

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 99-12287-JMD
Chapter 11CGE Shattuck, LLC,
Debtor

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MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On November 27, 2000, the Court held a continued hearing on a motion by Banc of America Commercial Finance Corporation f/k/a NationsCredit Commercial Corporation (“NCC”) to estimate the claim of Allan E. Hill (“Hill”) for purposes of voting. In October of 2000 NCC purchased the Hill claim (Doc. No. 335) for the purpose of blocking confirmation of the Sixth Amended Chapter 11 Plan of Reorganization dated August 23, 2000 (the “Plan”) filed by CGE Shattuck, LLC (the “Debtor”) and Torrance Family Limited Partnership (“TFLP”) (collectively the “Proponents”). The Debtor had scheduled Hill’s claim as a disputed claim in the amount of \$26,000.00. Hill filed a proof of claim in the amount of \$26,000.00. See Claim No. 15. The Debtor objected to the Hill claim and requested that the

Court not count the vote cast by NCC on the Hill claim since it was not an allowed claim under section 502(a) of the Bankruptcy Code. See 11 U.S.C. § 1126(a). In a hearing held on October 23, 2000, NCC made an oral motion that the Court temporarily allow the claim in the amount of \$26,000.00, or such other amount as the Court might determine, for purposes of counting the vote submitted by the holder of the claim. See Fed. R. Bankr. P. 3018(a). At the conclusion of the November 27, 2000 hearing the Court took the NCC motion under advisement.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The Hill claim arises from amounts allegedly unpaid for work done for the Debtor in 1996. Hill filed a proof of claim in the amount of \$26,000.00. The only documentation attached to the proof of claim was a copy of a writ of summons filed by Hill against the Debtor in a prepetition state court suit on his claim. See Claim No. 15. Not surprisingly, Hill’s writ supports his version of his claim against the Debtor.

A. Undisputed Factual Evidence

The parties agree that on or about May 10, 1996 Hill and the Debtor entered into a written contract for certain site work at the Debtor’s golf course in Jaffrey, New Hampshire at a price of \$44,000.00 (the “1996 Contract”). The parties agree that additional services were rendered in 1996 by Hill which resulted in a claim by him for additional compensation, which claim was compromised by agreement of the parties. The parties agree that on or about June 17, 1997 the parties entered into a time and materials contract for additional site work to be performed by Hill (the “1997 Contract”).

The charges under the 1997 Contract were evidenced by periodic bills and payments totaling the amount of those charges made by, or on behalf of, the Debtor. The parties agree that all of the charges for

the 1997 Contract were paid. The parties also agree that (1) between July 14, 1996 and November 13, 1996 the Debtor delivered five checks totaling \$56,000.00 to Hill on account of work done in 1996; (2) the extra \$12,000.00 paid in 1996 over and above the \$44,000.00 contract price was for extra work done in 1996; (3) in late 1996 or early 1997 there was a claim by Hill for extra work done in 1996; (4) on February 21, 1997 the Debtor's counsel delivered to Hill a trust account check in the amount of \$15,000.00; (5) between June 27, 1997 and September 12, 1997 the Debtor delivered six checks totaling \$36,066.50 in full payment for work done under the 1997 Contract; and (6) the Debtor delivered two checks, one dated June 25, 1997, in the amount of \$5,000.00, and the second dated July 8, 1997, in the amount of \$10,000.00, in payment for work done prior to the 1997 Contract. The parties agree on little else.

B. NCC's Evidence

NCC claims that even after deducting the \$12,000.00 paid in 1996, Hill was still owed \$67,100.00 for extra work done in 1996. NCC further claims that a compromise settlement agreed to between Hill and the Debtor called for the Debtor to pay an additional \$50,000.00 by the end of 1997 for the additional work completed in 1996. NCC contends that the \$15,000.00 paid on February 21, 1997 was on account of the \$50,000.00 compromise settlement. No evidence of this agreement was presented by NCC other than some notes compiled by Maurice Turgeon, an agent of Hill, which reflect Hill's version of the settlement. NCC also points to language in the 1997 Contract which provided "payment of 15,000 on past work to be made by 6/30/97 5,000 of which to be paid 6/20/97." NCC maintains that this contract provision was a further agreement on payment of a portion of the compromise settlement. NCC also points to a notation on a telecopier cover sheet dated August 21, 1997, which was used to transmit the final invoice for the 1997 work to the Debtor, as evidence of its version of the compromise settlement. The notation recites: "We still have a outstanding Balance on 1996 of \$20,000.00. Please we could sure use it. Thanks." NCC further points to the February 20, 1997 check for \$15,000.00, and checks for \$5,000.00, dated June 25, 1997, and \$10,000.00, dated July 8, 1997, as evidence of payments on the \$50,000.00 settlement, which reduced the

amount to \$20,000.00. NCC points out that the memo on the last check dated July 8, 2000 recites “part payment 1996 acct,” and claims that this is confirmation of its version of the settlement agreement.

Finally NCC contends that when the Debtor failed to complete payment of the settlement in 1997, the parties agreed that the Debtor would transfer a dump truck to Hill as interest or liquidated damages. Hill claims that the parties agreed that the dump truck was worth \$6,000.00 and that it was never transferred. The Debtor agrees that it delivered the three 1997 checks totaling \$30,000.00 and that it did not transfer a dump truck to Hill, but denies all of NCC’s version of the Debtor’s 1996 settlement with Hill.

C. The Debtor’s Evidence

The Debtor made an offer of proof that Jeffrey Torrance, who was present at the hearing, would testify that in late 1996 the parties agreed to an additional payment in the amount of \$15,000.00 in full satisfaction of Hill’s claims for the work done in 1996. The Debtor points to a check of \$15,000.00 dated February 20, 1997, drawn on the trust account of its attorney, and an “Individual Waiver of Mechanics Lien” executed by Hill on February 21, 1997 as evidence of its version of the agreement and the satisfaction of the settlement. The Debtor points to the language in the lien waiver which recites “in consideration of Fifteen Thousand (\$15,000.00) Dollars received to my full satisfaction” and release of a mechanics lien as evidence that the \$15,000.00 check was payment in full for all work done in 1996. The Debtor offered no further documents supporting its version of the compromise settlement. NCC contends that the February 21, 1997 document is simply a receipt for the \$15,000.00 payment and a lien waiver, but not a release of any other claim for work done in 1996.

The Debtor contends that the two checks delivered to Hill in June and July of 1997 were payments for work done in April 1997, prior to the 1997 Contract, and not payments on account of the work done in 1996. Further, the Debtor contends that the memo on the July 8, 2000 check for \$10,000.00 was not written by the Debtor, but by Hill and, therefore, is not evidence of any agreement or admission by the Debtor.

III. DISCUSSION

Under 11 U.S.C. § 502(a), a proof of claim is allowed unless a party in interest objects. Since Hill was scheduled by the Debtor as a disputed claim, and the Debtor has objected to the claim, Hill's claim is not deemed allowed under section 502(a) of the Bankruptcy Code and not entitled to a vote on the Plan under section 1126(a). See 11 U.S.C. §§ 502(a) and 1126(a). Hill's proof of claim is of little assistance to NCC in establishing the amount of the Hill claim because no business records, contracts, or other contemporaneous evidence of the business dealings between Hill and the Debtor were attached to it. At the November 27, 2000 hearing the Court admitted into evidence copies of the 1996 Contract, the 1997 Contract, all checks delivered to Hill by or on behalf of the Debtor during calendar years 1996 and 1997, a copy of the lien waiver dated February 21, 1997, and the invoices for the work completed under the 1997 Contract.¹ The parties agreed that all of these exhibits were true copies of original documents, but they disagreed on the meaning of the documents.

The central issue disputed by the parties is the amount of the compromise settlement for the site work done in 1996 beyond the \$44,000.00 price described in the 1996 Contract plus the additional \$12,000.00 that was admittedly paid for extra work done in 1996. The Debtor claims that the compromise settlement was in the amount of \$15,000.00, while NCC maintains that Hill and the Debtor agreed on the amount of \$50,000.00.

Under Hill's version of his agreement with the Debtor, the \$67,100.00 still owed from 1996 was compromised to a sum of \$50,000.00, \$15,000.00 of which was paid on February 21, 1997. NCC contends that when Hill made a proposal to the Debtor to do additional work in 1997, he insisted that an additional \$15,000.00 of the balance due for the 1996 work be paid within the first few weeks and that all

¹ The Court stated at the end of the hearing on November 27, 2000 that the affidavits of Maurice Turgeon would be accepted as offers of proof and that the documents attached thereto would be accepted as business records. The Court wishes to make it clear that in rendering this decision it has not read the affidavits of Maurice Turgeon and has only examined those items attached thereto that were admitted as business records.

future work be on a time and materials basis. Pursuant to the 1997 Contract, all invoices for work completed in 1997 were paid and NCC contends that the Debtor paid an additional \$15,000.00 to Hill on account of the balance due for the 1996 work in two checks dated June 25, 1997, in the amount of \$5,000.00, and July 8, 1997, in the amount of \$10,000.00. Under NCC's version, the balance due for the 1996 work would have been thereby reduced to \$20,000.00.

The Debtor's version contends that the lien waiver executed on that date constitutes evidence of payment in full for the 1996 work and compromise settlement as of that date. It alleges that the two payments totaling \$15,000.00 mentioned in the 1997 Contract and paid within the three weeks following the execution of the 1997 Contract were not on account of the 1996 work and compromise settlement, but were for work done by Hill in April of 1997. The Debtor presented no contract or invoice to support the alleged April 1997 contract.

After consideration of the evidence, the Court finds that while Hill did not put change orders in writing, the Court does not find it credible that Hill, who had always had a written agreement with the Debtor before beginning a *new* project, would have begun a new project for the Debtor in April of 1997 without some type of written agreement. See 1996 Contract and 1997 Contract. If the Debtor's version is to be believed, Hill, who in his view had already had problems collecting payment for work done that was not contained in written agreements, would have agreed to do \$15,000.00 worth of work without a written agreement just months after finally collecting on an old bill. The Court simply does not find such a story to be credible.

Accordingly, the Court finds NCC's version of the 1996 compromise settlement more credible. NCC did not, however, present any documentary evidence which supported its claim that the Debtor and Hill agreed to the transfer of a \$6,000.00 dump truck to compensate Hill for the Debtor's failure to make full payment of the balance due for 1996 by the end of 1997 or that the 1996 compromise settlement included an agreement to complete full payment by the end of 1997. Therefore, the Court will not allow,

for the purpose of voting, the \$6,000.00 portion of Hill's claim that was based upon the transfer of the dump truck.

Further, as this matter involves contradicting accounts of events, claims that are not based upon written documentation, and the absence of a full evidentiary hearing, the Court finds that it would be inequitable to allow Hill's claim in the full amount. Considering the conflicting claims of the parties regarding the terms of the compromise settlement and the greater credibility of the NCC version, the Court shall temporarily allow the Hill claim in the amount of \$10,000.00 for the purposes of voting.

IV. ORDER

For the reasons set forth in this memorandum opinion, it is hereby ORDERED that pursuant to Federal Rule of Bankruptcy Procedure 3018(a) the claim of Allan E. Hill, now owned by NCC, shall be temporarily allowed in the amount of \$10,000.00 for purposes of voting on the Plan.

This opinion and order constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DONE and ORDERED this 30th day of November, 2000, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge