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## THE WEEK'S OPINIONS

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### Subcontract - Sums Due

Where a plaintiff secured creditor, authorized to collect accounts receivable due a Chapter 11 debtor, has filed a complaint against a defendant to recover sums allegedly due under a number of construction subcontracts, a request by the defendant for summary judgment should be denied and a motion by the plaintiff for additional discovery should be allowed.

### Judge's Conclusions

"[Defendant] Modern [Continental Construction Co.] contends that summary judgment is appropriate because [plaintiff United States Steel Corp.] concedes in its Complaint that [debtor] Cyclone [Inc.] failed to substantially complete its performance under the subcontracts. ...

"I find that the subcontract provides for recovery by the Subcontractor of payments owed it at the time of the breach subject to a deduction for 'all sums chargeable to Subcontractor and damages due from said breach.' ... Accordingly, summary judgment is inappropriate. ...

"USS argues in the alternative that Modern breached the contract by failing to make timely payments, thereby excusing Cyclone's subsequent breach. ...

"USS employee David] Karr ... raises a genuine issue of material fact as to whether Modern was in material breach of at least two of the relevant contracts (C17A9 and C19E7) at the time of its own breach, and therefore whether it is entitled

to recover those amounts due. Modern does not assert, nor could I find, that Cyclone or USS waived its rights with respect to any breach for failure to make timely payments. ...

"Karr also states that he does not have sufficient information regarding the other five contracts, and that Modern possesses but has failed to produce in discovery the relevant information. Therefore, USS moves under Rule 56(f) for additional discovery. ...

"USS satisfies each of the five requirements with respect to discovery on the issue of prior breach. ...

"For the reasons set forth more fully above, I hereby grant plaintiff's Rule 56(f) motion for additional discovery and deny defendants' motion for summary judgment with respect to the claims for breach of contract (Counts 1, 3, 5, 7, 9, 11, 13, 15, 19); grant defendants' motion for summary judgment with respect to the claims for quantum meruit (Counts 2, 4, 6, 8, 10, 12, 14, 16, 20), and in doing so expressly deny plaintiff's Rule 56(f) motion for additional discovery with respect to these counts and deny plaintiff's motion for certification of questions to the SJC."

*USS Corp. v. Modern Continental Construction Co., Inc., et al. (Lawyers Weekly No. 02-263-02) (23 pages) (Woodlock, J.) (USDC) Marc Redlich, Merle Ruth Hass and Howard Burger for the plaintiff; Joel Lewin and Hugh Gorman for the defendants (Civil Action No. 01-10561-DPW).*