

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

Building Materials Holdings
Corporation, et al.,

Debtors.

Chapter 11

Case No. 09-12074 (KJC)
Jointly Administered

Objection Deadline: May 5, 2010 @ 4:00 p.m.
Hearing Date: May 19, 2010 @ 11:30 a.m.

**MOTION OF K. HOVNIANIAN AT BRIDGEPORT, INC.
FOR RELIEF FROM AUTOMATIC STAY**

K. Hovnanian at Bridgeport, Inc. (“K. Hovnanian”) hereby moves (the “Motion”) this Court for an order granting relief from the automatic bankruptcy stay so that it may prosecute the Litigation and Cross-Complaint (both as defined below) and proceed *only* against the available insurance proceeds of debtor H.N.R. Framing Systems, Inc. (“HNR”), a subsidiary of debtor Building Materials Holdings Corporation pursuant to 11 U.S.C. § 362. In support of this Motion, K. Hovnanian relies upon the Declaration of Yvette M. Dumas. (“Dumas Decl.”) filed contemporaneously herewith and states as follows:

BACKGROUND

1. On or about June 16, 2009, HNR filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). Dumas Decl., ¶ 2.

2. K. Hovnanian is a creditor of HNR and, therefore, qualifies as a party in interest in this case. Dumas Decl., ¶ 3.

3. On or about June 9, 2008, Anthony Trolinger and various homeowners (collectively, the “Homeowners”) commenced litigation against K. Hovnanian relating to a certain housing development located in San Diego, California (the “Project”), alleging numerous causes of action and seeking damages based upon strict liability, breach of express and implied warranties, and negligence (the “Complaint”). A true and correct

copy of the Complaint is attached as Exhibit "A" to the Dumas Decl. The matter is known as Case No. 37-2008-00085314-CU-CD-CTL in the Superior Court of the State of California, County of San Diego (the "Litigation"). Dumas Decl., ¶ 4.

4. On or about February 17, 2009, K. Hovnanian filed a Cross-Complaint for equitable indemnity, express indemnity, breach of express and implied warranties, breach of written contract, negligence, contribution, declaratory relief, and total indemnity (the "Cross-Complaint") against HNR, among others, based upon the alleged construction defects caused by HNR during HNR's performance of work and/or services and/or providing of materials which were incorporated in the development, construction and/or sale of the Project. A true and correct copy of the Cross-Complaint is attached as Exhibit "B" to the Dumas Decl. Dumas Decl., ¶ 5.

5. The Litigation is set to proceed to trial on October 1, 2010. Based on the information produced in discovery in the Litigation, it appears that Plaintiffs' claims implicate HNR. Dumas Decl., ¶ 6.

6. K. Hovnanian seeks recovery from HNR for indemnification and payment of the total amount of any judgment rendered against K. Hovnanian based upon the Complaint, together with K. Hovnanian's attorneys' fees, expenses and costs of suit incurred in defending the Litigation. Additionally, K. Hovnanian seeks recovery for any and all attorneys' fees, experts' fees, costs and discovery expenses incurred by K. Hovnanian in its defense of the Litigation and in its pursuit of the Cross-Complaint. Dumas Decl., ¶ 7.

7. K. Hovnanian states, on information and belief, that HNR is insured under one or more general and excess liability insurance policies and that K. Hovnanian's claims can or have been tendered under those liability insurance policies. Dumas Decl., ¶ 8.

8. K. Hovnanian states, on information and belief, that on or about May 4, 1998, HNR and K. Hovnanian executed a Subcontract Agreement whereby HNR agreed

to provide materials and labor at the Project. A true and correct copy of the subcontract is attached as Exhibit "C" to the Dumas Decl. The parties entered into Subcontract extensions to include all of the properties involved in the Litigation. Additionally, pursuant to the subcontract, HNR agreed to obtain general liability insurance with a limit of combined bodily injury and property damage of not less than \$1,000,000. Dumas Decl., ¶ 9.

9. K. Hovnanian states, on information and belief, that HNR obtained a general liability insurance policy and excess liability insurance, wherein the insurers agreed to pay all sums, not to exceed \$1,000,000, which HNR should become liable to pay as damages imposed upon it by law, for injury sustained in the course of business (including HNR's work relating to the Project). Dumas Decl., ¶ 10.

10. K. Hovnanian states, on information and belief, that said insurance policies provide that insolvency or bankruptcy of HNR shall not release the insurance company from the payment of damages for injuries sustained during the term within the area of coverage of said policies. Dumas Decl., ¶ 11.

11. K. Hovnanian states, on information and belief, that the insurance policies at issue are not required or otherwise necessary to HNR for an effective debt liquidation under chapter 11 of the Bankruptcy Code. Dumas Decl., ¶ 12.

12. K. Hovnanian states, on information and belief, that the Litigation against HNR will be defended at no expense to HNR. Dumas Decl., ¶ 13.

13. If Movant K. Hovnanian is not permitted to pursue its interests in the insurance policies and proceeds, then K. Hovnanian will suffer irreparable injury, loss and damage. Dumas Decl., ¶ 14.

14. No issues of federal or bankruptcy laws are involved in the pending lawsuit against HNR, only questions of California state law. Dumas Decl., ¶ 15.

RELIEF REQUESTED

15. K. Hovnanian seeks a modification of the automatic stay imposed by Bankruptcy Code section 362 for the limited purpose of allowing K. Hovnanian to pursue its claims for indemnification and damages against HNR's liability insurance policies while waiving any deductibles.

16. K. Hovnanian agrees not to proceed against HNR's bankruptcy estate in the event of judgment against HNR in the Litigation in excess of HNR's insurance coverage.

17. Should HNR be found liable for K. Hovnanian's damages in the Litigation, to the extent that HNR's insurance coverage does not satisfy such liability, K. Hovnanian agrees to waive its right to satisfaction of its claim and participation in any distribution of assets of HNR's estate.

BASIS FOR RELIEF REQUESTED

18. The purpose of the automatic stay is “to prevent certain creditors from gaining a preference for their claims against the debtor; to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it; and, in general, to avoid interference with the orderly liquidation or rehabilitation of the debtor.” *St. Croix Condominium Owners v. St. Croix Hotel*, 682 F.2d 446, 448 (3d Cir. 1982). However, the automatic stay is not meant to be absolute, and, in appropriate instances, relief may be granted. *Wedgewood Inv. Fund, Ltd. V. Wedgewood Realty Group, Ltd. (In re Wedgewood)*, 878 F.2d 693, 697 (3d Cir. 1989).

19. Section 362(d)(1) of the Bankruptcy Code provide that “[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay – (1) for cause, including the lack of adequate protection of an interest in property of such party in interest” “Cause [, as defined in Section 362(d)(1),] is a flexible concept and courts often conduct a fact intensive, case-

by-case balancing test, examining the totality of the circumstances to determine whether sufficient cause exists to lift the [automatic] stay.” *In re The SCO GROUP, INC.*, 395 B.R. 852, 856 (Bankr. D. Del. 2007) (internal citations omitted). This Court utilizes the following “three-prong balancing test to determine whether to grant relief from the stay: (1) whether any great prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit; (2) whether the hardship to the non-bankrupt party by maintenance of the stay considerably outweighs the hardship to the debtor; and (3) the probability of the creditor prevailing on the merits.” *Id.* at 857; *Izzarelli v. Rexene (In re Rexene Prods. Co.)*, 141 B.R. 574, 576 (Bankr. D. Del. 1992). In particular, this Court confirmed that the legislative intent of Section 362(d)(1) was to emphasize the “importance of allowing a case to continue in the original tribunal so long as there is not prejudice to the estate.” *Id.*

20. Here, application of the Court's balancing test favors granting K. Hovnanian relief from the automatic stay for three reasons. First, there will be no great prejudice to HNR or HNR's bankrupt estate because K. Hovnanian agrees not to proceed against either HNR or its estate in excess of HNR's insurance coverage. In addition, to the extent that HNR's insurance coverage does not satisfy such liability of HNR, if any, K. Hovnanian agrees to waive its right to satisfaction of its claim and participation in any distribution of assets of HNR's estate. Second, K. Hovnanian will suffer considerable hardship if the stay is not lifted because it will not be able to continue prosecution of its Cross-Complaint and will be left to defend itself without the benefit of its additional insured status under HNR's insurance policies. Third, the likelihood of K. Hovnanian prevailing on the merits is extremely high because HNR's obligations to defend, indemnify and name K. Hovnanian as an additional insured were agreed to and formalized by written contract, to which HNR has never objected. Therefore, relief from the automatic stay should be granted.

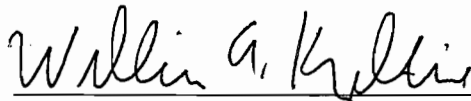
CONCLUSION

WHEREFORE, K. Hovnanian respectfully requests the entry of an order, substantially in the form attached hereto, which grants the following relief:

1. That the automatic stay imposed pursuant to 11 U.S.C. § 362 be modified forthwith to permit K. Hovnanian to proceed with prosecution of its Cross-Complaint against HNR and others;
2. That K. Hovnanian be allowed to assert its claims against the liability insurance policies of HNR;
3. That in the event K. Hovnanian obtains a judgment against HNR or otherwise resolves the Litigation, K. Hovnanian may receive HNR's insurance policy proceeds without any further approval by this Court; and
4. For such other and further relief as the Court may deem proper, just and equitable.

Dated: April 8, 2010
Wilmington, Delaware

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FOR THE DISTRICT OF DELAWARE**

In re:

Building Materials Holdings
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Objection Deadline: May 5, 2010 @ 4:00 p.m.
Hearing Date: May 19, 2010 @ 11:30 a.m.

NOTICE OF MOTION AND HEARING

PLEASE TAKE NOTICE that on April 8, 2010, K. Hovnanian at Bridgeport, Inc. ("K. Hovnanian") filed the attached **Motion of K. Hovnanian at Bridgeport, Inc. for Relief from the Automatic Stay** (the "Motion") with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 5th Floor, Wilmington, Delaware 19801 (the "Bankruptcy Court").

PLEASE TAKE FURTHER NOTICE that any objections or responses to the Motion must be made in writing, filed with the Bankruptcy Court, and served upon undersigned counsel for the moving party, so as to actually be received by the undersigned, on or before **May 5, 2010 at 4:00 p.m. (Prevailing Eastern Time)**.

PLEASE TAKE FURTHER NOTICE that if an objection is filed, a hearing on the Motion may be held before the Honorable Kevin J. Carey in the Bankruptcy Court, 824 Market Street, 5th Floor, Wilmington, Delaware 19801, on **May 19, 2010 at 11:30 a.m. (Prevailing Eastern Time)**.

PLEASE TAKE FURTHER NOTICE THAT IF NO OBJECTION TO THE MOTION IS TIMELY FILED IN ACCORDANCE WITH THE ABOVE PROCEDURES, THE BANKRUPTCY COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: April 8, 2010
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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

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Chapter 11

Case No. 09-12074 (KJC)
Jointly Administered

Related Docket No. _____

**ORDER GRANTING MOTION OF K. HOVNIANIAN AT
BRIDGEPORT, INC. FOR RELIEF FROM AUTOMATIC STAY**

Upon Consideration of the Motion of K. Hovnanian at Bridgeport, Inc. for Relief From Automatic Stay and any objections or responses thereto; and finding good and sufficient cause for granting the relief requested in the Motion; it is hereby ordered and adjudged as follows:

1. The Motion for Relief from Automatic Stay on behalf of K. Hovnanian at Bridgeport, Inc. (“K. Hovnanian”) is granted for the limited purpose of allowing K. Hovnanian to pursue its claims for indemnification and damages against debtor H.N.R. Framing Systems, Inc.'s (“HNR”) liability insurance policies while waiving any deductibles.

2. In the event that K. Hovnanian obtains a judgment against HNR or otherwise resolves the litigation, K. Hovnanian may receive HNR's insurance policy proceeds without any further approval by this Court.

3. K. Hovnanian shall not proceed against HNR's bankruptcy estate in the event of judgment against HNR (or any other resolution, including, but not limited to, settlement) in the pending California litigation entitled *Trolinger, et al. v. K. Hovnanian at Bridgeport, Inc.* (California state case no. 37-2008-00085314-CU-CD-CTL) (the “Litigation”).

4. Should HNR be found liable for K. Hovnanian's damages in the Litigation (or should HNR settle the claims asserted against it in the Litigation), to the extent that HNR's insurance coverage does not satisfy such liability, K. Hovnanian waives its right to satisfaction of its claim and participation in any distribution of assets of HNR's estate.

5. This Court shall retain jurisdiction with respect to the interpretation, implementation and enforcement of this Order.

Dated: May ___, 2010

The Honorable Kevin J. Carey, Chief Judge
United States Bankruptcy Court

CERTIFICATE OF SERVICE

I, William A. Hazeltine, do hereby certify I am not less than 18 years of age and that on this 8th day of April 2010, I caused a copy of the within *Motion of K. Hovnanian at Bridgeport, Inc. for Relief from Automatic Stay* to be served upon the parties on the attached service list via U.S. Mail, First Class, postage pre-paid

Under penalty of perjury, I declare the foregoing to be true and correct.

April 8, 2010
Date

/s/ William A. Hazeltine
William A. Hazeltine

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