

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In re:

EAST MAIN COMPLEX, LLC,

Debtor.

Chapter 11

Tax ID 16-1539673

No. 1-17-11789-CLB

Hon. Carl L. Bucki

**NOTICE OF DEBTOR'S MOTION TO DIRECT AND COMPEL MANDATORY
TURNOVER AND ACCOUNTING OF DEBTOR'S PROPERTY IN POSSESSION OF
COURT-APPOINTED RECEIVER, FOR AUTHORITY TO USE CASH COLLATERAL
ON AN EMERGENCY BASIS, AND TO SCHEDULE INTERIM AND FINAL
HEARINGS ON DEBTOR'S USE OF CASH COLLATERAL**

PLEASE TAKE NOTICE that, East Main Complex, LLC, by and through its proposed counsel, Gleichenhaus, Marchese & Weishaar, PC, has filed an Emergency Motion to Direct and Compel Mandatory Turnover and Accounting of Debtor's Property in Possession of Court-Appointed Receiver, for Authority to Use Cash Collateral, and to Schedule Interim and Final Hearings, dated September 15, 2017.

PLEASE TAKE FURTHER NOTICE that, a hearing on the Motion will be held before the Hon. Carl L. Bucki, United States Bankruptcy Judge, in the courtroom usually occupied by him, at the United States Bankruptcy Court, Olympic Towers, 300 Pearl Street, Buffalo, New York 14202 on the 21st day of September, 2017 at 1:00 pm.

Dated: Buffalo, New York
September 15, 2017

GLEICHENHAUS, MARCHESE & WEISHAAR, P.C.

/s/ Michael A. Weishaar
By: Michael A. Weishaar, Esq.
Proposed Counsel to the Debtor
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UNITED STATES BANKRUPTCY COURT
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In re:

EAST MAIN COMPLEX, LLC,

Debtor.

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Tax ID 16-1539673

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**DEBTOR'S EMERGENCY MOTION TO DIRECT AND COMPEL MANDATORY
TURNOVER AND ACCOUNTING OF DEBTOR'S PROPERTY IN POSSESSION OF
COURT-APPOINTED RECEIVER, FOR AUTHORITY TO USE CASH COLLATERAL
ON AN EMERGENCY BASIS, AND TO SCHEDULE INTERIM AND FINAL
HEARINGS ON DEBTOR'S USE OF CASH COLLATERAL**

East Main Complex, LLC ("EMC" or, the "Debtor"), the Debtor in the above-captioned proceedings voluntarily commenced pursuant to chapter 11 of title 11 of the United States Code (the "Code"), by and through its proposed counsel, Gleichenhaus, Marchese & Weishaar, PC, for its motion (the "Turnover & Cash Collateral Motion"), seeking to (a) direct and compel Bouvier Partnership, LLP, the court-appointed receiver (the "Receiver"), in the foreclosure proceeding entitled *Manufacturers and Traders Trust Company v. Daniel P. Sturniolo, et al.*, Index No. K12016-501 (the "Foreclosure Proceeding"), commenced by Manufacturers and Traders Trust Company ("M&T"), currently pending before Hon. Justice Frank A. Sedita, III, in the State of New York Supreme Court, County of Chautauqua (the "NYS Supreme Court"), to turnover and relinquish control over the Debtor's real property located at 183 East Main Street, Fredonia, New York 14063 ("183 East Main St."), together with (i) all rents and other proceeds of the Debtor's property collected or otherwise under control of the Receiver since his appointment in the Foreclosure Proceeding (the "Rents"), and (ii) the Debtor's personal property located at the 183 East Main St. (the "Personal Property" and together with 183 Main St. and the Rents, the "Debtor's Property"), and to provide an accounting of the Debtor's Property to the Office of the United States Trustee (the "US Trustee") and the Debtor as soon as practicable after entry of an Order granting the relief sought by this Turnover & Cash Collateral Motion (the "Turnover & Cash Collateral Order"), but not later than ten (10) days after entry of the Turnover & Cash Collateral Order, (b) use cash collateral in the ordinary course of the Debtor's business on an

emergency basis including the Rents and any proceeds from operating 183 Main St. (the “Cash Collateral”), and (c) schedule interim and final hearings on the Debtor’s use of its Cash Collateral, respectfully states:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §1334(b), 28 U.S.C. § 157(a), and the Standing Order of Reference so ordered by Hon. William M. Skretny, Chief Judge, United States District Court for the Western District of New York, on February 29, 2012. This is a “core proceeding” pursuant to 28 U.S.C. §§ 157(b)(2). Venue of this proceeding is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

PRELIMINARY STATEMENT

2. The Debtor files this Turnover & Cash Collateral Motion pursuant to, *inter alia*, Code sections 105, 361, 363, 541, and 543, and rules 4001 and 6002 of the Federal Rules of Bankruptcy Procedure (the “Rules”), seeking to direct and compel the Receiver (a) to turn over the Debtor's Property no later than three (3) business days after entry of the Turnover & Cash Collateral Order; and (b) to provide an accounting to the US Trustee and the Debtor regarding the Debtor's Property as soon as practicable, but not later than ten (10) days after entry of the Turnover & Cash Collateral Order.

3. Furthermore, immediately upon the Debtor regaining dominion and control over the Debtor’s Property, the Debtor also seeks authority to use the Cash Collateral on an emergency basis in the ordinary course of its business and respectfully requests that the Court schedule interim and final hearings on the Debtor’s use of its Cash Collateral, all as set forth more fully below.

4. To maintain the liquidity necessary to administer this chapter 11 case and continue its operations in the ordinary course of business, the Debtor respectfully requests (i) authority to continue using the Cash Collateral in the ordinary course of business subject to the Prepetition M&T Lien (defined below), in accordance with (a) the thirteen (13) week budget covering the period from September 18, 2017, through December 11, 2017 (the “Budget”, which is attached as Exhibit “A” to the proposed Turnover & Cash Collateral Order); (ii) that the Court grant adequate protection to M&T, with respect to any potential diminution in value to the extent the Cash Collateral is actually used during the pendency of this chapter 11 case, pursuant to the Budget, and as set forth more fully below (collectively, the “Adequate Protection”); and (iii) to schedule interim and final hearings on the relief sought by this Turnover & Cash Collateral Motion.

BACKGROUND

5. On August 25, 2017 (the "Petition Date"), the Debtor filed its petition and voluntarily commenced this chapter 11 proceeding.

6. The Debtor is a limited liability company formed on October 27, 1997, pursuant to the laws of the State of New York.

7. The Debtor's sole member is Mr. Daniel P. Sturniolo who holds a one hundred (100%) percent controlling interest in the Debtor's activities.

8. The Debtor is authorized to manage its properties and affairs as a debtor in possession pursuant to Code sections 1107(a) and 1108.

9. No trustee or examiner and no official committee of unsecured creditors have been appointed in this case.

10. The Debtor owns a fee simple interest in the real property located at 183 East Main St., with an appraisal value of \$1,980,000.

11. 183 East Main St. is a multi-use commercial, residential, and industrial complex, which is partially owner occupied and partially tenant occupied. 183 East Main St. contains twenty-two residential apartments. The Debtor owns certain Personal Property comprised of various appliances in each of the residential apartments, as well as pieces of property maintenance equipment located at that address.

12. On July 6, 2012, The Community Preservation Corporation ("CBC") assigned all of its right, title, and interest to M&T in that certain Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement dated December 22, 2006, by EMC to CBC (the "Assignment of Mortgage").

13. On July 31, 2012, EMC entered into that certain Mortgage Modification Agreement with M&T, pursuant to which it granted M&T a security interest in the real property located at 183 East Main St. (the "Mortgage Modification Agreement").

14. Together with the Mortgage Modification Agreement, the Debtor entered into that certain General Assignment of Rents, pursuant to which EMC granted to M&T certain rights with respect to the rents generated by 183 East Main St. as additional security for the Indebtedness (as defined in the Mortgage Modification Agreement), and EMC was granted a conditional license to collect and use the income derived from 183 East Main St. and to take certain leasing actions in the ordinary course of business (the "General Assignment of Rents").

15. As of the Petition Date, the Debtor was indebted to the following creditors holding secured claims:

- a. M&T, in the aggregate amount of approximately \$1,455,000 (the “M&T Prepetition Indebtedness”), secured by a first mortgage in favor of M&T (as described above, the “M&T Mortgage”); and
- b. Chautauqua Industrial Development Agency (“CIDA”), in the aggregate amount of approximately \$578,000, secured by a second mortgage in favor of CIDA (the “CIDA Prepetition Indebtedness” and together with the M&T Prepetition Indebtedness, the “Prepetition Indebtedness”).

The exact amount of the Prepetition Indebtedness is subject to review by the United States Trustee, any official committee appointed in this case, or any other party in interest.

16. M&T currently holds a lien against the Debtor’s Cash Collateral, as evidenced by the General Assignment of Rents.

17. The Debtor submits that its Cash Collateral is not subject to any other claims or liens, including those by any trust fund beneficiaries, as such term is defined by state or federal law.

18. Prior to the Petition Date, M&T commenced the Foreclosure Proceeding.

19. The Receiver was appointed pursuant to section 254(10) of the New York Real Property Law and the terms of the Mortgage (as defined in the Notice of Pendency).

20. Upon information and belief, the Receiver continues to maintain and manage 183 East Main St. and collect the Rent for the benefit of M&T.

**THE EMERGENCY AND INTERIM RELIEF REQUESTED
SHOULD BE GRANTED BY THE COURT**

21. The Debtor requests entry of an Order, substantially in the form of that attached as Exhibit “B”, to (a) direct and compel the Receiver to turnover the Debtor’s Property and to provide an accounting of the Debtor’s Property to the US Trustee and the Debtor as soon as practicable after entry of an Order granting the relief sought by this Turnover & Cash Collateral Motion; (b) authorize the Debtor to use its Cash Collateral on an emergency basis and grant rollover and replacement liens granting security to the same extent, to the same relative priority, and with respect to the same assets as served as collateral for the M&T Prepetition Indebtedness, to the extent the Cash Collateral is actually used, without the need of any further recordation to perfect such liens or security interests (the “Adequate Protection Liens”), effective as of the Petition Date; and (c) seek to provide M&T with further adequate protection cash payments in the amount of \$10,168.95, as they would be due and owing prepetition in the ordinary course of business, but in any event to commence no later than September 1, 2017 (the “Adequate Protection Cash Payments”), and schedule the date and time for hearings on (i) the Debtor’s

request for the entry of an Order, substantially in the form of that attached as Exhibit “C”, authorizing the Debtor's interim use of Cash Collateral, in accordance with the Budget, to permit it to meet the costs of overhead, operations and preservation of its secured creditors’ collateral, pending the time of a final hearing in this matter, and (ii) the Debtor’s request for the entry of an Order, substantially in the form of that attached as Exhibit “D”, authorizing the Debtor’s ongoing use of cash collateral.

I. The Receiver Should be Compelled to Turnover the Debtor’s Property and Provide an Accounting to the US Trustee and the Debtor

22. Pursuant to Code section 543 of the bankruptcy code, the NYS Supreme Court’s jurisdiction over the Receiver and the Debtor’s Property terminated once the Debtor filed its petition for bankruptcy relief. Code section 543 provides that:

A custodian shall (1) deliver to the trustee any property of the debtor transferred to such custodian, or proceeds of such property, that is in such custodian’s possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case; and (2) file an accounting of any property of the debtor, or proceeds of such property that, at any time, came into the possession, custody, or control of such custodian.

23. A state court appointed receiver is a “custodian” within the meaning of Code section 101(11). *In re Lizeric Realty Corp.*, 188 B.R. 499, 506 (Bankr. S.D.N.Y.1995). Therefore, once a bankruptcy petition is filed, a non-bankruptcy custodian’s receivership terminates and the custodian must, as a general proposition, deliver the debtor’s property to the trustee or the debtor, and must account for the properties which were in the custodian’s possession, custody, or control as a custodian. *See In re WPAS, Inc.*, 6 B.R. 40,43 (Bankr. M.D. Fla. 1980).

24. Moreover, even when the turnover requirements of section 543(b)(1) are modified pursuant to 543(d), a receiver may not act as a trustee or a debtor in possession. “Since no section of the Code includes a receiver who remains in possession within the definition of trustee, the receiver does not take on the obligations and duties of a Chapter 11 trustee nor the somewhat different ones of a debtor-in-possession. Simply put the receiver has absolutely no responsibility to ensure the progress of the case...or to perform any other duties which are the prerogative and burden of a debtor-in-possession and a trustee.” *In re 400 Madison Ave. Ltd Partnership*, 213 B.R. 888, 894-5 (Bankr. S.D.N.Y. 1997). *See also, French Bourekas Inc. v. Turner*, 199 B.R. 807, 818 (E.D.N.Y. 1996) (code section 543(d) “does not ... give a custodian who remains in possession of a debtor’s property the powers of a trustee”).

25. Here, as it is early in the proceedings, the Debtor should be given the opportunity to do everything in its power to make the Debtor a success; upon information and belief, with the rents collected by the Receiver, the Debtor is capable of producing sufficient income that, with proper maintenance and operation, can successfully fund a confirmable plan.

26. It is believed that the goal of the Receiver is to simply operate 183 East Main St. at minimum levels so as to “preserve the Receivership Property.” Upon information and belief, the Receiver is not expending any efforts to grow or increase the profitability of the Debtor. By operating the Debtor with little or no desire for increased profitability, it will create significant doubt as to whether a viable business plan is possible and will eventually lead to the foreclosure of 183 East Main St.

27. What is more, the Receiver may be incurring additional receivership fees, to be borrowed from M&T and to be secured against the Debtor, to keep the rental property operating. If the Debtor were in possession, these fees would not be incurred or would otherwise be provided for by the Debtor rather than borrowing additional fees from M&T.

28. The Debtor is confident that if it were allowed to take over operation of 183 East Main St. that it could maximize profits and make the building complex profitable. Additionally, it will be virtually impossible for the Debtor to propose a feasible and successful plan of reorganization if the Debtor is not allowed to take over operation of the Debtor’s Property.

29. Generally, the equities favor a debtor or debtor in possession because a significant impediment is added to the debtor’s burden of attempting to reorganize and to promulgate an acceptable plan of reorganization if the debtor does not have access to all of its income producing assets during its initial breathing spell. *See In re KCC-Fund*, 96 B.R. at 239-40. Furthermore, turnover is the general rule. *In re Poplar Springs Apartments of Atlanta, Ltd.*, 103 B.R. 146, 150 (Bankr.S.D. Ohio 1989). Here, the Debtor has a huge incentive to make 183 East Main St. viable because the Debtor’s financial future hangs in the balance. Thus, the Court should find that the Debtor should be given a final chance to recover 183 East Main St., together with the remaining Debtor’s Property, and make it profitable.

30. The Receiver is not acting for the benefit of all creditors, nor is the Receiver authorized to act for the benefit of all creditors. Many custodians that would be subject to Code section 543(a) & (b) are charged with the responsibility of acting for the benefit of all creditors such as an “assignee under a general assignment for the benefit of the debtor’s creditors” or a “trustee, receiver, or agent under applicable law, or under a contract, that is appointed or

authorized to take charge of property of the debtor . . . for the benefit of the debtor's creditors." 11 U.S.C. § 101(11). That is not the case here under the express terms of the appointment.

31. Given that the Receiver does not have authority to address the claims of creditors other than M&T (and others that happen to be essential to the short term operation of the Debtor's business until a foreclosure sale can be scheduled) it is difficult to conceive how the best interest of all creditors can be served by the Court invoking the exception to the general rule.

32. Moreover, the inevitable result of the Receiver's efforts in administering the revenues of 183 East Main St. is sale of the Real Property at a foreclosure sale. Since foreclosure sales typically generate far less than full fair market value, it is difficult to see how sale of the property at a foreclosure sale would benefit any creditor other than the first lien holder on the Real Property.

33. If M&T believes a trustee is needed in this case or that it should have stay relief to foreclose on 183 East Main St., then it should seek such relief. The Court, though, should not allow the Receiver, who does not have the powers or responsibilities of a trustee or debtor-in-possession, to remain in control of the Debtor's Property. *See, e.g., In re Stratesec*, 324 B.R. 156, 157 (Bankr. D.D.C. 2004) (allowing receiver to "continue indefinitely" found to be "inconsistent with the Bankruptcy Code.").

II. The Debtor Should be Granted Authority to Use the Cash Collateral on an Emergency Basis

34. Code section 363(c) provides that a debtor may use cash collateral in the ordinary course of business, after a preliminary hearing scheduled in accordance with the needs of the debtor. *See* 11 U.S.C. § 363(c) (2017). Parties with an interest in cash collateral are entitled to adequate protection. *See* 11 U.S.C. § 363(e) (2017). Adequate protection may be provided in various forms, including granting roll-over or replacement liens and providing cash payments. *See generally* 11 U.S.C. § 361 (2017); *see also* 495 Cent. Park, 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992); *In re Beker Indus. Corp.*, 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986); *In re Hubbard Power & Light*, 202 B.R. 680, 685 (Bankr. E.D.N.Y. 1996). An *ex parte* order authorizing the use of cash collateral may be appropriate so as to maintain the status quo of the debtor's operations. *See generally, Armstrong v. Norwest Bank, Minneapolis, N.A.*, 964 F.2d 797, 801 (8th Cir. 1992).

35. The Debtor does not dispute that there is the M&T Prepetition Indebtedness in the approximate amount of \$1,200,000 subject to review by the Debtor, the United States Trustee,

and any other party in interest, including any official committee appointed in this case. However, the Debtor reserves its rights to challenge the validity, extent, and priority of the M&T Prepetition Liens held by M&T in the Cash Collateral and the rents generated by 183 East Main St.

36. Prior to the Petition Date, and prior to the appointment of the Receiver, the Debtor used cash collateral in the ordinary course of business to pay its ongoing operating costs and payroll obligations.

37. In the event the Debtor is not authorized to use the Cash Collateral on an emergency basis, the Debtor will be unable to meet its various obligations as they become due.

38. The Debtor believes and submits that the Adequate Protection Liens and proposed Adequate Protection Cash Payments are sufficient to protect M&T, from any potential diminution in value of its collateral with respect to any prepetition indebtedness and its respective prepetition liens, including the relative priority of any such liens, to the extent the Cash Collateral is actually used during this chapter 11 case.

39. Accordingly, for the reasons set forth above, entry of an Order granting the above relief on an emergency basis, pending interim and final hearings on the additional relief sought herein, is necessary to preserve the status quo of the Debtor's operations and to avert immediate and irreparable harm to the Debtor's estate.

REQUEST FOR INTERIM AND FINAL HEARINGS

40. Pursuant to Rule 4001(b)(2), the Debtor requests (a) the Court set a date within seven (7) days after entry of the Emergency Order as a hearing for consideration of entry of an interim order on the relief sought by this Motion; and (b) the Court set a date more than fourteen (14) days after entry of the Emergency Order as a hearing for consideration of entry of a final order on the relief sought by this Motion.

41. The Debtor requests that it be authorized to serve a copy of the signed Emergency Order, which fixes the time and date for the interim and final hearings, by first class mail upon the notice parties listed below. The Debtor further requests that the Court consider such notice of the Interim Hearing to be sufficient notice under Rule 4001(c)(2).

THE DEBTOR SATISFIES BANKRUPTCY RULE 6003

42. Rule 6003 provides that, “[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within twenty-one (21) days after the filing of the petition, issue an order granting the following: . . . a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate” FED. R. BANKR. P. 6003(b) (2017). The Debtor submits that, because the relief requested in this Motion is necessary to avoid

immediate and irreparable harm to the Debtor for the reasons set forth herein, Rule 6003 has been satisfied. The Debtor only seeks authorization to pay amounts due and owing in the first twenty-one (21) days after the filing of the petition and do not seek to accelerate any payments.

WAIVER OF RULE 6004(a) AND 6004(h)

43. To the extent applicable and to implement the foregoing successfully, the Debtor respectfully requests a waiver of the notice requirements under Rule 6004(a) and the fourteen (14)-day stay of an order authorizing the use, sale, or lease of property under Rule 6004(h). Pursuant to Rule 6004(h), “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of fourteen (14) days after entry of the order, unless the court orders otherwise.” As set forth above, the payments proposed herein are essential to prevent potentially irreparable damage to the Debtor’s operations, value, and ability to reorganize. Accordingly, the Debtor submits that ample cause exists to justify a waiver of the fourteen (14)-day stay imposed by Rule 6004(h), to the extent it applies.

RESERVATION OF RIGHTS

44. Nothing contained herein is intended to be or shall be construed as (i) an admission as to the validity of any claim against the Debtor, except as expressly set forth herein, (ii) a waiver of the Debtor’s or any appropriate party in interest’s rights to dispute any claim, or (iii) an approval or assumption of any agreement, contract, program, policy, or lease under Code section 365. Likewise, if the Court grants the relief sought herein, any payment made pursuant to the Court’s order is not intended to be and should not be construed as an admission to the validity of any claim or a waiver of the Debtor’s rights to dispute such claim, except as expressly set forth herein.

NOTICE

45. The Debtor proposes that Notice of this Motion and the Motion for interim and final hearings be provided to (i) the Office of the U.S. Trustee for Region 2: Western District of New York (Buffalo Division) (Attn. Joseph W. Allen, Esq.); (ii) M&T, secured creditor of the Debtor, M&T Bank, One Fountain Plaza, Buffalo, New York 14203 (Attn. Kenneth W. Paulin, Jr. (Vice President), and Vincent J. Harper (Administrative Vice President)); (iii) counsel to M&T, Hodgson Russ LLP, The Guaranty Building, 140 Pearl Street, Suite 100, Buffalo, New York 14202 (Attn. Steven Wells, Esq.); (iv) Chautauqua Industrial Development Agency, 200 Harrison Street, Jamestown, New York 14201 (Attn. Carol Rasmussen); (iv) counsel to CIDA, Phillips Lytle, LLP, 201 West Third Street, Suite 205, Jamestown, NY 14701-4907 (Attn. Gregory L. Peterson, Esq.); and (v) the Receiver in the Foreclosure Proceeding, Bouvier Partnership, LLP, 350 Main Street, Buffalo, New York 14202 (Attn. Jeffrey Bochiechio, Esq.);

and that Notice of this Motion for interim and final hearings be provided to the holders of the twenty (20) largest unsecured claims against the Debtor. The Debtor submits that, in view of the facts and circumstances, such notice is sufficient and no other or further notice need be provided.

WHEREFORE, the Debtor requests that the Court grant its motion, to compel mandatory turnover of the Debtor's Property and to provide an accounting, and establishing dates for interim and final hearings regarding the usage of cash collateral, and that it authorize the interim use of cash collateral described above until such time as a final hearing in this matter may be held, that it establish dates for and prescribe notice for such final hearing, as set forth more fully above, and that it grant to the Debtor such other and further relief as this Court deems just and proper.

Dated: Buffalo, New York
September 15, 2017

GLEICHENHAUS, MARCHESE & WEISHAAR, P.C.

/s/ Michael A. Weishaar
By: Michael A. Weishaar, Esq.
Proposed Counsel to the Debtor
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