

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

EASTERN OUTFITTERS, LLC, *et al.*,

Debtors.

Chapter 11

Case No. 17-10243 (LSS)

(Jointly Administered)

Objection Deadline: March 17, 2017

Hearing Date: March 22, 2017

Related to Docket No. 27 & 60

LIMITED OBJECTION BY LEVIN MANAGEMENT CORPORATION, AGENT FOR SOMERSET COUNTY SHOPPING CENTER TO DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 363, 364, 503 AND 507 (I) AUTHORIZING DEBTORS TO OBTAIN SECURED PROSTPETITION FINANCING, (II) AUTHORIZING USE OF CASH COLLATERAL, (III) GRANTING LIENS AND PROVIDING SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS, (IV) GRANTING ADEQUATE PROTECTION, (V) MODIFYING THE AUTOMATIC STAY, (VI) SCHEDULING A FINAL HEARING AND (VII) GRANTING RELATED RELIEF

Levin Management Corporation, as agent for Somerset County Shopping Center, a New Jersey partnership ("Landlord"), hereby files this limited objection to Debtors' Motion for Entry of Interim and Final Orders Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503 and 507, (I) Authorizing Debtors to Obtain Secured Postpetition Financing, (II) Authorizing Use of Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Status, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief [D.I. 27] (the "Financing Motion"), and respectfully represent as follows:

PRELIMINARY STATEMENT

1. Debtors should be required to pay Stub Rent and should not be permitted to conduct business outside of the ordinary course, including disruptive closing sales, for the benefit of the DIP and Prepetition Secured Lenders, without



Full and immediate payment of Stub Rent should be mandated otherwise 171024317031700000000002 LAUDIGUS WILL DE

deprived of its adequate protection rights, while the DIP and Prepetition Secured Lenders get to use leased premises for non-ordinary course sales for their benefit, while Landlord is forced into becoming an unsecured lender, funding Debtors' operations, including the store closing sales.

2. To the extent the Financing Motion is granted, the final order should require the immediate payment of Stub Rent and deny any requested waiver of protections afforded to Debtors pursuant to Sections 506(c) and 552 of the Bankruptcy Code.

BACKGROUND

3. On February 5, 2017 (the "Petition Date"), Debtors filed voluntary petitions under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") with this Court.

4. Upon information and belief, Debtors are operating their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. On or about April 25, 1999, Somerset and Eastern Mountain Sports, Inc. entered into a lease (the "Lease") for premises located in the Somerset County Shopping Center, 347 US Highway 202/206 South, Bridgewater, NJ 08807 (the "Premises").

6. The Lease was subsequently extended and modified twice on February 19, 2009 and July 22, 2013, respectively, through two (2) separate extensions and modifications (the "2009 Modification" and "2013 Modification").

7. On or about October 4, 2016, the Lease was assigned to Eastern Mountain Sports, LLC.

8. Levin Management Corporation is the authorized agent for Landlord.

9. As of the Petition Date, \$47,054.66 was due and owing in unpaid rent, plus any additional rent, charges, damages, interest, late fees, attorneys' fees and costs and unbilled reconciliation charges.

10. On February 7, 2017, Debtors filed the Financing Motion. The Court entered an interim order approving the Financing Motion (the “Interim Order”) [D.I. 60]. The Interim Order includes language limiting lien rights with respect to the Lease and access rights with respect to the Premises in the event of default (the “Landlord Protections”). *See* Interim Order, ¶ 5(a) at p. 20 and ¶ 25. The final hearing to consider the Financing Motion is scheduled for March 22, 2017.

11. A proposed final order approving the Financing Motion (the “Proposed Final Order”) has not been filed. Counsel for certain Landlords have been provided with a draft of the Proposed Final Order which apparently includes Landlord Protections. Landlord has not been provided with said draft and apparently, it has not yet been approved by the DIP Agent and the DIP Lenders. Landlord requests a copy of the same, immediately.

12. In exchange for the proposed post-petition financing and use of cash collateral, Debtors and the DIP and Prepetition Secured Parties agreed to a Budget, attached to the Interim Order, which, seemingly, did not provide for the payment of the rent owed to the Landlord for use of their property from February 5, 2017 through February 28, 2017 (the “Stub Rent”). Moreover, it appears that the Stub Rent was the only administrative expenses not provided for in the budget and that without DIP financing, the sale would not likely render Debtors’ estates administratively solvent. As such, Debtors and the lenders are using the Premises for their post-petition benefit, while Landlord is not budgeted for and/or paid in full its administrative claim.

13. While failing to provide for payment of Stub Rent, Debtors improperly seek to waive their protections provided for in sections 506(c) and 552(b) of the Bankruptcy Code, subverting protections which were enacted to prevent secured creditors from compelling other creditors to pay for the liquidation of collateral.

OBJECTIONS

14. Debtors' continuing use and occupancy of Landlord's Premises is critical to Debtors' sales process, including store closing sales. The use and occupancy of the Premises provides an actual, necessary, and ongoing benefit to Debtors, and the Court should require Debtors to pay Landlords the Stub Rent. Authorizing use of the Premises for the benefit of the DIP and Pre-petition Secured Lenders without payment of Stub Rent is not supported by applicable law.

15. Landlord should not be forced to bear the risk of administrative insolvency while all other parties in interest benefit from the ongoing sales process. The Court should require that payment be remitted to Landlord for post-petition rent for the use of the Premises for the benefit of the Prepetition Secured Lenders. *See e.g., In re ZB Company, Inc.*, 302 B.R. 316, 320 (Bankr. D. Del. 2003) (holding that rent should be paid to landlords on a per diem basis during the pre-rejection period in order to avoid the potential that the landlord could be left with an allowed administrative claim against an administratively insolvent estate).

16. Payment of Stub Rent is also warranted as adequate protection pursuant to Section 363(e) of the Bankruptcy Code. This provision of the Bankruptcy Code serves as a basis to grant adequate protection to real property lessors. *See, e.g., Matter of Cont'l Airlines, Inc.*, 154 B.R. 176, 180 (Bankr. D. Del. 1993) (finding that adequate protection is available under § 363(e) for a decrease in value due to the use, sale, *or lease* of an entity's interest in property) (emphasis added); *In re P.J. Clarke's Restaurant Corp.*, 265 B.R. 392, 404 (Bankr. S.D.N.Y. 2001) (providing that a "landlord's right to adequate protection seems to follow clearly from the language of Section 363(e)..."). Here, with the likely administrative insolvency of Debtors, landlords should not be compelled to allow use of their property, without payment of Stub Rent.

17. In addition to the foregoing, the Court may require payment of Stub Rent pursuant to Section 506(c) which authorizes a debtor to surcharge property that serves as collateral for a secured claim the "reasonable, necessary costs and expenses of preserving or disposing

of, such property to the extent of any benefit to the holder of such claim” 11 U.S.C. § 506(c). There is substantial authority “...which permits lessors to recover under Section 506(c) provided that the standards for recovery are met.” In re World Wines, Ltd., 77 B.R. 653, 658 (Bankr. N.D.Ill.1987). Such standards are that the services provided were necessary and beneficial to the lender. Visual Ind., Inc., 57 F.3d at 325.

18. Here, the DIP and Prepetition Secured Lenders are the primary beneficiaries of the post-petition sales at the Premises. As such payment should be made for such use of the Premises pursuant to Section 506(c).

19. Finally, the Court may authorize the immediate payment of Stub Rent as an administrative claim under Section 503(b). Section 365(d)(3) does not preclude the Court from ruling that Stub Rent is an administrative expense under Section 503(b)(1). *See In re Goody’s Family Clothing Inc.*, 610 F.3d 812, 816 – 819 (3rd. Cir. 2010); In re Garden Ridge Corp., 323 B.R. 136, 142-43 (Bankr. D. Del. 2005) (citing ZB Company Inc., 302 B.R. at 319 (landlords entitled to prorated rent from the Petition Date – despite the fact that the billing date occurred the day before the petition date).

20. Courts have discretion to determine the timing of payment of administrative claims, and may direct immediate payment of prorated, post-petition rent. *See, e.g., Garden Ridge Corp.*, 323 B.R. at 143 (citing HQ Global Holdings, Inc., 282 B.R. 169, 173 (Bankr. D. Del. 2002) (entering interim orders directing the full contract rent for February 2004 to each landlord); ZB Company, 302 B.R. at 320. “In determining the time of payment, courts consider prejudice to the debtor, hardship to the claimant, and potential detriment to other creditors.” *See Garden Ridge Corp.*, 323 B.R. at 143; see also HQ Global, 282 B.R. at 173.

21. Here, the prejudice to Debtors and other constituents is far outweighed by the hardship to Landlord. Unless Landlord is paid immediately for Stub Rent, it is left exposed to providing use and occupancy at the Premises cost-free, while Debtors and others reap the

benefits of the on-going sales. Other constituents are not being compelled to provide post-petition services or goods to Debtors' estates without payment and Landlords should not be forced to shoulder the burden of the on-going sales as an involuntary lender. *See In re Travel 2000, Inc.*, 264 B.R. 444 (Bankr. W.D. Mich. 2001) (finding that Congress and courts have determined that a landlord should receive the benefit of its bargain and be compensated for being compelled to continue providing a debtor with a critical service).

**JOINDER IN OBJECTIONS RAISED BY OTHER
LANDLORDS AND RESERVATION OF RIGHTS**

22. To the extent consistent with the objections expressed herein, Landlord also joins in the objections of other shopping center lessors and other to this Motion. Further, Landlord reserves all rights to make further and or future objections as they are identified.

WHEREFORE, for the foregoing reasons, Levin Management Corporation as agent for Somerset County Shopping Center, a New Jersey partnership respectfully requests the relief set forth above, and such other and further relief as this Court deems just and proper.

Respectfully submitted,

Dated: March 17, 2017

By: /s/ John R. Weaver, Jr.
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