

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS**

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

MOTION FOR RELIEF FROM THE AUTOMATIC STAY

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 pursuant to F.B.R. 4001(a) and 9014 and Section 362(d) of the Bankruptcy Code for relief from the automatic stay (i) allowing Smyrna to appeal the rulings of Farbricant, J. and Bornstein, J.’s in Superior Court Docket No. 00-1192B and to proceed in the Appeals Court Docket No. 2008-P-58, (“The State Action”) (ii) allowing any and all actions to reach and implement settlements between the Plaintiff and non-debtor defendants in the State Action and to proceed until December 31, 2009, and (iii) scheduling a hearing prior to December 31, 2009 to consider granting relief from the stay for further proceedings in the State Action.

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. On June 23, 2008 MCC filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code.

9. On July 8, 2008 MCC filed a Suggestion of Bankruptcy in the State Court Action.

10. The Surety Companies have filed a Motion to Extend Time for Filing its brief seemingly in acknowledgement that the Stay does not apply to them as third party litigants. The parties have been involved in eight years of litigations and the documents that the Smyrna has received from MCC in discovery occupy an entire office suite.

11. Upon information and belief there are at least two insurance policies available to pay some or all of Smyrna's claims:

Name of Insurer: U.S. Fidelity and Guaranty Company

Bond No.: 24-0120-17960976 & 11133291143

Amount of Bond: \$200,000,000.00

Name of Insurer: Fireman's Fund Insurance Company

Bond No.: 24-0120-17960976 & 11133291143

Amount of Bond: \$200,000,000.00

12. The limited nature of the relief requested by Smyrna in this Motion does not require the Court to determine at this time the extent to which Smyrna may recover on its claims against the available insurance. Information concerning MCC's insurance is provided because it substantiates that there is little prejudice or harm to MCC.

13. There are currently several other non-debtor defendants in this action.

14. The Court is further requested to consider Smyrna's request that the Court grant relief from the stay to allow Smyrna and all parties to take such actions as are necessary and helpful to reach and implement settlements in the State Court Action between Smyrna and non-debtor defendants.

15. Smyrna further request that a further hearing be scheduled prior to December 31, 2009, and that Smyrna be permitted to amend and/or supplement this Motion by a date certain prior to such hearing to provide adequate notice and opportunity for parties to respond to such other and further request for relief for the stay which Smyrna may choose to bring in such amended supplemental pleadings. It is anticipated that such pleadings will set forth Smyrna's request for relief from stay to proceed with

trial and determine the extent to which Smyrna may seek recovery for its Claims from available insurance policies.

ARGUMENT

I. RELIEF FROM THE AUTOMATIC STAY SHOULD BE GRANTED PURSUANT TO BANKRUPTCY CODE SECTION 362(d)(1)

Bankruptcy Courts may grant relief from the automatic stay for cause pursuant to 11 U.S.C. 362(d)(1). While the Bankruptcy code does not define what cause is but it is generally accepted that cause is said to exist when harm that would result from a continuation of the stay would outweigh any harm that might be suffered by the debtor or the debtor's estate if the stay is lifted. Peerless Ins. Co. v. Rivera, 208 B.R. 313 315 (D.R.I. 1997) In determining whether the harm from the stay would outweigh the harm if relief from the stay is granted the courts generally use a twelve factor test. Holtkamp v. Littlefield (In re Holtkamp), 669 F.2d 505, 508 (7th Cir. 1982); Perez v. Cumberland Farms, Inc., 213 B.R. 622 (D. Mass. 1997); and Mazzeo v. Lenhart (In re Mazzeo), 167 F. 3d 139, 143 (2d. Cir. 1999).

Of the twelve factors the following are relevant to this motion and they are (1) whether relief would result in partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether litigation in another forum would prejudice the interests of other creditors; (4) the interests of judicial economy and the expeditious and economical resolution of litigation; (5) whether the parties are ready for trial in the other proceedings; and (6) impact of the stay on the parties and the balance of harms.

(1) WHETHER RELIEF WOULD RESULT IN PARTIAL OR COMPLETE RESOLUTION OF THE ISSUES

MCC initially admitted that it owes Smyrna some money for some of its claims. In its Answer and Counterclaim, sworn statement of Robert Pine, dated April 4, 2003 and in its Brief MCC stated it owes Smyrna \$90,300.60 for extra work. MCC later claimed it did not owe Smyrna anything. Now MCC has reverted back to its original position and lists Smyrna as a creditor. Smyrna claims the value of these claims is approximately \$10,000,000.00. Since the only issue is now the value of the claims, as liability is no longer an issue, the relief from the automatic stay would result in determining if MCC or Smyrna figures are correct or if a third figure is correct and therefore resulting in resolution of all issues.

(2) LACK OF ANY CONNECTION WITH OR INTERFERENCE WITH THE BANKRUPTCY CASE

There would no interference with the bankruptcy. The Superior Court and the Appeals Court have made detailed factual findings on the issues at hand and up until now MCC sole defense has been a legal one. Since MCC now concedes the liability issue its legal defense no longer exists. Since the relief sought by Smyrna is merely payment for services previously rendered and some if not all of these payments are covered by insurance policies there would no interference with the Bankruptcy.

(3) WHETHER LITIGATION IN ANOTHER FORUM WOULD PREJUDICE THE INTERESTS OF OTHER CREDITORS

The only other creditors with an interest in this litigation are named in the litigation and have been actively involved in it. Far from prejudicing the interest of these creditors their interests would actually be protected as they would have the benefit of past decisions and would not have to re-litigate matters already decided.

(4) THE INTERESTS OF JUDICIAL ECONOMY AND THE EXPEDITIOUS AND ECONOMICAL RESOLUTION OF

LITIGATION

Smyrna and MCC have spent the last eight years litigating this matter in State Court. As it stands now almost everyone one the factual disputes have been resolved. The only disputes left concerns proper application of legal principals. If MCC and Smyrna were forced to commence an Adversary Proceeding in the Bankruptcy Court the parties would have re-litigate every single factual dispute previously resolved in another competent legal forum. It is hard to imagine a greater waste of scarce judicial resources.

(5) WHETHER THE PARTIES ARE READY FOR TRIAL IN THE OTHER PROCEEDINGS

MCC's brief is currently due in the Appeals Court on July 14, 2008. Since MCC now admits it is liable to Smyrna for some money the only issue left is the issue of damages. It would appear that the parties would ready for such a hearing almost immediately.

(6) IMPACT OF THE STAY ON THE PARTIES AND THE BALANCE OF HARMS.

Smyrna and MCC have been involved in litigation for the past eight years concerning the whether MCC owes Smyrna any money for work performed on the job. MCC admitted it owed Smyrna money for the work Smyrna performed, although less than the amount Smyrna claimed, than MCC denied it owed any money at all, and now admits it owes some.

Allowing the case to go forward in State Court will not harm MCC at all as it will simply resolve the amount of money that is owed to Smyrna. Denying the motion will force Smyrna to start from square one and litigate this case for probably another eight

years. This will also affect other creditors as well as it is unlikely any Chapter 11 plan will be approved while an Adversary Proceeding is ongoing.

WHEREFORE; Smyrna respectfully requests that the court grant it relief from the automatic stay by (i) allowing Smyrna to appeal the rulings of Farbricant, J. and Bornstein, J.'s in Superior Court Docket No. 00-1192B and to proceed in the Appeals Court Docket No. 2008-P-58, ("The State Action") (ii) allowing any and all actions to reach and implement settlements between the Plaintiff and non-debtor defendants in the State Action and to proceed until December 31, 2009, and (iii) scheduling a hearing prior to December 31, 2009 to consider granting relief from the stay for further proceedings in the State Action.

Respectfully Submitted
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By its attorneys

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