

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

In re:)	
)	
Eddie Carrazco,)	Case No. 02-52925
)	
Debtor.)	
)	

ORDER

This matter came on for hearing before the court on August 27, 2003, after due and proper notice, upon the objection by the Debtor to the claim of Davie Construction Company. Appearing before the court was Phillip E. Bolton, attorney for the Debtor and Ashley Rusher, attorney for Davie Construction. After consideration of the evidence, the arguments of counsel and other matters of record, the Court makes the following findings of fact and conclusions of law.

FACTS

In late 2001, Davie Construction Company ("Davie"), a construction contractor, entered into a contract with SciWorks for certain renovations and additions to the SciWorks facility. On December 3, 2001, Davie entered into a subcontract with Carrazco Electric, a sole proprietorship owned and operated by the Debtor, in the amount of \$100,050. The Debtor's subcontract provided that the Debtor was responsible for the electrical work as required by the specifications in SciWorks contract, including the installation of certain fire alarm and security systems. The specifications for the SciWorks project indicated that those fire alarm and security systems were to be installed by Johnson Controls, the company that had installed the existing systems. The

Debtor's subcontract price of \$100,050 included both the work to be performed directly by the Debtor's company, and the work to be performed by Johnson Controls.

Upon receipt of the Debtor's bid, Kyle Condrey, the project manager, called the Debtor to confirm that the Debtor's bid included the Johnson Controls work, as indicated in the specifications. The Debtor's bid was accepted and work at the SciWorks site began at the end of December 2001. The parties disagree as to the sequence and nature of events that followed.

Davie contends that during the first few weeks of construction, the Debtor's work progressed smoothly; however, by February of 2002, it began to experience problems with the Debtor's performance. The Debtor was not supplying an adequate job force and was unable to keep up with the pace of construction. In addition, some of the Debtor's submittals were not approved by the architect and were not resubmitted as requested by Davie. The project manager, Kyle Condrey, made numerous phone calls to the Debtor in an attempt to rectify the problem.

On February 25, 2002, the Debtor submitted an application for payment to Davie for certain electrical fixtures ordered from Ligon Electric ("Ligon"). The terms of the Debtor's subcontract provided that Davie would not prepay subcontractors for fixtures to be ordered, though in some circumstances, Davie might pay for materials that had been delivered, but were not yet incorporated into the job site. Accordingly, the Debtor was not entitled to payment if the Ligon fixtures had not been delivered to the job site by February 25, 2002.

Concerned about the status of the fixtures, Davie contacted both the Debtor and Ligon directly. Davie received information from Ligon indicating that the Debtor did not have a credit line available to order the fixtures. In addition, the superintendent of the SciWorks job site, who was present on the job site everyday, reported that the Ligon fixtures were never delivered nor

were they placed in the equipment storage area, which doubled as his office. Davie concluded that the Debtor improperly requested payment of the fixtures prior to delivery because the Debtor did not have the cash to pay C.O.D. Therefore, Davie denied the application for payment on the basis that those fixtures had not been delivered by the date of the application.

In early March 2002, Davie also became concerned that the Debtor had not yet entered into a subcontract for the work to be performed by Johnson Controls. Finally, Davie contends that the Debtor was not making sufficient progress on the job and, by early March, was not sending workers to the job site.

On March 14, 2002, Davie sent a notice of failure to comply with the subcontract and a letter to the Debtor notifying him that he had defaulted on his subcontract. The notice gave the Debtor 48 hours to start work and show progress on the project. On March 15, 2002, Davie sent a second notice of failure to comply with subcontract due to his failure to supply workers on the job site and maintain the required schedule of work. Finally, on March 18, 2002, Davie sent correspondence to the Debtor, notifying him that the Debtor's company would be replaced on the SciWorks project and that the Debtor would be liable for any cost overages incurred as a result.

Following the termination of the contract with the Debtor, on March 27, 2002, Davie entered into a subcontract with Storm Electric to perform the remaining electrical work for \$110,000. Davie subsequently agreed to a change order to the Storm contract for an additional payment of \$6,626. While the language of the Storm contract is identical to that of the Debtor's contract, Davie did not require Storm Electric to subcontract with Johnson Controls for the alarm work. Rather, Davie subcontracted with Johnson Controls to perform the work and paid \$16,738 directly to Johnson Controls.

The Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code in the Middle District of North Carolina on October 28, 2002. On Schedule F of the petition, the Debtor listed a disputed and unsecured claim held Davie in the amount of \$64,835. On November 13, 2002, Davie filed a proof of claim in the amount of \$56,835 for damages for failure to complete the SciWorks electrical contract. At the hearing, Davie amended its proof of claim amount to account for a change order allowed to the new electrical contract in the amount of \$6,262, which would have been allowed if Carrazco had completed the electrical work. Davie claims damages, not including attorney fees, as follows:

New electrical contract	\$133,074
Payments to Carrazco	12,618
Lost time (21 days @ \$533/day)	11,193
Initial Carrazco contract	(106,312)
Total Damages	\$ 50,573 (not including attorney fees)

In contrast, the Debtor contends that he never received any complaints about the quality or progress of his work, and that all applications for payment were proper. At the hearing on this matter, the Debtor testified that Davie held bimonthly meetings for the SciWorks job, and the minute sheets prepared by Davie for these meetings did not reflect any problems with the performance of the Debtor.

The Debtor presented conflicting evidence regarding the status of the Ligon fixtures. The Debtor testified that he had ordered the fixtures on a credit line and insisted that the fixtures had been delivered by the date of the application for payment. The Debtor was unable to recall or provide evidence of the date of delivery for the Ligon fixtures. The Debtor further testified that this order was part of the proof of claim filed by Ligon in this proceeding. The orders allegedly made by the Debtor do not appear on the account history attached to Ligon's proof of claim

which was filed with this court and covers the time period in question. The Debtor offered no credible explanation as to why the orders do not appear on the account history.

Finally, the Debtor testified that his bid did include the work to be performed by Johnson Controls; however, after receiving pricing and proposal from Johnson Controls, the Debtor determined that it was in his best interest to do the work himself. It is the Debtor's position that the job specifications merely recommended that Johnson Controls be hired to install the fire and security systems, but it was not required by the contract.

According to the Debtor, on March 14, 2002, after providing notice, he quit the job and walked off the site because he did not receive timely payment of the February 25, 2002 invoice. It is the Debtor's position that he did not breach the subcontract with Davie. Rather, the Debtor contends that Davie breached the subcontract by failing to remit payment when due. The Debtor has filed an objection to Davie's claim, contending that Davie is not entitled to damages, or in the alternative, that the damages claimed by Davie are excessive.

DISCUSSION

Pursuant to section 502 of the Bankruptcy Code, a filed proof of claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). The evidentiary effect of a proof of claim is set forth in Rule 3001(f) of the Federal Rules of Bankruptcy Procedure. Rule 3001(f) provides that a proof of claim that has been properly filed by the claimant is entitled to prima facie validity. The claimant is only entitled to have the claim considered "prima facie valid" if the claimant alleges facts sufficient to support the claim. In re Allegheny Int'l, Inc., 954 F.2d 167, 173 (3rd Cir. 1992) (citing In re Holm, 931 F.2d 620, 623 (9th Cir. 1991)).

The burden of proof then falls upon the debtor to overcome the presumed validity and

amount of the creditor's claim. Id. The Debtor is not required to disprove the claim. In re Kahn, 114 B.R. 40 (Bankr. S.D.N.Y. 1990). Once the debtor presents evidence to rebut the prima facie effect of the proof of claim, the ultimate burden falls upon the claimant to prove the validity and amount of its claim by a preponderance of the evidence. In re Allegheny Int'l, Inc., 954 F.2d at 174.

In the present case, the Court finds that Davie properly filed a proof of claim that alleges facts sufficient to provide a legal basis for a claim. Therefore, the Court concludes that the claimant has satisfied his initial burden of going forward. The Debtor, however, presented evidence at the hearing to rebut this prima facie effect. Therefore, Davie must prove its claim by a preponderance of the evidence.

The facts clearly establish that the Debtor failed to complete the electrical subcontract with Davie. The Debtor's objections to Davie's claim are based upon the theory that (1) Davie improperly denied payment for the February 25, 2002 application and (2) the Debtor was not obligated to subcontract with Johnson Controls for the work related to the fire alarm and security systems. In alternative, the Debtor contends that if Davie is entitled to damages, the amount set forth on Davie's claim is incorrect.

The Court finds Davie has shown, by a preponderance of the evidence, that the Debtor improperly requested payments for the Ligon fixtures prior to delivery. The evidence presented, including the testimony of the superintendent that the Ligon fixtures were never delivered and the proof of claim submitted by Ligon, shows that the Ligon fixtures were not delivered to the job site by the date of the application. When considered in light of all the evidence presented, the Court finds that the Debtor's testimony regarding the order and delivery of the fixtures was

inconsistent and not credible. Accordingly, the Court finds that pursuant to the terms of the subcontract, Davie was not obligated to make payment to the Debtor on the February 25, 2002 application from the Debtor and did not breach the subcontract by refusing to do so.

As to the second issue in dispute, the Court finds that the evidence shows that both the Debtor and Davie intended for the Debtor's bid to include the subcontract with Johnson Controls. After receiving a bid from Johnson Controls, however, it appears that the Debtor realized that he substantially underbid the job and decided not to subcontract with Johnson Controls. Irregardless, while the Johnson Controls subcontract was an issue in dispute between the parties, the Debtor admits that he walked off the job before he received notice of termination from Davie. Furthermore, the evidence clearly reflects that Davie terminated the contract with the Debtor due to his failure to supply workers on the job site and maintain the required schedule of work.

The Court concludes that the Debtor's failure to complete its contractual obligations and its abandonment of the project constituted a material breach of the subcontract agreement. As such, Davie is entitled to damages incurred as a result of that breach.

As a general rule, damages for breach of contract are awarded in an attempt to place an injured party in the position that the party would have been in had the contract been performed. Strader v. Sunstates Corp., 129 N.C. App. 562, 500 S.E.2d (1998). An injured party is entitled to nominal damages automatically upon proof of breach, but may recover general compensatory damages upon proof by the greater weight of the evidence that such damages were incurred and were naturally and proximately caused by the breach of contract. Stanback v. Stanback, 37 N.C. App. 324, 327, 246 S.E.2d 74, 77 (1978) (citing Builders Supply v. Midyette, 274 N.C. 264, 162 S.E.2d 507 (1968)). The party seeking damages must present sufficient evidence to furnish a

basis for the calculation for damages. RPR & Associates, Inc. v. University of North Carolina-Chapel Hill, 153 N.C. App. 342, 570 S.E.2d 510, 518 (2002); Biemann & Rowell Co. v. Donohoe Cos., 147 N.C. App. 239, 245, 556 S.E.2d 1, 5 (2001).

Here, Davie presented evidence that prior to the Debtor's breach, it paid the Debtor \$12,618. Davie also presented evidence that, as a result of the Debtor's failure to complete the electrical work at Sciworks, Davie incurred the cost of the subcontract with Storm Electric in the amount of \$110,000 to complete the electrical work. Davie contends that, unlike the Debtor's subcontract, the Storm Electric contract did not include the work to be performed by Johnson Controls. Therefore, in addition to the \$110,000 paid to Storm Electric, Davie paid \$16,738 directly to Johnson Control.

The Carrazco contract and the Storm Electric contract, both of which were admitted into evidence, are identical. Davie presented no evidence of the subcontract with Johnson Controls in the amount of \$16,738. Nonetheless, Davie contends, that the Storm Electric contract was orally modified by the parties to exclude the Johnson Controls work. Other than testimony by the project manager, Davie presented no evidence to contradict the plain language of the Storm Electric contract. Article 5 of the Storm Electric contract contains the following provisions:

The contract documents enumerated in this Agreement from the contract for construction represent the entire and intergrated agreement between the parties hereto and supersede all prior negotiations, representations or agreements, either oral or written. This Agreement may only be amended or modified in a writing signed by both subcontractor and contractor.

The Court finds that Davie did not carry its burden of proof with regard to contractual modification and that Davie is not entitled to the additional damages in the amount of \$16,738

for the Johnson Controls work.

Davie further claims delay damages for twenty one days at \$533 per day for a total of \$11,193. The president of Davie, Carl Carney, testified that the figure of \$533 per day was based upon the expenses Davie incurred on a daily basis for that particular job. No documentation was presented to support this figure. Carney further testified that he believed that the Debtor was absent from the job site for a period of twenty one days until he was replaced by Storm Electric.

The evidence presented does not support this portion of Davie's claim. On March 14, 2002, the Debtor quit the job and Davie sent notice of termination. The Storm Electric contract was signed March 27, leaving perhaps a fourteen day gap. Furthermore, Davie presented no specific evidence as to the impact of this absence on the timely completion of the entire SciWorks job. Carney testified that the entire SciWorks job was completed approximately one month later than originally planned, but merely speculated that some of this time was attributable to the absence of the Debtor. The loss of fourteen days work by an electrical subcontractor does not necessarily translate into a delay of fourteen days for the entire job. While it is clear that the Debtor's breach may have caused some delay in the performance of the SciWorks contract, Davie has not carried its burden with regard to the amount of these actual damages. Therefore, the Court finds that Davie is not entitled to a claim for the delay.

Therefore, Davie paid a total of \$122,618 (\$110,000 to Storm and \$12,618 to the Debtor) for the electrical work as provided for in the Carrazco contract. The Debtor originally contracted to do this work for \$100,050. The Court finds that, in order to place Davie in the position in which it would have been had the contract been performed, Davie is entitled to damages in the amount of \$22,568. In addition, in as much as the contract provides for attorney fees, the Court

finds that Davie is entitled to a claim for attorney fees in the amount of \$5,700.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that the Debtor's Objection to the claim is allowed in part and that Davie Construction is allowed an unsecured claim in the amount of \$28,268.

This the 26th day of September 2003.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge