

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re:

Case No. 6:08-bk-05849-ABB
Chapter 11

EKBERG STUCCO, INC.,

Debtor.

ORDER

This matter came before the Court on the Objection to Claim (Doc. No. 136) filed by Ekberg Stucco, Inc., the Debtor herein ("Debtor"), seeking to have Claim No. 6 filed by Central Florida Lath & Stucco, Inc. ("Claimant") reduced. An evidentiary hearing was held on February 10, 2009 at which representatives of the Debtor, counsel for the Debtor, Manuel Quilli, the Claimant's President, and Al Mesa, the Claimant's accountant, appeared.

The Debtor filed this case on July 11, 2008 ("Petition Date"). The Debtor engaged Claimant prepetition as a subcontractor to provide stucco services and supplies. Claimant asserts it holds an unsecured claim of \$78,835.98 for services and supplies for the period January 7, 2008 through February 13, 2008. The claim includes \$20,087.94 for late payment charges, interest at the monthly rate of 1.5%, collection fees, bookkeeping fees, and attorney's fees for a collection suit instituted by Claimant against the Debtor in Orange County.

The Debtor asserts the claim should be reduced for back-charges and worker's compensation insurance and no basis exists for the charges totaling \$20,087.94. The Debtor contends it owes Claimant \$31,684.20.

The Debtor back-charged Claimant \$15,998.05 for substandard work and safety violations.¹ It deducted the back-charges from the amounts owed on Claimant's invoices. The Debtor notified Claimant of the back-charges by issuing Labor Work Order/Bills to Claimant stamped "Backcharge" detailing the back-charge

amount and basis for each back-charge.² Claimant collected the Labor Work Order/Bills from its drop-box in the Debtor's office pursuant to the parties' customary protocol.

Claimant did not dispute or challenge the back-charges. The Debtor severed its relationship with Claimant due to the back-charges. The back-charges of \$15,998.05 are due to be deducted from Claim No. 6.

The Debtor contests the amount of \$20,087.94 claimed for late payment charges, interest at the monthly rate of 1.5%, collection fees, bookkeeping fees, and attorney's fees. The Debtor utilizes a standardized written contract with its subcontractors, which the Debtor and Claimant executed. The parties did not present the contract. The contract, according to Jeanette Ekberg, the Debtor's Vice President and Comptroller, contains a provision for the award of attorney's fees to the Debtor in the event of a dispute. The contract does not provide for the recovery of interest or other fees.

Claimant instituted a collection action against the Debtor post-petition. Claimant's collection action was barred by the automatic stay, which arose on the Petition Date pursuant to 11 U.S.C. Section 362(a). Claimant did not seek relief from the automatic stay. Any attorney's fees incurred by Claimant relating to the collection action constitute a post-petition debt and are not recoverable.

Claimant, had it instituted the collection action against the Debtor pre-petition, may have been entitled to recovery of its attorney's fees and costs pursuant to Florida Statute Section 57.105(7) and *In re Woollacott*, 211 B.R. 83, 87 (Bankr. M.D. Fla. 1997) (holding Fla. Stat. Section 57.105(7) is applicable in bankruptcy proceedings). Claimant has not established a basis for its charges of \$20,087.94 and such amount is due to be deducted from Claim No. 6.

Claimant, as a condition of its employment, was required to maintain worker's compensation insurance. The Debtor, through an insurance audit, discovered Claimant had allowed its worker's compensation insurance to lapse and failed to inform the Debtor of such

¹ Debtor's Exh. No. 1.

² *Id.*

lapse.³ The Debtor was required to pay \$8,375.00 for worker's compensation insurance for Claimant's coverage.⁴ The insurance cost of \$8,375.00 paid by the Debtor to FCCI Insurance Group is due to be deducted from Claim No. 6.

Claimant is entitled to a claim in the amount of \$34,374.99.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Debtor's Objection (Doc. No. 136) is hereby **SUSTAINED** and Claim No. 6 filed by Central Florida Lath & Stucco, Inc. is allowed as a general unsecured claim of \$34,374.99.

Dated this 18th day of February, 2009.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge

³ Debtor's Exh. No. 5.

⁴ Id. at p. 4. The Debtor asserts in its Objection it paid \$11,846.00 for worker's compensation insurance. Its documents and testimony establish it paid \$8,375.00. The Debtor's assertion Claimant is entitled to a claim of \$31,684.20 apparently includes a worker's compensation insurance cost deduction of \$11,065.79, which amount has not been substantiated by the Debtor.