

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 05-93363
) (jointly administered)
THE AUSTIN COMPANY, et al.,)
) Chapter 11
Debtors.)
_____) Judge Pat E. Morgenstern-Clarren
)
SEABOARD SURETY COMPANY nka) Adversary Proceeding No. 06-1153
ST. PAUL TRAVELERS COMPANIES, INC.,)
)
Plaintiff,)
)
v.) **MEMORANDUM OF OPINION**
) **ON CROSS-MOTIONS FOR**
THE AUSTIN COMPANY, et al.,) **SUMMARY JUDGMENT** (NOT FOR
) **COMMERCIAL PUBLICATION**)
Defendants.)

Prepetition, the debtors received payments from third parties under construction contracts bonded by the plaintiff Seaboard Surety Co.¹ (St. Paul). St. Paul filed this adversary proceeding to request declaratory and injunctive relief regarding its rights with respect to those payments. Each party requests summary judgment in its favor on various counts of the complaint.² For the

¹ The plaintiff is also known as St. Paul Travelers Companies, Inc.

² See docket 22, 24, 25, 28, 30, 32, 34. St. Paul requested leave to submit a brief after the briefing deadline and the debtors submitted a reply brief, both of which have been considered by the court. See docket 42, 46.

reasons stated below, St. Paul's motion is denied and the debtors' motion for summary judgment is granted in part.³

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2).⁴

FACTS

A.

These are the undisputed material facts based on the pleadings, the parties' joint pretrial statement,⁵ and the evidence submitted in support of the motions:

Austin Co., Austin Holdings, Inc., and RB of PA, Inc.⁶ provided architectural, engineering, design-build, and construction management services. St. Paul issued performance bonds and payment bonds in favor of Austin and RB of PA on these construction projects:

³ The debtors' chapter 11 cases were filed before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which is generally effective October 17, 2005. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 109-8, § 1501(b)(1), 119 Stat. 23, 216 (stating that, unless otherwise provided, the amendments do not apply to cases commenced under title 11 before the effective date of BAPCPA). Therefore, all references to the bankruptcy code in this opinion are to the pre-BAPCPA version.

⁴ This written opinion is entered only to decide the issues presented in this case and is not intended for commercial publication in an official reporter, whether print or electronic.

⁵ Docket 15.

⁶ RB of PA, Inc. is also known as Ragnar Bensen, Inc.

- (a) S367995 (NECCO)
- (b) S368005 (COE-Ft. Lewis)
- (c) S355912 (Hempfield Township)
- (d) 400SN5567 (Hines VA Hospital)
- (e) 400SS8761 (Fairmont State College)
- (f) S393898 (Old Dominion Electric- Marsh Run)
- (g) 400SN5516 (Whitfield County Career Academy)
- (h) 400SS8737 (NAVFAC Hush House)
- (i) S348674 (NAVFAC C-17)
- (j) 400SN5523 (Greater Kelly Dev. Auth.)
- (k) S367985 (Tinker AFB- Army Corp. of Engineers)
- (l) 400SS8733 (University of California- Los Alamos)
- (m) S367998 (University of California- Santa Barbara)
- (n) S367997 (GSA Santa Anna)
- (o) 393890 (Village of Niles- Niles Police Facility)⁷

In connection with the bonds, Austin and Austin Holdings executed indemnity agreements in favor of St. Paul as indemnitee. The indemnity agreements provide that:

The Contractor and Indemnitors covenant and agree that all payments received for or on account of a Bonded Contract shall be held as a trust fund in which the Surety has an interest, for the payment of obligations incurred in the performance of the contract and for labor, materials, and services furnished in the prosecution of the work provided for in said contract or any authorized extension or modification thereof; and, further, it is expressly

⁷ Pretrial statement and St. Paul exhs. 3, 4, 5, 6, 7, 8, 9.

understood and declared that all monies due and to become due under any such contract or contracts are trust funds, whether in the possession of the Contractor or Indemnitors or otherwise, for payment of all such obligations in connection with any such contracts or contracts for which the Surety would be liable under any of said Bonds, which said trust also inures to the benefit of the Surety for any liability or loss it may have or sustain under any such Bonds, and this agreement and declaration shall also constitute notice of such trust.⁸

The agreements also provide that Austin and Austin Holdings:

will indemnify the Surety and hold it harmless from and against all liability, losses, costs, damages, attorneys' fees, disbursements and expenses of every nature which the Surety may sustain or incur by reason of having executed or procured the execution of any such Bonds; and they will pay over and make good to the Surety all money which the Surety or its representatives shall pay, or cause to be paid, or become liable to pay, by reason of its execution of any such Bond as soon as it shall become liable therefore, whether the Surety shall have paid out such sum or any part thereof or not⁹

Prepetition, the debtors received these payments on active projects bonded by St. Paul: GSA—federal building repairs and alteration (\$895,000.00 on 10/12/05 and \$160,423.00 on 9/1/05); University of California, Los Alamos (\$943,002.81 on 9/20/05); Greater Kelly Development Auth. (\$399,932.00 on 9/13/05); Village of Niles (\$63,137.50 on 10/7/05); and Whitfield County Bd. of Education (\$139,668.00 on 9/7/05) (collectively, the prepetition payments). The debtors handled these payments in the same manner in which they handled payments from non-bonded projects.¹⁰ This meant that the debtors deposited each check in a bank near one of its five regional offices, after which time the funds were swept into a Cleveland

⁸ St. Paul exhs. 1 and 2 at para. 10.

⁹ St. Paul exhs. 1 and 2 at para. 6.

¹⁰ Pretrial statement and debtors' exh. 1.

account. The funds then moved to an investment account before they went into a disbursing account used to pay subcontractors and suppliers.¹¹ At no time prepetition did St. Paul ask the debtors to segregate the funds they received on any bonded project into a separate bank account.¹²

Austin Co., Austin Holdings, Inc., and RB of PA, Inc. filed chapter 11 petitions on October 14, 2005. St. Paul made bond payments both before and after the filings.

DISCUSSION

St. Paul moves for summary judgment on count 1 of the complaint. St. Paul contends that, under the doctrine of equitable subrogation, it has a priority lien interest in the prepetition payments. St. Paul asserts that this lien makes the prepetition payments its cash collateral under 11 U.S.C. § 363, for which it is entitled to adequate protection under 11 U.S.C. § 361 before the debtors may use the cash. The debtors oppose the motion on multiple grounds.

Both parties move for summary judgment on count 2, which raises the issue of whether the prepetition payments are estate property. St. Paul makes two arguments: that the prepetition payments are trust funds which are not property of the chapter 11 estates and, alternatively, that they are excluded from the estates by the assignment clauses in the indemnity agreements.¹³ The debtors oppose the motion, and move for summary judgment in their favor, on the ground that St. Paul has not shown that all requirements for creating a trust have been met. The debtors respond

¹¹ Debtors' exh. 1.

¹² Debtors' exh. 1.

¹³ The motions do not address count 3, in which St. Paul asked for a preliminary injunction requiring the debtors to segregate the disputed funds.

to the second theory (assignment) by, among other things, pointing out that St. Paul did not specifically raise this in the complaint and arguing that it is now barred from doing so.

A. Summary Judgment Standard

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The court must evaluate each summary judgment motion on its merits and “draw all reasonable inferences against the party whose motion is under consideration.” *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994) (quoting *Taft Broad Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991)). A movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323. Summary judgment “shall be rendered . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact[.]” FED. R. CIV. P. 56(c).

Once the movant has met its burden, the burden shifts to the nonmoving party to show the existence of a material fact which must be tried. *Id.* The nonmoving party must oppose a proper summary judgment motion “by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves” *Celotex Corp. v. Catrett*, 477 U.S. at 324. “[T]he nonmoving party has an affirmative duty to direct the court’s attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.” *Poss v. Morris (In re Morris)*, 260 F.3d 654, 665 (6th Cir. 2001). All reasonable inferences drawn from

the evidence must be viewed in the light most favorable to the party opposing the motion.

Hanover Ins. Co. v. Am. Eng'g Co., 33 F.3d 727, 730 (6th Cir. 1994). The issue at this stage is whether there is evidence on which a trier of fact could reasonably find for the nonmoving party.

Street v. J.C. Bradford & Co., 886 F.2d 1472, 1477 (6th Cir. 1989).

B. Property of the Estate

Property of the estate consists of “all legal and equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). This broad definition is limited by bankruptcy code § 541(d), which states that:

Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 541(d). Consequently, if a debtor holds property subject to a trust, the equitable interest in the property is not property of the estate. See *Begier v. Internal Revenue Serv.*, 496 U.S. 53, 59 (1990).

A debtor’s property rights are defined by state law. See *Butner v. United States*, 440 U.S. 48, 55 (1979). The parties agree that Ohio law applies in this case to determine if an express trust exists.

1. Express Trust

St. Paul argues that, under the indemnity agreements, the debtors agreed that when they received payments from third parties under bonded contracts, they would hold those payments in trust for the contractors, laborers, and suppliers who provided materials, services, and labor on the contracts. St. Paul makes this argument that a trust corpus exists: the debtors received some

payments under the contracts and had some cash on hand in their general accounts at the time of filing; therefore, some of that cash must have come from the contract payments and is the trust corpus. The debtors contend that this argument is contrary to Ohio law on trusts because the parties did not intend to create a trust, there is no trust corpus, and there is no fiduciary relationship between the debtors and St. Paul.

Under Ohio law, “a trust is the right, enforceable in equity, to the beneficial enjoyment of property, the legal title to which is in another.” *Ulmer v. Fulton*, 195 N.E. 557, 564 (Ohio 1935). “To create an express trust in Ohio, there must be a manifestation of intent to create a trust, there must be created a trust corpus, and there must be a fiduciary relationship between the trustee and the beneficiary.” *Indiana Lumbermens Mut. Ins. Co. v. Constr. Alternatives, Inc. (In re Constr. Alternatives, Inc.)*, 2 F.3d 670, 677 (6th Cir. 1993) (citing *Brown v. Concerned Citizens for Sickle Cell Anemia, Inc.*, 382 N.E.2d 1155, 1158 (Ohio 1978)). Stated another way,

to constitute an express trust there must be an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created, accompanied with an intention to create a trust, followed by an actual conveyance or transfer of lawful, definite property or estate or interest, made by a person capable of making a transfer thereof, for a definite term, vesting the legal title presently in a person capable of holding it, to hold as trustee for the benefit of a cestui que trust or purpose to which the trust fund is to be applied; or a retention of title by the owner under circumstances which clearly and unequivocally disclose an intent to hold for the use of another.

Ulmer, 195 N.E. at 564.

The parties to a trust include (1) a settlor, who creates the trust by providing the trust property; (2) a trustee, who receives the property and holds legal title to it; and (3) a beneficiary for whose benefit the equitable interest in the property is held. *Id.* In this case, the funds in dispute were paid by project owners to the debtors, independent of the indemnity agreements between the debtors and St. Paul. As a result, the factual predicate for St. Paul's position is that when the payments arrived in the debtors' hands, the debtors became both the settlors and the trustees of a trust created by the indemnity agreements. In such situations, it is especially important that the requirements of a trust be met. The Ohio Supreme Court has stated that:

[w]hile it is undoubtedly true that the settlor and trustee may be one and the same person, his words and acts must clearly and unmistakably denote an intention to hold certain property thenceforth as trustee for the benefit of another; the essentials of a trust must exist. *Worthington v. Redkey*, 86 Ohio St. 128, 135, 99 N.E. 211; 65 Corpus Juris, 277, § 61 et seq.; 26 Ruling Case Law, 1182, § 19; 1 Perry on Trusts and Trustees (7th Ed.) 27, § 38; *In re Small*, 27 App. Div. 438, 443, 50 N.Y.S. 341, 344, appeal dismissed, 158 N.Y. 128, 52 N.E. 723.

Id. Additionally, “[i]f a settlor declares himself trustee, of property for a beneficiary, the declaration must be complete and in praesenti and the creation of the trust must amount to a complete transfer of the equitable interest.” *Thomas v. Dye*, 127 N.E.2d 228, 231 (Ohio Ct. App. 1954).

The parties focus on two Sixth Circuit decisions which discuss Ohio trust law in the context of construction contracts: *Indiana Lumbermen's Mut. Ins. Co. v. Constr. Alternatives, Inc.* (*In re Constr. Alternatives, Inc.*), 2 F.3d 670 (6th Cir. 1993) and *Fed. Ins. Co. v. Fifth Third Bank*, 867 F.2d 330 (6th Cir. 1989). St. Paul relies heavily on the *Federal Insurance* decision. That case is not, however, determinative because it addresses materially different facts than those

presented here. As one court noted, “[i]n *Federal Insurance*, the court encountered a classic trust where the state as settlor passed the contract funds in trust to the contractor as trustee for the benefit of subcontractors.” *Acuity Mut. Ins. Co. v. Planters Bank, Inc.*, 362 F. Supp. 2d 885, 893 (W.D. Ky. 2005). As discussed above, the factual scenario here is not a “classic trust” because the alleged trust relationship is not between the project owners and the debtors but is instead between the surety and the debtors, with the debtors being both the settlor and the trustee. *Federal Insurance* is, therefore, of limited assistance in resolving this dispute.

The *Construction Alternatives* opinion, on the other hand, is directly relevant.¹⁴ In that case, the Sixth Circuit considered the nature of a surety’s interest in progress payments based on an indemnity agreement with the contractor which provided that “all monies due or to become due under any contract or contracts covered by the [b]onds are trust funds” *In re Constr. Alternatives, Inc.*, 2 F.3d at 676 n. 4. The court held that the payments were not held pursuant to a trust because:

no provision of the General Agreement of Indemnity required [the contractor] to keep any portion of the progress payments as a separate trust fund, and the record does not indicate that [the contractor] kept the progress payments in a separate account. Thus since there was no trust corpus, no trust was created.

Id. at 677.

The undisputed facts here also lead to the conclusion that the debtors do not hold the prepetition payments in a trust. Although the indemnity agreements state that contract payments are to be held in trust, they do not require the debtors to keep the payments in a separate account

¹⁴ St. Paul states that *Construction Alternatives* is “not the last word on this jurisprudence in this bailiwick.” (Docket 28 at 2). This court is, however, bound to follow Sixth Circuit law.

and St. Paul never demanded that the funds be segregated, thus showing a lack of intent to create a trust. Additionally, even assuming that intent could be found, St. Paul failed to show that there is a trust corpus. From day one, the debtors commingled the contract payments with other corporate monies without objection from St. Paul. As a result, there simply is no “definite property” committed to a trust.

St. Paul argues that a trust corpus exists because the debtors received funds on the bonded projects prepetition and they still had at least that amount of money at the time of filing.¹⁵ St. Paul takes this one step further and contends that the money on hand is, therefore, the trust corpus. While the debtors did have cash when they filed, the existence of that cash does not suffice to show that it was “definite property” committed to a trust. To the contrary, the cash was in general accounts, undifferentiated in any fashion from cash generated from non-bonded projects. Based on these undisputed facts, there is no trust corpus. The debtors are, therefore, entitled to summary judgment on this issue.

2. Assignment

Alternatively, St. Paul argues that the prepetition payments are not property of the estates by virtue of the general assignment clauses included in the indemnity agreements. The clauses state that:

In the event the Contractor shall breach, or default in or delay the performance of, any Bonded Contract, or fail promptly to discharge all obligations which might be claimable under any Bond executed in connection therewith or which might give rise to a lien or charge upon any unpaid contract balance or the property of the Obligee named in any such Bond, or in the event of any breach of the terms

¹⁵ Docket 28 at 4.

of this instrument, the Undersigned and each of them, hereby assign and set over unto the Surety, as of the date hereof, their right, title and interests in and to: (a) All of the deferred payments and retained percentages, and all monies and properties that may be, and that thereafter may become payable to the Contractor on account of and all claims and actions and causes of action relating to such contract, or on account of or relating to extra work or materials supplied in connection therewith as well as all other mines or properties of the Contractor hereby agreeing that such money and the proceeds of such payments, properties, claims, actions and causes of action shall be the sole property of the Surety to be by it credited upon any sum due or to become due it under the terms of this instrument¹⁶

Under appropriate facts, a valid assignment can serve to exclude property from a bankruptcy estate. *See In re Gresley*, case no. 01-22258, memorandum of opinion (Bankr. N.D. Ohio July 9, 2003) (discussing the validity of an assignment of the proceeds of a personal injury claim).

In opposition, the debtors argue, among other things, that St. Paul did not plead assignment in its complaint and should not now be permitted to raise this as a theory for summary judgment. On consideration, this court finds that St. Paul may raise the assignment argument, but will need to do so through an amended complaint to avoid unfair prejudice to the debtors. It is not, therefore, appropriate to consider the summary judgment argument made by St. Paul at this time.

Civil rule 8 requires only that the complaint provide “a short plain statement of the claim showing that the pleader is entitled to relief[.]” FED. CIV. R. P. 8(a)(2) (made applicable by FED. R. BANKR. P. 7008(a)). ““The function of an affirmative federal pleading, under FED. R. CIV. P. 8(a)(2), is to give the opposing party fair notice of the nature and basis or grounds for a claim, and a general indication of the type of litigation involved.” *Colonial Refrigerated Transp., Inc.*

¹⁶ St. Paul exhs. 1 and 2 at para. 12.

v. Worsham, 705 F.2d 821, 825 (6th Cir. 1983) (quoting *Ogala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 714 (8th Cir. 1979)). The “theory of the pleadings” doctrine no longer applies and “when a party has a valid claim, [it] should recover on it regardless of . . . counsel's failure to perceive the true basis of the claim at the pleading stage, provided that such a shift in the thrust of the case does not work to the prejudice of the opposing party.” *Id.* (internal quotations and citations omitted).

St. Paul’s complaint raises the general argument that the prepetition payments are not estate property and also attaches the indemnity agreements which contain the alleged assignment clauses, although it did not link the two by having a count seeking recovery on the theory that the payments are not estate property because they were assigned to St. Paul. Based on the applicable pleading standards, St. Paul is not precluded from making this argument, but it cannot go forward at this point because the debtors have represented that “injection of the assignment theory [for the first time on summary judgment] has precluded Austin from conducting any discovery on the claim and from developing applicable defenses.”¹⁷ This part of the motion for summary judgment is, therefore, denied without prejudice and the court will grant St. Paul leave to file an amended complaint to add this count in support of its position that the prepetition payments are not property of the estate.

C. Equitable Subrogation

St. Paul also moves for summary judgment on count 1. Here, St. Paul argues that it stepped in and made payments under the bonds, which gives it an equitable lien interest in the prepetition payments under the doctrine of equitable subrogation. St. Paul argues that this lien

¹⁷ Docket 30 at 18.

interest entitles it to adequate protection.¹⁸ The debtors oppose this motion on the grounds that (1) St. Paul was not subrogated to the rights of any party when the debtors received the prepetition payments; and (2) even if it had been timely subrogated, it would only be subrogated to a general unsecured claim, not a priority claim.

In general, a surety who pays the debt of another has a right to reimbursement from the primary obligor to the extent it has fulfilled the underlying obligation. *See generally* Restatement (Third) of Suretyship & Guaranty § 22 (1996). And it is firmly established that “a surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed.” *Pearlman v. Reliance Ins. Co.*, 371 U.S.132, 137 (1962). This right, otherwise known as equitable subrogation, applies in the bankruptcy context. *In re Constr. Alternatives, Inc.*, 2 F.3d at 675. “Moreover, this right relates back to the date of the surety’s issuance of the bonds[.]” *Kentucky Cent. Ins. Co. v. Brown (In re Larbar Corp.)*, 177 F.3d 439, 443-44 (6th Cir. 1999). The actual parameters of equitable subrogation are determined by applicable state law.¹⁹ *In re Constr. Alternatives, Inc.*, 2 F.3d at 675.

“Under Ohio law, a surety that pays amounts owed to a subcontractor, laborer, or supplier, is subrogated to the rights of those it has paid and to the rights of persons whose obligations the surety has discharged, i.e. the owner and the contractor.” *Id.* “A surety’s rights, however, are no greater than the rights of the party to whom it is subrogated.” *Id.* As a general

¹⁸ *See* 11 U.S.C. § 363. St. Paul is not invoking any statutory subrogation right, *see* 11 U.S.C. § 509, which provides rights distinct from the doctrine of equitable subrogation.

¹⁹ The parties have not stipulated to the applicable state law and their briefs do not address any particular state’s law on this issue. The indemnity agreements were executed in Ohio and the parties agree that Ohio law applies to the trust issue. Absent argument to the contrary, the court will apply Ohio law.

rule, a surety is only entitled to subrogation to the extent its payment totally discharged the principal's obligation to the other party. *See Harshman v. Harshman*, 42 N.E.2d 447, 450-51 (Ohio Ct. App. 1941), *see also* Restatement (Third) of Suretyship & Guaranty § 27 (1996). Equitable subrogation applies "when a contractor defaults on its obligations and a surety completes the work called for by the contract and pays all of the related bills. The law is clear that a surety under these circumstances has a right to the payments due the contractor to the extent of full reimbursement." *In re Larbar Corp.*, 177 F.3d at 444 (citations omitted). A surety has this right whether its bond is for performance or payment. *Id.*

St. Paul's factual basis for asserting an interest in the prepetition payments under the theory of equitable subrogation is this: (1) the debtors received the prepetition payments for work performed under contracts which St. Paul bonded; (2) St. Paul made payments under its bonds on unrelated contracts before the chapter 11 filings and made payments on related and unrelated bonded contracts after the filings; and (3) St. Paul has paid more than \$19,000,000 in bond claims as of August 16, 2006. These facts do not show that St. Paul is entitled to an equitable lien in the prepetition payments. St. Paul's evidence on this issue consists of two exhibits listing payments which it made on the bonded contracts. *See* St. Paul exhs. 10 and 11. These exhibits are insufficient to establish whether the parties paid have been fully satisfied and they do not provide a basis for determining what rights those parties have to assert to which St. Paul is subrogated.

There is a more significant problem with St. Paul's equitable subrogation claim and that is that the evidence submitted shows that St. Paul did not make any payments on the bonded contracts under which the debtors received the prepetition payments until after the debtors had

received the payments and commingled them with other funds. Because the payments have already been made, St. Paul is not asking to be equitably subrogated to the right of the debtors to receive the prepetition payments. Instead, it is asserting its own contract right to be reimbursed by the debtors because it has made payments under its bonds and it is arguing that the debtors should be required to reimburse it using the prepetition payments. Equitable subrogation does not give a contractor's surety an equitable lien under these circumstances because the funds at issue have already been paid to the debtors and are no longer considered contract proceeds. *See Acuity*, 362 F. Supp. 2d at 894-95 (holding that contract payments made to the principal and used to pay another debt were no longer contract proceeds subject to equitable subrogation and stating "Only a surety who fully performs on a payment or performance bond may enforce this equitable interest [created by the doctrine of equitable subrogation] and only then against unpaid funds or those retained as a security on a construction contract.").

For all these reasons, St. Paul's request for summary judgment on its equitable subrogation claim must be denied.

CONCLUSION

St. Paul's motion for summary judgment on the trust issue and on the equitable subrogation issue is denied. St. Paul's motion for summary judgment on the assignment issue is denied without prejudice. The debtors' motion for summary judgment is granted in part and the prepetition payments are determined not be held pursuant to an express trust. A separate judgment reflecting this decision will be entered.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

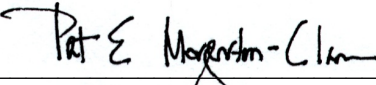
NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



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)	Chapter 11
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_____)	Judge Pat E. Morgenstern-Clarren
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SEABOARD SURETY COMPANY nka)	Adversary Proceeding No. 06-1153
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Defendants.)	

For reasons stated in the memorandum of opinion entered this same date, the defendant debtors' motion for summary judgment is granted in part and the prepetition payments are determined not to be held pursuant to an express trust. (Docket 22). The motion of plaintiff Seaboard Surety Company (St. Paul) for summary judgment is denied on the trust issue and on the issue of equitable subrogation. Additionally, St. Paul's motion on the assignment issue is denied without prejudice. (Docket 24).



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge