

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE: § CHAPTER 11
§
BUILDING MATERIALS HOLDING § CASE NO. 09-12074(KJC)
CORPORATION, et al.,¹ §
§
§ Related Doc No. DI 1432

**RESPONSE FILED BY POST UPTOWN, L.L.C., ET AL., TO DEBTORS’
FIFTEENTH OMNIBUS (SUBSTANTIVE) OBJECTION TO CLAIMS
PURSUANT TO SECTION 502(b) OF THE BANKRUPTCY CODE,
BANKRUPTCY RULES 3003 AND 3007 AND LOCAL RULE 3007-1**

Comes now, Post Uptown, L.L.C., Post Apartment Homes, L.P., Post GP Holdings, Inc. and Post Midtown Square, L.P. (collectively “Post”), and hereby files their Response to Debtors’ Fifteenth Omnibus (Substantive) Objection to Claims Pursuant to Section 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007 and Local Rule 3007-1 (hereinafter “Post Response”) and states as follows:

1. On August 31, 2009, Post filed their Proof of Claim in the amount of \$1,165,683.90. The Proof of Claim filed by Post is claim number 2432. The Proof of Claim was timely and complied with the requirements of Bankruptcy Rule 3001 and as such constitutes prima facie evidence of the validity and amount of the claim. The Proof of Claim, which was filed as unsecured, was for services and products sold to BMC West Corporation, one of the Debtors listed in the above styled case. The Proof of Claim was received by Garden City by 10:30 a.m. on August 31, 2009.

¹ The Reorganized Debtors, along with the last four digits of each Reorganized Debtor’s tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Reorganized Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

2. On February 19, 2010, the Debtors filed the Reorganized Debtors' Fifteenth Omnibus (Substantive) Objection to Claims Pursuant to Section 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007 and Local Rule 3007-1 (the "Debtors' Objection") (docket number 1432). Post was listed under the category "Claims to be expunged as no liability" and the comment listed by the Debtors in the Debtors' Objection states "The Debtors have been dismissed from this case without prejudice per Order of Nonsuit No. 2008-13691 in the District Court of Harris County, Texas, 333rd Judicial District signed September 3, 2009." *See*, Exhibit B of the Debtors' Objection (docket no. 1432).

3. On March 5, 2008, Post Uptown, L.L.C., Post Apartment Homes, L.P., Post GP Holdings, Inc. and Post Midtown Square, L.P. filed their Plaintiff's Original Petition listing Royal Door, Staz-on Roofing, SWI Finishing, Inc., Texas EIFS, LLC, and Monarch Windows and Doors L.L.C. as Defendants (the "District Court Case"). Royal Door is a d/b/a for BMCW SouthCentral, L.P. The case was filed in the District Court of Harris County, Texas, 333rd Judicial District. The Debtors appeared in the District Court Case, had answered, and were defending the District Court Case pre-petition.

4. A Suggestion of Bankruptcy was served by BMCW SouthCentral, L.P. in the District Court Case on or about July 20, 2009. The Suggestion of Bankruptcy stated that BMC West Corporation, the general partner of Defendant BMCW SouthCentral, L.P. filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware on June 16, 2009. The bankruptcy proceeding stayed any further litigation against the Debtor pursuant to 11 U.S.C. § 362.

5. Post served the proof of claim against the Debtors on August 28, 2009 which was received by Garden City on August 31, 2009. The Post Proof of Claim has been properly and

timely filed in the bankruptcy case. The Proof of Claim was filed in the Bankruptcy case prior to the filing of the dismissal, without prejudice, pleading in the District Court Case.

6. Once the Debtors filed bankruptcy, Post understood that its claims against the Debtors needed to be asserted in the bankruptcy case; therefore, Post filed the Plaintiffs' Notice of Non-Suit, Without Prejudice, as to Defendant, BMCW SouthCentral, L.P., d/b/a Royal Door (the "Notice") at 4:01 p.m. on August 31, 2009. On September 3, 2009, the Order of NonSuit was signed by the Court. This action preserved Post's claims against the Debtors and allowed the District Court Case to proceed as to the other defendants.

7. The Order of NonSuit that Post obtained in the District Court Case regarding the Debtors, states that "[i]t is ordered, adjudged and decreed that Post Uptown, LLC., Post Apartment Homes, L.P., Post GP Holdings, Inc. and Post Midtown Square, L.P.'s claims against Defendant, BMCW SouthCentral, L.P. d/b/a Royal Door, are nonsuited without prejudice." A true and correct copy of the Order of NonSuit is attached hereto as Exhibit "A." Post, according to Texas Civil Procedure, within a specific time period after the court signs an order of dismissal, is permitted to bring another civil action for the same cause. Under Rule 162 of the Texas Rules of Civil Procedure, at any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case or take a non-suit. Tex. R. Civ. P. 162. The right to a nonsuit is absolute, so long as defendant has not made a claim for affirmative relief, or there is a pending motion for sanctions or costs at the time of the filing of the nonsuit. *Greenberg v Brookshire*, 640 S.W. 2d 870,871 (Tex. 1982). Subject to certain conditions, a plaintiff who takes a nonsuit is not precluded from filing a subsequent suit seeking the same relief. *Aetna Cas. & Sur.Co. vs Specia*, 849 S.W. 2d 805, 806, (Tex. 1993). Of course, in this case, it is not possible for Post to refile their claim against the Defendants since the Defendants

have filed for bankruptcy protection. Post's claims previously being asserted against the Debtors in the District Court Case are being asserted by Post in the Proof of Claim and the Proof of Claim so states.

8. The appropriate forum for Post to assert its claims against the Debtors, after the filing of the bankruptcy case, was the Bankruptcy Court. Post's Proof of Claim was filed timely and there was supporting documentation attached to the Proof of Claim. The Debtors did not object to the Proof of Claim because the Proof of Claim was filed late or the Proof of Claim lacked supporting evidence. Instead, the Debtors objected to Post's Proof of Claim based on flawed and illogical reasoning. Nothing in the Debtors' Objection attacks the validity of Post's Proof of Claim. The Debtors instead attempt, in an improper omnibus objection (*see*, B.R. 3007(d)), to have Post's Proof of Claim disallowed due to an improper basis. Had the Debtors read the attachments to the Proof of Claim, the Debtors would have known that Post continues to assert the very same claims raised in the District Court Case. The Proof of Claim was filed **only after** Post received the Suggestion of Bankruptcy. The Post Proof of Claim was filed prior to Post seeking to dismiss the Debtor from the District Court Case. The Order of Nonsuit was entered **after** Post received the Suggestion of Bankruptcy.

9. Pursuant to the Notice of Reorganized Debtors' Fifteenth Omnibus (Substantive) Objection to Claims Pursuant to Section 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007 and Local Rule 3007-1, the persons possessing ultimate authority to reconcile, settle, or otherwise resolve the Disputed Claim or Response on behalf of the responding party are Michael J. Durrschmidt and Eric Lipper, Hirsch & Westheimer, P.C., 700 Louisiana, Suite 2550, Houston, Texas 77002; 713-223-5181.

Therefore, premises considered, Post Uptown, L.L.C., Post Apartment Homes, L.P., Post GP Holdings, Inc. and Post Midtown Square, L.P. request that this Court deny the Debtors' objection to the Proof of Claim filed by Post, allow the Post Proof of Claim in full, and grant such other relief as is just.

Respectfully submitted this 15th day of March, 2010.

WHITEFORD TAYLOR PRESTON LLC

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of March, 2010, a copy of the foregoing Response to Debtors' Fifteenth Omnibus (Substantive) Objection to Claims Pursuant to Section 502(b) of the Bankruptcy Code, Bankruptcy Rules 3003 and 3007 and Local Rule 3007-1 was served to the parties on the attached service list via first class mail, postage prepaid.

/s/ Michael J. Durrschmidt
Michael J. Durrschmidt

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