

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

MARS MECHANICAL LLC,

Case No. 17-11011-1
Chapter 11

Debtor.

**MOTION OF GLENS FALLS NATIONAL BANK & TRUST COMPANY TO
(I) RESTRICT DEBTOR’S USE OF CASH COLLATERAL OR SEGREGATE
AND ACCOUNT FOR CASH COLLATERAL AND (II) FOR RELIEF FROM
THE AUTOMATIC STAY**

Glens Falls National Bank & Trust Company (“GFNB”) by and through its attorneys Lemery Greisler LLC, submits this motion (“Motion”) in the chapter 11 case of Mars Mechanical LLC (the “Debtor”), for entry of an order (i) restricting the Debtor’s use of cash collateral pursuant to 11 U.S.C. § 363(c)(2) or requiring the Debtor to segregate and account for cash collateral pursuant to 11 U.S.C. § 363(c)(4); and (ii) granting GFNB relief from the automatic stay, for cause, pursuant to 11 U.S.C. § 362(d)(1). In support of the Motion, GFNB states as follows:

PRELIMINARY STATEMENT

1. GFNB is a secured creditor of the Debtor pursuant to a Credit Line Agreement and a Note, both secured by a security interest in the Debtor’s pre-petition collateral.
2. Upon information and belief, following the commencement of the Debtor’s chapter 11 case, the Debtor has been using GFNB’s “cash collateral” as such term is defined in Bankruptcy Code section 363(a) (“Cash Collateral”).
3. The Debtor has not yet obtained GFNB’s consent to the use of such cash collateral or authorization from this Court to use Cash Collateral as is required by Bankruptcy Code section 363(c)(2)(A) and (B).

4. GFNB seeks an order of this Court restricting the Debtor's further use of its Cash Collateral or requiring the Debtor to segregate and account for the Cash Collateral.

5. The Debtor failed to make its required monthly payment to GFNB for the month of July on its Note in the amount of \$2,350.64, with the payment for August being due the day following the filing of this Motion.

6. The Debtor's real estate holding company, Mars Real Estate Holding Co., LLC ("Mortgagor"), also failed to make its July payment to GFNB on a Promissory Note in the amount of \$1,913.46. Both loans are secured by Mortgages on the Mortgaged Property (defined below) owned by Mortgagor.

7. GFNB seeks to commence a foreclosure action on the Mortgaged Property owned by Mortgagor, but needs to include the Debtor as a necessary party as a Borrower under two of the loans.

8. Given the lack of payments on the loans and failure to reach an agreement on use of cash collateral, there is ample "cause" to grant GFNB's motion for relief from the stay to permit GFNB to commence a foreclosure action.

BACKGROUND

9. Debtor filed its chapter 11 petition for relief on May 31, 2017 (the "Petition Date").

10. The Debtor is managing and operating its business as a debtor in possession pursuant to Bankruptcy Code section 1107(a) and 1108 and no trustee or committee has been appointed.

The Credit Line

11. On or about May 8, 2015, the Debtor delivered to GFNB its Credit Line Agreement (“CLA”) with a credit limit of \$300,000.00, attached hereto as **Exhibit A**.

12. In order to induce GFNB to lend to the Debtor, for good and valuable consideration, Mortgagor delivered to GFNB its Credit Line Mortgage, dated May 8, 2015 granting a mortgage lien on certain real property known as 16 Graham Drive, Plattsburgh, New York (the “Mortgaged Property”) and an Assignment of Rents related to the same property, attached hereto respectively as **Exhibits B and C**.

13. The Credit Line Mortgage was recorded in the Clinton County Clerk’s Office on May 12, 2015 at Instrument Number 2015-00271613.

14. As security for payment of the CLA, the Debtor and Mortgagor executed and delivered to GFNB a Commercial Security Agreement (“Loan 1 Security Agreement”) dated May 8, 2015, attached hereto as **Exhibit D**, granting GFNB a security interest in all of the Debtor’s and Mortgagor’s inventory, chattel paper, accounts, equipment, instruments, general intangibles, money, rights to payment and performance, furniture, and fixtures as more particularly described therein (the “Pre-Petition Collateral”).

15. On May 12, 2015 GFNB filed a UCC-1 Financing Statement against the Debtor and Mortgagor to reflect its security interest in the Pre-Petition Collateral at Filing Number 2015-00003065, attached hereto as **Exhibit E**.

16. The CLA is also guaranteed by Commercial Guarantees executed by Mars Ventures, Inc., the Mortgagor, Nicole M. Mars, and Jeffrey A. Mars (“Loan 1 Guarantees”).

17. On June 26, 2017, GFNB filed a secured proof of claim against the Debtor on account of the CLA in the amount of \$301,053.89 assigned claim number 7 in the Court's claims register.

The Note

18. On or about May 8, 2015, for good and valuable consideration, the Debtor delivered to GFNB its Promissory Note, dated May 8, 2015 in the original principal amount of \$213,000.00 (the "Note"), attached hereto as **Exhibit F**.

19. In order to induce GFNB to lend to Debtor, the Mortgagor delivered to GFNB a second Mortgage and Assignment of Rents on the Mortgaged Property both dated May 8, 2015, attached hereto respectively as **Exhibits G and H**.

20. The Mortgage on the Note was recorded in the Clinton County Clerk's Office on May 12, 2015 at Instrument Number 2015-00271611.

21. As security for payment of the Note, the Debtor and Mortgagor executed and delivered to GFNB a Commercial Security Agreement ("Loan 2 Security Agreement") dated May 8, 2015, attached hereto as **Exhibit I**, granting GFNB a security interest in all of the Pre-Petition Collateral.

22. On May 12, 2015 GFNB filed a UCC-1 Financing Statement against the Debtor to reflect its security interest in the Pre-Petition Collateral at Filing Number 2015-00003065. *See* Exhibit E hereto.

23. The Note is guaranteed by Commercial Guarantees executed by Mars Ventures, Inc., the Mortgagor, Nicole M. Mars, and Jeffrey A. Mars ("Loan 2 Guarantees").

24. On June 26, 2017, GFNB filed a secured proof of claim against the Debtor on account of the Note in the amount of \$178,734.21 assigned claim number 8 in the Court's claims register.

25. The Debtor is delinquent on payments under the Note and failed to make its required monthly payment to GFNB for the month of July in the amount of \$2,350.64. August payment is due the day following the filing of this Motion.

Mortgagor Loan

26. On or about July 19, 2013, for good and valuable consideration, the Mortgagor delivered to GFNB its Promissory Note, dated July 19, 2013 in the original principal amount of \$298,500.00 (the "Mortgagor Note"), attached hereto as **Exhibit J**.

27. To secure the Mortgagor Note, the Mortgagor delivered to GFNB a Mortgage on the Mortgaged Property dated July 19, 2013, attached hereto as **Exhibit K**.

28. The Mortgage on the Mortgagor Note was recorded in the Clinton County Clerk's Office on July 22, 2013 at Instrument Number 2013-00258205.

29. The Mortgage Loan is also guaranteed by Commercial Guarantees executed by the Debtor, Nicole M. Mars, and Jeffrey A. Mars ("Mortgagor Loan Guarantees"). The Debtor's Guarantee of the Mortgage Loan is attached hereto as **Exhibit L**.

30. On June 26, 2017, GFNB filed an unsecured proof of claim against the Debtor on account of its Guarantee of the Mortgagor Note in the amount of \$262,742.39 assigned claim number 9 in the Court's claims register.

31. The Mortgagor is delinquent on payments under the Mortgagor Note and failed to make its required monthly payment to GFNB for the month of July in the amount of \$1,913.46. August payment is due the day following the filing of this Motion.

Cash Collateral Use

32. Upon information and belief, the Debtor has been using GFNB's Cash Collateral since the Petition Date – approximately two months ago.

33. The Debtor has not made a motion to this Court that would permit the Debtor to use GFNB's Cash Collateral.

34. Debtor's counsel and GFNB's counsel have not yet reached an agreement on the terms of a Cash Collateral agreement and adequate protection.

35. GFNB and its counsel tried to proactively negotiate for use of Cash Collateral. However, the Debtor's and Mortgagor's failure to make July payments on the Note and Mortgage Note has impacted GFNB's willingness to permit use of Cash Collateral.

36. Additionally, the Debtor failed to deliver a proposed budget and other documents to GFNB that were required under a proposed agreement, making completion of any agreement on cash collateral impossible.

JURISDICTION AND VENUE

37. The Court has jurisdiction over this case and this motion, which is a core proceeding, pursuant to 28 U.S.C. § 1334 and 28 U.S.C. 157(b)(2)(A) and (G). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

RELIEF REQUESTED

38. By this Motion, GFNB requests an order of the Court restricting the Debtor's use of GFNB's Cash Collateral pursuant to 11 U.S.C. § 363(c)(2)(A) and (B) or requiring the Debtor to segregate and account for Cash Collateral pursuant to 11 U.S.C. § 363(c)(4).

39. GFNB also requests relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) to allow GFNB to name Debtor as a necessary party in an action to foreclosure on the Mortgaged Property with respect to all three Mortgages.

BASIS FOR RELIEF REQUESTED

A. Debtor is Not Permitted to Use Cash Collateral

40. Bankruptcy Code section 363(c)(2) provides that: “The [debtor in possession] may **not** use, sell, or lease cash collateral under paragraph (1) of this subsection unless – (A) each entity that has an interest in such cash collateral consents; or (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.” 11 U.S.C. § 362(c)(2)(A) and (B) (emphasis added). *See In re Cerrico Realty Corp.*, 127 B.R. 319, 324 (Bankr. E.D.N.Y 1991) (“ . . .section 363(c)(2) provides that the Debtor may not use, sell or lease cash collateral that is property of the estate, unless the debtor obtains the consent of the impaired creditor, or the court, after notice and a hearing so authorizes such use, sale or lease.”).

41. Upon information and belief, the Debtor has been using GFNB’s Cash Collateral for the past two months without proper authority.

42. Debtor did not make a motion to use Cash Collateral with this Court.

43. The Debtor and GFNB have not reached an agreement regarding the Debtor’s use of Cash Collateral, through no fault of GFNB or its counsel, who diligently and proactively tried to negotiate the terms of a cash collateral agreement.

44. However, in light of the fact that the Debtor and Mortgagor have failed to make July’s payment to GFNB on account of the Note and Mortgagor Note, GFNB is unlikely to consent to the Debtor’s use of Cash Collateral.

45. Additionally, the Debtor has not provided GFNB with a proposed budget and other information required under the proposed agreement, making the completion of such difficult.

46. The Debtor has failed to comply with the requirements of Bankruptcy Code section 363(c)(2)(A) and (B) and for this reason, the Debtor's use of Cash Collateral should be restricted.

47. Alternatively, Bankruptcy Code section 363(c)(4) requires that the debtor in possession "shall segregate and account for any cash collateral in the [debtor in possession's] possession, custody, or control." 11 U.S.C. § 362(c)(4). *See Cerrico*, 127 B.R. at 325 (requiring the Debtor to segregate and account for rental income that constituted cash collateral).

48. Here, the Debtor should be required to segregate and account for any Cash Collateral subject to GFNB's security interests.

B. GFNB is Entitled to Relief from the Automatic Stay

49. Under § 362(d)(1) the court shall grant relief from the automatic stay "for cause, including the lack of adequate protection of an interest in" the property. 11 U.S.C. § 362(d)(1).

50. The moving party bears the initial burden of showing "cause" for relief, but once a *prima facie* case has been established, the debtor has the ultimate burden of proof to show that cause does not exist to grant relief from the stay. *In re Montague Pipeline Technologies Corp.*, 209 B.R. 295, 305 (Bankr. E.D.N.Y. 1997).

51. "A continued failure to make monthly payments under loan documents can constitute cause for granting relief from the automatic stay. . ." *In re Balco Equities Ltd., Inc.*, 312 B.R. 734, 749 (Bankr. S.D.N.Y. 2004)(*quoting In re James River Assocs.*, 148 B.R. 790 (E.D.Va. 1992)); *Fed. Nat'l Mortgage Ass'n v. Dacon Bolingbrook Assocs. Ltd. P'Ship*, 153 B.R. 204, 208 (N.D. Ill. 1993) (movant can meet burden of proof by establishing debtor's failure to make periodic payments on secured debt).

52. Here, as discussed above, the Debtor failed to make the July payment on account of the Note, and the Mortgagor failed to make the July payment on the Mortgage Note (of which the Debtor is a guarantor). GFNB has no confidence in the Debtor's ability or resolve to make continued payments on the loans going forward. This issue also goes hand in hand with the Debtor's unauthorized use of Cash Collateral for the past two months.

53. GFNB seeks to commence a foreclosure action on the Mortgaged Property. Although the Mortgaged Property is owed by the Mortgagor, and not the Debtor, GFNB wishes to foreclose on all three Mortgages given by Mortgagor at the same time. GFNB needs to name the Debtor as a necessary party as the Borrower under the CLA and Note and requests stay relief to name the Debtor as a party to the foreclosure action for complete relief.

54. The lack of payment together with unauthorized use of Cash Collateral creates sufficient "cause" to grant relief from the stay.

55. GFNB will account to the estate for any surplus proceeds.

56. GFNB also requests that the order granting relief from the automatic stay contain a waiver of the 14-day stay set forth in Bankruptcy Rule 4001(a)(3).

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CONCLUSION

WHEREFORE, GFNB respectfully requests that the Court enter an order (1) restricting the Debtor's use of GFNB's Cash Collateral or requiring the Debtor to segregate and account for GFNB's Cash Collateral, (2) granting relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1), and (3) granting such other and further relief as may be just, necessary and proper.

Dated: July 31, 2017

Respectfully submitted

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