United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Terence P. O'Shaughnessy

Bankruptcy No. **99 B 24427**

Adversary Caption: N/A

Adversary No. **N/A**

Date of Issuance: July 30, 2001

Judge: Judge John H. Squires

Appearance of Counsel:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Chapter 11
TERENCE P. O'SHAUGHNESSY,	)	Bankruptcy No. 99 B 24427
	)	Judge John H. Squires
Debtor.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of William L. Garrow ("Garrow") for summary judgment pursuant to Federal Rule of Civil Procedure 56 on the objection to Garrow's claim filed by Terence P. O'Shaughnessy (the "Debtor"). For the reasons set forth herein, the Court hereby denies the motion because material issues of fact preclude the entry of summary judgment.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B) and (O).

II. FACTS AND BACKGROUND

The following facts are not in dispute. On May 9, 1998, Garrow, as lessor, entered into a lease (the "Lease") with Always Open Franchising Corporation ("Always Open"), as lessee. See Exhibit A to Rule 402.M Statement. The Debtor and George

Slowinski ("Slowinski"), the president of Always Open, were the sole shareholders of the parent corporation that owned the stock in Always Open. See Exhibit KKK to Rule 402.M Statement. In addition, the Debtor was the secretary of Always Open. See Exhibit A at ¶ 2 to Rule 402.N Statement.

Pursuant to the Lease, Garrow agreed to install equipment necessary to operate a gasoline filling station and to construct a convenience store at 5208 North Richmond, Appleton, Wisconsin, which would accommodate two fast food restaurants. See Exhibit A, Article II, § 3 at p. 2-3 to Rule 402.M Statement. Always Open agreed to pay Garrow $7,422.25 per month for the leased premises. See Exhibit C to Rule 402.M Statement. The Debtor and Slowinski provided Garrow with a personal guaranty for Always Open's financial obligations under the Lease up to $89,067.00 or twelve months of lease payments. See Exhibit KKK to Rule 402.M Statement and Exhibit A at ¶ 4 to Rule 402.N Statement. The parties' dispute focuses on the Debtor's claimed liability under his guaranty and Garrow's alleged material breach of the Lease.

The Lease provided that the contractor would be DeWindt Construction Co. ("DeWindt") and that DeWindt would be responsible for performing the work set forth in the Lease. See Exhibit A, Article III, § 5.A and § 5.B; Exhibit B at p. 5, ¶ 4 and Exhibit F at ¶ 2 to Rule 402.M Statement. The Debtor was a principal of DeWindt. See Exhibit JJJ to Rule 402.M Statement.

On February 5, 1999, Arthur J. Lawler ("Lawler"), construction manager for

Always Open, informed Garrow that it would take possession of the premises pursuant to the Lease effective February 22, 1999 and that the rent commencement date under the Lease would be March 9, 1999. See Exhibit C to Rule 402.M Statement. Always Open never made any rent payments to Garrow under the Lease.

It is undisputed that despite the contractual requirement under the Lease, Garrow did not use DeWindt as the contractor for the construction of the Always Open store. Garrow allegedly utilized other contractors to erect and improve the premises for which the Debtor has demanded strict proof. Garrow asserts he has substantially performed the essential material terms of the Lease and is entitled to recover under it and the Debtor's guaranty. Garrow maintains that DeWindt refused to begin construction in May or June 1998, and by August 1998, DeWindt still had not begun construction. See Exhibit F at ¶ 4 to Rule 402.M Statement. Further, Garrow states that Slowinski instructed him to seek out and select another general contractor. Id. at ¶ 5. Thus, he argues that Always Open effectively waived the contractual term whereby DeWindt was required to serve as general contractor for the project.

The Debtor, on the other hand, states that he never informed Garrow that DeWindt was unable to, or chose not to, act as the contractor for the construction of the Always Open store. See Exhibit A at ¶ 11 to Rule 402.N Statement. The Debtor further states that a representative of DeWindt attended several pre-construction meetings in Appleton and DeWindt was at all times ready, willing and able to act as the contractor for the construction of the Always Open store. Id. The Debtor claims that Garrow's failure to use DeWindt constitutes a material breach of the Lease, and as a result of his failure to

perform his obligations under the Lease, he is barred and estopped from demanding performance by the Debtor. Furthermore, the Debtor argues that Garrow's failure to perform his obligations under the Lease constitutes a failure of consideration for the Lease and guaranty, thereby rendering both the Lease and guaranty unenforceable.

On March 3, 1999, Always Open filed a Chapter 11 petition. See Exhibits FFF and GGG to Rule 402.M Statement. Always Open rejected the Lease effective May 3, 1999 pursuant to 11 U.S.C. § 365. See Exhibits GGG and LLL. The Debtor filed a Chapter 11 petition on August 5, 1999. See Exhibit B to Rule 402.N Statement.

On November 23, 1999, Garrow filed a proof of claim in the amount of $88,903.69. See Exhibit HHH to Rule 402.M Statement. Garrow seeks to recover monies allegedly owed pursuant to the Debtor's guaranty of the Lease. On July 7, 2000, the Debtor filed an objection to Garrow's claim. See Exhibit C to Rule 402.N Statement. Thereafter, on August 4, 2000, Garrow filed a response to the Debtor's objection to his claim. See Exhibit D to Rule 402.N Statement.

On June 13, 2001, Garrow filed the instant motion for summary judgment. On June 21, 2001, the Court set a briefing schedule on the motion and thereafter took the matter under advisement. The objection to Garrow's claim has been set for an evidentiary hearing which is scheduled to commence on September 10, 2001.

III. APPLICABLE STANDARDS

A. Summary Judgment

In order to prevail on a motion for summary judgment, the movant must meet the

statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) reads in part:

> [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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.

Fed. R. Civ. P. 56(c). See also Dugan v. Smerwick Sewerage Co., 142 F.3d 398, 402 (7th Cir. 1998). The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when there is no genuine issue of material fact in dispute. Trautvetter v. Quick, 916 F.2d 1140, 1147 (7th Cir. 1990); Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmen's Federal Sav. & Loan Ass'n of Indianapolis, 806 F.2d 146, 149 (7th Cir. 1986)). Where the material facts are not in dispute, the sole issue is whether the moving party is entitled to a judgment as a matter of law. ANR Advance Transp. Co. v. International Bhd. of Teamsters, Local 710, 153 F.3d 774, 777 (7th Cir. 1998).

In 1986, the United States Supreme Court decided a trilogy of cases which encourage the use of summary judgment as a means to dispose of factually unsupported claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The burden is on the moving party to show that no genuine issue of material fact is in dispute. Anderson, 477 U.S. at 248; Matsushita, 475 U.S. at 585-86; Celotex,

477 U.S. at 322.

All reasonable inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). The existence of a material factual dispute is sufficient only if the disputed fact is determinative of the outcome under applicable law. Anderson, 477 U.S. at 248; Frey v. Fraser Yachts, 29 F.3d 1153, 1156 (7th Cir. 1994). "Summary judgment is not an appropriate occasion for weighing the evidence; rather the inquiry is limited to determining if there is a genuine issue for trial." Lohorn v. Michal, 913 F.2d 327,

331 (7th Cir. 1990). The Seventh Circuit has noted that trial courts must remain sensitive to fact issues where they are actually demonstrated to warrant denial of summary judgment. Opp v. Wheaton, 231 F.3d 1060 (7th Cir. 2000); Szymanski v. Rite-way, 231 F.3d 360 (7th Cir. 2000).

Local Rule 402.M of the Bankruptcy Rules adopted for the Northern District of Illinois requires the party moving for summary judgment to file a detailed statement ("402.M statement") of material facts that the movant believes are uncontested. Local Bankr. R. 402.M. The 402.M statement "shall consist of short numbered paragraphs, including, within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion." Id.

Garrow filed a 402.M statement that substantially complied with the requirements of Rule 402.M. It contained numbered paragraphs setting out uncontested facts with

reference to parts of the record.

The party opposing a summary judgment motion is required by Local Rule 402.N to respond ("402.N statement") to the movant's 402.M statement, paragraph by paragraph, and to set forth any material facts that would require denial of summary judgment, specifically referring to the record for support of each denial of fact. Local Bankr. R. 402.N. The opposing party is required to respond "to each numbered paragraph in the moving party's statement" and make "specific references to the affidavits, parts of the record, and other supporting materials relied upon." Local Bankr. R. 402.N(3)(a). Most importantly, "[a]ll material facts set forth in the [402.M] statement required of the moving party will be deemed admitted unless controverted by the statement of the opposing party." Local Bankr. R. 402.N(3)(b). The Debtor has complied with this Rule and has also filed a statement of additional material facts in opposition to the motion.

B. Contested Proof of Claim

Pursuant to Federal Rule of Bankruptcy Procedure 3001(f), "[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f); see also 11 U.S.C. §§ 501 and 502(a). Claim objectors carry the initial burden to produce some evidence to overcome this rebuttable presumption. In re O'Malley, 252 B.R. 451, 456 (Bankr. N.D. Ill. 1999). Once the objector has produced some basis for calling into question allowability of a claim, the burden then shifts back to the claimant to produce evidence to meet the objection and establish that the claim is in fact allowable. Id. (citation omitted). However, the ultimate burden of persuasion always remains with the claimant to prove

entitlement to the claim. In re Octagon Roofing, 156 B.R. 214, 218 (Bankr. N.D. Ill. 1993). The properly filed claim of Garrow constitutes prima facie evidence of the validity and amount of the claim. The objector to that claim, the Debtor, has the burden of presenting evidence to rebut the prima facie validity. If that burden is satisfied, then Garrow bears the ultimate burden of proving his claim.

IV. DISCUSSION

First, the Debtor contends that a disputed issue of material fact exists regarding whether Lawler had the authority to act on behalf of or legally bind Always Open, including acting to modify or waive the terms of a contract to which Always Open was a party. The undisputed affidavit of the Debtor states that Lawler was employed only as a construction manager by Always Open and did not have the authority to act on his behalf or to legally bind him, including to negotiate, modify or waive the terms of the Lease with Garrow pertaining to his personal guaranty. See Exhibit A at ¶ 12 to Rule 402.N Statement.

An agent is "one who undertakes to manage some affairs to be transacted for another by his authority, on account of the latter, who is called the principal, and to render an account." Brunswick Leasing Corp. v. Wisconsin Cent., Ltd., 136 F.3d 521, 526 (7th Cir. 1998) (citing Wargel v. First Nat'l Bank of Harrisburg, 121 Ill. App.3d 730, 736, 460 N.E.2d 331, 334 (5th Dist. 1984)). The right to control the method or manner of accomplishing a task by the alleged agent, as well as the agent's ability to subject the principal to liability is the test for an agency relationship. Id. The burden of establishing

the existence of an agency relationship is on the party asserting its existence. Matthews Roofing Co. v. Community Bank & Trust Co. of Edgewater, 194 Ill. App.3d 200, 206, 550 N.E.2d 1189, 1193 (1st Dist. 1990). Ultimately, the existence of an agency relationship is a question of fact. United States v. Koenig, 856 F.2d 843, 848 fn.1 (7th Cir. 1988).

The Court concludes that a genuine issue of material fact exists regarding whether Lawler had the authority to act on behalf of or legally bind Always Open, including any authority to modify or waive the terms of the Lease. The Debtor has submitted an affidavit which states that Lawler did not possess this authority. As a result, a material issue of fact exists.

Next, the Debtor maintains that there is a material issue of fact regarding whether Garrow was informed that he should obtain another general contractor. Garrow relies upon a letter written to him by Lawler, in which Lawler confirmed the rent payment amount and commencement date, and that occupancy by Always Open would begin on February 22, 1999. See Exhibit C to Rule 402.M Statement. He also contends that Slowinski instructed him to seek out another contractor. See Exhibit F at ¶ 5 to Rule 402.M Statement. The Debtor argues that this letter does not show that Garrow was authorized by Slowinski or him to use a general contractor other than DeWindt. The Debtor contends that a genuine issue of fact exists with respect to whether the letter from Lawler to Garrow can be construed as a waiver of the contractual provision requiring Garrow to use DeWindt as the general contractor for the Always Open store. Moreover, the Debtor asserts that he never informed Garrow that DeWindt was unable to act as contractor, and avers that representatives of DeWindt attended several pre-construction meetings, and that DeWindt was at all times ready, willing and able to act as such

contractor. See Exhibit A at ¶ 11 to Rule 402.N Statement.

Waiver is the voluntary and intentional relinquishment of a known and existing right and may be either express or implied. See Caisse Nationale de Credit Agricole v. CBI Indus., Inc., 90 F.3d 1264, 1275 (7th Cir. 1996); Lake County Grading Co. of Libertyville, Inc. v. Advance Mechanical Contractors, Inc., 275 Ill. App.3d 452, 462, 654 N.E.2d 1109, 1118 (2d Dist. 1995) (citation omitted). A party to a contract may waive, by express agreement or by its course of conduct, its legal right to strict performance of the terms of a contract. 275 Ill. App.3d at 463, 654 N.E.2d at 1118 (citation omitted). The waiver doctrine is intended to prevent the waiving party from lulling another into a false belief that strict compliance with a contractual duty will not be required and then suing for noncompliance. Id. (citations omitted).

The Court concludes that a genuine issue of fact exists with respect to whether the letter from Lawler to Garrow or the non-specific instruction from Slowinski can be construed as a waiver of the contractual provision which required Garrow to use DeWindt as the general contractor for the Always Open store.

V. CONCLUSION

For the foregoing reasons, the Court denies the motion for summary judgment.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Chapter 11
TERENCE P. O'SHAUGHNESSY,	)	Bankruptcy No. 99 B 24427
	)	Judge John H. Squires
Debtor.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 30th day of July, 2001, the Court hereby denies the motion of William L. Garrow for summary judgment.

ENTERED:

DATE: _____

_____
John H. Squires
United States Bankruptcy Judge

cc: See attached Service List