

**IN THE DISTRICT COURT OF BOYD COUNTY, NEBRASKA**

**JEROME ENGELHAUPT,**  
Plaintiff,

Case No. 4662

vs.

**ORDER ON MOTIONS**

**FARM CREDIT SERVICES OF THE  
MIDLANDS, a United States corporation,**  
Defendant.

**DATE OF HEARING:** January 14, 2000.

**APPEARANCES:**

For plaintiff: George H. Moyer, Jr. without plaintiff.  
For defendant: Christopher R. Hedican.

**SUBJECT OF ORDER:** defendant's (1) objection to progression order, (2) motion to compel, and, (3) motion for summary judgment.

**FINDINGS:** The court finds and concludes that:

1. Regarding the objection to the progression order, the defendant makes a persuasive argument that the action should be tried to the court without a jury. However, the court need not reach that issue until the final pretrial conference. Accordingly, the objection should be sustained to the extent of the relief granted herein and otherwise denied.

2. Regarding the motion to compel, the controversy centers on a document identified by plaintiff's counsel as "an Eeks (phonetic) 8 1/2 by 11 inch canary legal pad which contains both [plaintiff's counsel's] handwriting and [plaintiff's] handwriting." Ex. 3 at 7, 132:13-16. The defendant claims that it is entitled to examine the document under Neb. Evid. R. 612 and Neb. Ct. R. of Discovery 37.

a. The motion, in part, seeks an order compelling the plaintiff "to produce documents requested in [d]efendant's [f]irst [r]equest for the [p]roduction of [d]ocuments." Ex. 4 at 2 (Req. No. 5). The plaintiff responded that he would "produce such notes, diaries and calendars as he has but will not produce correspondence with his attorney." *Id.*

(1) The only record that the court has, at this point, would support the plaintiff's assertion of the attorney-client privilege as the response made on or about September 20, 1999,

to the request for production. In other words, everything in the record at this point shows that, *at the time of the written responses*, the notes in question were protected by the attorney-client privilege.

(2) To the extent that the motion to compel is directed to the plaintiff's responses to requests for production under Neb. Ct. R. of Discovery 34, the motion should be denied.

b. However, as to the justification under Rule 612, the situation differs. The defendant asserts that the plaintiff reviewed the notes in preparation for and during the course of the deposition of plaintiff conducted by defendant's attorney.

(1) The plaintiff admitted unequivocally that he reviewed the notes to help assist the plaintiff the answer the questions propounded by the defendant's attorney at the deposition. Ex. 3 at 8, 133:23-134:2.

(2) It appears likely to the court that Rule 612 requires that the defendant be allowed to inspect at least parts of those notes. However, it is also quite possible that portions of the notes, particularly the plaintiff's notes regarding communications from the plaintiff's lawyer to the plaintiff, remain privileged and were not used "to refresh his memory for the purpose of testifying" under Rule 612. Those portions cannot be determined without reference to the materials, which were not submitted at the hearing on the motion to compel.

(3) Neb. Evid. R. 612 specifies the appropriate procedure under these circumstances. See also *State v. Schroeder*, 232 Neb. 65, 439 N.W.2d 489 (1989). The motion should be granted as to the relief contemplated in Rule 612.

3. Regarding the motion for summary judgment, the court concludes that the word "dismissal," as used in the first sentence of NEB. REV. STAT. § 48-1119(4) (Reissue 1998), means a dismissal on the merits. Such a dismissal on the merits could occur upon (1) an initial determination that there is not reasonable grounds to believe that the charge is true, (2) a formal order following a contested hearing, or, (3) a dismissal because of the complainant's failure to cooperate with the commission or its investigators or staff. The court also concludes that the word "dismissal" does not mean or include an administrative closure of the case pursuant to notice that the complainant intends to directly file an action in court. Consequently, the record does not show a "dismissal" at any time prior to the commencement of this case.

The reading suggested by the defendant would lead to absurd results. The motion for summary judgment must be denied.

**ORDER:** IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The defendant's objection to the progression order previously entered by the court is sustained to the extent that the trial type specified in paragraph 9 of the progression order is stricken, and the court substitutes therefor: "To be determined at the final pretrial conference."

2. Except to the extent sustained above, the objection is overruled.

3. The defendant's motion for summary judgment is denied.

4. To the extent that the motion addresses the responses served by plaintiff on or about September 20, 1999, to the defendant's requests for production, the defendant's motion to compel is denied.

5. The defendant's motion to compel is granted to the extent that the court orders that the plaintiff, either personally or through the plaintiff's counsel, shall appear in open court on **April 14, 2000**, at **10:00 a.m.**, in the District Courtroom of the Boyd County Courthouse in Butte, Nebraska, and produce the original "Eeks (phonetic) 8 ½ by 11 inch canary legal pad" at an evidentiary hearing for in camera inspection by the court, and shall also produce a true, accurate, and complete copy of the entire writing for purposes of preservation for appellate review of any portion withheld upon the in camera inspection.

6. Further relief, if any, on the motion to compel is deferred to that date and time. For purposes of the motion calendar, such hearing may be referred to by the court clerk as "Further Hearing on Motion to Compel."

7. The determination of any award of expenses of the motion to compel under Neb. Ct. R. of Discovery 37(a)(4) is deferred to that date and time following the further evidentiary hearing. The hearing at such time and place shall constitute the "opportunity for hearing" specified in Neb. Ct. R. of Discovery 37(a)(4).

Signed in chambers at Ainsworth, Nebraska, on February 1, 2000.

DEEMED ENTERED as of the date of filing by the court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Note the decision on the trial docket as: [date of filing] Signed "Order on Motions" entered in part sustaining and in part overruling defendant's objection to progression order, denying defendant's motion for summary judgment, and partially granting defendant's motion to compel as to specific relief and deferring further relief until further evidentiary hearing on [date and time from body of order].  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

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William B. Cassel  
District Judge