, as well as money spent in compiling the list. *Id.* (citations omitted).

Other factors to be considered are

> (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and to his competitors; . . . (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Glosband v. Watts Detective Agency, Inc., 21 B.R. 963, 973 (D. Mass. 1981) (citation omitted). It would be DEI and/or SLE's burden to provide evidence to support the position that such information should be treated as a trade secret; otherwise, Plaintiffs are entitled to the information.

4. The Eighth Document Request seeks any and all documents showing financial results for

DEI and/or SLE for 1999, 2000, 2001 and 2002.

Debtor's Response: With respect to SLE, Debtor contends that disclosure of information is confidential and in the nature of trade secrets. Debtor asserts that its production would cause irreparable harm to SLE, and derivatively to the Debtor, given that the "Board of Plaintiff" is comprised of Debtor's direct competitors. With respect to DEI, Debtor indicates that the documents are in storage and will be made available to Plaintiffs.

In the opinion of the Court, financial results or statements, to the extent they exist, do not constitute trade secrets or confidential business information and are discoverable. However, as previously discussed, the request for such information of SLE must be made to the corporation.

5. The Ninth Document Request seeks any and all checking account or other accounting ledgers for SLE and/or DEI for 1999-2002.

Debtor's Response: With respect to SLE, such information is in the nature of trade secrets and its disclosure would cause irreparable harm to SLE given that the "Board of Plaintiff" is comprised of Debtor's direct competitors. With respect to DEI, Debtor indicates that the documents are in storage and will be made available to Plaintiffs.

In the opinion of the Court, checking accounts and accounting ledgers do not constitute trade secrets or confidential business information and are discoverable. However, as previously discussed, the request for such information of SLE must be made to the corporation.

6. The Fifteenth Document Request seeks any and all federal state and local tax returns for DEI, SLE, Debtor and/or Sharon Mathusa, his wife, for 1999-2002.

Debtor's Response: Debtor indicates 1999 tax returns for DEI have been provided to Plaintiffs. Returns for 2000 and 2001 have not been filed due to the cessation of the business and seizure of the assets by M&T. Returns of Debtor (and his wife) for 1999 and 2000 have been provided. Assertion that 2001 returns are not discoverable as they represent a postpetition period. With respect to SLE, Debtor asserts they are not discoverable as SLE is not a party and also that the information is confidential. Furthermore, Debtor asserts such information is not relevant in that the returns are for a postpetition period, namely 2001 and 2002.

Although tax returns are not privileged documents *per se*, there is no absolute right to their discovery. *See In re American Motor Club, Inc.*, 129 B.R. 981, 989 (Bankr. E.D.N.Y. 1991). The party seeking the tax returns bears the burden of establishing that they are relevant. *Id.* (citation omitted). If relevance is established, then it is the burden of the party resisting their disclosure to establish that there are alternative sources for the information available. *Id.* As discussed previously, a request for SLE's tax returns must be made to the corporation and then if SLE declines to provide the returns, Plaintiffs will have to establish their relevancy.

7. The Eighteenth Document Request seeks any and all financial statements, and drafts and notes thereof, of DEI and SLE for 1999-2002.

Debtor's Response: Plaintiffs have bee provided with the statements for DEI. With respect to SLE, Debtor asserts that the information is confidential and disclosure would cause irreparable harm to SLE, and to Debtor derivatively, if made available to SLE's competitors.

In the opinion of the Court, financial statements do not constitute trade secrets or

confidential business information and are discoverable to the extent that they are relevant to the matter herein. However, as previously discussed, the request for such information of SLE must be made to the corporation.

8. The Tenth Document Request seeks any and all documents showing or regarding transactions between Debtor, Sharon Mathusa, or an entity in which either of them has or had an ownership interest and DEI or SLE.

Response: Request is vague, overbroad and unduly burdensome.

The Court believes that it would be appropriate that Plaintiffs specify a time period for any such transactions. Also, the request should be more narrowly defined. For example, under the current request arguably the Debtor would have to provide invoices or purchase agreements he may have entered into with a vendor who supplied DEI with building or even office supplies. The same is true with respect to Debtor's wife, Sharon Mathusa, in whose name SLE was originally incorporated.

9. The Eleventh Document Request seeks any and all documents showing or relating to any transaction or connection between William Mathusa or any company owned or formerly owned by him and DEI, SLE, Debtor or Sharon Mathusa.

Response: Request is vague, overbroad and unduly burdensome.

It is the Court's understanding that William Mathusa, who is not a party to this proceeding, resides in Georgia and is outside the subpoena power of this Court as set forth in Rule 45(b)(2) of the Fed.R.Civ.P. However, the documents certainly may be sought from the Debtor, his wife, DEI and/or SLE to the extent that they are in their possession and/or control. The request should be narrowed and if at all possible designate what information is desired. *See*

American Motor Club, 129 B.R. at 988. As it stands, the request is overbroad and vague. For instance, as Debtor's father, arguably documents exist concerning transactions between William Mathusa and the Debtor of a personal, as well as a business nature, going back many years which have no relevance whatsoever to the matter presently before this Court.

Based on the foregoing, it is hereby

ORDERED that pursuant to Federal Rule of Bankruptcy Procedure 7016 and Local Rule 7016-1:

1. All discovery shall be completed by January 19, 2003.

2. All motions are to be filed and made returnable before February 26, 2003.

3. This case is scheduled for trial commencing on March 19, 2003, at the U.S. Courthouse, 10 Broad Street, Utica, New York at 9:00 A.M..

4. Any pre-trial memoranda shall be filed and served by the parties on or before March 14, 2003.

5. Any written stipulations as to evidence shall be submitted by the parties on or before the trial date referred to in paragraph #3.

6. A proposed witness list, together with a brief summary of testimony shall be filed on or before March 12, 2003.

7. A list of proposed exhibits shall be filed on or before March 12, 2003.

8. All exhibits shall be marked in accordance with Local Rule 9070-1(a).

9. Request for adjournments and adjournments of the trial date shall be made only in accordance with Local Rule 7091-1.

SETTLEMENT

In the event of settlement, the parties shall notify the Court as far in advance of trial as is possible. Notification of Settlement shall not, however, cause the Court to remove the trial from its calendar. Such removal shall occur only upon the parties' filing with the Court fully executed settlement documents at least three days prior to the date of the trial. In the event the adversary proceeding or contested matter is settled within three days prior to the trial, the attorneys for all parties shall appear with their clients at the time and date of trial and be prepared to place the terms of the settlement on the Court's record.

Failure to comply with the foregoing may result in dismissal of the adversary proceeding or contested matter or the entry of an order of judgment by default.

Dated at Utica, New York

this 15th day of November 2002

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge