

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

NOXSO CORPORATION

Debtor

No. 97-10709

Chapter 7

(Involuntary)

MEMORANDUM AND ORDER

Appearances: Kyle R. Weems, Weems & House, Chattanooga, Tennessee,
Attorney for Noxso Corporation

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Napolitan, PLLC, Chattanooga, Tennessee, Attorneys for Olin
Corporation

R. THOMAS STINNETT, UNITED STATES BANKRUPTCY JUDGE

The court must decide whether to grant or deny a motion to strike filed by Olin Corporation (“Olin”). Olin and two other creditors filed an involuntary bankruptcy petition against Noxso Corporation (“Noxso”). Noxso filed a motion to dismiss. The court denied Noxso’s motion to dismiss and ordered Noxso to file an answer to the involuntary petition. Noxso filed a pleading captioned “Response of Noxso Corporation to Petition for Involuntary Bankruptcy.” Noxso also filed a brief to support the response. In its motion to strike, Olin asks the court to strike the entire response and enter an order for relief, as if Noxso has totally failed to respond to the involuntary petition. Olin asserts the response does not amount to an answer as required by the rules of procedure. According to Olin, the response is just another motion to dismiss. *Fed. R. Bankr. P.* 1011(b), 1013(b) & 7012; *Fed. R. Civ. P.* 12(f).

The allegations made in an involuntary petition recite the requirements of Bankruptcy Code § 303. 11 U.S.C. § 303; *Fed. R. Bankr. P.*, Official Form 5. The lower left corner of the form for an involuntary petition sets up a check box system for making the required allegations:

ALLEGATIONS
(Check applicable boxes)

1. Petitioner(s) are eligible to file this petition pursuant to 11 U.S.C. § 303(b).

2. The debtor is a person against whom an order for relief may be entered under title 11 of the United States Code.

3. a. The debtor is generally not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute;

or

3. b. Within 120 days preceding the filing of this petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

All four boxes are checked in the involuntary petition filed against Noxso.

On the second page of the form, each petitioning creditor must state its name, its address, and the nature and amount of its claim. *Fed. R. Bankr. P.*, Official Form

5. Olin and the other two petitioning creditors executed the second page.

The form does not require the petitioning creditors to state all the relevant facts specifically as they relate to the creditors or the debtor. Paragraph 1 does not require the creditors to include specific information to show that they are qualified to file the petition. Paragraph 2 does not require specific factual statements, but some of the information is covered in the earlier section of the form titled "INFORMATION REGARDING DEBTOR". Paragraph 3 does not require specific factual allegations to show that the debtor is not paying its debts as they become due or to show the appointment of a custodian within the preceding 120 days. In this regard the Committee Note to the official form states:

Petitioners may wish to supplement the allegations set forth in the form with a further statement of facts. Additional information concerning any allegation can be requested by the debtor as part of the discovery process.

Noxso's response immediately raises a question of form. It is labeled a response instead of an answer. This makes no difference. If the substance of the response amounts to an answer, then the court will treat it as an answer. *In re Riggan*, 102 B.R. 677 (Bankr. W. D. Tenn. 1989); *United States v. Louisville & Nashville RR. Co.*, 221 F.2d 698 (6th Cir. 1955).

Noxso's response also does not follow the usual form of an answer. Of course, the usual form of an answer follows the usual form of a complaint. The complaint states the alleged facts in numbered paragraphs, and the answer responds to the alleged facts paragraph by paragraph. *Fed. R. Bankr. P.* 1018 & 7008; *Fed. R. Civ. P.* 8(b); *Fed R. Bankr. P.* 1018 & 7010; *Fed. R. Civ. P.* 10. Noxso's response resembles a complaint. It begins with a long statement of facts, and finally asserts Noxso's defenses based on the alleged facts: (1) Olin is not eligible to be a petitioning creditor, and (2) Olin filed the involuntary petition in bad faith.

Noxso's response could have followed the general pattern of the allegations in the involuntary petition. It could have admitted or denied the allegations made in the involuntary petition in the same order they are stated in the petition. It could have done this without necessarily following the numbering of the allegations, since the involuntary petition contains only four paragraphs of allegations. Indeed, Noxso's response illustrates a

problem that is likely to occur. Since the answer will probably state many more facts, it will probably use many more paragraphs. Given this inherent problem, the failure of Noxso's response to follow the usual pattern of an answer is not a serious problem by itself. It is not a ground for completely striking the response and treating Noxso as if it has failed to answer. The problem of the structure of the response can be dealt with by other methods. 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure 2d* §§ 1322 & 1323 (1990).

The more serious problem is the failure of the response to deal with all the allegations of the complaint. The response deals almost entirely with whether Olin is eligible to file the involuntary petition. The response does not clearly answer the other allegations of the petition. An answer should reveal to the other party the allegations that are admitted and will not be contested at trial and the allegations that are contested and will require proof. 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure 2d* § 1261 at 383 (1990).

The failure of the response to deal with all the allegations of the petition is not a ground for striking the entire response as not amounting to an answer. An answer that fails to deal with all the allegations of the complaint is still an answer. Rule 8(d) makes this clear. It provides that, as a general rule, an averment that is not denied is deemed to have been admitted. *Fed. R. Bankr. P.* 1018 & 7008; *Fed. R. Civ. P.* 8(d). The court leaves open the question of whether, under Rule 8(d), Noxso has in effect admitted the other

allegations of the involuntary petition. Suffice it to say that treating the allegations as admitted may be a more appropriate remedy than striking the response entirely.

In this regard, the rules of procedure allow a court to strike any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. *Fed. R. Bankr. P.* 1011(b) & 7012; *Fed. R. Civ. P.* 12(f) The court can seldom strike an entire pleading on the ground that every piece fits into at least one of these categories. That certainly is not true of Noxso's response. The long statement of facts is not redundant, immaterial, impertinent, or scandalous. It relates to Noxso's defense that Olin is not eligible to file an involuntary petition against it because Olin's claim against Noxso is subject to a bona fide dispute. Noxso's response also can not be stricken on the ground that it raises an insufficient defense. The bad faith allegation relates to whether, if Olin is not eligible, the requirement of three creditors can be met by allowing at least one other creditor to join in the petition. Of course, Noxso may not be able to prove the defenses raised by the response, but that does not make the response insufficient as a matter of law. *Federal Savings & Loan Ins. Corp. v. Burdette*, 718 F.Supp. 649 (E. D. Tenn. 1989).

Olin assumes that if the court strikes the response, then it will enter a default order for relief against Noxso. This assumption is not necessarily correct. The court must balance the need for a prompt decision on whether to enter an order for relief and the importance to the debtor of avoiding bankruptcy. The court will not be unjust to the debtor by entering an order for relief based on technical failures in responding to the involuntary petition. *Cf. In re Riggan*, 102 B.R. 677 (Bankr. W. D. Tenn. 1989).

On this point Olin asserts that the Noxso's response is not in good faith because its president testified at an earlier hearing that some of Olin's claims are not disputed. In other words, Olin is asking the court to consider evidence in deciding whether to grant its motion to strike, which would essentially convert the motion to strike into a motion for summary judgment. 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure 2d* § 1380 at 656-658 (1990). This matter is set for hearing in less than two weeks. It would be a waste of judicial energy to rule now on this factual question when it and the other factual issues raised by the response can be determined at once after the hearing that is already scheduled.

The court denies Olin's motion to strike Noxso's response and enter an order for relief. Since the court is denying the motion to strike, the hearing set for April 7, 1997 is still needed. Therefore, the court also denies Olin's request to cancel the hearing.

This brings the court to Olin's final request. In the event the court denied Olin's motion to strike, Olin asked for additional time for discovery and to respond to Noxso's "current motion to dismiss" (meaning Noxso's response to the involuntary petition). Olin's motion is unclear as to whether it wants the hearing postponed to a later date while it conducts additional discovery. The court will deny the motion pending the hearing. Olin may be able to avoid the thrust of Noxso's response without delving into all the facts stated in Noxso's response. The court intends to proceed with the scheduled hearing to the full extent possible. If it turns out that the parties should have more time, the court can let the hearing continue at a later date.

IT IS SO ORDERED.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052.

At Chattanooga, Tennessee.

BY THE COURT

entered 3/27/1997

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE