

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Manshul Construction Corporation)
by its Trustee in Bankruptcy) ASBCA Nos. 47795, 47797
)
Under Contract Nos. N62472-84-C-0268)
N62472-89-C-0071)

APPEARANCES FOR THE APPELLANT: Yann Geron, Esq.
Robert D. Nosek, Esq.
Geron & Associates, P.C.
New York, NY

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Chuck Kullberg, Esq.
Senior Trial Attorney
Engineering Field Activity
Chesapeake
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE KIENLEN
ON MOTION BY THE BANKRUPTCY TRUSTEE
FOR RECONSIDERATION OF
THE DISMISSAL FOR FAILURE TO PROSECUTE

On 12 March 2001 these appeals were dismissed with prejudice under ASBCA Rules 31 and 35 for failure to prosecute. The trustee in bankruptcy filed a timely motion for reconsideration. The trustee averred that he was not aware of these appeals until informed of the dismissal by a third party. The trustee's motion for reconsideration is granted and the appeals are restored to the Board's active docket.

STATEMENT OF FACTS

These appeals were filed by counsel for the appellant in July 1994. ASBCA No. 47795 relates to a claim in the amount of \$734,797 for the Navy's direction to perform certain contractor quality control requirements. ASBCA No. 47797 relates to a claim in the amount of \$350,290 for the Navy's direction to demolish and remove certain buildings and to remove and dispose of PCB contaminated materials, and for an 84-day time extension. Both contracts were performed at the Naval Station, Staten Island, New York.

The appellant was represented by Carol A. Sigmond, Esq. The Department of the Navy was represented by Chuck Kullberg, Esq. Pleadings were completed by the end of 1994. The parties engaged in sporadic discovery through November 1996. Thereafter the appellant did not communicate with the Board or the Government.

In May 1999, by certified mail, the Board, *sua sponte*, ordered both parties to advise the Board as to the status of these appeals. The mail to the appellant and to its counsel, at the appellant's last known corporate address, were returned with the notation that they were refused. A duplicate mailing to counsel at her last known New York City address was returned with a mail not forwarded notation. Counsel for the Navy advised that a Westlaw search of Bankruptcy Court records reflected that the appellant had filed a Chapter 11 bankruptcy on 31 July 1996, and that the bankruptcy was converted to a Chapter 7 on 6 December 1996. Navy counsel stated that the Government had received no contact from the appellant or its counsel since November 1996.

An electronic search of Bankruptcy Court decisions disclosed a recent decision involving the bankruptcy estate of Manshul Construction Corporation. *In re Manshul Construction Corp., et al. v. Allan G. Schulman, et al.*, 228 B.R. 532 (Bankr. S.D.N.Y. 1999). The case citation stated that Yann Geron was the trustee.

The trustee in bankruptcy had not entered an appearance in the appeals or advised the Board of his address. Nevertheless, on 16 June 2000 the Board, *sua sponte*, issued a memorandum order advising of the existence of these appeals on the Board's docket and seeking to have the trustee advise the Board whether he was aware of these claims, whether he had abandoned them, or whether he intended to pursue them. This memorandum order was sent to the trustee at the following address:

Trustee, Estate of Manshul Construction Corporation
Docket No. 96-B-44080 (Yann Geron, Trustee)
U.S. Bankruptcy Court, S.D.N.Y.
One Bowling Green, 6th Floor
New York, NY 10004

There was no response from the trustee. Thereafter, on 31 January 2001, the Board, *sua sponte*, issued an order to show cause why these appeals should not be dismissed with prejudice for failure to prosecute. The order was sent certified mail to appellant's counsel of record at a new New York City address, taken from other Board records. Appellant's counsel received the order. The order was also sent to the trustee at the One Bowling Green address. The order sent to the trustee was stamped "Received" by the U.S. Bankruptcy Court, Southern District of New York, on 2 February 2001.

There was no response, from appellant's counsel or the trustee, to the Board's order to show cause. On 12 March 2001, these appeals were dismissed with prejudice for failure to prosecute (unpublished decision). That decision was sent to counsel of record for both parties, but not to the trustee, by certified mail dated 13 March 2001. It was received by counsel for the appellant on 15 March 2001.

On 13 April 2001 counsel for Yann Geron, Esq., as Chapter 7 Trustee of the Estate of Manshul Construction Corporation, Debtor, Case No. 96-44080, pending in the U.S. Bankruptcy Court, Southern District of New York, filed a notice of appearance and this timely motion for reconsideration. The motion seeks restoration of these appeals to the Board's docket. The trustee stated in an affidavit that "On March 21, 2001, I received a copy of Judge Kienlen's decision of dismissal from parties in the bankruptcy proceedings who are two or three steps removed from the ASBCA appeal process." The trustee stated that he had not received the Board's orders, presumably because they were sent to the Bankruptcy Court instead of his address as trustee.

The trustee averred that prior to receiving this decision he was not aware of the claims in these appeals. The trustee stated that Ms. Sigmond, appellant's counsel of record, never informed him of the existence of these appeals; and, he noted that she has been barred by the Bankruptcy Court from assisting the debtor's estate in any way since approximately February 1997. The trustee subsequently also averred that the sole stockholder of the appellant had concealed these claims from the trustee; and, that these claims were not listed, as they were required to be, on the appellant's schedules filed in the bankruptcy proceeding.

The trustee affirmed that upon learning of the decision he immediately sought to retain special counsel skilled in Government contracts to continue the appeal process of these appeals, assuming that they are restored to the ASBCA docket. He noted that the retention of such counsel was subject to approval by the Bankruptcy Court and that he had commenced that process. The trustee further averred that, if his motion to restore the appeals to the Board's docket was approved, he would "prosecute the appeals in as expeditious [a] manner as possible." He also said that if he had known of the pendency of these appeals that he "would have done all that is in my power to resolve these claims as expeditiously as possible." He further averred that he "did not have timely notice of the Board's orders, and that [he] did not willfully ignore such orders." Trustee's affidavit, ¶¶ 10-12.

Counsel for the Navy promptly filed a motion in opposition to the trustee's motion for reconsideration. Both parties have supplemented their motions. The Navy contends that the trustee "knew or should have known about the appeals" before this Board as a result of the unsuccessful proceedings brought by the trustee "to retain Ms. Sigmond as an attorney/advisor." (Respondent's supp. resp. at 7) The sole stockholder of appellant

objected to the retention of Ms. Sigmond because he had an attorney client relationship with her which was in conflict with her advising the trustee.

Notwithstanding the fact that the Court agreed with the sole stockholder and prohibited the retention of Ms. Sigmond because of the appearance of a conflict, the respondent contends that as a result of “those proceedings, the Trustee would have learned that Appellant had performed contracts for the Navy, that Appellant had brought claims under those contracts, and that Ms. Sigmond had been representing Appellant in connection with the appeals of those claims, ASBCA Nos. 47795 and 47797.” (Respondent’s supp. resp. at 7)

Indeed, on 21 February 1997, shortly after the conversion to Chapter 7, the trustee had filed an application with the U. S. Bankruptcy Court, Southern District of New York, seeking to retain the services of Ms. Sigmond as a special attorney advisor to the trustee. Opposed to the trustee’s motion was Allan Schulman, the sole stockholder of the appellant’s corporation, who contended that Ms. Sigmond was also his personal attorney with respect to certain personal financial matters. Those financial matters were the subject of litigation with the trustee, who was attempting to recover assets which the sole stockholder had allegedly removed from the corporation by transferring assets to his personal accounts. Mr. Schulman claimed that the retention of Ms. Sigmond by the trustee would create a conflict of interest and breach the attorney client relationship between himself and Ms. Sigmond.

In the unsuccessful attempt to retain Ms. Sigmond, counsel for the trustee attached to that application an affidavit of Ms. Sigmond, dated 20 February 1997, in which she detailed her activities as counsel to the debtor corporation and to its sole stockholder. Attached to Ms. Sigmond’s affidavit was an earlier affidavit dated 5 February 1997, in which Ms. Sigmond had sought to defeat the sole stockholder’s efforts to have Ms. Sigmond disqualified as counsel for Aetna, one of the debtor’s creditors. Attached to that affidavit was an even earlier affidavit, dated 29 July 1996, in connection with the debtor’s motion to retain Ms. Sigmond as special litigation counsel in the debtor’s original Chapter 11 bankruptcy proceeding. In that July 1996 affidavit Ms. Sigmond disclosed that she had been asked to continue with appeals under Navy contracts, both pending and anticipated. Her affidavit stated:

3. Post-Petition. I have been asked to continue to represent the Debtors in the following matters: (a) Manshul Construction v. City of New York (Central Repair Shop); (b) Manshul Construction Corp. v. City of New York (PS 29); (c) Appeals of Manshul Construction Corp. under Navy contracts N262472-84-C-0268 and 062472-89-C-0071 (both pending and anticipated); and (d) Manshul Construction Corp. v. City of New York (Betsy Head). These are matters in which I had

represented the Debtors prior to the Petition Date and which for cost purposes make the most sense that I continue to handle post-petition. [underlining in original]

(Respondent's supp. resp., tab G-1)

The two contract numbers cited in Ms. Sigmond's 29 July 1996 affidavit are similar to, but not identical with, the two contract numbers in these appeals. The contract numbers for the contracts involved in these appeals are contrasted with those numbers cited in Ms. Sigmond's affidavit as follows: the contract under ASBCA No. 47795 is N62472-84-C-0268 vs. "N262472-84-C-0268" in Ms. Sigmond's affidavit;* and, the contract under ASBCA No. 47797 is N62472-89-C-0071 vs. "062472-89-C-0071." The differences in the first few digits are obvious.

The Navy also points to Ms. Sigmond's testimony before the bankruptcy judge during the hearing on the trustee's application to have Ms. Sigmond appointed as a special attorney advisor. During her testimony on 15 April 1997 Ms. Sigmond stated, when asked how many claims Manshul had against others, that there was "one with the Navy." She testified as follows:

Q. Did you prepare anything in connection with claims that Manshul has to recover monies owed to it?
[objection omitted]

A. Essentially, I prepared two things; one is a set of working notes about all of the offensive claims; and two, the Draft Affidavit and Opposition to the Motion to Convert.

Q. And could you describe those working notes briefly?

A. They are a series of green ledger sheets with numbers – handwritten numbers on them. There was draft adversary complaints to go with them. It's in a file about a half inch thick.

Q. And without going into any specifics, what, generally, do they contain concerning the claims that Manshul has against people who owe money to Manshul?

A. The names of the owners, the amounts of money sometimes broken down by requisition number, change order, change order requests, disputed change order.

* The respondent's supplemental response incorrectly cited the contract number in Ms. Sigmond's affidavit as "N62472-84-C-0268." That number is the correct contract number for ASBCA No. 47795. The Sigmond affidavit referred to a different contract number - N262472-84-C-0268.

Q. And what did you do in connection with putting these sheets together?

A. Well, it depends upon when I put the sheets together. There are actually three times I did it -- not two, there was one time I did it for the Chapter 11 account list. There was one time I did it for a presentation that Martin Brecker wanted to make to Aetna, and there was one time I did it in connection to the Opposition to the Motion to Convert. So there was three different purposes.

Q. What documents did you look at to prepare these sheets?

A. The files for the various projects.

Q. How much money is owed to Manshul?

A. You are talking now on the -- on the contracts?

Q. Yes.

A. In earned contract balances and retainages, \$9 million, approximately.

Q. And against how many people does Manshul have claims for this \$9 million?

[objection omitted]

A. There is the Department of the Navy, School Construction Authority, several agencies of New York City, the City of Yonkers and Nassau county. So I count five. But New York City is, like, fifteen different agencies and contracts. One was Department of Sanitation, one was the Parking Department. I believe, there are ten with the Board of Education, one with the New York City School Construction Authority, and five were the Department of General Services, one with the Navy, one with Nassau, two with Yonkers, and one with the Transit Authority.

Q. Prior to bankruptcy, who, if anybody, was prosecuting these claims?

A. There were various attorneys, including me, prosecuting the claims.

Q. Approximately how many attorneys?

A. I would say about a half dozen, approximately.

Q. And who at Manshul was coordinating the efforts of these attorneys, if anybody was?

....

A. Mr. Schulman was trying to and I was trying to.

THE COURT: How many of those claims were reduced to litigation - - affirmative claims I'm talking about.

THE WITNESS: I would say about half, Your Honor.

THE COURT: Were you the attorney of record in any of those?

THE WITNESS: Yes. The Central Repair Shop and certain in [sic] the administrative claims with the Department of the Navy.

(Respondent's supp. resp., tab G-3 at transcript testimony, pp. 4-7)

We conclude that the above information could have led the trustee to discover the existence of the claims underlying these appeals, and perhaps to the presence of these two appeals on the Board's docket. However, the trustee's ability to obtain corporate information from Ms. Sigmond was limited by the District Court's order prohibiting attorney-client discussions with Ms. Sigmond, because of the Court's concern for the appearance of a conflict of interest between such a role and her attorney-client relationship with the sole stockholder of the appellant.

The trustee does not allege that he attempted to locate these Navy claims. He simply asserts that he was unaware of them. To the extent that he could have been aware, the trustee argues that his failure to discover those claims was at worst a case of excusable neglect within the meaning of Federal Rule of Civil Procedure 60, citing *Triad Microsystems, Inc.*, ASBCA No. 48763, 00-1 BCA ¶ 30,876. We need not reach that issue, because we conclude that in any event the trustee was not aware that the claims under the two instant contracts were pending before this Board; and, that the information available to the trustee was insufficient to put the trustee on notice that these two appeals were pending. Nor do we conclude that the trustee should have discovered the existence of the claims underlying these appeals.

The trustee affirms that he was unaware of the ASBCA orders which were submitted to the Bankruptcy Court, and specifically states that he had "not received any orders or other information related to these appeals from the bankruptcy court." He also affirms that he had not received any information related to these appeals from any source until these appeals were dismissed from the Board's docket. (Trustee's motion) In his supplemental response, the trustee states (at 3):

It is reasonable to assume that this Board believed I received notice of the [Order to Show Cause] when this Board served same upon the bankruptcy court in which debtor's case is pending. However, as previously submitted and uncontroverted, the bankruptcy court in this district does not forward mail to me and certainly did not advise me of this notice. Thus, any assumption that I received notice of the [Order to Show Cause] when same was served on the bankruptcy court was incorrect.

We conclude that there is no evidence that the trustee was ever aware, prior to the decision dismissing these appeals for failure to prosecute, of any orders of this Board with respect to these appeals.

DECISION

If this motion had been filed by the appellant, rather than by the bankruptcy trustee, we would summarily deny the motion. *Batalas Industries, Inc.*, ASBCA No. 44071, 98-1 BCA ¶ 29,456, and cases cited therein. We note that it is the responsibility of every appellant, as well as the responsibility of a trustee, to keep this Board informed of its correct mailing address; and, the failure to do so in the usual case is sufficient grounds to dismiss an appeal with prejudice. *Mac-In-Erny, Inc.*, ASBCA No. 28689, 88-1 BCA ¶ 20,359, *aff'd*, 862 F.2d 321 (Fed. Cir. 1988) (Table). The trustee's motion argues that in this case we should treat the trustee differently than we would treat the appellant, at least with respect to whether or not these appeals should be dismissed for failure to prosecute. We examine that limited issue.

We begin with the creation of the bankruptcy estate. Upon the filing of a bankruptcy petition a bankruptcy estate is created which "is comprised of all the following [specifically identified] property, wherever located and by whomever held:" excluding certain interests in trusts for the benefit of others, leases of nonresidential real property, and specific interests. The statutory creation of the bankruptcy estate thus includes most, but not all the property interests of the debtor. 11 U.S.C. § 541.

The bankruptcy trustee becomes the "representative" of this statutory bankruptcy estate and has the "capacity to sue and be sued." 11 U.S.C. § 323. The trustee is charged with the responsibility to "collect and reduce to money the property of the estate for which such trustee serves" 11 U.S.C. 704. Manshul's claims against the Government are causes of action that are included within the bankruptcy estate. 11 U.S.C. 541. *See generally*, LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY ¶ 541.08[4] (15th ed. rev. 2001). The trustee is thus the representative of the bankruptcy estate and has charge of the assets, but the trustee is not the bankrupt appellant.

Furthermore, as we have recognized, upon the creation of a bankruptcy estate, neither the appellant nor its counsel has standing to pursue a claim before this Board without the authorization or consent of the Bankruptcy Court or the trustee. *Filtron Company, Inc.*, ASBCA No. 17451, 73-2 BCA ¶ 10,277; *Port Hueneme Industrial Services, Inc.*, ASBCA No. 15181, 73-1 BCA ¶ 9910 (dismissing appeal for lack of standing by a guarantor who did not have authorization from the trustee); *Coy C. Goodrich*, ASBCA Nos. 6491, 6492, 60-2 BCA ¶ 2828. *See Terrace Apartments, Ltd.*, ASBCA No. 40125R, 95-1 BCA ¶ 27,458; *Caesar Construction Co., Inc.*, ASBCA No. 46023, 97-1 BCA ¶ 28,665, *aff'd*, 132 F.3d 51 (Fed. Cir. 1997) (Rule 36) (Table). We conclude that, at

least with respect to issues of standing, the trustee should be treated differently than the appellant.

Nevertheless, we also have held that “When a final order of dismissal has been made under Rule 31, it will be vacated only under the most compelling circumstances.” *Marwan Maintenance and Janitorial Service*, ASBCA No. 20492, 78-1 BCA ¶ 12,917 at 62,912. *See also, Mac-In-Erny, Inc.*, ASBCA No. 28689, 88-1 BCA ¶ 20,359, *aff’d*, 862 F.2d 321 (Fed. Cir. 1988) (Table).

Moreover, we have held that dismissal with prejudice for failure to prosecute is a harsh and drastic sanction which should be exercised sparingly and then only when there is a clear record of willing delay or contumacious or contemptuous conduct by the appellant, because it operates as an adjudication on the merits. *GSE Dynamics, Inc.*, ASBCA No. 24826, 82-2 BCA ¶ 16,059 at 79,676; *Bulloch International, Inc.*, ASBCA No. 44210, 93-2 BCA ¶ 25,692; *Scorpio Piping Company*, ASBCA No. 34073, 89-2 BCA ¶ 21,813.

On occasions where there is an inability to proceed, but no bad faith or contumacious conduct, we have simply dismissed the appeal without prejudice. *BMSI, Inc.*, ASBCA No. 41542, 94-3 BCA ¶ 27,034 (appellant’s failure to respond stemmed from inability rather than willfulness, bad faith or fault; appeal dismissed without prejudice due to inability to have probate trustee appointed). *Cf. Power Engineering Company, Inc.*, ASBCA No. 13173, 71-1 BCA ¶ 8684 (dismissing appeal under Rule 30, rather than Rule 31, where the trustee’s failure to respond was apparently due to the attendant complications of the bankruptcy proceeding).

On motion for reconsideration we have reinstated appeals which had been dismissed with prejudice, in accord with Rule 31, for failure to prosecute: *J & F Machine Works, Inc.*, ASBCA No. 30485, 85-3 BCA ¶ 18,419 (lawyer died before responding to order to show cause); *Pembroke Machine Co., Inc.*, ASBCA No. 34819, 88-1 BCA ¶ 20,494 (written request for extension not received until after the dismissal, but there was an oral request prior to the dismissal); *Sunrise Forest Products Company*, ASBCA No. 23744, 79-2 BCA ¶ 14,166 (appellant was an inexperienced small business); *accord Willie Wood Mechanical Systems, Inc.*, VABCA No. 2808R, 89-3 BCA ¶ 22,039 (appellant timely responded to the wrong address). *See also GSE Dynamics, Inc.*, ASBCA No. 24826, 82-2 BCA ¶ 16,059 at 79,676 (comparing dismissals for failure to prosecute to dismissals under Rule 41(b) of the Federal Rules of Civil Procedure); and, *Cosmic Construction Company, Inc.*, where we summarized the law:

This Board has refused to reinstate an appeal dismissed with prejudice upon appellant’s voluntary and unconditional withdrawal of the appeal when reinstatement was requested after the 30-day appeal period had expired, on the ground that at that time certain rights had already vested in the Government.

Essex Shirt Company, ASBCA No. 3278, 57-1 BCA ¶ 1294; *Standard Stevedoring Company, Inc.*, ASBCA No. 5171, 59-2 BCA ¶ 2320; *Francis John Bueche*, ASBCA No. 11789, 67-1 BCA ¶ 6331.

On the other hand, appeals dismissed with prejudice pursuant to Rule 31 for appellant's failure to prosecute have been reinstated upon a showing that the dismissal was based on an erroneous assumption as to the appellant's or parties' wishes or the appellant has shown willingness to pursue the appeal, based upon determination that no adjudication on the merits had occurred and in the exercise of the inherent power of the board to modify its previous order to rectify an obvious error or providing the appellant an opportunity to present and have its case decided on the merits. *GSE Dynamics, Inc.*, ASBCA No. 24826, 82-2 BCA ¶ 16,059; *Sunrise Forest Products Company*, ASBCA No. 23744, 79-2 BCA ¶ 14,166; *E. Walters & Co.*, ASBCA No. 20834, 79-1 BCA ¶ 13,804; *ABC Knitwear Corporation*, ASBCA No. 22575, 14 June 1979 (unpubl.); *E.H. Marhoefer, Jr. Co.*, DOT CAB No. 70-17 *et al.*, 70-1 BCA ¶ 8177; *R.J.Home Improvements*, HUD BCA No. 75-67-C20, 78-2 BCA ¶ 13,532.

Cosmic Construction Company, Inc., ASBCA Nos. 24014 *et al.*, 84-1 BCA ¶ 17,028 at 84,798.

While we agree with the Government that the trustee might have discovered the existence of these appeals by a thorough search of the records and depositions of all the witnesses, it does not appear to us that, given the circumstances, it can be said that the trustee should have known of these appeals. Having concluded that the trustee was not aware of these appeals, we find that the trustee did not engage in a "clear pattern of delay or contumacious or contemptuous conduct." It cannot be fairly said that he disobeyed an order. We hold that the trustee is not tarnished by the conduct of the appellant and its legal representative in failing to respond to the Board's orders and in failing to notify the Board of the bankruptcy status of the appellant.

The Government has argued that the "passage of time since the end of 1996 has seriously prejudiced the Government." In particular, the Government asserts that "[t]he Staten Island facility where the Appellant performed the contracts has been transferred from the Department of the Navy to other agencies, and potential Government witnesses have either transferred or left Government service." (Respondent's resp. to motion at 4) Such issues of prejudice may be raised and considered in the normal course of this appeal.

CONCLUSION

Because the dismissal for failure to prosecute is a sanction for unacceptable conduct, and because the conduct of the appellant cannot be imputed to the trustee under these circumstances, the sanction of dismissal for failure to prosecute should not be imposed against the trustee. Our order of 12 March 2001, dismissing these appeals for failure to prosecute, is reconsidered and vacated. The caption of the appeals is amended to reflect the appearance of the trustee in bankruptcy. These appeals are restored to the Board's active docket.

Dated: 13 February 2002

RONALD A. KIENLEN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 47795, 47797, Appeals of Manshul Construction Corporation by its Trustee in Bankruptcy, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services

