

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(Wilkes-Barre)

_____	)	Chapter 11
In re:	)	Case No. 5:16-bk-02183-RNO
B&B REAL ESTATE)	
GENERAL PARTNERSHIP,)	
Debtor-in-Possession.)	
_____)	
B&B REAL ESTATE	)	Hearing Date: December 15, 2016
GENERAL PARTNERSHIP,	)	Time: 9:30 a.m.
Plan Proponent,	)	Place: U.S. Bankruptcy Court, CR 2
v.	)	Max Rosem U.S. Courthouse
NEWTEK SMALL BUSINESS FINANCE, LLC,	)	197 South Main Street
Objector.	)	Wilkes-Barre, PA 18701
_____	)	Objections Due: December 6, 2016
	)	Related to D.I. Nos. 40, 41

**OBJECTION TO DEBTOR’S DISCLOSURE STATEMENT FOR CHAPTER 11
PLAN OF REORGANIZATION DATED OCTOBER 31, 2016, AND TO
CONFIRMATION OF PLAN OF REORGANIZATION, PURSUANT TO
11 U.S.C. §§1123, 1125, AND 1129, AND FED.R.BANKR.P 3017.1, 3020 AND 9014,
FILED ON BEHALF OF NEWTEK SMALL BUSINESS FINANCE, LLC,
SUCCESSOR BY MERGER TO NEWTEK SMALL BUSINESS FINANCE, INC.**

NOW COMES Newtek Small Business Finance, LLC, Successor by Merger to Newtek Small Business Finance, Inc. (“Newtek”), by and through its attorneys, John J. Winter, Esquire and The Chartwell Law Offices, LLP, and files the following Objection to Debtor’s Disclosure Statement for Chapter 11 Plan of Reorganization dated October 31, 2016, and to Confirmation of said Plan of Reorganization (D.I. Nos. 41 and 40, respectively, and hereinafter, the “Disclosure Statement” and “Plan”):

I. JURISDICTION AND VENUE.

1. The above-captioned case or controversy arises under and relates to the chapter 11 case of the debtor pending in this District, as more fully described hereinbelow.

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§151, 157 and 1334, and 11 U.S.C. §105(a).

3. The matter presented by the Debtor's Disclosure Statement and Plan, and this objection is a core proceeding under 28 U.S.C. §157(b)(2)(A), (L) and (O).

4. Venue is properly laid within the United States Bankruptcy Court for the Middle District of Pennsylvania, by virtue of 28 U.S.C. §§1408, and 1409.

5. This Objection is brought pursuant to 11 U.S.C. §§ 1123, 1125, and 1129, and Fed.R.Bankr.P. 3017.1, 3020 and 9014.

II. BACKGROUND

The Loan, Default and Judgment.

6. On June 22, 2010, pursuant to an SBA Authorization dated April 21, 2010 (the "Authorization"), B&B Real Estate General Partnership, d/b/a Elevations Health Club ("B&B REGP") and B&B Fitness and Barbell Inc. ("B&B FBI") jointly and severally borrowed the principal sum of \$1,711,000.00 from Newtek Small Business Finance, Inc. to: refinance outstanding debt to ESSA (\$1,565,197.00, plus \$25,000.00); fund loan closing fees and costs (\$15,003.00); and provide working capital (\$105,800.00) (the "Loan"), as evidence of which, B&B REGP and B&B FBI (collectively, the "Debtors") executed and delivered to Newtek their promissory note dated June 22, 2010, in the original principal amount of \$1,711,000.00 (the "Note"). True and correct copies of the Authorization and Note are attached hereto as Exhibits "A" and "B", respectively, and are incorporated herein by reference.

7. The Note provided for a twenty-five (25) year term, and required the Debtors to make one (1) interest-only payment beginning one month from the date of the Note, and then

regular monthly payments of principal and interest, beginning two (2) months from the date of the Note, initially in the amount of \$11,024.00 each. Pursuant to the terms of the Note, the Loan would initially accrue interest at the contract rate of 6.00% per annum, and would accrue interest thereafter at the rate of Prime (as announced in the Wall Street Journal) plus 2.75%, to be adjusted quarterly. Further, the Note authorized the imposition of late fees equal to five (5%) percent of the unpaid portion of the regularly scheduled payment. The Note also contained a warrant of attorney to confess judgment against the Debtors.

8. To secure Debtors' obligations under the Note, B&B REGP executed and delivered to Newtek a first lien "Mortgage" covering its real property located at Route 611 North, Pocono Township, Scotrun, PA 18355, Tax Code No. 12/6/1/17-1 (the "B&B REGP Property"), dated June 22, 2010, in the original principal amount of \$1,711,000.00, which was recorded in the Office of the Recorder of Deeds of Monroe County on June 30, 2010, at Instrument No. 201015179, Book 2372 page 7539 (the "B&B REGP Mortgage"). A true and correct copy of the B&B REGP Mortgage is attached hereto as Exhibit "C" and is incorporated herein by reference.

9. To further secure Debtors' obligations under the Note, B&B REGP executed and delivered to Newtek an "Assignment of Leases and Rents" covering the Scotrun Property, dated June 22, 2010, in the original principal amount of \$1,711,000.00, which was recorded in the Office of the Recorder of Deeds of Monroe County on July 8, 2010, at Instrument No. 201015883, Book 2373 page 1074 (the "B&B REGP Assignment of Rents"). A true and correct copy of the B&B REGP Assignment of Rents is attached hereto as Exhibit "D" and is incorporated herein by reference.

10. To further secure Debtors' obligations under the Note, Borrowers executed and

delivered to Newtek a seventh lien “General Security Agreement” dated June 22, 2010, in the original principal amount of \$1,711,000.00 (subject to the prior liens of PNC Bank, Sterling National, Wells Fargo, Interchange Capital and On Deck Capital, Inc.), covering, without limitation, all assets, all personal property, inventory, equipment, fixtures, accounts, chattel paper, contract rights, instruments, documents and general intangibles, accounts and accounts receivable, then existing or thereafter acquired inventory, and listed machinery, equipment, furniture and fixtures, as well as all issued and outstanding shares of stock in the corporate Borrower (the “Security Agreement”). A true and correct copy of the Security Agreement is attached hereto as Exhibit “E” and is incorporated herein by reference.

11. To perfect its security interests thus granted, Newtek filed UCC-1 Financing Statements against the Debtors, covering all personal property: (a) against B&B Real Estate General Partnership, filed with the Secretary of the Commonwealth of Pennsylvania on July 2, 2010 at 2010070207245, continued by UCC-3 filed on April 20, 2015 at 2015042000053, covering all personal property, etc. (the “Personal Property Collateral”); and (b) against B&B FBI, with the Secretary of the Commonwealth of Pennsylvania on July 17, 2012 at No. 2012071709890; and (c) against B&B FBI, with the Delaware Department of State on July 6, 2010 at No. 2010 2410730, subsequently continued (collectively, the “Financing Statements”). True and correct copies of the Financing Statements are attached hereto collectively as Exhibit “F” and are incorporated herein by reference.

12. To further secure Borrowers’ obligations with respect to the Loan, each of Barry Klein (“B. Klein”) and Robert Bishop R. Bishop executed and delivered to Newtek an “Unconditional Guarantee”, dated June 22, 2010, in the original principal amount of \$1,711,000.00 (the “B. Klein Guarantee”, and “R. Bishop Guarantee”). True and correct copies

of the B. Klein Guarantee and R. Bishop Guarantee are attached hereto as Exhibits “G” and “H”, respectively, and are incorporated herein by reference.

13. To further secure Debtors’ obligations with respect to the Loan, Cheryl Bishop (“C. Bishop”) executed and delivered to Newtek an “Unconditional Limited Guarantee”, dated June 22, 2010, in the original principal amount of \$1,711,000.00 (the “C. Bishop Limited Guarantee”). C. Bishop’s liability thereunder was limited to her interest in the real property located at RR 7, Box 7670, East Stroudsburg, PA 18301. A true and correct copy of the C. Bishop Limited Guarantee is attached hereto as Exhibit “I” and is incorporated herein by reference.

14. To secure their obligations under the R. Bishop Guarantee and C. Bishop Limited Guarantee, R. Bishop and C. Bishop executed and delivered to Newtek a second lien mortgage (subject to the first mortgage of ESSA Bank & Trust in the amount of \$50,000.00) against his real property located at RR 7, Box 7670, East Stroudsburg, PA 18301, which was recorded in the Office of the Recorder of Deeds of Monroe County, PA on June 30, 2010, at Instrument No. 20105182, Book 2372, Page 7576 (the “R. Bishop Mortgage”). A true and correct copy of the R. Bishop Mortgage is attached hereto as Exhibit “J” and is incorporated herein by reference.

15. To further secure Debtors’ obligations with respect to the Loan, and their own under their Guarantees, B. Klein and R. Bishop, executed and delivered to Newtek pledges of their shares of stock in B&B FBI (respectively, the “B. Klein Stock Pledge” and “R. Bishop Stock Pledge”). True and correct copies of the B. Klein Stock Pledge and R. Bishop Stock Pledge are attached hereto as Exhibits “K” and “L”, respectively, and are incorporated herein by reference.

16. To further secure Debtors’ obligations with respect to the Loan, Deann Klein (“D.

Klein”) executed and delivered to Newtek an “Unconditional Limited Guarantee”, dated June 22, 2010, in the original principal amount of \$1,711,000.00 (the “D. Klein Limited Guarantee”). D. Klein’s liability thereunder was limited to her interest in the real property located at 107 Benson Court, East Stroudsburg, PA. A true and correct copy of the D. Klein Limited Guarantee is attached hereto as Exhibit “M” and is incorporated herein by reference.

17. To secure their obligations under the B. Klein Guarantee and D. Klein Limited Guarantee, B. Klein and D. Klein executed and delivered to Newtek a third lien mortgage against their real property located at 107 Benson Court, East Stroudsburg, PA (subject to the first mortgage of SIB Mortgage Corp. in the amount of \$250,000.00, and the second mortgage of ESSA Bank & Trust in the amount of \$30,000.00), dated June 22, 2010), which was duly recorded in the Office of the Recorder of Deeds of Monroe County on June 30, 2010, at Instrument No. 201015181, Book 2372, Page 7559 (the “Klein Mortgage”). A true and correct copy of the Klein Mortgage is attached hereto as Exhibit “N” and is incorporated herein by reference.

18. To further secure Debtors’ obligations with respect to the Loan, Patricia Bishop (“P. Bishop”) executed and delivered to Newtek an “Unconditional Limited Guarantee”, dated June 22, 2010, in the original principal amount of \$1,711,000.00 (the “P. Bishop Limited Guarantee”). P. Bishop’s liability thereunder was limited to her interest in the real property located at 143 Crestmont Drive, Mantua, NJ 08051. A true and correct copy of the P. Bishop Limited Guarantee is attached hereto as Exhibit “O” and is incorporated herein by reference.

19. To secure her obligations under the P. Bishop Limited Guarantee, P. Bishop executed and delivered to Newtek a “Mortgage” dated June 22, 2010, in the original principal amount of \$1,711,000.00, which was duly recorded in the Office of the Gloucester County, NJ

Clerk on July 28, 2010, at Docket No. 28326, Mortgage Book 12264, Page 44 (the “P. Bishop Mortgage”). A true and correct copy of the P. Bishop Mortgage is attached hereto as Exhibit “P” and is incorporated herein by reference.

20. The Loan went into default for non-payment, and as of February 12, 2016, the next payment due was that which came due on October 1, 2015, constituting defaults and events of default under the Note, B&B REGP Mortgage, B&B REGP Assignment of Rents, Security Agreement, Stock Pledges, the aforesaid Guarantees and Limited Guarantees and the mortgages given to secure them (collectively, the “Loan Documents”), arrearages totaled \$56,091.00, and the following balances were due and owing with respect to the Loan:

Principal:	\$1,541,481.27
Interest to 2-12-16:	27,055.18
Late fees:	3,345.00
Site inspection fee:	<u>135.00</u>
TOTAL:	\$1,572,016.45

Plus additional interest accrued after February 12, 2016 at the rate of \$267.62 *per diem*, plus late fees, attorney’s fees and costs, and costs of collateral preservation.

21. On February 19, 2016, Newtek, through counsel, issued: (a) notice of default, acceleration and demand for payment; (b) UCC Notice to marshal and of future sale of the Personal Property Collateral; and (c) attachment of the rents (the “Default Notice”). A true and correct copy of the Default Notice is attached hereto as Exhibit “Q” and is incorporated herein by reference.

22. The foregoing notices were unavailing, and on May 2, 2016, Newtek, through counsel, exercising the warrants of attorney and guarantees described above, filed a Complaint in Confession of Judgment for Money Damages in the Court of Common Pleas of Montgomery County at Docket Number 2016-0329, against B&B REGP, B&B FBI, B. Klein, D. Klein, R.

Bishop and C. Bishop, jointly and severally, in the amount of \$1,759,181.56 (the “Judgment”).

The Chapter 11 Bankruptcy, Plan and Disclosure Statement.

23. On May 23, 2016, B&B REGP filed a voluntary petition for relief under chapter 11 of the title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Middle District of Pennsylvania, at Case No. 5:16-bk-02183 RNO.

24. On June 6, 2016, B&B FBI filed its own voluntary chapter 11 petition which was docketed at Case No. 5:16-bk-02387 RNO.

25. On October 31, 2016, B&B REGP filed its proposed Chapter 11 Plan (D.I. No. 40) and Disclosure Statement (D.I. No. 41). No plan of reorganization or disclosure statement have been filed in B&B FBI’s chapter 11 case.

26. The Plan and Disclosure Statement classify claims against the Debtor as follows: Class 1- all Court-approved Super-Priority Claims (none at this time), designated as unimpaired; Class 2 - all Allowed Administrative Claims, designated as unimpaired; Class 3 - all Allowed Priority Claims, designated as impaired only as to the timing of payment; Class 4 - Secured Claims, including Newtek, with a secured claim of \$1,616,713.59 and a loan arrearage of \$98,883.49, and the Monroe County Tax Claim Bureau (“MCTCB”), with a secured claim of \$386,440.25, designated as impaired only as to the timing of payment; Class 5 - Interests; Class 6 - Unsecured Claims (none exist at this time); and Class 7 - Insider Claims.

27. With respect to the treatment of Class 4 Secured Claims, the Plan and Disclosure Statement provide that payment of these claims will begin 30 days after the 30th calendar day after an Order confirming the Plan becomes final (the “Effective Date”), with Newtek’s arrearage claim to be paid in full within 36 months of the Effective Date of the Plan, and the Tax

Claim Bureau's claim to be paid within 96 months of the Effective Date of the Plan.

28. Newtek objects to the adequacy of the information contained in the Disclosure Statement because its provisions concerning payment of Newtek's claim is ambiguous. It only provides for payment of all arrearages over 36 months, and does not make it clear whether the Debtor (as it should) will also be making the regular monthly payments to Newtek coming due under the Mortgage. Similarly, the Plan and Disclosure Statement do not indicate that the Debtor will remain current on its post-petition taxes real estate and school taxes as they are assessed against the Property. Without the Debtor's clear commitment to remain current on its post-petition mortgage and tax payments as they come due, the Plan is inherently infeasible, and there is no reason to approve the Disclosure Statement.

29. The Disclosure Statement contains inadequate information in that, although the Plan relies for its funding upon rent paid by its tenants, the Disclosure Statement provides that the Debtor's main tenant, B&B FBI, will begin stepping up its monthly rent payments to equal market rate. However, the Disclosure Statement fails to provide either B&B FBI's current rental rate, or the market rate to which it is to be adjusted.

30. The Plan and Disclosure Statement indicate that B&B FBI's stepped-up rental payments is what will be used to retire the secured claims of Newtek and the Tax Claim Bureau. However, the proposed rental step-up schedule is ambiguous, calling for a \$2,000 rent increase the first year, a \$3,000/month increase the second year, a \$4,000/month increase the third year, and a \$5,000/month increase the fourth year. Does that schedule indicate (a) *cumulative* annual increases in monthly rent due, i.e., rent at the current rate ("CR") plus \$2,000/month for the first year after the Effective Date; CR plus \$2,000 plus \$3,000/month for the second, for a \$5,000/month increase; CR plus \$2,000 plus \$3000 plus \$4,000/month for the third year, for a

\$9,000/month increase; \$2,000 plus \$3000 plus \$4,000 plus \$5,000/month, for the fourth year, for a \$14,000/month increase; or (b) *incremental increases*, so that rent payable will be CR plus \$2,000/month for the first year, CR plus \$3,000/month for the second year, CR plus \$4,000/month for the third year, and CR plus \$5,000/month for the fourth year?

31. Suggesting that it is the latter, i.e., only incremental increases of \$1,000/each year, the Plan and Disclosure Statement go on to provide that from the stepped up rental payments, B&B REGP will pay Newtek \$1,000/month against its arrears for the first year after the Effective Date, \$1,500/month the second year, and \$2,000/month the third year. Newtek objects to any requirement being imposed upon it by the Plan concerning the application of these payments, the Plan requiring same to be applied to arrears, and reserves the right to apply such payments to principal, interest, and/or expenses payments as permitted and/or required by the Loan Documents and/or applicable law and/or the U.S. Small Business Administration.

32. The Disclosure Statement also provides that B&B REGP will make the same payments to the Tax Claim Bureau the first through third years, followed by payments of \$5,000/month for the fourth through eighth year of the Plan.

33. The indicated arrearage payments to be paid to Newtek from stepped-up rentals from B&B FBI over the first three years of the Plan would total \$12,000 the first year, \$18,000 the second year, and \$24,000 the third year. The sum of these payments is only \$54,000, which is \$44,883.49 less than Newtek's arrearage claim as stated in the Disclosure Statement. This flies in the face of the Plan's commitment to pay Newtek's arrearage claim in full.

34. The Plan fails to provide that Newtek shall retain all of its liens against the Debtor's assets (and those of B&B FBI), until such time as Newtek has been fully repaid all sums presently due or to come due under the terms of the Loan Documents. See 11 U.S.C.

§1129(b)(2)(A)(i)(I). Absent such provision, Newtek will not accept the Plan.

35. The Plan provides, at Section 7, *inter alia*, that “Upon the Effective Date, the Confirmation Order shall operate to enjoin any action against the Debtor by the holder of any Pre-Confirmation Claim and shall also satisfy all claims and causes of action against the Debtor arising out of any claims settled and satisfied under the terms of the Plan.” Newtek is concerned that language may be asserted by the Debtor’s non-bankrupt co-obligors that their own obligations are discharged by operation of the Plan.

36. The discharge of debts under 11 U.S.C. §1141(d)(1) through a plan of reorganization is limited to debts of the debtor. As a general rule, §1141(d)(1) has no impact on any right to relief which creditors may have against persons who are not debtors and who are liable on the claim with the debtor. *See, e.g., Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 979 (1st Cir. 1995) (“Since the chapter 11 debtor is the only entity permanently discharged upon confirmation of a chapter 11 plan, . . . its creditors usually are free to pursue all available remedies against those undischarged entities which were obligated, along with the chapter 11 debtor, on a prepetition debt.”); *In re Zenith Elecs. Corp.*, 280 F.3d 203 (Bankr.D.Del. 1999) (disapproving plan provisions that effected releases of nondebtor parties).

37. A release of entities other than the debtor is improper as a plan provision, at least as it applies to non-consenting creditors, in the absence of evidence that such third-party releases are necessary to the success of the reorganization. *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203 (3d Cir. 2000) (invalidating as to nonconsenting creditors release of nondebtor officers and directors in confirmed and implemented plan that lacked “the hallmarks of permissible non-consensual releases – fairness, necessity to the reorganization, and specific factual findings to support these conclusions”).

38. In this case, the Plan and Disclosure Statement should make it clear that nothing is intended to affect or impair Newtek's remedies against its non-debtor obligors.

39. The Plan and Disclosure Statement do not provide for the disposition of property of the estate upon the Effective Date, that is, whether or not such property is to re-vest in the Debtor, or remain property of the estate.

40. The Disclosure Statement values the Debtor's real property at \$1,400,000.00, significantly less than the \$1,616,713.59 the Disclosure Statement indicates is owed to Newtek on its secured claim, particularly when the \$386,440.25 secured claim of the MCTCB is considered as priming Newtek's Mortgage. It is unclear whether the Plan and Disclosure Statement thereby seek to bifurcate Newtek's claim into its secured and unsecured components as an under-secured claim, in which case, there has been no provision made for payment of Newtek's unsecured claim. However, since full payment of Newtek's claim is proposed, it is may be that no such bifurcation is intended. Clarification as to bifurcation is in order, as is how such value was determined, affecting, as it will, any prospective deficiency claims Newtek may have against non-debtor parties.

41. Without resolving the foregoing objections and ambiguities, or establishing the likelihood of adequate plan funding through rent generated by B&B FBI's operations, it cannot be found that the Debtor's Disclosure Statement contains "adequate information" as is required under 11 U.S.C. §1125(a)(1), and approval thereof should be denied.

42. The Plan fails to provide for adequate means of its implementation, as required by 11 U.S.C. §1123(a)(5), in that it:

(a). fails to provide for adequate funding, in that the primary source of income is derived from rent payable by B&B FBI, which has not itself filed a plan and disclosure

statement, and cannot be assured to represent a viable and reliable source of income for the Debtor, so that the Plan cannot be found to be feasible;

(b). fails to provide for the Debtor's retention of all or any part of the property of its estate;

(c). fails to provide for adequate remedies should the Debtor default under the Plan, in which case, the automatic stay should be terminated on Newtek's filing of a Certificate of Default, and all creditors and other parties in interest should be authorized to move to dismiss or convert Debtor's case to one under chapter 7, and all such remedies should be clearly set forth in the Plan.

43. For the foregoing reasons, even if the Disclosure Statement were to be approved, Newtek will not accept the Plan.

44. To the extent that the Debtor proceeds to seek confirmation of the Plan pursuant to 11 U.S.C. §1129(b) of the Bankruptcy Code, and can establish its right to do so, the Plan should be modified to reflect that notwithstanding confirmation thereof, nothing contained therein will affect the liability of any other party obligated to Newtek with respect to its claims against the Debtor. Further, to the extent that it becomes necessary or appropriate for it to do so, Newtek reserves the right to exercise its right of election under 11 U.S.C. §1111(b).

45. Newtek reserves the right to amend or supplement these objections prior to or at the hearings on the Disclosure Statement and/or confirmation of the Plan.

IV. RELIEF REQUESTED

46. For the foregoing reasons, the Court should deny approval of the Disclosure Statement, and/or confirmation of the Plan.

WHEREFORE, for the foregoing reasons, Newtek Small Business Finance, LLC, Successor by Merger to Newtek Small Business Finance, Inc., respectfully requests that this Honorable Court enter an Order or Orders:

- (a). Sustaining the foregoing Objection;
- (b). Disapproving the Disclosure Statement; and
- (c). Denying confirmation of the Plan.

FURTHERMORE, Newtek Small Business Finance, LLC, Successor by Merger to Newtek Small Business Finance, Inc., requests that the Court grant such other and further relief as is just and proper under the circumstances.

Respectfully submitted,

The Chartwell Law Offices, LLP

Dated: Philadelphia, PA
December 5, 2016

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