

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

Case No. 6:06-bk-00223-ABB
Chapter 11

IGC ROOFING, INC.

Debtor.

ORDER

This matter came before the Court on the Request of Creditor McCree General Contractors, Inc. for Allowance and Payment of Administrative Expense (“Request”)¹ filed by McCree General Contractors, Inc. (“McCree”), against IGC Roofing, Inc., the Debtor herein (the “Debtor”) and the Debtor’s Emergency Motion for Turnover of Funds from McCree General Contractors, Inc. and Certificate of Necessity of Request for Emergency Hearing (“Emergency Motion”)² filed by the Debtor against McCree. McCree asserts an administrative claim in the amount of \$10,330.35.³ The Debtor seeks turnover of funds owed by McCree in the amount of \$13,326.65. The Debtor’s turnover action requires to be filed as an adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7001. The Debtor’s Emergency Motion will be treated as an objection to McCree’s administrative claim. An evidentiary hearing was held on December 21, 2006 at which counsel for the Debtor and McCree and a representative of each party appeared. The Court makes the following Findings of Fact and Conclusions of Law after reviewing the pleadings and evidence, hearing live testimony and argument, and being otherwise fully advised in the premises.

FINDINGS OF FACT

The Debtor filed this Chapter 11 case on February 14, 2006 (“Petition Date”) and is a Debtor-in-Possession.⁴ The Debtor and McCree entered into three executory subcontracts for roofing projects: (1) Shiloh Baptist Church; (2) Vista Lakes; and (3) Tire Kingdom,

collectively (the “Contract”). The authenticity and executory nature of the Contract is undisputed.

CertainTeed Corporation (“CertainTeed”) was required pursuant to Court Order entered on August 15, 2006⁵ to issue, within ten days of its entry, fifteen-year NDL Golden Star Warrantees (“Golden Star Warrantees”) on several subcontracts with the Debtor, including the Shiloh Baptist Church and the Vista Lakes subcontracts.⁶ CertainTeed did not issue the Golden Star Warrantees on the Shiloh Baptist Church subcontract, and, as a result, the Debtor rejected the Shiloh Baptist Church subcontract, and McCree did not pay the remaining balance of \$13,326.65 owed on the Vista Lakes subcontract.

The Debtor subsequently ceased performance on the Tire Kingdom project. The Tire Kingdom project was a \$36,225.00 subcontract.⁷ The Debtor had supplied and delivered shingles to the site, and a change-order was issued where McCree paid for the shingles at a discounted price of \$7,871.00, reducing the subcontract price to \$28,354.00.⁸ The Debtor breached the Tire Kingdom subcontract due to McCree’s slow payment on the Vista Lakes project. McCree hired a third party, Roof Top, at an increased price to perform the Tire Kingdom project. McCree did not accept competitive bids due to the urgency of completing the project.

Roof Top initially subcontracted to install the shingles for \$18,600.00.⁹ McCree and Roof Top executed two change orders for Roof Top to purchase and install metal roofing for \$27,111.29 and to purchase and install gutters for \$3,600.00. The final subcontract for the Tire Kingdom project was \$49,311.29.¹⁰

McCree is entitled to a twenty percent (20%) premium of \$5,670.80 on the Tire Kingdom subcontract price of \$28,354.00 due to the Debtor’s breach of the subcontract and the repercussions of seeking immediate replacement. The premium is reasonable considering the untimely circumstances of the Debtor’s actions. The Debtor is permitted a ten-percent (10%) credit for supplying McCree with the shingles used in the Tire Kingdom project based upon McCree being able to purchase the supplies at the Debtor’s discount. McCree paid \$7,871.00 for the shingles, and the Debtor is entitled to a \$787.10 credit.

¹ Doc. No. 283.

² Doc. No. 305.

³ McCree sought in its Request \$20,957.00 in damages for the breach of the Tire Kingdom project with a right to setoff \$10,626.65, a debt owed the Debtor on the Vista Lakes project, thus being entitled to \$10,330.35. The actual balance owed the Debtor is \$13,326.65 instead of \$10,626.65.

⁴ Doc. No. 7.

⁵ Doc. No. 209: Order Granting Debtor’s Motion to Assume Executory Contract With CertainTeed Corporation and To Compel Performance On Golden Star Warrantees.

⁶ McCree’s Exh. Nos. 1 and 3; Debtor’s Exh. No. 1.

⁷ McCree’s Exh. No. 4; Debtor’s Exh. No. 7.

⁸ McCree’s Exh. No. 5.

⁹ McCree’s Exh. No. 6.

¹⁰ McCree’s Exh. Nos. 7 and 8.

McCree's administrative claim is disallowed to the extent the amount McCree is seeking exceeds the reasonable and necessary amount to complete the subcontract. McCree is entitled to an administrative claim of \$4,883.70, McCree's premium of \$5,670.80 minus the Debtor's credit of \$787.10. McCree is entitled to setoff its allowed administrative claim against the \$13,326.65 balance owed the Debtor. The Debtor is awarded \$8,442.95 for the remaining balance due on the Vista Lakes project.

CONCLUSIONS OF LAW

The issue for determination is whether McCree is entitled to its administrative claim with a right of setoff due to the Debtor's breach of contract.

"The rule has been frequently stated in this jurisdiction that the measure of damages in a suit by a contractor against an owner for breach of contract when the contract has not been fully completed is either quantum meruit or the contractor's lost profit together with the reasonable cost of labor and materials incurred in good faith in the partial performance of the contract." Poinsettia Dairy Prod. v. Wessel Co., 123 Fla. 120, 166 So. 306 (Fla. 1936); Fidelity & Deposit Co. of Maryland v. Accel, Inc., 354 So.2d 424, 426 (Fla. App. 1978); D.D. Jackson v. Riley, 427 So.2d 255 (Fla. 5th D.C.A. 1983); Perry v. O.S.B. Const. Inc., 430 So.2d 985 (Fla. 3rd D.C.A. 1983). "Plaintiff must allege and prove not only the breach of the contract, but also such other essential matters of fact as are necessary to show that plaintiff has sustained actual damages by such breach." Poinsettia Dairy Prod., 123 Fla. at 129, 166 So. at 309.

The Debtor ceased performance on the Tire Kingdom project, breaching the subcontract with McCree. McCree was compelled to find immediate replacement to perform the Tire Kingdom subcontract and did not have time to accept competitive bids due to the urgency of finding a replacement. McCree is entitled to a twenty-percent (20%) premium of \$5,670.80 on their \$28,354.00 subcontract price. An allowed administrative claim must consist of the actual, necessary and reasonable costs and expenses of preserving the estate. In re Subscription Television of Greater Atlanta, 789 F.2d 1530, 1532 (11th Cir. 1986). This premium is reasonable considering the ramifications caused by the Debtor's breach.

The Debtor is entitled to a ten-percent (10%) credit for supplying and delivering shingles to McCree at its discounted price for the Tire Kingdom Project. The shingles costs \$7,871.00, entitling the Debtor to a \$787.10 credit.

McCree is entitled to setoff its allowed administrative claim against the \$13,326.65 balance owed the Debtor. The Bankruptcy Code preserves this right of setoff because: (i) McCree has a valid right of setoff pursuant to common and statutory law; (ii) McCree and the Debtors owe each other post-petition debts; and (iii) the debts are mutual—they are between the same parties and are due and owing in the same capacity. 11 U.S.C. § 553. Both transactions giving rise to the setoff must either have occurred prepetition or both must have occurred post-petition. In re SunCruz Casinos, LLC, 342 B.R. 370, 379 (Bankr. S.D. Fla. 2006).

The Debtor's objection to the administrative claim is sustained. McCree's administrative claim is disallowed to the extent the amount McCree is seeking exceeds the reasonable and necessary amount. McCree is allowed an administrative claim of \$4,883.70 after reduction for the Debtor's credit of \$787.10 from McCree's premium of \$5,670.80. McCree owes the Debtor \$8,442.95 for the remaining balance on the Vista Lakes project after setoff.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Debtor's objection to McCree General Contractor, Inc.'s administrative claim is **SUSTAINED** and McCree's administrative claim is allowed in the amount of \$4,883.70; and it is further

ORDERED, ADJUDGED and DECREED that after setoff of McCree General Contractor, Inc.'s administrative claim, McCree General Contractor, Inc. owes the Debtor \$8,442.95.

Dated this 29th day of December, 2006.

/s/Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge