

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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July 29, 2008

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Selbyville Bay Development,
LLC

**Re: Selbyville Bay Development, LLC v. Frick Electric, Heating and
Air Conditioning, Inc. a/k/a Frick Electric Co., Inc.
Adv. Proc. No. 07-51694**

Dear Counsel:

This is with respect to Selbyville Bay Development, LLC's ("Selbyville") motion (Doc. # 17) for summary judgment. For the reasons set forth below, I will deny the motion.

While the complaint alleges nine separate causes of action, many of the counts are duplicative in terms of the factual basis for the count and the amount of the requested recovery. I will briefly comment on what I see as disputed material facts.

(1) With respect to the electric contract, Selbyville claims that Frick Electric, Heating and Air Conditioning, Inc. ("Frick") breached that contract in failing to properly label telephone and power lines. Frick responds that Selbyville waited eight months to attempt to connect the telephone and power lines and that delay resulted in the loss of the labeling.

(2) Selbyville asserts that the electric contract was also breached by Frick due to Frick's failure to submit certain documents to the architect. However, the Crosby affidavit submitted by Frick states that it is customary in the construction industry to have the construction manager or the general contractor, not a subcontractor such as Frick, make submissions to the architect.

(3) Selbyville claims that it paid \$3,645.00 to various third parties to correct the labeling of the telephone and power lines. Selbyville references invoices attached as Exhibit D. Those invoices obviously constitute hearsay and it is not possible to discern from those documents whether in fact they were costs incurred and paid by Selbyville to remedy the labeling problem.

(4) Selbyville asserts that Frick improperly removed 24 HVAC units from the construction site. Frick does not deny this, but it does dispute the value of those units. Based on a unit price of \$1,800, Selbyville concludes that Frick is liable to it in the amount of \$43,200. With appropriate reference to the Frick

deposition, Frick asserts that the per-unit price is only \$950, so that the obligation aggregates only \$22,800. Furthermore, Frick asserts that in filing its proof of claim, it deducted \$24,182 from the \$111,569 amount allegedly owed to Frick so that Selbyville will be appropriately reimbursed by having the Frick claim reduced to \$87,387.

(5) Selbyville asserts that it had to pay \$47,650 to replace the HVAC units. In support of this claim, Selbyville offers copies of invoices (Ex. F). These invoices obviously constitute hearsay. By live testimony it may be possible to have the invoices admitted into evidence. For example, a Selbyville witness may have first hand knowledge of the billings and payments, including identifying copies of Selbyville cancelled checks. However, at this summary judgment stage, the invoices alone are insufficient to prove what it cost Selbyville to replace the HVAC units.

(6) Some of the counts seek recovery of \$43,200 for the 24 HVAC units removed by Frick. Other counts seek \$47,650 as the relief sought for Frick's removal of the 24 HVAC units. I do not understand how Selbyville could get a judgment for both amounts.

(7) As noted above, Frick claims that it had a claim against Selbyville for \$111,569. According to Frick, in recognition of its improper conduct in removing the HVAC units, it is giving Selbyville a credit of \$24,182 for the 24 HVAC units. Thus, Frick filed a proof of claim in the reduced amount of \$87,387. I note

that in its schedules, Selbyville has identified Frick as a creditor in the amount of \$111,567. Of course, the claim is listed as contingent, unliquidated and disputed. It seems to me that Frick may have setoff rights as allowed by § 553. No plan has been filed yet in this case, but I strongly suspect that it will not be a 100% payment plan. It strikes me that it may be more efficient and appropriate to resolve the issues raised by the complaint in the context of a claim resolution with respect to Frick's proof of claim.

Very truly yours,



Peter J. Walsh

PJW:ipm

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In Re:) Chapter 11
)
SELBYVILLE BAY DEVELOPMENT,) Case No. 07-10664 (PJW)
LLC,)
)
Debtor.)
)

SELBYVILLE BAY DEVELOPMENT,)
LLC,)
)
Plaintiff,)
)
v.) Adv. Proc. No. 07-51694 (PJW)
)
FRICK ELECTRIC, HEATING AND)
AIR CONDITIONING, INC. a/k/a)
FRICK ELECTRIC CO., INC.,)
)
Defendant.)

ORDER

For the reasons set forth in the Court's letter ruling of this date, Selbyville Bay Development, LLC's motion (Doc. # 17) for summary judgment is **DENIED**.



Peter J. Walsh
United States Bankruptcy Judge

Dated: July 29, 2008