

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:)	CHAPTER 13
)	
ROBERT S. BERNARD,)	CASE NO. 01-64004
)	
Debtor.)	JUDGE RUSS KENDIG
)	
)	
)	
)	MEMORANDUM OF DECISION

This matter is before the court on an amended objection to claim filed on February 25, 2002 by Robert S. Bernard (hereafter “Debtor”) and a response filed on March 2, 2002 by Rebecca M. Peters and Jennifer S. Risinger (hereafter “Creditors”). A hearing was held on April 29, 2002. Present were Joshua Brown, counsel for Debtor, Debtor, and Creditors, who appeared pro se. Debtor and Creditor Rebecca Peters testified. The matter was taken under advisement. For the following reasons, Debtor’s objection to claim is **SUSTAINED**, and Creditors are allowed a claim in the amount of **\$5,000.00**.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(b) and the General Order of Reference entered in this district on July 16, 1984. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B). The following are the court’s findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

FACTS

Creditors hired Debtor and his company, Builders Group, L.L.C., to build a house. Debtor obtained bids from subcontractors and priced supplies from suppliers to prepare a bid “takeoff,” a sum total of the cost Creditors would incur to have the house built. The bid “takeoff” totaled \$112,690.88. Based on the bid “takeoff,” Debtor prepared a contract for the work he and his company were to perform. The work included:

1. insulating home and garage;
2. installing garage door;
3. digging out footer tiles and downspout lines;
4. hanging drywall;
5. framing exterior and interior;
6. installing roof, shingles, siding, and fascia soffit;
7. installing basement stairs;
8. burning trash;
9. installing exterior doors and windows;
10. installing base molding, trim, and exterior and interior walls;

11. installing gutters and downspouts;
12. laying brick;
13. and coordinating project, scheduling subcontractors, and troubleshooting.

Creditors were to pay Debtor and his company \$48,173.00 for this work through periodic draws.

Creditors budgeted \$125,000.00 for the home's construction. They planned to use \$40,000.00 of their own funds and finance the balance through a loan from M & T Mortgage. As a condition of financing, M & T Mortgage required the parties to execute an additional contract. According to this contract, Debtor would not receive payment until completion of the construction. Debtor testified he was not aware of this contract provision.

In March 2000, Debtor started construction. By June 2000, Creditors had paid \$31,365.98 to Debtor and exhausted their funds. Without money to pay subcontractors, Debtor instructed the workers to stop working and locked the house. Creditors then obtained new financing, albeit on different terms, from Richland Bank. Creditors were able to immediately access the loaned funds but could no longer funnel money through Debtor for subcontractors' work. Debtor testified the loan terms altered his job responsibilities as general contractor and decreased his profit margin, so he informed Creditors he was discontinuing work on the project. Creditors testified they incurred additional expense in hiring new workers to complete the unfinished project and to correct Debtor's deficient workmanship.

On October 10, 2000, Creditors filed a lawsuit against Debtor in Richland County Common Pleas Court. The parties entered into a settlement. Creditors agreed to accept \$5,000.00 if received by August 1, 2001.

On September 21, 2001, Debtor filed a chapter 13 bankruptcy. On schedule F, he listed a debt of \$5,000.00 owed to Creditors.

On February 4, 2002, Creditors filed a proof of claim for an unsecured, priority debt of \$35,000.00. Creditors attached a copy of the state court complaint and the home purchase contract required by M & T Mortgage.

On February 15, 2002, Debtor filed an objection to Creditors' claim. As grounds, Debtor listed Creditors' lack of priority status, his disagreement with the amount owing, and Creditors' lack of attached documentation supporting the valuation of their claim. Subsequently, Debtor filed an amended objection correcting a deficiency in the attached notice.

On March 7, 2002, Creditors filed a response to Debtor's amended objection. They alleged the \$5,000.00 amount listed in Debtor's schedule was a time contingent settlement of

the state court case, and the expiration of time invalidated the amount and reinstated the debt of \$35,000.00. Creditors admitted they erroneously characterized the debt as a priority debt.

ARGUMENTS

Creditors argue Debtor failed to perform his obligations under the home construction contract. First, they argue he breached the contract when he left the site before the home's completion. They allege they are entitled to compensation for the money they paid to have the construction completed. Second, they contend Debtor breached his duty to perform the construction in a workmanlike manner. They allege Debtor's construction work was deficient, and they had to expend additional money to have it corrected.

Debtor counters Creditors breached the contract when they obtained new financing. Creditors' new financing, which required them to pay the subcontractors directly, deprived Debtor of control over the project and decreased his profit margin. He denies Creditors' claims of deficient workmanship.

DISCUSSION

I. Burden of Proof on Objection to Proof of Claim

A proof of claim is prima facie evidence of the claim's validity and amount under 11 U.S.C. § 502(a) and Federal Rule of Bankruptcy Procedure 3001(f). *See* 11 U.S.C. § 502(a) and Fed. R. Bankr. P. 3001(f); In re Consolidated Pioneer Mortgage, 178 B.R. 222, 225-26 (B.A.P. 9th Cir. 1995), *aff'd on other grounds*, 91 F.3d 151 (9th Cir. 1996) (Table, Text in Westlaw, No. 95-55491). An objecting party has the burden of proof as to the invalidity or incorrect amount of a claim. In re Allegheny Int'l, 954 F.2d 167, 173-74 (3rd Cir. 1992). Once this burden is met, the burden of proof shifts back to the claimant to prove the validity of the claim by a preponderance of the evidence. *Id.*; In re Bosak, 242 B.R. 400, 405 (Bankr. N.D. Ohio 1999); In re Nelson, 206 B.R. 869, 878 (Bankr. N.D. Ohio 1997).

Prior to a determination under 11 U.S.C. § 502(a) as to the allowed amount of a claim, a court must determine the existence of a claim as a matter of state law. In re Highland Superstores, Inc., 154 F.3d 573, 578 (6th Cir. 1998) (court must examine state law for validity of claim before proceeding to claim's allowance under bankruptcy law); In re Johnson, 960 F.2d 396, 404 (4th Cir. 1992) (existence of claim is question of state law); In re Sanford, 979 F.2d 1511, 1513 (11th Cir. 1992) (analysis of claim under applicable nonbankruptcy law is necessary before a determination of its allowance under bankruptcy law can be made).

Thus, under 11 U.S.C. § 502(a), Creditors' proof of claim is presumptive evidence as to its validity and amount. Debtor is required to rebut this presumption by a preponderance of evidence in order to prevail on his objection. In re Allegheny Int'l, 954 F.2d at 173-74. In

order to determine whether he has met his burden, the court must first examine Creditors' claim under state law.

II. State Law Considerations

Creditors allege Debtor breached the construction contract when he left the work site and failed to construct their house in a workmanlike manner, thereby making him liable for their resulting damages. Breach of contract and breach of implied duty to perform in a workmanlike manner are determined under state law. In order for Debtor to prevail on his objection to Creditors' claim, he must prove he neither breached the construction contract nor his duty to perform in a workmanlike manner.

A. Breach of Contract

Creditors contend Debtor breached the construction contract thereby entitling them to damages. In order to prove a breach of contract, a complaining party must prove the contract's existence, the complaining party's performance, the opposing party's breach, and the complaining party's loss. Malick Inv. v. R. Russell Assoc., Inc., 2001 WL 1142333, *3 (Ohio App. 9th Dist. 2001); Chaney v. Ramsey, 1999 WL 217656, *5 (Ohio App. 4th Dist. 1999); Doner v. Snapp, 98 Ohio App.3d 597, 600 (1994).

Upon proving a breach of contract, a nonbreaching party is entitled to damages for its expectation interest: those damages sufficient to place the nonbreaching party in as good a position as he or she would have been had the contract been performed. Schulke Radio Prod., Ltd. v. Midwestern Broadcasting Co., 6 Ohio St.3d 436, 439 (1983); Lakeshore Corp. v. Xam, Inc., 2002 WL 22096, *6 (Ohio App. 8th Dist. 2002); Nilavar v. Osborn, 738 N.E. 2d 1271, 1289 (Ohio App. 2nd Dist. 2000), *appeal not allowed*, 90 Ohio St.3d 1405 (2000).

Creditors failed to prove all the elements of a breach of contract by Debtor. A contract existed, but Creditors did not fully perform their obligations under the contract. According to the contract prepared by Debtor, Creditors were to pay Debtor through periodic draws. At first, they paid Debtor as work was performed but quickly depleted their funds. Contrary to the Debtor-prepared contract, the terms of the financing with M & T Mortgage required payment upon completion of the construction, so when it became apparent that Debtor and the subcontractors would not perform further work without further payment, Creditors obtained new financing through Richland Bank. Creditors gained immediate access to the loan funds, but the new lender required payment be made directly to the subcontractors at Creditors' direction. Creditors' new role in the payment process eliminated Debtor's ability to schedule, coordinate, and supervise subcontractors and profit from their work. Creditors had breached the contract. Creditors' breach obviated Debtor's obligation to further perform.

Creditors request damages for the money they expended in hiring additional workers

to complete Debtor's job. This includes reimbursement for workers' installation of a stoop, a garage door, downspouts, gutters, brick, siding, and backfill. Essentially, Creditors request reimbursement for the costs they incurred to place them in the position in which they would have been had the contract been performed. However, they, not Debtor, breached the contract. Their breach excused Debtor from performing this work and prevents them from recovering damages for his failure to complete the work.

B. Breach of Implied Duty to Perform in a Workmanlike Manner

Creditors allege Debtor failed to perform the construction work in a workmanlike manner. A builder or contractor has a duty to perform his or her work in a workmanlike manner. McCray v. Clinton County Home Improvement, 708 N.E.2d 1075, 1077 (Ohio App. 12th Dist. 1998); Vistein v. Keeney, 593 N.E.2d 52, 60 (Ohio App. 11th Dist. 1990); Barton v. Ellis, 34 Ohio App.3d 251, 252 (1986); Dawn Court Assoc. v. Cristia, 761 N.E.2d 705, 708 (Ohio Com. Pl. 2001). To perform in a workmanlike manner requires a builder or contractor to act reasonably and to exercise that degree of care which a member of the construction trade in good standing in that community would exercise under the same or similar circumstances. Jenkins v. Huebner, 2002 WL 255124, *3 (Ohio App. 3rd Dist. 2002); Ohio Valley Bank v. Copley, 699 N.E.2d 540, 545 (Ohio App. 4th Dist. 1997), *dismissed, appeal not allowed*, 80 Ohio St.3d 1423 (1997). The aggrieved party has the burden of proving a breach by a preponderance of evidence. Henderson v. Fillinger, 2002 WL 27319, *3 (Ohio App. 2nd Dist. 2002).

The measure of damages for failure to perform in a workmanlike manner is the cost of repairing the deficient work because the aggrieved party is entitled to proper performance of the contract. McCray, 708 N.E.2d at 1076; Barton, 34 Ohio App.3d at 253. Repairing deficient work may involve both additional activities necessitated by the deficient work, and activities previously omitted, but necessary, to comply with a workmanlike standard. McCray, 708 N.E.2d at 1076; Barton, 34 Ohio App.3d at 254.

Creditors allege Debtor's workmanship failed to meet his implied duty to perform in a workmanlike manner. Creditors did not call a construction expert to substantiate their claims. Debtor has a 16 year history in the construction business and provided the sole testimony in response. Admittedly, Debtor's testimony may be self-serving, but Creditors' failure to employ an expert witness leaves the court without the benefit of a truly objective professional. One cannot take melted plastic and mold it into brick.

An expert witness is needed to establish building repairs were not done in a workmanlike manner. An expert witness is needed because people who are not trained or experienced in construction cannot know whether repairs to a building were done in a workmanlike manner. The expert must testify that it is more probable than not that the building repairs that

are the subject of the lawsuit were not done in a workmanlike manner, [sic] and that this failure caused the damages sustained by the plaintiff.

Dawn Court, 761 N.E.2d at 709 (citation omitted).

At trial, Creditors alleged Debtor constructed the house in a deficient manner. They claimed the house's foundation is crooked due to faulty installation and alleged Debtor agreed to recompense them by installing a basement bedroom free of charge. Creditors alleged several windows were broken during installation. According to Creditors, improper shimming of the windows prevented the installation of screens. They allege no seal existed at the bottom of the bay window causing it to need reshimmed and set. Creditors testified the drywall was to be California wrapped without any wood trim. Creditors stated the trusses were not secured to the walls of the house causing the walls to bow. They complained the basement floor is not square. They claim Debtor never secured the walls to the foundation nor did he install basement steps or a shower. They said Debtor did not burn and haul trash as part of the cleanup.

On direct examination, Debtor responded to some, but not all, of these allegations. Debtor admitted the foundation is not square but said it cannot be fixed. Debtor claimed the windows were not broken when he left the work site. He hypothesized the new workers hired to install the siding broke the windows. Debtor said he attempted to supervise the screens' installation by meeting with Moore's Lumber to ensure the screens would be installed correctly, but the screens were not the right size. Debtor said according to the bid, the drywall was to have wood trim and was not to be California-wrapped. Debtor acknowledged the walls of the house may bow but explained how this could have been fixed. Debtor did not respond to the other allegations.

At trial, Creditors testified as to their damages, speculating as to costs of future repairs and introducing receipts as to costs of performed repairs. In response, the court asked Creditors to clarify which of the receipts identified actual expenses Creditors incurred to correct Debtor's deficient work. The majority of the receipts covered work previously decided by this court to be expectation damages denied to Creditors because their breach excused Debtor's performance. However, the court finds Creditors were able to produce two receipts satisfying the request. The first receipt was for \$1,937.50 paid a woodworker to reset two bedroom doors, redo closet doors, rebuild stairs from the garage, and reinstall the front door due to the crooked interior caused by the unsecured trusses. The second receipt was for \$1,160.00 paid to have the garage door reheaded.

Creditors failed to introduce concrete evidence as to their damages on each allegation of deficient work, therefore, the court will only address those allegations underlying the two receipts mentioned above. The parties disagree as to the unsecured trusses. Creditors maintain Debtor's poor workmanship is to blame. Debtor maintains had Creditors not breached, he would have secured the trusses before the construction's completion. The court

is reminded of the proverb “rotten wood cannot be carved.” Creditor Rebecca Peters’ testimony lacks the weight of an expert witness. The court cannot attribute that to Creditors which they lack. Instead, the court looks to Debtor’s years of experience in the construction industry and gives his testimony greater weight. Additionally, the court finds Debtor’s explanation credible. Debtor did not breach the implied duty of workmanship as to the trusses. Creditors did not provide an explanation as to why the garage door had to be reheaded. Based on this lack of evidence, the court finds Creditors failed to meet their burden of proof by a preponderance of evidence as to the garage door. Creditors are not awarded damages equal to the amount of these two receipts.

III. Judicial Admission

In Debtor’s schedule F and his objection to proof of claim, Debtor listed the debt owed to Creditors as \$5,000.00. At trial, the court asked Debtor’s counsel to clarify what amount, if any, Debtor admitted owing Creditors. Debtor’s counsel responded Debtor admitted owing Creditors \$5,000.00 but disputed Creditors’ claimed amount of \$35,000.00.

Unequivocal statements made during trial within the scope of an attorney’s authority are considered judicial admissions binding upon the attorney’s client. Kreidle v. IRS, 145 B.R. 1007, 1015 (Bankr. D. Colo. 1992); Ahghazali v. Secretary of Health and Human Serv., 867 F.2d 921, 927 (6th Cir. 1989); *see also* Knudsen v. United States, 254 F.3d 747, 752 (8th Cir. 2001) (quoting Soo Line R. Co. v. St. Louis Southwestern R. Co., 125 F.3d 481, 483 (7th Cir. 1997) (“[J]udicial efficiency demands that a party not be allowed to controvert what it has already unequivocally told a court by the most formal and considered means possible.”) The court finds Debtor admitted, no less than three times, that he owes Creditors \$5,000.00. Creditors are allowed a claim in the amount of \$5,000.00.

IV. Conclusion

Creditors’ proof of claim is presumed valid. Upon filing his objection to proof of claim, Debtor has the burden of proving Creditors’ claim invalid.

The claim is based on a home construction contract, so state law must be analyzed. Under state law, Creditors have the burden of proving Debtor breached the terms of the construction contract. Creditors failed to meet this burden, and accordingly, they are not entitled to the expectation damages claimed in their proof of claim.

Under state law, Creditors have the burden of proving Debtor breached his duty to perform in a workmanlike manner. Creditors’ failure to sufficiently state their damages prevents them from meeting their burden of proof.

Debtor admits owing Creditors \$5,000.00 in damages.

Based on the foregoing, Debtor has met his burden of proving the invalidity of Creditors' proof of claim. Debtor's objection to Creditors' proof of claim is **SUSTAINED**, and Creditors are allowed a general, unsecured claim in the amount of **\$5,000.00**.

An appropriate order shall enter.

Russ Kendig
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:)	CHAPTER 13
)	
)	CASE NO. 01-64004 CHAPTER 13
ROBERT S. BERNARD,)	
)	JUDGE RUSS KENDIG
Debtor.)	
)	
)	JUDGMENT ORDER

This matter came before the court on an amended objection to claim filed by Robert S. Bernard and a response filed by Rebecca M. Peters and Jennifer S. Risinger. Following a trial of the matter, the court issued a memorandum of law. In accordance with the decision set forth in the court's memorandum, it is hereby ordered Debtor's objection to claim is **SUSTAINED**, and Creditors are allowed a general, unsecured claim in the amount of **\$5,000.00**.

Russ Kendig
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of _____ 2002, the above Memorandum of Decision and Order were sent via regular U.S. Mail to:

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