UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

GEORGE K. ABRAHAM — Case No. 99-16553 K

Debtor

THRUWAY BUILDERS SUPPLIES CORP.

Plaintiff

-vs- — AP No. 00-1021 K

GEORGE K. ABRAHAM

Defendant

RIEFLER CONCRETE PRODUCTS, LLC

Plaintiff

-vs- — AP No. 00-1033 K

GEORGE K. ABRAHAM III
BARBARA K. ABRAHAM

Defendants

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Buffalo, New York 14202

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Attorney for Debtors

The parties have agreed to submit on stipulated facts. The facts are sketchy, to say the least. All that is clear is that the Debtors controlled a corporation that was in the construction trades; the two creditors here provided labor or materials necessary to two projects on the premises of the Bethlehem Steel plant; one was to repair lost grout around the "pusher tracks" in the floor near the coke ovens, and the other was to fill a pit on the galvanized mill pickle line; the Debtor's corporation was paid in excess of $30,000 by Bethlehem; the Plaintiffs were not paid.

Rather than attempting to carry the burden of rebutting the presumption that attends a debtor-trustee who has not maintained suitable trust fund records (see *In re Phipps*, 217 B.R. 427 (Bankr. W.D.N.Y. 1998) aff'd No. 98 Civ. 0294C (W.D.N.Y. July 19, 1999); *Besroi Construction Corp. v. Kawzynski*, 442 F.Supp. 413 (W.D.N.Y. 1977)), the Debtors assert that the Lien Law is not applicable. From the outset they have claimed that such "incidental work" is not an "improvement" to the real property, and, consequently, the Lien Law does not apply. The Debtors cite *Chase Lincoln First Bank v. New York State Elec. & Gas Corp.,* 581 N.Y.S.2d 694 (App. Div. 3rd Dept. 1992) for this proposition. Though that case suggests that mere maintenance or upkeep is not an improvement, it was equally important in that case that the work was not intended to be permanent. The statute itself sweeps "repairs" to real property into the ambit of "improvements" if intended to be permanent.

Filling in a pit with concrete and regrouting track are surely intended to be permanent in ways that trimming trees around power lines (rather than removing them) could never be so intended. Consider, for example, *New York Artcrafts, Inc. v. Marvin*, 215 N.Y.S.2d 788 (District Ct. 1961), pointing out that mowing a lawn, plowing a field, sowing grain, trimming trees or cutting shrubbery are in their nature temporary, but that "permanent improvements" includes terracing, sodding, dredging, draining, filling and grading, making or repairing sidewalks, paperhanging, painting and the like. Each is "permanent . . . in character and improves the land for all time." [case citations omitted]. *Id.* at 789.

In the absence of self-injurious instincts on the part of a landowner, anything for which the landowner is willing to pay must be an "improvement," in the landowner's eyes. It is not entirely clear whose eyes are to measure what is an "improvement" or is not an "improvement,"[1] but consider *Consolidated Blast Corp. v. Colabella Bros.*, 168 N.Y.S.2d 275 (S. Ct. 1957). In that case, the Court sought to determine whether blasting, demolition and removal of rock below street level to create a "baling pit" was an "improvement" under the Lien Law. The facts were examined in detail. There, it was a "prospective" tenant for the real estate who wished the baling pit dug and the owner of the real estate was willing to guarantee a contract between the prospective tenant and the blasting contractor. It is unclear whether the prospective tenant ever in fact became the tenant, but the court stated that the baling pit "was an improvement in the ordinary and common sense meaning of the word [and] constituted an

[1] I recall a respected public official who clearly did not consider various fixtures installed to decorate the closed-to-traffic part of Main Street to be an "improvement" to Main Street. There are many who question whether certain office buildings or museums, or monuments, etc. in cities in other parts of the world in fact "improved" a vacant parcel.

integral part of the realty, [and/or] contracted for and created for the owner's benefit to be used by [the prospective tenant]." *Id.* at 278. And the court pointed out that the fact that the "prospective tenant was to pay, in whole or in part, for the creation of the baling pit in no way minimizes the consent to the improvement by the owner as landlord, nor did it make the baling pit any less an improvement of [his] property." *Id.*

It seems to this Court that even if the prospective tenant backed out, and the landlord had to have the baling pit filled back in to accommodate the next incoming tenant, it would not be anomalous to say that the creation of the baling pit and its elimination both are "improvements." "Improvement" seems to connote utility or desirability to the landowner rather than actual increase in fair market value, and this seems to be the view of the courts that have discussed the legislative intention to grant a lien to those whose labor or materials were used to "enhance" the value of the property. See, for example, *Wahle-Phillips Co. v. Fitzgerald*, 225 N.Y. 137 (1919), which, finding certain light fixtures to be a permanent improvement rather than mere personalty, stated

> As between materialman and contractor and owner, lighting fixtures may, with propriety, be deemed to constitute an improvement of real property in a sense that does not exist with fixtures more temporary in their character, not commonly leased with the realty but commonly furnished and removed by the tenant as he furnishes and removes his rugs, pictures, desks and chairs. When, and only when the building is thus equipped does it become complete for the use for which it was designed.

Id. at 139.

Thus, the highest court of the state focused on the intentions of the owner and not

on how the resale marketplace might value what was done.

Here, as noted, precious few facts have been put before the court, but the Court is satisfied that filling a pit that has outlived its purpose, and repairing in-floor tracks that are needed to move product, are "improvements" to Bethlehem's real property, by anyone's standards.

The Debtors further argue that "[if] every effect or action upon real property were to be considered an improvement . . . numerous businesses and their principals would simply be foreclosed from bankruptcy protection." (Defs'. Letter Brief of 5/11/00.) This misapprehends the problem. The problem is not the Court's interpretation of § 523 and the Lien Law. The problem for such persons is their failure to realize that it is a crime to violate the Lien Law and to fail to remain faithful to the trust the Lien Law creates. N.Y. Lien Law § 79-a. If it is only by breaking the law that contractors are able to stay in business, then they should close their business sooner rather than later, before more suppliers and laborers are left unpaid. These Debtors' opportunity for a "fresh start" in the event the business failed was always in their own hands. They only needed to maintain proper trust records. And if doing so had proved that they could stay in business only by diverting trust funds, then they could have made an intelligent decision whether to default on other jobs and close their doors to avoid being out of trust on any job, or instead face a § 523(a)(4) judgment here and to risk prosecution in criminal court.

Judgment will enter for Riefler Concrete Products, L.L.C. in the amount of $12,652.28 against both Debtors in Adversary Proceeding No. 00-1033, and for Thruway

Builders Supplies Corp. in the amount of $ $2805.19 against only George Abraham in Adversary Proceeding No. 00-1021. Each Plaintiff shall also be entitled to the Adversary Proceeding filing fee, as costs. Although the Plaintiffs seek attorney fees, the Court is not aware of any right to such fees in a fiduciary fraud case under non-bankruptcy law. See *Wegmans Food Mkt., Inc. v. Lutgen (In re Lutgen),* 1999 U.S. Dist. Lexis 5160 (W.D.N.Y. April 5, 1999).

SO ORDERED

Dated: Buffalo, New York
March 21, 2001

/s/ Michael J. Kaplan

U.S.B.J.