

FILED & JUDGMENT ENTERED
Steven T. Salata

Oct 27 2011

Clerk, U.S. Bankruptcy Court
Western District of North Carolina



George R. Hodges
George R. Hodges
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re:)
) Chapter 11
MW GROUP, LLC) Case No. 11-32674
)
Debtor.)
_____)

**EMERGENCY CONSENT ORDER AUTHORIZING THE
USE OF CASH COLLATERAL PURSUANT TO 11 U.S.C. § 363,
AND NOTICING AN INTERIM HEARING**

THIS MATTER coming on before the Court without hearing upon the Emergency Motion For Order Authorizing The Use Of Cash Collateral Pursuant To 11 U.S.C. § 363 And Noticing A Final Hearing (“Cash Collateral Motion”) filed by MW Group, LLC (“Debtor”). Upon review of the Cash Collateral Motion, the other pleadings in this case and the argument of counsel, the Court makes the following:

FINDINGS OF FACT

A. On October 21, 2011 (the “Petition Date”), the Debtor filed a voluntary petition under the provisions of Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of North Carolina.

B. The Court has jurisdiction over this case pursuant 28 U.S.C. § 1334(b). Venue is proper in this district pursuant to 28 U.S.C. 1408. This is a “core” matter pursuant to 28 U.S.C. § 157(b)(2)(A), (D), (K), and (M).

C. No official committee of unsecured creditors has been appointed in this case pursuant to 11 U.S.C § 1102.

D. The Debtor is a limited liability company organized and existing under the laws of North Carolina. Its assets consist of 36.5 acres of vacant land, 48 condo units for rent, and 200 apartments known as Weyland and Weyland II, located in Charlotte, Mecklenburg County, North Carolina (the “Property”).

E. Since the Petition Date, Debtor has managed its affairs and has continued in possession of the Property pursuant to 11 U.S.C. §§ 1107 and 1108.

F. Prior to the Petition Date, the Debtor and Bank of America, N.A. (“BOA”) entered into, among other documents, the following loan and collateral documents: (i) that certain Loan Agreement, dated as of June 1, 2003 (as the same may have been amended, restated, supplemented or otherwise modified from time to time, the “Loan Agreement”); (ii) that certain Note, dated as of June 1, 2003 (as the same may have been amended, restated, supplemented or otherwise modified from time to time, the “Note”), in the original principal amount of \$6,250,000.00; (iii) a Deed of Trust covering the Property and securing the Note dated as of June 1, 2003 and recorded on June 6, 2003, in Book 15473, Page 573, in the Mecklenburg County Public Registry (the “Deed of Trust”); (iv) an Assignment of Rents and Leases further securing the Note dated as of June 1, 2003 and recorded in Book 15473, Page 608 of the Mecklenburg County Register of Deeds (the “Assignment of Rents”); (v) an Assignment of

Plans, Permits and Contracts dated as of June 1, 2003 from the Debtor to LaSalle (“Assignment of Plans”); (vi) that certain Indemnity Agreement dated as of June 1, 2003 (“Indemnity Agreement”), from the Debtor and Laurance H. Freed (the “Guarantor”) to LaSalle; and (vii) the Guaranty of Payment and Performance dated as of June 1, 2003 from the Guarantor to LaSalle (“Guaranty”). The Note, Loan Agreement, Deed of Trust, Assignment of Rents, Assignment of Plans, Indemnity Agreement, Guaranty and all modifications thereto are sometimes collectively referred to hereinafter as the “Loan Documents”.

G. Under the terms of the Assignment of Rents, the Debtor assigned to BOA, all the rents, incomes, profits and revenues due under or by virtue of any lease or sublease, either oral or written, or any letting of or any agreement for the use or occupancy of any part of the Property. These rents, incomes, profits and revenue constitute "cash collateral" as that term is defined in §363 of the Bankruptcy Code (the "Cash Collateral").

H. Debtor defaulted under the Note and Deed of Trust by failing to pay the entire outstanding balance due under the Note upon maturity of the Note. As of the Petition Date, BOA, contends the principal and interest amount due from Debtor to BOA is \$5,644,967.67 plus additional fees, costs, and expenses as may be due and owing to BOA from Debtor under the Loan Documents (the “BOA Existing Obligations”).

I. On or about March 3, 2011, BOA instituted a foreclosure action in the North Carolina Superior Court, Mecklenburg County, Case No. 2011-SP-2031 (the "Foreclosure Action"). The foreclosure sale subsequently was held on October 14, 2011 at which time, BOA bid in the full amount of its debt.

J. The Debtor has sought authorization to use the Cash Collateral. The proposed use of Cash Collateral is necessary for the continued maintenance of the Debtor's Property, and the Debtor is unable to make favorable arrangements for such new credit other than under terms and conditions as specified in this Order. The Debtor has an immediate need to use the Cash Collateral to maintain, preserve and protect the Property.

K. Good cause has been shown for the entry of this Order. Among other things, entry of this Order will preserve the realizable value of Debtor's assets and permit Debtor to maintain, preserve, and protect those assets until they may be sold, collected, or otherwise realized upon.

On the basis of the foregoing, the Court reaches the following:

CONCLUSIONS OF LAW

A. The paragraphs contained in the preamble of this Order are incorporated herein by reference.

B. This is a "core" proceeding within the meaning of 28 U.S.C. §§ 157(b)(2)(D), (G), and (M), among other provisions, and this Court has authority to enter this Order under 11 U.S.C. §§ 105, 361, 362, and 363, among other sections.

C. BOA's liens and security interests in the Pre-Petition Collateral appear to be perfected and the BOA Existing Obligations appear to constitute a valid fully secured claim for the contemplated use of the Pre-Petition Collateral within the meaning of 11 U.S.C. § 506(a).

D. Entry of this Order is in the best interest of the Debtor, its creditors and other parties in interest in this case.

E. This Order is a duly entered Order of this Court and is fully enforceable according to its terms under the Bankruptcy Code, the Federal Rules of Bankruptcy Procedures (“Bankruptcy Rules”), and other applicable law to the same extent as if it were an order without the consent of the parties; and in addition, because of written consent by the parties, this Order constitutes a binding contract supported by mutual consideration between and among the parties that is fully enforceable as a contract in this or any other jurisdiction, subject only to the applicable provisions of the Bankruptcy Code.

F. To the extent that any provision of the Bankruptcy Code or Bankruptcy Rules or applicable law requires a finding of “cause” of entry of any provision of this Order, the Court expressly finds and concludes that such cause exists.

In view of the foregoing, it THEREFORE IS ORDERED, ADJUDGED AND DECREED as follows:

1. Authority To Use Cash Collateral. The Debtor shall be and is hereby authorized to use Cash Collateral pursuant to the terms of the budget (the “Budget”) attached hereto as Exhibit “A” and incorporated herein by reference through the earliest of (i) the entry of a final order authorizing the use of Cash Collateral, or (ii) the date the Debtor’s right to use Cash Collateral terminates in accordance with the terms of this Order (the “Usage Period”). The Debtor, to the best of its knowledge, information and belief warrants and represents that the Budget includes all reasonable, necessary and foreseeable expenses to be incurred in the ordinary course of business in connection with the operations of its business for the Usage Period including the expenses associated with payment of professionals. The Debtor shall only be authorized to use Cash Collateral for the actual and necessary expenses of operating the Debtor’s

business pursuant to the Budget, as set forth above and for payment of Chapter 11 quarterly fees pursuant to 28 U.S.C. §1930(a)(6). The Debtor shall not voluntarily contract for any administrative expense claims other than as set forth in the Budget. Unless otherwise authorized by order of the Court, Debtors shall not use Cash Collateral for payment of any pre-petition indebtedness or obligations of, or pre-petition claims against, the Debtor. Nothing contained herein is intended to provide, or shall be construed to imply, that by inclusion of the Budget as an exhibit hereto, BOA has waived any right to object to any use of Cash Collateral by Debtor except as otherwise expressly authorized herein.

2. Adequate Protection. In addition to the existing rights and interests of BOA in the Cash Collateral and for the purpose of attempting to provide adequate protection for the interests of BOA, BOA shall have to the extent of use of Cash Collateral, a continuing lien and security interest in all post-petition assets of the Debtor (the "Post-Petition Collateral"), to the same extent, type and priority as BOA has in the Pre-Petition Collateral. These liens and security interests (the "Post-Petition Security Interests") shall continue to be perfected, enforceable, continuing, choate and effective without the necessity of BOA taking any other action, including the filing of any additional security documents with respect thereto. BOA may, at its option, require the Debtor to execute additional security documents including, UCC financing statements, to reflect the Post-Petition Security Interests. In addition to the Post-Petition Security Interests granted to BOA pursuant to this Order, BOA is hereby granted a super-priority administrative claim under Sections 503(b)(1), 507(a), and 507(b) of the Bankruptcy Code (the "507(b) Claims") for the amount by which adequate protection afforded herein for the amount by which the Debtor use of Cash Collateral proves to be inadequate. Such 507(b) Claims shall have

priority over all other costs and expenses of the kind specified in or ordered pursuant to Sections 105, 326, 330, 331, 503(b), 506(c), 507(a), 507(b) or 726 of the Bankruptcy Code provided, however, that any "super-priority" claim asserted by BOA pursuant to this Paragraph 2 shall be subordinate in priority to any quarterly fee owed to the Bankruptcy Administrator for the Western District of North Carolina pursuant to 28 U.S.C. § 1930.

3. Nothing contained in this Order shall authorize Debtor to use BOA's Cash Collateral for any purpose or for any amount other than for the purposes and amounts set forth on the Budget and itemization attached hereto as Exhibit A, except as otherwise may be reviewed with, and approved in writing by BOA from time to time.

4. Other Protections. As adequate protection, Debtor agrees to pay to BOA principal and interest at the non-default rate of interest as set forth in the Budget. All payments made under this Order shall be applied by BOA to the BOA Existing Obligations. Notwithstanding the proposed amount of interest to be paid to BOA under the interim Budget, BOA and Debtor reserve all rights with respect to the appropriate interest rate and payment amount owed to BOA under the Bankruptcy Code, applicable law, and the Loan Documents including, inter alia, whether Debtor must pay to BOA, during the pending of this Chapter 11 case, interest at the default rate provided under the Loan Documents.

5. The entry of this Order is without prejudice to BOA's right to object to any other motions filed by the Debtor or any other relief sought by the Debtor or to seek affirmative relief in this Bankruptcy Case, including (i) seeking relief from stay or the conversion or dismissal of this Bankruptcy Case or (ii) if, after the initiation of this Chapter 11 case, Debtor seeks authority from this Court to obtain credit advances with a priority senior or equal to that afforded BOA as

provided herein. To the extent that Debtor seeks such authority and to the extent that an Order is entered permitting the establishment of such senior credit advances, Debtor's authority to use Cash Collateral provided herein shall be automatically terminated.

6. Access To Premises; Reporting. Debtor: (i) shall provide BOA access, upon reasonable request, to its facilities, books, and records during their normal business hours and shall allow BOA to inspect and review such books and records and any and all inventory and property of Debtor upon request; (ii) shall provide monthly financial statements and other monthly financial information requested by BOA in a form reasonably acceptable to BOA on or before the 25th day following the end of the month to which the statement and information refers; and (iii) shall provide annual financial statements in a form reasonably satisfactory to BOA.

7. Accounting. Debtor shall provide BOA on a monthly basis a written accounting of its use of Cash Collateral during the preceding month, such accountings to be presented by Debtor to BOA no later than the 25th day after the close of the month. In addition, Debtor shall provide all information, documentation, and reports to BOA as to Debtor's cash and rent rolls as shall be reasonably requested by BOA on a monthly basis. Debtor also shall continue to comply with the reporting requirements, if any, contained in the BOA Loan Documents.

8. Termination-Default. In the event of (i) the Debtor's failure to fully perform any of its obligations as provided in this Order; (ii) the appointment of a trustee or other fiduciary for the Debtor or the property of the Debtor's estate, (iii) the conversion of the Debtor's Chapter 11 case to a case under Chapter 7 of the Bankruptcy Code; (iv) the dismissal of the Debtor's Chapter 11 case or any converted Chapter 7 case absent the consent of BOA; (v) cancellation or lapse of comprehensive public liability, fire, hazard or workers compensation insurance coverage

due to nonpayment of the insurance premiums; (vi) any material adverse change in the Debtor's business or financial condition (collectively the "Events of Default"), then and upon the occurrence of any of the foregoing Events of Default, BOA shall have the right to seek termination of this Order, on an expedited basis, after notice and opportunity for hearing, provided that BOA provide written Notice to Debtor's counsel, by electronic mail, at least five (5) days prior to exercising its rights to seek termination of this Order upon default. Notwithstanding the foregoing, entry of an order dismissing or converting this Chapter 11 case under Section 1112 or appointing a chapter 11 trustee or examiner under Section 1104 shall constitute an immediate and automatic termination of the Debtor's authority to use Cash Collateral pursuant to this Order and shall not be subject to the five (5) day notice period.

9. Unauthorized Use. Should Debtor use Cash Collateral for a purpose not authorized herein, BOA's liens and other security interests shall automatically attach to any assets acquired with such Cash Collateral to the same extent and with the same priority as the pre-petition liens and security interests would have attached thereto.

10. Challenges. Nothing contained herein shall prevent a creditor, subsequently appointed trustee, or official creditors' committee from contesting the validity, perfection and enforceability, or priority of the Pre-Petition Collateral or the amount of the BOA Existing Obligations, or from raising any defenses, offsets, deductions or counterclaims thereto; provided, however, that the Pre-Petition Collateral shall be deemed to be valid, perfected, enforceable, and unavoidable, and the BOA Existing Obligation shall be deemed allowed in full and not subject to any avoidance, set off, recoupment, counterclaim, deduction, or any claim of any, unless and to the extent that a creditor, subsequently appointed trustee, official creditors' committee or other

interested party files and serves upon counsel for Debtor, BOA, and the Bankruptcy Administrator at the addresses shown below, a written objection or challenge by no later than sixty (60) days after the conclusion of the first meeting of creditors pursuant to § 341 of the Bankruptcy Code or the filing by BOA of a proof of claim in the Bankruptcy Case, whichever is earlier. If a written objection or challenge is timely filed and served, such objection or challenge shall be effective only with respect to the matters specifically covered by such objection or challenge and the Court will consider the objection or challenge at hearing to be scheduled thereafter by the Court.

11. Successors And Assigns. The provisions of this Order shall be binding upon and inure to the benefit of BOA and Debtor and their assigns, including any trustee or other representative hereafter appointed for Debtor's estate.

12. Effect Of Subsequent Order. If any or all of the provisions of this Order are hereafter modified, vacated, or stayed by subsequent order of this Court, or by any other Court, or the use of Cash Collateral pursuant hereto is terminated, such stay, modification, vacation, or termination, shall not affect the validity and enforceability of any lien or priority authorized herein with respect to any indebtedness of Debtor to BOA, unless and until the BOA Existing Obligations are fully paid.

13. Notice. Any notices, responses, or objections contemplated by the BOA Loan Documents, this Order, or applicable law to be given to BOA or to Debtor shall be sufficient if given in writing and delivered in a manner prescribed for service of motions pursuant to the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the Western District of North Carolina, with a copy to:

Christine L. Myatt
Nexsen Pruet, PLLC
Post Office Box 3463
Greensboro, North Carolina 27402
Email: cmyatt@nexsenpruet.com

for any notice to Debtor, and to:

MW Group LLC
2814 Marlowe Avenue
Charlotte, North Carolina 28028
Attn: Donald R. James
Email: DJames@jfreed.com

for any notice to BOA, and to:

Gary J. Katunas
IL4-135-08-25
135 South LaSalle Street, Suite 900
Chicago, IL 60603
Email: gary.katunas@bankofamerica.com

with a copy to:

Jason J. DeJonker
Seyfarth Shaw LLP
131 South Dearborn Street, Suite 2400
Chicago, IL 60603-5577
Email: dejonker@seyfarth.com

for any notices to the Bankruptcy Administrator:

Linda Simpson
402 West Trade Street
Suite 200
Charlotte, NC 28202

14. Subsequent Interim Hearing And Response Dates.

a. Subsequent Interim Hearing. An Interim Hearing (the “Subsequent Interim Hearing”) in respect of this matter shall be held on November [____], **2011 at**

_____ a.m., Courtroom #126, U.S. Courthouse, Charles Jonas Federal Building, 401 West Trade Street, Charlotte, North Carolina.

b. Responses. Any objection or other responses to Debtor's Motion or to this Order shall be served on (i) Debtor; (ii) BOA; and (iii) the Bankruptcy Administrator, and filed with the Court so that it is actually filed and received by Debtor, BOA, and the Bankruptcy Administrator no later than three (3) business days prior to the above-scheduled time for the Subsequent Interim Hearing. If no objection to this Order is timely filed and served in accordance with the above, this Order shall continue in full force and effect, in accordance with its terms, subject to such modifications, if any, as the Court may make at the Subsequent Interim Hearing. If a written objection or other response is timely filed and served in accordance with the above, the Court will consider such objection or response at the Subsequent Interim Hearing. The Subsequent Interim Hearing may be adjourned by announcement in open Court at the time of such hearing; provided, however, that the adjournment of the Subsequent Interim Hearing shall not extend or otherwise alter the above-stated time for filing and serving objections or other responses.

15. Interim Order. The findings, conclusions, or orders set forth herein are made on an interim basis, shall not constitute a final decision on any legal or factual issue, and are without prejudice to the right of any party to raise, contest, or seek the same or a different outcome at any subsequent hearing.

16. Service. Debtor shall forthwith serve a copy of this Order on counsel for BOA, its unsecured creditors, the Bankruptcy Administrator, the Internal Revenue Service, and such other

parties as may have filed notices of appearance in this case and served copies of the same upon Debtor.

This Order has been signed electronically. The judge's signature and court's seal appear at the top of the Order

United States Bankruptcy Court

AGREED AND CONSENTED TO:

/s/ Christine L. Myatt

Christine L. Myatt
N.C. State Bar No. 10444
Attorney for MW Group, LLC

OF COUNSEL:

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/s/ Jason J. DeJonker

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Ill. State Bar No 6272128

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MW Group LLC
Monthly Cash Flow Budget Detail
October 21, 2011 to November 3, 2011

As of 10-24-2011	<u>Oct. 21 - Nov. 3</u> <u>Cash Budget</u>
Cash Balance Beginning of Period	3,000.00
OPERATING INCOME	
RENTAL INCOME	
Fixed Rent (10/21-31)	23,000.00
Rent collected 11-1 to 11-3-2011	40,000.00
NET RENTAL INCOME	<u>63,000.00</u>
INTEREST INCOME	
Interest Income	175.00
TOTAL INTEREST INCOME	<u>175.00</u>
OTHER INCOME	
Application Fee	175.00
TOTAL OTHER INCOME	<u>175.00</u>
TOTAL Cash Available	66,350.00
EXPENSES	
REPAIRS & MAINTENANCE	
R M Bush Hogging	75.00
R M Electrical-Contractor	165.00
R M Window Repairs	150.00
TOTAL REPAIRS & MAINTENANCE	<u>390.00</u>
MAKE READY	
M R CLEANING	500.00
M R PAINT-CONTRACTOR	830.00
M R MISC.	
TOTAL MAKE READY	<u>1,330.00</u>
TOTAL R M & M R	1,720.00

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October 21, 2011 to November 3, 2011

As of 10-24-2011	<u>Oct. 21 - Nov. 3</u> <u>Cash Budget</u>
PAYROLL EXPENSE	
Administrative	5,770.76
Grounds General Labor	649.20
Maintenance Dept.	3,711.04
TOTAL PAYROLL EXPENSE	<u>10,131.00</u>
PAYROLL TAXES	
Payroll Taxes	780.00
TOTAL PAYROLL TAXES	<u>780.00</u>
MANAGEMENT FEES	
Management Fees	2,071.52
TOTAL MANAGEMENT FEES	<u>2,071.52</u>
PROFESSIONAL FEES	
Security	400.00
ADP Administrative Fees	45.00
TOTAL PROFESSIONAL FEES	<u>445.00</u>
OFFICE EXPENSE	
Office Expense	50.00
Postage	88.00
TOTAL OFFICE EXPENSE	<u>138.00</u>
TRAVEL & VEHICLE EXPENSES	
Meals and Entertainment	70.00
TOTAL MEALS & ENTERTAINMENT	<u>70.00</u>
OTHER EXPENSES	
Bank Fees	17.00
Eviction Costs	400.00
TOTAL OTHER EXPENSES	<u>417.00</u>

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Monthly Cash Flow Budget Detail
October 21, 2011 to November 3, 2011

As of 10-24-2011	<u>Oct. 21 - Nov. 3</u> <u>Cash Budget</u>
INTEREST EXPENSE	
Interest Expense BofA Acqui @ Prime - 3.25%	4,601.24
Interest Expense BofA Const @ Prime - 3.25%	94.17
TOTAL INTEREST EXPENSE	4,695.41
TOTAL EXPENSES	20,467.93
NET CASH REMAINING AFTER EXPENSES	45,882.07
Transfer to Money Market for Real Estate Taxes	10,218.80
Cash Remaining End of Period	35,663.27