

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:	DGS Realty, LLC Debtor))))	Bk. #18-10024-BAH Chapter 11

EX PARTE, ASSENTED TO FIRST DAY MOTION FOR ORDER
AUTHORIZING USE OF CASH COLLATERAL
AND PROVISION FOR ADEQUATE PROTECTION

NOW COMES DGS Realty, LLC, the Debtor and Debtor-in-Possession (hereinafter “the Debtor”), in this bankruptcy proceeding, pursuant to Federal Rule of Bankruptcy Procedure 4001(b) and Local Bankruptcy Rule 4001-2(b), and on an assented to basis requests as follows:

Statement of Introduction

1. Pursuant to Code Sections 105, 363 and 361, the Debtor asks this Court to authorize the Debtor to use the proceeds of its accounts, rent and other cash collateral to pay the mortgage, costs and expenses listed as estimated in the budget attached as Exhibit A for the period beginning January 1, 2018 and ending on March 31, 2018 (the “Interim Use Period”), the “Use Period” and Budget”).
2. The following exhibits are attached hereto and incorporated herein by reference:
 - a. Exhibit A Budget for the Interim Use Period
 - b. Exhibit B. Affidavit of David H. Booth in Support of this Motion
3. Accompanying this Motion is a proposed Order granting the Debtor the relief requested herein through the last day of the Interim Use Period (the “Interim Order”) and unless this Court should sustain an objection to the continued use of cash collateral during such Interim Use Period or an order revoking Debtor’s right to use cash collateral should be entered by this

Court (the “Continued Order”), which among other things: (i) limits the amount of cash collateral which Debtor may spend during the Use Period, (ii) grants the lien holder a replacement lien on the Debtor’s post-petition cash collateral to the extent such lien holder held a valid pre-petition lien thereon as security for the payment of any loss or diminution in the value thereof resulting from Debtor’s post-petition operations as opposed to pre-petition actions taken or omitted to be taken by a lien holder, (iii) reserves the right to contest the validity , perfection, enforceability or value of any lien held or claimed by a lien holder for any reason, (iv) specifically excludes from the scope of a replacement lien actions arising under Chapter 5 of the Bankruptcy Code and the proceeds thereof and (v) in the case of the Interim Order, expires on the earliest date on which a hearing on an objection to this Motion can be held under the notice and service requirements of Bankruptcy Rules 4001(b) absent the entry of an order extending following such hearing. None of the provisions that must be highlighted and justified pursuant to Local Bankruptcy Rule 4001-2(c) are included in the proposed Order.

Jurisdiction and Venue

4. On January 11, 2018 (the Petition Date”), the Debtor commenced this Chapter 11 reorganization by filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. Section 101-1330 (the “Code”).

5. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334.

6. This is a “core” proceeding pursuant to, inter alia, 28 U.S.C. § 157(b)(2). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

7. The bases for the relief requested herein are Sections 363(c) of Chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”), and Rules 4001 and 9014 of the Federal Rules of Bankruptcy Procedure.

8. No Committee has been appointed in this Case as of this motion.

9. On information and belief, the sole cash collateral lien holder of the Debtor is the secured creditor Ocwen Loan Servicing, LLC, with a mailing address of 1611 Worthington Road, Suite 100, West Palm Beach, FL 33409 (hereinafter “Ocwen”).

Factual Background

A. The Debtor’s Business:

10. DGS Realty, LLC is a real estate limited liability company with a mailing address of P.O. Box 1077, Concord, New Hampshire 03302-1077.

11. The principal office address of DGS Realty, LLC is 74 Regional Drive, Concord, NH 03301.

12. DGS Realty, LLC is owned by three (3) people, each owning a one-third (1/3) interest in the LLC, David H. Booth, Manager, Stephen W. Booth, and Gregory A. Booth.

13. DGS Realty, LLC was formed on or about May 10, 2017.

14. The Debtor does not have any employees. The Tenant on the land is a business called Transformer Service, Inc.

15. The Debtor owns a three and one half (3½) acre parcel of land with three buildings on the property. There is an additional parcel of land which is an unbuildable parcel of land, “a gully”, which abuts the larger property. The Debtor also owns this parcel.

16. The secured lender Ocwen has a mortgage on both parcels.

17. The Debtor is in possession of its property and is actively and effectively operating and managing its business asset as Debtor in Possession pursuant to sections 1107 and 1108 of the Code.

18. “Cash collateral” means and includes for the purposes of this Motion “cash, deposit accounts and other cash equivalents.... In which the estate and an entity other than the estate have an interest, and includes the proceedsof property” of the estate, including rents. Under Code Section 363(c)(2), a debtor may not use cash collateral without the consent of each “entity that has an interest in such cash collateral” or the “court.....authorizes such use”.

19. At this time, Debtor believes that Ocwen holds a first priority lien on the pre-petition cash collateral.

B. The Debtor’s Debt Financing

20. On the Petition date, the cash collateral consisted of approximately \$0.00 in cash, and the real estate valued at \$1,900,000.00.

21. The Debtor does not have any accounts receivables; however, the Debtor is owed rent from its tenant for the month of January in the approximate amount of \$10,425.00.

22. The Debtor was paying its mortgage payments monthly to Ocwen until such time that Ocwen refused to accept them. At this time, the Debtor is behind on its monthly mortgage payments to Ocwen.

Relief Requested

23. Attached hereto as Exhibit A is the Budget for the Interim Use prepared by the Debtor which sets forth, among other things, the Debtor’s estimated cash receipts and cash disbursements for the period January 1, 2018 through March 30, 2018 (the “Budget Period”) for the business. The Budget for periods of time includes costs and expenses, which will be incurred in the

ordinary course of the Debtor's on-going business during the Interim Use Period. The Budget projects and summarizes fairly and accurately the expected results of the Debtor's business operations on a cash flow basis during the Interim Use Period based on the information available to the Debtor at this time. The Debtor's cash flow is comprised of rental income from its tenant.

24. Ocwen has a lien on the Debtor's real estate. Thus, the Debtor has no cash with which to pay the mortgage and operating expenses other than cash collateral. Such cash is necessary to pay operating expenses and monthly mortgage payments.

25. The Debtor cannot continue its operations without the use of cash collateral because like any other operating company, the Debtor must pay its mortgage and bills as they come due.

26. The Budget projects the amount of the projected receipts and disbursements as required by LBR 4001-2(d) and shows that the Debtor will be able to meet its mortgage and operating expenses during the Use Period.

27. The Budget also shows that the Debtor's cash will increase over the Use Period.

28. No significant diminution in the amount of the Debtor's accounts receivable or cash will occur during the Use Period because of their value of the Petition Date. The use of the cash collateral is essential to the effective reorganization of the Debtor.

29. The Debtor has the ability to reorganize its business affairs for the benefit of its creditors and equity holders. Debtor expects to be able to propose a confirmable plan.

30. The Debtor's business assets have more value in reorganization than in liquidation.

31. Without the ability to pay its expenses and mortgage including tax escrow monthly as listed in the Budget, this reorganization will fail. Creditors will be irreparably and unnecessarily harmed. Pending a hearing on this Motion, this Court should grant the Debtor and its bankruptcy estate the relief requested in this Motion, on an ex parte, emergency basis.

32. The Court, after notice and a hearing, may authorize a Debtor-in-Possession to use, sell, or lease cash collateral. See 11 U.S.C. § 363(c)(2)(B). The Debtor requests authority to utilize the cash generated by post-petition operations in order to fund its operations during the Budget Period. Approving the use of cash collateral on the terms set forth herein is in the best interests of the Debtor, its employees, the estate, and creditors, because it will permit the Debtor to continue as a going concern, thereby maximizing the value of its assets, a result which will inure to the benefit of all of the Debtor's creditors and other constituencies.

Adequate Protection

33. Section 363(e) of the Bankruptcy Code entitles a creditor with a security interest in cash collateral to adequate protection of such security interest prior to the use, sale, or lease of the cash collateral. See 11 U.S.C. § 363(e). In deciding whether a security interest is adequately protected, the Court must determine “the value of the [creditor's] interest and whether the [Debtor's] proposed use of their cash collateral would impair that interest.” In re Dynaco Corp., 162 B.R. 389, 394 (Bankr. D.N.H. 1993). Although adequate protection may take the form of, inter alia, “additional or replacement liens to the extent such . . . use, sale, [or] lease . . . results in a decrease in the value of such entity's interest in such property,” 11 U.S.C. § 361(2), the ultimate determination must be “based upon equitable considerations arising from the particular facts of each proceeding.” Dynaco, 162 B.R. at 394. Moreover, “early in the reorganization proceeding, the Court will generally permit the business operation to continue, at least to the point of plan formulation, if the debtors make an evidentiary showing to support their projections.” Id. at 395.

34. The Debtor believes that only Ocwen has a security interest in cash collateral. The Debtor proposes granting Ocwen a replacement lien on the estate's post-petition accounts receivable and the cash proceeds thereof (the “Post-Petition Cash Collateral”). The proposed

replacement lien shall have the same priority, validity, and enforceability as such existing liens on the Pre-Petition Cash Collateral, but shall only be recognized to the extent of the diminution in value, if any, of the Pre-Petition Cash Collateral resulting from the Debtor's use of cash collateral during the Budget Period.

35. The Debtor's budget demonstrates that it will generate sufficient positive cash flow from its operations to meet all of its post-petition operating expenses, pay its mortgage payment, and generate surplus cash. Most importantly, there is not a "substantial danger of a permanent decline" in the projected level of collateral supporting the pre-petition liens. To the contrary, based on its budget, the value of the Debtor's cash collateral will remain the same and not decrease from the commencement of this proceeding (the "Petition Date"), to the end of the Budget Period. Accordingly, Ocwen will be adequately protected by the proposed grant of replacement liens.

36. The above liens will be granted by the Debtor without prejudice to the future rights of the Debtor, creditors and any creditors committee or other party in interest to challenge the validity, priority and enforceability of any such lien. This post-petition lien will also be subject to Debtor's future right to seek Debtor-in-Possession financing pursuant to 11 U.S.C. Section 364.

37. This Order shall apply to the quarterly fees owed to the Office of the United States Trustee and the Debtor shall be allowed to pay out of the cash collateral any quarterly fees due and outstanding to the Office of the United States Trustee and said fees shall be added to and made a part hereof of the Debtor's budget attached to the Order.

Notice

38. This Motion has been served as set forth in the certificate of service. Given the nature of the relief requested herein, the Debtor submits that no further notice is necessary.

39. A copy of this Motion for Use of Cash Collateral, the Affidavit of David H. Booth and the Budget was emailed and mailed to Jeffrey J. Hardiman, Esq., Shechtman, Halperin Savage, LLP, Counsel for the secured lender Ocwen. Attorney Hardiman consents to this Ex Parte Motion for Use of Cash Collateral.

WHEREFORE, the Debtor respectfully requests that the Honorable Court:

1. Enter an Order authorizing the use of cash collateral on an interim basis (a proposed order is attached hereto as Exhibit C);
2. Enter an Order authorizing the continued use of cash collateral in the ordinary course of the Debtor's business;
3. Grant a replacement lien to Ocwen Loan Servicing, LLC to the extent described herein;
4. Schedule emergency and final hearings on the use of cash collateral, as necessary;
5. Grant such other and further relief as is deemed just and equitable.

Respectfully submitted,
DGS Realty, LLC,
Chapter 11 Debtor-in-Possession
By its Attorneys,

VICTOR W. DAHAR, P.A.

Dated: February 2, 2018

By: /s/ Eleanor Wm. Dahar
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