

POSTED ON WEBSITE

**NOT FOR PUBLICATION**

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

|                             |   |                                  |
|-----------------------------|---|----------------------------------|
| In re                       | ) | Case No. 05-17886-B-7            |
| Dean Clifton Marshall, Jr., | ) |                                  |
| Debtor.                     | ) |                                  |
| <hr/>                       |   |                                  |
| Teresa Marshall,            | ) | Adversary Proceeding No. 06-1101 |
| Plaintiff,                  | ) | DC No. SJS-1                     |
| v.                          | ) |                                  |
| Dean Clifton Marshall, Jr.  | ) |                                  |
| Defendant.                  | ) |                                  |

**MEMORANDUM DECISION REGARDING PLAINTIFF'S  
MOTION FOR DISCOVERY SANCTIONS**

**This Memorandum Decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of res judicata and claim preclusion.**

Susan J. Salehi, Esq., appeared on behalf of the plaintiff Teresa Marshall (the "Plaintiff").

Robert S. Williams, Esq., of Williams & Williams, appeared on behalf of the debtor Clifton Dean Marshall, Jr. (the "Debtor").

Before the court is a discovery dispute arising out of a bitter divorce. Plaintiff, the Debtor's former spouse, filed an adversary proceeding to determine the dischargeability of debts which Debtor agreed to pay pursuant to a marital settlement agreement. Plaintiff also seeks to deny the Debtor's discharge based on alleged false schedules. Plaintiff contends, *inter alia*, that the Debtor has failed to

1 disclose assets and misrepresented his income and expenses. The Plaintiff asked  
2 the court to compel the Debtor to respond to her discovery request (the “First  
3 Discovery Motion”). That request was granted. Under submission is Plaintiff’s  
4 request for sanctions (the “First Sanction Request”), *i.e.*, an award of attorney’s  
5 fees and costs incurred in having to bring the First Discovery Motion.<sup>1</sup> The  
6 request for sanctions will be granted.

7 This Memorandum Decision contains findings of fact and conclusions of  
8 law required by Federal Rule of Civil Procedure 52 (made applicable to this  
9 adversary proceeding by Federal Rule of Bankruptcy Procedure 7052). The court  
10 has jurisdiction over this motion pursuant to 28 U.S.C. § 1334 and General Orders  
11 182 and 330 of the U.S. District Court for the Eastern District of California. This  
12 is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and (J).

13 **Background.**

14 Plaintiff is the Debtor’s former spouse. In March 2004, Plaintiff  
15 commenced proceedings to dissolve the marriage in the Kern County Superior  
16 Court (the “Dissolution Action”). A final judgment was entered in the Dissolution  
17 Action in June 2005. In the Dissolution Action, the parties entered into a marital  
18 settlement agreement wherein, it is alleged, the Debtor retained certain marital  
19 assets in exchange for his agreement to pay joint debts totaling in excess of  
20 \$36,000 (the “Marital Settlement”). Shortly after conclusion of the Dissolution  
21 Action, the Debtor filed this bankruptcy case and now seeks to discharge the debts  
22 which he agreed to pay in the Marital Settlement. Plaintiff contends, *inter alia*,  
23 that she will be liable for those debts if the Debtor receives that discharge and that  
24

---

25 <sup>1</sup>Also under submission is Plaintiff’s subsequent request for terminating  
26 sanctions (docket control number SJS-2). That motion was argued on October 5,  
27 2006, and is still under submission. The court will rule on that motion separately.

1 she would not have entered into the Marital Settlement if she had known that the  
2 Debtor intended to file bankruptcy.

3 The Debtor filed for chapter 7 relief on September 26, 2005. Plaintiff  
4 commenced this adversary proceeding on March 9, 2006<sup>2</sup> (the “Adversary  
5 Proceeding”). The claims in this Adversary Proceeding arise under 11 U.S.C.  
6 § 727(a)(4)(A)<sup>3</sup> (knowingly and fraudulently making a false oath or account),  
7 § 727(a)(5) (failure to explain satisfactorily any loss of assets or deficiency of  
8 assets to meet the Debtor’s liabilities), and § 523(a)(2)(A) (fraud in the making of  
9 the Marital Settlement). Plaintiff contends, *inter alia*, that the Debtor did not  
10 intend to perform the Marital Settlement at the time he entered into it, that he  
11 failed to disclose valuable assets in his bankruptcy schedules, and that he has  
12 grossly misrepresented his financial condition, specifically his monthly income  
13 and expenses. The Debtor filed an answer denying all liability.

14 On May 31, Plaintiff served a request for production of documents, Set  
15 No.1, on the Debtor’s counsel (the “Discovery Request”). The Discovery Request  
16 asked for documents in 17 different categories, specifically copies of bills, bank  
17 statements, credit card statements and insurance policies, over a 15-month period,  
18 all relevant to the issues raised in the Adversary Proceeding. The Discovery  
19 Request called for the documents to be produced by June 30 at the office of  
20 Plaintiff’s counsel in Bakersfield and provided that the Debtor could comply with  
21

---

22 <sup>2</sup>Hereafter, all relevant events occurred in 2006, unless specifically stated  
23 otherwise.

24 <sup>3</sup>Unless otherwise indicated, all chapter, section and rule references are to  
25 the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of  
26 Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to  
27 October 17, 2005, the effective date of The Bankruptcy Abuse Prevention and  
Consumer Protective Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 the Discovery Request by mailing copies of the requested documents. The  
2 Debtor's written response to the Discovery Request was due in 33 days pursuant to  
3 Fed.R.Civ.P. 34(b), and Fed.R.Bankr.P. 7034 and 9006(f). At no time during that  
4 period did the Debtor file an objection to the Discovery Request, or seek a  
5 protective order to limit the scope of discovery. On June 10, and again on June 27,  
6 Debtor's counsel sent a letter to Plaintiff's counsel representing that the Debtor  
7 would respond timely to the Discovery Request.

8 The Debtor failed to serve a written response to the Discovery Request, and  
9 to produce any documents within the time period prescribed by the Rules. The  
10 court held a continued status conference on July 7. That morning, Debtor's  
11 counsel left a voice mail message with Plaintiff's counsel informing Plaintiff's  
12 counsel, for the first time, that the Debtor refused to produce any of the requested  
13 documents.

14 On July 11, Plaintiff filed this First Discovery Motion seeking an order to  
15 compel the Debtor to respond to the Discovery Request. The Debtor responded to  
16 the Motion on July 26. The Debtor first attempted to argue the merits of the  
17 Adversary Proceeding and then acknowledged that he had not responded to the  
18 Discovery Request. The Debtor then argued, in essence, that the Discovery  
19 Request was overbroad and oppressive. He states that all of his documents were  
20 hand-delivered to Plaintiff's counsel on July 22, a point which the Plaintiff  
21 disputes. The Debtor asks the court to adjudicate the merits of his objection to the  
22 Discovery Request before it rules on the First Sanction Request. However, the  
23 Debtor never sought a timely protective order. After the hearing, the court granted  
24 the First Discovery Motion and entered an order on August 14 (the "First  
25 Discovery Order"), which provided:

26 ///

1 “IT IS HEREBY ORDERED that the defendant file and serve proper  
2 responses to the plaintiff’s Request for Production of Documents, Set No.  
3 One within ten (10) days. The responses are to be received by plaintiff’s  
counsel no later than August 21, 2006.”<sup>4</sup>

4 Plaintiff’s First Sanction Request seeks an order pursuant to Rule 37(a)  
5 requiring the Debtor to pay her attorney’s fees and costs associated with having to  
6 bring the First Discovery Motion in the amount of \$795.<sup>5</sup> The court continued the  
7 Plaintiff’s First Sanction Request to September 8, in part to monitor the status of  
8 the Debtor’s compliance with the First Discovery Order. At that time the First  
9 Sanction Request was argued and submitted.

10 **Analysis.**

11 **Applicable Law.**

12 Discovery in an adversary proceeding is governed by the Federal Rules of  
13 Civil Procedure and made applicable through the Federal Rules of Bankruptcy  
14 Procedure. FRCP 37(a) (made applicable by FRBP 7037), provides for a monetary  
15 award of legal fees and costs to a party who must file a motion to compel  
16 disclosure or discovery, and is successful. Fed.R.Civ.P. 37(a)(4)(A) provides in  
17 pertinent part:

18 ///

19 ///

20  
21 \_\_\_\_\_  
22 <sup>4</sup>Plaintiff contends that the Debtor has since failed to comply with the First  
23 Discovery Order. The Debtor contends that he systematically destroyed all of his  
24 bills and bank records and that he produced everything he had. (See footnote 1,  
supra.)

25 <sup>5</sup>The Plaintiff’s attorney states that she spent approximately 5.0 hours at  
26 \$150 per hour plus costs of \$45 in the preparation and prosecution of the First  
27 Discovery Motion. She states that her hourly billing rate is \$250 per hour, but the  
actual calculation only reflects \$150 per hour.

1 “If the motion is granted or if the disclosure or requested discovery is  
2 provided after the motion was filed, the court shall, after affording an  
3 opportunity to be heard, require the party or deponent whose conduct  
4 necessitated the motion or the party or attorney advising such conduct or  
5 both of them to pay to the moving party the reasonable expenses incurred in  
6 making the motion, including attorney’s fees, unless the court finds that the  
7 motion was filed without the movant’s first making a good faith effort to  
8 obtain the disclosure or discovery without court action, or that the opposing  
9 party’s nondisclosure, response, or objection was substantially justified, or  
10 that other circumstances make an award of expenses unjust.”

11 The First Discovery Motion was successful. The Debtor waived his right to  
12 object to the Discovery Request by not serving a written response, producing the  
13 documents, or seeking a protective order, within the time prescribed in the Rules.  
14 The fact that the Debtor began producing some documents after the First  
15 Discovery Motion was filed does not vitiate the sanction issue. The Debtor never  
16 responded in writing as required by Fed.R.Civ.P. 34(b). Rule 37(a)(4)(A) states  
17 that fees and costs *shall* be awarded, even if the discovery is produced after the  
18 Motion was filed. The pertinent question is whether the First Discovery Motion  
19 was necessary and whether the moving party made a good faith effort to get the  
20 discovery without court intervention. The court is persuaded that Plaintiff’s  
21 conduct necessitated the First Discovery Motion. The court is also persuaded that  
22 Plaintiff’s attorney made a good faith effort to obtain the discovery without court  
23 action. Indeed, Debtor’s counsel affirmatively represented on multiple occasions  
24 that the documents would be provided. Only after the time had expired to seek a  
25 protective order, did the Debtor respond by refusing to produce any documents.  
26 The Debtor’s informal and untimely response to the Discovery Request was not  
27 substantially justified. Ergo, the First Sanction Request will be granted.

28 Dated: November 2, 2006

/s/ W. Richard Lee  
W. Richard Lee  
United States Bankruptcy Judge