

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF PENNSYLVANIA**

IN RE:	:	Chapter 11
	:	
BRITH SHOLOM WINIT, LP,	:	Case No.: 23-12309-amc
	:	
Debtor	:	

**PHILADELPHIA GAS WORKS’ OBJECTION TO DEBTOR’S MOTION FOR
AUTHORITY TO (I) OBTAIN POST-PETITION FINANCING PURSUANT
TO 11 U.S.C. § 364; (II) GRANT LIENS AND SUPERPRIORITY CLAIMS TO
THE LENDER PURSUANT TO 11 U.S.C. § 364; AND
(III) MODIFY THE AUTOMATIC STAY**

Philadelphia Gas Works (“PGW”), by and through undersigned counsel, hereby file this objection (“Objection”) to the motion of debtor, Brith Sholom Winit, LP (“Debtor”) seeking authority to obtain post-petition financing and grant liens and superpriority claims to the same lender under 11 U.S.C. § 364, and to modify the automatic stay (“Motion”) [Docket No. 56]. In support of the Objection, PGW respectfully states and avers as follows:

1. On August 1, 2023, (“Petition Date”), Debtor commenced this bankruptcy proceeding by filing a Chapter 11 Voluntary Petition.
2. Debtor owns real property located at 3939 Conshohocken Avenue (“Service Address”) and operates a large rental apartment complex thereon as a Debtor in Possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.
3. PGW is a collection of real and personal property owned by the City of Philadelphia and is operated and managed by the Philadelphia Facilities Management Corporation, a non-profit Pennsylvania corporation, pursuant to an Agreement with the City of Philadelphia dated December 29, 1972, as amended.

4. PGW has provided, and continues to provide, Debtor, at the Service Address, with both pre-petition and post-petition utility services in the form of natural gas.
5. As of October 6, 2023, Debtor owes PGW the following in unpaid gas charges and liens:
 - a. Lien in the amount of \$51,568.00 docketed on January 11, 2023 with the Philadelphia County Court of Common Pleas, Docket No. 230130020;
 - b. Lien in the amount of \$199,491.79 docketed on July 7, 2022 with the Philadelphia County Court of Common Pleas, Docket No. 220730020;
 - c. Pre-petition debt of \$158,094.92; and
 - d. Post-petition debt of \$6,287.51.*

TOTAL: \$415,442.22.

*Based on Debtor's historical gas usage, Debtor's monthly gas bills will increase significantly in the upcoming winter months.

6. Debtor's last payment to PGW on its account was a partial payment in the amount of \$56,201.67 on January 10, 2022.
7. During the thirty (30) day period running from the Voluntary Petition filing date, Debtor did not reach out to PGW to arrange for any adequate assurances of payment for Debtor's use of post-petition gas service¹.
8. By letter dated September 21, 2023 to Debtor, PGW demanded a deposit of \$90,000, based on Debtor's highest winter utility bill of \$30,100.54, for adequate assurances of payment.
9. To date, neither the Debtor nor the U.S. Trustee has provided PGW with any adequate assurances of payment on the Debtor's post-petition gas service in accordance with 11 U.S.C. § 366(c).

¹ On October 11, 2023, Debtor's counsel returned undersigned counsel's call and began a discussion regarding adequate assurances.

10. To date, Debtor has not remitted, to PGW, any payments on its monthly post-petition gas bill(s).
11. On October 5 and 6, 2023, PGW issued and served thirty-seven (37) day termination notices (“37 Day Notices”) at the Service Address pursuant to 66 Pa.C.S. §§ 1523-1525.
12. On September 22, 2023, Debtor filed the instant Motion, alleging an inability to obtain adequate credit, either unsecured or secured, under Sections 503(b)(1), 364(c)(1), 364(c)(2), and 364(c)(3) of the Bankruptcy Code. In the Motion, Debtor seeks leave of Court, pursuant to 11 U.S.C. §§ 364(c) and (d), to enter into an Insurance Premium Financing Agreement (“Financing Agreement”) with FIRST Insurance Funding, a Division of Lake Forest Bank & Trust Company, N.A. (“Financier”) for the purposes of acquiring commercial property and general liability insurance coverage and to give Financier a secured interest in the Collateral, with a superpriority administrative expense claim. *See* Debtor’s Motion [Docket No. 56].
13. The Court utilizes a three-prong test to determine if a debtor in possession should be permitted to obtain post-petition financing under Section 364(c): (1) debtor is unable to obtain unsecured credit or credit without superpriority status; (2) the financing is necessary to preserve the assets of the estate; and (3) the terms of the proposed financing are fair, reasonable, and adequate upon consideration of the circumstances of the debtor and proposed lender. *See In re Aqua Assocs.*, 123 B.R. 192, 195-196 (Bankr. E.D. Pa. 1991); *In re Crouse Group, Inc.*, 71 B.R. 544, 549-550 (Bankr. E.D. Pa. 1987). With respect to the first prong, Debtor must demonstrate that reasonable efforts, albeit

- unsuccessful, were made to obtain unsecured credit under Sections 364(a) or (b). *See In re Ames Department Stores, Inc.*, 115 B.R. 34 (Bankr. S.D.N.Y. 1990).
14. PGW objects to Debtor's Motion as Debtor has failed to meet all three prongs of its burden of proof for obtaining the requested post-petition financing.
15. With respect to the first and third requirements, Debtor's Motion is silent on the factual details supporting its conclusory statements that its "insurance broker surveyed various entities to secure the best financing available for the Debtor", and "the terms of the Financing Agreement are fair, reasonable, and adequate" which will "benefit all parties in interest". *See* Debtor's Motion, para. 17-18; 23-24. Debtor fails to identify both the "various entities" contacted by the insurance broker and any proposed financing terms which may have been available to Debtor and/or considered by Debtor. Debtor fails to compare those potential financing terms to the specific terms Debtor desires to accept, and fails to describe how or why the terms offered by Financer, a proposed secured lender, are "the most favorable and flexible." *See* Debtor's Motion, para. 19. *See Crouse*, 71 B.R. at 550 (debtor's post-petition financing motion denied where, *inter alia*, debtor only contacted one lender for financing).
16. Moreover, Debtor fails to describe how PGW and other secured creditors are adequately protected should Debtor's Motion be granted. Where debtor is unable to obtain unsecured credit, debtor may obtain credit secured by a senior or equal lien on the estate's property that is already subject to a lien (i.e. "priming" of liens), provided the secured creditor's interest is adequately protected. *See* 11 U.S.C. § 364(d); *Ames*, 115 B.R. 40-41.

17. Sufficient “adequate protection” is determined by reviewing the facts and circumstances as a whole. *See Aqua Assoc.*, 123 B.R. 196-197. “Adequate protection” may consist of periodic cash payments or replacement or additional liens where such use of causes the secured creditor to suffer a decrease in the value of its interest in the property or such other relief the Court deems appropriate. *See* 11 U.S.C. § 361; *The Resolution Trust Corp. V. Swedeland Development Group, Inc. (In re Swedeland Development Group, Inc.)*, 16 F.3d 552, 564 (3rd Cir. 1994).
18. In the instant matter, PGW is not adequately protected should Debtor’s Motion be granted. Debtor desires to use its cash and rental income for payments to a new, post-petition lender and to give this lender a superpriority claim, all while Debtor has not paid PGW any adequate assurances and for post-petition gas service. PGW’s administrative expense claim would be diluted by the newcomer, Financer’s superpriority claim.
19. PGW is further harmed by Debtor’s proposed use of its cash and rental income to pay Financier because PGW has claim to the rental income, now that PGW is proceeding with termination of gas service based on unpaid post-petition debt. PGW issued and served the required 37 Day Notices. The Debtor’s tenants have the right to act on their own behalf in order to prevent termination of the utility service. *See* 66 Pa.C.S. §§ 1521-1528. The tenants are allowed to contact PGW, pay a deposit in “an amount equal to the bill for the affected account of the landlord ratepayer for the billing month preceding the notice to the tenants,” and pay all subsequent utility bills in full. 66 Pa.C.S. § 1527(a) and (b).

20. Debtor's tenants have the statutory right to recover the amount of their utility payments from the Debtor by either "deducting the amount from any rent or payment on account of taxes or operating expenses then or thereafter due from the tenant to the [Debtor] or by obtaining reimbursement from the [Debtor]." 66 Pa.C.S. § 1529.
- Where tenants continue to pay Debtor the full amount of rent and Debtor, in turn, uses that rental income to pay Financer instead, Debtor has not paid PGW for post-petition gas service. PGW is harmed because PGW has provided (and continues to provide) a benefit to Debtor, all while not receiving any compensation from Debtor.
21. In the event the tenants deduct their utility payments from their rent, Debtor receives a reduced rental income and such a reduced rental income may not be sufficient to qualify for the proposed financing of the insurance premiums. Thus, Debtor is unable to meet the second prong of its burden – to show that the financing is necessary to preserve the assets of the estate.
22. Debtor has failed to meet its burden of demonstrating that it is entitled to post-petition financing. Debtor's Motion must be denied.

WHEREFORE, the Philadelphia Gas Works respectfully requests that this Court deny Debtor's Motion for Authority to (I) Obtain Post-Petition Financing Pursuant to 11 U.S.C. § 364; (II) Grant Liens and Superpriority Claims to the Lender Pursuant to 11 U.S.C. § 364; and (III) Modify the Automatic Stay and enter such other relief the Court deems just and appropriate.

PHILADELPHIA GAS WORKS

Dated: Oct. 11, 2023

By: /s/Anita J. Murray
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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2023, I caused the foregoing Philadelphia Gas Works' Objection to Debtor's Motion for Authority to (I) Obtain Post-Petition Financing Pursuant to 11 U.S.C. § 364; (II) Grant Liens and Superpriority Claims to the Lender Pursuant to 11 U.S.C. § 364; and (III) Modify the Automatic Stay to be filed and served electronically via the C/M ECF System upon all counsel of record.

Dated: Oct. 11, 2023

By: /s/Anita J. Murray
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ORDER

AND NOW, on this _____ day of October, 2023, upon consideration of debtor, Brith Sholom Winit, LP's ("Debtor") Motion for Authority to (I) Obtain Post-Petition Financing Pursuant to 11 U.S.C. § 364; (II) Grant Liens and Superpriority Claims to the Lender Pursuant to 11 U.S.C. § 364; and (III) Modify the Automatic Stay and the Objection filed by Philadelphia Gas Works, it is hereby ORDERED that Debtor's Motion is DENIED.

BY THE COURT:

By: _____
The Honorable Ashely M. Chan
United State Bankruptcy Judge