

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: 16-cv-21301-GAYLES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff

v.

**ARIEL QUIROS,
WILLIAM STENGER,
JAY PEAK, INC.,
Q RESORTS, INC.,
JAY PEAK HOTEL SUITES L.P.,
JAY PEAK HOTEL SUITES PHASE II. L.P.,
JAY PEAK MANAGEMENT, INC.,
JAY PEAK PENTHOUSE SUITES, L.P.
JAY PEAK GP SERVICES, INC.,
JAY PEAK GOLF AND MOUNTAIN SUITES L.P.,
JAY PEAK GP SERVICES GOLF, INC.,
JAY PEAK LODGE AND TOWNHOUSES L.P.,
JAY PEAK GP SERVICES LODGE, INC.,
JAY PEAK HOTEL SUITES STATESIDE L.P.,
JAY PEAK GP SERVICES STATESIDE, INC.,
JAY PEAK BIOMEDICAL RESEARCH PARK L.P.,
AnC BIO VERMONT GP SERVICES, LLC**

Defendants, and

**JAY CONSTRUCTION MANAGEMENT, INC.,
GSI OF DADE COUNTY, INC.,
NORTH EAST CONTRACT SERVICES, INC.,
Q BURKE MOUNTAIN RESORT, LLC.**

Relief Defendants.

MOTION FOR RELIEF FROM STAY OF LITIGATION

NOW COMES Blanc & Bailey Construction, Inc. (“Blanc & Bailey”), by and through its undersigned attorneys, and requests relief from the stay entered by this Court for the limited

purpose of preserving its rights under Vermont law related to the attachment of real property located in the State of Vermont. In support of this Motion, Blanc & Bailey states the following:

FACTUAL BACKGROUND

1. PeakCM, LLC (“PeakCM”) entered into a general contract with Burke 2000, LLC (“Burke 2000”)¹ for the construction of the Q Burke Mountain Resort Hotel & Conference Center (the “Project”) located at 4600 Mountain Road, Burke Vermont (the “Property”). The Property is owned by Burke 2000.

2. On or about May 8, 2014, Blanc & Bailey² entered into a Standard Form of Agreement between Contractor and Subcontractor (the “Subcontract”) with PeakCM, as General Contractor for Burke 2000, under which Blanc & Bailey agreed to perform “Rough Carpentry” (the “Work”) for the Project.

3. Blanc & Bailey performed and completed the Work in substantial conformance with the Subcontract, including and subject to modifications, change orders, and instructions received from PeakCM.

4. Burke 2000 and PeakCM accepted the work, labor and materials furnished by Blanc & Bailey and Burke 2000 received the benefit of Blanc & Bailey’s work, labor and materials, which enhanced the value of the Property in an amount equal to or greater than the cost of such work, labor and materials.

¹ Upon information and belief, Burke 2000 is a wholly-owned subsidiary of Relief Defendant Q Burke Mountain Resort, LLC. Thus, Blanc & Bailey has filed this motion out of an abundance of caution in the event the Court subsequently determines that the order enjoining litigation and proceedings extends to a statutorily mandated action required by Vermont law to perfect a lien against Burke 2000’s property.

² Blanc & Bailey is a New Hampshire corporation, registered to do business in the State of Vermont.

5. PeakCM has failed to pay Blanc & Bailey for no less than \$401,504.51, plus interest and attorney's fees, due Blanc & Bailey under the terms of the Subcontract and in accordance with Chapter 102 of Title 9 of the Vermont Statutes Annotated.

6. As a result of PeakCM's failure to pay amounts owed to Blanc & Bailey, on November 30, 2015, Blanc & Bailey filed a contractor's lien (the "Lien") on the Property with the Town Clerk of the Town of Burke, Vermont pursuant to 9 V.S.A. §§ 1921 *et seq.* to secure payment of amounts owed to Blanc & Bailey by PeakCM under the Subcontract.

7. On December 6, 2015, a memorandum of the Lien was recorded in the Town of Burke Land Records, as required by 9 V.S.A. §1923. A copy of the recorded Lien is attached hereto as Exhibit ___.

8. The Lien has not been satisfied. Therefore, pursuant to 9 V.S.A. § 1924, Blanc & Bailey must commence suit and obtain a Writ of Attachment within 180 days from recording the Lien. Thus, if a Writ of Attachment is not obtained on or before June 6, 2016, Blanc & Bailey's Lien may be deemed to have expired and be lost.

9. In accordance with 9 V.S.A. § 1924, Blanc & Bailey commenced an action to enforce its Lien by filing its Complaint and Motion for Writ of Attachment in the Civil Division of the Vermont Superior Court for Caledonia County, Vermont on May 6, 2016. A copy of the Complaint and Motion for Writ of Attachment are attached hereto as Exhibits ___ and ___, respectively.

10. On April 13, 2016, this Court entered its Order Granting Plaintiff Securities and Exchange Commission's Motion for Appointment of Receiver (the "Order") which provides, amongst other things:

During the period of this receivership, all persons ... with actual notice of this Order, are enjoined ... from in any way disturbing the assets or proceeds

of the receivership or from prosecuting any actions or proceedings which involve the Receiver or which affect the property of the Corporate Defendants and Relief Defendants.

(Order, ¶ 15) and

No ... person or entity shall exercise any form of set-off, alleged set-off, lien, or any form of self-help whatsoever, or refuse to transfer any funds or assets of the Corporate Defendants and Relief Defendants to the Receiver's control without the permission of this Court.

(Order, ¶ 21).

11. Because Burke 2000 is a wholly-owned subsidiary of Relief Defendant Q Burke Mountain Resort, LLC, the Order arguably prohibits Blanc & Bailey from taking the action necessary to preserve its rights and perfect its lien under Vermont law. Although Blanc & Bailey does not believe that the Order is so broad as to prohibit its action in Vermont state court to perfect its Lien against Burke 2000, Blanc & Bailey file this motion out of an abundance of caution.

12. Therefore, Blanc & Bailey requests that this Court issue an order lifting the stay for the limited purpose of permitting Blanc & Bailey to proceed in the Civil Division of the Caledonia County, Vermont Superior Court to obtain a Writ of Attachment and, if granted, to record a copy of same with the town clerk as required to perfect its Lien.³

ARGUMENT AND CITATION OF AUTHORITY

Although imposing a stay of litigation in a receivership serves a valuable purpose, “an appropriate escape valve, which allows potential litigants to petition the court for permission to sue, is necessary. *U.S. v. Acorn Technology Fund, L.P.*, 429 F.3d 438, 443 (3d Cir. 2005). In determining whether to lift a receivership stay, courts have adopted a three part test:

(1) Whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to

³ Blanc & Bailey has asked the Vermont court for additional time to obtain a writ of attachment due to the issues raised by this proceeding. However, there is no case law on point and it is unclear whether the Vermont court will grant such a request.

proceed; (2) the time in the course of the receivership at which the motion for relief from the stay is made; and (3) the merit of the moving party's underlying claim.

S.E.C. v. Wencke, 742 F.2d 1230, 1231 (9th Cir. 1984); *S.E.C. v. Universal Fin.*, 760 F.2d 1034, 1038 (9th Cir. 1985); *Acorn Tech.*, 429 F.3d at 443. Here, these factors support lifting the stay in the limited manner requested by Blanc & Bailey.

1. Lifting the Stay Would Preserve the Status Quo and Prevent Substantial Injury.

The first question is “whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed.” One of the most important purposes of imposing a stay in a receivership is to preserve the status quo while the receiver organizes and understands the entities under his control. However, in this case, the stay actually has the opposite effect; rather than preserving the status quo, the stay actually prevents the preservation of the status quo and would cause substantial injury to Blanc & Bailey if they are not permitted to proceed.

Vermont's contractor lien statutes require a four step process to perfect a lien, and maintain perfection of that lien, before enforcement of that lien can take place. 9 V.S.A. § 1921, *et seq.*; *In re Casson*, 412 BR 646, 654-55 (Bkrcty. D. Vt. 2009) (detailed discussion of four step process). The statutory scheme “clearly delineates when the ‘interest in property’ arises, and how it is subsequently preserved, perfected, and ultimately enforced.” *In re Summit Ventures, Inc.*, 135 B.R. 483, 488 (Bkrcty. D. Vt. 1991).

The contractor's lien arises at the time work begins or materials are delivered. It is preserved by filing a written notice in the town clerk's office within [180] days of the date payment was due for the last of the work performed or materials delivered. And it must be perfected by obtaining an attachment on the liened property in a suit for payment. The judgment eventually obtained must be timely recorded in the land records, after which it can be foreclosed upon if not paid.

Id. at 488-489 (holding that timely perfection of a contractor's lien is not subject to the Bankruptcy Code's automatic stay); *see, also, In re Cusson*, 412 B.R. 646, 654-55 (Bkrcty. D. Vt. 2009) (same and noting that "[t]he effect of an intervening bankruptcy on a contractors' lien differs with respect to the action taken on the lien: perfection or enforcement."); *In re APC Const., Inc.*, 112 B.R. 89, 126 (Bkrcty. D. Vt. 1990) ("The pre-judgment contractor may proceed to post-petition perfection in State Court by obtaining a pre-judgment State Court writ of attachment so long as it may be timely had under State law").

If the stay is not lifted, Blanc & Bailey risks its Lien expiring and losing its rights. *See Wharton v. Tri-State Drilling & Boring*, 824 A.2d 531 (Vt. 2003) (mechanic's lien expires by operation of law if a court order is not obtained within the time established in 9 V.S.A. § 1924); *Wardell v. Metilly*, 253 B.R. 512 (Bkrcty. D. Vt. 2000) (if action to perfect lien is not brought within time set forth in 9 V.S.A. § 1924, lien is lost); *In re APC Const.*, 112 B.R. at 117-120, 126 (lienor's enforcement action is tolled by the Bankruptcy Code but, the time to perfect the contractor's lien is not tolled). If that were to occur, Bland & Bailey would be substantially prejudiced as a result of the stay.

Here, Blanc & Bailey only seeks to have the stay lifted for the limited purpose of maintaining the perfection of its lien, not enforcement, under Vermont law. That is, at this time, Blanc & Bailey seeks permission from this Court to obtain a Writ of Attachment and record a copy of that judgment with the town clerk. If the stay is lifted, the status quo will be maintained. If it is not, the Lien will expire resulting in substantial injury to Blanc & Bailey.

2. The Time in the Course of Receivership Does Not Weigh Against Lifting the Stay.

The second consideration is “the time in the course of the receivership at which the motion for relief from the stay is made.” There is no “clear cut-off date after which a stay should be presumptively lifted,” and the inquiry is “inherently case-specific.” *Acorn Tech.*, 429 F.3d at 450.

Blanc & Bailey acknowledges that this receivership is in its infancy. However, if the stay is not lifted to permit Blanc & Bailey to obtain a Writ of Attachment before June 6, 2016, the Lien will expire.

Given that the receivership is in its earliest stages, Blanc & Bailey only seeks a very limited lift of the stay at this juncture to permit it to take the steps necessary to maintain the status quo with regard to the Lien. Although Blanc & Bailey may return to this Court in the future to request that the stay be lifted to permit Blanc & Bailey to enforce the Lien, given the present timing in the course of the receivership, Blanc & Bailey does not request that relief at this time.

Accordingly, because lifting the stay in the limited fashion requested would merely maintain the status quo, the factor of timing does not weigh in favor of maintaining the stay. Further, given the June 6, 2016 deadline to obtain a Writ of Attachment under Vermont law, the timing factor weighs in favor of lifting the stay for this limited purpose.

3. The Merits of Blanc & Bailey’s Underlying Action

The third consideration is the merit of Blanc & Bailey’s underlying action. “A district court need only determine whether the party has *colorable* claims to assert which justify lifting the receivership stay.” *Acorn*, 429 F.3d at 444 (emphasis in original). Here, the underlying action is merely an action to perfect the Lien by obtaining a Writ of Attachment. As shown above, Blanc and Bailey has satisfied all of the previous steps in the process under Vermont law. Accordingly, the merits of the action are clear. *See, e.g., Acorn*, 429 F.3d at 444 (emphasis in original).

WHEREFORE, Blanc & Bailey respectfully requests that this Court issue an order that permits Blanc & Bailey to proceed in the Civil Division of the Caledonia County, Vermont Superior Court to perfect the Lien and obtain an attachment on the Property of Burke 2000 upon which Blanc & Bailey performed work and provided materials for the construction of the Q Burke Mountain Resort Hotel & Conference Center.

CERTIFICATE OF GOOD FAITH CONFERENCE

Pursuant to Local Rule 7.1(a)(3), Blanc & Bailey's counsel hereby certifies that it conferred with counsel for the SEC in a good faith attempt to resolve the issues raised in this motion on May 16, 2016, via telephone who stated that the SEC opposes the motion but would defer to and may change its position based upon the Receiver's position. Blanc & Bailey's counsel certifies that it attempted to confer with counsel for the Receiver via telephone on May 16, 2016, but was unable to do so. Blanc & Bailey's counsel conferred with counsel for the Receiver via email on May 17, 2016, who stated that the Receiver opposes the relief sought in the motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was electronically filed on May 17, 2016 with the CM/ECF filing portal, which will send a notice of electronic filing to all counsel of record.

Respectfully submitted, this 17th day of May, 2016.

GURLEY ■ VITALE

/s/ J. Ben Vitale

David E. Gurley

Florida Bar No. 0402214

J. Ben Vitale

Florida Bar No. 0088304

GURLEY ■ VITALE

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