



IT IS ORDERED as set forth below:

Date: December 17, 2010

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

In re:	:	CASE NUMBER
	:	
VISION BUILDING	:	10-81106-MGD
MATERIALS, LLC,	:	
	:	
Debtor.	:	CHAPTER 11
	:	

ORDER

This chapter 11 case is before the Court on the Chapter 7 Trustee’s (“Trustee”) Motion for Public Auction and/or Private Sale of Certain Personal Property Free and Clear of Encumbrances and to Pay Expenses of Selling Said Property (“Motion to Sell”). (Docket No. 86). Vision Building Materials, LLC (“Debtor”) filed its petition under Chapter 11 of the Bankruptcy Code on July 22, 2010. (Docket No. 1). Debtor’s case was converted to a case under Chapter 7 on November 9, 2010. (Docket No. 81). Trustee’s Motion was filed on November 17, 2010. Subsequently, Konecny Brothers Lumber Co., Inc. (“KBLC”) filed an Objection to Trustee’s Motion (“KBLC’s Objection”) on November 24, 2010. (Docket No. 94). Cargotec USA, Inc. (“Cargotec”) also filed an Objection

to Trustee's Motion ("Cargotec's Objection") on November 24, 2010. (Docket No. 96). A Brief in Support of Objections ("KBLC/Cargotec's Brief") was filed by counsel for KBLC and Cargotec on December 2, 2010. (Docket No. 97). A hearing on the matter was held on December 2, 2010. Present at the hearing were W. Russell Patterson, counsel for the Chapter 7 Trustee, and Aaron M. Kappler, counsel for KBLC and Cargotec. At the hearing, Mr. Patterson provided the Court with a Draft Brief, and then filed a Brief in Support of Trustee's Motion (Trustee's Brief) on December 3, 2010.

The Court heard two issues at the hearing. First, do KBLC and Cargotec have reclamation rights as to goods they sold to Debtor? Second, are the goods (and their proceeds) that KBLC and Cargotec sold to Debtor subject to a constructive trust? The Court's ruling in this Order only addresses the first issue. The second issue, concerning the existence and extent of a constructive trust, will be considered at a later date in the case.

A. Factual History

Prior to filing bankruptcy, Debtor operated a building supply business. (KBLC's Objection, ¶ 7). Debtor's inventory comprised lumber, shingles, and doors, and Debtor also possessed equipment for operating its business. (KBLC's Objection, ¶ 8). Debtor filed for bankruptcy on July 22, 2010. Prior to then, KBLC and Cargotec had each sold goods to Debtor.

Beginning on May 11, 2010, KBLC sold several shipments of lumber and plywood materials on credit to Debtor for a total price of \$196,559.97. KBLC's Objection, ¶ 15, 17. KBLC's last sale and shipment of materials to Debtor occurred on June 1, 2010. *Id.* at ¶ 15. Debtor failed to pay KBLC for the lumber, and also refused to return the lumber or allow KBLC to retake possession of the lumber. *Id.* at ¶¶ 19-21. KBLC then sent a Reclamation Notice to Debtor on July 19, 2010, asserting that KBLC would be exercising its right to reclamation under Georgia law.

Cargotec sold and delivered a forklift to Debtor on July 17, 2010 for a total price of \$13,500.

Cargotec's Objection, ¶¶ 10-11. Debtor issued Cargotec a check for the total amount on that same day. *Id.* Cargotec's bank later returned the check to Cargotec because the account on which the check was drawn held insufficient funds. *Id.* at ¶ 13. Despite Cargotec's demands, Debtor refused to return the forklift to Cargotec. *Id.* at ¶ 14. Cargotec never made a formal reclamation demand before or after Debtor filed its petition. Trustee's Brief, p. 2.

When Trustee made his Motion to Sell Debtor's personal property free and clear of liens, KBLC and Cargotec objected, in part, on the basis of their claimed reclamation rights.

B. Reclamation Law under the Bankruptcy Code

Section 546(c) of the United States Bankruptcy Code ("Code") provides creditors with a reclamation remedy as to debtors in a bankruptcy case. Under that section,

the rights and powers of the trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, within 45 days before the date of the commencement of a case under this title, but such seller may not reclaim such goods unless such seller demands in writing reclamation of such goods—

(A) not later than 45 days after the date of receipt of such goods by the debtor; or

(B) not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case.

"Section 546(c) of the Bankruptcy Code provides the exclusive remedy for a seller who seeks to reclaim goods from a debtor in bankruptcy." *Flavo-O-Rich, Inc. v. Rawson Food Service, Inc. (In re Rawson Food Service, Inc.)*, 846 F.2d 1343 (11th Cir. 1988). In providing this exclusive remedy, the Code does not create a right of reclamation. *In re Dana Corp.*, 367 B.R. 409, 418 (Bankr. S.D.N.Y. 2007); *In re Video King of Illinois, Inc.*, 100 B.R. 1008, 1013 (Bankr. N.D. Ill. 1989). Rather, the Code recognizes a creditor's state law right to reclamation in bankruptcy, if the requirements of § 546(c) are met. *In re Video King*, 100 B.R. at 1013. Thus, "Section 546(c)

[narrows] nonbankruptcy reclamation rights by imposing additional procedural and substantive requirements before such rights will be recognized in a bankruptcy case.” *Id.*

Here, KBLC and Cargotec do not meet the requirements of § 546(c) and, therefore, cannot exercise their state law reclamation rights in Debtor’s bankruptcy case. KBLC made its last shipment to Debtor on June 1, 2010, and Debtor later filed bankruptcy on July 22, 2010. Fifty-one days passed between KBLC’s last shipment and Debtor’s filing bankruptcy. KBLC did not dispute Trustee’s assertion of untimeliness, either in its brief or at the hearing. Nor did KBLC contend that the written reclamation demand was made within 45 days after Debtor received the goods. Consequently, the Court concludes KBLC does not meet the requirements of 11 U.S.C. § 546(c).

As an alternative to reclamation under § 546(c), KBLC asserts it is only seeking permission to pursue its state law, not bankruptcy, right to reclamation. As noted above, § 546(c) is the exclusive means of pursuing a reclamation right in a bankruptcy case. *Flavo-O-Rich, Inc.*, 846 F.2d at 1346. Once a debtor enters bankruptcy, the right to reclamation is solely based in § 546(c) of the Code. KBLC did not, pursuant to § 546(c), deliver goods to Debtor received within 45 days of Debtor’s filing bankruptcy or timely make a reclamation demand. Consequently, KBLC may not reclaim its goods from Debtor.

Nor is Cargotec permitted, pursuant to § 546(c), to reclaim the forklift it sold to Debtor. While Cargotec has alleged that Debtor received the forklift within 45 days of filing bankruptcy, Cargotec did not make a written reclamation demand at any time in this bankruptcy case. To reclaim goods under § 546(c), Cargotec was required to make a written reclamation demand no later than 20 days after the bankruptcy filing. Accordingly, for the reasons stated herein and on the record,

It is hereby **ORDERED** that Trustee’s Motion to Sell is **GRANTED**.

It is **FURTHER ORDERED** that neither KBLC nor Cargotec may reclaim goods sold to

Debtor.

The Clerk shall serve a copy of this Order upon Debtor, Debtor's attorney, the Chapter 7 Trustee, Counsel for the Chapter 7 Trustee, Counsel for KBLC and Cargotec, and all interested parties in the case.

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