

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
: :
PAMELA A. MICHELFELDER, : Case No. 92-550-C
: Chapter 7
Debtor. :
- - - - - :
AMERICAN FAMILY SERVICE : Adv. No. 92-92099
CORPORATION, :
: :
Plaintiff, :
: :
vs. :
: :
PAMELA A. MICHELFELDER, :
: :
Defendant. :
- - - - - :
THEODORE J. MICHELFELDER, : Case No. 92-2456-C
: Chapter 7
Debtor. :
- - - - - :
AMERICAN FAMILY SERVICE, : Adv. No. 92-92221
CORPORATION, :
: :
Plaintiff, :
: :
vs. :
: :
THEODORE J. MICHELFELDER, :
: :
Defendant. :

ORDER--JOINT MOTION TO STRIKE
WITNESS LIST AND EXCLUDE TESTIMONY

On January 13, 1994, hearing was held on the Joint Motion to Strike Witness List and Exclude Testimony. This motion was filed jointly by Pamela A. Michelfelder and Theodore J. Michelfelder. The above-captioned adversary complaints were consolidated for trial purposes only. Plaintiff, American Family Service Corporation, was represented by its attorney Joseph G. Bertroche, Sr. Defendant, Pamela A. Michelfelder,

appeared by her attorney, Anita L. Shodeen. Defendant, Theodore J. Michelfelder, appeared by his attorney, Donald F. Neiman. At the conclusion of the hearing, the Court took this matter under advisement.

This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(J). The Court, upon review of the pleadings, evidence, and argument of counsel, now enters its findings and conclusions of law pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. Pamela Michelfelder filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on February 24, 1992.

2. Theodore Michelfelder filed his voluntary petition for bankruptcy relief under Chapter 7 of the Bankruptcy Code on August 13, 1992.

3. Plaintiff, American Family Service Corporation, filed complaints objecting to discharge against Pamela Michelfelder and Theodore Michelfelder on May 20, 1992, and November 10, 1992, respectively.

4. On August 30, 1993, the Court entered a scheduling order consolidating for trial the above-captioned adversary proceedings. The scheduling order also provided for the disclosure of witnesses on or before December 1, 1993. The parties were ordered to exchange and file names of all

witnesses they intended to present at trial, together with a brief summary of the testimony that the witnesses would present.

5. On December 1, 1993, Pamela A. Michelfelder filed her witness list pursuant to the scheduling order. The list provided that anticipated testimony was expected from Pamela A. Michelfelder, Theodore J. Michelfelder, Christopher Pose, Pamela Greibel, Michael Connolly, Lloyd Clarke, Patti Moorman, Brian Pingel, and Ronni Beglieter and other potential unknown witnesses.

6. On December 1, 1993, Theodore J. Michelfelder filed his witness list pursuant to the scheduling order. The list included Pamela J. Michelfelder, Theodore J. Michelfelder, Ronni F. Beglieter, and other potential unknown witnesses.

7. On December 17, 1993, American Family Service Corporation filed its witness list. The list included Michael J. Connolly, Brian Pingel, Ronni Beglieter, and Lloyd Clarke.

8. Subsequently, Defendants brought this joint motion requesting an order striking the witness list as submitted by Plaintiff's counsel, and excluding such witnesses' testimony.

DISCUSSION

Defendants move for an order striking the Plaintiff's witness list and excluding such testimony on the grounds that the list was untimely filed in violation of the scheduling

order. Plaintiff resists such motion arguing that the Defendants were not prejudiced by the untimely filing of the witness list.

Fed.R.Civ.P. 16(f), made applicable to bankruptcy proceedings by Fed.R.Bankr. P. 7016, provides as follows:

Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party, or both, to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

In turn, Fed.R.Civ.P. 37(b)(2) allows for certain orders including:

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination.

The Eighth Circuit has held that the district court may order pretrial witness disclosure and may, in its discretion, exclude exhibits or refuse to permit testimony of a witness not listed prior to trial, in contravention of a pretrial order. See Admiral Theatre Corp. v. Douglas Theatre, 585 F.2d 877 (8th Cir. 1978). Furthermore, the Eighth Circuit has found the following four factor test relevant when ruling on a party's request to call a witness not included on a pretrial witness list:

- (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified;
- (2) the ability of that party to cure the prejudice;
- (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court; and
- (4) bad faith or willfulness in failing to comply with the court's order.

Morfeld v. Kehm, 803 F.2d 1452, 1455 (8th Cir. 1986) (holding that defendant could be called by the plaintiff even though the defendant was not listed as one of the plaintiff's witnesses because the defendant's name was listed on his own counsel's list of witnesses). In this case, the Plaintiff filed an untimely witness list in violation of the scheduling order. The Court finds that the four factor test is relevant in these circumstances.

The Plaintiff's witness list included only those names already indicated on the Defendants' witness lists. The

Defendants had knowledge that these witnesses would be called to testify and would be subject to cross-examination. Therefore, the Court finds that the Defendants have suffered no surprise nor prejudice by the late filing of Plaintiff's witness list. Additionally, as these witnesses were timely listed by the Defendants, the Court cannot find that the late filing of the Plaintiff will result in disruption of the trial. Moreover, there has been no evidence presented that would indicate that the disobedience of the scheduling order was a result of bad faith rather than neglect on the part of counsel. Accordingly, the Court finds that, in these circumstances, the Plaintiff's witness list should not be stricken nor testimony excluded.

Although the Court believes that striking the witness list and excluding testimony would not be proper remedies in this case, the Court is quite troubled by the failure of counsel to comply with the scheduling order. The order clearly stated that witnesses were to be disclosed by December 1, 1993. Counsel for the Plaintiff did not file this list until December 17, 1993. Counsel for the Plaintiff has offered no reasonable excuse for the untimely filing of the witness list. Although in this particular case no prejudice resulted to the opposing parties, the Court will not tolerate the failure by counsel to comply with court orders. Therefore, the Court believes that an admonishment of counsel, Joseph G. Bertroche,

Sr., is necessary.

ORDER

IT IS THEREFORE ORDERED that the Joint Motion to Strike Witness List and Exclude Testimony is denied.

IT IS FURTHER ORDERED that Joseph G. Bertroche, Sr. is admonished for failure to comply with a scheduling order entered by this Court.

Dated this 11th day of February, 1994.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE