

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

In the matter of:

CONCRETE PRODUCTS, INC.
(Chapter 11 Case 88-20540)

Debtor

CONCRETE PRODUCTS, INC.

Plaintiff

v.

ROOF DECKS, INC.

Defendant

Adversary Proceeding

Number 92-2100

FILED

at 9 O'clock & 09 min AM

Date 12/2/93

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



MEMORANDUM AND ORDER
ON MOTION FOR JUDGMENT ON THE PLEADINGS

Debtor filed a Motion for Judgment on the Pleadings on October 29, 1993. Upon consideration of the parties' motions, briefs and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor filed its Chapter 11 petition on October 3, 1988. On or about January 16, 1990, the Chapter 11 Trustee for the Debtor filed an adversary proceeding against Roof Decks, Inc (hereinafter referred to as "Roof Decks"). *See* Adversary Proceeding No. 90-2003. Roof Decks filed an answer and counterclaim against the Debtor, seeking approximately \$231,246.00 in damages. Pursuant to 28 U.S.C. Section 1409(d), this Court transferred the adversary proceeding to the Western District of North Carolina, where the case still pends as Case No. C-C-90-0219-MU.

Roof Decks alleges in its counterclaim that its damages arose out of Debtor's breach of contract, failure to timely deliver products, failure to deliver products according to requested specifications, and failure to deliver goods of a merchantable quality. Roof Decks claimed that it incurred damages for repair and replacement of faulty work and materials supplied. Roof Decks also claimed that it incurred expenses for supplies, labor, and material as well as increased overhead due to Debtor's poor work performance.

Debtor filed this adversary proceeding on December 16, 1992, seeking a declaratory judgment that any damages awarded on the basis of Roof Decks' counterclaim be classified as a general unsecured claim under 11 U.S.C. Section 502(g). Roof Decks timely answered, asserting that the claims which form the basis

of its counterclaim in the action pending in the Western District of North Carolina arose post-petition and, as such, should be treated as administrative expenses under 11 U.S.C. Section 503.

Debtor's Motion for Judgment on the Pleadings is based upon not only the pleadings in this proceeding, but also upon the pleadings filed in the action pending in the Western District of North Carolina. *See* Motion for Judgment on the Pleadings, at 2. Debtor asserts in its motion that the both sets of pleadings establish that no facts are in dispute, that this Court entered an Order, dated April 20, 1989, stipulating that any contracts not expressly assumed by Debtor within 60 days of the date of the Order would be rejected by operation of law under 11 U.S.C. Section 365, and that Debtor did not assume any of its contracts with Roof Decks. Debtor therefore contends that any claim by Roof Decks based upon these contracts must, as a matter of law, be classified as a general unsecured claim under 11 U.S.C. Sections 365 and 502(g).

In its response to Debtor's motion, Roof Decks contends that, under Bankruptcy Rule 7012(c), the court may not consider the pleadings from the action now pending in the Western District of North Carolina in a Motion for Judgment on the Pleadings. Roof Decks further contends that consideration of such matters would require this court to treat Debtor's motion as a motion for summary judgment, and

adhere to the requirements of Bankruptcy Rule 7056.

CONCLUSIONS OF LAW

Bankruptcy Rule 7012(c) provides:

After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed.R.Bankr.P. 7012(c) (emphasis added). Roof Decks is correct in its assertion that this court may not, in considering Debtor's Motion for Judgment on the Pleadings, examine any matter outside the pleadings in this case, unless the motion is treated as one for summary judgment and dealt with in conformity with Bankruptcy Rule 7056. Thus, the court cannot consider, in ruling on Debtor's motion, the pleadings from Adversary Proceeding No. 90-2003, now pending in the Western District of North Carolina as Case No. C-C-90-0219-MU, without treating the motion as a motion for summary judgment.

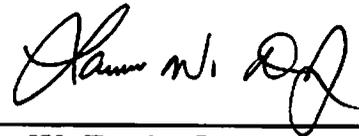
In a motion for judgment on the pleadings, all well-pleaded factual allegations in the non-movant's pleading must be considered as true, and all inferences must be drawn in favor of the non-movant. *See e.g., Viacom Intern. Inc. v. Time Inc.*, 785 F.Supp. 371 (S.D.N.Y. 1992). A court may grant a motion for judgment on the pleadings only if it appears beyond doubt that the non-movant can plead or prove no set of facts in support of its claim which would entitle non-movant to relief, or if the material facts are undisputed and judgement on the merits of the case is possible merely by considering contents of pleadings. *See e.g., Park Center Inc. v. Champion Intern. Corp.*, 804 F.Supp. 294 (S.D.Ala. 1992).

The pleadings in this case, standing alone, do not support Debtor's motion for judgment on the pleadings. Essential elements of Debtor's case are not present in the pleadings. For instance, the pleadings do not reveal whether Debtor rejected its contracts with Roof Decks, an essential element in Debtor's case. Moreover, Roof Decks alleges in its answer that some or all of its claim arose post-petition, therefore entitling it to administrative expense status. This allegation must be taken as true in considering Debtor's motion. Debtor's motion must therefore be denied. However, pursuant to Bankruptcy Rule 7012(c), the court will permit Debtor twenty (20) days from the entry of this order to file a motion for summary judgment, together with any supporting evidence, and an appropriate brief. If such a motion is made, Roof Decks will be permitted twenty (20) days to respond and tender

countervailing evidence. If no motion is timely made the case will be set for trial at the next available date.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Plaintiff's Motion be denied. IT IS FURTHER ORDERED that Plaintiff be given twenty (20) days to file a Motion for Summary Judgment, and that Defendant have twenty (20) days from the filing of said motion to file any response and supporting evidence.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 1st day of December, 1993.