

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re

THOMAS A. VON EIFF and
LAURA L. VON EIFF,

Debtors.

Case No. 99-29495-MDM

Chapter 7

CHRISTIANSEN BUILDING CENTER, INC.

Plaintiff,

v.

THOMAS A. VON EIFF,

Debtor.

Adversary No. 99-2528

MEMORANDUM DECISION

The plaintiff filed this adversary proceeding against the debtor, Thomas A. Von Eiff, asking that a debt be excepted from the debtor's discharge under 11 U.S.C. § 523(a)(4). The complaint alleged that the debtor diverted funds which were due the plaintiff for goods and services rendered for a construction project for which the debtor was the general contractor, in violation of Wisconsin's theft by contractor statute, § 779.02(5), Wis. Stats. A trial was held, followed by oral argument and post-trial briefs, after which the court took the matter under advisement.

This court has jurisdiction under 28 U.S.C. § 1334(b), and this is a core proceeding under 28 U.S.C. § 157(b)(2)(I). The following opinion constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

BACKGROUND

Greg and Roxanne Platz contracted with Von Eiff Construction in February 1998 to perform substantial remodeling of their home. The agreed price for the job was \$56,000, and after the Platzes made a down payment of \$26,500, the work commenced. With change orders agreed to while construction was underway, the total contract price rose to \$67,475. Additional payments of \$20,000 and \$2,550 were made in April and June, respectively. During the construction, the Platzes and Mr. Von Eiff experienced problems and, ultimately, the work was never completed by Von Eiff Construction. In fact, of the \$67,475 total due from the Platzes to Von Eiff Construction, the homeowners paid a total of only \$49,050 to Mr. Von Eiff.

Christiansen Building Center (“Christiansen”) was the supplier of materials used on the Platz remodeling job (and may have installed doors), including gutters, windows, doors, pine boards, log railings, and dumpsters. All charges incurred by the debtor with Christiansen were allocated to the Platz contract. Other than one payment of \$3,828.03 in May 1998 and various other credits totaling \$215.73, Von Eiff Construction never paid the remaining \$18,492.86 balance owed Christiansen at the time of filing.

ARGUMENTS

The debtor argues that the majority of monies he received from the Platzes only covered phase one of the remodeling job, which entailed the support for the existing structure, removal of the foundation, and erection of a new foundation and basement. Little or no supplies furnished

by Christiansen were used for this portion of the contract, and Christiansen should not be allowed to collect from the initial down payment. Funds received for the second phase of the job, which included the use of the materials supplied by Christiansen, were used to pay for other legitimate construction expenses. The debtor argues that all expenditures made in connection with this job were legitimate, and he should not be penalized in his bankruptcy case for being injured and having to hire extra help, which resulted in cost overruns. Finally, he argues that Christiansen was a mere supplier, not a subcontractor who was involved in construction, and it is not entitled to have its share of the costs considered trust funds.

The plaintiff contends that all money received by the debtor from the homeowners was trust money in the hands of the debtor, and subject to the pro rata claims of all suppliers and subcontractors, which the court calculates to be \$12,553.84.¹

DISCUSSION

Section 523(a)(4) of the Bankruptcy Code provides that a debtor does not receive a discharge of any debt incurred by way of "defalcation while acting in a fiduciary capacity." State law determines whether a fiduciary relationship exists. *See, e.g., Matter of Thomas*, 729 F.2d 502 (7th Cir. 1984). Section 779.02(5), Wis. Stats., creates a trust fund in the hands of a prime contractor or subcontractor for funds received from an owner for payment of improvements. The statute provides in pertinent part as follows:

¹Mr. Von Eiff received \$49,050, or 72.69%, of the \$67,475 billed the Platzes. Likewise, Christiansen seeks 72.69% of its total claim. Attorney Moczydlowski calculated this as \$12,350.05 in his brief, but he subtracted the debtor's payment from the \$18,492.86, the amount due at filing, before applying the percentage. Payments and credits were already taken into account on the plaintiff's statement (Ex. #6); also, payments would have to be added back in before applying the percentage. The court calculated damages as described below.

[A]ll monies paid to any prime contractor or subcontractor by any owner for improvements, constitute a trust fund only in the hands of the prime contractor or subcontractor to the amount of all claims due or to become due or owing from the prime contractor or subcontractor for labor and materials used for the improvements, until all the claims have been paid, and shall not be a trust fund in the hands of any other person. The use of any such monies by any prime contractor or subcontractor for any other purpose until all claims, except those which are the subject of a bona fide dispute and then only to the extent of the amount actually in dispute, have been paid in full or proportionally in cases of a deficiency, is theft by the prime contractor or subcontractor of monies so misappropriated and is punishable under s. 943.20.

Section 779.02(5), Wis. Stats. The statute results in a corresponding civil action for parties damaged by its violation. *See, e.g., Thomas*, 729 F.2d 502; *Capen Wholesale, Inc. v. Probst*, 180 Wis. 2d 354, 509 N.W.2d 120 (Ct. App. 1993).

This court is satisfied that a fiduciary relationship existed between the prime contractor, Mr. Von Eiff, and the material supplier, Christiansen, by virtue of § 779.02(5), Wis. Stats. Whether the supplier of materials took part in the actual construction (which it may have - the record is not clear) or merely delivered materials to the site, an entity who adds value to real estate that is paid for by the owner is an intended beneficiary of the statute. The statute protects suppliers of both labor and materials provided to the owner by a prime contractor, as Von Eiff was here, or by a subcontractor, and the debtor's interpretation splits a hair that is not grammatically supported by the reasonable interpretation of the words or meaning of the statute.

Mr. Von Eiff made cash payments to laborers on the job, but he claims that he could not pay his material supplier because he had insufficient funds for the project. He was, however, able to make other "company" payments to parties other than material suppliers or subcontractors during that same time period. Checks drawn on Von Eiff Construction Company's account during the relevant period (April through July 1998) included the following: Tim's Auto Parts,

\$35.72; Federal Kemper Insurance Co., \$347.50; Wisconsin Electric Co., \$649.56; Lake States Insurance Co., \$453; PrimeCo., \$705.93 (checks of \$255.93, \$450); City of Oconomowoc Utilities, \$153.98; Cash (at Herr's Mobil) \$50; Rookie's Sports Bar and Grill, \$90; Cash (endorsed by Mr. Von Eiff), \$2,147.09 (various checks); Supersaver, \$153 (three checks of \$51); Oconomowoc Auto Parts, \$46.10; Municipal Court, \$73.90; Tim's Auto Parts, \$89.30; Amoco, \$126.64 (checks of \$48.98, \$37.41, \$40.25); Registration Fee Trust, \$74.78; Wisconsin State Fair, \$132; Sam's Club, \$110.53; and Erv's Repair Service, \$1,168.74. Some of these are clearly not legitimate charges against the Platz contract, and others are questionable. Since the prime contractor is not entitled to take a profit or to pay personal expenses from trust funds, or to pay for other labor and supplies from funds rightfully due Christiansen, the propriety of these expenses is of no assistance to the debtor in determining what should be discharged or excepted from discharge.

The actual cost of work done by the debtor is not in the record. It is possible that the materials supplied by Christiansen were a smaller percentage of the debtor's total cost on the project than the percentage of the contract price received by the debtor. However, it would not be fair to reduce Christiansen's share of monies received by the debtor on account of problems that had nothing to do with Christiansen. In any event, liabilities of the debtor in excess of trust funds due the suppliers of labor and materials are discharged. Therefore, the debtor's total cost is not a proper measure of damages.

The plaintiff has proven that funds for the improvements passed from the owners to the prime contractor and did not reach the plaintiff. *See W.H. Major & Sons, Inc. v. Krueger*, 124 Wis. 2d 284, 369 N.W.2d 400 (Ct. App. 1985). Although Mr. Von Eiff asserts that he could not

pay due to the alleged homeowners' breach of contract, there was no bona fide dispute as to the amount due Christiansen. *See, e.g., Loehrke v. Wanta Builders, Inc.*, 151 Wis. 2d 695, 445 N.W.2d 717 (Ct. App. 1989). In fact, Christiansen has already agreed to reduce the total amount it is owed in relation to the amount of the original contract that Von Eiff Construction has received.

While the debtor would like to attribute the funds he received to costs other than Christiansen, the evidence does not support the allocation of payments or costs to different phases of the construction. The contract itself does not do so, nor is there any indication that any payment was for other than the entire job. Charges by Christiansen began shortly after the project began, and it is more reasonable to treat the contract and all payments in a unitary fashion.

The court is mindful of the case cited by the debtor, *In re Koch*, 197 B.R. 654 (Bankr. W.D. Wis. 1996), in which the court held that more than negligent defalcation is necessary for nondischargeability under § 523(a)(4), even though defalcation under Wisconsin law may be attributable solely to negligence. The court respectfully disagrees and is satisfied that willfulness, recklessness, or any other standard in excess of defalcation is not required for a debt to be nondischargeable under § 523(a)(4). Thus, it is not necessary to evaluate whether the debtor's failure to pay was attributable to any wrongful conduct on his part.

For the reasons stated above, the plaintiff is entitled to a portion of the amount due for materials it supplied for the Platz contract. Since the debtor did not receive the entire amount due under the contract (and any additional amounts owed by the Platzes is enforceable only by the trustee in bankruptcy), Christiansen is entitled to the same percentage of its claim as the

percentage of the contract that the debtor received from the owner, i.e., 72.69%. Christiansen supplied materials and other charges valued at \$22,752.35, less credits other than payments of \$215.73, for a total of \$22,536.62.² Christiansen's share of amounts paid the debtor would be \$16,381.87. The debtor paid \$3,828.03, so the amount due is \$12,553.84. The plaintiff is entitled to a nondischargeable judgment for that amount.

A separate order for judgment against the debtor in the amount of \$12,553.84, which is excepted from the debtor's discharge under 11 U.S.C. § 523(a)(4), will be entered.

Dated at Milwaukee, Wisconsin, February 8, 2001.

BY THE COURT

_____/s/_____
Honorable Margaret Dee McGarity
United States Bankruptcy Judge

²Finance charges through September 30, 1998, and a returned check charge are included per the invoice admitted in evidence at trial (Ex. #6), dated January 22, 1999. While the court believes finance charges were not properly calculated, error is probably de minimus, the invoice was not objected to, and it will be accepted as the proper measure of damages.

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ORDER FOR JUDGMENT

For the reasons set forth in the court's memorandum decision entered on this date, IT IS ORDERED the plaintiff shall recover from the defendant \$12,553.84, and such amount is excepted from the defendant's discharge under 11 U.S.C. § 523(a)(4).

The Clerk shall enter judgment accordingly.

Dated at Milwaukee, Wisconsin, February 8, 2001.

BY THE COURT

Honorable Margaret Dee McGarity
United States Bankruptcy Judge

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