

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

PASS BUSINESS TERMINAL, LLC,

CASE NO. 16-51767-KMS

DEBTOR.

CHAPTER 11

MOTION TO PROHIBIT USE OF CASH COLLATERAL

Pursuant to 11 U.S.C. §§ 361 and 363, Whitney Bank, a Mississippi state chartered bank, formerly known as Hancock Bank, a Mississippi state chartered bank (“**Bank**”), moves the Court to prohibit the use of cash collateral in the above-referenced Chapter 11 proceeding. In support thereof, the Bank states the following:

I. JURISDICTION

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, 11 U.S.C. §§ 361, 363, 552(b), and the order granting automatic reference to this Bankruptcy Court. This matter is governed procedurally by Fed. R. Bankr. Proc. 4001, 7004, and 9014, along with Miss. Bankr. L.R. 4001-1, 6007-1, and 9014-1.¹

II. PARTIES

2. Pass Business Terminal, LLC (“**Debtor**”) filed a petition for relief (“**Petition**”) on October 11, 2016 [**Dkt. #1**] under chapter 11 of title 11 of the United States Code. The Debtor is the debtor-in-possession in this chapter 11 proceeding.

3. The Bank is a secured creditor of the Debtor.

¹ The Bank has filed contemporaneously herein a Motion For: (1) Abandonment and Relief from Automatic Stay; or (2) Determination of Single Asset Real Estate Status; and/or (3) Adequate Protection (“**Stay Motion**”) [**Dkt. #36**] that is incorporated herein by reference. The Bank incorporates herein the Exhibits to the Stay Motion in order to avoid needless duplication.

III. FACTS

A. LOAN HISTORY

4. The Debtor executed in favor of the Bank a Consolidated Promissory Note (“**Note**”) in the original principal amount of \$473,162.64 dated as of November 6, 2014. A true and correct copy of the Note is attached the Stay Motion as Exhibit “1.”²

5. The Note is secured by the following instruments granting the Bank a lien on real property commonly known by the address of 323 East North Street, Pass Christian, Mississippi 39571 (the “**Property**”)³ located in the First Judicial District of Harrison County, Mississippi:

A. Deed of Trust executed by Debtor to the Bank, filed for record on March 29, 2012, as Instr. No. 2012 2875T-J1; modified by Modification to Deed of Trust, filed for record on November 17, 2014, as Instr. No. 2014 9466T-J1, and as further modified by Modification to Deed of Trust filed for record as Instr. No. 2016 160T-J1 on January 7, 2016, in the Office of the Chancery Clerk of the First Judicial District of Harrison County, Mississippi, true and correct copies of which are attached the Stay Motion as collective Exhibit “2.”

B. Deed of Trust executed by Debtor to the Bank, filed for record on March 29, 2012, as Instr. No. 2012 2878T-J1; modified by Modification to Deed of Trust filed for record on September 19, 2014, as Instr. No. 2014 7719T-J1, as further modified by Modification to Deed of Trust, filed for record on November 17, 2014, as Instr. No. 2014 9467T-J1, and as further modified by Modification to Deed of Trust filed for record on January 7, 2016, as Instr. No. 2016 158T-J1, in the Office of the Chancery Clerk of the

² The Note was a consolidation of several previous notes between the Debtor and the Bank.

³ In accordance with Miss. Bank. L.R. 4001-1(a)(1)(B)(i), a legal description of the Property is attached the Stay Motion as Exhibit “A.”

First Judicial District of Harrison County, Mississippi, true and correct copies of which are attached the Stay Motion as collective Exhibit “3.”

6. In addition to the lien granted by Exhibits “2” and “3,” the Debtor executed in favor of the Bank an Assignment of Rents filed for record on October 9, 2012, as Instr. No. 2012 6134 D-J1; modified by Modification to Assignment of Rents, filed for record on November 17, 2014, as Instr. No. 2014 9018D-J1, and as further modified by Modification to Assignment of Rents filed for record on January 7, 2016, as Instr. No. 2016 135D-J1, in the land records of the Office of the Chancery Clerk of the First Judicial District of Harrison County, Mississippi, true and correct copies of which are attached the Stay Motion as collective Exhibit “4.” The Assignment of Rents granted the Bank a lien on rents, security deposits, proceeds, income, and other kinds of revenue (referred to herein as “**Cash Collateral**”).

7. In addition to the foregoing instruments, Continuing Guaranty agreements, true and correct copies of which are attached the Stay Motion as collective Exhibit “5,” were executed by the following on November 6, 2014: Roger L. Caplinger; Gretchen Caplinger; Innovative Builders, Inc.; and Gun-Ho, LLC (each a “**Guarantor**” and together, “**Guarantors**”).⁴

8. The Note matured on November 6, 2015. The Bank and the Debtor (along with the Guarantors) entered into a Forbearance Agreement dated as of December 29, 2015, a true and correct copy of which is attached the Stay Motion as Exhibit “6.” The Forbearance Agreement, in turn, expired of its own terms on May 6, 2016.

⁴ The Debtor’s Schedule H [**Dkt. #9**] incorrectly lists only Roger Caplinger as a co-debtor. The Bank reserves all rights against the Guarantors.

9. The documents attached the Stay Motion as Exhibits “1” – “6,” together with other loan documents executed by the Debtor in favor of the Bank, are referred to collectively as “**Loan Documents.**”

10. Following the expiration of the Forbearance Agreement, the Debtor failed to satisfy the Note. Consequently, the Bank initiated a foreclosure sale scheduled for October 14, 2016, that was stayed by the filing of the Debtor’s Petition three days earlier on October 11, 2016.

B. REAL ESTATE COLLATERAL AND OPERATIONS

11. The Property is an existing industrial property containing 44,796 square feet of gross building area. The Property is used exclusively for owner use and leasing of space to third parties. As of August 11, 2016, the Property was 54.5% owner occupied and 45.5% leased to third parties. Upon information and belief, the current leases for the Property are either between related parties or insiders of the Debtor or Guarantors and/or have expired. The expired leases are believed to be on a month-to-month basis. The state of occupancy of the Property as of August 11, 2016, is believed to be as follows:

| <u>Tenant/Occupant</u> | <u>% of Occupancy</u> | <u>Lease Termination Date</u> |
|--|------------------------------|--------------------------------------|
| Gun-Ho, LLC ⁵ | 15% | 2/25/16 |
| Top Gun | 18.1% | 9/30/16 |
| Innovative Builders, Inc. ⁶ | 1.6% | 2/25/16 |

⁵ This entity is a Guarantor. According to the Mississippi Secretary of State’s Office, the Forbearance Agreement, and the Continuing Guaranty of this entity, another Guarantor (Roger Caplinger) is the Manager of Gun-Ho, LLC.

⁶ This entity is a Guarantor. According to the Mississippi Secretary of State’s Office, the Forbearance Agreement, and the Continuing Guaranty for this entity, two Guarantors (Roger Caplinger and Gretchen Caplinger) are incorporators, officers, and/or directors of Innovative Builders, Inc.

| | | |
|-------------------|-------|---------|
| Borguezan Granite | 8.1% | 2/28/16 |
| EA Wholesale | 2.7% | 7/31/16 |
| Debtor | 54.5% | N/A |

Total: 100%

12. To the extent any Cash Collateral is property of the estate, the Bank's lien on Cash Collateral extends to amounts collected post-petition pursuant to 11 U.S.C. § 552(b).

C. INDEBTEDNESS AND DEFAULTS

13. As of October 20, 2016, the Debtor is indebted to the Bank under the Loan Documents in the principal sum of \$444,424.80. In addition to the principal balance, the Debtor owes the Bank as of October 20, 2016, accrued interest of \$16,426, appraisal costs of \$2,723.00, and environmental assessment costs of \$5,266.00, as well as all costs of collection, including attorney's fees and expenses to the extent permitted under 11 U.S.C. § 506(b).

14. The Debtor is in default under the Loan Documents for failing to pay the Note in full upon expiration of the Forbearance Agreement. Moreover, the Debtor is in default for failure to timely pay 2015 ad valorem taxes.

IV. RELIEF REQUESTED

15. To the extent Cash Collateral is being used post-petition, it is being used without Court approval or consent of the Bank in violation of 11 U.S.C. § 363(c)(2).

16. Under the Deed of Trust, Assignment of Rents, and modifications thereto attached to the Stay Motion, any Cash Collateral belongs to the Bank. *See O'Neal Steel, Inv. v. E.B., Inc. (In re Millette)*, 186 F.3d 638 (5th Cir. 1999) (determining that Mississippi is an "intermediate title" state in which title to rents shifts to lender upon borrower's default); *accord, Davis v. JPMorgan Chase Bank*, 2014 U.S. Dist. LEXIS 39138, *6 (S.D. Miss., March 25, 2014); *Martin v. USDA Rural Housing Service (In re Martin)*, 276 B.R. 552, 555-57 (Bankr. N.D. Miss.

2001)(under Mississippi law, a debtor is divested of legal title to property upon default, subject only to the right to redeem that remains property of the estate under Section 541 of the Code); *Moore v. Marathon Asset Management, LLC*, 973 So.2d 1017, 1021 (Miss. Ct. App. 2008)(under Mississippi law, debtor retains legal title to property until default, upon which mortgagee holds title subject to debtor's equity of redemption); *Anderson v. Kimbrough*, 741 So.2d 1041, 1047-48 (Miss. Ct. App. 1999)(holding that Mississippi is an intermediate title theory state in which title shifts to lender upon default, subject only to borrower's equity of redemption). In this instance, because the Note has fully matured, the Debtor cannot exercise the equity of redemption without paying the Note in full, which it apparently cannot do. The Debtor has not had the resources to pay the Note in full since the expiration of the Forbearance Agreement.⁷ Consequently, any Cash Collateral is not property of the estate.

17. The Bank requests an order prohibiting the use of its Cash Collateral and requiring delivery of any Cash Collateral to the Bank. The Bank further requests an order requiring the Debtor to provide an accounting (within 30 days of entry of said order) of all Cash Collateral used by it and its insiders and/or affiliates since the filing date. Alternatively, the Bank requests adequate protection of its interests.

18. The Bank requests that the Court waive the fourteen (14) day stay of execution under Fed. R. Bankr. Proc. 4001(a)(3) for the reasons specified in the Stay Motion.

19. A proposed order granting this Motion, is attached hereto as Exhibit "1," pursuant to Miss. Bankr. L. R. 5005-1(a)(2)(D)(iii).

⁷ Indeed, the Debtor admitted in Section II. C. of the Forbearance Agreement that one purpose of the Forbearance Agreement was to give the Debtor time to locate alternate financing. Its inability to obtain alternate financing during the Forbearance Period indicates that it is highly unlikely that the Debtor will be able to exercise the equity of redemption.

WHEREFORE, the Bank moves the Court for an order providing the relief request herein. Alternatively, the Bank requests such other and further relief as the Court deems just and appropriate.

DATED: October 24, 2016.

Respectfully submitted,

WHITNEY BANK, A MISSISSIPPI STATE
CHARTERED BANK, FORMERLY KNOWN AS
HANCOCK BANK, A MISSISSIPPI STATE
CHARTERED BANK

By Its Attorneys,
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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the parties set forth in the Electronic Mail Notice List as of the date hereof, including the following:

Office of U.S. Trustee
USTPRegion05.AB.ECF@usdoj.gov

Matthew L. Pepper
pepperlaw@msn.com
mississippimatt@msn.com

I further certify that on October 24, 2016, I caused to be mailed by United States mail, postage-prepaid, a true and correct copy of the foregoing document to the following:

Pass Business Terminal, LLC
323 East North St.
Pass Christian, MS 39571

DATED: October 24, 2016.

s/ Jeffrey R. Barber

Jeffrey R. Barber