



**Dated: August 15, 2016**  
**The following is SO ORDERED:**

  
Paulette J. Delk  
UNITED STATES BANKRUPTCY JUDGE

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**In re:**

**Bluff City Sheet Metal,**  
**Debtor.**

**Case No. 16-24627 PJD**

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**MEMORANDUM OPINION AND ORDER ON MOTION OF MILLS-WILSON-GEORGE COMPANY, INC. TO LIFT AUTOMATIC STAY AND FINDING NO STAY IN EFFECT AS TO PROPERTY LOCATED AT 212 SOUTH MAIN STREET, MEMPHIS, TENNESSEE**

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This matter came before the Court on the Motion to Lift Automatic Stay (“Motion”) filed by Mills-Wilson-George Company, Inc. (“Creditor”) in the Chapter 11 case filed on May 17, 2016 by Bluff City Sheet Metal (“Debtor”). A hearing on the Motion was held on July 26, 2016. During the hearing, Creditor sought an order modifying the automatic stay of 11 U.S.C. § 362 to allow it to proceed with a lien enforcement suit in state court against real property owned by Center City Revenue Financial Corporation (“Center City”) located at 212 South Main Street, Memphis

Tennessee, pursuant to TCA § 66-34-101 et seq. At the hearing Creditor indicated that in addition to the lien enforcement action, it may have rights against a bond. Debtor orally objected to the Motion arguing that 11 U.S.C. § 108 (c) applies to obviate the need to file the lien enforcement suit. At the close of the hearing, the Court took the matter under advisement.

The Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C. §157(b)(2)(A) and (G), which the Court has jurisdiction to hear and determine.

Debtor contracted with Creditor for the purchase of materials, as well as work and labor for fabrication, prior to the filing of this Chapter 11 case. The materials were provided and work performed under the contract prepetition. Creditor alleges, and Debtor does not dispute, that Debtor defaulted on the contract for the payment of the materials, work and labor. Creditor alleges that Debtor has an unpaid balance of \$77,856.21. Debtor's schedules reveal an unsecured claim for \$147,091.63 with Creditor listed as the unsecured creditor.

Creditor filed a Notice of Lien in the Shelby County Register's Office on May 25, 2016 against the real property owned by Center City located at 212 South Main Street, Memphis, Tennessee. Debtor's petition does not reveal that Debtor has an interest of any kind in this real property—neither fee simple, leasehold nor mere possessory interest.

To perfect and preserve its lien against this real property, Creditor, pursuant to T.C.A. § 66-11-115, must file a state court action against the property within 90 days of the date of service of the notice of lien.

Debtor argues that 11 U.S.C. §362(a)(6) applies here to stay enforcement of the lien against the real property owned by Center City, since it is an act to collect a prepetition claim against the

Debtor. Debtor also argues that 11 U.S.C. § 108 ( c) applies to toll the time period within which Creditor must file the state court action to perfect and preserve its lien.

Various provisions of Bankruptcy Code §362 protect the debtor, property of the debtor and property of the bankruptcy estate from a number of actions that creditors may seek to take to collect on prepetition claims. Both the Debtor and Creditor here agree that Debtor has no ownership, leasehold or possessory interest in the property owned by Center City. This property is not property of the bankruptcy estate, nor property of the Debtor.

Section 362(a)(6) stays “any act to collect, assess, or recover a *claim against the debtor* that arose before the commencement of the case under this title. (emphasis added).”

Section 101(5) defines “claim” as a “right to payment” or a “right to an equitable remedy for breach of performance if such breach gives rise to a right to payment....” This stands in contrast with 101(12) which defines “debt” as “liability on a claim.” Section 362(a)(6) does not stay acts to collect a *debt* of the debtor, rather, it stays acts to collect a *claim* against the debtor.

Here, Creditor has at least three claims arising out of Debtor’s debt: it has a claim or right to payment (1) against Debtor under the contract; (2) against the property under the Tennessee statute; and (3) against the bond, under the contract with the surety. In the action that Creditor seeks to take after modification of the automatic stay, it is pursuing its claim against property in which Debtor has no interest. As a result, §362(a)(6) does not apply, since Creditor is not seeking to collect a claim against the Debtor. See *In re Torrez*, 132 B.R. 924, 943 (Bankr. E.D. Ca. 1991)(“a strict reading of 11 U.S.C. §362(a)(6) indicates that it stays acts to recover a ‘claim’ against the debtor, and not a debt owed by the debtor.”); *Advanced Ribbons and Office Prods., Inc. v U.S. Interstate Distributing Inc. (In re Advanced Ribbons and Office Prods., Inc.)*, 125 B.R.259, 264

(B.A.P. 9<sup>th</sup> Cir. 1991)(finding that §362(a)(6) did not apply to a foreclosure because “...the sale did not involve collection of a claim against the debtor. [T]he appellees had a claim against the debtor, the debtor’s property, and Teuber’s stock in the debtor. The foreclosure sale was an act to collect a claim against Teuber’s property—his stock in the debtor—just as an action against a guarantor is an act to collect a claim against the guarantor.”); *Everchanged, Inc. v. First Nationwide Mortg. Corp.* (*In re Everchanged, Inc.*), 230 BR 891, 894 (Bankr. S.D. Ga. 1999)(finding that §362(a)(6) prohibits in personam actions against debtors); *In re Collett*, 2014 WL 2111309, Nos. 13-8033, 12-61190 at \*6 (B.A.P. 6<sup>th</sup> Cir. May 21, 2014)(“It is well established that a creditor may collect from a non-debtor third party without violating the automatic stay.”)(citations omitted); *Saratoga Group, Ltd. v. People’s Nat’l Bank ( In re Geris)*, 973 F2d 318 (4<sup>th</sup> Cir. 1992); *In re Log, L.L.C.*, 2010 WL 4774347, No. 10-80378 (Bankr. M.D.N.C. Nov. 9, 2010).

Because the property against which the Notice of Lien was filed is not property of the estate, nor is it property of the Debtor, and the lawsuit which Creditor seeks to file in state court is not in pursuit of a claim against the Debtor, rather it is a claim against property in which the Debtor has no interest, the automatic stay of §362 does not apply. It does not bar Creditor from filing the required lawsuit in state court to enforce its lien. To the extent that Creditor has a claim against a surety on a bond arising out of the debt owed by Debtor, the automatic stay does not apply to an action to collect solely on the bond.

Since the automatic stay does not apply, §108(c), which tolls the effect of the automatic stay for a statutorily determined time period, is not applicable in this matter. Thus it does not toll the running of the 90-day period under T.C.A. §66-11-115. See generally, *Morton v. Nat’l Bank of New York City (In re Morton)*, 866 F2d 561 (2d Cir. 1989); *Minor Corp. v. Hunters Run Ltd. P’ship (In*

*re Hunters Run Ltd. P'ship*), 875 2d 1425 (9<sup>th</sup> Cir. 1989).

Assuming, arguendo, that the automatic stay does apply, the court finds sufficient cause to modify the stay to permit Creditor to take action to enforce its claims against the property owned by Center City and against any surety, and to waive the provisions of Bankruptcy Rule 4001(a)(3). This opinion constitutes the court's finding of fact and conclusions of law.

### **ORDER**

Consistent with this Memorandum Opinion entered contemporaneously herewith, it is ORDERED that the automatic stay of §362(a) is not in effect to stay Creditor from enforcing its lien against property owned by Center City, nor from taking action to pursue its claim against a surety. The automatic stay is in effect and prevents Creditor from pursuing a claim against the Debtor, property of the estate or property of Debtor.

cc:

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Bluff City Sheet Metal  
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