

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION**

IN RE:

EDWARD J. MILLER and
DONNA A. MILLER,

Debtor(s).

)
)
)
)
)
)
)

Case No. : 00-51323

**ORDER ALLOWING DEBTOR'S OBJECTION TO
ALLOWANCE OF CLAIM**

This matter came on for hearing before the undersigned Bankruptcy Judge upon the Debtors' Objection to Allowance of Claim filed by Tom Douglas ("Mr. Douglas") in the amount of \$20,000.00 requesting that the claim be disallowed in its entirety. Appearing before the Court were Gerald S. Schafer, counsel for the Debtors, and Robert H. Raisbeck, Jr., counsel for Mr. Douglas. The Court, after hearing the testimony of the witnesses and reviewing the exhibits presented, makes the following findings of fact:

BACKGROUND

1. The Debtors filed a voluntary petition for relief under Chapter 13 of Title 11 on July 13, 2000.
2. On or about November 15, 1999, Mr. Douglas contracted with the male Debtor (hereinafter "Debtors") to construct an outbuilding on his property located at 3041 Baltimore Road in East Bend, North Carolina. The contract required payment by Mr. Douglas of \$12,000 at the time materials were delivered to the site, \$8,000 when the construction was framed and \$4,000 upon completion of the building for a total of \$24,000.00.
3. A dispute between the parties arose prior to completion of the contract regarding the

specifications of the building, the concrete floor, the footings and North Carolina Building Code requirements. The final payment of \$4,000.00 was not made to the Debtors.

4. On August 14, 2000, Mr. Douglas filed an unsecured proof of claim in the amount of \$20,000.00 based upon the two payments he made pursuant to the contract to build the outbuilding. Attached to the proof of claim was a copy of the contract, copies of receipts for the payment of a total of \$20,000.00 and a copy of a letter from Jerry Miller, Chief Building Inspector, Yadkin County.

5. On May 22, 2001, the Debtors objected to the claim in its entirety on the grounds that there is no basis for the amount of money since the claimant contracted with the Debtors to build a building which was built by the Debtors to his specification.

SUMMARY OF THE EVIDENCE

Edward J. Miller testified that he entered into a contract to build an outbuilding on Mr. Douglas' property on November 15, 1999. The contract and a related change order were admitted into evidence. The contract provided that the Purchaser was responsible for all site preparation and included a disclaimer that the Debtors were not responsible for cracking of concrete due to varying soil or fill conditions or the weather. Pursuant to the terms of the contract, Mr. Douglas made an initial payment of \$12,000.00 upon delivery of the materials.

Once construction began, Mr. Douglas was present on the building site almost every day. Mr. Miller testified that the concrete and footings were poured dry, which was the Debtors' normal practice, then the slab was poured and the building was framed. At that point, Mr. Douglas was satisfied with the work and paid an additional \$8,000.00. As the construction progressed, the concrete began to crack due to settling caused by the site preparation. There were additional minor problems which the Debtors agreed to fix. Mr. Miller maintained that the

building was built according to the specifications provided by the contract. In particular, Mr. Miller indicated that the building height was in excess of 14 feet outside, as listed in the contract.

Upon inspection, the building did not meet North Carolina Building Code requirements. Mr. Miller testified that he agreed to make all necessary repairs if Mr. Douglas would agree to pay him the remaining \$4,000.00 balance of the contract price. Mr. Miller testified that he could make all necessary repairs to the building with approximately one day of labor. The parties could not reach an agreement regarding exactly what repairs were required. The primary issue was whether the concrete floor needed to be completely replaced. Mr. Miller testified that the parties agreed to reduce the contract price to the \$20,000.00 which had already been paid and that Mr. Douglas would find someone else to make any further repairs to the outbuilding. Mr. Miller further stated that he remained willing to complete all repairs necessary to meet North Carolina Building Code requirements in exchange for payment of the remaining \$4,000.00 contract balance, but that he was not willing to remove the building and repour the concrete floor.

Tom Douglas testified that the parties reached no final agreement regarding the repairs to the outbuilding, and the building remains substantially in the condition in which it was left by Mr. Miller. Most significantly, the concrete floor is cracked in numerous areas. Mr. Douglas testified that the floor cannot be repaired and that the floor must be entirely repoured, which would require that the outbuilding be taken down and rebuilt. Mr. Douglas testified that the cracking was due to the footings which were improperly poured; however, Mr. Douglas further testified that he did not have any building or construction expertise. There have been additional problems including leaking and insufficient height for the garage door to properly function. Mr. Douglas testified that the building was 14 feet in height on the outside, but not 14 feet inside the

building. Finally, there are some other problems noted by the building inspector related to the gutters and roof that still have not been fixed.

Mr. Douglas further testified that he received a letter from the building inspector stating that the building did not meet code requirements.¹ Mr. Douglas testified that he had planned to run electricity to the outbuilding, but that cannot be done unless the building meets building code requirements. The outbuilding still does not meet North Carolina Building Code requirements, and is not currently used for any purpose.

The Court finds the testimony of Mr. Douglas to be very credible and finds as fact that the building does not meet North Carolina building code requirements, that Mr. Miller was willing to bring the building in compliance with the building code, that the demand by Mr. Douglas that he remove the outbuilding and repour the concrete floor was not required by the terms of the contract and that the \$4000 discount on the price of the outbuilding was compensation to Mr. Douglas for the outbuilding's defects.

Based on the foregoing Findings of Fact, the court makes the following:

CONCLUSIONS OF LAW

A proof of claim filed under Section 501 is deemed allowed, unless a party in interest objects. 11 U.S.C. §502(a). Pursuant to Bankruptcy Rule 3001(f), if a proof of claim has been properly filed by the claimant, the claim is entitled to prima facie validity. The claimant is only entitled to have the claim considered "prima facie valid" if he alleges facts sufficient to support

¹A copy of this letter was attached to the proof of claim, but was not introduced into evidence. The letter does not reference a specific code section. The letter does refer to some problems with the concrete floor, but it does not state a cause, nor does it state that the building must be entirely removed and the concrete repoured. The letter further refers to a conflict arising from the use of two different sets of plans; however, no plans were introduced into evidence or attached to the proof of claim.

the claim. In re Allegheny International, Inc., 954 F.2d 167, 173 (3rd Cir. 1992) (citing In re Holm, 931 F.2d 620, 623 (9th Cir. 1991)). The Debtor then bears the initial burden of proof to overcome the presumed validity and amount of the creditor's claim. Id. To satisfy this burden, the Debtor must produce evidence equal to the prima facie case which negates one or more of the allegations in the proof of claim. Id. The Debtor is not required to disprove the claim. In re Kahn, 114 B.R. 40 (Bankr. S.D.N.Y. 1990). The burden then reverts to the claimant to prove the validity and amount of its claim by a preponderance of the evidence. In re Allegheny International, Inc., 954 F.2d at 174.

In the present case, the Court finds that the proof of claim provides adequate factual support for the claim. Therefore, the court concludes that the claimant has satisfied his initial burden of going forward. The claim will be given prima facie validity and the burden rests on Debtors to produce evidence which, if believed, would refute at least one of the essential allegations of the claim.

The Debtors carried their burden in this case. The Debtors offered evidence that Mr. Douglas contracted with the Debtors to build a building which was built by the Debtors to the contract specifications. The Debtors further offered evidence that when the building did not meet building code requirements, that Mr. Miller was willing, and remained willing, to make the necessary repairs to the building to meet North Carolina Building Code requirements, but that Mr. Douglas would not accept the repairs unless Mr. Miller agreed to repour the concrete floor. In addition, the Debtors offered testimony that the cracking in the cement was due to improper site preparation. The written contract clearly indicated that Mr. Douglas was responsible for all site preparation and disclaims responsibility for cracking due to varying soil or fill conditions. The Debtors also offered testimony that according to the building plans, the height specification

in the contract was for the outside of the building, not the inside of the building. Finally, Mr. Miller offered testimony that the parties agreed to a \$4,000 discount to compensate for the claimant's complaints.

Given the evidence produced by the Debtors in this case, the burden was on the claimant to prove the validity of his claim by a preponderance of the evidence. The court finds that the claimant failed to show by a preponderance of the evidence that he was entitled to a claim in the amount of \$20,000. The burden of proof was upon Mr. Douglas to show by a greater weight of the evidence that the Debtors remain indebted to Mr. Douglas despite having already reduced the contract price to \$4,000. While it is clear from the evidence that the building does not meet North Carolina Building Code requirements, the claimant offered no evidence other than his own testimony to support the assertion that the building must be removed and rebuilt to meet North Carolina Building Code requirements. The claimant also failed to show that the cost to repair the building was greater than that the \$4,000 discount. The claimant offered no testimony or written estimates by other builders regarding the cost to bring the building into compliance with the building code. In addition, the claimant failed to show by a preponderance of the evidence that the cracking in the concrete floor was a result of something other than improper site preparation and soil conditions, as Mr. Miller testified, and consequently, was the responsibility of the Debtors under the terms of the contract.² Further, Douglas failed to show that the outbuilding was not built to specification. Specifically, Douglas failed to show by a preponderance of the evidence that the 14-foot height requirement clearly stated in the contract was for the inside of

²The Court notes that neither could a claim for breach of an implied warranty succeed because this right of action is limited to work on a new residential dwelling. Stanford v. Owens, 46 N.C.App 388, 393, 265 S.E.2d 617, 621 (1980); Dawson Industries, Inc. v. Godley Construction Co., Inc., 29 N.C.App 270, 276, 2224 S.E.2d 266, 269 (1976).

the building, rather than the outside. The burden of proof regarding the amount and validity of the claim was simply not satisfied by the evidence presented by the claimant.

Mr. Douglas filed an unsecured proof of claim in the amount of \$20,000.00. The Court finds that based upon the testimony presented and upon a review of the documents placed into evidence, Mr. Douglas has not proved his claim by a preponderance of the evidence.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that the Debtor's Objection to the claim is allowed and that Mr. Douglas' unsecured claim in the amount of \$20,000 shall be disallowed.

This the 2 day of August, 2001.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge