



UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: 450 S. Western, LLC, a California limited liability company, Debtor.	Case No.: 2:20-bk-10264-ER Adv. No.: 2:21-ap-01030-ER
Philmont Management, Inc., Plaintiff, v. 450 S. Western, LLC, a California limited liability company, Defendant.	MEMORANDUM OF DECISION GRANTING MOTION TO DISMISS COMPLAINT WITH PREJUDICE [RELATES TO DOC. NO. 12] Date: April 7, 2021 Time: 11:00 a.m. Location: Ctrm. 1568 Roybal Federal Building 255 East Temple Street Los Angeles, CA 90012

At the above-captioned date and time, the Court conducted a hearing on the Debtor's *Motion to Dismiss Philmont Management, Inc.'s Complaint to Determine Validity, Priority, or Extent of Lien on Estate Property* [Doc. No. 12] (the "Motion").¹ For the reasons set forth below, the Motion is **GRANTED**, and the Complaint is **DISMISSED WITH PREJUDICE**.

¹ The Court considered the following pleadings in adjudicating this matter:

1) Complaint to Determine Validity, Priority, or Extent of Lien on Estate Property [Doc. No. 1] (the "Complaint");

I. Facts and Summary of Pleadings

On January 10, 2020 (the “Petition Date”), 450 S. Western, LLC (the “Debtor”) filed a voluntary Chapter 11 petition. As of the Petition Date, the Debtor owned and operated a three-story, 80,316 square foot shopping center—commonly known as California Marketplace—located at the intersection of South Western Avenue and 5th Street (the “Property”).

On October 23, 2020, the Court entered an order authorizing the sale of the Property to Jake Sharp Capital for the purchase price of \$57.5 million. *See* Bankr. Doc. No. 241 (the “Sale Order”). The Sale Order provides that liens against the Property “attach to the proceeds of the sale in the same extent, priority, and validity as they did with respect to the Property prior to the sale of the Property.” Sale Order at ¶ 7.

On February 11, 2021, Philmont Management, Inc. (“Philmont”) filed a *Complaint to Determine Validity, Priority, or Extent of Lien on Estate Property* [Adv. Doc. No. 1] (the “Complaint”). The material allegations of the Complaint are as follows:

- 1) Philmont is a contractor licensed by the State of California. Prior to the Petition Date, Philmont performed certain tenant improvements at the Property. Philmont billed the Debtor \$1,835,561.32 for labor and materials.
- 2) On July 18, 2018, Philmont recorded a mechanic’s lien. Over the next eighteen months, the Debtor repeatedly reassured Philmont that the amount due under its mechanic’s lien would be paid. In the course of these discussions, the Debtor informed Philmont that it was in the process of completing a refinance of the Property and that Philmont’s valid mechanic’s lien would be paid through escrow as part of the refinancing transaction. The Debtor requested that Philmont not file a lawsuit to perfect its mechanic’s lien because doing so would create a cloud on title, potentially jeopardizing the pending refinance. Instead, the Debtor and Philmont understood that Philmont would simply re-record its mechanic’s lien if not paid from the escrow of the impending refinance within ninety days of the original recording. The parties further understand that the Debtor would not claim the successive liens were untimely.
- 3) In reasonable reliance on the Debtor’s representations and promises, Philmont did not commence an action to foreclose its mechanic’s lien against the Property and instead re-recorded its mechanic’s lien four additional times between June 2018 and December 2019. The act of multiple recordings of Philmont’s mechanic’s lien was consistent with the parties’ understanding and, accordingly, the Debtor did not object. Rather, the Debtor continued to give assurances to Philmont that its lien would be paid from the refinance, but that the refinance process required more time.

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- 2) Notice of Motion and Motion to Dismiss Philmont Management, Inc.’s Complaint to Determine Validity, Priority, or Extent of Lien on Estate Property [Doc. No. 12] (the “Motion”);
 - a) Request for Judicial Notice in Support of Motion to Dismiss Philmont Management, Inc.’s Complaint to Determine Validity, Priority, or Extent of Lien on Estate Property for Order to Allocate Commission Proceeds [Doc. No. 13];
 - b) Supplement to the Request for Judicial Notice in Support of Motion to Dismiss Philmont Management, Inc.’s Complaint to Determine Validity, Priority, or Extent of Lien on Estate Property for Order to Allocate Commission Proceeds [Doc. No. 20];
 - 3) Plaintiff Philmont Management, Inc.’s Opposition to Defendant’s Motion to Dismiss Complaint to Determine Validity, Priority, or Extent of Lien on Estate Property [Doc. No. 18] (the “Opposition”); and
 - 4) Reply to Philmont Management, Inc.’s Opposition to Motion to Dismiss Complaint to Determine Validity, Priority, or Extent of Lien on Estate Property [Doc. No. 21] (the “Reply”).

- 4) In reasonable reliance on the Debtor's representations and promises, Philmont recorded its fifth and final mechanic's lien against the Property on December 19, 2019, for the outstanding sum then due from the Debtor of \$2,361,878.40, including statutory interest.
- 5) On April 29, 2020, Philmont filed a timely Notice of Perfection of Mechanic's Lien under 11 U.S.C. § 546(c).
- 6) On September 23, 2020, the Debtor filed a motion to approve the sale of the Property (the "Sale Motion"). In the Sale Motion, the Debtor claimed for the first time—and contrary to its prior repeated assertions and requests—that Philmont's mechanic's lien was invalid and disputed.
- 7) The sale of the Property closed on December 4, 2020. The Debtor holds sale proceeds of approximately \$11,419,486 in a segregated trust account subject to all remaining disputed secured claims, including Philmont's mechanic's lien.

Based upon the foregoing allegations, Philmont seeks a determination that it holds a valid and enforceable mechanic's lien on the proceeds of the sale of the Property (the "Sale Proceeds") in the amount of \$1,808,281.32, plus statutory interest.

Debtor moves to dismiss the Complaint, with prejudice, for failure to state a claim upon which relief can be granted. Debtor argues that dismissal with prejudice is required for two reasons:

- 1) Cal. Civ. Code § 8412(a) requires that a notice of mechanic's lien be recorded within 90 days from the date the underlying work is completed. To perfect a mechanic's lien that has been properly recorded, Cal. Civ. Code § 8460(a) requires that an action to enforce the mechanic's lien be commenced within 90 days of recordation. The only way to extend the 90-day deadline to perfect the mechanic's lien is to record a Notice of Credit. *See* Cal. Civ. Code § 8460(b). Philmont recorded five notices of mechanic's lien. The first notice was recorded within the 90-day window after work was completed. However, this first notice does not support a valid and perfected security interest in estate property, because no action was commenced by Philmont within 90 days of the July 18, 2019 recording date as required by § 8460(a), and no Notice of Credit was recorded to extend the 90-day deadline.
- 2) Even if the 90-day deadline to commence an enforcement action could be equitably tolled (which it cannot be), and even if the fifth mechanic's lien recorded on December 19, 2019 was timely (which it was not), Philmont still failed to properly perfect its mechanic's lien when it did not timely file the required notice of perfection under § 546 of the Bankruptcy Code.

Philmont opposes the Motion to Dismiss for the following reasons:

- 1) Philmont has alleged facts sufficient to establish that the Debtor is equitably estopped from asserting that Philmont's fifth mechanic's lien was not timely recorded. The facts alleged by Philmont show that it refrained from commencing an enforcement action, and instead re-recorded its mechanic's lien four separate times, in reasonable reliance upon the Debtor's representations that a refinance transaction was pending, that Philmont would be paid from the refinance, and that the Debtor would not later take the position that recordation of the mechanic's lien was untimely.

- 2) Philmont was not required to file a Notice of Perfection under § 546 of the Bankruptcy Code. Philmont perfected its mechanic's lien by recording the lien on December 19, 2019. Under California law, Philmont was then required to commence an action to enforce the lien within 90 days or "the claim of lien expires and is unenforceable." Cal. Civ. Code § 8460(a). The 90-day deadline specified by Cal. Civ. Code § 8460(a) was tolled by § 108(c) of the Bankruptcy Code, and Philmont was not required to file a Notice of Perfection under § 546(b) of the Bankruptcy Code because its lien was already perfected by recordation and Cal. Civ. Code § 8412(a) deals with enforcement, but not perfection, of liens. *See In re Hunters Run Ltd. P'ship*, 875 F.2d 1425, 1427 (holding that the holder of a mechanic's lien was not required to file an action to foreclose the lien, because a lien foreclosure action was "an act to ... enforce [a] lien against property of the estate" tolled by § 108(c), and finding that the notice of perfection requirement under § 546(b) of the Bankruptcy Code did not apply to the commencement of an action to enforce a mechanic's lien, again because the foreclosure action was an "enforcement action" and not a "perfection action").

The Debtor makes the following arguments in reply to Philmont's opposition:

- 1) In support of its contention that the Debtor is equitably estopped from challenging the timeliness of the recordation of Philmont's fifth mechanic's lien, Philmont relies on *Hubbard v. Lee*, 102 P. 528 (Cal. Ct. App. 1909), a 110-year old decision that has not been cited in the last 25 years. Philmont's reliance upon *Hubbard* is unavailing, because "one who acts with full knowledge of plain provisions of law and their probable effect on facts within his or her knowledge ... may claim neither ignorance of the true facts nor detrimental reliance on the conduct of the person claimed to be estopped, two of the essential elements of equitable estoppel." *Steinhart v. County of Los Angeles*, 27 Cal. 4th 1298, 1317 (2010). Philmont cannot allege that it was ignorant of the true facts—namely, that its work had been completed and that the statute required a notice of mechanic's lien to be recorded within 90 days. Knowing this, Philmont decided to wait a year and a half before recording the December 19, 2019 notice of mechanic's lien.
- 2) There is no merit to Philmont's contention that it was not required to file a notice of perfection under § 546(b) of the Bankruptcy Code to perfect its mechanic's lien. Philmont's reliance upon *Hunters Run* is misplaced because that case's holding is limited to a Washington statute that differs materially from the California statute at issue here.

II. Findings and Conclusions

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). To state a plausible claim for relief, a complaint must satisfy two working principles:

First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitations of the elements of a cause of action, supported by mere conclusory statements, do not suffice.... Second, only

a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not “show[n]”—“that the pleader is entitled to relief.”

Id. (citing Civil Rule 8(a)(2)).

Although the pleading standard Civil Rule 8 announces “does not require ‘detailed factual allegations,’ ... it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.... A pleading that offers ‘labels and conclusions’ or a ‘formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

A. The Complaint Fails to Sufficiently Allege Facts Showing that the Debtor is Estopped from Challenging the Timeliness of Philmont’s Recordation of its Mechanic’s Lien

Under California law, a contractor may not enforce a mechanic’s lien unless it is recorded within 90 days of completion of the work. The 90-day deadline can be tolled only by recordation of a notice of completion. These deadlines are specified by Cal. Civ. Code § 8412, which provides:

A direct contractor may not enforce a lien unless the contractor records a claim of lien after the contractor completes the direct contract, and before the earlier of the following times:

- (a) Ninety days after completion of the work of improvement.
- (b) Sixty days after the owner records a notice of completion or cessation.

Cal. Civ. Code § 8412.

To maintain the perfection of a valid mechanic’s lien timely recorded within the deadlines specified by Cal. Civ. Code § 8412, the contractor must commence an action to foreclose the lien within 90 days of recordation:

The claimant shall commence an action to enforce a lien within 90 days after recordation of the claim of lien. If the claimant does not commence an action to enforce the lien within that time, the claim of lien expires and is unenforceable.

Cal. Civ. Code § 8460(a).

The Complaint does not allege the exact date when Philmont completed the work on the Property. However, there is no dispute that the first mechanic’s lien that Philmont recorded on July 18, 2018 was recorded within the 90-day deadline specified by Cal. Civ. Code § 8412. Nor is there any dispute that the fifth mechanic’s lien recorded by Philmont on December 19, 2019, was not recorded within the 90-day deadline. Instead, the issue is whether the Complaint alleges facts sufficient to support a reasonable inference that the Debtor is equitably estopped from challenging the timeliness of the December 19, 2019 mechanic’s lien.

“Four elements must ordinarily be proved to establish an equitable estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury.” *Hopkins v. Kedzierski*, 225 Cal. App. 4th 736, 756, 170 Cal. Rptr. 3d 551, 568 (2014). “[O]ne who acts with full knowledge of plain provisions of law and their probable effect on facts within his or her knowledge, especially where represented by counsel, may claim neither ignorance of the true facts nor detrimental reliance on the conduct of the person claimed to be estopped, two of the essential elements of equitable estoppel.” *Steinhart v. Cty. of Los Angeles*, 47 Cal. 4th 1298, 1317, 223 P.3d 57, 70 (2010).

Here, the Complaint’s allegations demonstrate that Philmont understood the necessity both of recording its mechanic’s lien within 90 days of the completion of the work and of commencing a foreclosure action within 90 days of recordation of the lien. For example, the Complaint alleges that Philmont continued to record successive mechanic’s liens, in lieu of commencing an action to foreclose its lien, based on the Debtor’s representations that a refinancing transaction was imminent. Complaint at ¶ 12. The Complaint additionally alleges that the “parties further understood that [the Debtor] would not claim the successive liens were untimely.” *Id.* These allegations show that Philmont knew that where a lien was not recorded within 90 days of completion of the work, and/or where a foreclosure action was not commenced within 90 days of the recordation of the lien, the lien at issue was at risk of being subjected to a timeliness challenge. That is, Philmont acted “with full knowledge of plain provisions of law” and the probable effect of those provisions on the validity of its lien. *Steinhart*, 47 Cal. 4th at 1317. Consequently, Philmont cannot claim “ignorance of the true facts nor detrimental reliance on the conduct of [the Debtor], two of the essential elements of equitable estoppel.” *Id.*

Philmont’s reliance upon *Hubbard v. Lee*, 10 Cal. App. 477 (Cal. Ct. App. 1909) for the proposition that the Complaint sufficiently alleges facts showing that the Debtor is equitably estopped from challenging the timeliness of Philmont’s mechanic’s lien is unavailing. In *Hubbard*, the property owner represented to the contractor that the project was not complete and demanded that further work be done. *Id.* at 482. Because the contractor did not record his lien in reliance upon these representations, the court held that the property owner’s estate was estopped from later claiming the project had been completed earlier. *Id.* at 483.

Here, by contrast, there is no dispute as to the date upon which Philmont completed the work. The Complaint’s allegations demonstrate that Philmont knew that it had completed the work and also knew that compliance with the provisions of the California Civil Code was necessary to acquire and perfect a mechanic’s lien. Philmont chose not to take the actions it knew were required to maintain and perfect that lien in the hopes that it might be paid through a refinancing transaction. Philmont’s gamble that a refinancing transaction would be completed failed to pay off. Having made such a gamble and deliberately refrained from taking the steps it knew were necessary to acquire and maintain its lien, Philmont cannot now invoke the doctrine of estoppel to avoid the consequences of its actions.

B. Even if Philmont Could Allege Facts Sufficient to Support a Reasonable Inference of Equitable Estoppel, Philmont’s Failure to Allege that it Timely Recorded a Notice of Perfection Under § 546(b) of the Bankruptcy Code Requires Dismissal

Section 546(b) provides:

- (1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that—
 - (A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or
 - (B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.
- (2) If—
 - (A) a law described in paragraph (1) requires seizure of such property or commencement of an action to accomplish such perfection, or maintenance or continuation of perfection of an interest in property; and
 - (B) such property has not been seized or such action has not been commenced before the date of the filing of the petition;
such interest in such property shall be perfected, or perfection of such interest shall be maintained or continued, giving notice within the time fixed by such law for such seizure or such commencement.

As noted above, under California law, the holder of a mechanic's lien is required to commence an action to enforce that lien within 90 days of recordation in order to maintain the perfection of the lien:

The claimant shall commence an action to enforce a lien within 90 days after recordation of the claim of lien. If the claimant does not commence an action to enforce the lien within that time, the claim of lien expires and is unenforceable.

Cal. Civ. Code § 8460(a).

The Ninth Circuit Bankruptcy Appellate Panel has explained the interaction between California law and § 546(b) of the Bankruptcy Code as follows:

Under California law, the filing of a foreclosure suit, an enforcement action, is required to maintain the perfection of a lien: if no suit is timely filed, the lien becomes void. Section 546(b) unambiguously mandates that, if commencement of an action is required to maintain or continue perfection, notice shall be given instead.

Village Nurseries v. David Gould (In re Baldwin Builders), 232 B.R. 406, 411 (B.A.P. 9th Cir. 1999).

Here, Philmont recorded its fifth mechanic's lien on December 19, 2019. As explained in Section II.A., above, the December 19, 2019 lien is not valid because it was not recorded within 90 days of completion of the work, as required by Cal. Civ. Code § 8412, and Philmont has failed to allege facts sufficient to support its theory that the Debtor is equitably estopped from challenging the timeliness of the lien. Even if the Court were to overlook the untimeliness of the December 19, 2019 lien, dismissal would still be required because Philmont has not alleged—and cannot allege—that it timely provided the notice necessary to maintain the perfection of its lien as required by § 546(b).

As of the Petition Date (January 10, 2020), Philmont had not commenced an action to enforce its mechanic's lien. Therefore, to maintain the perfection of its lien, Philmont was required to file a notice maintaining perfection under § 546(b) within 90 days of December 19, 2019—or by no later than March 18, 2020. However, as reflected in the record and as alleged in the Complaint, Philmont filed its *Notice of Perfection of Mechanic's Lien* [Bankr. Doc. No. 121] (the "Notice") on April 29, 2020—approximately one month late.² As a result of Philmont's failure to timely file the Notice, its December 19, 2019 mechanic's lien "expire[d] and is unenforceable." Cal. Civ. Code § 8460(a).

Philmont relies on *In re Hunters Run Ltd. Partnership*, 875 F.2d 1425 (9th Cir. 1987) for the proposition that it was not required to file a notice maintaining perfection under § 546(b) because its 90-day deadline to file an action to enforce its lien was tolled by § 108(c).³ At the time *Hunters Run* was decided, § 546(b) explicitly authorized only the filing of a notice to perfect a lien, not the filing of a notice to *maintain or continue* the perfection of a lien. This "'caused trouble because ... filings may lapse, expire, or become ineffective for several reasons.'" *In re WorldCom, Inc.*, 362 B.R. 96, 104 (Bankr. S.D.N.Y. 2007), *on reconsideration*, 382 B.R. 610 (Bankr. S.D.N.Y. 2008), *aff'd*, No. 09 CIV. 9623 RJS, 2011 WL 1496378 (S.D.N.Y. Apr. 19, 2011) (citing Kathryn R. Heidt, *The Effect of the 1994 Amendments on Commercial Secured Creditors*, 69 Am. Bankr.L.J. 395, 424–425 (1995)). In 1994, Congress amended § 546(b) to expand the circumstances under which the filing of a notice was required. In addition to requiring the filing of a notice to perfect a lien, the amended § 546(b) also requires the filing of a notice to *maintain or continue* the perfection of a lien. At the same time Congress amended § 546(b), it also amended § 362(b)(3) to except from the coverage of the automatic stay "any act to perfect, or to *maintain or continue the perfection of*, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title." (The prior version of § 362(b)(3) covered only acts to perfect an interest in property, not acts to *maintain or continue the perfection of* an interest in property.)

Hunters Run involved a mechanic's lien that had been perfected prior to the filing of the petition. The Washington statute under which the lien had been recorded provided that "[n]o lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim has been filed unless an action be commenced in the proper court within that time to enforce such a lien." *Hunters Run*, 875 F.2d at 1426 (9th Cir. 1989) (citing Wash. Rev. Code Ann. § 60.04.100 (West Supp. 1989)). The *Hunters Run* court held that

² The Court may consider the Notice without converting the motion to dismiss to a motion for summary judgment for two reasons. First, the Court may take judicial notice of the Notice, since it was filed in the Debtor's bankruptcy case and is therefore a matter of public record. *See Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994) (matters of public record may be judicially noticed); *Rose v. Beverly Health & Rehab. Servs., Inc.*, 356 B.R. 18, 24 (E.D. Cal. 2006), *aff'd sub nom. Rose v. Beverly Health & Rehab. Servs., Inc.*, 295 F. App'x 142 (9th Cir. 2008) (taking judicial notice of bankruptcy court filings in the context of a motion to dismiss). Second, the Notice may be treated as though it were part of the Complaint itself under the incorporation-by-reference doctrine, because the Complaint alleges that Philmont filed the Notice on April 29, 2020. *See* Complaint at ¶ 16; *see also Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018) (discussing the incorporation-by-reference doctrine).

³ Section 108(c) tolls the deadline to commence a nonbankruptcy action against the debtor until thirty days after the termination or expiration of the automatic stay.

notwithstanding the lienholder's failure to commence an action to enforce the lien within the eight-month period specified in the statute, the lien remained enforceable, because the eight-month deadline had been tolled by § 108(c) of the Bankruptcy Code. *Id.* at 1428. Reaching this conclusion required the court to examine the complicated interplay among §§ 546(b), 362(b)(3), 362(a)(4), and 108(c). Applying the versions of these code sections then in effect, the court reasoned as follows:

- The lienholder could *not* have perfected his lien by providing notice of the enforcement action under § 546(b). The enforcement action could not qualify as an “act to perfect an interest in property” for purposes of § 546(b) since the lien had been perfected prepetition.
- Had the lienholder been eligible to perfect his lien by invoking § 546(b), he could have done so without violating the automatic stay. This is because § 362(b)(3) “allows creditors with certain types of liens to avoid the potential prejudice of section 362’s automatic stay by allowing for post-bankruptcy-petition perfection of these liens.” *Id.* at 1428. Therefore, the lienholder’s perfection of his lien by way of § 546(b) would not have violated § 362(a)(4)’s stay of “any act to create, perfect, or enforce any lien against property of the estate.”
- However, the lienholder’s inability to take advantage of § 546(b) meant that § 362(b)(3)’s exception *did not* apply, making the enforcement action subject to the stay imposed by § 362(a)(4).
- Since the enforcement action was stayed by § 362(a)(4), the tolling provision set forth in § 108(c) applied to extend the Washington statute’s deadline to commence the enforcement action.

The debtor in *Hunters Run* argued that § 108(c)’s tolling provision did not apply on the ground the lien had *not* been perfected prepetition. The court rejected this argument:

In essence, [the debtor] argues that Washington law requires a two-step “perfection” process: recording the lien and commencing an action to enforce it. [The debtor] cites no authority for the proposition that a lien recorded pursuant to RCW 60.04.060 is somehow not “perfected.” ... Commencement of foreclosure proceedings under RCW 60.04.100 is not an element of “perfection” exempted from section 362’s stay by section 546(b); rather, it is “enforcement” which remains stayed by section 362. Consequently, section 108(c) applies to toll the enforcement period of RCW 60.04.100.

Hunters Run, 875 F.2d at 1428 (9th Cir. 1989).

Philmont argues that under *Hunter’s Run*, its deadline to commence the lien enforcement action specified by Cal. Civ. Code § 8460(a) was tolled by § 108(c) of the Bankruptcy Code. Philmont argues that Cal. Civ. Code § 8460(a), like the Washington statute at issue in *Hunters Run*, “deals with enforcement, not perfection, of liens.”⁴

Philmont’s argument overlooks the expanded scope of § 546(b) that resulted from the 1994 amendments. Once the additional reach of § 546(b) is taken into account, application of the

⁴ Opposition at 16. (Page citations are to the CM/ECF pagination appearing at the top of each page, not the pagination used by the document’s preparer.)

identical reasoning used by the *Hunters Run* court to the facts of this case produces the opposite result. That is, Philmont’s deadline to commence its enforcement action was *not* tolled by § 108(c) and Philmont *was* required to provide notice of the enforcement action under § 546(b) in order to maintain the perfection of its lien. The following table illustrates how this result is perfectly consistent with the reasoning of *Hunter’s Run*:

Reasoning Employed by <i>Hunter’s Run</i> Court	Identical Reasoning Applied to the Facts of this Case
The lienholder could <i>not</i> have perfected his lien by providing notice of the enforcement action under § 546(b). The enforcement action could not qualify as an “act to perfect an interest in property” for purposes of § 546(b) since the lien had been perfected prepetition.	Philmont could have perfected its lien by providing notice of the enforcement action under § 546(b). The enforcement action specified in Cal. Civ. Code § 8460(a) is an action to <i>maintain or continue the perfection of</i> a lien for purposes of § 546(b). Cal. Civ. Code § 8460(a) states that if the lienholder “does not commence an action to enforce the lien” within the specified 90-day deadline, “the claim of lien expires and is unenforceable.” Under the plain language of the statute, the lien ceases to be perfected if the action is not filed timely.
Had the lienholder been eligible to perfect his lien by invoking § 546(b), he could have done so without violating the automatic stay. This is because § 362(b)(3) “allows creditors with certain types of liens to avoid the potential prejudice of section 362’s automatic stay by allowing for post-bankruptcy-petition perfection of these liens.” <i>Id.</i> at 1428. Therefore, the lienholder’s perfection of his lien by way of § 546(b) would not have violated § 362(a)(4)’s stay of “any act to create, perfect, or enforce any lien against property of the estate.”	Since Philmont was eligible to invoke § 546(b), Philmont’s recordation of the Notice to maintain the perfection of its lien did <i>not</i> violate the automatic stay. This is because the current version of § 362(b)(3) excepts from the automatic stay both acts to perfect a lien and acts to <i>maintain or continue</i> the perfection of a lien (the version of § 362(b)(3) in effect when <i>Hunters Run</i> was decided permitted only acts to perfect a lien). Therefore, Philmont’s recordation of the Notice to maintain the perfection of its lien did not violate the automatic stay.
However, the lienholder’s inability to take advantage of § 546(b) meant that § 362(b)(3)’s exception <i>did not</i> apply, making the enforcement action subject to the stay imposed by § 362(a)(4).	As stated above, § 362(b)(3) does <i>not</i> apply, and therefore Philmont’s recordation of the Notice to maintain the perfection of its lien <i>did not</i> violate the automatic stay.
Since the enforcement action was stayed by § 362(a)(4), the tolling provision set forth in § 108(c) applied to extend the Washington statute’s deadline to commence the enforcement action.	Since Philmont’s recordation of the Notice to maintain the perfection of its lien was <i>not</i> subject to the automatic stay, the tolling provision set forth in § 108(c) did <i>not</i> extend Philmont’s deadline to commence the enforcement action.

In *Baldwin Builders*, the Ninth Circuit Bankruptcy Appellate Panel dealt with facts similar to this case, and reached the same result set forth in the table above. It is noteworthy that the *Baldwin Builders* court acted with full awareness of the decision in *Hunter's Run*—in fact, the court's opinion discusses *Hunter's Run* at length. See *Baldwin Builders*, 232 B.R. at 411 (summarizing the facts of *Hunter's Run*). As in this case, the lienholder in *Baldwin Builders* perfected its lien prior to the filing of the petition, but failed to provide the notice necessary to maintain the perfection of its lien required by § 546(b). The court held that the lienholder's failure to do so caused the lien to lose its perfected status:

Under California law, the filing of a foreclosure suit, an enforcement action, is required to maintain the perfection of a lien: if no suit is timely filed, the lien becomes void. Section 546(b) unambiguously mandates that, if commencement of an action is required to maintain or continue perfection, notice shall be given instead.

Id. at 411.

There is no merit to Philmont's contention that *Baldwin Builders* is inconsistent with *Hunters Run*. To the contrary, the table above shows that once the effect of the 1994 amendments is taken into account, the reasoning of *Baldwin Builders* is consistent with that of *Hunters Run*.

Philmont's failure to allege the timely recordation of the Notice is fatal to Philmont's claim, and this failure cannot be cured through amendment given that the record reflects that the Notice was recorded more than one month late. Therefore, the dismissal of the Complaint is with prejudice. See *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) ("Although leave to amend should be given freely, a district court may dismiss without leave where a plaintiff's proposed amendments would fail to cure the pleading deficiencies and amendment would be futile.").

III. Conclusion

Based upon the foregoing, the Motion is **GRANTED**, and the Complaint is **DISMISSED WITH PREJUDICE**. The Court will enter an order consistent with this Memorandum of Decision.

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Date: May 10, 2021



Ernest M. Robles
United States Bankruptcy Judge