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ADV. NUMBER: None

JUDGE: M. A. Mahoney

PARTIES: Billy Edward Danford, Jerry Lyons

CHAPTER: 13

ATTORNEYS: F. V. Anderson, L. Williams

DATE: 3/25/97

KEY WORDS:

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ALABAMA

In Re

BILLY EDWARD DANFORD

Case No. 96-11749

Debtor.

ORDER

Frank V. Anderson, Mobile, Alabama, for Billy Danford.  
Lionel C. Williams, Mobile, Alabama, for Jerry Lyons.

This matter is before the Court on Billy Danford's objection to the claim of Jerry Lyons. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court finds that Jerry Lyons' claim is allowed as an unsecured claim in the amount of \$5,200.

FACTS

Billy Danford and Jerry Lyons were involved in a dispute concerning the restoration of Lyons' property. The dispute led to the filing of the case styled *Lyons v. Delta Sun Contracting, Inc., et al.*, CV 93-1672 in the Circuit Court of Mobile County, Alabama. Four defendants were named in the case: Delta Sun Contracting, Inc. (Delta Sun), Glenn Sumlin, Indiana Lumbermens Mutual Insurance Company (Lumbermens), and the debtor, Billy Danford. On October 17, 1994, Lyons dismissed Lumbermens as a defendant. On October 25, 1994, Danford and Lyons entered into a settlement in open court. A default judgment was entered against Delta Sun and Glenn Sumlin. The agreement between Danford and Lyons was dictated into the Circuit Court's record. The record reflects the following exchange:

THE COURT: Now, sir, I understand that you have entered into an agreement with

Mr. Tyson's client; is that correct, sir?

MR. PARKER: Mr. Danford.

MR. LYONS: Mr. Danford?

THE COURT: Right.

MR. LYONS: Yes, sir.

THE COURT: For the record, Mr. Danford is in court and he is represented by his attorney, Mr. Tyson. All right. Mr. Tyson, would you put in the record the sum and substance of the agreement between your client and Mr. Lyons.

MR. TYSON: Yes, sir. Mr. Danford has agreed to supervise the restoration of Mr. Lyons' property. Mr. Danford will obtain the necessary dirt to fill in the holes. That is specifically contingent upon his getting permission from another landowner to build a lake. And all of which we've fully discussed with Mr. Parker and Mr. Lyons. Mr. Lyons is then to supply the equipment necessary to do the job, along with the operators for the equipment. Included in the equipment will have to be a backhoe, a bulldozer - how many dump trucks?

MR. LYONS: About five.

MR. TYSON: Maybe five dump trucks. Will a lowboy be necessary?

MR. LYONS: No.

MR. TYSON: All right. A lowboy is not necessary. Is that all the equipment?

MR. LYONS: I think so.

MR. TYSON: In any event, we have a cooperative arrangement between Mr. Lyons and Mr. Danford where both of them contribute to the restoration of the property.

THE COURT: All right. Mr. Parker, is that the sum and substance of the agreement as you understand it?

MR. PARKER: Yes sir.

The agreement also stipulated that the restoration would be carried out by December 9, 1994.

On August 9, 1995, the Court signed an order requiring that the parties comply with the settlement agreement. Subsequently, Danford filed a Motion to Dismiss for non-compliance with the August 9 Order. The Court granted Danford's motion; however, on Lyons' Motion to Reconsider, the dismissal was set aside by order dated November 10, 1995. The November 10 Order mandated that the parties comply with the settlement agreement by November 27, 1995. Danford filed a Motion to Reconsider, which was granted on December 8, but only to the extent that the compliance deadline was extended to January 1, 1996.

On December 28, Danford filed a Motion for Clarification and Extension of Time. A status

conference was held February 29, 1996. On March 11 the Circuit Court ordered the following:

Therefore, this Court ORDERS for the final time that the settlement agreement which the parties negotiated, accepted, and entered into on October 25, 1994, nearly eighteen months ago, be complied with by the parties. This Court finds as a matter of common sense that the Defendant, Billy Danford, in agreeing to “provide” the dirt, is obligated to provide the equipment to remove it from the ground. Mr. Danford is ORDERED to provide not only the dirt, but is also ORDERED to provide the equipment to remove the dirt from the ground and load it onto trucks provided by the Plaintiff. Plaintiff’s trucks are ORDERED to transport that dirt to the plaintiff’s property, where the Plaintiff is ORDERED to provide the equipment necessary to do the job under Defendant Danford’s supervision, all as per the October, 1994 agreement.

Both sides shall strictly comply with this ORDER no later than five o’clock on Friday, April 12, 1996. . . .

On April 5, Danford requested that the Circuit Court vacate or set aside the March 11 Order. The Circuit Court denied Danford’s motion on April 25. On May 13, 1996, Danford filed Chapter 13. Lyons sought a contempt order from the Circuit Court based on Danford’s alleged failure to comply with the March 11 Order. By order dated August 20, 1996, Circuit Court Judge Chris Galanos found Danford in contempt of the March 11 Order. On August 21, Danford filed a motion in this bankruptcy proceeding alleging that Lyons and his state court attorney, John Parker, had willfully violated the automatic stay by continuing the Circuit Court action. Lyons and Parker filed a response to the motion on August 29. The matter came before this Court on December 13, 1996. The Court found that Jerry Lyons had not willfully violated the automatic stay, and the complaint against him was dismissed on the merits. The Court found that John Parker had willfully violated the automatic stay, but damages were not assessed.

Lyons failed to file a claim prior to the bar date of September 25, 1996. On November 27, Lyons filed a “Motion to Establish Informal Proof of Claim and Permissible Amendment Thereto, or, in the Alternative, to Allow Late-Filed Proof of Claim.” Danford objected to the motion. The

matter was heard and the Court granted Lyons' motion. The "Response to Motion for Relief from Willful Violation of the Automatic Stay" filed by Lyons on August 29 was allowed as a timely-filed, amendable, informal proof of claim. The Court, however, made no finding, as to what amount, if any, would be accorded to the claim or any amendment thereto.

Danford and Lyons disagree as to what amount should be accorded to the claim. Lyons' filed claim is based upon the March 11 Order. Lyons alleges that he is entitled to an equitable remedy for the specific performance delineated in the March 11 Order. His claim was initially filed for \$67,800. The claim was later amended to \$27,000. Danford contends that the March 11 Order is incorrect, in that he never agreed to perform all of the specified actions. In addition, Danford objects to Lyons' claim on the ground of fraud. Lyons received \$50,000 from Lumbermens. Therefore, Danford alleges that Lyons is prohibited from collecting any amount from him.

#### LAW

The settlement reached by Danford and Lyons was dictated into the Circuit Court's record. Judge Galanos issued subsequent orders in an attempt to enforce the settlement. After Judge Galanos entered his denial of the motion to vacate or set aside his March 11 Order, but prior to the expiration of the appeals time<sup>1</sup>, Danford filed Chapter 13. The filing of Chapter 13 tolled the appeals time; however, the automatic stay provision of the Bankruptcy Code prevented Danford from going forward with an appeal. 11 U.S.C. § 362(a)(1). *Teachers Ins. & Annuity Ass'n of America v. Butler*, 803 F.2d 61, 65 (2d Cir. 1986); see also *Assoc. of St. Croix Condominium Owners*

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<sup>1</sup>Alabama Rules of Appellate Procedure require that a notice of appeal be filed within 42 days of the date of entry in the civil docket of an order granting or denying a post-judgment motion. ALA. R. APP. P. 4. An appeal in the state court case could have been filed within 42 days of the docket entry of Judge Galanos' April 25 denial of Danford's motion to vacate or set aside the March 11 Order.

*v. St. Croix Hotel*, 682 F.2d 446, 449 (3d Cir. 1982), cited with approval in *Ellison v. Northwest Engineering Co.*, 707 F.2d 1310, 1311 (11th Cir. 1983). Danford could have petitioned the Court to lift the automatic stay so that he could proceed with a state court appeal. He did not. Lyons could have petitioned the Court to lift the automatic stay so that he could continue to prosecute<sup>2</sup> and / or liquidate his claims against Danford in state court. He did not. Therefore, it is appropriate for the Court to resolve the matter by determining what dollar amount, if any, should be accorded to Lyons' claim.

Bankruptcy courts apply the basic principles of res judicata in determining the effect to be given in bankruptcy proceedings to judgments rendered in other forums. A bankruptcy court may set aside a fraudulent judgment if the issue of fraud has not been previously adjudicated. *Pepper v. Litton*, 308 U.S. 295, 306, 60 S.Ct. 238, 245, 84 L.Ed. 281 (1939). Both Danford and Lyons alluded to the fact that the agreement made the basis of the March 11 Order was the product of fraud. Neither party established that the agreement entered into on October 25, 1994, was the product of fraud. Danford argued that Lyons failed to disclose his settlement with Lumbermens. Lyons had no legal obligation to provide Danford with that information. Lyons' silence did not amount to fraudulent concealment. *Mudd v. Lanier*, 247 Ala. 363, 377, 24 So.2d 550, 562 (Ala. 1945). Lyons' counsel stated that Lyons had a fraud claim pending against Danford in state court. Perhaps, as an alternative to an equitable remedy for Danford's specific performance, Lyons hoped to show that Danford entered the settlement agreement with the intention of violating its express terms. *Oaks v. City of Fairhope, Alabama*, 515 F.Supp. 1004, 1034 (S.D.Ala. 1981). The evidence

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<sup>2</sup> The acts taken on behalf of Lyons in violation of the automatic stay are void and of null effect. *Kalb v. Feurstein*, 308 U.S. 433, 439, 60 S.Ct. 343, 346, 84 L.Ed. 370 (1940).

did not support the contention that Danford was insincere about his promise to help restore Lyons' property. Danford's subsequent failure to perform is not conclusive proof of his intent at the time he agreed to the settlement.

The judgment in this case is based upon an agreement reached in open court by Danford and Lyons on October 25, 1994. That agreement contractually binds the parties. *Nero v. Chastang*, 358 So.2d 740, 743 (Ala.Civ.App.), *cert. denied*, 358 So.2d 744 (1978). A court is not permitted to modify settlement terms or in any manner rewrite the agreement reached by the parties. *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). The settlement bound both parties. All allegations raised in the lawsuit were dealt with by the settlement terms. The contentions of fraud prior to October 25 are no longer at issue. Since the resolution of the suit was consensual, this Court's evaluation of the claim starts from the October 25, 1994 agreement.

The parties dispute arises from the fact that they contend the settlement agreement read into the record was ambiguous in several respects. Was Danford to provide the dirt to fill the holes without exception? Was Danford or Lyons to provide equipment to remove the dirt from the ground and to load the dirt on Lyons' trucks?

Judge Galanos issued an Order on March 11, 1996, construing the original agreement. The March 11 Order was never final for purposes of appealability because Danford's bankruptcy case was filed before the appeal period had expired. This Court finds for several reasons that Judge Galanos' order should be utilized by this Court in determining the value of Lyons' claim. First, the Circuit Court order of March 11, 1996, is final for res judicata purposes, even if it is not for appealability purposes. *Teachers Ins. & Annuity Ass'n of America v. Butler*, 803 F.2d 61, 66 (2d Cir. 1986). ("The bankruptcy court should not permit the partnership to relitigate issues decided by

[a different judge], for to allow [a debtor] to do so, when it knew of the judgment before it filed for bankruptcy, would result in its slipping arguments through the backdoor that had already been turned away at the front door.”) Second, neither Lyons nor Danford has sought relief from the stay to return to state court. It may be that both parties simply determined that a claim objection hearing in this Court was a more expeditious way to handle resolution of the matter, but the lack of a request for relief is an indication that the order should be given some weight. Third, Judge Galanos was involved with this matter and the parties for a longer period of time than this Court and his knowledge of the case deserves deference. Fourth, this Court will not go behind another court’s order without more evidence of its impropriety than was offered at the hearing on this claim. Based on the evidence, Judge Galanos’ construction of the agreement is reasonable.

The March 11 Order construed the settlement agreement entered into by Danford and Lyons on October 25, 1994. When the Circuit Court’s construction is incorporated into the settlement, the crux of the settlement is as follows:

Danford has agreed to supervise the restoration of Lyons’ property. Danford will obtain the necessary dirt to fill in the holes. **Danford is obligated to provide the equipment to remove the dirt from the ground, and to load the dirt onto trucks provided by the Lyons.** That is specifically contingent upon his getting permission from another landowner to build a lake. Lyons is then to supply the equipment necessary to do the job, along with the operators for the equipment. Included in the equipment will have to be a backhoe, a bulldozer, and approximately five dump trucks. **Lyons’ trucks will transport the dirt to Lyons’ property, where Lyons is to provide the equipment necessary to do the job under Danford’s supervision.**

The agreement can be reduced to three basic parts: 1) Danford will supervise the entire project; 2) Danford will remove and load the dirt; and 3) Lyons will transport and spread the dirt.

Danford is obligated under the settlement agreement to perform part 1 and part 2. Part 2 of Danford's obligation, to remove and load dirt, is contingent upon "his getting permission from another landowner to build a lake." Danford presented evidence to show that he was successful in getting permission to build a lake. Mr. Vester Deakle, Sr. agreed in December 1994 and August 1995, to provide the dirt necessary to restore Lyons' property. Danford Exhibit No. 7.

The Bankruptcy Code treats a right to an equitable remedy as a right to the payment of money if the right to an equitable remedy gives rise to a right to payment. 11 U.S.C. § 101(4)(B); 11 U.S.C. § 502(c)(2). Clearly, the performance outlined in the March 11 Order and incorporated settlement agreement give rise to a right to payment. Lyons filed his claim for \$27,000 based upon the cost of purchasing eighteen thousand cubic yards of dirt from a pit. The Court is not convinced that Danford has an obligation under the settlement agreement to purchase the dirt. The agreement suggests that the dirt to be used to restore Lyon's property would, in fact, be the excess dirt of a third party. Danford will obtain the dirt, if the dirt is available to him at no cost. The agreement does not indicate that either Danford or Lyons is responsible for purchasing the dirt.

Lyons is entitled to payment for the performance outlined in part 1 and part 2 of the settlement agreement. Part 1 requires that Danford supervise the project. Danford testified that the project would take approximately three weeks to finish. Danford grosses approximately \$2,600 per month doing similar work. The Court will allow Lyons \$1,800 for supervision of the project. Part 2 requires that Danford remove and load the dirt. Donnie Miller, a general site contractor, testified that it would take an operator working with a mass excavator five days (assuming eight hour days and perfect weather and trucking conditions) to dig and load the amount of dirt necessary to restore Lyons' property. It cost eighty-five dollars per hour to rent a mass excavator. The price includes

an operator and fuel. The Court will allow Lyons \$3,400 for the removal and loading of dirt.

Accordingly, it is ORDERED that Jerry Lyons' claim is allowed as an unsecured claim in the amount of \$5,200.

Date: March 25, 1997

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MARGARET A. MAHONEY  
CHIEF BANKRUPTCY JUDGE