

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Tuesday, May 19, 2020

Hearing Room 1568

10:00 AM

2:20-12839 Rosalina Lizardo Harris

Chapter 11

#3.00 HearingRE: [11] Motion to Dismiss Debtor or, Bankruptcy Case or, Alternatively, To Convert To Chapter 7, Pursuant To 11 U.S.C. § 1112

Docket 11

Matter Notes:

5/19/2020

The tentative ruling will be the order.

Party to lodge order: As set forth in the Tentative Ruling

POST PDF OF TENTATIVE OR AMENDED TENTATIVE RULING TO CIAO

Tentative Ruling:

5/19/2020

Note: Telephonic Appearances Only. The Courtroom will be unavailable for in-court appearances. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, ext. 188 no later than one hour before the hearing. The cost for persons representing themselves has been waived.

(Amended after hearing in RED.) For the reasons set forth below, the Motion to Dismiss is **GRANTED**. The Motion for Relief from the Automatic Stay is **DENIED AS MOOT** in view of the dismissal.

Pleadings Filed and Reviewed:

- 1) Notice of Motion and Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362 [Doc. No. 10]
- 2) Notice of Motion to Dismiss Bankruptcy Case or, Alternatively, to Convert to Chapter 7, Pursuant to U.S.C. § 1112 [Doc. No. 11] (the "Motion")
 - a) Declaration of Anthony R. Bisconti in Support of (I) Motion to Dismiss Bankruptcy Case or, Alternatively, to Convert to Chapter 7, Pursuant to 11 U.S.C. § 1112, and (II) Motion for Relief from the Automatic Stay [Doc. No.

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Tuesday, May 19, 2020

Hearing Room 1568

10:00 AM

CONT...

Rosalina Lizardo Harris

Chapter 11

- 12]
- b) Declaration of Paul P. Young in Support of (I) Motion to Dismiss Bankruptcy Case or, Alternatively, to Convert to Chapter 7, Pursuant to 11 U.S.C. § 1112, and (II) Motion for Relief from the Automatic Stay [Doc. No. 13]
 - c) Request for Judicial Notice in Support of (I) Motion to Dismiss Bankruptcy Case or, Alternatively, to Convert to Chapter 7, Pursuant to 11 U.S.C. § 1112, and (II) Motion for Relief from the Automatic Stay [Doc. No. 14] (the "RJN")
- 3) Opposition to Motion to Dismiss Bankruptcy Case Or, Alternatively, to Convert to Chapter 7, Pursuant to 11 U.S.C. Section 1112 [Doc. No. 24]
- a) Declaration of Debtor Rosalina Harris in Support of Opposition to Motion to Dismiss Bankruptcy Case Or, Alternatively, to Convert to Chapter 7, Pursuant to 11 U.S.C. Section 1112 [Doc. No. 25]
- 4) Limited Opposition to Motion for Relief from the Automatic Stay Under 11 U.S.C. Section 362 [Doc. No. 26]
- 5) Consolidated Reply in Support of (I) Motion to Dismiss Bankruptcy Case or, Alternatively, to Convert to Chapter 7, Pursuant to 11 U.S.C. § 1112 and (II) Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362 [Doc. No. 27]

I. Facts and Summary of Pleadings

Crystal Holmes ("Holmes") moves for orders (1) dismissing the voluntary Chapter 11 petition filed by Rosalina Lizardo Harris ("Harris") or, in the alternative, converting the case to Chapter 7 and (2) granting Holmes relief from the automatic stay, to enable Holmes to continue to enforce a judgment that Holmes holds against Harris (the "Judgment") and to allow Harris' appeal of the Judgment to proceed. Harris opposes both Motions.

A. Holmes' Judgment Against Harris

On May 3, 2018, Holmes filed a complaint against Harris and other parties in the District Court, asserting claims under 42 U.S.C. § 1983 (the "Complaint"). On July 11, 2019, after conducting a jury trial, the District Court entered judgment in favor of Holmes in the amount of \$2,265,952.00 (the "Judgment"). RJN, Ex. 4. The jury found that Harris, who is a detective employed by the Los Angeles Sheriff's Department (the "LASD"), violated Holmes' Fourth Amendment right to be free from unreasonable arrest without probable cause, and awarded damages of \$765,952. *Id.* The jury further found that Harris acted with malice, oppression, or reckless disregard of Holmes' constitutional rights, and awarded punitive damages of \$1.5 million. *Id.*

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Tuesday, May 19, 2020

Hearing Room 1568

10:00 AM

CONT... Rosalina Lizardo Harris

Chapter 11

On September 19, 2019, the District Court denied Harris' renewed motion for judgment as a matter of law. The District Court stated:

The Court concludes that there was ample evidence to support the jury's verdict. There was sufficient evidence supporting the jury's conclusion that [Harris] acted under color of law in procuring [Holmes'] arrest, and that [Harris] procured [Holmes'] wrongful arrest without probable cause.

RJN, Ex. 5.

On October 4, 2019, the District Court denied Harris' motion for a new trial or, in the alternative, an altered or amended judgment. RJN, Ex. 6. The District Court rejected Harris' contention that the award of actual damages was not supported by sufficient evidence. *Id.* The District Court also found that the award of \$1.5 million in punitive damages was justified:

Here, the jury found that [Harris] acted "with malice, oppression, or reckless disregard of [Holmes'] constitutional rights" in procuring her wrongful arrest, rather than negligently. The jury concluded that [Harris], a law enforcement officer, carried out the wrongful arrest of an innocent person under the authority of her position, in deliberate disregard of [Holmes'] right to be free of unlawful arrest. The Court concludes that this is reprehensible conduct.

Id. (internal citations omitted).

On October 4, 2019, the District Court awarded Holmes attorneys' fees in the amount of \$760,397.50, and costs and expenses in the amount of \$2,709.29. *Id.*

On October 10, 2019, Harris appealed the Judgment to the Ninth Circuit. The Ninth Circuit took no action on the appeal prior to the filing of Harris' voluntary Chapter 11 petition.

B. Harris' Voluntary Chapter 11 Petition

On March 13, 2020 (the "Petition Date"), Harris filed a voluntary Chapter 11 petition (the "Petition"). Harris' primary assets, and the scheduled valuations of those assets, are as follows:

- 1) **Primary residence, located at 400 W. Altadena Dr., Altadena, CA 91001 (the "Property").** The Property is valued at \$887,000.00, and is

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Tuesday, May 19, 2020

Hearing Room 1568

10:00 AM

CONT...

Rosalina Lizardo Harris

Chapter 11

encumbered by liens in the amount of \$516,851.84.

- 2) **401(k) County of Los Angeles Defined Contribution Plan (the “401k Plan”)**. The 401k Plan is valued at \$363,338.44, and is encumbered by a lien in the amount of \$45,000.00.
- 3) **LACERA County Employment Retirement Benefit Plan (the “Pension Plan”)**. The Pension Plan is valued at \$309,288.56. There are no encumbrances against the Pension Plan.

Harris also scheduled as assets (1) potential claims for legal malpractice against Seki, Nishimura & Watase (“Seki”), the law firm appointed by Los Angeles County (“LA County”) to represent Harris in the Holmes litigation and (2) potential claims for indemnity against LASD, LA County, and her homeowner’s insurer regarding the Holmes litigation. With respect to the indemnity claims, Harris states that after Holmes commenced the litigation, she was informed that LA County and LASD would be responsible for defending the matter. Harris asserts that she never signed a retention agreement with Seki, that she was never advised that her personal assets could be subject to a judgment, and that she was excluded from substantive participation in litigation strategy or settlement discussions. Harris states that she believed that LA County would bear financial responsibility for any judgment entered against her, and that she maintained this belief until she was informed in late 2019 that LA County might not pay the punitive damages portion of the Judgment.

Aside from the Judgment, Harris’ liabilities consist of (1) unpaid tax debt of approximately \$6,000.00, (2) credit card debt of approximately \$5,000.00, (3) and several months of arrearages on the Property’s mortgage.

According to the Petition, Harris made the following pre-petition transfers. In September 2019, Harris paid \$20,000 to purchase a vehicle for her daughter. Statement of Financial Affairs (the “SOFA”) at ¶ 8. In October and November 2019, Harris transferred \$35,000.00 from her retirement account to her mother and sister. SOFA at ¶ 7. The funds were returned to Harris in February 2020, prior to the Petition Date. *Id.* In January 2020, Harris paid \$26,717.00 to retain bankruptcy counsel. SOFA at ¶ 16. [Note 1]

C. Summary of Holmes’ Motion to Dismiss and Motion for Relief from the Automatic Stay

Holmes moves to dismiss the petition under § 1112, or in the alternative, to convert the case to Chapter 7. Holmes also moves for relief from the automatic stay,

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Tuesday, May 19, 2020

Hearing Room 1568

10:00 AM

CONT... Rosalina Lizardo Harris

Chapter 11

pursuant to § 362(d)(1), to enable Harris' appeal of the Judgment to proceed and to allow Holmes to continue to enforce the Judgment. Holmes makes the following arguments and representations in support of the Motions:

Harris sought bankruptcy protection solely to avoid posting a supersedeas bond in connection with her appeal of the Judgment. Harris has limited assets, no ongoing business to reorganize, no meaningful unsecured creditors other than Holmes, and insufficient income to sustain a plan of reorganization. Harris commenced the petition solely to hinder, delay, and frustrate Holmes' ability to collect on the Judgment. The petition should be dismissed as having been filed in bad faith. *See In re Mense*, 509 B.R. 269, 279–81 (Bankr. C.D. Cal. 2014) (holding that a bankruptcy filed to avoid posting a supersedeas bond was not filed in good faith where the debtor lacked financial problems other than the adverse judgment and did not operate a viable business).

Harris' bad-faith is also shown by a series of pre-petition transfers Harris engaged in to deplete the value of the estate, including the following:

- 1) Refinancing her home and reducing the available equity by at least \$125,000;
- 2) Withdrawing \$45,000 from a retirement account;
- 3) Spending \$20,000 to purchase a new vehicle for her daughter;
- 4) Spending \$28,000 to purchase a brand-new truck for her husband; and
- 5) Transferring \$35,000 to her sister and mother.

On March 3, 2020, Holmes requested a copy of Harris' tax return, pursuant to § 521(e)(2). Harris failed to timely provide a copy of the tax return. Under § 521(e)(2), dismissal of the petition is mandatory because Harris has not demonstrated that the failure to provide the tax return was due to circumstances beyond her control.

If the Court does not dismiss the case, the Court should grant Holmes relief from the automatic stay so that the appeal of the Judgment may continue and so that Holmes may continue to enforce the Judgment. Stay relief is warranted under § 362(d)(1) because the petition was filed in bad faith. Holmes should be allowed to enforce the Judgment because it is non-dischargeable under § 523(a)(6). The District Court found there was sufficient evidence to support the jury's finding that Harris acted "with malice, oppression, or reckless disregard of [Holmes'] constitutional rights" by procuring the false arrest of Holmes.

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Tuesday, May 19, 2020

Hearing Room 1568

10:00 AM

CONT... Rosalina Lizardo Harris

Chapter 11

D. Summary of Harris' Opposition to the Motion to Dismiss and Motion for Stay Relief

Harris makes the following arguments and representations in opposition to both Motions:

In support of her contention that the bankruptcy was filed in bad faith, Harris relies primarily on *In re Mense*, 509 B.R. 269 (Bankr. C.D. Cal. 2014), which is not binding authority. In addition, the facts of *Mense* differ from the facts here. In *Mense*, the debtor had nearly \$20 million in assets and was faced with a judgment of less than \$2.5 million. Unlike in *Mense*, Harris lacks the ability to post a supersedeas bond. Further, Harris sought bankruptcy protection to save the Property, which is a legitimate bankruptcy objective. Harris has the ability to confirm a plan of reorganization. Harris has over \$360,000 in exempt retirement assets to commit to a Plan. Combined with her scheduled income, Harris has the ability to fund a plan regardless of the results of the appeal of the Judgment.

Harris also holds (1) potential claims for malpractice against Seki and (2) potential claims for indemnity against LASD, LA County, and her home insurer regarding the Holmes litigation. LASD paid for Harris' defense but did not warn Harris that her personal assets could be at stake and excluded Harris from meaningful participation in litigation strategy. Harris' claims for implied and equitable indemnity against LASD will likely be an important source of income to fund a plan.

There is no merit to Holmes' argument that Harris' pre-petition transfers to family members support a finding of bad faith. Harris fully disclosed these transfers in her petition, and the funds at issue have been returned.

Harris does not oppose the lifting of the automatic stay to permit her appeal of the Judgment to proceed. However, Harris does object to Holmes' request for stay-relief to enforce the Judgment against the assets of the estate. In support of this relief, Holmes contends that the Judgment is non-dischargeable under § 523(a)(6). Holmes emphasizes the jury's finding that Harris acted with "malice, oppression, or reckless disregard" of Holmes' constitutional rights. Use of the disjunctive "or" means that the jury could have based the punitive damages award on "oppression" or "reckless disregard," rather than "malice," in which case the Judgment would be dischargeable.

E. Summary of Holmes' Reply in Support of the Motion to Dismiss and Motion for Stay Relief

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Tuesday, May 19, 2020

Hearing Room 1568

10:00 AM

CONT... Rosalina Lizardo Harris

Chapter 11

Holmes makes the following arguments and representations in reply to Harris' opposition:

Harris has not demonstrated that she can confirm a viable plan of reorganization. Harris' contemplated plan involves retaining the Property while using her remaining assets to pay Holmes. Such a plan violates the absolute priority rule and cannot be confirmed over Holmes' opposition. Holmes would vote against such a plan.

Cause for dismissal exists because Harris has not filed any Monthly Operating Reports, and has failed to file any applications to employ professionals, even though this case was filed on March 12, 2020. [Note 2]

II. Findings of Fact and Conclusions of Law

A. Evidentiary Issues

Holmes relies upon Harris' testimony at the § 341(a) meeting of creditors in support of both Motions. However, Holmes has not submitted a transcript of the § 341(a) meeting. Instead, Holmes attempts to introduce Harris' § 341(a) testimony by relying upon the "extensive, detailed notes of the questions asked and of the Debtor's sworn testimony" that were taken by Anthony R. Bisconti, Holmes' counsel. Declaration of Anthony R. Bisconti (the "Bisconti Decl.") at ¶ 6.

Bisconti's recollection of Harris' § 341(a) testimony is inadmissible as hearsay. The proper method for Holmes to introduce Harris' § 341(a) testimony would have been to provide a transcript of the meeting. The Court declines to consider Harris' alleged § 341(a) testimony in adjudicating either of the Motions. [Note 3]

B. The Motion to Dismiss is Granted

"Under § 1112(b)(1), a court may dismiss a Chapter 11 bankruptcy case 'for cause,' based on a finding that the petition was filed in bad faith." *Prometheus Health Imaging, Inc. v. UST – United States Tr. (In re Prometheus Health Imaging, Inc.)*, 705 F. App'x 626, 627 (9th Cir. 2017) (citing *In re Marshall*, 721 F.3d 1032, 1047 (9th Cir. 2013)); see also *Marsch v. Marsch (In re Marsch)*, 36 F.3d 825, 828 (9th Cir. 1994) ("Although section 1112(b) does not explicitly require that cases be filed in 'good faith,' courts have overwhelmingly held that a lack of good faith in filing a Chapter 11 petition establishes cause for dismissal"). "While § 1112(b)(4) provides a list of what circumstances may constitute 'cause' for dismissal, the list is non-exhaustive, and 'courts may consider any factors which evidence an intent to abuse the judicial process and the purposes of the reorganization provisions,' to make the

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Tuesday, May 19, 2020

Hearing Room 1568

10:00 AM

CONT... Rosalina Lizardo Harris

Chapter 11

bad faith determinations." *In re Prometheus Health Imaging, Inc.*, 705 F. App'x at 627. The existence of good faith "does not depend on one factor alone, but . . . is to be judged by looking at the totality of the circumstances surrounding the case." *In re WLB-RSK Venture*, 296 B.R. 509, 514 (Bankr. C.D. Cal. 2003).

The Ninth Circuit has expanded on this concept as follows:

To determine whether a debtor has filed a petition in bad faith, courts weigh a variety of circumstantial factors such as whether:

- 1) the debtor has only one asset;
- 2) the debtor has an ongoing business to reorganize;
- 3) there are any unsecured creditors;
- 4) the debtor has any cash flow or sources of income to sustain a plan of reorganization or to make adequate protection payments; and
- 5) the case is essentially a two party dispute capable of prompt adjudication in state court.

In re St. Paul Self Storage Ltd. P'ship, 185 B.R. 580, 582–83 (B.A.P. 9th Cir. 1995).

Where a debtor seeks Chapter 11 protection to avoid posting a supersedeas bond, courts consider the following factors to determine if the petition was filed in good faith:

- 1) Whether the debtor is a viable business which would suffer severe disruption if enforcement of the judgment was not stayed; and the chapter 11 petition was filed to preserve its status as an ongoing concern and to protect its employees and creditors;
- 2) Whether the debtor had financial problems on the petition date, other than the adverse judgment;
- 3) Whether the debtor has relatively few unsecured creditors, other than the holder of the adverse judgment;
- 4) Whether the debtor has sufficient assets to post a bond to stay the judgment pending appeal;
- 5) Whether the debtor acted in good faith to exhaust all efforts to obtain a bond to stay the judgment pending appeal;
- 6) Whether the debtor intends to pursue an effective reorganization within a reasonable period of time, or whether the debtor is unwilling or unable to propose a meaningful plan until the conclusion of the litigation; and

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Tuesday, May 19, 2020

Hearing Room 1568

10:00 AM

CONT...

Rosalina Lizardo Harris

Chapter 11

- 7) Whether assets of the estate are being diminished by the combined ongoing expenses of the debtor, the chapter 11 proceedings, and prosecution of the appeal.

In re Mense, 509 B.R. 269, 280–81 (Bankr. C.D. Cal. 2014).

Applying the factors set forth in *St. Paul Self Storage* and *Mense*, the Court finds that Harris filed the petition in bad faith, in order to avoid the necessity of posting a supersedeas bond during the appeal of the Judgment. First, Harris has failed to demonstrate that she has the ability to confirm a plan. Any plan proposed by Harris would have to deal with the Judgment, which exceeds \$3 million. Harris describes the provisions of the plan that she envisions in only minimal detail. Under the contemplated plan, Harris would retain the Property and make monthly payments to creditors, funded by an unspecified portion of Harris' family income and other assets. Harris' potential claims against Seki, LASD, LA County, and her home insurer would also form part of the plan.

As the holder of the Judgment, Holmes is by far the estate's largest creditor. Holmes states that she would vote against any plan that allowed Harris to retain the Property while not paying Holmes in full.

In the Ninth Circuit, individual Chapter 11 debtors are subject to the absolute priority rule. *Zachary v. California Bank & Tr.*, 811 F.3d 1191 (9th Cir. 2016). This means that to confirm a plan over Holmes' opposition, the plan must either (1) provide for payment of the Judgment in full or (2) not permit Harris to retain the Property. Harris' objective in seeking bankruptcy protection was to save the Property, which limits Harris to proposing a plan that would provide for payment of the Judgment in full.

Even a plan funded by all of Harris' assets other than the Property would fall far short of paying the Judgment in full. The Judgment exceeds \$3 million; the unencumbered assets of the Pension Plan and 401k Plan total approximately \$630,000. (This calculation assumes that Harris would be willing to devote even exempt assets to funding a plan.) Payment of the entirety of Harris' retirement assets toward the Judgment would leave \$2.37 million of the Judgment unsatisfied. Assuming a very favorable interest rate of 3%, a plan providing for the payment of the remaining \$2.37 million over 30 years would require monthly payments of \$9,992.02. According to Schedule J, Harris' monthly net income is only \$3,918.11—less than half the amount required to fund a plan.

Harris asserts that a plan could also be funded by potential malpractice and

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Tuesday, May 19, 2020

Hearing Room 1568

10:00 AM

CONT... Rosalina Lizardo Harris

Chapter 11

indemnity claims. But Harris has provided no meaningful evidence that any claims she does possess would generate funds sufficient to make a plan confirmable. Harris' description of the claims is cursory and leaves the Court with serious doubts as to whether the claims would even be viable.

At the hearing, Harris asserted that she could confirm a plan over Holmes' opposition by taking advantage of the new-value corollary to the absolute priority rule. Harris stated that her new value contribution could be funded by exempt assets, including the exempt equity in the Property and her exempt retirement assets. Harris estimated that total exempt assets that could be committed to a new value contribution could exceed \$500,000.

Under the new value corollary to the absolute priority rule, a debtor may cram down a plan while simultaneously retaining non-exempt pre-petition assets, provided that the debtor contributes "new value" toward the plan. *See generally Bank of America v. 203 North LaSalle Street Partnership*, 526 U.S. 434 (1999) (describing the new value corollary). To qualify as "new value," the contribution must be "(1) new, (2) substantial, (3) in money or money's worth, (4) necessary for successful reorganization, and (5) reasonably equivalent to the value or interest received." *Liberty Nat'l Enterprises v. Ambanc La Mesa Ltd. P'ship (In re Ambanc La Mesa Ltd. P'ship)*, 115 F.3d 650, 654 (9th Cir. 1997).

If Harris did in fact propose a plan committing \$500,000 in exempt assets in order to retain a Property with approximately \$400,000 in equity, the Court cannot conclusively rule out the possibility that such a plan could be confirmed over Holmes' opposition. However, there is nothing in the record indicating that Harris would be willing to commit to the hypothetical plan postulated by her counsel. In her declaration in opposition to the Motion to Dismiss, Harris' testimony regarding a hypothetical plan was limited to the following: "I have had the basics of bankruptcy reorganization explained to me and believe there is a way to save my home for my family and reorganize in bankruptcy and pay my creditors including Holmes what they would get if I were to liquidate to pay them, and still save my house. It will not be easy I know." Harris Decl. [Doc. No. 25] at ¶¶ 25–26. This cursory testimony fails to show that Harris is willing to make the substantial sacrifice of committing approximately \$500,000 in non-exempt assets that would be required were Harris to have a realistic possibility of confirming a plan.

Further, the remaining evidence before the Court shows that Harris' intent in seeking bankruptcy protection was not to propose a plan funded by substantially all her non-exempt assets, but rather to circumvent the requirement to post a supersedeas

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Tuesday, May 19, 2020

Hearing Room 1568

10:00 AM

CONT... Rosalina Lizardo Harris

Chapter 11

bond. This case has been pending for more than two months, but Harris has yet to comply with certain basic obligations that are applicable to all Chapter 11 debtors. She has not filed Monthly Operating Reports for the months of March or April. Pursuant to Local Bankruptcy Rule ("LBR") 2015-2(a) and the *Guidelines and Requirements for Chapter 11 Debtors in Possession* published by the United States Trustee, the March Monthly Operating Report was due on April 15 and the April Monthly Operating Report was due on May 15. Harris has not filed an application to employ Jeffrey B. Smith as her general bankruptcy counsel. According to the *Disclosure of Compensation of Attorney for Debtor* [Doc. No. 1], Smith has been paid a retainer of \$26,717.00 and has agreed "to render legal services for all aspects of the bankruptcy case, including ... [p]reparation and filing of any ... plan which may be required" Under LBR 2014-1(b)(1)(E), "an application for the employment of counsel for a debtor in possession should be filed *as promptly as possible* after the commencement of the case" (emphasis added).

Second, Harris did not have financial problems other than the Judgment as of the Petition Date, and there are no significant creditors other than Holmes. Other than the \$3 million Judgment, Harris' liabilities consist of (1) unpaid tax debt of approximately \$6,000.00, (2) credit card debt of approximately \$5,000.00, (3) and several months of arrearages on the Property's mortgage. The liabilities aside from the Judgment are *de minimis* and could easily be dealt with outside of Chapter 11. This case is a two-party dispute between Holmes and Harris that was in the process of being resolved before the Ninth Circuit prior to the filing of the petition.

Third, there is no indication that Harris acted in good faith to attempt to post a supersedeas bond prior to seeking bankruptcy protection. As an explanation for her failure to obtain a supersedeas bond, Harris states that LA County and LASD control all aspects of her appeal, and that in any event it would be futile for Harris to attempt to secure a supersedeas bond given the size of the Judgment. This explanation does not show that Harris "exhaust[ed] all efforts" to obtain a supersedeas bond, *Mense*, 509 B.R. at 280–81. Instead, it shows that Harris made no real effort to obtain a supersedeas bond. She did not, for example, petition the District Court to allow her to post a bond in less than the full amount of the Judgment. A Chapter 11 petition is filed in bad faith where the debtor "made no sincere attempt to post the supersedeas bond or seek further reduction" in the bond, *In re Chu*, 253 B.R. 92, 95 (S.D. Cal. 2000).

Fourth, there is no business to reorganize. **The Court is aware that this factor does not strictly apply to individual debtors such as Harris who do not operate a business. As applied to Harris, the relevant inquiry under this factor is whether the petition was**

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Tuesday, May 19, 2020

Hearing Room 1568

10:00 AM

CONT... Rosalina Lizardo Harris

Chapter 11

filed to achieve legitimate objectives under the Bankruptcy Code, as opposed to circumventing the requirement to post a supersedeas bond. Here, Harris has not shown a realistic possibility of confirming a plan, and there is no indication that she is pursuing other legitimate bankruptcy objectives, such as renegotiating debt with secured lenders. But for the Judgment and Holmes' attempts to enforce it, Harris would not have sought bankruptcy protection.

Where, as here, a Chapter 11 petition has been filed in bad faith, the Court must determine whether dismissal or conversion in the best interests of creditors. *Shulkin Hutton, Inc. v. Treiger (In re Owens)*, 552 F.3d 958, 961 (9th Cir. 2009). Because Holmes is the only meaningful creditor, the Court primarily considers the interests of Holmes in making this determination. The Court finds that dismissal, rather than conversion, is in Holmes' interest. Conversion would result in the accrual of administrative fees which would reduce Holmes' recovery.

Dismissal is also required under § 521(e)(2)(B), as a result of Harris' failure to timely provide a copy of her tax return to Holmes. Under § 521(e)(2)(A)(i), the debtor must provide, by not later than seven days prior to the meeting of creditors, a copy of the debtor's tax return for the most recent tax year to any creditor that timely requests such a copy. Here, Holmes requested a copy of Harris' tax return on March 30, 2020, well before the April 27, 2020 meeting of creditors. As of April 28, 2020—the date of the filing of the Motion to Dismiss—Harris had not provided the tax return.

Pursuant to § 521(e)(2)(B), the Court is required to dismiss the case unless Harris demonstrates that the failure to provide her tax return is due to circumstances beyond her control. Harris has made no such showing. Instead, she claims that the requirement to provide tax returns applies only in Chapter 7 and Chapter 13, not in Chapter 11.

The plain language of § 521(e)(2)(B) does not except Chapter 11 debtors-in-possession from providing tax returns to creditors making a timely request. In addition, courts construing § 521(e)(2)(B) have held that the provision applies to Chapter 11 debtors. *See, e.g., In re Stewart*, No. 11-04129-8-JRL, 2012 WL 3732798, at *2 (Bankr. E.D.N.C. Aug. 28, 2012). As Harris has not shown that circumstances beyond her control prevented her from supplying her tax return, the Court must also dismiss this case pursuant to § 521(e)(2)(B).

III. Conclusion

Based upon the foregoing, the Chapter 11 petition is **DISMISSED**, pursuant to § 1112(b). The Motion for Relief from the Automatic Stay is **DENIED AS MOOT** in

**United States Bankruptcy Court
Central District of California
Los Angeles
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Courtroom 1568 Calendar**

Tuesday, May 19, 2020

Hearing Room 1568

10:00 AM

CONT... Rosalina Lizardo Harris

Chapter 11

view of the dismissal. Within seven days of the hearing, Holmes shall submit orders incorporating this tentative ruling by reference.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Note 1

Holmes also asserts that Harris testified at the § 341(a) meeting that she received approximately \$125,000 from refinancing her home in October 2019. As discussed in Section II.A., below, the Court does not consider this alleged testimony because Holmes has not supplied a transcript of the § 341(a) meeting.

Note 2

Holmes also asserts that Harris' bad-faith is shown by alleged inconsistencies between testimony Harris gave at the § 341(a) meeting and information in the petition regarding certain pre-petition transfers. As discussed in Section II.A., below, the Court does not consider Harris' § 341(a) testimony because Holmes has not supplied a transcript of the § 341(a) meeting.

Note 3

The following alleged facts are not considered because they are predicated only upon Bisconti's recollection of Harris' § 341(a) testimony and are not supported by any other evidence in the record:

- 1) Harris withdrew \$125,000 from the Property in a refinancing transaction conducted in October 2019.
- 2) Harris withdrew approximately \$45,000 from a retirement account in October 2019.
- 3) Harris did not explore the possibility of posting a supersedeas bond.
- 4) Harris stated at the § 341(a) meeting that the only purpose for seeking

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Tuesday, May 19, 2020

Hearing Room 1568

10:00 AM

CONT...

Rosalina Lizardo Harris

Chapter 11

bankruptcy protection was to deal with the Judgment.

Party Information

Debtor(s):

Rosalina Lizardo Harris

Represented By
Jeffrey B Smith