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United States District Court

District of Vermont

RAYMOND OBUCHOWSKI, Trustee,

Plaintiff,

v.

LYNDONVILLE SAVINGS BANK,
JEFFREY POULIN,
GARY PHILLIPS,
DAVID REDMOND,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 1:01-CV-356

98-11181

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U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

 Jury Verdict. This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

 X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Memorandum of Decision and Findings of Fact (Paper No. 34) filed May 31, 2002, JUDGMENT is hereby entered for defendants Lyndonville Savings Bank, Jeffrey Poulin, Gary Phillips and David Redmond against plaintiff Raymond Obuchowski, Trustee.

RICHARD PAUL WASKO

Date: May 31, 2002

Richard Paul Wasko
(By) Deputy Clerk

U.S. BANKRUPTCY COURT
DISTRICT OF VERMONT

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JUDGMENT ENTERED ON DOCKET

DATE: 05/31/2002

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U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

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RAYMOND OBUCHOWSKI, TRUSTEE :
:
v. :
:
LYNDONVILLE SAVINGS BANK, :
et al. :
_____ :

Civil No. 1:01CV356

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BANKRUPTCY COURT
DISTRICT OF VERMONT

MEMORANDUM OF DECISION

Findings of Fact

The facts underlying this dispute are succinctly stated in a decision the Court issued in the related matter of Obuchowski v. Lyndonville Savings Bank, Civil No. 01CV180, slip op. at 3-5 (D. Vt. Sept. 19, 2001) (hereinafter "Case 1"), familiarity with which is presumed. In Case 1, this Court found a single factual dispute remaining - whether the Bank breached the covenant of good faith and fair dealing. Case 1, slip op. at 12-13. The Court held:

Neither party challenges the existence of contracts between LSB [Lyndonville Savings Bank] and Pro Paving. Therefore, both parties are subject to the covenant and must act with faithfulness to their agreed purpose and consistently with their justified expectations. Obuchowski claims that the conduct of the LSB directors and officers wrongfully terminated the contracts and thus violated the covenant of good faith and fair dealing. He claims that the Defendants, motivated by a desire to liquidate some of its smaller loans in order to assist some larger, nearly insolvent debtors, manipulated funds owed to Stevens in order to cause her to default on the loans. Obuchowski insists that if Jeffrey Poulin and LSB's officers had not interfered with the monies owed Stevens by Poulin Grain, she would have been able to stay in business, even though she was

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barely able to stay current (or close to) current on her bank debt. In other words, Obuchowski claims that Appellees intentionally forced Stevens to default on her loans in order to seize her assets for nefarious purposes.

This is decidedly a context-based, factual question meant for the fact finder.

Slip op. at 8.

On March 12 and 13, 2002, the Court held an evidentiary hearing on the remaining issue of whether the defendants violated the covenant of good faith and fair dealing. Upon consideration of the oral testimony and documentary evidence presented, the Court finds as follows. See Fed. R. Civ. P. 52(a).

In December 1995, Newport, Vermont businessman Daniel Scott approached Elana Stevens with the idea of creating a local paving company. Both had been involved in the paving industry, Scott as the owner of a paving business called Libra Paving Company, and Stevens, as an employee of Pike Industries, which included as part of its business the production of paving materials. Scott explained to Stevens that his goal in establishing the new company was to recoup approximately \$50,000 he had lost through his involvement with Libra. See 3/12 Trial Transcript at 174-75.

In early 1996, Stevens and Scott's daughter, Kristy Scott Gobiell, formed Pro Paving, Inc. Stevens owned 40% and Gobiell owned 60% of Pro Paving's stock. Gobiell provided no services

for Pro Paving; however, the parties believed that Pro Paving might be entitled to certain "preferences" as a women/minority-owned firm. See 3/13 Trial Transcript at 142-43.

In the Spring of 1996, Scott and Stevens approached Lyndonville Savings Bank to obtain financing for Pro Paving. At the time, Scott already was one of Lyndonville Savings Bank's largest customers.

They met with Gary Phillips, a loan officer at Lyndonville's Derby branch. On April 26, 1996, Lyndonville granted Pro Paving an initial line of credit in the amount of \$50,000. Because Pro Paving was a start-up business, the bank required the personal guarantee of all stockholders holding more than 20% of the stock, as well as the personal guarantee of Daniel Scott. See Plaintiff's Exhibit 193 (commercial loan analysis).

On September 9, 1996, the bank increased Pro Paving's line of credit to \$100,000. It renewed the line of credit on April 11, 1997 and increased it to \$130,000 on June 30, 1997. On March 26, 1998, the bank approved Pro Paving's final line of credit in the amount of \$130,000.

With the exception of the final line of credit loan, Daniel Scott personally guaranteed all loans. The promissory note and security agreement for each of these loans contained

the following default provision: "I will be in default if . . . I do or fail to do something which causes you to believe that you will have difficulty collecting the amount I owe you." Under its "Remedies" for default, the bank was permitted, inter alia, to demand immediate payment of outstanding loans and to require the borrower to gather collateral and make it available for sale. See Defendant's Exhibits 2, 3, 4, 5.

On April 11, 1997, Lyndonville also approved Pro Paving's application for a \$191,260.23 equipment loan. Pro Paving used \$124,295.72 to purchase equipment the company had been renting from one of Scott's companies. The testimony at trial suggests the price of this equipment may have been inflated so that Scott could recoup his losses from Libra. See 3/12 Trial Transcript at 62, 183. This loan was guaranteed by Stevens, Scott and Gobiell, and the application also contained the same default language as the credit loan documents. See Defendant's Exhibit 6.

Because Pro Paving was in precarious financial condition, the company applied \$67,665.57 of the equipment loan to the delinquent 1996 line of credit. In fact, according to Pro Paving's profit and loss statements, the company lost \$81,954.25 in 1996 and \$55,739.72 in 1997. See Defendant's Exhibits 11, 12. In addition, in early 1998, Pro Paving still

owed Pike Industries, the supplier of its paving materials, approximately \$67,000 for product it had used in 1997. See 3/13 Trial Transcript at 12. By May 14, 1998, Stevens had telephoned bankruptcy attorney Gleb Glinka and had made an appointment to meet with him on May 18. See 3/13 Trial Transcript at 39.

On January 13, 1998, Kristy Scott Gobel resigned as a director of Pro Paving and sold her shares of stock back to the company. Because Gobel had no assets and no longer had an interest in the company, Phillips released her from guarantee obligations to Lyndonville Savings Bank. See 3/13 Trial Transcript at 8.

Pro Paving's first job in 1998 was for Poulin Grain, Inc. Pro Paving had bid on the Poulin Grain job in the fall of 1997, with work to commence in the spring of 1998. The contract price was \$65,000, with the parties disputing whether the final bill was to be adjusted for the actual quantity of paving material used. See 3/12 Trial Transcript at 155-58. Payment was to be made upon completion of the job. See 3/12 Trial Transcript at 159.

Steven's former employer, Pike Industries, was the only paving materials supplier in the area and therefore supplied Pro Paving's materials. At the time Pro Paving was to begin the Poulin Grain job, Stevens told Poulin Grain that she had

to pay Pike Industries on May 20, 1998, so that she would not go into her work season with a large, outstanding materials bill. See 3/13 Trial Transcript at 40-41.

Pro Paving began work on the Poulin Grain job on May 11, 1998. Steven dealt exclusively with John Robillard, the Poulin Grain employee overseeing the contract. Robillard had confidence in Pro Paving because one of Pro Paving's employees, Rene Patenaude, had an excellent reputation as a paver. See 3/13 Trial Transcript at 35. On May 14, 1998, Robillard told Stevens he was concerned that Patenaude was not working on the paving project and in fact complained about the quality of Pro Paving's work. See 3/12 Trial Transcript at 239-41.

On Monday, May 18, 1998, Stevens met with Attorney Glinka, who eventually filed a bankruptcy petition on Stevens' behalf on August 7, 1998. Later that afternoon, during a conversation with Robillard, Stevens mentioned Pro Paving was going out-of-business and that her last day would be May 19, 1998. See 3/12 Trial Transcript at 242-43. Apparently desperate for funds, she further offered Robillard a \$10,000 discount for the Poulin Grain job. See 3/12 Trial Transcript at 248.

Robillard reported this conversation to his employer, Jeffrey Poulin. Mr. Poulin is the president of Poulin Grain.

and a director of the Lyndonville Savings Bank.

On May 19, 1998, Charles Bucknam, President of Lyndonville Savings Bank, and David Redmond, the Bank's senior loan officer, stopped at Poulin Grain to speak with Mr. Poulin about an unrelated matter. When Bucknam and Redmond commented on the paving job in process, either Poulin or Robillard mentioned that Pro Paving was going out-of-business. See 3/12 Trial Transcript at 235-37, 243-44; 3/13 Trial Transcript at 69.

After leaving Poulin Grain, Redmond phoned Gary Phillips and asked him if he had heard that Pro Paving was going out-of-business. Phillips indicated he had not heard such a rumor but that he would contact Elana Stevens. The next morning, Phillips telephoned Stevens, who confirmed the rumor that Pro Paving was going out-of-business. See 3/13 Trial Transcript at 15, 16.

Based on this information and on the insecurity clause in the default section of the loan documents, Phillips contacted Mr. Poulin to inform him that the Bank had a first security interest in all of Pro Paving's receivables. He requested the \$55,000 which Poulin Grain owed Pro Paving be paid using a check made jointly to Lyndonville Savings Bank and Pro Paving. See 3/13 Trial Transcript at 16-17; Plaintiff's Exhibit 46. Phillips then made a second call to

Stevens, whom he informed that he had requested a joint check from Poulin Grain. Stevens voiced no objection to this arrangement. See 3/13 Trial Transcript at 44.

On May 20, 1998, Stevens met with Phillips at the Bank's Derby branch. Phillips informed her that Pro Paving's equipment had to be delivered to the bank. Though crying and upset, Stevens voiced no objection to this request. See 3/13 Trial Transcript at 44-45.

On May 22, 1998, Stevens went to the Derby branch and endorsed the joint check from Poulin Grain to the bank. Later that day, Gary Phillips received a phone call from Pike Industries' attorney, who stated his intention to assert a lien against Jeffrey Poulin's property and requested the bank to place the funds in escrow. 3/12 Trial Transcript at 90-91. Nevertheless, the Bank decided to retain the Poulin Grain payment and apply it to Pro Paving's outstanding debt.

Thereafter, Pike Industries sued Lyndonville Savings Bank, Poulin Grain and Pro Paving. In October 1998, the bank paid Pike \$22,899 to settle the suit against both it and Poulin Grain, and to release a lien placed against Jeffrey Poulin's real estate. See 3/12 Trial Transcript at 114-17; Plaintiff's Exhibit 188. The Bank then charged this settlement amount back to Pro Paving. Lyndonville Savings Bank also sold Pro Paving's equipment and attempted to collect

other company receivables. After applying these proceeds to the indebtedness, approximately \$95,000 remained on the equipment loan which Daniel Scott had guaranteed. To resolve his remaining guarantee obligations, Scott paid the bank \$70,000. See 3/12 Trial Transcript at 195-96.

Conclusions of Law

Stevens claims that Lyndonville Savings Bank unjustifiably seized her company's equipment and payment from Poulin Grain to put Pro Paving out-of-business. See Plaintiff's Amended Proposed Finding of Fact (Paper 31) at para. 14. Stevens has demonstrated that Lyndonville's record-keeping was shoddy and perhaps its business practices incestuous. She also has shown the Bank may have acted precipitously when it seized her assets upon hearing a rumor that Pro Paving was going out-of-business. However, she has failed to demonstrate that, under these circumstances, the Bank's actions caused Pro Paving to default on her loans or otherwise constituted a breach of the covenant of good faith and fair dealing.

"An underlying principle implied in every contract is that each party promises not to do anything to undermine or destroy the other's rights to receive the benefits of the agreement." Carmichael v. Adirondack Bottled Gas Corp. of

Vt., 161 Vt. 200, 208 (1993). "The implied covenant of good faith and fair dealing exists to ensure that parties to a contract act with faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Id. (citation and quotations omitted).

The types of conduct which may evidence bad faith include: "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." Restatement (Second) of Contracts § 205, comment d. "[T]he covenant of good faith 'also extends to dealing which is candid but unfair, such as taking advantage of the necessitous circumstances of the other party'."

Carmichael, 161 Vt. at 209 (quoting Restatement (Second) of Contracts § 205 cmt. e).

From its inception, Pro Paving's financial viability was questionable. In fact, Pro Paving never made a profit and was never financially liquid. Stevens did not provide an adequate explanation for the curious relationship she entered with Scott and his daughter when establishing Pro Paving. It is clear, however, that Stevens needed Scott's involvement in order to borrow the funds to start her business. The fact that Stevens voluntarily entered a business relationship with

Scott which resulted in financial disaster cannot be imputed to Lyndonville Savings Bank.

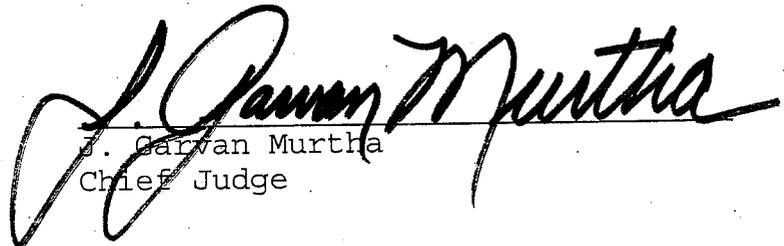
Furthermore, it is undisputed Bank officials acted within their rights under the credit line default and remedies clauses. The plaintiff's suspicions regarding the motivations of various members of her area business community does not change the fact that the Bank received an indication Pro Paving was in serious financial trouble, a rumor which Stevens herself confirmed.

While understandably upset, Stevens complied with the Bank's requests to co-sign the Poulin Grain check and deliver her equipment. This Court is unable to conclude that the Bank acted in bad faith or took advantage of Stevens because she never objected to their actions. Her failure to ask the Bank to take a different course of action is fatal to her claim.

Judgment is entered for the defendants.

SO ORDERED.

Dated at Brattleboro, Vermont, this 30TH day of May, 2002.


J. Garvan Murtha
Chief Judge

RICHARD PAUL WASKO
CLERK

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
DISTRICT OF VERMONT
FEDERAL BUILDING
BURLINGTON, VERMONT 05402-0945

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Civil Action No. 1:01cv 356

Date May 31, 2002

Obuschowski vs. Lyndonville Savings Bank

NOTICE TO LITIGANTS

If you wish to appeal the enclosed judgment or order, you must file a Notice of Appeal within 30 days after entry of the judgment or order appealed from (or 60 days if the United States or an officer or agency of the United States is a party). Fed.R.App.P. 4(a)(1). The fee for filing an appeal is \$105.00.

If you wish to appeal but are unable to file your Notice of Appeal within 30 days [or 60 days if applicable] after the date of entry shown on line 2 below, then you have an additional 30 days to file a Motion for Extension of Time. The Motion for Extension of Time **must** be filed within 30 days after the date on line 3 below. Every Motion for Extension of Time must contain an explanation which demonstrates "good cause" or "excusable neglect" for failure to file the Notice of Appeal within the time limit required. Fed.R.App.P. 4(a)(5).

PLEASE TAKE NOTICE

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|--|---------------------|
| 1. Judgment filed | <u>May 31, 2002</u> |
| 2. Date of Entry of Judgment on the docket of this court | <u>May 31, 2002</u> |
| 3. Notice of Appeal MUST be filed on or before | <u>July 1, 2002</u> |

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U.S. BANKRUPTCY COURT
DISTRICT OF VERMONT

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