

UNITED STATE BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH DAKOTA

In re:)
) Case No. 11-40680
) Chapter 11
SCOTT OLSON DIGGING, INC.,)
TAX ID/EIN: 46-0429319)
) MOTION TO DISMISS
) AND FOR ALTERNATIVE RELIEF
Debtor.)
)

American Bank & Trust, a secured creditor and party in interest herein, moves the Court for its Order dismissing the above-captioned Chapter 11 case upon the grounds and reasons stated herein, and, in the event the Court denies the Motion to Dismiss, American Bank & Trust pleads in the alternative for relief from the automatic stay or for adequate protection.

1. American Bank & Trust (the "Bank") is a bank formed under the laws of the state of South Dakota having a place of business in Huron, South Dakota

2. Debtor Scott Olson Digging, Inc. ("Debtor") filed for relief under 11 U.S.C. Chapter 11 on or about August 19, 2011.

3. Debtor is a contractor specializing in substantial earthwork and excavation services for large construction projects.

4. Debtor's line of business requires substantial earthmoving equipment and the ability to bid and perform significant excavation projects.

5. In order to finance its operations, Debtor executed six promissory notes in favor of the Bank over the course of several years and the total outstanding indebtedness due and owing the Bank as of August 19, 2011, was the total sum of \$2,566,635.24 (the "Debt").

6. As security for the Debt, Debtor made in favor of, executed, and delivered to the Bank Commercial Security Agreements dated April 8, 2004, and December 31, 2008 (the "Security Agreements") granting the Bank a blanket security interest in all personal property

assets of the Debtor including, but not limited to, the Debtor's earthmoving equipment, accounts receivable, and titled vehicles.

7. The Bank perfected and gave notice of its security interest in all personal property assets of the Debtor by filing a UCC-1 financing statement with the South Dakota Secretary of State's office and noting its name upon multiple Certificates of Title issued by the State of South Dakota.

8. Moreover, the Bank is a secured creditor of Debtor's principal owner Scott D. Olson and his wife Lori A. Olson, who are identified as co-debtors in Debtor's Chapter 11 Voluntary Petition. Scott D. Olson and Lori A. Olson (the "Olsons") executed personal Guaranties of all of the obligations owed by Debtor to the Bank (the "Guaranties"), and pledged their personal and real property assets to secure payment of the Guaranties.

9. The Bank has also extended credit to the Olsons personally.

10. In the Security Agreements, the Debtor granted the Bank a security interest in all of the personal property assets of Debtor, including the following general categories of collateral:

Accounts and other rights to payment, inventory, equipment, instruments, and chattel paper, general intangibles, documents, farm products and supplies, government payments and programs, investment property, and deposit accounts.

11. Additionally, the following-described motor vehicles of Debtor have been pledged to the Bank as security for the Debt:

2006 International 7000 Series Truck; VIN 1HTWNAZT66J380577
2005 Peterbilt Truck; VIN 2NPLLD0X35M888321
2002 International 4400 Truck; VIN 1HSMKADN72H531568
2000 Peterbilt Truck; VIN 1NPFXBTX1YD499124
1999 Peterbilt Truck; VIN 1XP5D69X1XD471119
1999 Peterbilt Truck; VIN 1XP5D69X7XD472694
1998 International 4700 Truck; VIN 1HTSCAAM8WH520953
1991 Chevrolet Truck; VIN 1GBG6H1J7MJ105058
1989 International F9300 Truck; VIN 2HSFEGUR2KC022789

2008 GMC Sierra Pickup; VIN 3GTEK13M08G145728
2007 Chevrolet Silverado Pickup; VIN 1GCHK33647F537878
2006 GMC Truck; VIN 1GDE5E1276F400725
2000 Ford F25 Pickup; VIN 1FTNF21F7YED49982
1998 Chevrolet Pickup; VIN 1GBJK34R4WF009514
1990 Stou Van 48; VIN 1DW1A482XLS628729
1985 Rave Flatbed; VIN 1R1F3482XEE840276
1982 Utility Van; VIN 1UYVS2509CU818121
2001 homemade 8X18 Trailer; VIN 0368970
1996 Dako Trailer; VIN 1DA12TN15TP012318
1996 Dako Trailer; VIN 1DA12TN12TP012308
1994 homemade 9X23 Trailer; VIN 346234
1990 homemade 8X22 Trailer; VIN 326771
1999 Trailing trailer; VIN 1TKJ05139XM047596
1998 SMC0 Dolly Trailer; VIN 1S9TD163XWL476053
2008 Sidedump; VIN 1S9DS353X8S819699
2008 Sidedump; VIN 1S9DS35368S819702
1999 SMC0 Sidedump; VIN 1S9SS423XXL476564
1998 Smit 42 Dump Trailer; VIN 1S9SS3534WL476435
1998 Smit 42 Dump Trailer; VIN 1S9SS3536WL476436.

12. The Bank is Debtor's primary secured creditor and by far the Debtor's largest overall creditor.

13. In or about 2009, Debtor claimed a mechanic's lien on a large excavation project that it performed for Northern Beef Packers Limited Partnership (the "Northern Beef Project"). The mechanic's lien claimed by Debtor totaled the sum of \$2,114,975.49, which is itemized as an account receivable in Debtor's Schedules (the "Mechanic's Lien").

14. The Debtor commenced litigation seeking foreclosure of its Mechanic's Lien, and expended nearly \$200,000 in legal fees prior to the commencement of the Bankruptcy seeking to enforce its claim.

15. Any proceeds that result from Debtor's enforcement of its Mechanic's Lien claim would have been subject to the Bank's above-described security interest.

16. Debtor's owner, Scott D. Olson, testified at the meeting of creditors that the Debtor did not operate in 2010, and therefore no income was generated last year.

17. Debtor's owner, Scott D. Olson, also testified that Debtor had substandard operations in 2009 due to the Northern Beef Project.

18. Over a two year period, the Bank repeatedly extended the maturity date for several of the promissory notes evidencing the Debt based, in part, on the Debtor's hope of successfully litigating its foreclosure action on the Mechanic's Lien. Notwithstanding funding these extensions, all six promissory notes evidencing the Debt matured on July 23, 2010.

19. Debtor has failed to make any payments to the Bank on the Debt for over fifteen months and, additionally, Debtor has not made a voluntary principal payment on the Debt in either 2010 or 2011 to date. The principal balance of one of the Debtor's Notes was reduced by \$20,000 in October, 2010, following the Debtor's sale of equipment collateral.

20. After attempting to negotiate extensively with the Debtor, on May 19, 2011, the Bank commenced an action against the Debtor and the Olsons in the Third Judicial Circuit of the State of South Dakota, Beadle County, captioned *American Bank & Trust v. Scott Olson Digging, Inc. et al.*, Case No. 11-230, seeking judgment upon the Debt and foreclosure of the personal and real property security interests granted by Debtor and the Olsons.

21. After the Olsons and the Debtor filed answers in the state court action, the Bank filed a Motion for Summary Judgment and Default Judgment dated August 1, 2011. A hearing on the Motion was set for hearing on August 22, 2011. The Debtor never filed a response to the Motion for Summary Judgment. Instead, the Debtor filed its Petition commencing this case on August 19, 2011, staying the lawsuit.

22. According to the Debtor, Debtor received a payment for excavation work in the approximate sum of \$112,345.01 on August 19, 2011, the date Debtor filed for bankruptcy. Despite the Bank's perfected and valid security interest in Debtor's accounts receivable, Debtor

failed to deposit this payment in its account maintained at the Bank, and Debtor did not otherwise surrender the proceeds of this cash collateral to the Bank.

23. Debtor's owner, Scott D. Olson, testified at the meeting of creditors that the Debtor used the funds post-petition for operating and material expenses. The Bank did not consent to this use of its cash collateral. Further, Debtor failed to itemize this sum as an asset in the Debtor's Schedules.

24. Shortly after the commencement of this case, the Bank demanded that the Debtor provide adequate protection for its continued use of the Bank's collateral. The Bank also advised the Debtor that it had not consented to any use of its cash collateral. Despite such demands, the Debtor apparently, so far as can be determined by the Bank, has brazenly utilized cash collateral for purposes unknown and failed to make any offer of adequate protection. Debtor's counsel has advised, and the Bank's officers have confirmed, that the Debtor is actively utilizing the Bank's equipment collateral in connection with two current excavation subcontracts in the Huron area. Upon information and belief, Debtor has used, and continues to use, the Bank's cash collateral to pay its employees, fuel its equipment, and generally maintain its operations.

25. Further, Debtor has failed and refused, despite request therefore, to provide a budget or forecast of its projected income and expenses or a complete accounting for the funds expended post-petition in connection with the two projects. Debtor has also failed to commence fully utilizing the debtor-in-possession accounts it established at the Bank.

26. The Bank has demanded information regarding Debtor's current outstanding contracts for work to be performed in the scope of its business. Debtor's counsel advised and presented documentation for two current subcontracts, and one future subcontract, entered into

by Debtor. The Debtor apparently believes it can simply continue utilizing the Bank's equipment collateral and cash collateral without compensation or accounting to the Bank.

27. Upon information and belief, creditor American Contractors Indemnity Company's claim arises out of projects the Debtor performed for the City of Lennox and the City of Tea, where the Debtor failed to pay subcontractors, resulting in claims on the Debtor's bond.

28. Upon information and belief, the Debtor's breach of the bond on the Lennox and Tea Projects has resulted in the Debtor being unable to bid on certain larger excavation projects where general contractors must be bonded.

29. Based on Debtor's inability to obtain performance bonds, Debtor is unable to bid larger contracts necessary to allow the Debtor to reorganize successfully and service the substantial secured debt owed to the Bank.

30. Based on the foregoing, Debtor's current business model is unsustainable.

DISMISSAL

31. Based on the foregoing the Bank requests that this case be dismissed for cause pursuant to 11 U.S.C. § 1112(b).

32. Cause exists for the dismissal of this case based upon the substantial and continuing loss to or diminution of the estate based upon the Debtor's continued utilization of the Bank's equipment collateral and the absence of a reasonable likelihood of rehabilitation given the substantial amount of the Debt and the Debtor's inability to engage in sufficiently substantial excavation projects to service the indebtedness, all as provided under 11 U.S.C. § 1112(b)(4)(A).

33. Cause further exists for the dismissal of this case pursuant to 11 U.S.C. § 1112(b)(4)(B) due to the Debtor's gross mismanagement of the estate through its complete

failure to recognize the requirements of the Bankruptcy Code and Debtor's duties to secured creditors.

34. Cause further exists for the dismissal of this case pursuant to 11 U.S.C. § 1112(b)(4)(D) due to the Debtor's unauthorized use of the Bank's cash collateral.

RELIEF FROM AUTOMATIC STAY

35. In the event the Court does not dismiss Debtor's case on the above grounds, the Bank pleads in the alternative for relief from stay to allow it to pursue its state court action to recover and liquidate the collateral securing the Debt pursuant to 11 U.S.C. § 362(d)(1) for cause since the Debtor has failed to make the payments due and owing to the Bank and has otherwise failed and refused to adequately protect the Bank's interests in its collateral.

36. The Bank further requests that this Court's Order specifically waive the fourteen (14)-day stay under Bankruptcy Rule 4001(a)(3).

ADEQUATE PROTECTION

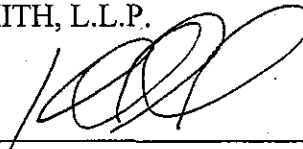
37. In the event the Court does not dismiss this action or grant the Bank relief from the automatic stay, the Bank pleads in the alternative for the Court's Order granting the Bank appropriate adequate protection of its interest in the above-described collateral in an amount determined by the Court.

WHEREFORE, movant prays that the Court will enter its Order of Dismissal pursuant to 11 U.S.C. § 1112(b); or in the alternative, the Bank prays that the Court will enter its order granting the Bank relief from stay to exercise its rights and remedies under the contracts with Debtor and non-bankruptcy law with respect to the collateral; or in the final alternative, for an award of adequate protection in favor of the Bank in an amount to be determined by the Court;

and that the Court will grant such other, further and different relief as it may deem just, proper and equitable in the premises.

Dated at Sioux Falls, South Dakota, this 4th day of October, 2011.

DAVENPORT, EVANS, HURWITZ &
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