UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-2922

(Summary Calendar)

IN THE MATTER OF: DDS MATERIALS, INC., DDS Development, Inc. d/b/a DDS Materials, Inc.,

Debtor.

KINGSLEY CONSTRUCTORS, INC.,

Appellant,

versus

DDS MATERIALS, INC., DDS Development Inc. d/b/a DDS Materials, Inc.,

Appellee.

Appeal from the United States District Court
For the Southern District of Texas
CA H 92 1656 c/w CA H 92 1657

September 9, 1993

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Kingsley Constructors, Inc. ("Kingsley") appeals the district court's judgment affirming the bankruptcy court's denial of the following motions: (1) motion to compel assumption or rejection of

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

executory contracts; (2) motion for relief from automatic stay to effect offset; and (3) motion for new trial, or in the alternative, motion for reconsideration. We affirm.

In February 1991, Kingsley and DDS Development Inc. ("DDS") signed a purchase order in which DDS agreed to supply approximately 14,000 tons of stabilized sand for Kingsley's use in performing a contract with the City of Houston. DDS was to receive approximately $115,000.00 for this sand. In June 1991, Kingsley and DDS signed a second purchase order in which DDS agreed to supply approximately 16,000 tons of stabilized sand for Kingsley's use in performing a contract with the State of Texas. DDS was to receive $133,000.00 for this sand.

Sometime before June 3, 1991, some of the sand supplied under the February purchase order did not pass Houston's inspection standards. Houston did not pay Kingsley for the part of the contract in which this sand was used until the problem was solved. Kingsley, in turn, withheld payment of all money owed to DDS after June 3, 1991, including all the money owed to DDS under the June purchase order. On July 23, 1991, DDS filed a Chapter 11 bankruptcy petition. DDS continued to supply sand to Kingsley and to seek payment according to the terms of the purchase orders until July 31, 1991. On August 2, 1991, DDS sent Kingsley a letter stating that it would no longer manufacture stabilized sand and would no longer be able to supply such sand. Kingsley wrote back in reply that it planned to withhold all payment due DDS until the completion of the parts of the project for which DDS was to supply

sand. After that time, Kingsley would offset the cost of cover against the money owed to DDS.

After filing a proof of claim for the cost of cover, Kingsley filed an expedited motion to compel assumption or rejection of executory contracts in bankruptcy court, and a motion for relief from automatic stay to effect offset. In those motions, Kingsley argued that DDS's letter was a postpetition rejection of the purchase orders, which would allow Kingsley to offset the cost of cover against the money owed to DDS.[1]

After a full hearing, the bankruptcy court found that Kingsley, and not DDS, "breached the contracts by withholding payment owed to [DDS] for sand delivered to [Kingsley] from June 3, 1991 through July 29, 1991." Record Excerpts for DDS tab 6, at 11. Based upon this finding, the bankruptcy court "decline[d] to compel debtor to assume or reject the contracts," *id.* at 7, and held that Kingsley had "no prepetition damages against which it can set off the money owed to debtor." *Id.* at 12. The bankruptcy court subsequently denied the motions.[2] Kingsley then filed a motion for

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[1] The Bankruptcy Code treats a postpetition rejection of an executory contract as a breach of contract taking place immediately before the date of the filing of the bankruptcy petition. *See* 11 U.S.C. § 365(g)(1) (1988). The Code further allows for relief from an automatic stay to offset a mutual debt, provided that the creditor's right of setoff stems from an independent source. *See* 11 U.S.C. § 553 (1988).

[2] Because the bankruptcy court's conclusion that DDS did not reject or breach the contracts was based on its finding that Kingsley itself breached the contracts, we assume that the bankruptcy court also implicitly found that Kingsley's conduct constituted a material breach of the contracts. *See Bernal v. Garrison,* 818 S.W.2d 79, 86 (Tex. App.))Corpus Christi 1991, writ denied) ("In a bilateral contract, where promises have been exchanged for an exchange of performances and the contract is executory on both sides, one party's repudiation of a duty to perform*, or a breach of the contract of such materiality indicating an intention to repudiate the contract,* excuses or discharges the other party's remaining obligation to perform." (emphasis in original)).

new trial, or in the alternative, motion for reconsideration. The bankruptcy court denied this motion as well. Acting in its appellate capacity, the district court affirmed the bankruptcy court's decisions. Kingsley filed a timely notice of appeal.

When reviewing a bankruptcy decision, we apply the same standard used by the district court. *See Matter of Multiponics, Inc.,* 622 F.2d 709, 713 (5th Cir. 1990). Accordingly, we review the bankruptcy court's conclusions of law de novo, and its findings of fact for clear error. *See id.* We will reverse a factual finding as clearly erroneous, when we are "`left with the definite and firm conviction that a mistake has been committed.'" *Id.* at 723 (quoting *United States v. Gypsum Co.,* 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 2d 746, 766 (1948)).

In appealing the bankruptcy court's denial of its motion to compel rejection of executory contracts and motion for relief from automatic stay, Kingsley argues that the bankruptcy court clearly erred in finding that it, and not DDS, materially breached the contracts. *See* Brief for Kingsley at 5-11. After reviewing the entire record, we find no clear error in this factual finding. Kingsley admitted that it withheld payment on all invoices it received on both jobs from DDS after June 3, 1991, even though the terms of the contracts did not allow Kingsley to withhold payment.[3]

[3] Kingsley argued before the bankruptcy court, and reargues on appeal, that not paying a subcontractor until the general contractor receives payment is an industry practice. *See* Tex. Bus. & Com. Code § 2.202 (Tex. UCC) (Vernon 1968). The bankruptcy court found that Kingsley failed to prove that its specific conduct in this action))i.e., a complete cessation of all payments on all contracts to DDS when only a part payment is withheld from Kingsley on one contract))was either industry practice, a usage of trade, or consistent with the parties' course of dealing. Based upon our review of the record, we decline to

Because the bankruptcy court did not clearly err in finding that Kingsley materially breached the contracts, we conclude that the court did not err in concluding that Kingsley had no prepetition damages against which to offset its debt to DDS. Accordingly, the bankruptcy court properly denied Kingsley's motions to compel rejection of the contracts and for relief from automatic stay.

Kingsley also contends that the bankruptcy court erred in denying its motion for new trial, or in the alternative, for reconsideration, which was based on Kingsley's claims of newly discovered evidence and unfair surprise. *See* Brief for Kingsley at 11-16. We review a court's disposition of a motion for new trial for abuse of discretion. *See Hoyt R. Matise Co. v. Zurn,* 754 F.2d 560, 568 n.14 (5th Cir. 1985). Treating the motion as one for new trial, the bankruptcy court found that Kingsley failed to show that its newly discovered evidence))i.e., further testimony from Kingsley employees and more of its own business records))could not by due diligence have been produced at trial. *See id.* ("A court may grant a new trial so that a party may introduce additional testimony if the movant shows . . . (2) that there are facts from which the court may infer reasonable diligence to discover and obtain the evidence on the part of the movant . . . ."). The bankruptcy court further found that any surprise which may have occurred was not inconsistent with substantial justice, since it was evident to the parties that the focus of the full hearing would be upon which party breached the contracts. *See Conway v. Chemical*

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hold that this finding was clearly erroneous.

Leaman Tank Lines, Inc., 687 F.2d 108, 111 (5th Cir. 1982) ("The surprise, however, must be `inconsistent with substantial justice' in order to justify a grant of a new trial."). We find nothing in the record suggesting that these factual findings were clearly erroneous. We therefore hold that the bankruptcy court did not abuse its discretion in denying Kingsley's motion for new trial.

Accordingly, the district court's judgment affirming the bankruptcy court's decisions is AFFIRMED.