UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Return Date:
April 1, 2015 at 10:00 a.m.

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In re:

Chapter 11

HS 45 JOHN LLC,

Case No. 15-10368 (SHL)

Debtor.

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DEBTOR'S OPPOSITION TO THE MOTION OF THE LENDER FOR RELIEF FROM THE AUTOMATIC STAY

HS 45 John LLC (the "Debtor"), as and for its Opposition to the motion of SDF81 45 John Street 1 LLC and SDF81 45 John Street 2 LLC (collectively the "Lender") for relief from the automatic stay, represents and shows this Court as follows:

THE BASIS FOR THE CHAPTER 11 FILING

1. The purported simplicity of the lift stay motion belies a complicated fact pattern involving a number of divergent claims relating to the Debtor's stalled contract of sale (the "Contract") to purchase the real property at 45 John Street, New York, NY (the "Property") from 45 John Lofts LLC (the "Seller") for a combined purchase price of $65.9 million.

2. The Debtor filed its Chapter 11 petition in the wake of Seller's wrongful refusal to conclude a transaction which functionally closed when the Debtor assumed possession of the Property and tendered the bulk of the cash portion of the purchase price upon execution of the Contract last September. As a result, the final aspects of the closing should have been a formality, but the Seller improperly refused to move forward wrongfully sensing the opportunity for a better deal.

3. Thereafter, the Seller's true colors came to light amidst growing issues over the conduct of the Seller's lead principals, Chaim Miller ("Miller") and his professed silent partner Sam Sprei "(Sprei"), in misusing the initial payment of $14.33 million tendered by the Debtor.

As argued throughout this Opposition, the Lender is a central player in this controversy, and its role and relationship with Miller and Sprei cannot be divorced from the myriad of issues now plaguing the Property.

4. Given the conflicting claims, Chapter 11 offers the most viable opportunity to salvage the underlying sale transaction, which is spinning out of control under the weight of potentially crippling mortgage interest accruals. The existence of the interest accruals was unknown to the Debtor at the time the Contract was executed due to misrepresentations made by the Seller regarding the status of the mortgage debt. Pursuant to Section 7.1.12 of the Contract, the Seller represented and warranted that the mortgages were current and not subject to any defaults. Contrary to these representations and warranties, it is now claimed that the mortgages have been in default since July 1, 2014, and the Lender is seeking default interest at the exorbitant rate of 24% per annum. [1]

5. The overarching goal of the Chapter 11 case continues to be the utilization of the Bankruptcy Court's powers to expedite the final aspects of the closing, while addressing all competing claims in a fair, prompt and unified manner. With this goal in mind, the Debtor promptly commenced an adversary proceeding (Adv. Pro. No. 15-0166) (the "Adversary Proceeding") seeking, *inter alia*, specific performance of the Contract and a declaratory judgment that the Contract is a valid and enforceable agreement, was properly executed and authorized, and should be enforced according to its terms.

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[1] While the Lender contends that it allegedly accelerated the loan, no notice of acceleration is attached as an exhibit to the lift-stay motion. The Debtor only first received purported declarations of default on or about February 27, 2015, copies of which are annexed hereto as Exhibit "A". Having been issued after the Chapter 11 filing, they are not effective, and may even constitute a violation of the automatic stay. *See*, 11 U.S.C. § 362(a)(5) and (6). Moreover, the delay of almost eight months in issuing default letters is symptomatic that the Lender is not operating at arm's length.

6. The Seller, together with Miller and Sprei, as well as the Seller's investors as potential adverse claimants, have all been named in the Adversary Proceeding. A copy of the adversary complaint (without exhibits) is attached hereto as Exhibit "B".

7. To give further impetus to the Adversary Proceeding, the Debtor removed the main pre-petition litigation involving disgruntled investors, so that their claims can be consolidated and heard in connection with the Adversary Proceeding.

8. The Adversary Complaint includes important allegations regarding the conduct of the Lender which, among other things, is alleged to have confirmed prior to execution of the Contract to the Debtor's representatives, that the mortgages were current, only to subsequently disavow these statements, after the Lender refused to cooperate with the Debtor in obtaining current information about payments due under the mortgages in preparation of the final aspects of the closing.

9. In view of the forgoing, the Chapter 11 case is complicated enough without adding the spectre of a foreclosure action to the mix. Allowing the Lender to proceed with a foreclosure in the State Court will invariably make a final conclusion of the transaction that much more difficult to achieve and the Lender is not entitled to escape the scrutiny of the Bankruptcy Court.

10. At this stage, the Lender is not prejudiced by maintaining the automatic stay since its alleged secured claims can be addressed during the bankruptcy case. Other than pointing to the fact that the mortgages are allegedly in default, the motion offers no justification as to why a foreclosure action needs to be commenced immediately.

11. Substantively, the motion is premised on a badly flawed legal analysis, which mischaracterizes the Debtor as a mere nominal party in a foreclosure. This assertion is simply

wrong as a matter of law, and ignores that the Debtor retains important vested rights in the Property by virtue of its status as vendee-in-possession. As discussed below, the Debtor's possession of the Property pending a closing pursuant to a recorded contract of sale, confers an equitable ownership interest as a vendee-in-possession, even though the Debtor is not yet the fee owner or a direct borrower. This equitable ownership interest is indeed protected in bankruptcy because the Debtor retains the common law right to redeem the mortgages.

12. For purposes of bankruptcy, the ability to redeem the mortgages in turn confers upon the Debtor standing to object to the Lender's entitlement to all aspects of its claim including interest or default interest, or to seek equitable subordination thereof. Additionally, the Lender may also be subject to defenses of equitable estoppel based upon its conduct, which will figure prominently into the final amounts that could be recovered.

13. Under any circumstances, the Lender's efforts to collect post-petition pendency interest at a default rate of 24% remains subject to a number of equitable considerations under 11 U.S.C. §506(b). Indeed, just to request pendency interest at 24% raises obvious concerns that the rate is a penalty that should not be enforced in bankruptcy by a court of equity. *See* In re Vest Associates, 217 B.R. 696, 702 (Bankr. S.D.N.Y. 1998) ["[t]he presumption [of validity] may be rebutted if the rate is significantly higher without any justification offered for the spread or where the default rate appears inordinately high in relation to the non-default rate."]. *See also,* In re Bownetree, LLC 2009 WL 2226107 (Bankr. E.D.N.Y. 2009); In re Liberty Warehouse Assoc. L.P., 220 B.R. 546, 552 (Bankr. S.D.N.Y. 1998).

14. In sum, it is a gross oversimplification for the Lender to ignore the Debtor's state law property rights arising out of its status as a vendee-in-possession, particularly since the

Lender never once denies that it had prior knowledge of the Contract or consented to the Contract's recording, and to the Debtor going into possession pending a closing.

15. For all of the reasons stated herein, a more sensible approach is to maintain the automatic stay, and thereby preserve the *status quo,* until the Adversary Proceeding is resolved, at which point the curious, if not incestuous, relationship between the Lender and the Seller's lead principals, Miller and Sprei, can be fully vetted.

THE MULTI-FACETED RELATIONSHIP BETWEEN MADISON REALTY AND MILLER AND SPREI

16. The Lender is an affiliate of Madison Realty Capital ("Madison Realty") whose involvement with Miller and Sprei goes well beyond this transaction. It is widely acknowledged that Miller and Sprei have a long-standing business relationship with Madison Realty and have been involved in other real estate transactions.

17. For example, just a few short weeks ago on March 5, 2015, it was reported that Madison Realty paid Miller and his partners $45 million for a 215,000 square-foot building located at 29 Ryerson Street in Brooklyn, New York in what trade reports described as an "off-market" transaction. A search of the public record indicates that less than two years ago Miller and his partners purchased the property at 29 Ryerson Street for $26.35 million, and received a $10 million mortgage from Madison Realty, then resold the property to Madison Realty for a handsome profit. A copy of the article relating to the sale of this property, appearing in the Real Deal, is annexed hereto as Exhibit "C". Also included as part of Exhibit "C" is a copy of the

recorded contract of sale between a Madison affiliate, RH Realty LLC, as purchaser and 11-45 Ryerson Holdings LLC as seller.[2]

18. That Madison Realty is apparently doling out millions of dollars to Miller at the same time he is allegedly also in arrears of the mortgages raises obvious concerns that the alleged defaults here may have been orchestrated.

19. Nor is 29 Ryerson Street the only other transaction between Miller and Madison Realty. For example, the public record also indicates that in late 2013, a Miller controlled entity named 3112 Emmons Lofts LLC purchased the remaining 49 units at the 79-unit condominium known as the Breakers at Sheepshead Bay, at 3112 Emmons Avenue, Brooklyn, New York from Madison Realty Capital for $24.5 million, as noted in additional published reports and corresponding deed collectively annexed hereto as Exhibit "D".

20. A further example of the on-going relationship is found in the Memorandum of Contract for the purchase of an apartment building located at 97 Grand Avenue, Brooklyn, NY, which was signed by Miller on behalf of the purchasing company, 97 Grand Ave BK LLC, and filed on December 24, 2014 through ACRIS by the purchaser's attorney, Kriss & Feuerstein LLP, the Lender's counsel on the instant motion. A copy of the Memorandum of Contract is annexed hereto as Exhibit "E".

THE LENDER IS INVOLVED IN THE SELLER'S MISREPRESENTATIONS TO THE DEBTOR

21. Based upon these interrelationship, the Lender may well have been in control of the sale transaction from the outset. According to the public record, the Seller's ownership of the

[2] It is interesting to note that Chun Peter Dong, Miller's and Sprei's current nemesis, purchased a 25% interest in 11-45 Ryerson Holdings LLC from Miller in May, 2014, as documented in the Transfer Agreement which is also included as part of Exhibit "C".

Property is of recent vintage. The Seller was only first formed on February 21, 2014 to coincide with a settlement of a prior foreclosure action involving the Property commenced in New York Supreme Court in the matter of Bayerische Landesbank v. 45 John Street LLC (Index No. 108832/2009). A copy of the New York State Division of Corporations website relating to the organization of 45 John Street LLC is annexed hereto as Exhibit "F".

22. It further appears from the Court docket that the foreclosure action was settled on or about March 5, 2014, when a stipulation of discontinuance was executed and filed by the parties to that action, a copy of which is annexed hereto as Exhibit "G".

23. Interestingly, the Lender's current counsel pressing the instant motion, Kriss & Feuerstein LLP, is also listed on the March 7, 2014 deed to the Seller, 45 John Lofts LLC (the purported Miller/Sprei entity), as the mailing address for the Seller. A copy of this deed is annexed hereto as Exhibit "H".

24. Kriss & Feuerstein's presence on behalf of the Seller with respect to its acquisition of the Property raises the distinct possibility that Madison Realty, through one of its affiliates, financed the settlement of the foreclosure action under a transaction in which title to the Property was transferred to the Seller (perhaps at the direction of Madison Realty, or acting in concert with Miller & Sprei), and current mortgages against the Property were actually issued to fund the settlement. Thus, Madison Realty may have used the Seller as a conduit to hold title to the Property pending a resale of the Property for their mutual benefit.

25. The parties' relationship is further evidence by the declaration of Brian Shatz submitted in support of the Motion. Mr. Shatz discloses that by April 18, 2014, the Seller had already defaulted on its March 4, 2014 $4.5 million loan. Yet the Lender did not send a Notice

of Default until February 27, 2015 (*See* Exhibit "A"), two days after its counsel filed its Notice of Appearance in this case (ECF #5).

26. While all of the facts need to be explored (including the Lender's actions in connection with the Contract), it suffices to say that the links between Madison Realty and Miller and Sprei not only give reason for the Court to deny the motion to lift the stay, but may ultimately form the basis to deny any entitlement to the payment of interest, default or otherwise under doctrines relating to re-characterization of debt in bankruptcy, alter ego, and equitable subordination. Whether Madison Realty recruited Miller and Sprei or vice versa, it is clear that they were working in tandem in the acquisition of the Property last March, and likely continued to work in tandem in connection with the subsequent resale of the Property to the Debtor in September.

27. At a minimum, the relationship between Madison Realty and Miller and Sprei warrants discovery under Bankruptcy Rule 2004 and the Federal Rules of Civil Procedure to ascertain whether and to what extent Madison Realty had knowledge or was complicit in the Seller's misrepresentations regarding the status of the mortgage debt.

ADEQUATE PROTECTION CAN BE PROVIDED TO THE LENDER

28. The Lender also ignores that the Debtor is holding an interest reserve of $1.1 million, which can be utilized to provide adequate protection as necessary, although the Lender has offered no evidence that its collateral position is diminishing in value. This assessment cannot be made until we have a clear sense as to the final amount of the Lender's allowed claim after due inquiry.

29. As with most real estate related bankruptcy cases, adequate protection is the proper initial response to a foreclosing creditor's motion to lift the automatic stay. Adequate

protection serves the dual purpose of providing the Debtor with a reasonable opportunity to launch a reorganization, while also protecting the Lender against actual diminution in the value of the underlying collateral. There is no reason why a fair and balanced adequate protection program cannot be implemented in this case as an initial solution to the lift-stay motion.

30. However, the Debtor should not be put in the unenviable position of being forced to defend against a foreclosure claim occasioned by the Seller's misrepresentations and defaults. The Seller's resistance to a closing makes no logical sense unless Miller and Sprei are disingenuously attempting to utilize the mortgage default as a pretext to attempt to nullify the transaction. As devious as that may sound, such an agenda could involve the Lender, which is even more reason to deny the lift-stay motion.

ARGUMENT

THE MOTION TO LIFT THE AUTOMATIC STAY SHOULD BE DENIED

I. The Debtor has far greater rights in the Property than a nominal party

31. The entire lift-stay motion is premised on the false notion that the Debtor is merely a nominal party for purposes of foreclosure. The Lender does not cite any authority for this dubious contention, which is inconsistent with New York law concerning the rights of a vendee-in-possession, a distinction that is completely lost on the Lender.

32. As a vendee-in-possession, the Debtor has important legal and equitable rights to assume the Contract under Section 365 of the Bankruptcy Code and close the sale, as well as the right to redeem the mortgages. See, e.g., Bean v. Walker, 464 N.Y.S.2d 895, 897 (4th Dep't 1983) ("The vendee in possession, for all practical purposes, is the owner of the property with all the rights of an owner subject only to the terms of the contract"); Lippe v. The Genlyte Group, Inc., 2002 WL 531010, *4 (S.D.N.Y. 2002) ("Upon the execution of a contract for the sale of

land, however, the purchaser acquires equitable title to the property"); Polish National Alliance of Brooklyn, U.S.A. v. White Eagle Hall Company, Inc., 98 A.D.2d 400, 404-405, 470 N.Y.S.2d 642, 647 (2nd Dept. 1983); County Trust Co. v. Edmil Construction Corp., 203 Misc. 208, 212, 114 N.Y.S.2d. 520, 523 (Sup. Ct. Queens Co. 1952) ("from time immemorial it has been the settled law that a vendee in possession was considered as the equitable owner."). As the Court of Appeals explained in Carthage T.P. Mills v. Village of Carthage, "[t]he existence of the outstanding contract, possession by the vendees and improvements made by them, made them 'purchasers and owners,' as held by the referee." Carthage T.P. Mills v. Village of Carthage, 200 N.Y. 1, 9, 93 N.E. 60, 62 (1910).

33. Since the right to redeem extends to those holding any legal or equitable interest in the property derived from the mortgagor, a contract vendee has the common-law right[3] to redeem the mortgage prior to sale by tendering to the mortgagee the principal and interest due on the mortgage." Id. (internal citations omitted); Carnavalla v. Ferraro, 281 A.D.2d 443, 443, 722 N.Y.S.2d 47, 48 (2nd Dept. 2001)(same).

34. In bankruptcy, the concept that a vendee-in-possession has enhanced rights is recognized under Section 365(i), which provides that even though a trustee or debtor-in-possession may reject a contract to sell real property, if the purchaser is in possession and elects to close, the trustee or debtor-in-possession must accept payment and deliver title.

35. Based on these principles, the lift-stay motion should be reviewed under a traditional analysis laid down by the Supreme Court and the Second Circuit relating to whether the Debtor is pursuing a reasonable possibility of a successful reorganization within a reasonable

[3] Moreover, the definition of "Owner" in RPAPL Section 781 specifically includes a vendee in possession for real estate actions involving leases.

time. United Savings Association v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 375-76, 180 S.Ct. 626 (1987). Moreover, the Supreme Court duly noted that when a motion for stay relief is made in the early stages of a bankruptcy case the courts "demand less detailed showings" of reorganization prospects. Id., at 376. The Debtor submits that it easily meets this burden.

II. The Petition was Filed in Good Faith

36. There is no support whatsoever in law or in fact for the contention that the petition was filed in bad faith. Indeed, given the Debtor's prompt activities since the filing in commencing the Adversary Proceeding, removing the related state court actions, and seeking to resolve all issues in a single forum, the Debtor has demonstrated a proper use of the Bankruptcy Code while it endeavors to sort through competing claims so as to be in a position to close on the Property.

37. Under the precepts developed by the Second Circuit in In re Cohoes Industrial Terminal Inc., 931 F.2d 222 (2d Cir. 1991) and In re C-TC 9th Avenue Partnership, 113 F.3d 1304 (2d Cir. 1997), the test of good faith turns on objective futility and subjective bad faith to determine whether a reasonable possibility exists that the debtor will emerge from bankruptcy. *See also* In re 68 West 127th Street LLC, 285 BR. 838, 846 (Bankr. S.D.N.Y. 2002) (synthesizing Cohoes Indust. Terminal and C-TC 9th Avenue) ("The critical test of a debtor's bad faith remains whether on the filing date there was no reasonable likelihood that the debtor intended to reorganize and whether there is no reasonable possibility that the debtor will emerge from bankruptcy."); In re Kingston Square Assocs., 214 B.R. 713, 725 (Bankr. S.D.N.Y. 1997) ("[T]he standard in this Circuit is that a bankruptcy petition will be dismissed if both objective futility and subjective bad faith in filing the petition are found." (emphasis in original)); In re

RCM Global Long Term Corp. Appreciation Fund Ltd., 200 B.R. 514, 520 (Bankr. S.D.N.Y. 1996) ("In this Circuit, a petition will be dismissed if both objective futility of the reorganization process and subjective bad faith in filing the petition are found . . . But a court should reach the conclusion that there is no demonstrable ability to reorganize only upon the strongest evidentiary showing."). *Accord* In re Sylmar Plaza, L.P., 314 F.3d 1070 (9th Cir. 2002); In re Carolin, 886 F.2d 693 (4th Cir. 1989).

38. Citing to the C-TC factors, the Lender contends that the automatic stay should be vacated simply because the Debtor has only one asset, the claims of unsecured creditors are purportedly dwarfed by the mortgages, and this is essentially a two-party dispute. While C-TC is controlling, the Lender's analysis is misguided. To begin with, there is far from a two-party dispute. Secondly, the unsecured debt is far from insignificant, while bankruptcy is a permissible, if not preferred forum to challenge a lender's entitlement to default interest and other charges. In any event, a bad faith dismissal should be used sparingly, and is the exception and not the rule. *See*, In re Consolidated Distributors, Inc., 2013 WL 3929851 *7, fn. 47 (Bankr. E.D.N.Y. 2013) ("Many courts have held that dismissal on bad faith grounds should be granted sparingly."); In re Century/ML Cable Venture, 294 B.R. 9, 34 (Bankr. S.D.N.Y. 2003) ("dismissal for bad faith is to be used sparingly to avoid denying bankruptcy relief to statutorily eligible debtors except in extraordinary circumstances"); In re Sletteland, 260 B.R. 657, 662 (Bankr. S.D.N.Y. 2001) (noting that courts dismiss cases on bad faith grounds sparingly); In re 234-6 W. 22nd St. Corp., 214 B.R. 751, 757 (Bankr. S.D.N.Y. 1997); In re Johns-Manville Corp., 36 B.R. 727, 737 (Bankr. S.D.N.Y. 1984) (dismissal on bad faith grounds should be granted sparingly, and only upon a clear showing of abuse of bankruptcy process, avoiding an "intense focus on the debtor's motives in filing"). As Judge Lord explained:

> In applying the C–TC factors, the Court will not "engage in a mechanical counting exercise" to determine whether the Debtor filed this bankruptcy case in bad faith. *See* In re Century/ML Cable Venture, 294 B.R. 9, 34 (Bankr. S.D.N.Y. 2003). These factors are to be considered in the context of the totality of the circumstances and not in a vacuum. In re R & G Properties, Inc., 2009 WL 1076703, at *3 (Bankr. D.Vt. April 16, 2009). No one factor is determinative of good faith and, "[i]t is the totality of circumstances, rather than any single factor, that will determine whether good faith exists." In re Kingston Square Assocs., 214 B.R. at 725; *see also* In re C–TC 9th Ave. P'ship, 113 F.3d at 1312 (indicating that a finding of bad faith "requires a full examination of all the circumstances of the case" and is "a highly factual determination").

In re Consolidated Distributors, Inc., supra. at *7; *see also*, In re 68 W. 127th St., LLC, supra. at, 844 ("[t]he existence of 'bad faith' depends not on any one specific factor but on a combination of factors determined after careful examination of the facts of the particular debtor's case." (*quoting* In re Shar, 253 B.R. 621, 629 (Bankr. D.N.J. 1999)).

40. Indeed, the mechanical application of the C-TC factors suggested by the Lender would "automatically doom" almost every single asset case from the outset. In re Consolidated Distributors, Inc., supra. at *7 It is for that reason that courts have recognized that the C-TC factors "do no more than assist the [Court's] exercise of discretion in deciding when a debtor has improperly invoked the Bankruptcy Code." Id.

41. Moreover, in making a good faith analysis the Second Circuit has cautioned that "[t]he purpose of Chapter 11 reorganization is to assist financially distressed business enterprises by providing them with breathing space in which to return to a viable state. '[I]f there is not a potentially viable business in place worthy of protection and rehabilitation, the Chapter 11 effort has lost its raison d'etre . . . .'" In re C-TC 9th Avenue, supra. at 1310 (*citing* In re Winshall Settlor's Trust, 758 F.2d 1136, 1137 (6th Cir. 1985)).

42. Fundamentally, bad faith does not arise merely because the Debtor is a single real estate entity, particularly since the Bankruptcy Code contains a number of provisions giving express recognition to these types of filings. *See, e.g.*, 11 U.S.C. §362(d)(3); In re Balboa Street Beach Club, Inc., 319 B.R. 736, 742 (Bankr. S.D. Fla. 2005) ("[A] single asset real estate [sic] is not per se a bad faith filing, since Congress in the 1994 Amendments to the Bankruptcy Code implicitly allowed 'single asset real estate' cases by assigning a definition to them under 11 U.S.C. § 101(5)(b)"); Collier on Bankruptcy 1112.07[6][b][ii] (16th ed.) ("The presence of the specific single asset real estate provisions strongly suggests that such cases are not per se filed in bad faith.").

43. In view of all of the foregoing, the Debtor is using the Bankruptcy Code in an entirely appropriate manner to accomplish a result that may not otherwise be available outside of Chapter 11, namely to expedite a closing on the underlying sale transaction, while addressing all competing claims in a consolidated fashion. As noted by the Court in In re Clinton Centrifuge, Inc., 72 B.R. 900, 905 (Bankr. E.D.Pa. 1987):

> In engrafting the good faith requirement into the Code, courts must be careful not to upset the delicate balance of interests fashioned by Congress under chapter 11. Moreover, to the extent that the concept of good faith exists independent of other Code provisions (such as adequate protection), courts must be vigilant to apply this concept in ways consistent with the legislative policy decisions embodied in these other [Code] enactments. Thus, in evaluating a debtor's good faith, the court's only inquiry is to determine whether the debtor seeks to abuse the bankruptcy law by employing it for a purpose for which it was not intended. When a debtor is motivated by plausible legitimate reorganization (or liquidation) purposes and not solely or predominantly by the mere desire to prevent foreclosure or hinder creditors, bad faith is not present in a chapter 11 case.

44. Even if the Lender is frustrated by the fact that it is now stayed, the imposition of the stay does not render the petition a bad faith filing, as creditors are often frustrated by

bankruptcy. In re Cohoes Industrial Terminal Inc., supra. at 228 ("Filing a bankruptcy petition with the intent to frustrate creditors does not by itself establish an absence of intent to seek rehabilitation"). Moreover, the mere existence of state court litigation is not a sufficient basis alone to support dismissal of a bankruptcy case. As one court found,

> The Creditor . . . has not proven by a preponderance of the evidence that the Debtor filed its chapter 11 case as a litigation tactic for the purpose of stalling the Creditor's state court rights, or to open the door for expanded legal sparring of state court issues in bankruptcy court. Its bad faith arguments are quite conclusory and, in the judgment of the Court, manifest its understandable "frustration" with the Debtor's bankruptcy filing rather than a showing of the Debtor's "abuse of judicial purpose." Simply checking off these factors on the list does not prove bad faith.

In re R & G Properties, Inc., supra. at *3 (internal citations omitted). *See also* In re Kingston Square Assocs., 214 B.R. 713, 734, 736-37 (Bankr. S.D.N.Y. 1997) (eve-of-foreclosure filing not in bad faith because bankruptcy preserved value for handful of unsecured creditors and debtor's limited partners); In re Foundry of Barrington P'ship, 129 B.R. 550, 556 (Bankr. N.D. Ill. 1991) (fully encumbered single asset debtor with few creditors did not file in bad faith because debtor has reasonable prospect, as evidenced by active negotiations with several prospective tenants, of confirming plan).

40. For all of the reasons advanced herein, there is no legitimate basis to conclude that the Debtor filed the petition in bad faith and the lift stay motion should be denied.

WHEREFORE, the Debtor respectfully prays for the entry of an Order denying the Lender's lift-stay motion, and for such other relief as may be just and proper.

Dated: New York, New York
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