

IT IS SO ORDERED.

Dated: 04:37 PM October 29 2009



**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:) CASE NO. 09-53635
)
INVESTMENT C&R CO. LLC,) CHAPTER 11
)
DEBTOR.) JUDGE MARILYN SHEA-STONUM
)
) OPINION ON ORDER GRANTING MOTION
) FOR AUTHORITY TO OBTAIN CREDIT
) UNDER SECTION 364(d) [DOCKET #38]

This matter is before the Court on the Debtor’s Motion for Authority to Obtain Credit Under Section 364(d) [docket #38] (“Motion”) filed by Investment C&R Co. LLC (“C&R” or “Debtor”) and an objection [docket #42] filed by The Home Savings & Loan Company of Youngstown Ohio (“Home Savings”). The party that has agreed to provide the financing is an affiliate of the Debtor, K. Hovnanian Developments of Ohio, Inc. (“Lender”). Appearing at the hearing on these matters, held on October 8 and 13, 2009, were Howard Mentzer and John Mygrant, counsel for C&R; Suzana Koch (10/8) and Brodie Butland (10/13), counsel for Huntington Bank; R.J. Budway counsel for First Federal of Lorain; and Amanda Banner, counsel for Home Savings.

This proceeding arises in a case referred to this Court by the Standing Order of Reference

entered in this District on July 16, 1984. It is determined to be a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (D) and (K), over which this Court has jurisdiction pursuant to 28 U.S.C. §1334. Based upon the arguments of counsel and testimony provided at the previous hearings and the pleadings on file, the Court makes the following findings of fact and conclusions of law.

I. BACKGROUND FACTS

1. C&R, and an affiliated company, Ontario Land Company (“Ontario”), each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code on August 16, 2009 (the “Petition Date”). The cases of C&R and Ontario are being separately administrated; however, the two cases overlap in certain aspects.¹

2. C&R owns a residential subdivision known as Herrington Place. Ontario owns, among other properties, residential subdivisions known as Arlington Place and Windsor Point. Home Savings financed the purchase of the raw land that is being developed into Herrington Place and Arlington Place. Huntington Bank (“Huntington”) financed the purchase of Windsor Point raw land. The assets of the Debtor and Ontario include real estate parcels which are raw land and contract rights and other assets unique to real estate holdings.²

3. C&R and Ontario are engaged in the business of subdividing raw land into residential real estate lots and installing infrastructure improvements on those lots. Upon developing the lots at issue in the present cases, C&R and Ontario will sell the improved lots to an affiliated developer,

¹ Due to the overlapping nature of the financing that the Debtor and Ontario are seeking, as necessary the facts in this opinion discuss properties owned by each debtor.

² The planned residential developments discussed herein are not the only properties that Debtor and Ontario own, but are the only three subject to the proposed DIP Financing from Lender. Ontario owns a variety of other subdivisions, either with no mortgage on those properties or mortgages obtained through other lenders. It is not unusual for a business in this field to obtain financing from numerous lenders.

the Lender, when the developer has an end purchaser.

4. The Debtor's ownership of Herrington Place is subject to the senior lien of Home Savings. Ontario's ownership of Arlington Place and Windsor Point are subject to the senior liens of Home Savings and Huntington, respectively.

5. The outstanding balance owing to Home Savings and secured by a first lien on Herrington Place is \$2,175,000.00. The outstanding balance owing to Home Savings and secured by a first lien on Arlington Place is \$2,940,817.91. The outstanding balance owing to Huntington and secured by a first lien on Windsor Point is \$1,105,900.03.

6. C&R seeks to obtain debtor-in-possession financing ("DIP Financing") from the Lender, in order to develop the infrastructure on 55 residential lots, consisting of approximately 20 acres, out of the total of approximately 84 acres, in Herrington Place. Ontario seeks to Obtain DIP Financing from Lender to develop 12 lots in Arlington Place and 20 lots in Windsor Point.

7. The amount that C&R and Ontario seek to borrow from Lender for the infrastructure improvements is \$2,175,000.00, allocated as follows: \$1,330,000.00 to develop the 20 acres in Herrington Place, \$457,000.00 to develop Arlington Place, and \$388,500.00 to develop Windsor Point. The financing approved by Lender is a packaged deal that includes all three subdivisions and contains a provision specifying the notes on Windsor Point and Arlington Place will be cross defaulted.

8. As a condition to the DIP Financing, the Lender requires that it be granted a priming lien to the extent of the real estate that is improved using the funds that Lender advances for the infrastructure improvements to Herrington Place, Arlington Place and Windsor Point.

9. Home Savings will continue to have a first lien on the portions of Herrington Place

and Arlington Place that are not subject to the DIP Financing and a second lien on the lots that have been improved with the DIP Financing proceeds. Huntington will continue to have a first lien on the portions of Windsor Point that are not subject to the DIP Financing and a second lien on the lots that have been improved with the DIP Financing proceeds.

10. Home Savings objected to the DIP Financing, arguing that Home Savings' interests in both Herrington Place and Arlington Place are not adequately protected. Huntington has not objected to Lender taking a priming lien for the monies advanced for infrastructure improvements on the land within Windsor Point.

11. As a condition of its authorization to the Debtor to go forward with the DIP Financing, insofar as the properties on which Home Savings has first liens, this Court requires that the lien rights of the Lender will not spring immediately upon the Debtor and Ontario entering into the DIP Financing agreements, but will attach incrementally as Debtor and Ontario make infrastructure improvements. Because Huntington did not oppose the DIP Financing, this Court does not require the priming lien to attach incrementally to the infrastructure improvements that Ontario makes to the lots in Windsor Point.

12. The Motion, as originally submitted, contained a cross-default provision between Herrington Place, Arlington Place and Windsor Point. In light of Home Savings' objection, this Court found that a cross-default provision was inappropriate when the provision applied to two separate debtors. As noted above, the Debtor adjusted the relief sought in the Motion, and accordingly the terms of the Motion were changed to reflect that the DIP Financing was cross defaulted only on the notes of Arlington Place and Windsor Point.

II. DISCUSSION

The Debtor seeks authority to proceed with the DIP Financing pursuant to Section 364(d) of the Bankruptcy Code. Section 364(d) provides that

(1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if--

(A) the trustee is unable to obtain such credit otherwise; and

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

(2) In a hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

For the reasons that follow, this Court finds that C&R has met the requirements to obtain DIP Financing from the Lender.

A. C&R is Unable to Obtain Such Credit Otherwise

This Court is authorized, after notice and a hearing, to permit a debtor in possession to obtain credit secured by a lien on encumbered property that is senior or equal to any existing lien on the property. 11 U.S.C. § 364(d)(1). There is little guidance as to the quantity or quality of evidence that a debtor must provide in establishing an inability to obtain alternate financing as a required by § 364(d)(1)(A). *Suntrust Bank v. Den-Mark Constr., Inc.*, 406 B.R. 683, 693 (Bankr. E.D.N.C. 2009). A debtor's testimony alone may be sufficient to satisfy this requirement. *Id.*, (citing *In re Antico Mfg. Co.*, 31 B.R. 103, 105 (Bankr. E.D.N.Y. 1983)). Mr. Oster, a manager of C&R, testified that C&R was unable to obtain alternative financing without providing the new creditor superpriority status. This Court finds the testimony of Mr. Oster credible, especially when considered in the context of

current economic conditions.

B. Home Savings' Interests are Adequately Protected

Home Savings argues that it will not be adequately protected if this Court grants Lender a priming lien to the extent of the \$1,330,000.00 necessary for C&R to make the infrastructure improvements on the 55 lots in Herrington Place. This argument is not well taken. “Adequate protection” is a flexible standard that must be evaluated by the court on a case-by-case basis. *See* 11 U.S.C. § 361. *See also, e.g., Lend Lease, a Div. of Nat'l Car Rental Systems, Inc. v. Briggs Trans. Co. (In re Briggs Trans. Co.)*, 780 F.2d 1339, 1348 (8th Cir. 1985). Though cash payments and replacement liens are its more common forms, the definition of “adequate protection” allows a court to fashion relief that will result in the realization of the indubitable equivalent of an entity’s interest in property. 11 U.S.C. § 361(3).

In the present case, the Court finds that the 55 lots will increase in value as a result of the infrastructure improvements that C&R will make. While courts have held that continued construction based on projections and improvements to the property does not alone constitute adequate protection, *Resolution Trust Corp. V. Swedeland Dev. Group (In re Swedeland Dev. Group, Inc.)*, 16 F.3d 552, 556 (3rd Cir. 1994) (citing *Town of Westport v. Inn at Longshore*, 32 Bankr. 942, 946 (Bankr. D. Conn. 1983)), this Court believes that, in the present case, such continued construction will provided Home Savings with adequate protection. Improved land is more valuable than raw land. Mr. Rossi, Home Savings’ expert witness, acknowledged this fact in his valuations of the currently improved lots as compared to the raw acreage in Herrington Place. Further, Mr. Rossi offered a hypothetical

scenario in which the 20 acres in Herrington Place would increase nearly 25% in net present value³ upon C&R improving such land. Finally, this Court believes that as roads and developed infrastructure are brought to the edges of the land in Herrington Place that will remain undeveloped, that undeveloped land will increase in value because of the extension of infrastructure to what was previously land-locked property. Based on the foregoing, this Court finds that the improvements to the 20 acres in Herrington Place will increase the value of the land and, therefore, provide Home Savings with adequate protection.

III. CONCLUSION

Based upon the foregoing the Court finds that C&R's Motion for Authority to Obtain Credit Under Section 364(d) is well taken and such motion is hereby GRANTED as follows: with respect to Herrington Place, the priming lien will be incrementally effective, and will only be valid to the extent of infrastructure improvements that C&R has actually made. This Court believes that this modification is permissible under Chapter 11 of the Bankruptcy Code.

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cc (*via* electronic mail):

AMANDA BANNER, Counsel for The Home Savings & Loan Company of Youngstown Ohio
SUZANA KOCH, Counsel for Huntington Bank
HOWARD E MENTZER, Counsel for Debtor
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³ Mr. Rossi valued the approximately 84 acres of raw land at \$30,000 per acre. He then offered a figure which valued the 20 acres that were split off to develop Phase II of Herrington Place at \$760,000 (\$37,000 per acre) once developed.