



SO ORDERED.

SIGNED this 31 day of July, 2009.

A handwritten signature in black ink, appearing to read "A. Thomas Small".

**A. Thomas Small
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION**

IN RE:

CASE NO.

MAMMOTH GRADING, INC.

09-01286-8-ATS

DEBTOR

ORDER REGARDING MOTIONS FOR RELIEF FROM STAY

The matters before the court are the motions for relief from the automatic stay filed by Ferguson Enterprises, Inc., HD Supply Waterworks, General Concrete Construction, Wake Stone Corporation, and Fortress Fencing, LLC. A hearing was held on July 2, 2009, at which the court considered these motions as well as similar motions for relief from the automatic stay involving the same issues in the chapter 11 case of Harrelson Utilities, Inc., Case. No. 09-02815-8-ATS.

Mammoth Grading, Inc. filed a petition for relief under chapter 7 of the Bankruptcy Code on February 18, 2009, and Joseph N. Callaway was appointed trustee. Prior to filing, the debtor operated as a grading contractor on various projects. Ferguson, HD Supply, General Concrete, Wake Stone, and Fortress Fencing are unpaid subcontractors that did work for the debtor on several projects who now seek to enforce their lien rights pursuant to North Carolina law. On some of the projects Mammoth was the contractor and the lien claimants were the debtor's "first tier" subcontractors. At other times, Mammoth was a first tier subcontractor and the lien claimants were

Mammoth's "second tier" subcontractors. Paragon Bank maintains that it holds a first priority perfected security interest in the debtor's accounts receivable.

Ferguson acted as a first or second tier subcontractor on two projects, and contends it is owed \$31,309.11. On February 24 and March 6, 2009, Ferguson served notices of claims of liens on funds due Mammoth and filed, by subrogation to Mammoth's lien rights, claims of liens on real property. Ferguson seeks relief from the automatic stay to enforce the liens on real property pursuant to North Carolina law. HD Supply acted as a first or second tier subcontractor on six projects, and contends it is owed approximately \$497,212.18. On February 26, February 27, March 23, March 24, and May 4, 2009, HD Supply served notices of claims of liens on funds due Mammoth and filed, by subrogation to Mammoth's lien rights, claims of liens on real property. HD Supply seeks relief from the automatic stay to enforce the liens on real property.

General Concrete acted as a first or second tier subcontractor on four projects and contends it is owed approximately \$175,784.88. On February 20, 2009, for the project at The Villas at Centerview, General Concrete served a notice of claim of lien on funds due Mammoth and filed, by subrogation to Mammoth's lien rights, claims of lien on real property. General Concrete subsequently filed an action to enforce its claim of lien on the real property, naming the debtor as a defendant. General Concrete filed a motion for retroactive relief from the automatic stay to proceed with the action to enforce the lien. Also on February 20, General Concrete served notices of claims of liens on funds due Mammoth and filed, by subrogation to Mammoth's lien rights, claims of lien on real property with respect to three other projects. General Concrete seeks relief from the automatic stay to enforce the liens on real property.

Wake Stone acted as a first tier subcontractor on one project, and contends it is owed \$57,609.32. On February 17, 2009, one day prior to Mammoth's bankruptcy, Wake Stone served notices of claims of liens on funds due Mammoth and on March 12, 2009, filed, by subrogation to Mammoth's lien rights, claims of liens on real property. Wake Stone seeks relief from the automatic stay to enforce the liens on real property.

Fortress Fencing acted as a first tier subcontractor on one project, and contends it is owed \$19,402.50. On March 2, 2009, Fortress served notices of claims of lien on funds due Mammoth and filed, by subrogation to Mammoths' lien rights, claims of lien on real property. Fortress seeks relief from the automatic stay to enforce the liens on real property.¹

The trustee and Paragon oppose the motions for relief from the automatic stay. Paragon contends that its security interest in the funds owed Mammoth has priority over the liens claimed by the subcontractors. Both Paragon and the trustee maintain that, with the exception of Wake Stone, the claims of liens on funds were served postpetition and, because they violated the automatic stay, are invalid. Furthermore, the subrogation liens on real property are also invalid because they are not supported by a valid lien on funds. Rather than allowing relief from the stay to enforce the liens, Paragon and the trustee maintain, the court should find that the liens are void. With respect to Wake Stone, the trustee contends that the service of the notice of lien on funds filed the day prior to the petition for relief constitutes an avoidable preference, and thus the related lien on real estate should not be allowed.

¹ Because of filing deadlines set out in the North Carolina lien statutes, the parties entered consent orders allowing the subcontractors to file actions to enforce the claims of liens on real property, but those actions were to be held in abeyance pending the entry of this order.

After a thorough analysis of the legal arguments set forth by the parties in both this case and in Harrelson Utilities, the court in an order entered in the Harrelson case on July 30, 2009, held that serving a notice of claim of lien on funds due to the debtor postpetition violates the automatic stay under § 362(a)(4) of the Bankruptcy Code. Accordingly, postpetition notices filed by the subcontractors in this case violated the automatic stay and are void. As discussed in Harrelson, liens filed by subcontractors against the real property must be supported by valid liens on funds due to the contractor, and if the liens on the funds are invalid, so are the liens against the real property. The motions for relief from the automatic stay to file notices of liens on funds and to file subrogation liens on real property and enforce the subrogation liens on real property are **DENIED**. All of the liens of record should be withdrawn, and the state court actions filed to enforce the liens on real property should be dismissed.

Wake Stone served its notices of liens on funds prepetition, and, at this point, those liens are valid. Wake Stone's subrogation liens on real property are liens on property that is not property of the estate, and the action to enforce the lien is not stayed by § 362(a)(4). Because Wake Stone is required to name the debtor as a defendant in the enforcement action, but is not seeking relief against the debtor, Wake Stone's motion for relief from the automatic stay is **ALLOWED**. Wake Stone's liens may or may not be subject to avoidance by the trustee, but that issue will be addressed in an adversary proceeding to avoid the alleged preferences, if one is filed.

SO ORDERED.

END OF DOCUMENT