

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: NASH PLUMBING, INC.

CASE NO. 06-10276-DWH

MILTON H. NASH, d/b/a NASH PLUMBING, INC.

PLAINTIFF

VERSUS

ADV. PROC. NO. 06-1176-DWH

OHIO CASUALTY INSURANCE COMPANY

DEFENDANT

OPINION

On consideration before the court are motions for summary judgment filed by the plaintiffs, Milton H. Nash and Nash Plumbing, Inc., as well as, by the defendant, Ohio Casualty Insurance Company; responses to said motions having been filed by the respective party or parties in opposition; and the court, having heard and considered same, hereby finds as follows, to-wit:

I.

The court has jurisdiction of the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157. This cause of action would primarily be considered a core proceeding as defined in 28 U.S.C. §157(b)(2)(A) and (O). However, depending on how certain factual issues develop, a part of the proceeding could ultimately be considered non-core or related as contemplated in 28 U.S.C. §157(c).

The above captioned cause of action was originally filed by Milton H. Nash, d/b/a Nash Plumbing, Inc., as “plaintiff” in the Circuit Court of Lee County, Mississippi. On February 10, 2005, it was removed to the U.S. District Court for the Northern District of Mississippi by the

defendant, Ohio Casualty Insurance Company, (hereinafter Ohio Casualty), and referred to the U.S. Bankruptcy Court on October 3, 2006.

Orders denying both the plaintiff's motion for summary judgment and the defendant's motion for summary judgment were entered before the aforesaid referral by U.S. District Judge Glen H. Davidson on May 26, 2006. As noted in the introductory paragraph, the plaintiffs and the defendant have again filed their motions for summary judgment respectively on April 14, 2008 and March 1, 2008.

As previously mentioned, the original complaint was filed by Milton H. Nash, d/b/a Nash Plumbing, Inc., as "plaintiff," even though both Milton H. Nash, (hereinafter Nash), and Nash Plumbing, Inc., (hereinafter Nash Plumbing), appear to be distinct legal entities. This court will treat these two parties as if both were plaintiffs insofar as this proceeding is concerned unless information developed subsequently reveals a more appropriate procedural course.

II.

The parties stipulated to the following facts which have been grammatically edited by the court generally to conform to the identification designations set forth in the preceding paragraph, to-wit:

1. Nash Plumbing is a business engaged in the construction and renovation of commercial, governmental, and residential properties. In the course and scope of its business, Nash Plumbing submitted bids for and was awarded construction contracts for projects to be performed at the Oxford School District and the West Point School District, both located in the State of Mississippi.
2. Nash Plumbing, as required by Mississippi law, obtained payment and performance bonds issued by Ohio Casualty for the two projects.
3. In addition to the requirement that payment and performance bonds be purchased prior to the awarding of construction contracts, Miss. Code Ann. §27-65-21,

required Nash Plumbing to either pre-pay or purchase a bond to secure the payment of the Mississippi state sales tax exacted upon construction contracts.

4. Nash Plumbing did not pre-pay the tax.
5. Nash Plumbing applied for and obtained building permits for each construction contract from the proper municipal authorities.
6. On October 22, 2003, Milton Nash was indicted on four counts of tax evasion for his failure to pay the Mississippi state sales taxes as applied to construction activity contracts under Miss. Code Ann. §27-65-21. Among the construction projects upon which the State of Mississippi sought recovery of the deficient taxes were the Oxford School District and the West Point School District projects.
7. Ohio Casualty was placed on notice of the claim by the Mississippi State Tax Commission by correspondence dated July 27, 2004, and was requested by Nash Plumbing to satisfy the tax deficiency under the payment bonds previously purchased by Nash Plumbing. By correspondence dated August 20, 2004, Ohio Casualty denied Nash Plumbing's request for payment in satisfaction and denied any obligation for the contractor's tax under the bonds purchased by Nash Plumbing for Oxford School District and West Point School District projects. This denial came subsequent to Ohio Casualty's making payment to the Mississippi State Tax Commission on behalf of Nash Plumbing for outstanding sales/contractor's taxes due under payment bonds 3-640-360, 3-640-358, and 3-640-353, which were issued for similar construction projects.
8. The Mississippi State Tax Commission again made a request for the payment of the taxes on August 31, 2004. By letter dated November 10, 2004, Max Edwards, as attorney for Ohio Casualty, wrote the Mississippi State Tax Commission and explained that Ohio Casualty was not liable for the payment of the taxes associated with the two projects.
9. The Mississippi State Tax Commission is not a party to this proceeding and has not pursued a claim against Ohio Casualty.
10. Certain payment bonds issued to Nash or Nash Plumbing by Ohio Casualty regarding projects other than the Oxford and West Point projects contained separate "Sales Tax Riders."
11. Ohio Casualty paid the sales taxes due with regard to each project in which a separate "Sales Tax Rider" was issued.

12. With regard to the two projects that are involved in this proceeding, it is undisputed that there is no separate “Sales Tax Rider” associated with either bond.¹

III.

Summary judgment is properly granted when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show 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. Bankruptcy Rule 7056; Uniform Local Bankruptcy Rule 18. The court must examine each issue in a light most favorable to the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Phillips v. OKC Corp., 812 F.2d 265 (5th Cir. 1987); Putman v. Insurance Co. of North America, 673 F.Supp. 171 (N.D. Miss. 1987). The moving party must demonstrate to the court the basis on which it believes that summary judgment is justified. The nonmoving party must then show that a genuine issue of material fact arises as to that issue. Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Leonard v. Dixie Well Service & Supply, Inc., 828 F.2d 291 (5th Cir. 1987), Putman v. Insurance Co. of North America, 673 F.Supp. 171 (N.D. Miss. 1987). An issue is genuine if “there is sufficient evidence favoring the nonmoving party for a fact finder to find for that party.” Phillips, 812 F.2d at 273. A fact is material if it would “affect the outcome of the lawsuit under the governing substantive law.” Phillips, 812 F.2d at 272.

¹ There has been no stipulation as to the interpretation of the terms and conditions of the “Sales Tax Rider” and/or the obligations arising under such and/or arising from the absence of such. The parties expressly agree that the obligations and responsibilities, if any, which arise from the “Sales Tax Rider” remain at issue in this litigation. It is not the intent of this stipulation to include and/or address the terms, conditions, obligations, effect, etc. of the “Sales Tax Rider” at issue in this matter.

The court notes that it has the discretion to deny motions for summary judgment and allow the parties to proceed to trial so that the record might be more fully developed for the trier of fact. Kunin v. Feofanov, 69 F.3d 59, 61 (5th Cir. 1995); Black v. J.I. Case Co., 22 F.3d 568, 572 (5th Cir. 1994); Veillon v. Exploration Services, Inc., 876 F.2d 1197, 1200 (5th Cir. 1989).

IV.

Ohio Casualty asserts that Nash Plumbing lacks standing to bring suit against its own surety pursuant to Miss. Code Ann. §31-5-51. The court would point out that Miss. Code Ann. §31-5-51 is not applicable to this proceeding. This statute provides that persons who have furnished “*labor*” or “*material*” for a construction project, who remain unpaid after ninety days, “shall have the right to sue on such payment bond.” Miss. Code. Ann. §31-5-51(2). In this case, the issue is whether the surety, Ohio Casualty, is responsible for the payment of the unpaid sales taxes, a question to be determined pursuant to Miss. Code Ann. §27-65-21.

Nash and Nash Plumbing acknowledge in their response to Ohio Casualty’s motion for summary judgment that they have not filed this cause of action pursuant to Miss. Code. Ann. §35-5-51, nor are they attempting to enforce any obligation against Ohio Casualty under this statute. They are asking that the bonds be enforced according to their terms, which, they contend, require Ohio Casualty to pay the Mississippi State Tax Commission the taxes owed pursuant to Miss. Code Ann. §27-65-21. The court is of the opinion that Nash Plumbing has standing to assert the claims alleged in this proceeding.

This proceeding primarily involves contract construction. Ohio Casualty claims that it is not obligated to pay the sales taxes under the terms of the bonds or Miss. Code Ann. §31-5-51. Nash and Nash Plumbing contend that the language set forth in the bonds requires Ohio Casualty

to pay the sales taxes that are due. There are several significant questions that remain unanswered. For example, why did some of the bonds issued by Ohio Casualty contain a “Sales Tax Rider” and others did not? Was there any additional consideration paid for the “Sales Tax Rider”? Was the “Sales Tax Rider” the exclusive mechanism to impose liability on the surety for unpaid taxes? Accordingly, the court is of the opinion that there are material factual issues remaining in dispute that need to be developed through the presentation of evidence. As such, the motions for summary judgment filed by Nash and Nash Plumbing, as well as, by Ohio Casualty, are not well taken and will be overruled by a separate order to be entered contemporaneously herewith.

This the 11th day of June, 2008.

/s/ David W. Houston, III
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE