

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:) In Proceedings
) Under Chapter 7
BACCUS ENTERPRISES, INC.,)
a/k/a BACCUS ROOFING &) BK No. 90-41517
SIDING CO.,)
)
Debtor(s).)
)
CAPITAL DEVELOPMENT BOARD,) Adv. No. 91-4020
)
Plaintiff,)
)
v.)
)
GIBSON D. KARNES, Trustee,)
)
Defendant.)

OPINION

Plaintiff, Capital Development Board ("CDB") has filed a Complaint to Recover Property in which it asserts that it is the owner of certain roofing materials and supplies. In response, the Trustee filed a motion for summary judgment, contending that the materials and supplies at issue belong to the bankruptcy estate. CDB has filed a cross motion for summary judgment and both motions are now before the Court.

The following facts are not in dispute. On January 31, 1990, CDB entered into a contract with Lipps Construction Company ("Lipps") pursuant to which Lipps was hired as the general contractor on a public building project at John A. Logan College, Carterville, Illinois. Lipps and Baccus Roofing & Siding Co. ("Baccus"), the debtor in the

present case, then entered into a subcontract, in which Baccus agreed to complete the roofing work on the project. Baccus subsequently ordered roofing materials totalling \$22,909.66 from Lucas Sales Company. These materials were stored in Baccus' warehouse, are currently stored there, and were never incorporated in the building project. On August 20, 1990, Baccus submitted a bill to Lipps for "materials for John A. Logan College" in the amount of \$22,909.66. On August 21, Lipps paid Baccus \$20,618.69.¹ Lipps then submitted an "Invoice-Voucher" to CDB for \$229,502.84. Attached to the voucher was a nineteen-page Contractor's Affidavit and Sworn Statement setting forth in detail the charges by Lipps that were to be paid by CDB. An entry for the roofing materials and a previous payment of \$20,619.00 for those materials was listed on page eleven of the Affidavit. CDB paid Lipps \$229,502.84 on December 7, 1990 and Lipps negotiated the check on or about December 10, 1990. Baccus filed a Chapter 7 bankruptcy petition on December 17, 1990.

The subcontract between Lipps and Baccus provides, in relevant part, as follows:

ARTICLE 1: THE CONTRACT DOCUMENTS

1.1 The Contract Documents for this Subcontract consist of this Agreement and any Exhibits attached hereto, the Agreement between the Owner

¹Pursuant to Section 10.02A of Article 10 of the General Conditions incorporated into both the general contract and subcontract, CDB is entitled to retain 10% of each progress payment.

and Contractor dated as of January 31, 1990, the Conditions of the Contract between the Owner and Contractor (General, Supplementary and other Conditions), the Drawings, the specifications, all Addenda issued prior to and all Modifications issued after execution of the Agreement between the Owner and Contractor and agreed upon by the parties to this Subcontract. These form the Subcontract. and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein. (Emphasis added).

ARTICLE 11: SUBCONTRACTOR

11.1 RIGHTS AND RESPONSIBILITIES

11.1.1 The Subcontractor shall be bound to the Contractor by the terms of this Agreement and, to the extent that provisions of the Contract Documents between the Owner and Contractor apply to the Work of the Subcontractor as defined in this Agreement, the Subcontractor shall assume toward the Contractor all the obligations and responsibilities which the Contractor, by those Documents, assumes toward the Owner and the Architect, and shall have the benefit of all rights, remedies and redress against the Contractor which the Contractor, by those documents, has against the Owner, insofar as applicable to this Subcontract, provided that where any provision of the Contract Documents between the Owner and Contractor is inconsistent with any provision of this Agreement, this Agreement shall govern. (Emphasis added).

11.8 APPLICATIONS FOR PAYMENT

11.8.3 If payments are made on account of materials or equipment not incorporated in the Work but delivered and suitably stored at the site or at some other location agreed upon in writing, such payments shall be in accordance with the Terms and Conditions of the Contract Documents.

In addition, the general contract between CDB and Lipps provides, in part, that "CDB will make monthly payments for materials and work incorporated into the project as determined by CDB in consultation with the Architect/Engineer." Article 10, ¶10.01. The contract further provides:

10.03. Materials or Equipment not Incorporated in the Work. Progress payments will be made for materials and equipment not incorporated in the Work provided that:

A. Such materials and equipment have been delivered to and suitably stored at the site or some other location approved in writing by CDB.

B. The Contractor submits evidence of title to such materials and equipment.

C. The care and custody of such materials and equipment and all costs incurred for movement and storage shall be the responsibility of the Contractor.

D. Such materials and equipment are suitably insured by the Contractor. The Contractor shall submit a certificate of insurance showing CDB as an additional insured and showing the amount of the insurance coverage.

10.06. Title. Title to all work, materials and equipment covered by a progress payment shall pass to CDB upon receipt of such payment by the Contractor.

CDB contends that pursuant to paragraph 10.06, title to the roofing materials passed to CDB at the time the \$229,502.84 payment was made to Lipps. In response, the Trustee argues that Lipps' payment of

\$20,618.69 to Baccus was not for the roofing materials, "but was at all times considered to be a progress payment reflecting partial payment for services rendered or to be rendered by Baccus under the terms of the subcontract with Lipps." See Debtor's Affidavit attached to the Memorandum of Law in Support of Trustee's Motion for Summary Judgment at ¶13. The Trustee further argues that even assuming Lipps' payment to Baccus was for materials and not for services, title to the materials did not pass to Lipps under the terms of either contract and therefore Lipps had no title to pass to CDB.²

Summary judgment is appropriate only where the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party moving for summary judgment has the burden of establishing the lack of a genuine issue of material fact. Korf v. Ball State University, 726 F.2d 1222, 1226 (7th Cir. 1984). The fact that

²In conjunction with this argument, the Trustee contends that under paragraph 11.8.3 of the subcontract, any payments made by Lipps to Baccus for materials not incorporated in the work are governed by the contract between CDB and Lipps only if Baccus and Lipps first agree in writing to store the materials at some other location. According to the Trustee, since there was no written agreement between Baccus and Lipps to store the roofing materials at Baccus' warehouse, Lipps' payment to Baccus is not governed by the terms of the contract between CDB and Lipps. The Trustee further argues that in any event, the conditions set forth in paragraph 10.03 of the general contract (regarding payments by CDB for materials not incorporated in the work) were not satisfied, and CDB therefore had no enforceable obligation to pay Lipps for the roofing materials. In light of its decision above, the Court need not decide at this time whether the Trustee's arguments in this regard have any merit.

