

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

In the matter of: )

C-SYSTEMS, INC., )  
d/b/a Comcon Systems, )  
d/b/a Supermicro Distributors )  
(Chapter 11 Case 186-00549) )

Debtor )

C-SYSTEMS, INC., )  
d/b/a Comcon Systems, )  
d/b/a Supermicro Distributors, )  
WILLIAM A. SCHWEITZER )  
and )  
BETTY A. SCHWEITZER )

Plaintiffs )

v. )

OMNETIC INCORPORATED )  
and )  
GLENN FOLSOM, JR. )

Defendants )

Adversary Proceeding

Number 186-0051

**FILED**

at 3 O'clock & 46 min. PM

Date 8/15/88

MARY C. BECTON, CLERK  
United States Bankruptcy Court  
Savannah, Georgia POB

ORDER ON MOTION FOR COSTS AND ATTORNEY'S FEES

Defendants have moved this Court to enter an award of costs and attorney's fees pursuant to Federal Rule of Civil Procedure 54(d), Bankruptcy Rule 7054(d), and Federal Rule

of Civil Procedure 11 and Bankruptcy Rule 9011(a). In response to Defendants' Motion the Plaintiffs move this Court to deny the Defendants' Motion and to enter an Order for costs in its favor pursuant to Federal Rule of Civil Procedure 54. Both parties have submitted briefs in support of their respective positions.

As a matter of initial concern, it must be pointed out that Defendants' counsel is laboring under two mistaken assertions of law. First, counsel moves for an award of costs and attorney's fees "pursuant to Federal Rule of Civil Procedure 54(d) [Federal Bankruptcy Rule 7054(d)]". There is no Bankruptcy Rule 7054(d). Perhaps counsel's citation to Bankruptcy Rule 7054(d) is merely a typographical error, which was intended to be cited as Bankruptcy Rule 7054(b). Even if counsel intended to move under Bankruptcy Rule 7054(b), counsel's statement that "Federal Rule of Civil Procedure 54(d), applicable in bankruptcy actions pursuant to Federal Rule 7054[(b)]" is erroneous. Bankruptcy Rule 7054(a) provides that: "Rule 54(a) - (c) F.R.Civ.P. applies in adversary proceedings." Bankruptcy Rule 7054 does not incorporate F.R.Civ.P. 54(d), or make it applicable in bankruptcy. See: 9 Collier on Bankruptcy, ¶7054.03 (15th Ed. 1988). The major difference between F.R.Civ.P. 54(d) and Bankruptcy Rule 7054(b) is that under F.R.Civ.P. 54(d) there is a presumption that court costs shall be awarded to the prevailing party as a matter of course, whereas

under Bankruptcy Rule 7054(b) the award of costs is discretionary. See Id. at ¶7054.07. In fairness to Defendants' counsel, Plaintiffs' counsel likewise is laboring under the erroneous notion that F.R.Civ.P. 54(d) applies in bankruptcy and would entitle his clients to recover costs as a matter of course if they are found to be the prevailing party.

Bankruptcy Rule 7054(b) provides in relevant part that:

"The court may allow costs to the prevailing party . . . ."

The United States Supreme Court in Hensley v. Eckerhart, 461 U.S. 414, 433, 103 S.Ct. 1933, 1939 (1983) stated in the context of 42 U.S.C. §1988 that "a typical formulation is that 'plaintiffs may be considered prevailing parties for attorney's fees purposes if they succeed on any significant issue in a litigation which achieves some of the benefit the parties sought in bringing the action'." (Citations omitted). The standard applied in the Eleventh Circuit in determining whether a party is a "prevailing party" is "whether he or she has obtained substantially the relief requested or has been successful on the central issue". Martin v. Heckler, 773 F.2d 1145, 1149 (11th Cir. 1985) quoting Watkins v. Mobile Housing Board, 632 F.2d 565, 567 (5th Cir. Unit B, 1980). Moreover, "a prevailing party need not have prevailed

on all the issues; it is sufficient that [he or she] prevail on the main issue." Miami Herald Publishing Co. v. City of Hallandale, 742 F.2d 590, 591 (11th Cir. 1984), quoting Best v. Boswell, 696 F.2d 1282, 1289 (11th Cir. 1983).

The Defendants contend that the Court's finding that the Plaintiffs breached the contract is sufficient to make them "prevailing parties" within the contemplation of Bankruptcy Rule 7054(b). Plaintiffs, on the other hand, contend that they are a "prevailing party" because judgment was granted in their favor. The Plaintiffs further contend that the fact that they recovered an amount over the amount of the Defendants' counterclaim that they are entitled to taxable costs.<sup>1</sup>

In addressing the Plaintiffs' counterclaim, supra, it is difficult, if not impossible, for me to find that

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<sup>1</sup> The Plaintiffs point to the fact that out of the \$44,100.00 contract price they recovered \$22,818.65, whereas the Defendants are entitled to only a \$21,281.35 offset against the contract price.

the Plaintiff is a prevailing party notwithstanding its assertions to the contrary. In the first place, the original complaint proceeded under a conversion theory and sought judgment against the Defendants for the sum of \$177,195.00 plus all profits. By amendment to its original complaint, the Plaintiffs added a Count II but did not dismiss the conversion action. In focusing on the complaint as originally filed, it is clear that the central issue is whether the Defendant converted for their own use the assets of the Plaintiffs. At trial, the Plaintiffs neither pursued nor were successful on the conversion theory. Moreover, the award of \$22,818.65 to the Plaintiffs is not substantially the \$177,195.00 plus all profits requested by the Plaintiffs.

Pursuant to Count II of the amended complaint, the Plaintiffs allege that a contract had been entered into with the Defendants for a net purchase price of \$44,132.00 and sought to recover \$44,100.00 as the balance owing plus interest at 18% per annum. Moreover, the Plaintiffs sought to recover an additional \$2,195.00 under a conversion theory, for a total of \$46,295.00 plus interest in relief sought. In reading the complaint, it is difficult to say what is the central issue of Count II. Although it sounds in contract, it can easily be construed as conversion. For the reasons set forth hereafter, I find that the Plaintiffs did not succeed on the central issue.

Further, I do not find that a recovery of \$22,818.65 is substantially the \$46,295.00 plus interest in relief which was sought by the Plaintiffs in Count II of the amended complaint.

Although allegations of conversion, fraud, and breach of express warranties were asserted in the parties' complaints and at trial, the central issue which was the focus of the litigation was simply a contractual dispute. The central issue is what the parties intended by the contractual language "all existing assets". Although the Plaintiffs by and through counsel persisted in maintaining that "all existing assets" did not include the intangible rights to the software, the Plaintiffs' own testimony at trial indicates that the parties intended "all existing assets" to include these intangible rights. Furthermore, the Plaintiffs' testimony indicates that the agreed upon contract price was \$50,000.00 as contended by the Defendants, not the \$175,000.00 which the Plaintiffs had persisted in demanding from the Defendants. The Defendants were ready, willing and able to pay the 44,100.00 net balance owing to the Plaintiffs under the contract, but the Plaintiffs continued to demand \$175,000.00 until trial. The December 10, 1987, Order makes it clear that "the Plaintiffs' refusal to close and attempts to increase the purchase price constitute a breach of the contract . . . ". It was the Plaintiffs' breach which gave rise to the underlying action and which resulted in an offset in

the contract price in favor of the Defendants in the sum of \$21,281.35. Accordingly, I find that the Defendants have been successful on the central issue. I, therefore, award the Defendants costs in the amount of \$1,261.35.

In addition to costs, the Defendants seek a recovery of attorney's fees under the "bad faith exception" to the general rule that attorney's fees are not allowed under Federal Rule of Civil Procedure 54(d) or in the alternative Federal Rule of Civil Procedure 11. The Defendants cite Gordon v. Heimann, 715 F.2d 531, 539 (11th Cir. 1983) for the proposition that "grounds for such a bad faith award exist when a plaintiff brings a groundless suit and forces the defendant to expend time and effort conducting his defense." Heimann is distinguishable from the instant case in that it involved two purely frivolous RICO actions which were the twenty-second and twenty-third cases filed which stemmed from the same transactions. In this case, the Plaintiffs' law suit was not groundless or purely frivolous. The Plaintiffs did, in fact, manage to recover \$22,818.65 from the Defendants. Accordingly, the Defendants' Motion for Attorney's Fees under the "bad faith exception" is denied.

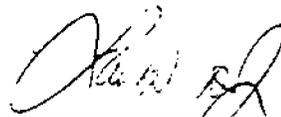
The Defendants contend that they are entitled to attorney's fees under Federal Rule of Civil Procedure 11 for

essentially the same reasons which they asserted under the "bad faith exception" theory. The Defendants' Motion for Attorney's Fees under Federal Rule of Civil Procedure 11 is likewise denied.

O R D E R

Based on the foregoing discussion IT IS THE ORDER OF THIS COURT that:

- 1) Defendants' Motion for Costs is granted, and the Plaintiffs shall pay the Defendants \$1,261.35;
- 2) The Defendants' Motion for Attorney's Fees, pursuant to Federal Rule of Civil Procedure 54(d), Bankruptcy Rule 7054(b) and Federal Rule of Civil Procedure 11, Bankruptcy Rule 9011(a), is denied;
- 3) The Plaintiffs' Motion for Costs, pursuant to Federal Rule of Civil Procedure 54(d) is denied.



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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 10<sup>th</sup> day of August, 1988.