

SIGNED.



Dated: April 23, 2009

James M. Marlara
JAMES M. MARLAR
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:)	Chapter
AVC VILLA DEL LAGO AT OCOTILLO)	No. 2-08-06834-JMM
DEVCO, L.L.C., an Arizona limited)	Jointly Administered With
liability company, tka AVC)	No. 2-08-06836 and
SWEETWATER VILLAGE, L.L.C.,)	No. 2-08-06837
dba VILLA DEL LAGO,)	
Debtor.)	MEMORANDUM DECISION
AVC ESTRELLA VILLAGE DEVCO,)	
L.L.C., an Arizona limited liability)	
company, dba THE VILLAS AT)	
MOUNTAIN RANCH,)	
Debtor.)	
VILLAS AT OCOTILLO, L.L.C., an)	
Arizona limited liability company, tka)	
FOX VILLAGE VILLAS AT OCOTILLO,)	
L.L.C.,)	
Debtor.)	

There are three Debtors in these matters, and their cases are being jointly administered. One Debtor, The Villas at Ocotillo, L.L.C. ("TVAO"), has filed an objection to the claim of Kitchell Custom Builders ("Kitchell") (Dkt. #126). Kitchell responded, and filed a motion which seeks to allow the Kitchell claim, for voting purposes (Dkt. #139). After reviewing all pleadings relevant to this issue, the court concludes that oral argument is unnecessary, and that it may decide the issue on the pleadings and record before it.

1 **FACTS**

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3 Kitchell filed a proof of claim in the case of TVAO (08-6837). That claim was filed
4 as an unsecured claim for \$681,038 (claim no. 16). Kitchell has filed no claim in either of the other
5 two cases.

6 In its unsecured proof of claim, Kitchell attached its contract with TVAO dated
7 March 11, 2005. Now, in response to the Debtors' objection to its claim, Kitchell has also filed two
8 affidavits (Messrs. Butler and Chowaniec) and an accounting summary of its claim.

9 The schedules of each of the Debtors reflect the following list of total unsecured
10 creditors, disputed or not:

11

12	Dkt. #23	08-6834	AVC Villa del Lago	\$156,679.21
13	Dkt. #16	08-6836	AVC Estrella Village	\$141,890.56
14	Dkt. #21	08-6837	Villas at Ocotillo	\$1,107,180.93

15 In the Ocotillo case (08-6837), Kitchell is listed as a disputed creditor for \$624,122.00

16 **THE OBJECTION**

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18 In its objection to the Kitchell claim, the relief sought is first to disallow it for voting
19 purposes (the actual merits will be later litigated in Superior Court if the plan is confirmed), and
20 eventually, to disallow the entire claim.

21 Today, the court will only deal with the voting aspects, because the issues concerning
22 who owes how much to whom is to be litigated in the Superior Court, if the Debtor's plan is
23 confirmed. (*See* plan filed in 08-6837 at Dkt. #109, p. 16, 17, para. 8, 14.) Or, alternatively, the
24 claim may be liquidated in the claims resolution process.
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1 Under the joint plan, the Ocotillo unsecured creditors are to be paid out of any net
2 recoveries from a lawsuit filed in Maricopa County Superior Court. (See Ex. C to Debtor's motion,
3 Dkt. #126.) That suit was filed in Superior Court about three months ago.¹

4 But merely because the Kitchell claim is disputed does not, of itself, deprive Kitchell
5 of its right to vote on the Debtor's plan. Besides its complaint, the Debtors have advanced no other
6 proof to overcome the prima facie validity accorded to Kitchell's claim. FED. R. BANKR. P. 3001(f).
7 Eventually, the outcome of the Superior Court litigation will determine the fate of the Kitchell claim.
8 Until such resolution, Kitchell may not be deprived of its vote merely because the Debtor disputes
9 the quality of Kitchell's construction work. It remains just as likely that Kitchell could defeat the
10 Debtor's complaint and prevail on its counterclaim. At this point, each side's contentions remain just
11 that--contentions-- and eventually the adversarial system will sort out and liquidate their various
12 claims. It is too early to divine that outcome.

13 The Debtor has, at this point, not sufficiently shown that Kitchell's claim is
14 undeserving of a vote.

15
16 **CONCLUSION**
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18 The Debtor's motion to restrict Kitchell from voting on its plan will be DENIED; and
19 Kitchell's motion to allow its claim for voting purposes only will be GRANTED.

20 A separate order to that effect will be entered on the docket, and the hearing on this
21 issue, set for May 13, 2009, will be vacated.

22
23 DATED AND SIGNED ABOVE.
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27 ¹ Kitchell complains that the bankruptcy court did not authorize the filing of this
28 suit. However, a debtor-in-possession needs no such prior authorization. FED. R. BANKR. P.
6009.

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2 date signed above:

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By /s/ M.B. Thompson
Judicial Assistant