

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - GRAND RAPIDS**

In re:

PAMELA F.R.O.G., LLC,

Debtor in Possession.

Case No. 16-04965

Chapter 11

Hon. Scott W. Dales

Filed September 28, 2016

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**DEBTOR'S SUPPLEMENTAL RULE 4001 MOTION TO USE CASH
COLLATERAL FOR PAYMENT OF PREPETITION PROPERTY TAXES AS
AGREED**

NOW COMES, the Debtor, PAMELA F.R.O.G., LLC, through its attorney, MICHAEL S. MAHONEY, P.C., by Michael S. Mahoney, Esq. (P71428), and for its *Supplemental Rule 4001 Motion to Use Cash Collateral for Payment of Prepetition Property Taxes as Agreed* (the "Motion"), requests this Court enter an order permitting Debtor to use cash collateral on deposit for the payment of 2015 delinquent property taxes due Ingham County Treasurer in connection with Debtor's principal place of business located at: 1205 Pierce Road, Lansing, MI 48933 (the "Property"), *nunc pro tunc*, saying in support thereof:

1. Debtor filed its Motion to use cash collateral on July 26, 2017, to which no objection has been raised.

2. On July 31, 2017, without counsel's knowledge, Debtor made payment of the 2015, delinquent property taxes.

3. On Wednesday, August 16, 2017, Debtor advised counsel that it had made the property tax payment on July 31, 2017.

JURISDICTION

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

RELIEF REQUESTED

5. By its motion, the Debtor sought the entry of an order authorizing Debtor's use of cash collateral (as agreed to by the secured holder) pursuant to 11 U.S.C. § 363, Federal Rules of Bankruptcy Procedure 4001(b)(2), and Local Rule 4001-3, for payment of the 2015 delinquent property taxes. Regrettably, payment was made by Debtor's Principal shortly after the filing of Debtor's original motion. Debtor now seeks relief *nunc pro tunc*.

BASIS FOR RELIEF SOUGHT BY THE DEBTOR

6. The statutory predicate for the relief requested in this Motion is, *inter alia*, 11 U.S.C. §§ 105, and in further support:

The decision to grant a *nunc pro tunc* application is not taken lightly by courts and requires exceptional circumstances unique to a particular case. "Exceptional circumstances" in this context have been interpreted to require a satisfactory explanation for the failure to receive prior judicial approval and a determination such services benefited the bankruptcy estate. See *In re Soderquist*, 349 B.R. 23, 25 (Bankr. D. Idaho 2005), see also *In re Twinton Properties Partnership*, 27 B.R. 817 (Bankr. M.D. Tenn. 1983). Courts applying the *Twinton Properties* criteria and alternatives testing whether exceptional circumstances are present have held that mere oversight is insufficient. 264 B.R. at 493; See, e.g., *In re Jarvis*, 53 F.3d 416, 421 (1st Cir. 1995); *In re Land*, 943 F.2d 1265 (10th Cir. 1991).

On the other hand, courts have held that "section 105(a) grants the Bankruptcy Court equitable power," but have warned that such power is constrained by the provisions of the Bankruptcy Code. *Childress v. Middleton Arms, L.P. (In re Middleton Arms, Ltd. P'ship)*, 934 F.2d 723, 724 (6th Cir.1991) (citing *Norwest Bank Worthington*, 485 U.S. at 206, 108 S.Ct. 963). A leading treatise notes that "[s]uch *nunc pro tunc* orders are permissible so long as they 'are necessary or appropriate to carry out the provisions of . . . [T]itle [11].'" 2-105 Collier on Bankruptcy-15th Edition Rev. § 105.04 (quoting *Thinking Machs. Corp. v. Mellon Fin. Servs. Corp. (In re Thinking Machs. Corp.)*, 67 F.3d 1021, 1028 (1st Cir.1995)). The same treatise cautions, "*nunc pro tunc* orders have been denied when they are not 'appropriate,' as when they are sought to validate an action arrived at by a process not in accordance with the Code." 2-105 Collier on Bankruptcy § 105.04(a) (quoting *Schwartz v. Aquatic Dev. Group, Inc. (In re Aquatic Dev. Group, Inc.)*, 352 F.3d 671 (2d Cir.2003)).

In the instant case, Debtor, in good faith, failed to realize the sequential order of the procedural steps necessary to achieve court approval of an agreement between Bayview Funding (“Bayview”) and Debtor to permit the payment of 2015, delinquent property taxes to protect Bayview’s interest in the property.

WHEREFORE, the Debtor respectfully requests that this Court enter an order: (a) authorizing the Debtor’s use of cash collateral in payment of the entire amount of delinquent 2015 property taxes *nunc pro tunc*, and/or (b) granting such other and further relief that is just and proper under the circumstances.

Respectfully submitted:
MICHAEL S. MAHONEY, P.C.,

Attorney for Debtor in Possession

Dated: August 18, 2017

By: /s/ Michael S. Mahoney
Michael S. Mahoney, Esq. (P71428)