

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

In re:

CASE NO.: 04-05589-BKC-3F7  
CHAPTER 7

FOLEY & ASSOCIATES  
CONSTRUCTION CO., INC.,

Debtor.

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**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

This case came before the Court upon the Trustee's, Gordon P. Jones, (the "Trustee") Objection to Claims 107, 118, 119, and 121 ("Objection") and Response to Trustee's Objection ("Response") filed by creditor Skanska USA Building, Inc. ("Skanska"). The Court conducted a trial on June 21, 2007 (the "Trial"). The Trustee and Skanska presented evidence in the form of testimony and exhibits at the Trial. The Court then took the matter under advisement and directed the parties to submit memoranda in support of their respective positions. The Trustee and Skanska both submitted memoranda supporting their arguments. Upon the evidence presented and the arguments of the parties, the Court makes the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

Foley & Associates Construction Co., Inc. ("Foley") is the debtor in this case. Foley was a concrete subcontractor for major construction projects, and entered into a subcontract agreement on March 27, 2003 with Skanska, a general contractor, to provide concrete work on the construction of the new Mainland High School in Daytona Beach, Florida (the "Project"). (Skanska's Ex. 2.) The Project consisted of seven individual buildings constructed primarily of concrete, and included concrete walkways, a concrete amphitheater, concrete planter-walls and concrete dumpster enclosures. According to Foley's construction schedule, Foley was to begin its work on June 1, 2003 and complete its progress on September 20, 2004. (Skanska's Ex. 4.) Due to financial problems, however, Foley shut down its business and ceased work on the Project on May 14, 2004. Skanska then self-completed Foley's scope of work. Foley filed for Chapter 7 relief on May 28, 2004. Skanska filed a proof of claim, to

which the Trustee objected, forming the underlying basis of this dispute.

**CONCLUSIONS OF LAW**

A proof of claim, according to Rule 3001(f) of the Federal Rules of Bankruptcy Procedure, if executed and filed in accordance with the Bankruptcy Code, is "prima facie evidence of the validity and the amount of the claim." Fed. R. Bankr. P. 3004(f) (2004). If a party in interest objects a proof of claim, then the burden:

shifts to the objecting party to produce evidence at least equal in probative force to that offered by the proof of claim and which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. This can be done by the objecting party producing specific and detailed allegations that place the claim into dispute, by the presentation of legal arguments based upon the contents of the claim and its supporting documents . . . in which evidence is presented to bring the validity of the claim into question. If the objecting party meets these evidentiary requirements, then the burden of going forward with the evidence shifts back to the claimant to sustain its ultimate burden of persuasion to establish the validity and amount of the claim by a preponderance of the evidence.

In re Taylor, 363 B.R. 303, 309 (Bankr. M.D. Fla. 2007) (quoting In re Armstrong, 320 B.R. 97, 104 (2005) (citing In re Rally Ptnrs., L.P., 306 B.R. 165, 168-169 (Bankr. E.D. Tex. 2003)). Therefore, in the case before the Court, the Trustee must present evidence "equal in force to the prima facie case." In re Allegheny Int'l, Inc., 954 F.2d 167, 173 (3rd Cir. 1992) (citations omitted). If the Trustee presents such evidence, then the burden shifts back to Skanska to prove the validity and amount of its claim by a preponderance of the evidence.

The Court finds that the Trustee failed to meet his burden as to the validity and the majority of the amount claimed by Skanska. In satisfying the requirements of Rule 3001(f), Skanska provided a thoroughly detailed summary of its damages through June 30, 2006. (Skanska's Ex. 26.) This constituted prima facie evidence of the claim's legal sufficiency. To refute this evidence, the Trustee proffered testimony from two former Foley employees who left the Project prior to its completion. They testified as

to what the ordinary course of dealing had been between Foley and Skanska, with respect to monthly progress payments and payment applications, which included completion percentages for the scope of the Project. (Tr. at 13-31, 53-62.)

During cross-examination, however, both witnesses for the Trustee admitted that they had no knowledge of what transpired *after* Foley defaulted and ceased operations. (Tr. at 34, 50-51, 64.) Moreover, Skanska further substantiated its claim by providing evidence in the form of testimony from Dan Weathington ("Weathington"), one of Skanska's structural superintendents on the Project from its commencement until March 2005. (Tr. at 75-76.) Weathington thoroughly elaborated on each building of the Project what had not been fully completed, to what extent it had been completed, and what had to be repaired from Foley's work to bring it up to code. (Tr. at 83-100.) The Trustee could not refute with evidence *equal in force to the prima facie case* the validity or amounts claimed by Skanska, with exception of the \$8,000.00 worth of equipment (a pump) that Skanska purchased from the estate and then lost. (Tr. at 165.) The Trustee provides creative legal rhetoric and speculation, but these simply are not weighty enough to overcome the legal sufficiency of Skanska's claim. As a result, the Trustee failed in carrying his burden of proving that Skanska is not entitled to the full amount of its claim, less \$8,000.00.

### **CONCLUSION**

Based upon the foregoing, the Court finds that Skanska filed a valid proof of claim, which constituted prima facie evidence of its validity and amount. The burden then shifted to the Trustee to prove that Skanska's claim was not valid, or that Skanska was not entitled to the claim in its entirety. The Trustee did not provide evidence at least equal in probative force to that offered by the proof of claim to refute the legal sufficiency of Skanska's claim, with the exception of \$8,000.00. Therefore, the Court will award Skanska its full proof of claim, less \$8,000.00. The Court will enter a separate order in accordance with these Findings of Fact and Conclusions of Law.

**DATED** this 9 day of August, 2007 in Jacksonville, Florida.

/s/ Jerry A. Funk

**JERRY A. FUNK**

United States Bankruptcy Judge

### **Copies furnished to:**

Ronald Bergwerk, Esq., Attorney for the Trustee  
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