

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE:

STEPHEN STANSELL,

Debtor.

BK #92-22784-B
Chapter 11

MEMORANDUM OPINION AND ORDER ON DEBTOR'S
OBJECTION TO CLAIM OF HUGH DANCY AND HUGH DANCY COMPANY, INC.

This contested matter was heard upon the debtor's ("Stansell") objection to the claim of Hugh Dancy and Hugh Dancy Company, Inc., ("Dancy"), the response of the claimant, the testimony and other proof introduced on November 23, 1992, and concluding on April 20, 1993. This contested matter is core pursuant to 28 U.S.C. §157(b)(2)(B).

The claimant asserts a verbal contract and/or guaranty between the debtor and the claimant arising after Cates and Weeks Contractors, Inc. ("Cates and Weeks") began to purchase dirt from the claimant Dancy. The debtor denies that he obligated himself, contractually or otherwise, to pay for dirt moved from property owned by Dancy to property owned by Stansell. The dispute involves, as one issue, whether Dancy is entitled to a lien on the Stansell property. This determination is significant because a lien could elevate Dancy to the status of a secured creditor on property that is being developed by Stansell for commercial purposes. Dancy further asserts that the debtor induced Dancy to extend the due date of their verbal contract so as to prevent Dancy from filing a timely lien on the debtor's real property and Dancy asserts that the debtor should be equitably estopped from asserting a bar date to the filing of a lien by Dancy.

Stansell of course is involved as debtor-in-possession in a Chapter 11 reorganization under which Stansell is attempting to restructure debts while selling and/or developing a tract of commercial property in Northern Mississippi.

The proof offered on this objection to claim included testimony by Stansell and Dancy as well as testimony of other witnesses. The proof established that Stansell had entered into a contract with companies, including one known as Cates and Weeks, to move fill dirt onto the commercial property owned by Stansell. However, Stansell did not enter into any direct contract with Dancy or others who owned property from which the dirt was moved. Rather, Cates and Weeks or other entities entered into independent agreements to purchase the necessary fill dirt. There is no dispute that a significant amount of fill dirt was moved onto the Stansell property. See Testimony of Ben W. Smith and Tr. Ex. 1. However, there was no testimony that Mr. Smith, the engineer employed by Stansell, had personal knowledge of the source of specific fill dirt. In fact, Mr. Smith was aware that Cates and Weeks had sources of fill dirt other than the Dancy site. Stansell, through his company known as Stephen Stansell Properties, Inc., entered into a contract on October 26, 1989, with Cates and Weeks Contractors, Inc. for the grading and filling of the commercial property at issue. Tr. Ex. 2. Stansell testified that he obtained a release of lien from Cates and Weeks in return for final payment of all fill and grading work on the subject tract, which release was signed by Robert C. Cates, President of Cates and Weeks, on January 22, 1990. Tr. Ex. 3. Stansell testified that when he entered into the contract with Cates and Weeks, he expected Cates and Weeks to be responsible for their own acquisition of and payment for the necessary dirt. Stansell testified that he had already paid Cates and Weeks in full prior to receiving a letter dated March 7, 1990, from Dancy to Stansell stating that Cates and Weeks owed Dancy \$36,940.00 for "material and equipment used to improve your property." Tr. Ex. 4. Stansell testified that he did not enter into any guaranty agreements, either oral or written, with Dancy nor did he have conversations with Dancy in which he agreed to pay Dancy for any dirt or equipment usage. Stansell further denied that he made any agreement to issue checks jointly payable to Cates and Weeks and Dancy. Stansell testified that at the time he entered into the contract with Cates and Weeks he did not know Dancy. Approximately three weeks after that contract, Stansell contacted Dancy concerning the possible purchase from Dancy of other real property and at that time, according to Stansell, Dancy told Stansell that he was furnishing some dirt to Cates and Weeks.

In the proof of claim filed by Dancy and his company, Dancy makes a claim for a total of \$55,327.91, including interest through the "date of filing" of the proof of claim on June 1, 1992. The claim includes 60,790 cubic yards of dirt at .50 per cubic yard, seventy-seven hours of backhoe work at \$85.00 per hour, attorney fees of one-third, and interest from November 15, 1990. Tr. Ex. 5.

In a deposition taken of Hugh Dancy on March 4, 1992, in reference a Circuit Court action in DeSoto County, Mississippi, which deposition was offered into evidence in this contested matter, Dancy testified that he sold dirt to contractors that were doing work for the Stansell property. In the deposition, Dancy admitted that he was not a "detail man," and that he "can't remember all these details." Tr. Ex. 5, p. 8. This Court finds that Mr. Dancy is apparently confused about some details, including his alleged multiple conversations with Stansell. In the deposition, Dancy testified that he did not let Cates and Weeks move any more dirt after he wrote the letter marked as Tr. Ex. 4, on March 7, 1990. Tr. Ex. 6, p. 11.

Stansell in his testimony denied that Dancy approached him in reference a guaranty or a request for joint checks from Stansell, and he denied that Dancy had multiple conversations with him concerning these issues. He testified that he first met with Dancy on November 10, 1989, when he communicated an offer to Dancy to purchase unrelated real property from Dancy. This meeting, of course, would have been after the October 26, 1989, contract between Stansell and Cates and Weeks. Stansell denied that Dancy told him of imminent liens. Stansell testified that he did issue some checks payable jointly to Cates and Weeks and other suppliers but denied that he was ever requested to issue checks payable jointly to Cates and Weeks and Dancy. He testified that the March 7, 1990, letter from Dancy to him was a surprise, and he testified that he had no knowledge of lack of payment to Dancy when he obtained a release of lien from Cates and Weeks. Stansell testified that he called Dancy after receiving the March 7, 1990, letter but this conversation occurred after he had already paid Cates and Weeks for their work. The contract price agreed between Stansell and Cates and Weeks was to include, according to Stansell, the dirt, for which Cates and Weeks were responsible for payment.

In an effort to facilitate a financing package on his property, Stansell did propose a settlement with Dr. William Coley, C & C Contracting, Inc. and Hugh Dancy, in November 1990, but the settlement was never agreed to by all parties. See Tr. Ex. 7. The settlement effort was not an admission by Stansell that he in fact owed additional monies to anyone, including Dancy, for the grading and fill.

Dancy and his company filed a notice of construction lien, dated December 17, 1990 (Tr. Ex. 8), and Dancy and his company filed a Circuit Court suit in DeSoto County, Mississippi against Stephen Stansell, Bob Cates, George Weeks, Jr. and William O. Coley on August 28, 1991. Tr. Ex. 9. Stansell attempted to have that complaint dismissed, but the Circuit Court denied the motion. Tr. Ex. 10.

Robert Cates, formerly with Cates and Weeks and C & C Contracting, testified that he obtained the contract with Stansell for grading and fill work and that he obtained the dirt for this fill work from Dancy. He testified that he "probably removed in excess of 60,000 cubic yards of dirt" from the Dancy land for the Stansell project, and he admitted that Dancy was not paid for the dirt. Cates testified that Stansell stated that he would issue joint checks payable to Cates and Weeks and Dancy but that such checks were not given. Cates and Weeks last obtained dirt from Dancy in early 1990.

It was obvious to the Court from the testimony of Mr. Cates and of others involved in this transaction that Cates, and his company Cates and Weeks were inexperienced in such projects and that Cates lacked a total understanding of the costs necessary to complete the work. Cates and Weeks, according to Cates, went broke on the Stansell project; nevertheless, another company known as C & C Contracting was formed and went back into business. Assuming that Cates had an understanding that joint checks would be written to provide payment to Dancy, Cates failed to follow through on assuring that such joint checks were in fact issued and paid. And, Cates' company continued to obtain dirt from Dancy notwithstanding failure of Cates and Weeks to pay Dancy. Without question, Cates and Weeks executed a release of lien for Stansell. That release of lien represented that suppliers, including Dancy, had been paid. Tr. Ex. 11. There was no written contract between Cates and Weeks and Dancy, but the oral agreement was for Cates and Weeks to pay Dancy

fifty cents a cubic yard for dirt moved. C & C Contracting, Inc. did not obtain dirt or rent equipment from Dancy. Only Cates and Weeks entered into an oral contract with Dancy.

Hugh Dancy, President of Dancy Construction, Inc., testified that he was approached by Cates concerning the purchase of dirt and he testified that he told Cates that Cates and Weeks were not receiving enough money in their contract with Stansell to pay for the dirt and to complete the Stansell project, and Dancy further testified that he advised Cates that Dancy would need a guaranty from Stansell as owner of the property being improved. Mr. Dancy testified that Stansell came to see him and promised that he would provide a letter of guaranty. However, Dancy admitted that he never received such a letter. The Court is perplexed as to why Mr. Dancy, an experienced business person, would permit an inexperienced company such as Cates and Weeks to remove a substantial amount of dirt from his property, knowing where the dirt was going, and not follow through on what he testified to be his insistence upon a written guaranty from Stansell and/or joint checks from Stansell. The Court finds Mr. Dancy's testimony to be less than plausible. After reviewing all of the testimony and proof in this contested matter, the Court reaches the conclusion that Mr. Dancy remembers the facts as he now has reconstructed them in his mind rather than as they actually occurred. Mr. Dancy's version of what occurred simply does not comport with normal business transactions nor with what a knowledgeable business person such as Mr. Dancy would do or would expect to occur. In contrast, Mr. Stansell's testimony, concerning his lack of an agreement with Dancy and his absence of repeated conversations with Dancy, is more consistent with the total proof on what occurred. Unfortunately, Mr. Dancy suffered a loss because he relied upon an inexperienced contractor, Cates and Weeks, rather than upon receiving a written agreement from Stansell and/or joint checks from Stansell. Mr. Dancy testified that he was looking throughout this transaction to Stansell for payment, but that testimony is simply inconsistent with the pattern of behavior of Mr. Dancy. Mr. Dancy had a lack of recall of critical facts and dates yet testified as to his recall of numerous meetings with Mr. Stansell. Mr. Dancy testified that it was customary in the dirt moving business to receive payment draws monthly, yet he did not discuss the time of payment with Cates and Weeks nor did he receive such payments. He testified that he assumed that the customary payment

method would be followed, that he had years of experience in this work, that he had filed several liens previously, that he understood he could not legally require payment without the filing of a lien, that he watched each load being moved (he testified this would be several hundred loads per day), that he relied upon representations that he would receive joint checks, yet Mr. Dancy failed to follow through on reasonable steps to assure that he would in fact be paid. Mr. Dancy contributed to or caused his own loss.

In contrast, the Court can not find that Mr. Stansell knowingly took advantage of Dancy or participated in Dancy's loss. Stansell, on the other hand, reasonably relied upon Cates and Weeks to pay for the dirt obtained by that contractor. In contrast to Mr. Dancy's testimony, the Stansell testimony was clear, specific, and compelling. Stansell testified that he never guaranteed the debts of Cates and Weeks; that he was not asked by Dancy to provide jointly payable checks; that if he had been so asked he would have provided joint checks; that in his conversation with Dancy in November, 1989, Dancy did not demand a guaranty or assurance or joint checks; that between November 10, 1989, and the letter of March 7, 1990, he had no communication with or from Mr. Dancy; that on January 22, 1990, he obtained a lien release from Cates and Weeks with an assurance by Cates and Weeks that all suppliers' claims had been paid. Mr. Stansell further testified that after he received the Dancy letter he talked to Mr. Dancy and in a later effort to assure that the title to this property would be clear, he attempted to settle any and all disputes with Dr. Coley and with Dancy.

Stansell denied that he did anything to prevent Dancy from filing a lien or perfecting lien rights, and the Court can find no convincing proof that Stansell participated in any delay on Dancy's part in perfecting Dancy's lien rights under applicable state law.

The real issue presented in this contested objection to claim is whether the debtor has liability to Dancy. Clearly, the Court can find that Dancy is owed money by someone, but the question is whether that someone is the debtor. Stansell's liability would arise, under Dancy's proof, from an oral guaranty agreement and there is no proof of a written guaranty agreement as Mississippi Code Annotated §15-3-1 seems to require. The mechanic's lien suit filed by Dancy in August 1991, to enforce his lien rights appears to be tardy

under Mississippi Code Annotated §85-7-141, and the Court can not agree with Dancy's argument that Stansell induced a waiver of the Dancy lien rights through settlement negotiations or otherwise. The Court agrees with Stansell's argument that Dancy sat on his rights every day that he allowed dirt to be moved from his property without receiving payment or without a written assurance of payment. There simply was insufficient proof by Dancy to convince the Court that Dancy demanded jointly payable checks or a guaranty from Stansell. Even assuming such demands, the question remains why would Dancy continue to allow his dirt to be moved without those demands being met. Dancy's argument that but for the continued promises of Stansell, Dancy would never have allowed Cates and Weeks to remove the dirt simply fails as not plausible under all of the facts and circumstances presented to the Court in the proof. The Court can not agree with Dancy's argument that Stansell is equitably estopped from asserting the Mississippi statute of frauds or the tardiness of Dancy's lien suit. Nor can the Court agree that this was a joint debt between Stansell and any other parties.

CONCLUSION

In conclusion, the Court is sympathetic to Mr. Dancy and his company not being paid, but the Court can not find from the proof that this debtor is obligated to pay Dancy. The debtor's objection to the claim of Hugh Dancy and his company is sustained, and the claim as filed is disallowed.

SO ORDERED this 21st day of June, 1993.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

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