

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

STEVENS STEEL STRUCTURES, INC.,

DEBTOR

STEVENS STEEL STRUCTURES, INC.,

Plaintiff

vs.

W. R. GRACE & CO., d/b/a  
WALNUT GROVE PRODUCTS,

Defendant

CASE NO. BK81-1858

A81-642

MEMORANDUM

Plaintiff brought this adversary proceeding to recover from W. R. Grace & Co., defendant, the sum of \$6,184.97 which represents the balance plaintiff believes is due on a contract. W. R. Grace & Co. counterclaimed for damages from what it asserts is a breach of the same contract.

Through the efforts of counsel, the issues are simple and the evidence refined.

The order on pretrial conference contains the uncontroverted facts of this litigation and I incorporate them by reference. In summary, the plaintiff asserts that it entered into a contract with the defendant whereby plaintiff agreed to demolish and remove a building and erect a replacement building. Plaintiff asserts the contractual provision was a cost plus ten percent contract. W. R. Grace disputes this and alleges that the contract was for a fixed sum of \$10,000. Plaintiff has received the \$10,000 and seeks the sum of \$6,184.97 as the amount it believes is due under the cost plus ten percent contract.

In this regard, plaintiff bears the burden of establishing facts sufficient to persuade the trier of fact that the contract was cost plus ten percent. This its evidence fails to do. The evidence offered by plaintiff could be interpreted to be compatible with that type of contract but is unpersuasive to persuade the Court, as trier of fact, that the contractual basis was cost plus ten percent. The result of the foregoing is that defendant is entitled to judgment in

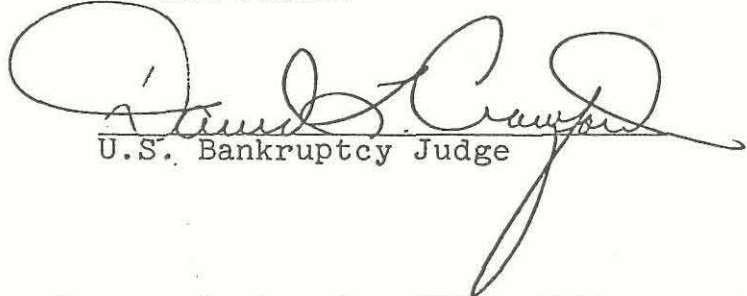
its favor on plaintiff's complaint.

W. R. Grace & Co. asserts a counterclaim by virtue of asserted damages which it sustained as a result of the plaintiff's failure to complete the demolition and erection of the new building within a period of time which would enable W. R. Grace & Co. to continue the operation of a conveyor belt operation. With regard to defendant's counterclaim, the evidence is unpersuasive that there was any term of the plaintiff's contract which established any protection of the continued operation of the conveyor belt sufficient to constitute a breach of the contract. While the evidence may disclose an awareness of the defendant's desire to continue the conveyor belt operation, the evidence is unpersuasive that that discussion became a part of the contract between the parties. The result of the foregoing is that plaintiff is entitled to judgment on the counterclaim of the defendant.

A separate judgment is entered in accordance with the foregoing.

DATED: August 23, 1982.

BY THE COURT:



U.S. Bankruptcy Judge

Copies to:

Eric Wood, Attorney, 810 Woodmen Tower, Omaha, Ne. 68102-2099

William R. Hadley, Attorney, 1000 Commercial Federal Tower, Omaha, Ne. 68124