In the United States Bankruptcy Court

for the Northern District of Iowa

CONNOLLY BROS. MASONRY INC.	Bankruptcy No. L92-00555W
Debtor(s).	Chapter 7

ORDER RE: MOTION FOR COMPROMISE OR SETTLEMENT OF CONTROVERSY

On May 11, 1994, the above-captioned matter came on for hearing in Waterloo, Iowa pursuant to assignment. Debtor appeared through its attorney, Charles Mattson. Chapter 7 Trustee Michael Dunbar also was present. The matter before the Court is a Motion for Compromise or Settlement of Controversy. The matter was argued to the Court after which the Court took the matter under advisement.

FINDINGS OF FACT

The uncontested facts establish that Debtor was a masonry contractor and was a subcontractor on a project at St. George's Church. Debtor contracted with Glen Gery Corporation and Burd Concrete Products to provide bricks to Debtor for this project. Glen Gery Corporation is a manufacturer wholesaler of bricks and Burd Concrete Products is a retailer or supplier. It appears in this case that Glen Gery provided the bricks to Burd Concrete, who in turn was the supplier to Debtor Connolly Bros. Masonry, Inc.

A problem developed with the bricks which were delivered to the Church. It is the position of Debtor that the bricks did not conform to industry standards for bricks of this type. It is alleged and largely undisputed that the bricks were curved and were narrower on one side than on the other. To deal with these imperfections, the bricks had to be sorted. The bricks were delivered in December, 1991 and January, 1992. Upon delivery, the bricks were frozen in large pallets. In order to sort the bricks, an enclosure had to be built and the pallets of bricks had to be thawed before they were sorted. Employees of Debtor corporation performed all of this work and Debtor now asserts that the total cost of sorting the bricks was $4,260.

Glen Gery and Burd Concrete dispute the claims of Debtor and assert that the work charged was unnecessary. They first state that the bricks delivered were within the tolerances provided in the brick building industry.

Glen Gery asserts that they had agreed to sort the bricks themselves before delivery to the job site. Finally, Glen Gery and Burd Concrete state that they had agreed that Debtor could sort out approximately 150 bricks in order to lay a field panel. A field panel is a test wall used to determine how the brick will look when put into a wall.

Glen Gery and Burd Concrete state that there were approximately 10,000 bricks delivered. They state that though they authorized sorting for the purposes of constructing a field panel, Debtor apparently took this limited authorization as a full invitation to sort all of the brick. As indicated, Glen Gery asserts that they had already sorted the vast majority of the bricks in Cedar Rapids before delivery to the job site.

Glen Gery and Burd Concrete state that the sorting process occurred in Cedar Rapids with the full knowledge of Debtor, as at that time there was a continuous exchange of information between Debtor, Glen Gery Corp., and Burd Concrete Products.

Debtor replies that Glen Gery did not begin sorting the bricks until after January 7, 1992. Debtor states that, by then, the bricks on the job site had already largely been sorted by Debtor. At that time, there were approximately 5,600 bricks on the job site. If it is assumed that Debtor only had authorization to sort bricks until January 7, 1992, the cost incurred by Debtor would still be in excess of $3,200.

Finally, Debtor states that there is no question that Glen Gery and Burd Concrete gave authorization to Debtor to sort the bricks. Debtor states it has a letter from a representative of Glen Gery which confirms that Debtor was authorized to sort 5,600 bricks. Additionally, Debtor states that it has received confirmation from Mr. Gary Lundhouser, the project architect with Novak Design, confirming that there was a conversation in which representatives of Glen Gery and Burd Concrete were present authorizing the brick to be sorted by Debtor.

The matter was unresolved and a lawsuit was filed in Linn County District Court in September of 1992. It is filed as a non-jury action (Linn County LA 22387). Debtor seeks $4,260 in damages for the labor and costs associated with sorting the bricks. The matter has previously been set for trial on two occasions and postponed both times. Some discovery has been done. No firm trial date has been reset.

Discussions ensued between Trustee and Glen Gery and Burd Concrete. An offer of $1,000 was made to the Trustee to settle this lawsuit. It is the opinion of the Trustee that the settlement is fair and equitable and as such, Trustee filed a Notice of and a Motion for Compromise or Settlement of Controversy on March 28, 1994. Notice was given to creditors. The only objector was Debtor, who timely filed an objection on April 7, 1994. It is Debtor's position that a judgment in an amount substantially more than the proposed compromise can be obtained if this matter proceeds to trial.

The Chapter 7 Petition filed in this matter reflects total liabilities in excess of $208,000 with claimed assets of approximately $36,600. The Internal Revenue Service is listed as a substantial unsecured priority claim holder.

CONCLUSIONS OF LAW

The 8th Circuit case of Drexel v. Loomis, 35 F.2d 800 (8th Cir. 1929) is generally considered to be the leading case establishing four primary criteria to determine whether a settlement is appropriate. These criteria are: a) the probability of success in the litigation; b) the difficulties, if any, to be encountered in the matter of collection; c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and d) the paramount interests of the creditors and a proper deference to their reasonable views in the premises. Id. at 806.

"The benchmark for determining the propriety of a bankruptcy settlement is whether the settlement is in the best interests of the estate". In re Energy Co-op., Inc., 886 F.2d 921, 927 (7th Cir. 1989).

The Court's role is not to conduct a trial or mini trial or to decide the merits of individual issues. Rather, the Court's role is to determine whether the settlement, as a whole, is fair and equitable. In re Lee Way Holding, Co., 120 B.R. 881, 890 (Bankr. S.D. Ohio 1990).

> Central to the bankruptcy judge's determination is a comparison of the settlement's terms with the litigation's probable costs and benefits. Among the factors the bankruptcy judge should consider in his analysis are the litigation's probability of success, the litigation's complexity, and the litigation's attendant expense, inconvenience and delay (including the possibility that disapproving the settlement will cause wasting of assets).

In re American Reserve, 841 F.2d 159, 161 (7th Cir. 1987).

ANALYSIS

The Bankruptcy Code contains no specific criteria as guidance to determine whether a proposed settlement is fair. The Drexel factors ordinarily form the basis for an evaluation of whether a proposed settlement is in the best interests of the estate. As such, the Court will address the four primary criteria as applied to the largely uncontested facts in this case.

The first factor is the probability of success in the litigation. As stated in the conclusions of law, it is not the role of this Court to conduct a trial and determine the merits of the respective claims. Nevertheless, it is unavoidable that some weighing of the probability of success in the case is important. This Court fully recognizes that evaluating a case as to its merits is a "imprecise endeavor". In re Lee Way Holding Co., 120 B.R. 881, 891 (Bankr. S.D. Ohio 1990). The trustee feels that the proposed settlement is favorable to the estate and recommends settlement. Counsel for Debtor, however, feels equally as strongly that this case has substantial merit and that a recovery substantially in excess of that proposed can be achieved. The opinions of counsel in this type of context are entitled to considerable weight. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1215 (5th Cir. 1978). However, in this case, both counsel feel strongly in their positions and their positions are diametrically opposed. In evaluating the facts in this case as presented, to the extent possible, it is the conclusion of this Court that the Debtor's claim has merit and the probability of success is considerable.

The second factor is the difficulty, if any, to be encountered in collection efforts if a judgment is obtained. Counsel for Debtor stated that Glen Gery and Burd Concrete are responsible financially and based upon the total amount of the potential award in this case, it appears that there would not be substantial difficulty in collecting this fairly modest amount.

The third factor considered in Drexel is the complexity of the litigation and the expense, inconvenience and delay necessarily attending this case. The case has previously been set for trial as a non-jury case. The Court was advised that the total length of trial would be one day or less. It does not appear that there would be a substantial outlay of expense involved in preparation of this case. Some discussion was held at the hearing relative to retaining experts. It does not appear that experts will be heavily involved in this litigation. The primary issue for determination will be whether Glen Gery and Burd Concrete consented to Debtor sorting the bricks themselves or whether this was a task retained by Glen Gery and Burd Concrete. The case does not appear to be inordinately complex and no reason appears, in the record, why a substantial delay would be involved in pursuing this case through trial.

The final factor in Drexel is consideration of the creditors' interest taking into consideration an appropriate amount of deference to their views. As indicated, the only objecting party to this

settlement is Debtor. Debtor feels strongly that a judgment substantially in excess of the offer can be obtained. The schedules filed by Debtor show a substantial amount of debt. In an objective economic analysis, whether the return on this case is $1,000 or $3,000 may not have a substantial impact on the overall payment of funds to the unsecured creditors. Debtor is taking the position, however, that the Internal Revenue Service has a substantial unsecured priority claim. It is Debtor's position that revenues generated will eventually be paid to the Internal Revenue Service. Debtor would like to maximize the effect of this judgment to bring down the obligation owed to the Internal Revenue Service. In a very real sense, it does not appear that the unsecured creditors in this case will be affected positively or negatively no matter what transpires.

It is the obligation of the Court to determine if a proposed settlement is in the best interests of the estate. Counsel for Debtor indicated to the Court, on the record, that he would be willing to represent Debtor in the lawsuit which is presently pending in Linn County District Court. He indicated that he would be willing to do so on a contingent fee basis for 1/3 of the judgment. If Debtor is successful and if counsel receives a 1/3 contingent fee, the estate will generate $2,840, reduced by any associated costs which are taxed to Debtor. As the impact of this determination will be born largely by Debtor and since counsel for Debtor is willing to prosecute this case to conclusion on a contingent fee basis, it is the determination of this Court that it is in the best interests of the estate to deny approval of the settlement and allow this matter to proceed to judgment in the State District Court.

WHEREFORE, the Motion for Compromise or Settlement of Controversy filed by the Trustee is DENIED.

FURTHER, the objection to the Motion for Compromise or Settlement of Controversy filed by Debtor is SUSTAINED.

FURTHER, Attorney Charles T. Mattson shall be authorized to represent Debtor in the Linn County Case, captioned Connolly Bros. Masonry, Inc. v. Glen Gery Corporation and Burd Concrete Products, LA 22387.

FURTHER, Attorney Mattson's compensation shall be on the basis of a 1/3 contingent fee.

FURTHER, Debtor shall proceed forthwith to have this matter set for trial at the earliest possible date.

SO ORDERED this 25th day of May, 1994.

Paul J. Kilburg
U.S. Bankruptcy Judge