

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)

CENTRAL TRANSFER AND)
DISTRIBUTION COMPANY,)

DEBTOR)

CASE NO. BK82-1704

(Affirmed 87:336

MEMORANDUM OPINION

This matter came on for hearing on January 21, 1987, on the objection of Tri-County Bank & Trust Company to the claim filed in this proceeding by Timmons Building Service, Inc. Appearing for Tri-County Bank & Trust Company were Jerrold L. Strasheim and Mary Swick of Baird, Holm, McEachen, Hamann & Strasheim, Omaha, Nebraska. Appearing for Timmons Building Service, Inc., was Larry R. Foreman of Schmid, Mooney & Frederick of Omaha, Nebraska.

Facts

The debtor filed its petition for relief under 11 U.S.C. Chapter 11 on September 29, 1982. On the same day, Central Storage and Van also filed a Chapter 11 petition in this Court. Central Transfer and Distribution Company ("Central Transfer") and Central Storage and Van ("Central Storage") are separate corporations which, prior to their filing of Chapter 11 petitions, both operated out of premises at 828 So. 17th Street, Omaha, Nebraska.

On September 24, 1981, Central Storage entered into a contract with Timmons Building Service, Inc., ("Timmons"). Mr. Jay Smiley signed the contract for Central Storage and Mr. Jerry Timmons signed the contract on behalf of Timmons Building Service, Inc. Under the terms of the contract, Timmons agreed to construct for Central Storage a Star building for the price of \$157,467. A later change in order increased the price to \$161,396.81. Central Transfer, the debtor herein, was not a party to the contract.

Construction on the building began, and as it progressed, Timmons sent invoices to Central Storage for performance that had been rendered. No invoices were sent to Central Transfer. The invoices were paid by Central Storage. The building was substantially completed in April of 1982. Some painting remained, which was completed in May of 1982. Shortly after the completion of the building, Jerry Timmons met with Jay Smiley. At that time, Mr. Smiley told Mr. Timmons that, due to financial difficulties of

Central Storage, no further payments would be forthcoming. Mr. Timmons then had a title search made on the real estate on which the Star building had been built. When he received the results of the title search, he learned that the real estate on which the building had been built under contract with Central Storage was owned by Central Transfer and not by Central Storage. Mr. Timmons then filed a mechanic's lien against Central Storage but on the real estate owned by Central Transfer. The mechanic's lien, which was signed by Jerry Timmons, states that Central Transfer was the owner of the said premises and that Central Storage was the contractor on said building and acting for the owner. (See Defendant's Exhibit 13).

On September 29, 1981, Timmons filed a suit to foreclose its mechanic's lien in the District Court of Douglas County, Nebraska, naming both Central Storage and Central Transfer as defendants. When the Chapter 11 petitions filed by the two corporations effected a stay of the foreclosure suit, Timmons filed a separate proof of claim in the Chapter 11 case of each corporation.

In his deposition, Jerry Timmons testified that he believed that Central Transfer and Distribution Company and Central Storage and Van Company were one and the same. However, he also testified that, on all documents relative to the contract to build the Star building, Central Storage was listed as the contracting party. In fact, Mr. Timmons testified in his deposition that the contract in connection with the building was between Timmons and Central Storage. (See Plaintiff's Exhibit 27). Timmons contends that its claim against the debtor herein in the amount of \$54,708.39 plus interest, costs and attorneys' fees should be allowed because Central Storage was acting as an agent for Central Transfer. Tri-County Bank and Trust Company, Inc., as the major unsecured creditor of the debtor, has objected to the claim of Timmons, alleging that there was no agency relationship between Central Storage and Central Transfer, and further, that if there were a valid contract between Central Transfer and Timmons, the mechanic's lien would be invalid because it was not timely filed.

Issues

1. Was Central Storage acting as an agent for Central Transfer, thus effecting a contract between Central Transfer and Timmons?
2. If a contract did exist between Central Transfer and Timmons, is the mechanic's lien filed against Central Transfer by Timmons nevertheless invalid because it was untimely filed?

Decision

Central Transfer and Distribution, the debtor herein, and Central Storage and Van are separate entities. The evidence presented does not support a finding that Central Storage was

acting as an agent for Central Transfer when it contracted for the building. Therefore, there is no contract between Central Transfer and Timmons, and the mechanic's lien filed by Timmons against the property of Central Transfer is invalid. The bank's objection to the claim of Timmons Building Service, Inc., should be and is sustained.

Discussion

Section 52-101 of the former Mechanic's Lien Act (which was in effect when the contract in the instant case was made) provides in pertinent part as follows:

"Any person who shall perform any labor or furnish any material, machinery, or fixtures. . .by virtue of an open running account or a contract or agreement, express or implied, with the owner thereof or his agent, shall have a lien to secure the payment of the same upon such house, mill, well, cistern, manufactory, building, or appurtenance and the lots of land on which the same shall stand or the work is performed, and such lien shall include the rental value of any equipment furnished." Nebraska Revised Statutes (Reissue 1974).

Timmons has argued that Central Storage was acting as an agent for Central Transfer at the time the contract was made between Mr. Smiley and Mr. Timmons. In support of that proposition, Timmons has cited numerous cases which put forth various theories such as implied agency, assent with knowledge, ratification, estoppel, and other related theories. However, after reviewing the case law presented by Timmons, as well as the depositions of Jerry L. Timmons and Norma Watts, who was a director of Central Transfer at the time of the contract in question, this Court remains unconvinced that there has been sufficient evidence presented to support a finding that there was some kind of agency relationship between the two corporations. The fact that Central Transfer and Central Storage operated out of the same building and had some of the same directors and shareholders does not indicate that they necessarily were one and the same entity. Jerry Timmons himself has stated that the contract was between Central Storage and Timmons. This Court can find no evidence that Central Storage was acting for Central Transfer, and, therefore, the contract was between Central Storage and Timmons, not between Central Transfer and Timmons. As there was no contract, the mechanic's lien filed by Timmons against Central Transfer is invalid.

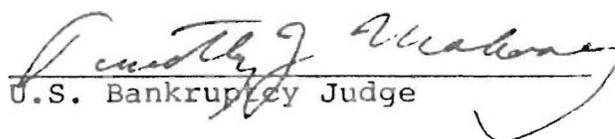
Having found that no contract existed between Central Transfer and Timmons, it is unnecessary to reach the question of whether or not the lien was timely filed.

This memorandum opinion shall constitute findings of fact and conclusions of law required by FRCP 52 and Bankruptcy Rule 7052.

Separate Journal Entry shall be filed.

DATED: March 31, 1987.

BY THE COURT:


U.S. Bankruptcy Judge

Copies mailed to:

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