

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
BRIDGEPORT DIVISION**

	X	
In re:	:	
	:	
Alpha 365, LLC,	:	Chapter 11
	:	Case No. 13-51150
Debtor.	:	

Appearances:

	X	
Jeffrey M. Sklarz, Esq. Green & Sklarz LLC P.O. Box 3639 New Haven, CT	: : : :	For the Debtor
Mark Stern, Esq. Mark Stern & Associates, LLC P.O. Box. 2129 Norwalk, CT	: : : :	For 365 Holdings, LLC
Juda J. Epstein, Esq. Law Office of Juda J. Epstein 3543 Main Street Bridgeport, CT	: : : : :	For Water Pollution Control Authority for City of Bridgeport

ORDER

I. Introduction

This Chapter 11 case was commenced by Alpha 365, LLC (“Alpha”) on July 24, 2013. The parties agree that its viability depends on whether there is a valid and enforceable lease between 365 Holdings, LLC (“Holdings”) and Alpha. In the absence of such a lease, Alpha’s proposed plan cannot be confirmed. For the reasons that follow, this case is dismissed pursuant to § 305(a)(1).

II. Background

Alpha commenced a post-petition action in the Connecticut Superior Court against Holdings in January 2014 regarding the subject lease (“Lease Action”). On January 16, 2014, this court, *sua sponte*, gave notice to the above parties that it would consider whether to abstain under §§ 105(a), 305(a). (See ECF No. 109, “Scheduling

Order”.¹) The parties were provided an opportunity to submit statements in support of or in opposition to a § 305(a) abstention. (*See id.*)

Alpha filed a timely statement that it “takes no position on whether the Court should, in its discretion, abstain . . .” (Alpha’s Statement at 2, ¶12, ECF No. 113.) The Water Pollution Control Authority for the City of Bridgeport (“WPCA”) filed an untimely statement objecting to a suspension of the case pursuant to § 305(a), but supporting a dismissal thereunder.² (*See WPCA’s Statement*, ECF No. 115.) Holdings did not file a statement.

The following facts are undisputed. Alpha is a limited liability company formed to develop an adult entertainment establishment. It is a small business debtor. *See* 11 U.S.C. § 101(51D). Holdings owns property located at 365 Cherry Street in Bridgeport, Connecticut (“Property”). On September 1, 2011, Holdings entered into an accommodation lease with Alpha for the rental of a small portion of the Property (approximately five percent). Alpha’s sole asset, if any, is a leasehold interest in the Property. It has not occupied the Property, it has no employees, and is not generating income.

On February 15, 2012, the Bridgeport, Connecticut, Fire Department’s Fire Marshal issued an abatement order to Holdings regarding the Property, which required “proper corrective action to remove or remedy all listed violations by March 16, 2012”. (*Abatement Order of Fire/Life Safety Hazards*”, ECF No. 103-1.) Holdings did not take corrective action.

¹. On January 14, 2014, Holdings was given an opportunity to seek abstention of this case, pursuant to 11 U.S.C. § 305(a), pending the outcome of the Lease Action. (*See* Jan. 14, 2014 Docket Entry; *see also* Scheduling Order.) However, it did not do so. (*See* Audio File of Jan. 16, 2014 Hr’g, ECF No. 110.)

² Pursuant to the Scheduling Order, the parties had until 6:00 p.m. on January 23, 2014 “to file papers in support of or in objection to the Court’s § 305(a) Motion”. (*Scheduling Order* at 1.) WPCA’s Objection was filed on January 28, 2014 at 9:21 a.m., approximately 40 minutes before the commencement of the hearing on the court’s *sua sponte* abstention motion.

On March 8, 2012, Holdings and Alpha entered into the subject amended lease (“Lease”), which provided, *inter alia*:

The parties acknowledge that the replacement premises are subject to a current eviction action and [Holdings] is not in possession of same. This Lease and all dates, and all rights[,] duties and obligations herein shall commence 10 days after [Holdings] gives Lessee [*i.e.*, Alpha] written notice that it is in possession of the Premises.

(March 8, 2012 Amended Lease, ¶D; see ECF No.44-1, Exh. A.)³ Holdings has never taken possession of the Property, and likewise, neither has Alpha. Holdings claims it terminated all leases with Alpha and its other tenants on April 17, 2012. (See Letter from Mark Stern, Esq., to “ALL TENANTS” (Apr. 17, 2012 (ECF No. 103-2).)

On January 11, 2013, the WPCA commenced a state court foreclosure action against Holdings for its failure to pay sewer usage fees on the Property (“Foreclosure Action”). The WPCA, claims that the Property is vandalized, condemned by the Fire Marshal, blighted and vacant. Tens of thousands of dollars in real estate taxes on the Property are delinquent and Holdings does not plan to pay them. The City of Bridgeport’s real estate tax claims take priority over the WPCA’s tax lien. Moreover, since July 16, 2013, blight fines of \$100 per day are being assessed against the Property, but those fines are not being paid.

Holdings did not oppose the Foreclosure Action. Over the WPCA’s objection and notwithstanding Holdings’ alleged termination of the Lease, Alpha was permitted to intervene in the Foreclosure Action, presumably on the basis of its asserted leasehold interest in the Property. Thereafter, WPCA and Holdings stipulated to judgment of foreclosure, which was entered on May 13, 2013 and set a foreclosure sale date of July 20, 2013. That date was extended for one week to July 27, 2013. The foreclosure judgment stated that WPCA is owed \$12,084.75 plus costs and fees. The commencement of this chapter 11 case has stayed the foreclosure sale. See § 362(a).

³ The Lease was not recorded on the Bridgeport land records.

III. Discussion

Section 105(a) of the Bankruptcy Code states:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a). Bankruptcy Code § 305(a) authorizes courts to abstain, that is dismiss or suspend all proceedings in a case:

(a) The court, after notice and a hearing, may dismiss a case under this title . . . at any time if—
(1) the interests of creditors and the debtor would be better served by such dismissal or suspension;

* * *

11 U.S.C. § 305(a)(1). Further, § 102(1) of the Bankruptcy Code states, in part: In this title—

(1) “after notice and a hearing”, or a similar phrase—
(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances;

* * *

11 U.S.C. § 102(1)(A). As noted, the court gave the parties notice that it would consider abstention. A hearing was scheduled for and conducted on January 28, 2014. No evidentiary hearing was sought, and no material facts were in dispute.

“Courts that have construed Section 305(a)(1) are in general agreement that abstention *in a properly filed bankruptcy case* is an extraordinary remedy” *In re Glolbo Comunicacoes E Participacoes S.A.*, 317 B.R. 235, 255 (S.D.N.Y. 2004) (emphasis added). In determining whether to abstain under § 305(a)(1), courts within the Second Circuit have considered the following seven factors:

- (1) The economy and efficiency of administration;
- (2) Whether another forum is available to protect the interests of both parties or there is already a pending proceeding in a state court;
- (3) Whether federal proceedings are necessary to reach a just and equitable solution;
- (4) Whether there is an alternative means of achieving an equitable distribution of assets;
- (5) Whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case;
- (6) Whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and
- (7) The purpose for which bankruptcy jurisdiction has been sought.

In re TPG Troy, LLC, 492 B.R. 150, 160 (Bankr. S.D.N.Y. 2013) (quoting *In re Monitor Single Lift I, Ltd.*, 381 B.R. 455, 464–65 (Bankr. S.D.N.Y.2008) (citing cases)). “While all factors are considered, not all are given equal weight in every case.” *Id.* at 160 (quoting *Monitor Single*, 381 B.R. at 465). Whether to abstain under § 305(a)(1) is a case-by-case determination. *See id.* (citations omitted). Further, while § 305(a)(1) is usually invoked as a basis upon which to dismiss an involuntary case, it is not limited to such cases. *See Monitor Single*, 381 B.R. at 463-664. Rather, “[c]ourts have also abstained pursuant to § 305(a)(1) based upon the absence of a proper purpose for filing a bankruptcy; where questions of state law needed to be resolved . . . before a bankruptcy could proceed; and where a bankruptcy was filed in response to a two-party dispute between a debtor and a single creditor.” *Id.* at 464 (internal citations omitted).

At the outset, the court determines that the 4th factor is entitled to little weight because it relates to alternative means of achieving equitable distribution of assets. It is conceded by Alpha that its bankruptcy estate has no asset other than the Lease, the existence of which is disputed by Holdings. As noted, *supra* at 1, the viability of the Lease is at the core of both this chapter 11 case and the pending state court Lease

Action.

Similarly, the 5th factor has minimal application in this analysis. There is no reasonable basis for the court to conclude that Alpha and Holdings will be able to settle the core issue of whether the Lease is viable. To the contrary Holdings, having declined to defend the Foreclosure Action, has essentially abandoned the Property. It is undisputed that Holdings does not have a right to occupy the Property and, therefore, it cannot lease it to Alpha. *See supra* at 3; *see also id.* (citing March 8, 2012 Amended Lease, ¶D).

Moreover, on October 21, 2013, when the WPCA sought relief from stay, it stated, *inter alia*, that Alpha holds no legal or equitable interest in the Property. (See ECF No. 28, “MRFS”). On October 30, 2013, Alpha filed an objection (see ECF No. 39, “Objection to MRFS”), and a motion to assume the Lease. (See ECF No. 41). On October 31, 2013, it amended its motion to assume. (See ECF No. 44, “Motion to Assume”.) Holdings objected on the basis that the Lease was terminated pre-petition, and, therefore, there is nothing to assume. (See ECF No. 49.)

The 6th factor is not relevant because there is no pending non-federal insolvency proceeding.

The court considers the 1st, 2nd, 3rd, and 7th factors collectively because issues pertaining to those factors overlap. Post-petition, Alpha commenced the Lease Action against Holdings alleging, *inter alia*, a breach of the Lease. Yet, before the state court can determine whether a breach has occurred, it must first determine whether the Lease exists. That determination will be made under Connecticut state law and that question needs to be resolved before this bankruptcy case can proceed. As noted, this bankruptcy case is a two-party dispute between Alpha and Holdings over the existence of a viable and enforceable lease. Yet, Alpha is proposing to pay a debt it does not owe, *i.e.*, Holdings’ debt to the WPCA. (See Proposed Plan, Article II; ECF No. 34 (hereafter, “Plan”).) Chapter 11 does not permit a debtor to pay non-existing claims. But more to the point, Alpha’s Plan rests on the proposition that it has an enforceable lease and the leasehold right of possession that Holdings, the owner of the Property, does not have.

The court gives considerable weight to the 7th factor regarding the purpose for which bankruptcy jurisdiction was sought. In the context of this case, consideration of this factor is more appropriately framed as whether this is a properly filed bankruptcy case. The following observations are warranted. Alpha's bankruptcy filing significantly affects not just Holdings, but the City of Bridgeport. While it is not uncommon for a debtor to file a bankruptcy to stay a foreclosure action commenced by one of its creditors, here, the WPCA is not a creditor of Alpha. Yet, Alpha sought bankruptcy protection to stay the Foreclosure Action commenced by third-party WPCA against Holdings.

The thrust of Alpha's argument is that under Chapter 11 of the Bankruptcy Code, it is permitted to confirm a plan that will pay whatever amount of money that is necessary to cure any and all code violations,⁴ see § 365(b)(1)(A), even though that is not its, but rather Holdings', obligation and also notwithstanding that Holdings did not and does not oppose foreclosure.^{5,6} That argument is untenable, but more to the point, it rests on a conclusion that the Lease is viable. That is the issue on which the Plan would succeed or fail, and that issue is pending in the state court Lease Action commenced by Alpha.

The cumulative effect of the many assumptions needed to be made persuades the court that the purpose for which the bankruptcy jurisdiction has been sought in this

⁴ There may also be an issue regarding parking requirements that must be satisfied in order to secure a certificate of occupancy. There is a dispute whether the parking issue can be corrected since Holdings represents that the lot that would serve as the parking lot for the Property has been sold and is no longer under its (Holdings') control. If that is so, the Debtor may have an insurmountable hurdle before it. While raised, that issue was not fully developed.

⁵ Curing monetary defaults have been estimated to approximate \$500,000. (See Audio File of Dec. 10, 2013 Hr'g, ECF No. 86.).

⁶ As noted, *supra* at 3, Alpha was permitted to intervene in the Foreclosure Action on the basis of its alleged lease interest in the Property. The State Court considered the claims of the parties in the Foreclosure Action, including Alpha's claim of a leasehold interest, but rejected that claim and entered a judgment of foreclosure.

instance is not for re-organization, but, for some unknown reason, to stop the sale of the Property. In any event, the Debtor cannot force Holdings to retain the Property by its (the Debtor's) hope that it will be able to assume a lease that may not exist.

Finally, as the WPCA argues, and no party disputes, while the stay remains in effect, taxes and fines accrue against the Property. (See Audio File of Dec. 3, 2013 Hr'g, ECF No. 78.) These continually increasing accruals are potentially detrimental to the WPCA, as the equity cushion in the Property is correspondingly diminished, thereby jeopardizing WPCA's ability to recover on its judgment. Yet, the WPCA has no remedy against Alpha for any harm it may suffer from the stay of the foreclosure sale, which was implemented by Alpha's filing of this bankruptcy case.

IV. Conclusion

Accordingly, IT IS ORDERED that, pursuant to § 305(a)(1), this case is dismissed.

Dated this 20th day of February 2014 at Bridgeport, Connecticut.

BY:



Alan H. S. Shiff
United States Bankruptcy Judge