

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

In re BUILDING MATERIALS
HOLDING CORPORATION, *et al.*¹

Debtor

CASE NO.: 09-12074 (KJC)
CHAPTER NO.: 11
JOINTLY ADMINISTERED

**MOTION OF WILLIAM LYON HOMES,
INC., FOR RELIEF FROM AUTOMATIC
STAY**

Objection deadline: November 12, 2009
Hearing date: November 19, 2009 at 11:00 a.m.

**MOTION OF WILLIAM LYON HOMES, INC. FOR
RELIEF FROM AUTOMATIC STAY**

William Lyon Homes, Inc. ("WLHI") hereby moves (the "Motion") this Court for an order granting relief from the automatic bankruptcy stay so that it may proceed only against the available insurance assets of debtor H.N.R. Framing Systems, Inc. ("HNR") pursuant to 11 U.S.C. section 362. In support of this Motion, WLHI relies upon the Declaration of Kevin S. McSherry ("McSherry Decl.", attached as Exhibit "1") 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"). McSherry Decl., ¶ 2.
2. WLHI is a creditor of HNR and, therefore, qualifies as a party in interest in this case. McSherry Decl., ¶ 3.
3. On or about October 22, 2008, Eduardo A. Angeles and various homeowners (collectively, the "Homeowners") commenced litigation against WLHI relating to a certain

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housing development located in San Marcos, California (the “Project”), and alleging numerous causes of action and seeking damages based upon strict liability, breach of express and implied warranties, breach of contract, and negligence (the “Complaint”). A true and correct copy of the operative Complaint is attached as Exhibit “A” to McSherry Decl. The matter is known as Case No. 37-2008-90679 in the San Diego County Superior Court (the “Litigation”). McSherry Decl., ¶ 4.

4. On or about April 15, 2009, WLHI filed a Cross-Complaint for: breach of written, oral and implied contract to indemnify, defend and obtain insurance; equitable indemnity; contribution and repayment; and declaratory relief for duty to indemnify, defend and obtain insurance (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 into the development, construction and/or sale of the Project. A true and correct copy of the Cross-Complaint is attached as Exhibit “B” to McSherry Decl. McSherry Decl., ¶ 5.

5. No trial date has been set in the Litigation. Based on the Complaint, it appears that approximately all of the Homeowners’ claims implicate HNR. McSherry Decl., ¶ 6.

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

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

8. WLHI states, on information and belief, that on or about January 5, 2000, January 12, 2000, January 26, 2000 and April 17, 2001, HNR and WLHI executed various Subcontractor

Agreements whereby HNR agreed to provide materials and labor at the Project. A true and correct copy of each subcontract is attached as Exhibit “C” to McSherry Decl. Additionally, pursuant to the subcontracts, HNR agreed to obtain general liability insurance with a limit of combined bodily injury and property damage of not less than \$1,000,000.00. McSherry Decl., ¶ 9.

9. WLHI states, on information and belief, that HNR obtained a general liability insurance policy and excess liability insurance policy, wherein the insurers agreed to pay all sums, not to exceed \$1,000,000.00, 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). McSherry Decl., ¶ 10.

10. WLHI 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. McSherry Decl., ¶ 11.

11. WLHI 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. McSherry Decl., ¶ 12.

12. WLHI states, on information and belief, that its instant pending lawsuit against HNR will be defended at no expense to HNR. McSherry Decl., ¶ 13.

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

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

RELIEF REQUESTED

15. WLHI seeks a modification of the automatic stay imposed by Bankruptcy Code section 362 (11 U.S.C. § 362) for the limited purpose of allowing WLHI to pursue its claims for indemnification and damages against HNR’s liability insurance policies while waiving any

deductibles.

16. WLHI 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 WLHI's damages in the Litigation, to the extent that HNR's insurance coverage does not satisfy such liability, WLHI 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* (3d Cir. 1982) 682 F.2d 446, 448.) 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)* (3d Cir. 1989) 878 F.2d 693, 697.)

19. Section 362(d)(1) of the Bankruptcy Code provides 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' 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.* (Bankr. D. Del. 2007) 395 B.R. 852, 856 (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 p. 857, referencing *Izzarelli v. Rexene (In re Rexene Prods. Co.)* (Bankr. D. Del.

1992) 141 B.R. 574, 576.) 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 no prejudice to the estate.” (*Id.*)

20. Here, application of the Court’s balancing test favors granting WLHI relief from the automatic stay for three reasons. First, there will be no great prejudice to HNR or HNR’s bankruptcy estate because WLHI 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, WLHI agrees to waive its right to satisfaction of its claim and participation in any distribution of assets of HNR’s estate. Second, WLHI 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 WLHI prevailing on the merits is extremely high because HNR’s obligations to defend, indemnify and name WLHI 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.

WHEREFORE, WLHI respectfully requests:

21. That the automatic stay imposed pursuant to 11 U.S.C. § 362 be modified forthwith to permit WLHI to proceed with prosecution of its Cross-Complaint against HNR and others;

22. That WLHI be allowed to assert its claims against the liability insurance policies of HNR; That in the event WLHI obtains a judgment against HNR or otherwise resolves the Litigation, WLHI may receive HNR’s insurance policy proceeds without any further approval by this Court; and

23. For such other and further relief as the Court may deem proper, just and equitable.

**MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN**

**BY: /s/ Vicki L. Shoemaker (ID No. 4861)
VICKI L. SHOEMAKER, ESQUIRE**

DATE: November 2, 2009

**1220 North Market Street, 5th Floor
P.O. Box 8888
Wilmington, DE 19899
(302) 552-4348
Attorney / Local Counsel for Defendant,
William Lyon Homes, Inc.**

15/868714.v1

**UNITED BANKRUPTCY COURT
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Debtor

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JOINTLY ADMINISTERED

**MOTION OF WILLIAM LYON HOMES,
INC., FOR RELIEF FROM AUTOMATIC
STAY**

Objection deadline: November 12, 2009
Hearing date: November 19, 2009 at 11:00 a.m.

**NOTICE OF MOTION OF WILLIAM LYON HOMES, INC.,
FOR RELIEF FROM STAY**

TO: Sean Matthew Beach, Esquire
Donald Bowman, Esquire
Young, Conaway, Stargatt & Taylor
The Brandywine Building, 17th Floor
1000 West Street
P.O. Box 391
Wilmington, DE 19899
Counsel for Debtor, Building Materials
Holding Corporation

Joseph J. McMahon, Esquire
United States Trustee
844 King Street, Room 2207
Lockbox #35
Wilmington, DE 19899-0035

Bradford J. Sandler, Esquire
Benesch Friedlander Coplan & Aronoff
222 Delaware Avenue, Suite 801
Wilmington, DE 19801
Counsel for Official Committee of
Unsecured Creditors

William Lyon Homes, Inc., has filed a Motion for Relief from Stay which seeks the following relief: a modification to the stay imposed pursuant to 11 U.S.C. §362, allowing William Lyon Homes, Inc., to proceed in its Cross-Complaint Action against H.N.R. Framing

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Systems, Inc., limited to seeking recovery of insurance proceeds under the insurance policy of H.N.R. Framing Systems, Inc.

HEARING ON THE MOTION WILL BE HELD ON NOVEMBER 19, 2009 AT 11:00 A.M.

You are required to file a response (and the supporting documentation required by Local Rule 4001-1(d)) to the attached motion at least five business days before the above hearing date. At the same time, you must also serve a copy of the response upon movant's attorney:

Vicki L. Shoemaker, Esquire
Marshall, Dennehey, Warner, Coleman & Goggin
1220 N. Market Street, 5th Floor
P.O. Box 8888
Wilmington, DE 19899

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 extent and validity of any security instrument.

**MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN**

**BY: /s/ Vicki L. Shoemaker (ID No. 4861)
VICKI L. SHOEMAKER, ESQUIRE
1220 North Market Street, 5th Floor
P.O. Box 8888
Wilmington, DE 19899
(302) 552-4348
Attorney / Local Counsel for Defendant,
William Lyon Homes, Inc.**

DATE: November 2, 2009

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23. For such other and further relief as the Court may deem proper, just and equitable.

**MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN**

**BY: /s/ Vicki L. Shoemaker (ID No. 4861)
VICKI L. SHOEMAKER, ESQUIRE**

DATE: November 2, 2009

**1220 North Market Street, 5th Floor
P.O. Box 8888
Wilmington, DE 19899
(302) 552-4348
Attorney / Local Counsel for Defendant,
William Lyon Homes, Inc.**

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ORDER

AND NOW, this _____ day of _____, 2009, upon
consideration of the Motion of William Lyon Homes, Inc., For Relief From Stay, it is hereby
Ordered and Decreed that the Automootic Stay is lifted for the limited purpose of allowing
William Lyon Homes, Inc., to pursue its claim against H.N.R. Framing Systems, Inc., for
recovery under the liability insurance policy of H.N.R. Framing Systems, Inc.

15/868821.v1

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CERTIFICATE OF SERVICE

I, Vicki L. Shoemaker, Esquire, hereby certify that I have served the MOTION OF
WILLIAM LYON HOMES, INC., FOR RELIEF FROM STAY on the following by e-filing:

Sean Matthew Beach, Esquire
Donald Bowman, Esquire
Young, Conaway, Stargatt & Taylor
The Brandywine Building, 17th Floor
1000 West Street
P.O. Box 391
Wilmington, DE 19899
Counsel for Debtor, Building Materials
Holding Corporation

Bradford J. Sandler, Esquire
Benesch Friedlander Coplan & Aronoff
222 Delaware Avenue, Suite 801
Wilmington, DE 19801
Counsel for Official Committee of
Unsecured Creditors

Joseph J. McMahon, Esquire
United States Trustee
844 King Street, Room 2207
Lockbox #35
Wilmington, DE 19899-0035

MARSHALL, DENNEHEY, WARNER,

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VICKI L. SHOEMAKER, ESQUIRE
1220 North Market Street, 5th Floor
P.O. Box 8888
Wilmington, DE 19899
(302) 552-4348
Attorney / Local Counsel for Defendant,
William Lyon Homes, Inc.**

DATE: November 2, 2009

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