UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THOMAS L. CARVOTTA, Ind.
and f/d/b/a Hilltop Handyman Services and as an Officer of Carvotta Builders, Inc.

CASE NO. 89-0l996

Debtor

APPEARANCES:

CAROLYN J. COOLEY, ESQ.
Trustee
Room 405
Mayro Building
Utica, New York l350l

G. LAWRENCE DILLON
LORELEI A. DILLON
Claimants
12 Steuben Park
Utica, New York l350l

STEPHEN D. GERLING, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Carolyn J. Cooley, the Trustee duly appointed in this Chapter 7 case ("Trustee"), has filed an objection to a second amended proof of claim ("Claim"), filed by G. Lawrence and Lorelei A. Dillon ("Dillons") in the sum of $82,055.86.

The contested matter first appeared on the Court's motion calendar at Utica, New York on March 29, l994 and was adjourned to April 26, l994. On the latter date the matter was submitted for decision, with the parties being allowed until May l7, l994 to submit memoranda of law.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to 28 U.S.C. §§1334(b) and l57(a), (b)(l) and (2)(B).

FACTS

On or about May 26, l989, the Dillons contracted with Carvotta Builders, Inc. ("Carvotta") to construct a one-family home in the Town of New Hartford, New York. The contract was executed by Thomas L. Carvotta ("Debtor"), as president of Carvotta. See Construction Contract attached to the Claim dated November 23, l993.[1] On November 2, l989, Debtor filed a voluntary petition pursuant to Chapter 7 of the Bankruptcy Code (ll U.S.C. §§l0l-l330) ("Code").

The Dillons' Claim has two components, the first component allegedly a priority claim pursuant to Code §507(a)(6), in the sum of $3,600. The second component is a general unsecured claim in the sum of $78,455.86.[2]

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[1] While the Trustee has not interposed any objection based upon privity of contract, it is not clear to this Court how Dillons have a claim against the Debtor as opposed to Carvotta.

[2] Dillons acknowledge receipt of the sum of $l2,0l6.00 recovered in an adversary proceeding commenced against the Debtor, which recovery is apparently a credit against the total amount of the Claim.

ARGUMENTS

The Trustee objects to the Claim on the ground that the "construction draws" referred to in Claimant's Reply To Trustee's Objection filed March 7, l994 are not "deposits" within the meaning of Code §507(a)(6), and if they are deposits, Dillons are entitled to a priority claim limited to $l,800. Additionally, the Trustee objects to a significant part of the general unsecured Claim on the ground that it represents amounts in excess of the allowances set forth in the Construction Contract with Carvotta. By letter to the Court dated April 6, l994, the Trustee modified her objection to Dillons' Claim to oppose only the Code §507(a)(6) priority claim in the sum of $3,600 and $5,l99.82 of the non-priority claim due to what the Trustee characterizes as "Expenditures in excess of contracted allowances:".

The Dillons contend that they are entitled to be reimbursed for the actual cost of completing their residence after the Debtor and/or Carvotta walked off the job on or about October 2, l989. They assert that they should be entitled to recover the amounts they actually expended to complete their home, even though those amounts exceeded allowances under the original contract, because the Dillons were unable to obtain those materials and services at the contractor's (Carvotta's) price. Additionally, Dillons point to cost overruns resulting from the destruction of sub-flooring in the unfinished home due to its being exposed to rains experienced in the aftermath of Hurricane Hugo.

With regard to the Code §507(a)(6) claim, Dillons assert

that they made two separate deposits with the Debtor in September, l989 and that they should be able to elevate $l,800 of each advance to priority status under Code §507(a)(6).

DISCUSSION

The first dispute presented by the Trustee's motion is Dillons' entitlement to assert a priority for $3,600 in "deposits" made with Carvotta pursuant to the Construction Contract.

Pursuant to Code §507(a)(6), priority is to be given to "allowed unsecured claims of individuals, to the extent of $900 for each such individual arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease or rental of property, or the purchase of services for the personal, family, or household use of such individuals, that were not delivered or provided." (emphasis added).

Initially, the Trustee, at oral argument, asserted that the monies Dillons claim to be deposits were admittedly construction draws pursuant to a building construction loan referred to in the Construction Contract and thus, were not deposits within the meaning of Code §507(a)(6).

A review of the Construction Contract fails to disclose any reference to the term deposit, although paragraph "Fifth" thereof does reference payment of the purchase price in accordance with a "building construction loan payment of schedules (sic) as prepared by Norstar Bank."

The Dillons refer the Court to the legislative History of

the Bankruptcy Reform Act of l978 (P.L. 95-598), which states in part, at page 6l48 in reference to H.R. 8200, the House of Representatives version of the Act, "The bill gives a priority in the distribution of assets of a bankrupt debtor to consumers who have deposited or made partial payments for the purchase or lease of goods or the purchase of services, that were not delivered or provided."

Additionally, the term "deposit" is defined in BLACK'S LAW DICTIONARY, FIFTH EDITION (l979), "Money lodged with a person as an earnest or security for the performance of some contract, to be forfeited if the depositor fails in his undertaking. It may be deemed to be part payment and to that extent may constitute the purchaser the actual owner of the estate."

In spite of the foregoing Legislative History and dictionary definition, the Court is not convinced that the two construction draws referred to in Dillons' Reply to Trustee's Objection are entitled to a Code §507(a)(6) priority. Construction draws pursuant to a building construction loan, are typically paid after a portion of the work has been completed, and the Court has no reason to believe that such was not the case with the Dillons' home. The fact that the house was never ultimately completed by Carvotta does not change the character of the draws.[3]

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[3] While Dillons contend that they received nothing in return for the construction draws, they do acknowledge the existence of a structure in some stage of completion. Further, in their "Itemization of Damages" attached to their Reply to Trustee's Objection, they acknowledge a credit for the amount remaining due on the contract, which suggests that approximately $26,000 worth of work, labor and services had been provided by Carvotta at the time it stopped working on the Dillons' home.

Code §507(a)(6) was intended to provide priority status to the extent of $900 to protect a consumer who makes a deposit upon or partially pays for goods and/or services never delivered or provided. Such was not the case, sub judice.

Furthermore, and assuming arguendo that Dillons were entitled to claim a priority, Code §507(a)(6) places a cap on the amount to which each individual is entitled to claim as priority, namely $900. If a single deposit does not exceed $900, a consumer would be able to assert a priority claim as to any other deposits made, but only to the extent of $900 per individual. This comports with a statement made in COLLIERS ON BANKRUPTCY, that "a claim or claims under this section may not exceed $900.00 per individual." See §507.04, p. 507-33.

Turning to the unsecured non-priority portion of the Dillons' claim, it appears that the only items remaining in dispute total $5,l99.82. (See letter of Carolyn J. Cooley dated April 6, l994). As indicated, the thrust of the Trustee's objection is what she characterizes as amounts in excess of the contract allowances. The Dillons respond that they exceeded the original contract allowances because they were forced to pay retail costs for items such as "plumbing fixtures, lighting and lawn" that they would have obtained at the builder's cost if it had not quit the job. They also cite the fact that in order to complete their residence, they had to contract for labor and materials on a "piecemeal" basis. (See Claimants' Reply to Trustee's Objection filed to March 7, l994).

Neither party in this contested matter has requested an

evidentiary hearing, and thus, the Court must rely on the papers submitted by each. In considering an objection to claim, the Court must determine the relative burdens of proof. Code §502(a) provides that a claim filed under Code §50l is deemed allowed unless a party in interest objects to it.

Case law interpreting Code §502(a) establishes a "bright line" of authority which holds that a properly filed proof of claim is prima facie evidence of the validity and amount of the claim absent an objection by a party in interest. The burden of going forward then falls upon the objector, who must present evidence to rebut the presumption. However, the ultimate burden of persuasion remains upon the creditor filing the claim. See In re Schaumsburg Hotel Owner Ltd. Partnership, 97 B.R. 943 (Bankr. N.D.Ill. l989); In re J. Bildner & Sons, Inc., l06 B.R. 8 (Bankr. D.Mass. l989); In re Rabzak, 79 B.R. 960 (Bankr. E.D.Pa. l987); In re BRI Corp., 88 B.R. 7l (Bankr. E.D.Pa. l988).

In the instant case, the Trustee has met her objector's burden by arguing to the Court that certain amounts reflected in Dillons' Claim exceeded the allowances set forth in the Construction Contract. Dillons then respond that to the extent the amounts in controversy exceed the allowances in the Construction Contract, they were necessitated by their inability to purchase the materials at the builder's cost and to obtain the labor other than on a piecemeal basis.

The Court accepts the Dillons' explanation and concludes that they have met the "ultimate burden of persuasion", except with regard to a "flooring" expense in the sum of $2,224.80, which

appears to relate to the installation of carpeting in the basement of Dillons' home. (See Checks #290 and #292 as part of Exhibit K attached to Claimants' Reply to Trustee's Objection filed March 7, l994). It is noted that such carpeting is not included in Dillons' contract with ColorCraft Interiors, Inc. also attached to Dillons' Exhibit K. The Court can find no indication in the Construction Contract that contemplates carpeting the basement of Dillons' home, nor does the Court believe that it is customary for a contractor to provide a carpeted basement when constructing a new home.

Thus, the Court will deny the Dillons' Code §507(a)(6) priority claim status to any portion of the construction draws. Further, the Court will allow the Dillons an unsecured, non-priority claim in the sum of $76,23l.06, less a credit of $l2,0l6.00 for amounts previously recovered from the Debtor, for a net allowable unsecured non-priority claim of $64,2l5.06.

IT IS SO ORDERED.

Dated at Utica, New York
this day of August, l994

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge