

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Wilkesboro Division**

IN RE:)	Case No. 01-50586
)	Chapter 13
Stephen H. Burleyson)	
)	
Debtor.)	
<hr/>		

ORDER ALLOWING CLAIM OF WALKER WELLS, IN PART

This matter was heard on January 11, 2002 upon the Trustee's objection to the claim of N. Walker Wells("Wells"). Stephen Burleyson, was represented by attorney David R. Badger; Steven G. Tate, the chapter 13 Trustee appeared pro se. Wells was represented by attorney Robert Lindsay.

Based upon the evidence presented and the record before it, this Court does Find and Conclude as follows:

PRIOR PROCEEDINGS

1. The Debtor filed a voluntary chapter 13 petition in this Court on April 6, 2001.

2. Wells was scheduled as a creditor in Burleyson's bankruptcy case and received notice of the filing.

3. The bankruptcy filing intercepted a lawsuit by Wells against Burleyson, pending in the Superior Court for Iredell County, North Carolina., Case No. 00CVS02931.

4. Wells filed a proof of claim in this bankruptcy case, alleging Burleyson owes him an unsecured debt of \$195,000. Wells contends the Debtor breached a contract with him to construct a

dock on Wells' Lake Norman, N.C. property. Additionally, Wells contends the Debtor is guilty of unfair and deceptive trade practices(N.C.G.S. § 75-1.1) such that his damages should be trebled and he should recover his costs and attorney fees.

5. The Trustee objected to Wells' claim in order that the claim might be liquidated. The Debtor joined that objection, and acted as the primary opponent of the claim at hearing. The Debtor denies he breached the parties' agreement, and even if he did, he disagrees with Wells' damages claim. Burleyson also denies committing unfair trade practices. Finally, he asks that Wells' damages be setoff against a slander of title claim in his favor occasioned by Wells' filing a lis pendens against his property.

HELD: The Debtor breached his contract with Wells and is liable to Wells for damages in the amount of \$75,000. The evidence does not support a finding of an unfair trade practice, and no augmentation of Wells' damages, or taxing of attorneys fees is appropriate. Likewise, Burleyson's slander of title claim against Wells fails, and no setoff is allowed.

FINDINGS OF FACT

1. At the outset, the Debtor and Wells were neighbors who owned lots on Lake Norman, North Carolina.

2. Over several years, Burleyson, an engineer, had personally constructed a most impressive preeminent boat dock on his property. This 1,200 square foot dock included diving boards,

undisputed that the Debtor never actually encumbered his property

the record whose recollection is correct. However, it is

7. Burleyson denies saying this, and it is not clear from

and dock would stand good for Wells' job.

that he, Burleyson, owed little on his own property, and his lot

security for the project. According to Wells, the Debtor replied

6. According to Wells, this caused him to ask Burleyson for

with paying in advance of the construction.

area, was agreeable to Burleyson's price but was less comfortable

5. Wells, a well-known commercial real estate broker in this

construction progressed.

payment from Wells of \$15,000 and monthly payments as the

for about \$65,000. To do so, Burleyson would need an advance

of the proposed dock. He told Wells he could build this dock

this information, Burleyson built Wells an elaborate scale model

4. Discussions ensued about size and design. Armed with

business. He informed Wells he could build such a dock for him.

the time and had been thinking of going into the dock building

Burleyson to recommend a contractor. Burleyson was unemployed at

dock. Wanting to build something similar on his lot, Wells asked

3. Wells had been such a guest and had admired Burleyson's

his neighbors and friends.

numbers of people, and Debtor regularly threw parties there for

system and a bath house. The dock was capable of holding large

a bar, sinks, refrigerators, grills, a TV, a microwave, a sound

to secure Wells' job, and it is obvious that Wells with his real estate acumen, was not relying on any such statement as a security interest.

8. Wells decided he could live with the Debtor's arrangement, with one caveat: Wells told Burleyson he needed the dock finished by the end of May, 2000. The Debtor agreed, and on this informal basis, the job began, during the Fall of 1999.

9. It was understood that much of the work would be performed on Burleyson's lot, where his tools were located. In particular, the floating dock was to be constructed at Burleson's place, and then towed over to Wells' lot.

10. Burleyson proved to be better at billing than building. From mid October, 1999 until July, 2000, Burleson billed Wells at least monthly, and collected a total of \$65,000 on the job. On the other hand, construction on the dock lagged behind schedule almost immediately.

11. Within a couple of months, Wells became alarmed, fearing that he was now paying well ahead of the construction. Burleson allayed Wells' fears, telling him that much of his money had been used for materials. Wells was also mollified by the stacks of building materials which he could see at the Debtor's lot.

12. However, as the months passed and the construction continued to lag well behind the level of progress billings, Wells concerns resurfaced. He continued to voice his concerns to

the Debtor, but also continued to pay Burleyson' monthly bills as they were presented.

13. By mid May, 2000, and with his construction deadline looming, Wells had paid the Debtor \$50,000 for a dock that was only about half finished. He knew he was in trouble. His anxiety was only heightened by the fact that Burleson appeared to close to selling his own property.

14. Even before construction began, Burleyson had his lot and pier listed for sale. Initially, Wells wasn't concerned about this, as the debtor's listing price (\$895,000) was in his opinion much too high to garner interest. However, by May, 2000, Burleson had substantially dropped his asking price, and Wells began to worry Burleyson would sell out and disappear.

15. To encourage Burleson to finish, Wells then offered to pay him an extra \$10,000 (for a total of \$75,000) if he could just complete the dock by June, 2000.

16. The Debtor would try--and he did, even if the biggest evidence of his efforts was on the billing side. His progress draws increased in frequency from monthly to biweekly, and then to almost weekly. Wells paid him another \$15,000, for a total of \$65,000. However, now at the end of July, 2000, Burleyson had only completed a part of the dock. While the pilings and framing for the stable(as opposed to the floating) dock and gangway were in, the boardwalk and the elaborate two- story gazebos were still unbuilt.

17. Wells had had enough. He hired an attorney and filed suit in state court on November 11, 2001.

18. Over the previous months, Wells had seen a construction work ongoing at Burleyson's place and had observed building materials piled up at the Debtor's site. Wells now concluded that his money and materials had been used by Burleyson for other purposes, including Burleyson's dock.¹ For this reason, in the state law suit he filed, Wells sought to impose a constructive trust against Burleson's assets. He also filed a Notice of Lis Pendens against Burleyson's real property in the Iredell County public registry.

19. Burleyson was, of course, offended by the suit, but more so by the lis pendens, which he believed was improper and would prevent him from selling his property. He demanded Wells withdraw and remove the notice. Wells refused. Apparently nothing was done in State Court to remove the notice, between filing the suit in November, 2000 and April, 2001 when Burleyson filed his bankruptcy.

20. Burleyson denies he breached his contract or used Wells money for other purposes. He testified he completed work commensurate with the level of payments he received. The problem, he says, was that he greatly underestimated the cost of

¹The evidence presented suggests that only a small amount of these monies were employed for this purpose (at most \$400-500). However, Wells had no way of knowing this at the time he filed the lis pendens.

the dock. While an engineer, Burleson is not a licensed contractor, and the only dock he had built before this one was his own, some ten years before. Burleyson says the cost of building materials had increased dramatically since that time.²

21. According to Burleyson, he had built 60% of Wells' dock and could have completed the job with another \$10,000-15,000. However, he says Wells was unwilling to pay for the overruns.³

22. This contention is not credible. While Burleyson may have underbid the job, it also apparent that he did not do \$65,000 of work on Wells project. The photographs of the completed construction at Wells site suggests much less work than that. In fact, Wells' evidence shows it will cost another \$75,000 to complete the dock, as envisioned by the parties.⁴

23. It also appears likely that not all of Wells' money was used by Burleyson on Well's job itself. A good deal of this appears to have covered Burleyson's living expenses. Burleyson was not otherwise employed during this time, and had no apparent

² At the trial of this matter, the debtor presented evidence suggesting that such a dock would actually cost over \$150,000 to construct. His own dock was valued by John Lancaster, a marine contractor and custom dock builder, at between \$150-200,000.

³ Burleyson thought it would take another \$30,000 to complete the work. Even if this estimate is accepted, it is hard to understand how he intended to complete the job. Burleson says he was ahead on payments by \$10,000-15,000 at the time, so at least this much would have had to be supplied by him.

⁴Burleyson's design would exceed the maximum allowed dock size for Lake Norman docks, so this estimate is for a slightly downsized structure which would meet Duke Energy's restrictions.

income apart from his dock building projects. These projects consisted of Wells' job, a similar project for a neighbor, Howard Reid, (which was also never completed), and a few small undertakings. This lack of income suggests that Wells' payments were funding his subsistence, at least in part.

24. Wells' belief that Burleyson was also using his money to pay for work on his dock and on other jobs was reasonable but not substantiated by the evidence. A minor amount of work (<\$500) was done by the Debtor on his dock during this time, but nothing directly tied this to Well's materials or funds. The same is true of the other jobs Burleyson was performing in this time period. The Court suspects the Debtor was diverting some of this to his other undertakings, but the proof is too weak to find this as a fact.

25. Burleyson testified his lot and dock was worth \$540,000 as of November, 2000. Ultimately, he sold the property in the Summer of 2001, but for only \$473,500. He attributes the lower realized price on his having to sell in bankruptcy, i.e., a forced sale. The bankruptcy he blames on a threatened foreclosure by his mortgage lender. That threat he blames on Wells' lis pendens. Hence, the slander of title claim.

CONCLUSIONS OF LAW

1. Clearly, Wells is entitled to a recovery of Burleyson based upon his failure to complete the dock.

2. First, the Debtor was performing construction services for which a contractor's license was required under N.C.G.S. § 87-1 (2001). Having no such license, the debtor was not entitled to any of the \$65,000 payments which he received from Wells. See *Harrell v. Clarke*, 72 N.C.App. 516, 517, 325 S.E.2d 33, 34 (1985), citing *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E.2d 507 (1968).

3. But even if he were licensed, Burleyson materially breached his agreement with Wells. In the first place, he failed to complete the contract by the deadline date, as extended. Second, Burleyson failed to perform construction of the dock commensurate with the amount of payments he received. And third, while he excuses his failure to complete the dock as his underestimating the costs of construction, this is irrelevant. The Debtor agreed to a set price contract. While it was foreseeable that the construction costs might vary slightly from Burleyson's quote, a deviation of this level--another \$75,000 was outside what was reasonably foreseeable.

4. For these reasons, Burleyson is liable to Wells for his damages and his costs in the state action.⁵

5. Wells' damages are the costs to have a licensed contractor complete the construction, here \$75,000.

6. Although a material breach of contract, this case does not rise to the level of an unfair and deceptive trade practice under N.C.G.S. § 75-1.1 (2001). That provision makes "unfair or deceptive acts or practices in or affecting commerce" unlawful. N.C.G.S. § 75-1.1 (2001).

7. For an act to be "deceptive" as under the statute, it must be so unfair as to "offend established public policy...as well as be immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." See *Opsahl v. Pinehurst Inc.*, 344 S.E.2d 68, 76 (N.C. App. 1986).

8. "[A] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Warfield v. Hicks*, 91 N.C.App. 1, 8, 370 S.E.2d 689, 693, disc. review denied, 323 N.C. 629, 374 S.E.2d 602 (1988) (citations omitted).

9. Ordinarily, breach of contract does not give rise to an unfair trade practice claim, even if the breach was intentional.

⁵Because the current matter is the assertion of a bankruptcy claim by an unsecured creditor, Wells cannot recover his fee costs or post-petition interest. See 11 U.S.C. § 506(b) (2001).

"[I]t is well recognized ... that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1." *Branch Banking and Trust Co. v. Thompson*, 107 N.C.App. 53, 62, 418 S.E.2d 694, 700, disc. review denied, 332 N.C. 482, 421 S.E.2d 350 (1992).

10. Rather, the plaintiff must show "substantial aggravating circumstances attending the breach to recover under the Act, which allows for treble damages." *Id.* It is "unlikely that an independent tort could arise in the course of contractual performance, since those sorts of claims are most appropriately addressed by asking simply whether a party adequately fulfilled its contractual obligations." *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 347 (4th Cir. 1998), citing *Strum v. Exxon Co.*, 15 F.3d 327, 333 (4th Cir. 1994).

11. Seen in this context, this is not a case of unfair trade practices. Burleyson, as Well's neighbor, was hardly in a trade or practice. Rather, he was an amateur, trying to undertake a job for which he was unprepared, both professionally and financially.

12. It also appears that Burleyson intended to perform under his agreement. No doubt, he lived on Wells money during the time of this construction. Being otherwise unemployed, this

was no surprise to Wells. However, apart from this, the record simply doesn't demonstrate fraud, deception or other egregious conduct which might support an unfair trade practice claim.

13. Moreover, in a bankruptcy case, punitive damage provisions, like the trebling function of N.C.G.S. § 75-1.1 (2001), inflate one creditor's claims to the detriment of other, equally worthy creditors. While there are circumstances where such damages are appropriate, a bankruptcy court should be slow to award punitive damages to a bankruptcy claimant, lest it do harm to other unpaid creditors or interfere with the debtor's fresh start. See *In re Garey*, 258 B.R. 356, (Bankr. E.D.Va. 2000); *In re AM Intern, Inc.*, 46 B.R. 566, (Bankr. Tenn. 1985); *In re Siegert Properties, Inc.*, 2001 WL 1699671 not yet reported in B.R., (Bankr. M.D.N.C. 2001). In this case, trebling Wells damages would be overkill.

14. As for Burleyson's setoff claim, no allowance is made for this either. Certainly, Wells' lis pendens was legally improper under N.C.G.S. § 1-116 (2001) et seq.. Absent a foreclosure or attachment order, a lis pendens may be filed only where a legitimate interest in real property lies. See *Pegram v. Tomrich Corp.*, 4 N.C.App. 413, 166 S.E.2d 849 (1969).

15. An action to impose a constructive trust on property is not such an interest, and lis pendens may not be employed for this purpose. See *Zinn v. Walker*, 87 N.C.App. 325, 337, 361

S.E.2d 314, 321 (1987); *Pegram v. Tomrich Corp.*, 4 N.C.App. 413, 166 S.E.2d 849 (1969).

16. However, the fact that the lis pendens was not properly filed does not automatically mean that Burleyson has a claim against Wells for slander of title.

17. Slander of title occurs when one publishes matter derogatory to the title to real property with the malicious intent to injure the owner thereof and which in fact does cause injury. *Cardon v. McConnell*, 120 N.C. 461, 27 S.E. 109 (1897). In North Carolina one " . . . who wantonly, maliciously, (and) without cause, commences a civil action, and puts upon record a complaint and lis pendens, for the purpose of injuring and destroying the credit and business of another, whereby that other suffers damage, must be liable for the legal consequences." *Whyburn v. Norwood*, 47 N.C.App. 310, 315, 267 S.E.2d 374, 377 (1980) (citing *Estates v. Bank*, 171 N.C. 579, 88 S.E. 783 (1916)).

18. This Court views Wells' actions in this regard as being legally incorrect, but not malicious. No doubt, Wells and his attorney hoped that the lis pendens would help Wells in his action. In this sense, all persons who file these notices are alike.

19. However, it appears that Wells believed that his monies had been used to enhance Burleyson's property and on other work performed at his site. While not ultimately proven in this

hearing, this was a reasonable belief at the time. Wells knew Burleyson was trying hard to sell his property, and feared he might abscond. This too was reasonable fear under the circumstances. Finally, Wells had endured numerous promises by Burleyson which promises were invariably not met. Seen from his perspective, Wells' filing a lis pendens notice appears to be a protective, and not a malicious act.

20. Moreover, the evidence does not prove by a preponderance that Burleyson was damaged by this act.

21. In the *Whyburn* case, the Plaintiffs' contentions that they were less successful in marketing their property due to an improperly filed notice of lis pendens were deemed too inconclusive to support a slander of title claim. This is the case in this action.

22. Would Burleyson have been able to sell his land earlier and/or received more for it, absent the lis pendens? One cannot tell. This was a highly unusual and not a particularly liquid property. Not everyone has a need for a 1200 square foot dock capable of holding 250 partygoers. Not everyone wants to buy an undeveloped lot with such an extravagant pier. Nor are there that many buyers in this area for \$540,000 undeveloped lake lots, especially in the Winter when this lis pendens was of record. Whether the Debtor could have sold the lot earlier, absent the lis pendens, is conjecture.

23. Could he have gotten more for it outside of bankruptcy? Again, this is only a guess. The only evidence of value of this property was Burleyson's unsupported testimony that the property had a fair market value of \$540,000. With unique properties like this, valuation is not precise. Witness the fact that Burleyson had previously been asking \$890,000 for the same property. One cannot gainsay he could have gotten more absent the lis pendens.

24. It is also not axiomatic that bankruptcy sales return less than fair market value. Sometimes they do, but certainly not always. Witness sales held in this district in the bankruptcy cases of The Pinnacle Group (furniture) or Stephen Walsh (Charlotte Hornets season ticket rights). Sometimes bankruptcy sales return far more than market value. One cannot tell whether the Debtor got less than market value or if he did, why.

25. Finally, this record is too weak to support Burleyson's contention that the lis pendens caused his lender to initiate foreclosure proceedings and caused him to file bankruptcy. Possibly a lack of a job and an ability to make mortgage payments may have had an effect as well.

26. In sum, the slander of title claim fails for lack of maliciousness and proof of damages occasioned by the filing of the lis pendens.

It is THEREFORE ORDERED:

1. Trustee's Objection to the claim of N. Walker Wells is SUSTAINED IN PART; AND IS OVERRULED IN PART.

2. By virtue of Burleyson's breach of the construction agreement, Wells is allowed an unsecured claim in the Debtor's bankruptcy case of \$75,000.

3. Burleyson's setoff request is DENIED.

SO ORDERED.

This the 6th day of February, 2002.


United States Bankruptcy Judge