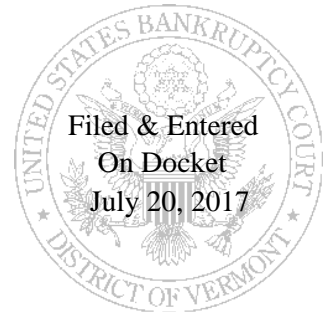


**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

In re:

**David Goodrich Properties, LLC,
Debtor.**

**Chapter 11
Case # 16-11465**



ORDER

**ON DEBTOR'S MOTION TO CONTINUE CONFIRMATION HEARING AND PRESENT 2ND AMENDED PLAN
AND FIRST MORTGAGEE'S MOTION FOR RELIEF FROM STAY**

The salient legal issue before the Court is whether this small business debtor should have additional time to present an amended and confirmable plan. The governing Bankruptcy Code provides, in pertinent part, as follows:

§ 1121 Who may file a plan

(e) In a small business case—

- (1) only the debtor may file a plan until after 180 days after the date of the order for relief, unless that period is—
 - (A) extended as provided by this subsection, after notice and a hearing; or
 - (B) the court, for cause, orders otherwise;
- (2) the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief; and
- (3) the time periods specified in paragraphs (1) and (2), and the time fixed in section 1129(e) within which the plan shall be confirmed, may be extended only if—
 - (A) the debtor, after providing notice to parties in interest (including the United States trustee), demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time;
 - (B) a new deadline is imposed at the time the extension is granted; and
 - (C) the order extending time is signed before the existing deadline has expired.

§1129 Confirmation of plan

- (e) In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).

11 U.S.C. §§ 1121(e), 1129(e) (2017).

David Goodrich Properties, LLC (the “Debtor”) filed for Chapter 11 relief on November 1, 2016, as a “small business” debtor. At the case management conference held on January 13, 2017 (at which the Debtor’s principal, the Debtor’s attorney, the U.S. Trustee, and representatives for the two mortgage creditors appeared), the Debtor represented it intended to file a plan and disclosure statement by May 1, 2017, i.e., by the expiration of the Debtor’s exclusive period for filing a plan under § 1121(e)(1). On January 17, 2017, the Court entered an order (doc. # 25) that included the Debtor’s intention to file the disclosure statement and plan by May 1, 2017, and the Debtor did so (docs. ## 35, 36). The hearing on the disclosure statement and plan was set for June 21, 2017.

On June 1, 2017, the Debtor filed a motion (doc. # 42) to postpone the confirmation hearing and allow the debtor until June 28 to file an amended plan. In support of that relief, the Debtor asserted the feasibility of the plan was dependent on zoning regulations in the Town of Milton, the Town had under review new zoning regulations that would permit the Debtor to both develop his property and propose a viable plan, and the Town would not make a determination of whether to enact the new zoning regulations until June 21. Upon consent of the U.S. Trustee and the two mortgage creditors, the Court entered an Order on June 5, 2017 (doc. # 45), which *inter alia* (i) directed the Debtor to file an amended plan and disclosure statement by June 28, and to file any objections to claim or necessary adversary proceeding by July 12; (ii) set a July 12 deadline for objections to the disclosure statement and plan; and (iii) set a continued confirmation hearing on July 19. Once again, the debtor met its obligation by filing the amended plan and disclosure statement on June 28 (docs. ## 48, 49). Thereafter, the Debtor filed a notice of evidentiary hearing on July 19.

On July 3, 2017, Hubert McCormick filed a motion for relief from stay against the subject Milton property (doc. # 51), and set it for hearing on July 19. On July 12, the U.S. Trustee and Mr. McCormick both filed objections (docs. ## 64, 67) to the first amended plan and disclosure statement. On July 16, the Debtor filed a motion (doc. # 72) to continue the July 19 confirmation hearing (and the other hearings set for that date) until a date in August, and to allow the Debtor until July 31 to file a second amended plan and a second amended disclosure statement. The U.S. Trustee and Mr. McCormick objected (docs. ##74, 76, 79). The Court set a hearing on the Debtor’s motion to continue, primarily to determine whether the Debtor should be granted additional time to file a further amended plan and disclosure statement.

Over the course of the afternoon, the parties presented legal arguments, and the Debtor presented testimony from Jacob Hemmerick, Sam Ruggiano, and the debtor's principal, David Goodrich. The testimony focused primarily on the status of the current zoning regulations in the Town of Milton, the feasibility of Mr. Goodrich's ideas and options for development of the subject property, and the timetable for obtaining the necessary approvals and participants in the project. Both the U.S. Trustee and counsel for Mr. McCormick cross-examined the witnesses. All three witnesses were credible and knowledgeable about the subject matter on which they offered evidence. At the close of the hearing, the Court advised the parties it would take the matter under advisement and issue an order (either in writing or orally) within 24 hours.

The Court has considered the entire record in this case, including the flurry of documents that was filed during the three days leading up to the July 19 hearing (docs. ## 72-89), as well as the Debtor's post-hearing statement and June 2017 operating report, later on July 19 (docs. ## 91, 92).

Decision

The Debtor's motion to continue presents a close call. As the Assistant U.S. Trustee astutely observed, it is rare to have the question of a chapter 11 case's viability determined in the context of a motion to continue, as is the situation now before the Court. The U.S. Trustee and creditors object to allowing the Debtor any additional time to file a confirmable plan, on the grounds that (1) the Debtor was already given an extension to file a confirmable plan and failed to do so; and (2) the Debtor's post-petition payment of \$21,000 to City Feed and Lumber Company (a/k/a Sticks & Stuff), the Debtor's apparent commingling of its finances with those Mr. Goodrich and his other businesses, and the extent to which the Debtor has access to the cash necessary to move forward with the development project intended to fund the plan, all raise significant questions of feasibility. The Debtor, on the other hand, argues (1) the feasibility of its plan was contingent upon the Town of Milton's decision to enact the zoning regulations, and the timing of that process was beyond the Debtor's control; (2) now that the zoning regulations have been preliminarily approved, these regulations make it highly probable the Debtor will be able to successfully complete his proposed development plan; and (3) it will be able to file a confirmable amended plan with more time and is willing to provide extensive protection to the objecting secured creditors in exchange for the additional time.

In balancing these conflicting positions, the Court finds the Debtor has met its burden of proof – even if just barely. It has shown by a preponderance of evidence that it is more likely than not that the court will confirm a plan within a reasonable amount of time. See In re AMAP Sales & Collision, Inc.,

flexibility to modify their plans pursuant to Section 1127, as circumstances of the dynamic chapter 11 process allow or dictate. Further, while this Court agrees that a small business debtor and counsel must move expeditiously, **circumstances outside the control of the debtor and counsel can, as is occurring in this case, make adherence to the unextended deadlines extremely difficult or even impossible.**” *See id.* (emphasis added).

At the hearing, the U.S. Trustee argued zealously that the Court should deny the Debtor’s motion, and essentially end this reorganization case, in the name of protecting the integrity of the bankruptcy system. This argument has merit and may well have prevailed if the Debtor were not proposing such clear and tight timeframes for its own performance going forward, providing extraordinary protections for secured creditors, and consenting to automatic relief from stay in the event it does not meet the performance targets. Moreover – and importantly – the Debtor’s proposed deadline of July 31, 2017 for the filing of a second amended plan is well before the statutory deadline of August 28, 2017, *i.e.*, the 300th day after the filing of the petition, under § 1121(e)(2).

With respect to Mr. McCormick’s motion for relief from stay, the Court finds there is not cause for unconditional relief from stay at this time, but there is cause for the granting of conditional relief from stay. It is undisputed that the Debtor did not fully comply with its obligations to Mr. McCormick under the Adequate Protection Order (doc. # 30), but it cured those defaults and was current on its adequate protection payments as of July 19, 2017. Additionally, the Debtor has committed to make all future adequate protection payments to Mr. McCormick on time, to pay him \$40,000 by July 28, 2017, to pay the McCormick mortgage debt in full one year prior to its maturity date, and to pay him all net proceeds from the sale of the “back parcel” currently under contract for sale – and to consent to relief from stay if it fails to fully and timely comply with any of these terms. Requiring the Debtor to fulfill these commitments as a condition of keeping the stay in place, and granting the creditor automatic relief from stay if the Debtor fails to do so, strikes a fair balance between the Debtor’s need for additional time to reorganize and the creditor’s right to adequate protection of its interest.

Based upon these findings and considerations, the totality of the circumstances presented by the record in this case, and the evidence and arguments presented on July 19, 2017,

IT IS HEREBY ORDERED that

1. The motion for relief from stay is **CONDITIONALLY GRANTED** such that the stay imposed by 11 U.S.C. § 362 will lift immediately, and without further hearing, if Mr. McCormick files an affidavit saying the Debtor has failed to meet any of the following requirements and the Debtor


affidavit are factually inaccurate:

- a. the Debtor shall make adequate protection payments of \$2,015.63 per month on or by the 20th day of each month,
 - b. the Debtor shall pay Mr. McCormick \$40,000 by July 28, 2017,
 - c. if the pending contract for sale of the back lot property is consummated, then by December 31, 2017, the Debtor shall pay all net proceeds from that sale to Mr. McCormick promptly thereafter, and
 - d. regardless of whether the subject Milton property is developed or the pending contract closes, the Debtor shall pay the full amount due to Mr. McCormick by October 31, 2018 (i.e., one year before its maturity date), with the amount due to be determined through stipulation or adjudication of the pending adversary proceeding.
2. The Debtor's motion to continue the confirmation hearing to a date in August, and allow the Debtor until July 31, 2017 to file a second amended plan and a second amended disclosure statement is GRANTED on condition that the Debtor comply with the following obligations and deadlines:
- a. deliver a copy of its 2016 tax return and June Operating Report to the U.S. Trustee by July 21, 2017;
 - b. make all adequate protection payments pursuant to the Adequate Protection Order (doc. # 30) on time;
 - c. file a proposed fully executed contract with an engineer, with application for retention and court approval, by July 24, 2017;
 - d. file proof that the buyer for the sale of the back lot has removed the contract contingencies promptly upon receipt, and include the status of the sale on monthly operating reports;
 - e. file a second amended plan, second amended disclosure statement, and any necessary motions relating to confirmation, by July 31, 2017; and
 - f. be prepared to proceed with a confirmation at a hearing to be held on August 30, 2017 at 9:30 a.m. at the U.S. Bankruptcy Court in Burlington, Vermont.

IT IS FURTHER ORDERED that the Debtor's failure to comply with any of the requirements set forth in this Order may constitute cause for dismissal of this case.

SO ORDERED.

July 20, 2017
Burlington, Vermont



Colleen A. Brown
United States Bankruptcy Judge