**UNITED STATES BANKRUPTCY COURT**
**EASTERN DISTRICT OF PENNSYLVANIA**

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| **IN RE: WINDSOR CONSTRUCTORS, INC.** | : | **Chapter 11** |
| | : | |
| **Debtor(s)** | : | **Bky. No. 03-36589ELF** |
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# M E M O R A N D U M

**BY: ERIC L. FRANK, U.S. BANKRUPTCY JUDGE**

## I. INTRODUCTION

Prior to filing its chapter 11 bankruptcy petition, Windsor Constructors, Inc. ("the Debtor") was a general contractor. In this contested matter, the Debtor objects to the claims of creditors who worked as subcontractors with the Debtor on several construction projects. The Debtor contends that the subcontractors' claims should be disallowed because they failed to avail themselves of the opportunity to participate in the distribution from a fund that was earmarked, during this bankruptcy case, for the payment of their claims.

For the reasons set forth below, I find that the subcontractors' claims should not be disallowed and I will deny, for the most part, the relief requested by the Debtor.[1]

## II. HISTORY OF THE CASE

### A. Procedural History

On November 12, 2003, the Debtor filed a voluntary petition under chapter 11 of the

[1] This Memorandum constitutes my findings of fact and conclusions of law pursuant to Fed. Rule of Bankr. P. 7052 as made applicable in this contested matter by Fed. Rule of Bankr. P. 9014.

Bankruptcy Code. In its bankruptcy Schedule F, the Debtor listed more than 100 unsecured creditors. The Debtor listed all but one of the creditors as holding unliquidated claims. Thus, virtually all of the Schedule F claimants were required to file proofs of claim for such claims to be "allowed." See Fed. R. Bankr. P. 3003(b)(1) (the schedule of liabilities filed by a debtor is "prima facie evidence" of the validity and amount of the claims of creditors "unless they are scheduled as disputed, contingent, or unliquidated").[2]

On November 23, 2005, the court confirmed the Debtor's Amended Liquidating Plan of Reorganization. The plan provides for a distribution to the holders of: (1) allowed administrative expenses, to be paid in full; (2) priority tax claims, to be paid in full; (3) other priority claims, to be paid in full; and (4) general unsecured claims, to be paid pro rata. No distribution to the Debtor's equity holders is contemplated. Funding for the distribution will derive from various bank accounts of the Debtor and projected recoveries from pending litigation. Amended Liquidating Plan of Reorganization of the Debtor ¶¶2.1, 2.4, 4.1, 4.2, 7.1 and 7.2

Diamond Dimensions ("Diamond") is a creditor of the Debtor. On January 21, 2004, Diamond filed a timely proof of claim in this case (Claim No. 36) for $14,503.86.

On March 3, 2006, the Debtor filed what it termed its "Second Omnibus Objections to Claims" ("the Debtor's Objection").[3] The Debtor's Objection targeted more than seventy (70)

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[2] Many of the so-called "unliquidated"claims were scheduled in very specific amounts – "to the penny." For example, the claim of Weather-Tite Window Products was listed as an "unliquidated" claim of $1,863.22. The propriety of a debtor listing all of its debts as either contingent, unliquidated or disputed perhaps, in order to compel creditors to file proofs of claim, and the possible consequences of doing so has not been put at issue in this case by any party in interest.

[3] My predecessor on the bench, the Honorable Kevin J. Carey, presided over all of the proceedings described in Part II.A of this Memorandum which occurred prior to February 14,

claims filed by creditors or otherwise listed by the Debtor in Schedule F.[4] Diamond's proof of claim was one of claims subject to the Debtor's Objection. On March 2, 2006, Diamond filed a written response to the Objection.

I held a hearing on the Objection on May 3, 2006. After the conclusion of the hearing, I took the matter under advisement pending the filing of briefs. Briefing was completed June 13, 2006. The contested matter is ready for disposition.[5]

**B. Factual Background**

Prior to the commencement of the bankruptcy case, the Debtor was engaged in the business of general contracting.[6] One of its customers was ESA Services, Inc. ("ESA"). Between March 2002 and October 2002, the Debtor entered into three (3) construction contracts

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2006.

[4] Several objections were directed against creditors who did not file proofs of claim. It is not immediately apparent why the Debtor filed those objections given the terms of Fed. R. Bankr. P. 3003(b)(1).

[5] Hannah Caulking, Inc. ("HCI") is another creditor of the Debtor. On December 26, 2003, HCI filed a timely proof of claim in this case (Claim No. 18) in the amount of $15,874.50. HCI's proof of claim was also among the claims subject to the Debtor's Objection. Unlike Diamond, HCI did not file a written response to the Objection, but did appear in open court to contest the Objection. Subsequently, the court was advised that the dispute between the Debtor and HCI was settled.

[6] Neither party submitted any evidence at the hearing on May 3, 2006. Therefore, I base my decision on the information available to me from two sources: (1) those facts set forth in the parties' respective briefs which are undisputed and (2) the exercise of judicial notice. I may take judicial notice of the content of the documents filed in the case for the purpose of ascertaining the timing and status of events in the case and facts not reasonably in dispute. See Fed. R. Evid. 201; In re Scholl, 1998 WL 546607, at *1 n. 1 (Bankr. E.D. Pa. Aug. 26, 1998). See also In re Indian Palm Associates, Ltd., 61 F.3d 197, 205 (3d Cir. 1995).

with ESA ("the ESA Contracts") for different construction projects ("the ESA Projects"). In connection with the ESA Projects, the Debtor subcontracted with other parties to provide services and supplies ("the ESA Subcontractors"). The ESA Contracts contained provisions stating that payments made by ESA to the Debtor "shall be held in trust" for the benefit of subcontractors. The ESA Contracts also provided that in certain circumstances, ESA could make payments jointly to the Debtor and its subcontractors.

As of the commencement of the bankruptcy case, ESA retained certain monies that were held back from the periodic payments due to the Debtor under the ESA contracts as retainage ("the Retainage Fund"). During the early phase of this bankruptcy case, the Debtor and some ESA Subcontractors all claimed an entitlement to the Retainage Fund.

To resolve the competing claims to the Retainage Fund, on March 17, 2004, ESA filed an adversary proceeding in the bankruptcy court in the nature of an interpleader action, docketed as Adv. No. 04-0323 ("the ESA Adversary Proceding"). ESA named the Debtor and sixty-three (63) ESA Subcontractors, including Diamond, as defendants. At the time the Adversary Proceeding was filed, another adversary proceeding was pending ("the Subcontractors' Adversary Proceeding") in which certain ESA Subcontractors sought a determination that ESA held the Retainage Fund in trust for the ESA Subcontractors, that the Retainage Fund was not property of the bankruptcy estate and that ESA should pay the Retainage Fund over to the ESA Subcontractors. The Subcontractors' Adversary Proceeding was docketed at Adv. No. 03-0220.

Early in the ESA Adversary Proceeding, on July 12, 2004, the court issued a Revised Scheduling Order, which provided in part:

> 4. In order to allow a timely determination of the rights of the parties to any interpleaded funds, on or before **July 21, 2004**, each defendant shall complete and file with the Court a Claim Support Worksheet, in the form attached as Exhibit "A," for each Project referenced in the Complaint at which such defendant performed work and for which such defendants claims to be owed money
>
> 5. The failure of a defendant to file such Claim Support Worksheet **shall not preclude that Subcontractor Defendant from filing a Proof of Claim in the underlying bankruptcy case**.

(emphasis added).

In the main bankruptcy case, by Order dated September 10, 2004, the court established October 30, 2004 as the deadline for filing of proofs of claim. Paragraph 5 of the September 10, 2004 Order states:

> Any creditor who holds or wishes to assert a claim and who is required to but fails to file a proof of claim or interest with respect thereto within the deadlines specified in this Order, shall be forever barred, estopped, and enjoined from asserting such a claim (or filing a proof of claim with respect thereto) against the Debtor, its successors and assigns, and its property.

In the ESA Adversary Proceeding, on October 6, 2004, the court entered a default judgment against those defendants (including Diamond) who had not responded to the Complaint. In its Order, the court relieved ESA from all liability to the judgment defendants and also determined that the judgment defendants "shall have no right, claim or interest in the Retainage Fund . . . ." I will refer to the defendants in the ESA Adversary Proceeding as to which default judgments were entered as "the Non-Participating ESA Subcontractors."[7]

[7] I use the term because the entry of the default judgment precluded the Non-Participating ESA Contractors from participating in any distribution from the Retainage Fund. It is not clear to me what treatment a Non-Participating ESA Subcontractor would have been entitled to receive if it had either: (1) filed an answer in the ESA Adversary Proceeding but not a Claim Support Worksheet; or conversely (2) did not file an answer in the ESA Adversary Proceeding but did file a Claim Support Worksheet. It is also not clear to me whether there were

Subsequently, the ESA Adversary Proceeding and the Subcontractors Adversary Proceeding were settled through a Settlement Stipulation approved by an Order of the court dated January 12, 2005 ("the Retainage Settlement"). In the Retainage Settlement, the Retainage Fund was divided among the Debtor (who received $75,000) and those ESA Subcontractors against whom default judgments had **not** been entered in the ESA Adversary Proceeding on October 6, 2004 ( "the Participating ESA Subcontractors").[8] The bankruptcy estate was released from any further claims of Participating ESA Subcontractors arising from work done on any of the ESA Projects. In other words, by participating in the distribution of the Retainage Fund, the Participating ESA Subcontractors waived their rights to any distribution from any other estate assets.[9]

By Order dated September 26, 2005, the court approved the Debtor's Amended Disclosure Statement in the main bankruptcy case. The Amended Disclosure Statement describes the general nature of the ESA Projects, the ESA litigation in the bankruptcy court and the Retainage Settlement. The Amended Disclosure Statement contains no mention of what effect, if any, the Retainage Settlement might have had on the rights of the Non-Participating

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any parties that fit either of the two categories just described. In any event, for purposes of this decision, it is sufficient to divide the ESA Subcontractors into two categories: (1) those who exercised their rights to participate in the distribution of the interpleaded Retainage Fund (Participating ESA Subcontractors) and (2) those who did not so participate (Non-Participating ESA Subcontractors).

[8] The Debtor reports that the Participating ESA Subcontractors received distributions amounting to approximately 75% of their claims.

[9] In the settlement, the bankruptcy estate released the ESA Subcontractors from any preference claims the estate may have had against them for payments made in connection with any of the ESA Projects.

ESA Subcontractors. The Amended Plan also contains no provision purporting to impair the distribution rights of the Non-Participating ESA Subcontractors due to their nonparticipation in the distribution of the Retainage Fund.

## III. DISCUSSION

### A. Legal Principles Involved in Claims Litigation

Section 502(b) of the Bankruptcy Code sets forth nine (9) grounds for disallowance of a claim if an objection to the claim is filed:

> Except as provided in subsections (e)(2), (f), (g), (h) and (I) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that–
>
> > **(1)** such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;
> >
> > **(2)** such claim is for unmatured interest;
> >
> > **(3)** if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;
> >
> > **(4)** if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;
> >
> > **(5)** such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;
> >
> > **(6)** if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds--
> >
> > > **(A)** the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of--
> > >
> > > **(i)** the date of the filing of the petition; and

> **(ii)** the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus
>
> **(B)** any unpaid rent due under such lease, without acceleration, on the earlier of such dates;
>
> **(7)** if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds--
>
> **(A)** the compensation provided by such contract, without acceleration, for one year following the earlier of--
>
> **(i)** the date of the filing of the petition; or
>
> **(ii)** the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus
>
> **(B)** any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;
>
> **(8)** such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or
>
> **(9)** proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide, and except that in a case under chapter 13, a claim of a governmental unit for a tax with respect to a return filed under section 1308 shall be timely if the claim is filed on or before the date that is 60 days after the date on which such return was filed as required.

11 U.S.C. §502(b).

Allocation of the burden of proof in resolving a claims objection requires several steps. Initially, a properly filed proof of claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 501. Even after an objection is filed, a properly filed proof of claim is prima facie

evidence of the validity and amount of the claim. Fed. R. Bankr. P. 3001(f). If an objection is filed to a proof of claim, the burden of proof may shift. See United States v. Baskin & Sears, P.C., 207 B.R. 84, 86 (E.D. Pa. 1997). The Court of Appeals has concisely summarized the shifting burdens as follows:

> [A] claim that alleges facts sufficient to support a legal liability to the claimant satisfies the claimant's initial obligation to go forward. The burden of going forward then shifts to the objector to produce evidence sufficient to negate the prima facie validity of the filed claim. It is often said that the objector must produce evidence equal in force to the prima facie case. In practice, the objector must produce evidence which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence.

In re Allegheny International, Inc., 954 F.2d 167, 173-74 (3d Cir. 1992) (citations omitted). See also In re Gimelson, 2004 WL 2713059, at *13 (E.D. Pa. 2004); In re Galloway, 220 B.R. 236, 244 (Bankr. E.D. Pa. 1998).

**B. The Positions of the Parties**

Without citing a specific subsection of 11 U.S.C. §502(b), the Debtor requests that the court disallow the claims of all of the Non-Participating ESA Subcontractors based solely on the creditors' failure to participate in the distribution of the Retainage Fund.[10] The Debtor asserts that "when a creditor has the ability to seek recovery from another party or to reduce its claims against a debtor, it is obligated to so." Debtor's Brief at 7. The Debtor makes three (3) legal

[10] The Debtor reserved the right to seek a reduction in the allowed amount of the claim of a Non-Participating Creditor in the event that it was unsuccessful in its objection to the entire claim. I will permit the Debtor to do so.

arguments in support of its objection:

> (1) the relationship between ESA, Debtor, and Diamond (and the other similarly-situated subcontractor creditors) is analogous to a suretyship arrangement, and because ESA became a *de facto* "primary debtor" and Diamond failed to seek funds from ESA, Diamond's claim should be disallowed;
>
> (2) the relationship between ESA, Debtor, and Diamond (and the other similarly-situated subcontractor creditors) is analogous to a guaranty relationship in which ESA was the "primary obligor" and the Debtor was the guarantor, and because Diamond failed to seek payment from ESA it released Debtor from its "guarantor" obligations;
>
> (3) Diamond failed to mitigate its damages by its failure to participate in the Interpleader Action and its claim should therefore be disallowed.

Given the nature of the Debtor's arguments, the only subsection of 11 U.S.C. §502(b) that can apply is §502(b)(1). Under §502(b)(1), the court's task is to determine under the parties' "agreement" or "applicable law" whether the claim should be disallowed in whole or in part. See In re Combustion Engineering, Inc., 391 F.3d 190, 245 (3d Cir. 2004); 4 Collier on Bankruptcy ¶502.03[2], at 502-24 (15th rev. ed. 2006). Both sides assume, and I will accept, that Pennsylvania law applies in this matter.

Diamond argues that the Debtor has not come forward with any legal authority under Pennsylvania law to support the proposition that the existence of the Retainage Fund prior to the implementation of the Retainage Settlement transformed the relationship of the parties into a suretyship or guaranty relationship. With respect to the Debtor's third argument (i.e., failure to mitigate), Diamond asserts that the mitigation doctrine is inapplicable in this case and, in any event, the Debtor has not established that Diamond acted unreasonably in choosing not to participate in the distribution of the Retainage Fund.

In its Reply Brief, the Debtor concedes that outside the context of a bankruptcy case, the

Pennsylvania courts would not deny Diamond's claim against the Debtor due to the principles drawn from surety relationships, principles drawn from guaranty relationships or the mitigation doctrine. The Debtor's argument, as refined in its Reply Brief, is as follows:

> Diamond argues that this Court is required to apply mechanically Section 502 of the Bankruptcy Code while ignoring the equitable principals [sic] the Code seeks to enforce. However, this Court should use its broad powers to prevent inequity which result from permitting a distribution from the Debtor's Estate to the [Non-Participating ESA Subcontractors], who ignored their opportunity to collect their share of the Retainage Fund. Making distributions to the Non-Responsive Defendants will substantially reduce the amount of the distribution to the unsecured creditors who did not have an opportunity to participate in the [distribution of the Retainage Fund].
>
> Under Section 105 of the Bankruptcy Code, the Bankruptcy Court has broad powers to fashion remedies to resolve the many unique situations it faces. This is a unique situation . . . .

Debtor's Reply Brief at 4.

**C. <u>Denial of the Objection as to Diamond</u>**

The Debtor concession – that there is no legal authority under Pennsylvania law to negate Diamond's claim based solely on Diamond's failure to participate in the distribution of the Retainage Fund – leaves for my consideration only the Debtor's argument under 11 U.S.C. §105. The Debtor invokes 11 U.S.C. §105 and asserts that as a matter of equity and in the exercise of my discretion, I should disallow Diamond's claim. I reject the Debtor's argument for two reasons.

First, I have considerable doubt whether 11 U.S.C. §105 provides any authority to override the clear command of 11 U.S.C. §502(b)(1) – that claims are to be allowed or

disallowed pursuant to the principles of applicable nonbankruptcy law. It is settled that §105 does not provide authority for a bankruptcy court to expand rights afforded to parties by the Bankruptcy Code, e.g., In re Continental Airlines, Inc., 203 F.3d 203, 211 (3d Cir. 2000) or to disregard provisions of the Code, e.g., In re Combustion Engineering, Inc., 391 F.3d 190, 236 (3d Cir. 2004). Thus, if there is no authority under Pennsylvania law for defeating Diamond's claim for the reasons presented by the Debtor, then the Bankruptcy Code gives me no power to override the outcome under Pennsylvania law.

Second, even if I had the authority under §105(a) to disregard the direct requirements of §502(b)(1), I would not exercise my discretion to do so in this case.

It is not self-evident that the analogies the Debtor asks me to adopt are appropriate. The critical element grounding the Debtor's position is the Non-Participating ESA Subcontractors' missed opportunity to realize payment from a source other than the general assets of the bankruptcy estate. Without a great stretch, I can devise other legal analogies applicable to these facts that run counter to the Debtor's position.

For example, one can conceive of the Non-Participating ESA Subcontractors as holding joint and severable claims against more than one party (i.e., a right to collect from the Debtor and from ESA, the holder of the Retainage Fund). Under Pennsylvania law, a creditor's right to payment from one of the jointly and severally liable parties is not impaired by a decision to target one party for collection over the other party. See Baker v. AcandS, 562 Pa. 290, 300, 755 A.2d 664, 669 (2000); L.B Foster Co. v. Charles Caracciola Steel & Metal Yard, Inc., 777 A.2d 1090, 1095 (Pa. Super. Ct. 2001). See also VP Buildings, Inc. v. Joseph A. Cairone, Inc. 2001 WL 1168862, *4 (E.D. Pa. 2001) (discussing concept of joint and several liability in contract actions).

Alternatively, one can conceptualize the Non-Participating ESA Subcontractors as obligees on a note secured by a mortgage (with the Debtor being liable on the note and the Retainage Fund as the asset subject to the encumbrance). Similarly, under Pennsylvania law, such a creditor may proceed on either the note or the mortgage – or both – so long as the creditor limits itself to but one recovery on the debt. 8 Pennyslvania Law Encyclopedia 2d §203 (2000); see Franklin Decorators, Inc. v. Kalson, 330 Pa. Super. 140, 479 A.2d 3 (1984).

More significant than the alternative analogies that legal minds can conjure is the fact that the Non-Participating ESA Subcontractors received no notice that their failure to participate in the distribution of the Retainage Fund would result in a waiver of their right to participate in the distribution from the assets available generally in the bankruptcy estate. Through the medium of the Retainage Settlement, the court bifurcated the assets of the Debtor and established a separate process permitting certain (arguably unsecured) creditors (the ESA Subcontractors) to assert claims against a specific asset (the Retainage Fund). As a quid pro quo for acceptance of their claim to a priority position against that specific asset,[11] the Participating ESA Subcontractors waived their right to a distribution from the estate for any unpaid portion of their allowed claims. However, the Non-Participating ESA Subcontractors were not advised that their failure to participate in the distribution would also cause a waiver of their right to a distribution from other estate assets. In fact, the only notice that addressed the subject stated exactly the opposite. The July 12, 2004 Revised Scheduling Order in the ESA Adversary Proceeding expressly stated that "The failure of a defendant to file such Claim Support Worksheet shall not preclude that

[11] Prior to the Retainage Settlement, the Subcontractors' position was that the Retainage Fund was held in trust for them.

Subcontractor Defendant from filing a Proof of Claim in the underlying bankruptcy case."

In these circumstances, I find that it would be inequitable to disallow the claims of the Non-Participating ESA Subcontractors. Creditors are entitled to rely on the well established procedures for allowance of their claims in bankruptcy cases under Fed. R. Bankr. P. 3003 and 3007 with the expectation that unencumbered funds of the bankruptcy estate will be distributed subject to the priorities established by the Bankruptcy Code. I find problematic any outcome that would depart from the creditors' legitimate expectations without clear advance notice.

Reduced to its essence, the Objection is a post hoc effort to invoke the "marshaling of assets" doctrine. Marshaling is an equitable doctrine providing that a creditor which may resort to two funds from which to satisfy its debt may not, by resorting to one of the funds, defeat other creditors who may reach only one of the funds.[12]

This case may have been appropriate for the exercise of the marshaling of assets doctrine. The problem for the Debtor is that the doctrine should have been invoked before the distribution of the Retainage Fund. Had the Debtor requested that the court compel all of the ESA Subcontractors to participate in the distribution of the Retainage Fund, given notice of the request to each affected creditor and had the court concluded that marshaling was appropriate,

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[12] Under Pennsylvania law, marshaling is permitted where (1) one creditor has a secured claim against two funds; (2) another creditor has a claim against only one of these funds; and (3) the creditor seeking to invoke marshaling can show that the rights of the senior secured creditor will not be endangered or injuriously delayed and that there is no reasonable doubt of the availability of another fund to satisfy the senior secured creditor's demand.

In re High Strength Steel, Inc., 269 B.R. 560, 572 (Bankr. D. Del. 2001). See also In re Mihalko, 87 B.R. 357 (Bankr. E.D. Pa. 1988).

the Debtor may have been able to achieve the result it now seeks – precluding all ESA Subcontractors from receiving a distribution from the general assets of the bankruptcy estate. It is now too late for that process to take place, however. The Debtor has waived any right it may have had to invoke the marshaling of assets doctrine.

Finally, I will address briefly the Debtor's "mitigation" argument. In asserting that Diamond's claim should be disallowed because it did not mitigate its damages, the Debtor is not arguing that Diamond or any of the other Non-Participating ESA Subcontractors could have taken some action which would have prevented their monetary damages from accumulating to the level that they claim, i.e., that through some type of primary conduct these creditors could have reduced their damages (just as a landlord could reduce its damages by re-leasing a property and collecting rent during the term of a lease that has been breached by a tenant). Rather, the Debtor's argument is that having suffered damages arising from nonpayment for the services rendered, the Non-Participating ESA Subcontractors could have reduced their losses by obtaining payment from another source, the Retainage Fund. Because the Retainage Fund was derived from the Debtor's right to payment under the ESA Contracts and was arguably property of the bankruptcy estate, I perceive this argument as being no more than a variation of a marshaling argument, not a true mitigation argument. I reject the argument for the same reasons discussed above.

**D. Denial of the Objection as to Other Non-Participating ESA Subcontractors**

Based on the Debtor's representations during the hearing in this matter, I understand that there are several proofs of claim that are similarly situated to Diamond's proof of claim. By this,

I mean that other Non-Participating ESA Subcontractors have filed proofs of claim in this case. The only distinction between Diamond and the other Non-Participating ESA Subcontractors who filed proofs of claim is that the other Non-Participating ESA Subcontractors did not respond or appear in opposition to the Objection. Due to the absence of opposition, the Debtor requests that notwithstanding my denial of the Debtor's objection to Diamond's claim, I sustain the Objection with respect to the other ESA Subcontractors who filed proofs of claim.

I decline the Debtor's invitation to sustain the objection as to the other Non-Participating ESA Subcontractors. As explained earlier, the filed proofs of claim are valid prima facie evidence of the validity and the amount of the claims. Fed. R. Bankr. P. 3001(f). The burden was on the Debtor to produce evidence to refute at least one of the allegations that is essential to each claim's legal sufficiency. The Debtor has not produced any evidence, but instead has relied upon a purely equitable argument based on the existing record in this bankruptcy case and I have found the Debtor's argument to be unconvincing. Thus, even though the other Non-Participating ESA Subcontractors have not actively contested the Objection, their claims must be allowed because the Debtor has not met its burden of production in overcoming the prima facie validity of their proofs of claim.[13]

[13] In the Objection, the Debtor referred to several claims which were not filed but which were referenced only in the Debtor's schedules (as unliquidated). As scheduled, unliquidated claims, such claims are not entitled to be treated as prima facie valid and presumptively allowed. See Fed. R. Bankr. P. 3003(b)(1). Thus, if any such claims exist and if the Debtor considers it necessary that they be disallowed, I will disallow those claims.

## IV.

In summary, I will: (1) deny the Objection to Diamond's claim; (2) deny the Objection to the proofs of claim filed by other Non-Participating ESA Subcontractors to the extent that the objection is based solely on non-participation in the Retainage Fund; and (3) grant the Objection as to any claim of a Non-Participating ESA Subcontractor who did not file a proof of claim in this case and whose claim arises solely from being scheduled in the Debtor's Schedule F as the holder of a contingent, unliquidated or disputed claim.

In the accompanying Order, I have directed the Debtor to identify by claim number, those claims which have been resolved by this decision.

**Date: December 18, 2006**

**ERIC L. FRANK**
**U.S. BANKRUPTCY JUDGE**

**UNITED STATES BANKRUPTCY COURT**
**EASTERN DISTRICT OF PENNSYLVANIA**

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| **IN RE:** | **WINDSOR CONSTRUCTORS, INC.** | **:** | **Chapter 11** |
| | | **:** | |
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| | | **:** | |

# O R D E R

**AND NOW,** upon consideration of the Debtor's Second Omnibus Objections to Claims ("the Objection"), the responses thereto, and after a hearing, and for the reasons set forth in the accompanying Memorandum, it is hereby **ORDERED** that:

1. The Objection is **DENIED** as to the claim of Diamond Dimensions (Proof of Claim No. 36).
2. The Objection is **DENIED** as to the claim of any Non-Participating ESA Subcontractor (as defined in the Memorandum) who filed a proof of claim in this bankruptcy case.
3. The Objection is **SUSTAINED** as to any claim of a Non-Participating ESA Subcontractor whose claim arises solely from being scheduled in the Debtor's Schedule F as the holder of a contingent, unliquidated or disputed claim (and who did not file proof of claim in this bankruptcy case).
4. Within fifteen (15) days from the entry of this Order, the Debtor shall submit a supplemental Order identifying by claim number, those claims described in Paragraphs 2 and by name those claims, if any, described in Paragraph 3 above.
5. If the Debtor objects to a claim otherwise allowable pursuant to Paragraph 2 above because the Debtor contends that the claim was not timely filed, upon request of the Debtor as provided below in Paragraph 7, the court will schedule a hearing to consider the Debtor's objection.

6. If the Debtor objects to the amount of any claim otherwise allowable pursuant to Paragraph 2 of this Order, the court will schedule a hearing and the court will consider the Debtor's objection.

7. Any request for a hearing pursuant to Paragraphs 5 or 6 above shall be made within fifteen (15) days from the entry of this Order by the filing of a renewed objection to claim pursuant to L.B.R. 3007-1 and 5070-1.

**Date: December 18, 2006**

**ERIC L. FRANK**
**U.S. BANKRUPTCY JUDGE**