

3. Thereafter, on July 22, 2008, because of an error in entering the claim amount of Norfolk's Original Claim¹ into the Claims Register, Norfolk filed its First Amended Proof of Claim in the amount of \$149,024.00, which was assigned Claim No. 8-2 ("Amended Claim"), based on the same contract with the Debtor for the Project.

4. On June 17, 2009, the Debtor filed its First Omnibus Objection To The Allowance Of Certain Claims seeking to disallow and expunge among other claims, Norfolk's Amended Claim from the claims register.

ARGUMENT

5. A creditor filing of a proof of claim that comports to Rule 3001 constitutes prima facie evidence of the amount and validity of said creditor's claim. See Fed. R. Bankr. P. Rule 3001(f); In re Callery, 274 B.R. 51, 60 (Bankr. D. Mass. 2002).

6. Once a creditor timely files a proper proof of claim, the burden shifts to the debtor to produce evidence to rebut the prima facie validity of said claim. See Sherman v. Novak (In re Reilly), 245 B.R. 768, 773 (B.A.P. 2d Cir. 2000).

7. "In order to rebut the presumption that attaches to a proof of claim, the party objecting must come forward with "substantial evidence." In re Callery, 274 B.R. at 60 (citing In re Hemingway Transport, Inc., 954 F.2d 1, 925 (1st Cir. 1992)).

8. Filing an objection to a proof of claim "with nothing more is 'insufficient to overcome the rebuttable presumption.'" In re Callery, 274 B.R. at 60 (quoting In re White, 168 B.R. 825, 828 (Bankr. D. Conn. 1994)).

¹ The total claim amount for Norfolk's Original Claim was inadvertently entered as \$0.00 into the Claims Register.

9. Amendments to a proof of claim are "to be freely allowed as long as the purpose of the amendment is to cure a defect in the claim, to describe the claim with greater particularity, or to plead a new theory of recovery." In re Crane Rental Company, Inc., 341 B.R. 118, 120 (Bankr. D. Mass. 2006) (quoting In re Callery, 274 B.R. at 56).

10. The equitable determination in allowing an amendment to proofs of claim timely filed is left to the sound discretion of the Bankruptcy Court. If allowed, the amendment relates back to the original proof of claim. In re Hemingway Transport, Inc., 954 F.2d at 10.

11. Norfolk amended its Proof of Claim to cure a defect in its claim as originally filed by increasing the amount of its Original Claim. The fact that Norfolk's Amended Claim² is for a larger sum than its Original Claim does not prevent Norfolk from amending its claim.³ "[A]mendments intended merely to increase the amount of a claim "grounded in the *same right to payment* are not considered 'new' claims under the Code." In re Callery, 274 B.R. at 56 (quoting Woburn Associate v. Kahn, 954 F.2d 1, 10 (1st Cir. 1992) (citing In re Hanscom Retail Foods, Inc., 96 B.R. 33, 35 (Bankr. E.D.Pa. 1988)) (emphasis in original); In re Crane Rental Company, Inc., 341 B.R. at 120.

12. The basis for Norfolk's Amended Claim is the same as that for its Original Claim, unpaid labor, materials and equipment furnished in construction of the Project. To the contrary, where a claimant attempts to change the nature of a proof of claim, said

² Neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure address amendments to proofs of claim. In re Callery, 274 B.R. at 56 (citations omitted).

amendments are generally disallowed. In re Crane Rental Company, Inc., 341 B.R. at 121 (citations omitted).

13. The Court must scrutinize both the substance of Norfolk's Amended Claim and Original Claim. First, the Amended Claim must not be a "veiled attempt" to assert a distinct new right to payment for which the Debtor's estate was not fairly alerted by the Original Claim. Second, the Amended Claim must not result in unfair prejudice to other holders of secured claims against the Debtor's estate. Third, the need to amend must not be the result of bad faith or dilatory tactic on the part of Norfolk. In re Hemingway Transport, Inc., 954 F.2d at 10.

14. Norfolk's Amended Claim does not constitute a new claim. The genesis of Norfolk's Original Claim and Amended Claim are both for unpaid labor, materials, and/or equipment furnished in construction of the *same* construction Project under the *same* contract with the Debtor. The increased amount of Norfolk's Amended Claim, which was filed on the same date as Norfolk's Original Claim, was the result of an error when entering the claim amount into the Claims Register. The increased amount does not result in unfair prejudice to other holders of unsecured claims against the Debtor's estate. The Debtor also fails to proffer any unfair prejudice. See Unioil v. H.E. Elledge (In re Unioil, Inc.), 962 F.2d 988, 993 (10th Cir. 1992) (party opposing amendment must show actual prejudice). Finally, there is no evidence whatsoever from which to infer Norfolk intentionally refrained, out of any improper or dilatory purpose, from asserting the amount set forth in Norfolk's Amended Claim.

³ As set forth above, Norfolk filed its Amended Claim on the same date Norfolk filed its Original Claim to correct an error when entering the claim amount into the Claims Register. On its face, the Original Claim and Amended Claim both contain the same claim amount of \$149,024.00.

CONCLUSION

WHEREFORE, Norfolk Electric, Inc. respectfully requests this Court deny the Debtor's First Omnibus Objection To The Allowance Of Certain Claims as it relates to Norfolk Electric, Inc.; and/or such other and further relief as this Court deems just and proper.

Respectfully submitted,

NORFOLK ELECTRIC, INC.
By its attorney,

Date: July 20, 2009

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served a true copy of the above document pursuant to MEF8 upon registered participants by electronically filing through this Court's CM/ECF filing system, this 20th day of July, 2009.

/s/ Francis A. Shannon, III
Francis A. Shannon, III, Esq.

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