



ORDERED in the Southern District of Florida on December 6, 2019.

**A. Jay Cristol, Judge
United States Bankruptcy Court**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:

Chapter 11 Case

MAGNUM CONSTRUCTION MANAGEMENT,
LLC f/k/a Munilla Construction Management,
LLC,¹

Case No. 19-12821-BKC-AJC

Debtor.

**ORDER GRANTING IN PART CREDITOR HERC RENTALS' STAY RELIEF
MOTION SEEKING ENFORCEMENT OF ORDER TO PAY BONDED CONTRACT
CLAIMS**

THIS MATTER came before the Court for hearing on October 24, 2019 at 2:30 p.m., in Miami, Florida (the "Hearing"), upon *Creditor Herc Rentals' (1) Motion for Relief From Automatic Stay to Recover Rented Equipment; (2) Application for Payment of Administrative Expenses; and (3) Motion to Enforce Order to Pay Bonded Contract Claims* [ECF No. 449] (the "Motion"). On October 29, 2019, the Court entered an *Order Granting in Part and Abating in Part*

¹ The Debtor's address is 6201 SW 70th Street, 1st Floor, Miami, FL 33143. The last four digits of the Debtor's federal tax identification number are 3403.



Creditor Herc Rentals’ (1) Motion for Relief From Automatic Stay to Recover Rented Equipment; (2) Application for Payment of Administrative Expenses; and (3) Motion to Enforce Order to Pay Bonded Contract Claims, resolving all but one of the requests for relief sought in the Motion [ECF No. 584]. This Order considers whether Herc Rentals, Inc. (“Herc Rentals”) is entitled to enforce the Court’s prior *Order Granting Debtor’s Emergency Motion for Order Authorizing it to Honor Contractual Obligations on Bonded Projects, Including Obligations to Materialmen and Subcontractors* (the “Bonded Contracts Order”) [ECF No. 95].

Herc Rentals asserts that the language of paragraph 5 of the Bonded Contracts Order establishes a mandatory procedure for the Debtor to pay subcontractors, vendors and materialmen under the Bonded Contracts, *including prepetition obligations*, promptly upon receipt of funds from project owners:

To the extent there are disputes over the amounts owing by the Debtor to subcontractors, vendors and materialmen, such disputes shall be resolved as follows: The undisputed portion of the debt shall be paid to the subcontractors, vendors and materialmen within five (5) business days of receipt by the Debtor. With respect to the disputed amount, the Debtor and the vendor or subcontractor, shall attempt to resolve the dispute and can do so without further leave of Court. However, if agreement is not reached within ten (10) business days of the Debtor being notified of a dispute by the vendor or subcontractor in writing to Magnum Construction Management, LLC, 6201 SW 70th Street, 1st Floor, Miami, FL 33143, Attn: Jorge Munilla, President, the vendor or subcontractor shall have the right to bring the matter before the Court on an expedited basis and the Debtor shall not challenge the matter being heard on an expedited basis. Upon the final determination of the disputed amounts owing by the Debtor, the Debtor is directed to pay such finally determined amounts within two (2) business days of resolution by out-of-court agreement between the parties or entry of a court order resolving the dispute.

Herc Rentals states it commenced the above-described procedures on June 17, 2019 when it sent correspondence to the Debtor [ECF No. 449]. The parties did not reach agreement to resolve the dispute within ten (10) business days and Herc Rentals argues it is now entitled to have its claim determined and paid on an expedited basis.

The Debtor relies on the motion which sought entry of the Bonded Contracts Order (the “Bonded Contracts Motion”) [ECF No. 23], and the statements made at the hearing on the Bonded Contracts Motion, to support its contention that payment of Herc Rentals’ pre-petition claim was discretionary. The Debtor cites to the title of the Bonded Contracts Motion, which states: “DEBTOR’S EMERGENCY MOTION FOR ORDER *AUTHORIZING* IT TO HONOR CONTRACTUAL OBLIGATIONS ON BONDED PROJECTS....” [ECF No. 23 at 1 (emphasis added)], and the first sentence of the Bonded Contracts Motion, which states that the Debtor “moves... for *authority, but not direction*, to honor its contractual obligations” regarding certain contracts relating to projects bonded by the Debtor’s sureties. *Id.* at 1-2 (emphasis added). The Debtor also relies on the language of the Bonded Contracts Order, which reads: “ORDER GRANTING DEBTOR’S EMERGENCY MOTION FOR ORDER *AUTHORIZING* IT TO HONOR CONTRACTUAL OBLIGATIONS ON BONDED PROJECTS....” [ECF No. 23 at 1 (emphasis added)] and contains the statement that “[t]he Debtor is *authorized* to honor its obligations under the Bonded Contracts....” *Id.* at 2, ¶2 (emphasis added).

At the hearing on the Bonded Contracts Motion, the Debtor explained it was seeking to pay essential or critical vendors to avoid defaulting under existing contracts and finance agreements. The U.S. Trustee had no objection, so the Court granted the Debtor authority to determine and pay certain pre-petition claims. Although the Court did not direct the Debtor to pay any particular pre-petition claims, the Court provided the Debtor the authority to pay certain critical vendors listed by it in its motion, of which Herc Rentals was one such critical vendor. Debtor’s counsel thereafter drafted and submitted for entry the Bonded Contracts Order which contains the payment and dispute resolution procedure mechanisms. These procedural mechanisms, contained in paragraph 5 of the Bonded Contracts Order, indeed appear to be

mandatory, in the sense that the Debtor agreed to such procedures with regard to certain pre-petition vendors. Herc Rentals continued to provide services to the Debtor after entry of the Order, but when it came time to commence the dispute resolution process set forth in the Bonded Contracts Motion and Bonded Contracts Order, the Debtor refused. The Debtor did not indicate why it chose not to proceed with the process at Herc Rentals' request; Debtor simply argues it does not have to participate in such process.

The Court finds Debtor's position to be untenable. To the extent funds are received by the Debtor under or pursuant to Bonded Contracts, the Debtor proposed, and this Court ordered, compliance with the procedures the Debtor proposed. Herc Rentals continued to provide necessary services (in this case, the use of heavy equipment and machinery) to the Debtor post-petition, no doubt relying on the "mandated" procedures which the Debtor requested and by which it agreed to be bound in its proposed Order, only to find later that the Debtor did not mean what it proposed. The language of the Bonded Contracts Order is certainly unclear and definitely ambiguous. As such, and because it was the Debtor's counsel who drafted and submitted same, the Court believes any ambiguity should be construed in favor of Herc Rentals.

The Court believes Debtor's obligation to pay Herc Rentals promptly upon receipt of funds from the project owners is not only consistent with paragraph 5 of the Bonded Contracts Order, but is also consistent with Florida and Texas prompt payment statutes and Debtor's obligations to Travelers Casualty and Surety Company of America and Berkshire Hathaway Specialty Insurance Company pursuant to payment bonds, indemnity agreements and financing agreements. As the U.S. Trustee noted at the hearing on the Bonded Contracts Motion, the more creditors paid pursuant to this motion and resulting order, the less claims there will be later against the bankruptcy estate.

Thus, because the Parties did not previously reach agreement to resolve the dispute within ten (10) business days, Herc Rentals is entitled to have its claim heard and determined on an expedited basis. It is

ORDERED AND ADJUDGED that the Motion, to the extent it seeks to enforce the Bonded Contracts Order against the Debtor, is GRANTED as follows:

1. The Parties are directed to meet and confer within the next 21 days to attempt to resolve the issue of the debt due Herc Rentals under Bonded Contracts regarding pre-petition obligations, as listed by the Debtor in its Bonded Contracts Motion. If the Parties resolve the dispute, they may submit an agreed order memorializing the resolution.
2. If the Parties are unable to resolve the dispute, then the Parties shall appear before this Court for a further preliminary hearing January 2, 2020 at 2:00 p.m., at which time a final evidentiary hearing will be scheduled.
3. Entry of this Order does not impair Herc Rentals' pending request for an administrative expense claim based on the Debtor's use of the leased equipment after the Petition Date per the Parties' underlying lease agreements.

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Copies furnished to:

Heather DeGrave, Esq.
Paul A. Avron, Esq.

(Attorney DeGrave is directed to serve a signed copy of this Order upon all interested parties and to file a Certificate of Service with the Court.)