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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 03-18559
)
MIDWEST FIREWORKS MFG. CO.,) Chapter 11
INC., II,)
) Judge Pat E. Morgenstern-Clarren
Debtor.)
_____)
COLONIAL FIREWORKS CO.,) Adversary Proceeding No. 03-1220
)
Plaintiff,)
)
v.) **MEMORANDUM OF OPINION**
) **AND ORDER RE CONTEMPT**
LAURENCE D. LOMAZ, et al.,) **SHOW CAUSE**
)
Defendants.)

The court issued an order directing the defendants Midwest Fireworks Mfg. Co., Inc., II and Laurence Lomaz to appear and show cause why they should not be held in contempt for failing to comply with a court order issued on July 1, 2003. (Docket 13). An evidentiary hearing was held on September 10, 2003.

JURISDICTION

The court has jurisdiction under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2).

FACTS

The plaintiff Colonial Fireworks Co. purchased some inventory prepetition from the debtor-defendant Midwest Fireworks Mfg. Co., Inc., II under a state court order. Colonial alleges

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in this adversary proceeding that the debtor and its shareholder and officer Laurence Lomaz converted some of the fireworks purchased by Colonial. The defendants answer in part that some of the inventory claimed by Colonial actually belongs to a third party, Sky Slam, which had transferred its product to the debtor's Conneaut store for sale. The plaintiff filed a motion for a temporary restraining order.

On July 1, 2003, during a hearing on the motion, Mr. Lomaz stated that he had "invoices" at his home that would show the transfers from Sky Slam to the debtor's Conneaut location. Ultimately, the parties entered into an agreed temporary restraining order containing these pertinent provisions:

- (1) The debtor will not enter the property located at 8550 State Route 224, Deerfield, Ohio (the Property) and will not remove any fireworks from the Property.
- (2) The debtor will, by 2:00 p.m. on July 2, 2003, deliver to Robert Stefancin, attorney for Colonial, and to Maria Giannirakis, office of the United States Trustee, invoices reflecting any product transfers from Sky Slam Fireworks (a non-debtor corporation) to the debtor's Conneaut, Ohio location.

(Docket 5). The requirement that the invoices be produced was intended to address the debtor's contention that some of the fireworks at issue belong to Sky Slam and were not sold to Colonial.

When Midwest and Mr. Lomaz (collectively, respondents) did not provide the invoices, Colonial moved for an order requiring the respondents to appear and show cause why they should not be held in contempt. After a hearing, the court entered such an order and scheduled an evidentiary hearing.

The respondents admit that they did not produce any invoices to Colonial. After a bit of delay that is not at issue, the respondents instead provided a list of the inventory that they

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contend was transferred, which list was compiled by Mr. Lomaz shortly after the July 1, 2003 hearing. Mr. Lomaz testified that he misspoke when he used the word “invoice” in connection with the agreed temporary restraining order; he did not mean a formal document but instead intended to agree to produce a list of the transferred product. The respondents contend that they did not violate the order because there are no invoices and they cannot produce what does not exist.

DISCUSSION

Contempt sanctions “may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard.” *International Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829 (1994).¹ In addressing a contempt request, a court must consider three issues: (1) did the respondent receive appropriate notice of the alleged contempt; (2) did the acts or failures to act constitute contempt of court; and (3) if so, what is the appropriate consequence.

There are no notice issues; therefore, the court starts with whether the respondents’ acts or failures to act constituted contempt of court. The primary purpose of civil contempt:

is to “compel obedience to a court order and compensate for injuries caused by non-compliance.” *McMahan & Co. v. Po Folks, Inc.*, 206 F.3d 627, 634 (6th Cir. 2000) (quoting *TWM Manuf. Co. v. Dura Corp.*, 722 F.2d 1261, 1273 (6th Cir. 1983)). “Compensatory contempt orders compensate the party harmed by the other party’s contemptuous actions; coercive orders seek to cajole the party in contempt to act in the manner desired by the court.” *Consolidated Rail Corp. v. Yashinsky*, 170 F.3d 591, 595 (6th Cir. 1999).

In re Walker, 257 B.R.493, 497 (Bankr. N.D. Ohio 2001) (footnote omitted).

¹ Under Bankruptcy Rule 9020, contempt proceedings are governed by Bankruptcy Rule 9014. See FED. R. BANKR. P. 9020 and FED. R. BANKR. P. 9014.

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The movant has the burden of proving by clear and convincing evidence that the respondents violated a specific and definite order that required them to act or refrain from acting, with knowledge of that order. *In re Walker*, 257 B.R. at 497 (citing *Rolex Watch U.S.A., Inc. v. Crowley*, 74 F.3d 716, 720 (6th Cir. 1996)). The respondents can successfully defend by establishing that they are unable to comply with the order. *Id.* (citing *Glover v. Johnson*, 138 F.3d 229 (6th Cir. 1998)). The inability to comply must be established categorically and in detail. *Electrical Workers Pension Trust Fund of Local Union #58 v. Gary's Electrical Serv. Co.*, 340 F.3d 373 (6th Cir. 2003); *Rolex Watch U.S.A., Inc.*, 74 F.3d 716, 720 (6th Cir. 1996).

The movant did prove that the respondents violated a court order by failing to produce the invoices. The respondents, however, proved that they are unable to comply with the order because there are no “invoices” per se. The court finds that Mr. Lomaz used the word “invoice” loosely in entering into the agreed order and that he thought he had complied with the order by preparing and providing a list of the allegedly transferred inventory.

Colonial is not, of course, required to accept as true the respondents’ statements that the inventory provided is accurate. The way to challenge that contention, however, is through discovery requests, which Colonial will be free to pursue as the adversary proceeding moves forward.

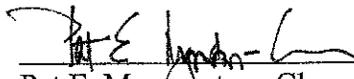
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CONCLUSION

For the reasons stated, the order to show cause is concluded without a finding of contempt.

IT IS SO ORDERED.

Date: 10 September 2003



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by telecopy on:

Morris Laatsch, Esq.

Robert Stefancin, Esq.

Mr. Laurence Lomaz

By: Joyce L. Gordon, Secretary

Date: 9/16/03