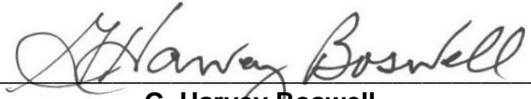




Dated: June 21, 2004
The following is SO ORDERED.


G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE

Dennis J. O'Connor and
Debbie O'Connor,
Debtors.

Case No. 01-27039

Congress Financial Corporation,
Plaintiff,

Chapter 7

v.

Adv .Pro. No. 01-0862

Dennis J. O'Connor and
Debbie O'Connor

Defendants.

MEMORANDUM OPINION AND ORDER RE
DEFENDANTS' MOTION TO DISMISS COUNT VI OF THE
THIRD AMENDED COMPLAINT DUE TO SPOILIATION OF EVIDENCE

In Count VI of their third amended complaint, the plaintiff in this matter, Congress Financial Corporation, ("Congress"), alleges that the debtors made materially false representations as to the value of Flying O Enterprises', ("Flying O"), cotton fiber inventory by claiming that the fiber was comprised of "high grade cotton" when in fact it was comprised of "low grade fiber." Congress asserts that the debtors made these misrepresentations knowing they were false or with gross recklessness as to the truth.

Congress discovered the debtors' alleged misrepresentation as to the value of the fiber inventory when they sampled Flying O Enterprises' cotton bales in preparation for liquidation. As a result of the misrepresentations, Congress alleges that the debt owed to them by the debtors is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and (B).

The debtors have moved for dismissal of count VI of the complaint based on spoliation of the evidence. It is their contention that in liquidating and abandoning the cotton fiber, Congress did not take or retain an adequate number of samples. Because Congress failed to test every bale and keep samples for the debtors' inspection, the debtors allege that they have been deprived of any ability to sample and test the remaining bales which were sold and/or abandoned. As additional support for their motion, the debtors also allege that they anticipate Congress arguing at trial that their experts' opinion should be entitled to greater weight than the debtor's experts because Congress's experts had the opportunity to inspect these bales and the debtor's experts did not.

In their response to the debtors' motion to dismiss, Congress alleges that the number of samples taken and retained by their experts was consistent with industry standards for liquidation. Congress also asserts that the debtor had ample opportunity to inspect the bales since, prior to their surrender, the cotton fiber was in Dennis O'Connor's physical custody and control. Congress further asserts that because the debtors have not proven Congress acted deliberately or in bad faith, dismissal of count VI of their complaint is inappropriate at this time.

The Court conducted a hearing on the debtors' Motion to Dismiss Count VI of the Third Amended Complaint on May 18, 2004. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. section 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

Flying O Enterprises surrendered its fiber inventory of approximately 60,000 bales to Congress on February 5, 2001. At the time of surrender, 25,000 to 30,000 bales had already been placed outside and exposed to the elements.¹ Congress liquidated 31,612 of the bales for \$719,181.97. In anticipation of this liquidation, Congress's experts took representative samples of the bales. With most of the samples, the experts either threw the sample on the floor or stuffed it back into the bale. Congress's experts only retained 33 of the samples they took; however, Congress did retain photographs and video of all the liquidated bales as well as the abandoned bales. According to Congress's experts, the number of samples taken and retained was consistent with industry practice for liquidation.

¹The parties dispute the facts surrounding the placement of the inventory outside.

Based on their allegedly poor quality, Congress abandoned the remaining bales of surrendered fiber. Congress abandoned 18,746 of these bales to Federal Compress Warehouse. Federal Compress hired a contractor to take these bales to a landfill. When Dennis O'Connor learned of this intended disposal, he contacted the contractor and asked him to deliver the abandoned bales to Flying O Enterprises' Shake Rag, Tennessee facility. O'Connor then resold several truck loads of the abandoned fiber "as is" for \$.29/pound. The debtor blended the remaining inventory in an effort to resume his livelihood.

The debtors also learned of other bales which had been abandoned at various warehouses. The debtor took samples from these bales and had them tested by the USDA. These test results show that the abandoned fiber was gradeable cotton fiber and not pills, motes or waste as Congress contends. The debtors also took samples from approximately 10,000 bales which had been put outside and burned up in a fire caused by lightning. When the debtors' experts inspected the bales several months later, they were able to take approximately 200 blank samples. These samples were all submitted to the USDA for testing. These results show that the sampled bales were gradable PIMA and upland cotton fiber and not pills, motes or waste.

II. CONCLUSIONS OF LAW

At issue in the motion before the court is whether or not the plaintiffs engaged in the spoliation of evidence at a level sufficient to dismiss count VI of the complaint. "When considering a motion to dismiss, a court must construe the complaint in a light most favorable to the plaintiff and accept all of [the] factual allegations as true." *Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir. 2002). In the case of *Welsh v. U.S.*, 844 F.2d 1239 (6th Cir. 1999), the Sixth Circuit recognized that "destruction of potentially relevant evidence obviously occurs along a continuum of fault—ranging from innocence through the degrees of negligence to intentionality. The resulting penalties vary correspondingly." *Id.* at 1246. Although there are many available sanctions when a court determines that spoliation of evidence has occurred, dismissal is a sanction of last resort to be used only in instances when the spoliator's actions are especially egregious or when lesser sanctions have failed. *Kentucky Nat'l Insurance Co. v. E.W. Scripps Co.*, 1998 WL 34078426, *2 (W.D. Ky. 1998); *Lekkas v. Mitsubishi Motors Corp.*, 2002 WL 31163722, *5 (N.D. Ill. 2002); *West v. Goodyear Tire & Rubber Co.*, 167 F. 776, 779 (2nd Cir. 1999). The trial judge has discretion to determine what sanction, if any, is appropriate in a given case. *Thurman-Bryant Electric Supply Co., Inc., v. UNISYS, et al*, 1991 WL 222256 (Tenn. Ct. App. 1991).

Given the proof currently before the Court, the Court finds that dismissal of Count VI of the plaintiff's complaint is inappropriate at this time. The debtors did not introduce any evidence at the May 18th hearing regarding the sufficiency or insufficiency of the sampling done by Congress's experts. There

was no showing that Congress's experts intentionally or even negligently disposed of the samples. No proof was introduced regarding the industry standards, if there are any, for sampling done in anticipation of litigation. Given the fact that the Court is compelled to accept all of the factual allegations as true when considering a motion to dismiss, the Court cannot find at this time that dismissal is proper.

In making this decision, the Court is in no way ruling on the sufficiency of the sampling process employed by Congress's experts or on the weight the Court will afford Congress's expert testimony. The Court is making the simple finding that dismissal of count VI of the plaintiff's third amended complaint is not proper given the proof introduced at the May 18, 2004, hearing.

III. ORDER

It is therefore **ORDERED** that the Defendants' Motion to Dismiss Count VI of the Third Amended Complaint is **DENIED**.

Mailing information

Debtors
Edward Montedonico, Case Trustee
Michael P. Coury, Attorney for Debtors
John D. Horne, Attorney for Debbie O'Connor
David Cocke, Attorney for Trustee
Joseph Kelly, Attorney for Plaintiff
Jack Marlow, Attorney for Plaintiff