

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

In re:	:	
	:	Chapter 11
Building Materials Holding Corporation,	:	
<i>et al.</i> , ¹	:	Case No. 09-12074 (KJC)
	:	Jointly Administered
Debtors.	:	Objection Deadline: November 12, 2009 at 4:00 p.m. (ET)
	:	Hearing Date: November 19, 2009 at 2:00 p.m. (ET)
	:	

ERIC THOMAS' MOTION FOR RELIEF FROM THE AUTOMATIC STAY

COMES NOW Eric Thomas ("Movant"), by and through his undersigned counsel, and hereby moves this Honorable Court for an Order providing relief from the automatic stay pursuant to Section 362 of the Bankruptcy Code. In support of this Motion, Movant asserts the following:

JURISDICTION

1. Select Build Mid-Atlantic, LLC ("Debtor") filed a Voluntary Petition for Relief in this Court under Chapter 11 of Title 11 of the United States Code on June 16, 2009.
2. This Court has jurisdiction over the parties and over the issues raised in this Motion in accordance with 28 U.S.C. §§ 157 and 1334 and in accordance with 11 U.S.C. § 362. This is a civil core proceeding arising under Title 11 of the United States Code, by which the Movant seeks to modify the stay of § 362 of the Bankruptcy Code.

¹ The Debtors, along with the last four digits of each 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 Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

PARTIES AND CLAIMS

3. On June 16, 2009 (the “Petition Date”), Building Materials Holding Corporation and certain of its affiliated debtor entities (the “Debtors”), including Select Build Mid-Atlantic, LLC, filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”).

4. On or about January 4, 2006, Eric Thomas was injured while performing a site inspection for the placement of a natural gas line at Villas at Snowden in Fredericksburg, Virginia when a retaining wall gave way and caused him to fall. On or about that date, Select Build Mid-Atlantic, LLC owned, operated, maintained and/or subcontracted for roofing work at the building site known as Villas at Snowden. Select Build Mid-Atlantic, LLC negligently failed to build/erect, inspect and maintain the construction site, specifically the retaining wall in a reasonable safe condition, negligently failed to warn Eric Thomas of the damage to and instability of the retaining wall, negligently failed to warn Eric Thomas of the defective and dangerous condition thereon and was otherwise negligent. As a result of the accident, Eric Thomas suffered serious and permanent injuries. His injuries were proximately and directly caused by the negligence of Debtor. On December 28, 2007, Eric Thomas filed suit against Select Build Mid-Atlantic, LLC and others in the Circuit Court of Spotsylvania County, Virginia.

5. Pursuant to this Motion, Movant would agree to limit any recoveries on account of their potential claims against the Debtors to proceeds of insurance policies of the Debtors and/or Select Build Mid-Atlantic, LLC that may provide coverage for the claims. Movant further agrees to waive all rights to recoveries from the Chapter 11 estate of Debtors.

RELIEF REQUESTED AND BASIS THEREOF

6. Through this Motion, Movant respectfully requests that the Court enter an order pursuant to section 362(d)(1) of the Bankruptcy Code modifying the automatic stay in order to allow Movant to liquidate his claims against Select Build Mid-Atlantic, LLC in the State Court Action described above.

7. The automatic stay set forth in section 362(a) of the Bankruptcy Code is “not meant to be indefinite or absolute,” and this Court has the power to grant relief from the automatic stay under appropriate circumstances. *In re Rexene Products Co.*, 141 B.R. 574, 576 (Bankr. D. Del. 1992).

8. Relief from the automatic stay can be granted pursuant to Section 362(d) of the Bankruptcy Code “(1) for cause,” The term “cause,” however, is not defined in the Bankruptcy Code; rather, whether such relief should be granted should be determined according to the facts of each case. *In re Rexene*, 141 B.R. at 576 (citation omitted). This Court has held that a single factor, such as “‘a desire to permit an action to proceed in another tribunal,’ or lack of any connection with or interference with the pending bankruptcy case,” may establish sufficient cause for relief. *Id.* (citing H.R. Rep. No. 95-595, 95th Cong., 1st Sess., 343-344 (1977)). Indeed, in *Rexene*, this Court referenced an opinion by the Bankruptcy Court for the Southern District of New York that cited several instances of cause sufficient to warrant modification of the stay, including, in particular, permitting litigation in another forum for the liquidation of claims. *Id.* (citing *Drexel Burnham Lambert Group, Inc.*, 113 B.R. 830, 838 n.8 (Bankr. S.D.N.Y. 1990)). In deciding whether sufficient cause exists to lift the stay based upon litigation pending in another forum, this Court has traditionally employed a three-part balancing test, which considers:

- (a) Whether any great prejudice to either the bankrupt estate or debtor will result from allowing the civil suit to continue;

(b) Whether the hardship to the non-bankrupt party by maintenance of the stay considerably outweighs the hardship to the debtor; and

(c) Whether it is probable that the creditor will prevail on the merits.

Id. (citation omitted). In the instant case, the foregoing factors weigh in favor of granting Movant relief from the automatic stay for “cause.”

9. First, neither the bankruptcy estate nor the Debtor will suffer any prejudice if Movant is permitted to pursue his claims in the State Court Action. The purpose of the automatic stay “is three-fold: ‘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.’” *In re Rexene*, 141 B.R. at 576 (citing *Borman v. Raymark Ind., Inc.*, 946 F.2d 1031, 1036 (3d Cir. 1991) (quoting *St. Croix Condominium Owners v. St. Croix Hotel*, 682 F.2d 446, 448 (3d Cir. 1982))). In other words, the purpose of the automatic stay is to prevent a “chaotic and uncontrolled scramble for the debtor’s assets in a variety of uncoordinated proceedings in different courts.” *In re Holtkamp*, 669 F.2d 505, 508 (7th Cir. 1982) (internal citations omitted). Here, Movant is not attempting to gain any unfair advantage over other creditors of the Debtors, but is merely attempting to liquidate and resolve his claims to the extent of the Debtors applicable insurance coverages. Therefore, granting Movant’s request for relief will have no effect on the value of the Debtors’ estates.

10. Second, the hardship to Movant by maintenance of the automatic stay outweighs any possible harm that the Debtors might suffer as a result of its modification. Movant merely seeks to liquidate his claims against the Debtors through the State Court Action to the extent of the Debtors’

applicable insurance coverages. If Movant is forced to litigate his presently unliquidated claims in Delaware, he would incur a significant financial burden. Movant, his attorneys, the witnesses, and the relevant documents in support of their claims are located in Virginia. That is why, as the court in *Rexene* suggests, “[i]t will often be more appropriate to permit proceedings to continue in their place of origin” *In re Rexene*, 141 B.R. at 576 (quoting H.R. Rep. No. 95-595, 95th Cong., 1st Sess., 341 (1977)).

11. Third, it is likely that Movant will prevail on the merits in the State Court Action. This Court has held that the required showing need only be “very slight.” *In re Rexene*, 141 B.R. at 578 (citing *In re Peterson*, 116 B.R. 247, 250 (D. Colo. 1990) (foregoing the three-part merits analysis completely in a relief from stay motion merely to liquidate a claim). The facts as set forth above relating to the accident likely establish a firm foundation for an award of damages under applicable law and are sufficient to meet the required showing for relief from the stay.

12. Finally, modification of the automatic stay will promote judicial efficiency by avoiding further expense and delay to the parties in the State Court Action. *See, e.g., In re Pursuit Athletic Footwear, Inc.*, 193 B.R. 713, 719 (Bankr. D. Del. 1996). Here, Movant sustained injuries resulting from the accident over three years ago, and has yet to obtain relief.

WHEREFORE, for the foregoing reasons, Movant hereby respectfully requests that this Court enter an order pursuant to section 362(d) of the Bankruptcy Code granting Movant the following relief against the Debtors:

- (a) Lift the automatic stay to allow Movant to liquidate his claims in the State Court Action against the Debtor, Select Build Mid-Atlantic, LLC and any other party in interest; and
- (b) Grant such other and further relief as the Court deems just and appropriate.

Dated: October 15, 2009
Wilmington, Delaware

BIFFERATO GENTILOTTI LLC

/s/ Garvan F. McDaniel

Garvan F. McDaniel (#4167)
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Attorneys for Eric Thomas

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

In re:	:	
	:	Chapter 11
Building Materials Holding Corporation,	:	
<i>et al.</i> , ¹	:	Case No. 09-12074 (KJC)
	:	Jointly Administered
Debtors.	:	Objection Deadline: November 12, 2009 at 4:00 p.m. (ET)
	:	Hearing Date: November 19, 2009 at 2:00 p.m. (ET)
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**NOTICE OF MOTION OF ERIC THOMAS'
MOTION FOR RELIEF FROM THE AUTOMATIC STAY**

PLEASE TAKE NOTICE THAT, Eric Thomas has filed a Motion for Relief From Stay with the United States Bankruptcy Court, for the District of Delaware which seeks to lift the automatic stay imposed by the Debtors' Petitions so that Eric Thomas may proceed with a lawsuit pending in the Circuit Court of Spotsylvania County, Virginia, Case No. CL07-1461 against Select Build Mid-Atlantic, LLC, one of the debtors in the above-captioned action.

HEARING FOR THE MOTION WILL BE HELD ON **November 19, 2009 at 11:00 a.m.** before The Honorable Kevin J. Carey at the United States Bankruptcy Court, 824 Market Street, 5th Floor, Courtroom #5, Wilmington, Delaware 19801.

You are required to file a response (and the supporting documentation required by Local Rule 4001-1(d)) to the attached motion with the Clerk of the Bankruptcy Court, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801 on or before **November 12, 2009 at 4:00 p.m. (ET)**.

At the same time you must also serve a copy of the response upon the movant's attorney:

Garvan F. McDaniel (#4167)
Bifferato Gentilotti LLC
800 N. King Street, Plaza Level
Wilmington, DE 19801

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IF NO OBJECTIONS TO THE MOTION ARE TIMELY FILED, SERVED AND RECEIVED IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

The hearing date specified above may be a preliminary hearing or may be consolidated with the final hearing, as determined by the Court.

The attorneys for the parties shall confer with respect to the issues raised by the motion in advance for the purpose of determining whether a consent judgment may be entered and/or for the purpose of stipulating to relevant facts such as value of the property, and the extend and validity of any security instrument.

Dated: October 15, 2009

BIFFERATO GENTILOTTI LLC

/s/ Garvan F. McDaniel
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Attorneys for Eric Thomas

In re:	:	
	:	Chapter 11
Building Materials Holding Corporation,	:	
<i>et al.</i> , ¹	:	Case No. 09-12074 (KJC)
	:	Jointly Administered
Debtors.	:	
	:	Re: Docket No. _____
	:	

WHEREAS, Eric Thomas (“Thomas”) filed a motion to lift the automatic stay to proceed with a lawsuit pending in the Circuit Court of Spotsylvania County, Virginia, Case No. CL07-1461 (the “Spotsylvania County Action”) involving Select Build Mid-Atlantic, LLC, one of the debtors in the above-captioned action (collectively, the “Debtors”).

IT IS HEREBY ORDERED THAT:

1. Thomas' motion is GRANTED.
2. The automatic stay imposed by 11 U.S.C. §362 is hereby lifted so as to permit Thomas to proceed with the litigation in the Spotsylvania County Action.
3. The automatic stay imposed by 11 U.S.C. §362 remains in effect for all other purposes with respect to the Spotsylvania County Action.

The Honorable Kevin J. Carey
United States Bankruptcy Court Judge

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CERTIFICATE OF SERVICE

Garvan F. McDaniel hereby certifies that, on October 15, 2009, he cause copies of the foregoing *Eric Thomas' Motion for Relief From the Automatic Stay* to be served upon the following via First Class U.S. Mail:

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