



SO ORDERED.

SIGNED this 18 day of March, 2010.

J. Rich Leonard

J. Rich Leonard
United States Bankruptcy Judge

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

IN THE MATTER OF:

New Bern Riverfront Development, LLC,

Debtor

**Case No. 09-10340-8-JRL
Chapter 11**

Order Authorizing Use of Cash Collateral

This matter came before the Court after due notice and hearing to consider the Motion for Authority to Use Cash Collateral (the "Motion") filed by New Bern Riverfront Development, LLC (the "Debtor") pursuant to §363 of the Bankruptcy Code and Rule 4001 of the Federal Rules of Bankruptcy Procedure.

Objections or requests for hearing were filed by Wachovia Bank, N.A., Weaver Cooke Construction, LLC, and Mark Halpin. et al (the "Disputed Contract Purchasers"). After considering the matters set forth in the Motion, the evidence presented, the objections filed, and any comments of parties in interest, the Court makes the following findings, conclusions and orders:

1. On November 30, 2009 (the "Petition Date"), the Debtor filed a voluntary petition seeking relief under Chapter 11 of the Bankruptcy Code, and operates as a debtor-in-possession.
2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the matter is a core proceeding under 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The Debtor is the developer of SkySail Condominium, a 121 residential condominium (plus 1 commercial/non-residential unit) located on Middle Street on the waterfront in historic

downtown New Bern, North Carolina, and sells the SkySail Condominiums (collectively, the "Sale Properties") in the ordinary course of business. As of the Petition Date, 42 condominiums have been sold, 52 condominiums are under contract, and certain unsold condominiums are occasionally rented by the Debtor.

4. In conjunction with the acquisition and development of the Sale Properties, the Debtor arranged financing with Wachovia Bank, National Association ("Wachovia") who holds a deed of trust to secure the funds advanced to complete the improvements. The Debtor reports that Wachovia is owed approximately \$21,015,209 as of the Petition Date (the "Wachovia Indebtedness") secured by first mortgage liens on the Sale Properties which have an aggregate value of approximately \$31,500,000.

5. The Debtor contracted with Weaver Cooke Construction, LLC ("Weaver Cooke") to act as the general contractor on the Riverfront Project pursuant to a construction contract between the parties dated July 27, 2006 ("Construction Contract"). Weaver Cooke has filed a claim of lien in the amount of \$2,344,072 against the Sale Properties pursuant to Chapter 44A of the North Carolina General Statutes which the Debtor disputes. The Weaver Cooke lien is junior to the lien of Wachovia and the subject of bona fide dispute.

6. There also are other lien claims filed against the Sale Properties by subcontractors (the "Lien Claimants") who supplied materials and/or labor for the purpose of constructing the improvements located on and thus an affixed part of the Sale Properties. The inchoate lien rights of the Lien Claimants are disputed, unliquidated, of unknown and uncertain priority, junior to the liens of Wachovia, and dependent upon and subsumed within the purported lien of Weaver Cooke.

7. Prior to the Petition Date, the Debtor instituted litigation in the Superior Court Division, Wake County, North Carolina (the "State Court Litigation") against Weaver Cooke, certain subcontractors hired by Weaver Cooke, and Travelers Casualty Surety Company of America ("Travelers"), the company that is the surety under certain payment and performance bonds provided by Weaver Cooke pursuant to the Construction Contract. In the State Court Litigation, the Debtor, among other things, is seeking to recover judgment against Weaver Cooke and Travelers, jointly and severally, for damages arising out of Weaver Cooke's breach of contract, and to have the liens filed against the Sale Properties by Weaver Cooke and the Lien Claimants

discharged and declared void. The State Court Litigation has been removed and referred to this Court.

8. The Debtor does not dispute the extent or validity of the Wachovia liens, but has reserved for itself, any Committee of Unsecured Creditors subsequently created, and any trustee subsequently appointed, any and all rights to challenge, avoid, object to, set aside or subordinate any claims, liens, security interests or rights of setoff against the Sale Properties.

9. By separate motion, the Debtor has sought an Order (i) approving the assumption of certain sale contracts, (ii) authorizing the Debtor to convey certain properties and pay certain closing costs, including broker's commissions, from the sale proceeds, and (iii) transferring all actual or potential liens to the proceeds of such sales. In addition, the Debtor in the ordinary course of business expects to sell and/or rent additional Sale Properties from time to time. The Debtor anticipates filing similar motions to approve any sales, pay certain costs at closing, and transfer liens to proceeds of such sales.

10. In each instance, the net proceeds from rentals and sales of the Sale Properties would constitute "cash collateral" as that term is defined in the Bankruptcy Code, the use of which is subject to the restrictions set forth in § 363.

11. The Debtor is dependent upon continued and uninterrupted use of such rental income and sales proceeds for revenue. The Debtor will need to use the rental income and sales proceeds to pay on-going costs of operating, insuring, preserving, and protecting the business and property of the estate, and to pay for the costs of the State Court Litigation in order to protect and enforce its rights with respect to the payment and performance bonds, and the disputed liens and claims asserted by Weaver Cooke and the Lien Claimants.

12. If not permitted to use cash collateral to pay ordinary operating expenses, the Debtor will have to close down operations. Similarly, if not permitted to use cash collateral to pay the costs associated with the State Court Litigation, the estate will be deprived of or unduly delayed in recovery on the payment and performance bonds which were obtained to protect the estate from subcontractors' liens and repairs which have not been performed by the contractor.

13. An order granting the requested relief would not prejudice the rights of Wachovia or any other party in interest, as (i) Wachovia is adequately protected with its existing liens on the Debtor's Sale Properties, which appear to have an aggregate value significantly greater than the outstanding Wachovia Indebtedness, (ii) any other creditors holding liens on the Sale Properties

are junior to the liens of Wachovia and likely to be deemed unsecured as to any individual unit. and (iii) in any event the use of such funds is necessary to continue operations without interruption and will preserve the value of the estate for all creditors.

Based upon the foregoing, the Court concludes that use of cash collateral is necessary and that an Order granting such relief would not prejudice the rights of the creditors having an interest in cash collateral. and for good and sufficient reasons appearing it is hereby ORDERED as follows:

1. The Debtor may use Cash Collateral for the period through and including September 30, 2010; provided, however, without further notice and hearing the Debtor may not use cash collateral for any purpose other than operations in the ordinary course of business or the payment of allowed administrative fees, costs, or expenses, irrespective of whether such purpose would be proper under applicable law.
2. As adequate protection for the use of Cash Collateral, the Debtor shall provide Wachovia the following:
 - a. At each closing of a Sale Property, the Debtor shall apply the gross sale proceeds (after credit for the purchaser's deposit or other credits required under the sale contract) to (i) the payment of ordinary and customary closing costs and, where applicable, a broker's commission, and (ii) payment of or reimbursement for any post-petition costs expended or incurred by the Debtor to complete the improvements on such property.
 - b. The remaining sale proceeds (the "Net Sale Proceeds") shall be disbursed in payment of costs and expenses as shown in the Budget attached hereto and incorporated by reference, or as may otherwise be approved by the Court after further notice and hearing, as follows:
 - i. The costs of operating and preserving the estate.
 - ii. The Chapter 11 quarterly fees.
 - iii. The allowed fees and expenses of Debtor's bankruptcy counsel, special counsel, expert witnesses, and other professionals.
 - iv. Repayment of funds advanced pursuant to the revolving credit facility to the extent permitted in the order approving such post-petition financing.

- v. Fifteen percent (15%) of the Net Sale Proceeds shall be deposited in a "Plan Escrow" account reserved for purposes of consummating a confirmed plan of reorganization; provided however, funds in the Plan Escrow shall remain subject to the lien of Wachovia and the lien of Weaver Cooke, as their interests may appear, and shall not be disbursed without further order of the Court.
 - vi. After payment or provision for the foregoing items, all remaining Net Sale Proceeds shall be disbursed to Wachovia as adequate protection payments.
 - c. The Debtor shall provide Wachovia and Weaver Cooke with an administrative expense claim to the extent the use of cash collateral results in a decrease in the value of such entity's interest in such property.
 - d. The Debtor shall provide Wachovia, Weaver Cooke and the Bankruptcy Administrator with financial reports as to the use of cash collateral, in form and frequency reasonably acceptable to such parties.
3. The Debtor's ability to use Cash Collateral will terminate immediately upon the occurrence of any of the following events: the effective date of a confirmed plan of reorganization or liquidation, the appointment of a trustee, or the conversion of this case to Chapter 7, whichever may first occur.
4. Notwithstanding any suspension or termination of the right to use Cash Collateral as set forth above (a "Termination Date"), the Debtor shall be permitted to carve out from Cash Collateral or any replacement collateral and use, and the collateral of Wachovia and Weaver Cooke shall be subject to the Debtor's right to recover under Section 506(c) of the Bankruptcy Code, an aggregate amount necessary to pay all Permitted Trailing Expenses. As used herein, the term "Permitted Trailing Expenses" shall mean, on the Termination Date, the following expenses to the extent incurred post-petition and prior to such Termination Date but in an aggregate amount not to exceed the aggregate expenditures set forth in the approved Budget through such Termination Date:
- a. The costs of operating and preserving the estate;
 - b. Quarterly fees pursuant to 28 U.S.C. § 1930(a)(7); and,
 - c. Professional fees and expenses (including expert witness fees and expenses) for professionals for the Debtor after application of any prepetition retainers.

5. To the extent that Wachovia or Weaver Cooke has an objection to the items paid or provided for as set forth in the monthly reports or other reports of operations filed or furnished by the Debtors, or objects to a proposed budget or to a specific manner in which cash collateral is being used, then either party may, upon ten (10) days notice to the Debtor and opportunity to cure: (i) seek an order of the Bankruptcy Court restraining such payments or usage as not being in conformity with this Motion; or (ii) seek an Order terminating further authority to use cash collateral altogether.

6. The terms of this Order shall be binding upon any Committee (if formed), and upon any trustee subsequently appointed, including but not limited to a Chapter 7 trustee upon conversion of this case to a case under Chapter 7 of the Bankruptcy Code; provided however, that based on the findings set forth in this Order and the reliance of Wachovia and Weaver Cooke in good faith on the terms thereof, (i) if any of the provisions of this Order are hereafter modified, vacated or stayed by an order of this Court or another court, such stay, modification or vacation shall not affect the validity and enforceability of any lien, security interest or priority authorized for the benefit of such parties that is granted or attaches prior to the effective date of such stay, modification or vacation, (ii) any use of the Cash Collateral by the Debtor pursuant to this Order prior to the effective date of such modification, stay or vacation shall be governed in all respects by the original provisions of this Order, and (iii) upon the entry and effect of any stay, modification or vacation of this Order, the Debtor's ability to use Cash Collateral hereunder shall be deemed immediately terminated without further order of the Court.

7. Debtor's counsel shall serve a copy of this Order upon the parties listed in the Limited Service List and file a certificate of such service with the Clerk.

[END OF DOCUMENT]

6 Months Cash Flow 11-Dec-2009 Revised - Second Round Final Version

New Barn Riverfront Development, LLC												
6 Months Cash Flow	Dec-09	Jan-10	Feb-10	Mar-10	Apr-10	May-10	Jun-10	Jul-10	Aug-10	Sep-10	Total	
Net Income	4	5,304	3,999	395	1,827	1,483	50,000	50,000	50,000	50,000	50,000	95,857
Depreciation												
Amortization												
DTF Loan	3,500	32,357	10,000	20,000	30,000	254,132	529,288	660,471	610,421	535,005	2,589,318	95,857
Sale Proceeds (net of closing costs)												
Rental Income (Net)	1,800	15,697	20,762	15,000	15,000	15,000	15,000	15,000	15,000	15,000	143,059	
Other												
Total Receipts	5,300	47,854	30,762	35,000	45,000	269,132	544,288	675,471	625,421	550,005	2,828,234	
Operating Expenses:												
HOA Expenses		15,819	15,819	15,819	15,819	15,819	15,819	15,819	15,819	15,819	142,368	
Electric/Water/Sewer		13,590	16,813	9,290	9,290	9,290	9,290	9,290	9,290	9,290	95,193	
Phone & Cable		10,370	1,082		5,750	5,750	5,750	5,750	5,750	5,750	51,702	
Repairs & Maintenance					6,500	6,500	6,500	6,500	6,500	6,500	40,250	
Marketing					7,500	7,500	7,500	7,500	7,500	7,500	45,000	
Northen Blue						25,000					100,000	
Ward & Smith						40,000					40,000	
Williams Overman Pierce						10,000					20,000	
Carl Walker							10,000				25,000	
Thomas Judy & Tucker							1,950				10,000	
Quarterly Fees		325		975							6,500	
Others		6,926									9,750	
Sales/Occupancy Tax		2,091	651	525	525	525	525	525	525	525	6,417	
DTF Loan Repayment												
Wachovia - Adequate Protection Payments						112,131	407,601	421,056	488,514	367,911	1,797,234	
Plan Escrow						38,120	79,393	99,071	91,563	80,251	388,398	
Total Disbursements		49,160	34,865	33,569	45,344	220,615	544,288	675,471	625,421	550,005	2,778,238	
Summary Receipt:												
Plus receipts	4	5,304	3,999	395	1,827	1,483	50,000	50,000	50,000	50,000	50,000	95,857
Less disbursements		47,854	30,762	35,000	45,000	269,132	544,288	675,471	625,421	550,005	2,778,238	
		5,300	49,160	34,365	33,569	45,344	544,288	675,471	625,421	550,005	550,005	
		5,304	3,999	395	1,827	1,483	50,000	50,000	50,000	50,000	50,000	50,000
Beginning Balance	0	3,500	35,857	45,857	65,857	95,857	95,857	95,857	95,857	95,857	95,857	95,857
Brought in	3,500	32,357	10,000	20,000	30,000	0	0	0	0	0	0	0
Paid Back	0	0	0	0	0	0	0	0	0	0	0	0
Ending Balance	3,500	35,857	45,857	65,857	95,857	95,857	95,857	95,857	95,857	95,857	95,857	95,857
Beginning Balance	0	0	0	0	0	0	38,120	117,513	216,584	308,147	308,147	308,147
Additional Escrow	0	0	0	0	0	38,120	79,393	99,071	91,563	80,251	388,398	388,398
Ending Balance	0	0	0	0	0	38,120	117,513	216,584	308,147	388,398	388,398	388,398