

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

In Re: CONCRETE STRUCTURES, INC.,)
 et al.,)
 Debtors-In-Possession)
))
CONCRETE STRUCTURES, INC.,) C/A 82-0869-R
 Plaintiff,)
-----)
v.)
))
OXFORD DEVELOPMENT CORPORATION,)
 Defendant.)

O R D E R

This case is before the court on an appeal and a cross-appeal from the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division. For the reasons stated in the accompanying memorandum opinion, the order and opinion of Bankruptcy Judge Shelley are AFFIRMED.

Let the Clerk send copies of this order and the accompanying memorandum opinion to all counsel of record.

DATE: March 1, 1983

Richard L. Williams
UNITED STATES DISTRICT JUDGE

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In Re: CONCRETE STRUCTURES, INC.,)	
<u>et al.</u> ,)	
Debtors-In-Possession,)	
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CONCRETE STRUCTURES, INC.,)	
Plaintiff,)	C/A 82-0869-R
-----)	
v.)	
)	
-----)	
OXFORD DEVELOPMENT CORPORATION,)	
Defendant.)	

MEMORANDUM OPINION

Concrete Structures, Inc. ("Structures") filed a Petition for Arrangement in the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division, on June 29, 1978. By order of the Bankruptcy Court, Structures was allowed to continue its business as debtor-in-possession. Oxford Development Corporation ("Oxford") filed a Proof-of-Claim, dated June 21, 1979 claiming as a general creditor \$183,774.00. Subsequently, Structures filed a complaint objecting to the allowance of the claim and claimed on its own behalf the sum of \$61,646.46 representing the alleged balance owed to Structures under the terms of an agreement with Oxford. Oxford filed an answer and a counterclaim. Trial on the merits was heard on July 22, 1981. By Order and Memorandum Opinion, dated

September 30, 1982, the Bankruptcy Court sustained Oxford's position that it was entitled to set-off cost overruns but in effecting the set-off, the Court ruled that no more funds could be recovered from either of the parties. Both Structures and Oxford appealed from the decision.

Oxford was the general contractor for the construction of a project known as the Kirkwood House in Baltimore City. On September 15, 1977, a subcontract agreement was entered into between the parties. Structures was to deliver and erect pre-stressed concrete materials to be used in the Kirkwood project.

During the early stages of construction, Structures stopped production because of financial difficulties. After the petition was filed in Bankruptcy Court, Structures, as debtor-in-possession, and Oxford entered into an agreement whereby Structures would continue to manufacture pre-cast concrete and Oxford would undertake the transportation and erection, a function previously assigned to Structures. Oxford, pursuant to the agreement, was to advance \$20,000.00 so that Structures could immediately begin production. In addition, a provision had to be added to the agreement whereby Oxford would receive credit for doing the transportation and erection of the materials. The total cost that Structures had estimated for transportation, erection, and finishing was \$83,247.53 and as of the July 3 agreement, Structures had performed \$11,229.16 of this amount in transportation and erection, leaving \$72,018.37 as the interim amount which Oxford had available to cover the costs. The final cost to Oxford was \$262,431.91, \$190,412.63 in excess of Structures'

estimates.

In paragraph 5 of the July 3 agreement, the parties agreed to have a contract end reconciliation. However, because the contract was ambiguous and unclear on its face, the reconciliation was impossible. Oxford contended that pursuant to the terms of the agreement, the full amount of "old contract monies" amounting to \$62,667.68 and the full amount of the retainer amounting to \$34,442.00 should be factored into the contract end reconciliation. Further, Oxford contends that the full amount of the cost overrun was recoverable. Structures argues, on the other hand, that whatever rights Oxford had to offset its cost overruns were contained only in paragraph 5 and that Oxford failed to show that it was entitled to set-off cost overruns against the monies it owed Structures. The retainage figure of 10% of the contract performed was, according to Structures, the sole amount available for overruns.

The reasoning and analysis of the Bankruptcy Judge is sound and should be affirmed. Under Bankruptcy Rule 810, the standard of review on an appeal of this nature is "clearly erroneous." Upon a review of the record, this court cannot say that the factual determinations made by Judge Shelley were clearly erroneous. Judge Shelley had the benefit of hearing the testimony presented by the parties and he carefully applied the law to the facts as he determined them. There is ample evidence supporting the Bankruptcy Court's findings and hence, these findings will not be disturbed. See, Universal Minerals, Inc. v. C. A. Hughes and Co., 669 F.2d

98 (1981). The contract of July 3 contradicts itself in several respects and the Bankruptcy Court gave it a reasonable interpretation. Oxford unreasonably claims that on account of the clause in the July 3 agreement which incorporates into that contract the provisions of the pre-petition contract, it is entitled to compensation for all cost overruns incurred in completing the work. The July 3 agreement does not mention the possibility of such an indemnification for cost overruns. As the Bankruptcy Court decided, it is unrealistic to believe that Structures would have accepted the risk of underwriting Oxford's entire cost of performance in exchange for the opportunity to enter into a new contract.

The Bankruptcy judge ruled with regard to Oxford's right of setoff against the pre-chapter account that in light of inconsistencies between paragraphs 2, 3 and 5 of the July 3 agreement, the \$20,000.00 advance was to be made from the pre-chapter account due Structures. Under the pre-chapter account \$42,667.86 remained unpaid. It appears from the facts that the \$20,000.00 was never paid, but was merely deducted from the account. The Bankruptcy judge concluded, based on the lack of evidence to the contrary, that Structures' work was completed late, i.e. after the August 6 date specified in the contract, and therefore, under paragraph 2, Structures was not entitled to payment of the \$42,667.86 at that time. Oxford did not pay Structures and may use those funds to offset part of the cost overruns incurred. In addition, Oxford is permitted to use the \$20,096.42 retained under the July 3 agreement for such cost overruns.

There is support for these findings and the ruling is therefore

Affirmed.

Let the Clerk of the Court send a copy of this memorandum opinion and the attached order to all counsel of record.

DATE: March 1, 1983

Richard L. Williams
UNITED STATES DISTRICT JUDGE