

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS**

In Re:)	
)	
)	
MODERN CONTINENTAL)	Chapter 11
CONSTRUCTION CO., INC.)	
)	Case No. 08-14558-WCH
Debtor)	
)	

**SMYRNA REEBAR’S OPPOSITION TO DEBTOR’S OBJECTION TO PROOF
OF CLAIM NO. 29 FILED BY SMYRNA REBAR, INC.**

Smyrna Rebar, Inc. (“Smyrna”), through its counsel, the Law Offices of Kenneth M. Diesenhof, P.C. and the Law Offices of Thomas A. Dougherty move this Honorable Court to deny Debtor’s request for Disallowance and Expungement of Smyrna’s Claim.

In support of the Motion, Smyrna States the following:

FACTS

1. In 1996 – 1997 Smyrna reviewed design plans and project documents that were to be incorporated in Schedule A of its Unit Price Subcontract (“SC”). The terms of the SC provided, Immersed Tunnel Tubes (“ITTs”) would be constructed in a 2-2-2 sequence. Two ITTS would be built and floated out, repeating the process two more times. Based on project documents provide Smyrna bid \$410.0.00 per ton to install rebar. MCC accepted.

2. On April 3, 1997 MCC began to re-negotiate the accepted bid proposing Smyrna “work overtime or extra shifts as may be required without additional costs to General Contractor.” Smyrna objected as there was no baseline schedule. Smyrna’s bid was based on a single shift per the bidding documents. Smyrna countered, “No overtime

shifts will be worked without additional compensation to the Subcontractor from the contractor unless the willing [sic] to work shifts and/or overtime in order to meet your schedule, however we will expect to be paid for the additional cost associated with this work.”

3. A compromise was reached. Smyrna would be compensated for extra shift work as long as Smyrna was not behind the schedule that Smyrna and MCC would at some future date agree to. The final SC reads Smyrna will “work overtime or extra shifts as may be required without additional cost to General Contractor *in accordance with the schedule as set by the Contractor and agreed to by the Subcontractor.*” Emphasis in the original. The parties signed the SC on June 20, 1997.

4. MCC had bid and was awarded the contract based on a 2-2-2 scheme.

5. In the spring of 1997 MCC proposed to the owner a massive design and sequence change to the contract. This significantly altered Schedule A of the SC Smyrna had relied on to calculate its bid. The original design plans/project documents were incorporated into the SC. The proposed alteration concerned the Federal Highway Administration “FHA”. On October 7, 1997, four months after the SC, MCC’s changes were approved by the owner. The table of contents of changes to Smyrna’s bidding/contract documents consists of 36 pages of single spaced text affecting over ten volumes of detailed drawings.

6. MCC never informed Smyrna of these changes, asked for an alternate bid, or presented them to Smyrna prior to Smyrna placing its bid or signing its SC. Four weeks after Smyrna commenced performance it was orally directed to add extra shifts due to the hidden changes. Shift workers had to be paid at a premium rate. Smyrna paid

shift premiums but objected at daily meetings MCC had with its sub-contractors. The effect of the extra shift work caused Smyrna's labor costs to balloon to an amount not contemplated in its bid or contract.

7. MCC also required to Smyrna to perform other work outside the contract. MCC now admits in its Answer and Counterclaim, the sworn statement of Robert Pine, dated April 4, 2003 and in its Brief that it owes Smyrna money for the extra work claims and said claims have a value of \$90,300.60. Smyrna claims the value of these claims is approximately \$10,000,000.00.

8. At trial, on that case which is Docket No. 00-1192B, MCC's counsel informed the judge that MCC had been paid for at least some of the work done by Smyrna.

9. In its decision the court stated that Smyrna Rebar, Inc. had done work extra to the contract and had not been paid for it, but declined to award any damages to Smyrna. This judgment is currently under appeal and hence no final judgment has been entered upon the docket. Therefore any claim that MCC has against Smyrna for monies it claims Smyrna owes is just that a claim which is currently under review.

10. In its petition MCC acknowledges it owes Smyrna Rebar, Inc. at \$9,693.03.

11. Smyrna filed a timely proof of claim.

12. Hillman, J. approved Smyrna's Motion for Relief from Stay to pursue its appeal of the denial of its claims in state court and that appeal is still pending and a decision is unlikely before the fall.

13. Smyrna filed a Motion to approve a setoff of the amount that Smyrna admits it owes MCC. After a Hearing Hillman, J. continued the Motion generally and stated he would not decide anything regarding a setoff until the claims between Smyrna and MCC were resolved in state court.

14. Smyrna and MCC have been involved in other cases that in no way bear upon the current case. In one of those cases Docket No. 03-01218B the court dismissed Smyrna's fraudulent inducement to contract case as having merit but filed after the statute of limitations had expired. The Appeals Court agreed and sanctioned both Smyrna and its Attorney's for making inappropriate argument regarding the standard for Summary Judgment. This debt is one referred to MCC's Motion as the Confirmatory Order.

15. It should be noted that the actions of 00-1192B which is the subject of the proof of claim and the 03-01218B which is not are in no way related and are in fact separated in both time and theory of recovery.

16. There is no final judgment in 00-1192B and therefore under Massachusetts State law Smyrna Rebar, Inc. does not owe MCC a dime at this point on this case.

ARGUMENT

I. THE CLAIM PROPERLY ASSERTS THE AMOUNT DUE SMYRNA

MCC claims that amount owed to Smyrna does not exceed \$9,693.00. MCC fails to state what this is for or provide any proof that MCC is correct and Smyrna is wrong. This also stands in stark contradiction to statements made to the Commonwealth of Massachusetts and to the Massachusetts Appeals Court that MCC actually owed in excess of \$90,000.00.

II. THE CLAIM PROVIDES SUFFICIENT DOCUMENTATION TO SUPPORT AN AWARD

MCC admits that it filed a 42 page letter explaining the nature and details of the claim. Despite and without disputing any of the factual allegations of the letter MCC claims this is not sufficient documentation. MCC declines to state why the documentation is insufficient.

Under the contract Smyrna with MCC any work done in excess of the contract would be paid pursuant to a formula of time and materials plus ten percent. In other words Smyrna would paid for the costs of its labor, i.e. the hourly rate of its employees, the costs of materials if any used, and 10 percent of the combined costs of the labor and the materials. For each extra work claim Smyrna carefully put the down the cost of the labor, materials and the ten percent figure and added them up. MCC has never claimed the worked was not done. MCC has never claimed the costs for the labor or materials is wrong. MCC has never claimed that the 10 percent figure is wrong. Therefore it is clear that documentation is sufficient.

III. MONDERN'S ARUGMENT

MCC's argument is seems to be one of that since MCC has decided that the claim should be disallowed than the claim should be disallowed. This despite the fact that MCC has in various courts and administrative tribunals admitted they owe Smyrna money. Smyrna does not expect or even hope that this court will blindly accept Smyrna's claim that MCC owes it a dime much less \$10,000.00. However, Smyrna does expect this court to demand of MCC more than blanket statements regarding the claim.

Smyrna proposes that if the Court should continue the Hearing on MCC Objection to Claim 29 generally until the Massachusetts Appeals Court has ruled on Smyrna's

Appeal or in the alternative grant a Smyrna full evidentiary hearing on its claim. Smyrna expects the full evidentiary hearing should take approximately fifteen full trial days. Smyrna will call at least four witnesses and present about 3,000 pages of documents. These estimates are based on the trial in Norfolk County in the case of 00-1192B.

CONCLUSION AND REQUEST FOR RELIEF

For the forgoing reasons Smyrna requests that this Honorable Court

1. Deny Debtor's Objection and allow the claim; or in the alternative
2. Schedule this matter for a full evidentiary hearing; or in the alternative
3. Continue the matter generally until a time when the Massachusetts Appeals Court has rendered a decision in Smyrna's Appeal Docket No. 2008-P-59.

Respectfully Submitted
SMYRNA REBAR, INC.
By its attorneys

/s/ Kenneth M. Diesenhof
Kenneth M. Diesenhof (BBO #561270)
Law Offices of Kenneth M. Diesenhof, P.C.
142 Main Street
Suite #407
Brockton, MA 02301
Tel: 508-580-6907
Fax: 508-580-8768
E-mail: ken.diesenhof@verizon.net

Thomas A. Dougherty (BB0 #630881)
142 Main Street
Suite 402
Brockton, MA 02301
Tel: 508-583-5454

Date: August 10, 2009