IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:		§	
		§	Case No. 02-46372
TRUDIE JORDAN,	**EOD**	§	Chapter 7
	03/31/2005	§	
Debtor		§	

ORDER ON DEBTOR'S OBJECTION TO CLAIM OF FRED GANS (CLAIM NO. 7)

This matter is before the Court to consider the objection filed by Trudie Jordan (the "Debtor") to the proof of claim filed by Fred Gans (the "Claimant") in the Debtor's Chapter 7 proceeding. A hearing was held on this matter on February 14, 2004, with each party appearing and presenting evidence and argument. After considering the evidence and argument of counsel, the Court orally announced its ruling. This order sets forth the Court's findings of fact and conclusions of law[1] and, to the extent inconsistent with the Court's prior oral ruling, this order governs.

I. Jurisdiction

1. This Court has jurisdiction of the matter pursuant to 28 U.S.C. §§ 1334 and 157. This a core proceeding over which this Court has authority to enter a final order pursuant to 28 U.S.C. § 157(b)(2)(B).

[1] To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such.

II. Procedural Background

2. The Debtor filed a petition for voluntary relief under Chapter 13 of Title 11 of the United States Code (the "Bankruptcy Code") on December 10, 2002 (the "Petition Date").

3. The Claimant thereafter filed claim No. 6 as an unsecured claim in the amount of $45,326.25 "for replacement of matured trees removed by Debtor from Claimant's property." The Claimant did not attach supporting documents to Claim No. 6 or any explanation of how he calculated the amount of the claim.

4. On October 23, 2003, the Debtor filed an objection to Claim 6 and moved to convert the case to a case under Chapter 7 of the Bankruptcy Code.

5. The Court converted the case and appointed Christopher Moser as Chapter 7 trustee (the "Trustee").

6. On December 1, 2003, the Claimant amended his unsecured claim by filing Claim No. 7 in the amount of $326,284.60 "for replacement of matured trees removed by Debtor from Claimant's property." As with his original claim, the Claimant did not attach supporting documents or any explanation of how he calculated the claim.

7. There was no trial on Claim No. 6. As a result of the filing of Claim No. 7, the Court entered an order disallowing Claim No. 6 on December 15, 2003.

8. The Debtor objected to Claim No. 7 on December 22, 2003. The Debtor argued that the claim contained inadequate information, stated no basis for any liability on the part of the Debtor, and was grossly overstated. The Claimant responded on January 12, 2004, generally denying the allegations in the Debtor's objection.

9. On February 27, 2004, the Court heard the Debtor's objection to Claim No. 7. The Claimant argued that the Debtor, or the Debtor acting by and through her agent, Mr. Charles Crews, was responsible for cutting down or otherwise damaging trees the Claimant alleged to be on his property. In addition to documentary exhibits, nine witnesses appeared and provided the Court with their testimony. Besides the two parties and Mr. Crews, the Court heard testimony from: (1) Danny Russey, owner of Green Leaf Landscape, who worked on the Debtor's property; (2) Edward Walters, owner of AAA Tree Service, who worked on the Debtor's property; (3) Dr. Robert E. Moon, a horticulturist who prepared a tree evaluation and appraisal report for the Claimant; (4) David Funderburk, a landscape architect hired by the Claimant to review the report prepared by Dr. Moon; (5) Gregory David, a registered consulting arborist; and (6) Bernard Tepera, an employee of Oncor Energy and Electric ("Oncor").

III. Findings of Fact

10. The Claimant and the Debtor own adjoining tracts of land on Lake Texoma. There is no fence or demarcation between the two tracts other than a stand of native trees.

11. Mr. Crews is the Debtor's son. He was unemployed at all relevant times. He lived with the Debtor on her property and paid no rent.

12. Mr. Crews was in charge of maintaining the Debtor's property, including landscaping, mowing, irrigation and the planting and trimming of trees. The Debtor signed blank checks on her bank account and left those checks with Mr. Crews for the purpose of paying expenses related to the maintenance of her property.

13. There was significant activity by numerous parties on the Debtor's property in the summer and fall of 2003. In or around June 2003, Mr. Crews hired Green Leaf Landscaping, which is owned by Danny Russey, to work on his mother's property. Mr. Russey testified, credibly, that his employees cut and pruned trees at the direction of Mr. Crews. The Debtor wrote a check to Mr. Russey in his presence on or about June 20, 2003, for his services. The check failed to clear. Mr. Crews eventually made a partial cash payment to Mr. Russey.

14. In the summer of 2003, Oncor cut several trees in order to replace a pole on an existing electricity line. Oncor was responsible for cutting no fewer

than two of the trees the Claimant asserted were damaged by the Debtor (designated on Exhibit P-5 as 92 and 94).

15. In early fall 2003, Mr. Crews hired AAA Tree Service to cut and trim additional trees on the Debtor's property. AAA Tree Service was first paid by Mr. Crews with checks drawn on the Debtor's account, but the checks failed to clear. AAA Tree Service eventually received a partial cash payment from Mr. Crews.

16. Additionally, in the fall of 2003, Mr. Crews hired O.T. Tree Service to cut and trim trees on the Debtor's property. O.T. Tree service was paid in cash with money provided by the Debtor's husband.

17. The Debtor had no involvement in hiring or directing the activities of Green Leaf Landscaping, AAA Tree Service, or O.T. Tree Service. Mr. Crews hired these companies and directed them to cut trees in areas designated by him. The Debtor testified that she was upset when she first noticed that trees had been cut or pruned on her property. However, she trusted that her son had a creative landscape design in mind and did not intervene.

18. Dr. Moon inspected the Claimant's property in July 2003. He prepared a tree evaluation and appraisal report admitted as Exhibit R-A based on his inspection of 134 cut or pruned trees. His report gave a value of $45,326.25 for the damage to the trees. However, Dr. Moon admitted at the hearing and the

Claimant conceded in a post-hearing brief that fifteen of the trees contained in Dr. Moon's report were not on the Claimant's property (designated on Exhibit R-A as 29, 31, 32, 38, 39, 40, 41, 44, 45, 52, 53, 54, 49, 58, 101). The total value assigned to these trees by Dr. Moon in his tree evaluation and appraisal report was $2,217.13.

19. The cut or pruned trees were indigenous to the area. Dr. Moon characterized the cut or pruned trees as "screening trees." Mr. Crews, in contrast, characterized them as "trash trees."

20. Dr. Moon prepared a supplemental report (Exhibit R-B) respecting five additional trees allegedly cut by Mr. Crews. Dr. Moon valued the damage to these trees at $9,847.48 and designated them as A-1 through A-5 in his supplemental report. Dr. Moon never saw these trees, and it is unclear from the evidence where they are located.

21. The Claimant hired Mr. Funderburk to evaluate Dr. Moon's report. The Claimant was a customer of Mr. Funderburk's, who had provided landscape architectural services to the Claimant in the past. Mr. Funderburk estimated that it would cost $326,284.60 to replace all of the cut or pruned trees. He did not visit the Claimant's property in forming his opinion. Rather, he looked at the diameter of the trees inspected and measured by Dr. Moon and calculated what it would cost to replace those trees.

22. Mr. David reviewed both Mr. Funderburk's and Dr. Moon's analyses. His own analysis was based on an assumption that the Claimant was entitled to the depreciated replacement cost of the trees. He did not consider the species of a tree or its location in determining value. Rather, he looked at a sample plot of trees that had not been cut to determine the value of those that had been cut or pruned.

23. A tree map, or survey, of the disputed property with notations for the location of the trees and other landmarks was admitted as Exhibit P-5. The tree map combined a survey of the Claimant's lot with Dr. Moon's report by plotting the trees inspected by Dr. Moon. However, the trees numbered in Dr. Moon's report as 11, 12, 18, 34, 35, 36, 37, 42, 43, 46, 47, 48, 50, 51, 55, 56, 57, 58, 59, 60, 61, 68, and 97 are not on the tree map. The total value assigned to these trees by Dr. Moon in his tree evaluation and appraisal report was $1,138.40

24. The value of the Claimant's property had increased as of the date of the hearing on the Debtor's objection to Claim No. 7.

IV. Conclusions of Law

A. Burden of Proof

25. A proof of claim, if it is executed and filed in accordance with the Federal Rules of Bankruptcy Procedure, constitutes *prima facie* evidence of the validity and amount of that claim and is deemed allowed unless a party in interest

objects. *See* 11 U.S.C. § 502(a); FED. R. BANKR. P. 3001(f); *Matter of Fidelity Holding Co., Ltd.*, 837 F.2d 696 (5th Cir. 1998). The Bankruptcy Code provides no guidance regarding what a proof of claim must contain, and, therefore, Rule 3001 is the definitive authority. Rule 3001 refers to the Official Form for a proof of claim and generally requires that the proof must be in writing; set forth the creditor's claim; be executed by the creditor or an authorized agent; attach any writings upon which the claim is based; and attach any documents evidencing perfection of any security interest.

26. The burden of persuasion under the bankruptcy claims procedure always lies with the claimant, who must comply with Rule 3001 by alleging facts in the proof of claim that are sufficient to support the claim. If the claimant satisfies this requirement, the burden of going forward with the evidence then shifts to the objecting party to produce evidence in at least probative force to that offered by the proof of claim and which, if believed, would refute at least one of the allegations that is sufficient to the claim's legal sufficiency. If the objecting party meets this evidentiary requirement, the burden of going forward with the evidence then shifts back to the claimant to sustain its ultimate burden of persuasion regarding the validity and amount of the claim by a preponderance of the evidence. *See In re Consumers Realty & Dev. Co.*, 238 B.R. 418 (B.A.P. 8th Cir. 1999); *Lundell v. Anchor Const. Specialists, Inc. (In re Lundell)*, 223 F.3d

1035, 1041 (9th Cir. 2000); *Calif. State Board of Equalization v. The Official Unsecured Creditors' Committee (In the Matter of Fidelity Holding Co., Ltd.*,) 837 F.2d 696, 697 (5th Cir.1988).

27. In this case, Claim No. 7 is in writing, sets forth the basis and amount of the claim, and was signed by the Claimant's attorney. The claim substantially complies with the Official Form and is sufficient to state a claim against the Debtor. The Debtor, however, objected to the claim on the grounds that it is unenforcable against the Debtor under applicable state law. *See* 11 U.S.C. § 502(b). In particular, the Debtor disputed any liability for the cutting and pruning of the Claimant's trees, arguing that Mr. Crews directed the cutting and pruning and that the mere provision of blank checks to Mr. Crews did not make him her agent.

B. Liability as Agent

28. In general, the validity of claims is determined under state law. *See In re Hinkley*, 58 B.R. 339, 348 (Bankr. S.D. Tex.1986). Under Texas law, an agency relationship exists when the principal has the right to control the agent in carrying out the assigned task. *Spangler v. Jones*, 861 S.W2d 392 (Tex. App. – Dallas 1993, writ den.). If an agency relationship exists, "[o]ne who acts through a duly authorized agent is bound as if he had acted in person." *Cash v. Lebowitz*, 734 S.W.2d 396, 398-99 (Tex.App.-Dallas,1987); *Lucas v. Whiteley*, 550 S.W.2d 767,

769 (Tex.Civ.App.--Amarillo 1977, writ ref'd n.r.e.). Further, the principal generally may be liable to third parties for the tortious conduct of her agent. *See Ames v. Great Southern Bank*, 672 S.W.2d 447 (Tex. 1984).

29. In this case, the Debtor authorized Mr. Crews to maintain her property, including tree trimming. The Debtor, as the property owner, had the right to control Mr. Crews' actions in maintaining her property. Mr. Crews acted within his authority when he hired Green Leaf Landscaping, O.T. Tree Service and AAA Tree Service. Under the circumstances of this case, Mr. Crews acted as the Debtor's agent in directing Green Leaf Landscaping, O.T. Tree Service and AAA Tree Service to enter upon the Claimaint's property and to cut or prune certain of the Claimant's trees. *See Cain v. Rust Indus. Cleaning Serv., Inc.*, 969 S.W.2d 464 (Tex. App. – Texarkana 1998, rev. den.).

C. Trespass to Realty

30. The commission of a trespass to realty necessarily involves an actor and injury or damage done by him to property of another resulting from his affirmative action. *See Waco Cotton Oil Mill of Waco v. Walker*, 103 S.W.2d 1071, 1072 (Tex. Civ. App. – Waco, 1937). Texas law supposes that every trespass committed upon property necessarily causes some damage to the owner's property rights. *Tex. Elec. Service Co. v. Lineberry*, 333 S.W.2d 596 (Tex. Civ.

App. – El Paso, 1960). When actual or material injury to the property results from the trespass, the trespasser is liable without regard to negligence or the exercise of care. *See Western Greenhouses v. U.S.*, 878 F.Supp. 917 (N.D. Tex. 1995) (applying Texas law).

31. In this case, Mr. Crews directed Green Leaf Landscaping, O.T. Tree Service and AAA Tree Service to enter upon the Claimant's property without the Claimant's authorization. Mr. Crews' affirmative acts resulted in damage to the Claimant's trees. The Debtor had authorized Mr. Crews to cut or prune trees on her property, and, given the absence of any fence or other barrier separating the Debtor's property from that of the Claimant, it was reasonably foreseeable that Mr. Crews' activities might result in damage to the Claimant's trees. Thus, the Court concludes that the Debtor is liable for any actual damage caused by the unauthorized cutting and pruning of the Claimant's trees

D. Damages

32. Trees are generally considered part of the realty unless they have a market value when detached from the land. The proper measure of damages for injury to land by removal of trees which have no market value, such as trees that have value only because they provide shade or are ornamental, is the diminution in the value of the property. *Cummer-Graham Co. v. W.A. Maddox*, 285 S.W.2d 932,

936 (Tex. 1956); *Lucas v. Morrison*, 286 S.W.2d 190, 191 (Tex. Civ. App.--San Antonio 1956, no writ). However, if the cutting down of the trees does not reduce the market value of the property, the injured party may be entitled to damages for loss of the intrinsic value of the trees. *Porras v. Craig* 675 S.W.2d 503, 506 (Tex. 1984).

33. Here, the parties did not present any evidence establishing that the value of the Claimant's property had declined as a result of Mr. Crews' actions. Instead, some evidence was presented suggesting that the value of the Claimant's property had increased. The issue before the Court, therefore, is the intrinsic value of the cut or damaged trees.

34. The parties offered several expert opinions regarding damages. The Claimant offered Dr. Moon, who was an exceedingly well educated and credible witness. In calculating the damage to the Claimant's property, Dr. Moon examined each tree and took into account its species, the diameter of the trunk, the condition of the tree, its location, and the amount of damage. Dr. Moon credibly described the trees as "screening trees." In contrast, Mr. Crews' characterization of the cut or pruned trees as "trash trees" was not credible. The trees served as the only physical demarcation between the two adjoining tracts and also provided a visual barrier.

35. The Claimant also offered Mr. Funderbunk to support his amended claim for $326,284.60 in damages. Mr. Funderburk's testimony was based on his assessment of the replacement value or cost of replacing all of the trees, which is the inappropriate test under Texas law. As noted *supra*, since the Claimant did not establish any diminution in value of his property as a result of the tree trimming or pruning, the proper measure of damages is the intrinsic value of the trees. *See Porras v. Craig* 675 S.W.2d at 506. Further, the Claimant was a customer of Mr. Funderburk, and the Court found Mr. Funderburk's testimony to be less credible than that of other witnesses.

36. The Debtor presented Mr. David, who employed a depreciated replacement value approach. Although he did not examine each tree as Dr. Moon did, the Court found his testimony credible and objective. Mr. David testified that the total depreciated replacement cost would be $31,376.55 based on his examination of an adjacent sample plot of similar but slightly smaller size. However, like Mr. Funderburk, Mr. David did not examine or testify regarding the intrinsic value of the damaged trees.

37. For all of the foregoing reasons, the Court concludes that the Claimant has established by a preponderance of the evidence that he has a claim against the Debtor based on the intrinsic value of the cut or pruned trees as screening trees. The Court further finds that the damage to the Claimant for the

loss of or damage to his trees is $45,326.25, less $2,217.13 (which is the value assigned by Dr. Moon for trees admitted by the Claimant to not be on his property), less $1,138.40 (which is the value assigned by Dr. Moon for trees that did not appear on the tree map), less $227.01 for the trees cut by Oncor. Based on the foregoing, the Court finds that the Claimant's claim should be allowed as an unsecured claim in the total amount of $41,743.71.

Accordingly, it is ORDERED that Claim No. 7, shall be, and it hereby is, ALLOWED as an unsecured claim in the amount of $41,743.71.

Signed on 3/30/2005

Brenda T. Rhoades MD

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE