

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK

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In re:

Chapter 11  
Case No. 22-20151 (PRW)

EAST/ALEXANDER HOLDINGS, LLC,

Debtor.

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**DECLARATION IN SUPPORT OF MOTION  
FOR RELIEF FROM THE AUTOMATIC STAY  
PURSUANT TO 11 U.S.C. §362(d)(1) and (2)**

RICHARD MARSHALL declares pursuant to 28 U.S.C. §1746 under penalty of perjury as follows:

1. I am Director of Special Assets for M360 Advisors, LLC. M360 Community Development Fund, LLC ("M360") is a wholly-owned subsidiary of MCREIF SubREIT, LLC. M360 Advisors, LLC is manager of MCREIFF SubREIT, LLC and oversees loans issued by both MCREIF SubREIT, LLC and M360. I have been assigned to manage the Loan by M360 to the Debtor. As such I have personal knowledge of the matters set forth in this Declaration.

2. I make this Declaration in support of the instant motion by Secured Creditor M360 for relief from the automatic stay pursuant to 11 U.S.C. §362(d)(1) for "cause" including bad faith and the lack of adequate protection of M360's interest in the Debtor's property, and pursuant to 11 U.S.C. §362(d)(2) since the Debtor has no equity in the subject property and it is not necessary to an effective reorganization.

3. The Debtor, East/Alexander Holdings, LLC, filed its Chapter 11 case on April 1, 2022 as Single Asset Real Estate pursuant to 11 U.S.C. §101(51)(B) as set forth in its Voluntary Petition.

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4. The Debtor's Emergency Motion for use of Cash Collateral (ECF Doc. No. 9) states that Debtor owns and operates three (3) residential/commercial buildings and associated parking lots situated at East Avenue in Rochester, New York, known as the "Sibley Building," the "Fitch Building," and the "Valley Building" (the "Properties"), which include associated parking lot parcels. I understand that the Debtor has no employees, but, rather, engages a management firm (owned by an insider) to operate the Properties.

5. M360 is the sole mortgage-holder with respect to the Properties.

6. On or about July 29, 2019, M360 provided a loan to the Debtor in the maximum principal amount of \$13,200,000.00 ("the Loan") for renovation and development of the Debtor's Properties. The Loan is evidenced by the following loan documents (collectively, the "Loan Documents"):

- (a) Loan and Security Agreement dated as of July 29, 2019 as amended by an Addendum to Loan and Security Agreement dated July 31, 2019 (the "Loan Agreement"). A copy of the Loan and Security Agreement is annexed hereto as **Exhibit A**.
- (b) Consolidated Amended and Restated Note dated July 29, 2019 (the "Note") A copy of the Note is annexed hereto as **Exhibit B**.
- (c) Mortgage Consolidation, Extension and Modification Agreement dated July 29, 2019, attached to which is the Mortgage, Assignment of Leases and Rents, Fixture Filings and Security Agreement dated July 29, 2019 (the "Mortgage"). A copy of the mortgage is annexed hereto as **Exhibit C**.
- (d) Collateral Security Agreement dated July 29, 2019 ("Security Agreement");

(e) Environmental Indemnity Agreement and other ancillary agreements relating to the Loan.

7. The Loan was initially funded in the amount of \$12,405,374.00 with additional advancements thereafter. As of the date of the filing of a Foreclosure action on February 16, 2021, the amount funded was \$13,066,044.85.

8. The Note provides for interest only payments until the maturity date of August 1, 2022 at which time the Debtor, as Borrower, is required to make a Balloon Payment covering the full amount of the Principal, any unpaid interest, and any additional amounts due pursuant to the Loan Documents.

9. The Loan Agreement set an Initial Interest Rate and Floor Rate of 7.625% and a default interest rate of 12% from the date of default.

10. The Debtor defaulted when it failed to timely make a Loan payment due September 1, 2019. That payment was not made until October 10, 2019. The October 1, 2019 payment was not made until November 7, 2019. The payments due on December 1, 2019, January 1, 2020 and February 1, 2020 were funded in whole or in part from a Debt Service Holdback account which started with an initial balance of \$200,000 and thereafter was fully depleted.

11. M360 and the Debtor entered into a Forbearance Agreement on May 1, 2020 which acknowledged the existing indebtedness, the validity of the Loan Documents and confirmed that Debtor had no defense or claims against M360. A copy of the Forbearance Agreement is annexed hereto as **Exhibit D**.

12. The forbearance period ended July 31, 2020 and Debtor immediately defaulted again, failing to make payments due August 1, 2020, September 1, 2020 and October 1, 2020. It

made a payment of \$83,008 on October 20, 2020, which was applied to the past missed payments. Debtor thereafter missed payments from November 1, 2020 to the present.

13. Due to the Debtor's continuing defaults, M360 filed a foreclosure action in Supreme Court, Monroe County under Index Number E2021001389 on February 16, 2021 (the "Foreclosure Action"). Because of the Governor's Moratorium on foreclosures, no further action could be taken to pursue the foreclosure; however during the period of the Governor's Moratorium on foreclosures, M360 and the Debtor agreed to a "Supervisory Receiver" on April 20, 2021 as permitted by the Loan Documents.

14. Once the Moratorium was lifted, M360 filed an Amended Complaint for foreclosure on October 21, 2021. Thereafter, M360 moved by Order to Show Cause for the appointment of a Receiver in the Foreclosure Action. The Debtor did not oppose M360's motion, and Wendy Dworkin ("Receiver") was appointed as receiver of the Debtor's Property by Order dated January 18, 2022 and entered January 20, 2022 ("Receivership Order").

15. The Debtor failed to comply with the Receivership Order in any meaningful way and, as a consequence, the Supreme Court entered an Order to Show Cause on March 8, 2022, at the request of the Receiver, to hold the Debtor in contempt for, among other things (a) refusing to provide access to the buildings; (b) refusing to turn over rents paid by tenants; (c) refusing to account for revenue from parking lots; (d) refusing to provide rent rolls and documentation of rent receipts; (e) refusing to provide documentation for the parking lot operator; and (f) documentation of a below market lease of certain units to the brother of the owner who, in turn, has been renting those units through "Airbnb" at \$80 per night.

16. The contempt motion was returnable on April 12, 2022 (Wendy Dworkin Affidavit, ECF Doc. No. 40-1 (¶29), but the Debtor filed its Chapter 11 case on April 1, 2022, just before the

hearing was to be held, to avoid the finding of contempt, to avoid being compelled to comply with the state court Receivership Order, and to delay the Foreclosure Action.

17. M360 had each of the buildings appraised on an "as is" basis and a "prospective value once the property is stabilized." The following are the valuations:

<b>Building:</b>	<b>As Is Value:</b>	<b>As Stabilized Value:</b>
Fitch Building	\$2,570,000 as of 8/1/21	\$2,930,000 as of 8/1/22
Sibley Building	\$3,530,000 as of 7/16/21	\$3,640,000 as of 7/16/22
The Valley Building	<u>\$2,450,000</u> as of 8/1/21	<u>\$3,300,000</u> as of 8/1/23
<b>Totals</b>	<b>\$8,550,000</b>	<b>\$9,870,000</b>

18. Copies of the appraisals are annexed hereto as **Exhibits E, F and G.**

19. As of March 31, 2022 the amount due M360 under the Note and the Loan Agreement is \$16,897,551.61 (the "M360 Debt"), exclusive of attorney's fees and costs. Following is a breakdown of the M360 Debt:

Principal	\$13,066,044.85
Interest	\$2,109,753.80
Default Interest	\$ 971,787.09
Late charges	\$109,638.01
Taxes paid	\$481,525.41
Receiver funding operation shortfalls	<u>\$28,146.00</u>
<b>Total</b>	<b>\$16,897,551.61</b>

20. As these figures demonstrate, M360 is greatly under collateralized, and the Debtor has no equity.

21. In its Voluntary Petition List of 20 Largest Creditors, the Debtor scheduled M360 as having an unsecured deficiency claim of \$8,751,906. The aggregate of other unsecured

creditors scheduled on the List of 20 Largest Creditors and Schedule E/F for unsecured claims is approximately \$275,000. Thus, M360 holds by far the largest unsecured claim.

22. The Debtor is also incapable of paying even the monthly debt service to M360. (The monthly interest only debt service at the non-default rate is \$85,791.29). In its Emergency Motion for use of cash collateral, the Debtor states that it must have access to approximately \$70,000 in cash collateral each month for ordinary course of business operating expenses. Its budget, annexed to its Emergency Cash Collateral Motion, includes no payment for debt service but a substantial amount for management fees to insiders. Though it projects a net income of \$67,000 per month, it proposes "adequate protection" payments to M360 of only \$35,000 for the months of April, May and June and then an increased amount "equal to the contract rate of interest on the value of the Secured Creditor's interest commencing July 1, 2022."

23. As noted in the calculation of indebtedness owed to M360, the Secured Creditor advanced from its own pocket the sum of \$481,525.41 for past due real estate taxes. Thus, Debtor's pre-petition cash flow was insufficient to meet that critical obligation.

24. The Debtor failed to make mortgage payments to M360 for almost a year and a half prior to filing its Bankruptcy Petition and failed to pay real estate taxes due to the County and the City of almost half a million dollars necessitating M360 to make that advance to protect its lien. Further, the Debtor withheld rents and revenues collected from the Properties as well as critical documentation from the Court-appointed Receiver, necessitating the Receiver to seek contempt sanctions against Debtor, after which this Chapter 11 case was filed on the eve of the contempt sanctions hearing.

25. Thus, M360 moves for relief from the automatic stay pursuant to Section 362(d)(1) for "cause" including bad faith, as this is essentially a two party dispute, the Debtor filed its petition

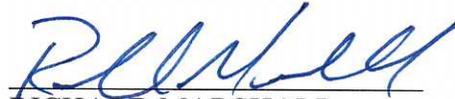
on the eve of the hearing for contempt sanctions and to avoid the state court Foreclosure Action and the effect of the Receivership Order in such action, and because the Debtor has no employees and has little or no cash flow to meet necessary expenses. M360 also moves for relief from the automatic stay pursuant to Section 362(d)(1) for "cause" including lack of adequate protection, because the cash flow from the Properties is insufficient and can barely cover its operating expenses. In addition, the Debtor has failed to make its required mortgage payments for twenty months and has failed to pay its real property taxes, thus the Debtor is clearly unable to provide adequate protection.

26. M360 also moves for relief from the automatic stay pursuant to Section 362(d)(2). There is no question that the Debtor lacks any equity in the Properties, and even its own Bankruptcy pleadings admits an equity shortfall of over \$8.0 million. The Debtor is not capable of an "effective" reorganization because of its insufficient cash flow and because M360, as the largest unsecured creditor, will not support any plan of reorganization. Thus, any proposed plan will never be effective and confirmable. Moreover, Debtor cannot sell the Property under 11 U.S.C. §363(f) since M360 will not consent.

27. M360 thus requests leave to continue its pending foreclosure action in the state courts.

28. I declare that the foregoing is true and correct under penalty of perjury.

[Signature Page to Richard Marshall Declaration]

  
RICHARD MARSHALL

Dated: April 22, 2022