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In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Waycross Division

In the matter of: )  
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DANNY PALMER ) Chapter 13 Case  
BRENDA J. PALMER ) Number 93-50237  
d/b/a BJ's Mower & Saw Shop )  
p/d/b/a Palmer's Construction )  
 )  
 )  
*Debtors* )

**AMENDED ORDER ON OBJECTION TO CONFIRMATION**

This Court entered an Order on January 20, 1994, on the Objection to Confirmation of Tarmac Florida, Inc., d/b/a Dixie Redi-Mix ("Tarmac"). In the text of that Order the following language appears:

At the close of the evidence the record was unclear as to how the \$40,000.00 in funds had been expended and I left the record open for two weeks to permit the Debtor to file an affidavit setting forth how the funds received had been disbursed. I also granted an additional two weeks time for any counter affidavit to be filed by the objecting creditor. Debtor's affidavit was filed November 12, 1993, and there has been no evidence submitted in contravention of same.

Following service of the Order on counsel for the parties, counsel for Tarmac informed the Court that he had in fact filed, on December 10, 1993, a timely response to the Debtor's affidavit. Based on this communication I discovered that such a response was timely filed

on December 10, 1993, but was not docketed by the Clerk until January 25, 1994, and therefore was not part of the record which I considered at the time of the entry of the Order. I therefore conclude that reconsideration of my Order dated January 18, 1994, and filed on January 20, 1994, is warranted, and accordingly I make the following additional Findings of Fact and Conclusions of Law.

As set forth in the original Order, Debtor produced evidence showing that he had drawn \$40,000.00 of the total contract price of the construction project in issue. He filed an affidavit showing that a total of \$45,300.15 was paid toward expenses incurred on that job. Thus the Debtor showed that he had paid the sum of \$5,300.15 out of other funds to make up the shortfall on the job and it was on this evidence that I concluded that there had been no bad faith action on his part or any conversion of funds which should have been remitted to Tarmac. The counter affidavit, however, reveals that total disbursements of the Debtor evidenced by canceled checks amounted to only \$34,514.29 and that a receipt for funds paid not supported by canceled check amounted to an additional \$1,834.86.

I agree with Tarmac that Debtor has not properly accounted for funds if the Debtor has not provided copies of a canceled check to offset all credits given. Because the giving of a credit could have originated in a cash payment, a payment by check, return of goods or other consideration, I conclude that the counter affidavit and supporting evidence of the creditor is sufficient to establish that the amount previously found by the Court to represent the funds to be credited Debtor was in error. In lieu of that finding I now conclude

that Debtor has accounted for only \$34,514.29 in total expenditures. Of that, the sum of \$2,800.00 was conceded to have been paid to the Debtor for his labor resulting in a net amount accounted for of \$31,714.29.

Based on previous precedent in this Court cited in my earlier Order, the Debtor has failed to account for \$8,285.71 which, not having been shown to have been devoted to labor and materials on this job not including that of the Debtor himself, constitutes a conversion which would be non-dischargeable under 11 U.S.C. Section 523. As a result, that sum must be paid at 100% because that is the sum which would likely be non-dischargeable in a Chapter 7. The balance of the creditor's claim in the amount of \$6,071.72 can properly be treated as a general unsecured claim and paid pro-rata with other unsecured creditors. As to these funds there is no showing of any conversion or other bad faith on Debtors' part which would stand as a bar to confirmation. The job simply cost more than Debtor estimated, the money ran out before Tarmac's bill was paid and there was no conversion beyond the sum of \$8,285.71.

Accordingly, IT IS ORDERED that the creditor's claim be bifurcated and that the Trustee fund the sum of \$8,285.71 as a special unsecured claim to be paid in full without interest; that the balance of the creditor's claim in the amount of \$6,071.72 be allowed as a general unsecured claim and that an Order of Confirmation be issued accordingly.

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Lamar W. Davis, Jr.

United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_ day of February, 1994.