

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX AT CHRISTIANSTED

SUPERIOR BLOCK, INC.,	)	
	)	CIVIL NO. 94/1981
	)	
Plaintiff,	)	
	)	ACTION FOR DEBT
vs.	)	
	)	
JAMES SIMON, PETER McDOUGAL, and	)	
FARMERS HOME ADMINISTRATION,	)	
	)	
	)	
Defendants.	)	

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PETERSEN, Judge

MEMORANDUM OPINION
April 27, 1983

Superior Block, Inc., Plaintiff, has brought this action against Defendants Simon, McDougal and the Farmers Home Administration (hereinafter referred to as FHA) to recover

SUPERIOR BLOCK, INC. v. SIMON, ET AL.
CIVIL NO. 94/1981
ACTION FOR DEBT
Page 2

payments made by FHA to Simon which are allegedly in violation of an assignment contract. The facts stipulated by the parties at trial are as follows:

On July 22, 1980, the parties entered into an assignment contract whereby Simon and McDougal assigned to Superior Block the sum of Six Thousand Two Hundred Sixty Four (\$6,264.00) Dollars. This sum represents the final amount due Simon from FHA on completion of a contract for the construction of a three-bedroom dwelling for McDougal. The assignment contract was signed by all the Defendants.

Relying on this assignment, Superior Block loaned to Simon the sum of Three Thousand (\$3,000.00) Dollars which was secured by a promissory note. Defendant FHA, after executing the assignment, paid Simon instead of paying the assignee, Superior Block. To date Superior Block has not received any funds from the Defendants.

A Motion for Default Judgment against Simon was filed by Superior Block on the grounds that the Defendant failed to appear, plead or otherwise defend as provided by law. Entry of Default Judgment against Simon was ordered by this Court on August 7, 1981.

The issues presented to this Court are:

1. Was the payment by FHA to Simon in violation of the assignment contract?

SUPERIOR BLOCK, INC. v. SIMON, ET AL.
CIVIL NO. 94/1981
ACTION FOR DEBT
Page 3

2. If so, who is liable to Superior Block,
and for what amount?

DISCUSSION

According to the terms of the assignment contract at issue herein, Defendants Simon and McDougal may be properly characterized as assignors. The Second Restatement 1/ of Contracts provides that the assignor in an assignment contract makes certain warranties to the assignee. Specifically:

Unless a contrary intention is manifested, one who assigns or purports to assign a right by assignment under seal or for value warrants to the assignee

(a) that he will do nothing to defeat or impair the value of the assignment and has no knowledge of any fact which would do so.

1/ Title 1, Section 4 of the Virgin Islands Code provides as follows:

The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

Since local law is not contrary, this section of the Restatement is the substantive law to be followed in the Virgin Islands. Co-Build Companies, Inc. v. Virgin Islands Refinery Corp., 15 V.I. 428, 570 F.2d 492 (3d Cir. 1978).

SUPERIOR BLOCK, INC. v. SIMON, ET AL.
CIVIL NO. 94/1981
ACTION FOR DEBT
Page 4

Restatement (Second) of Contracts, Section 333(1981). Comment d to this section states further that an assignor, at the assignee's election, is subject to liability for any amounts wrongfully collected from the debtor. Restatement (Second) of Contracts, Section 333, Comment d (1981).

It is obvious, then, that one who has made a valid assignment of a claim has no right, without authorization from the assignee, to receive payment from the debtor or to otherwise interfere with, defeat or impair the value of the thing assigned. This implied covenant protects the interest of a bonafide assignee of a chose in action from any such unauthorized acts on the part of the assignor. 6 Am. Jur. 2d Assignments, Sections 105, 107, & 112; 6A C.J.S. Assignments, Section 85 at 734.

If the assignor breaches this implied promise not to interfere, he renders himself liable to the assignee for the resulting damages, and the assignee can maintain an action for an appropriate remedy. For example, "He can sue for money damages in a contract action" 4 Corbin on Contracts, Section 904 at 623-24 (1951). Also, "[i]f the assignor has enriched himself by wrongful collection from the obligor, the assignee can maintain suit for the amount so received" Id. Furthermore, "if the assignor collects the claim, he holds what he has collected as constructive trustee for the

SUPERIOR BLOCK, INC. v. SIMON, ET AL.
CIVIL NO. 94/1981
ACTION FOR DEBT
Page 5

assignee." 3 Williston on Contracts, Section 445 at 316 (3d ed. 1960). See also, Restatement (Second) of Contracts, Section 333 Comment d (1981).

Defendant Simon signed the assignment contract and as an assignor under the terms of the contract he impliedly promised not to prejudice or defeat the rights of Plaintiff Superior Block, the assignee. The Plaintiff advanced Three Thousand (\$3,000.00) Dollars to Defendant Simon in reliance on this assignment contract. By receiving and retaining the monies paid by FHA to him, which sums had previously been assigned to Superior Block, Simon has clearly breached his warranty. As a result of his conduct, Simon has been unjustly enriched in the amount of Three Thousand (\$3,000.00) Dollars. He will not be allowed to profit from his wrong doing.

Defendant McDougal, although a party to the assignment contract, did not receive any of the monies from FHA that are the subject of this litigation. Furthermore, it appears from the record and oral arguments that McDougal has continued to make the monthly installment payments on his home to FHA. The events which led to the breach of contract were not within his power to control, and he has not profited from these events in any way. Thus, it would be inequitable to hold McDougal liable.

Defendant McDougal has cross-claimed against Simon.

SUPERIOR BLOCK, INC. v. SIMON, ET AL.
CIVIL NO. 94/1981
ACTION FOR DEBT
Page 6

However, since this cross-claim has not been supported by the proper documentation, he will be given ten (10) days from the date herein to submit the necessary documentation in support of his claim.

This Court has determined that Defendant Simon's wrongful conduct has resulted in his unjust enrichment. He is, therefore, liable to the Plaintiff for the amount that he has wrongfully received. However, this Court's analysis does not stop here. As was stated in Nickell v. United States, 355 F.2d 73,76 (10th Cir. 1966), "a debtor who pays the assignor with notice of the assignment is of course not absolved from liability to the assignee." The general rule is succinctly expressed in 6A C.J.S. Assignments, Section 87b at 736-38:

Before the debtor has received notice of the assignment he may make a payment of the indebtedness, which will be binding on the assignee, . . . to the assignor

After notice of a valid assignment, however, a payment to the assignor or any person other than the assignee is at the debtor's peril and does not discharge him from liability to the assignee The duty of the debtor to pay the assignee arises irrespective of who gives notice of the assignment.

[W]here the assignment is for security, the assignee can recover from the debtor paying the assignor in disregard of the notice of assignment only if the assignee's security has been adversely affected, that is, only if the assignee has suffered a loss.

See also 6A C.J.S. Assignments, Section 98 at 754; 6 Am. Jur.

2d. Assignments, Section 96 at 278-79.

The above concise statement of the general rule of law is followed in the majority of jurisdictions. See, e.g., Sterling Construction Co. v. Humboldt National Bank, 345 F.2d 994 (10th Cir. 1965) (debtor's obligation to pay monies assigned complete upon receipt of notice of assignment, and such notice alone sufficient to obligate debtor to assignee); Tractortechinc Gebrueder Kulenhempft & Co. v. Bousman, 301 F. Supp. 153, 156 (E. D. Wis. 1969) (while debtor may pay assignor prior to notice of assignment, he may not do so after notice); United States v. Mercury Motor Express, Inc., 294 F. Supp. 919, 920 (S.D. GA. 1968) (debtor with notice of assignment can not pay one other than assignee); Southern General Factors, Inc. v. Parker Concrete Pile Co., 236 F. Supp. 103, 105 (E.D.S.C. 1964) (debtor has right to deal with creditor until notified of assignment of debt, whereupon debtor bound to pay in accordance therewith); Jones v. Martin 256 P.2d 905, 908 (Calif. 1953) (debtor not discharged from obligation by performance to assignor after notice of assignment); Honolulu Roofing Co. v. Felix, 426 P.2d 298, 318 (Hawaii 1967) (debtors act at their peril when they make payments to persons other than assignee); International Harvester v. Peoples Bank & Trust, 402 So. 2d 856, 868 (Miss. 1981) (after notice of assignment of debt and acceptance

SUPERIOR BLOCK, INC. v. SIMON, ET AL.
CIVIL NO. 94/1981
ACTION FOR DEBT
Page 8

thereof, debtor who pays assignor or third party other than assignee is liable to assignee for amount of debt assigned); Lataif v. Commercial Industrial Construction, Inc., 286 S.E. 2d 159, 160 (Va. 1982) (once debtor receives notice of assignment its obligation runs to assignee and debtor pays assignor at its own risk).

FHA was fully aware of its duty to pay Superior Block. There is no question that FHA had notice of the assignment as it was a co-signor to the assignment contract. This is not a case where a debtor, without notice, innocently paid the assignor. Rather, it is a situation where a debtor, with full knowledge of its responsibility to the assignee, wrongfully paid its debt to the assignor. FHA simply ignored the assignment and paid Simon the amount due. As a result, FHA remains liable to Superior Block for the full amount.

Ultimate liability, however, lies with Simon. A Default Judgment was entered against Simon in favor of Superior Block on August 7, 1981. Superior Block may collect the proceeds from the assignment either from Simon, due to his breach of his warranty of noninterference with the assignee's rights, or, in the alternative, from FHA since FHA is not absolved from liability to the assignee despite its performance to the assignor. Should Superior Block choose to collect from FHA it must subrogate its rights under the

SUPERIOR BLOCK, INC. v. SIMON, ET AL.
CIVIL NO. 94/1981
ACTION FOR DEBT
Page 9

Default Judgment to FHA ^{2/}. The FHA, standing in the shoes of Superior Block, will then be able to proceed against Simon and may recover from him the amount for which FHA was liable to Superior Block.

Plaintiff also asks this Court to award attorney's fees and costs. During trial a question was raised as to whether attorney's fees may be assessed against the Federal Government or its agencies. The statute which governs with respect to the award of attorney's fees and costs against the government is 28 U.S.C. Section 2412. A recent Congressional amendment to this statute authorizes the recovery of attorney's fees and expenses by the prevailing party in any civil action or adversary adjudication brought by or against the United States or any of its agencies. As amended, the statute reads as follows:

Unless specifically prohibited
by statute, a court may award reasonable
fees and expenses of attorneys, in
addition to the costs which may be

^{2/} Legal subrogation has its basis in equity. It has as its purpose the promotion of justice. It is a device for the prevention of unjust enrichment. Through it equity seeks to place the ultimate burden of payment of a debt upon the shoulders of the person who, in justice, equity, and good conscience ought to bear it. Companion Anonima Venezolana De Nav. v. A.J. Perez Exp. Co., 303 F.2d 692 (5th Cir. 1962); Weissman v. Weissman, 114 A.2d 797 (PA 1955); 83 C.J.S. Subrogation, Section 2C at 581, 582-83.

SUPERIOR BLOCK, INC. v. SIMON, ET AL.
CIVIL NO. 94/1981
ACTION FOR DEBT
Page 10

awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

Equal Access to Justice Act, Pub. L. No. 96-481, Section 204(a), 94 Stat. 2327 (Oct. 21, 1980) (codified at 28 U.S.C.A. Section 2412(b)) (Cum. Supp. 1982). The Third Circuit, in analyzing this amendment to Section 2412, stated:

[T]he Equal Access to Justice Act . . . provides for recovery of attorney's fees against the United States in all civil actions (except tort actions) by the prevailing party 'unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.'

Pearlstine v. United States, 649 F.2d 194, 197 (3d Cir. 1981). See also Government of the Virgin Islands v. 19.623 Acres of Land, 16 V.I. 587, 594 n.2, 602 F.2d 1130, 1134 n.2 (3d Cir. 1979), where it is stated, "The provision [in Rule 54 F.R.C.P.] with respect to costs against the United States, its officers and agencies [which provides that costs against such parties shall not be imposed unless specifically authorized by some statute] is no longer applicable in view of the amendment

SUPERIOR BLOCK, INC. v. SIMON, ET AL.
CIVIL NO. 94/1981
ACTION FOR DEBT
Page 11

of 28 U.S.C. Section 2412 which has completely reversed the policy therein expressed with respect to such costs." It is, therefore, quite clear that an award for attorney's fees and costs against the government is indeed permissible.

Section 208 of the Equal Access to Justice Act, supra, provides that "[t]his title and the amendments made by this title shall take effect on October 1, 1981, and shall apply to . . . any civil action or adversary adjudication described in Section 2412 of title 28, United States Code which is pending on, or commenced on or after, such date." This action was filed on February 2, 1981, and was pending on the date the Equal Access to Justice Act became operable. The Act is therefore applicable to the case at bar and this Court has the authority to award costs and attorney's fees to this Plaintiff as against the FHA.

Pursuant to 5 V.I.C. Section 541(b), an award of attorney's fees is a matter of judicial discretion. Smith v. Government of the Virgin Islands, 5 V.I. 536, 539-40, 361 F.2d 469, 471 (3d Cir. 1966). Section 541(b) of Title 5 authorizes this Court to award to the prevailing party a fair and reasonable portion of its attorney's fees. Walter Fedderson Construction, Inc., v. Miller, 17 V.I. 134 (Terr. Ct., Div. St. T. & J., 1980). See also Bevens v. Triumpho, 17 V.I. 144, 148 (Terr. Ct., Div. St. T. & J., 1980). Any award of

SUPERIOR BLOCK, INC. v. SIMON, ET AL.
CIVIL NO. 94/1981
ACTION FOR DEBT
Page 12

attorney's fees in this jurisdiction must comply with the guidelines set forth by the United States Court of Appeals for the Third Circuit in Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) (Lindy I) and Lindy Bros. Builders, Inc., v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) (Lindy II).

The first step in arriving at a fee award is to calculate what has commonly become known as the "lodestar". The lodestar is determined by multiplying hours of service by hourly rate. In calculating hours of service, only those hours which are "reasonably supportive" of a successful claim are given favorable notice or attention. Hughes v. Repko, 578 F.2d 483, 487 (3d Cir. 1978). "The burden of persuasion must rest on the petitioner to demonstrate to the Court the number of hours attributable to the successful claim, and also to demonstrate that the number of hours so attributable was reasonably necessary to perform the work at issue." Id.

Once the lodestar has been fixed, that amount should be adjusted and either increased or decreased to reflect the contingent nature of success, the novelty and complexity of the issues presented, the quality of the attorney's work which the Court has had an opportunity to observe, and the amount of recovery, Lindy I, supra.

SUPERIOR BLOCK, INC. v. SIMON, ET AL.
CIVIL NO. 94/1981
ACTION FOR DEBT
Page 13

In his affidavit, Plaintiff's attorney avers that he has spent a total of Fourteen (14) hours working on various aspects of this case. Compensation is sought at an hourly rate of Seventy-Five (\$75.00) Dollars. Although the hourly rate sought is reasonable and within the range commonly charged in this jurisdiction, because this is a rather simple action for debt and there are no novel or complex issues it is the opinion of this Court that the Plaintiff is entitled to receive an award of reasonable attorney's fees in the amount of Seven Hundred and Fifty (\$750.00) Dollars. Ten (10) hours was a reasonable amount of time to have expended in this action, and at Seventy-Five (\$75.00) Dollars an hour, a reasonable fee would be Seven Hundred and Fifty (\$750.00) Dollars. This fee is to be borne equally by both Simon and the FHA.

Plaintiff's attorney further avers in his affidavit that he had "expended costs in the amount of Eighty Dollars (\$80.75) and Seventy Five Cents, as costs are defined in 28 U.S.C. Section 1920." Because this averment is insufficient as a matter of law, this Court can not award the amount sought as costs. Affidavits for attorney's fees and costs must not only itemize the amount of time expended on the various activities, but must also specifically itemize the costs. Lindy I, supra. If the costs are lumped together, the Court

SUPERIOR BLOCK, INC. v. SIMON, ET AL.
CIVIL NO. 94/1981
ACTION FOR DEBT
Page 14

cannot distinguish between those which are properly taxable and those which should be disallowed. Each individual cost should be listed separately so that the Court may be provided with a sufficient basis upon which an independent assessment of the propriety of each may be made. Kriegel v. St. Thomas Beach Resorts, 1981 St. T. Supp 92; Smith v. Sparky's Inc., 1981 St. T. Supp 98; Montebello v. Local 1825, 1981 St. T. Supp. 264, Utesch v. Atlas Motor Inns, Inc., 1981 St. T. Supp. 429. As such was not done in the case at bar, the requested costs can not be awarded.

CONCLUSION

The assignor, Simon, breached his warranty not to interfere with the rights of the assignee, Superior Block, by retaining money paid to him (Simon) by the debtor, FHA. Superior Block loaned Simon Three Thousand (\$3,000.00) Dollars which advance was secured by the assignment contract. By retaining the money received from FHA, Simon has breached this contract and has been unjustly enriched in the amount of Three Thousand (\$3,000.00) Dollars. It is this amount for which

SUPERIOR BLOCK, INC. v. SIMON, ET AL.
CIVIL NO. 94/1981
ACTION FOR DEBT
Page 15

Simon is indebted and which Superior Block is entitled to receive.



EILEEN R. PETERSEN
Judge