

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT**

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In re:)	Chapter 11
EN DIAN DEVELOPMENT, LLC)	Case No. 22-50573 (JAM)
Debtor.)	Re: ECF No. 17
)	

ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE

On October 24, 2022, En Dian Development, LLC, the above captioned Debtor, filed a voluntary Chapter 11 petition in this Court. (ECF No. 1, the “Petition,” which the Debtor amended on December 22, 2022 (ECF No. 46).) On November 4, 2022, TBB-29Pembroke-2, LLC, a secured creditor of the Debtor, (the “Movant,” and, together with the Debtor, the “Parties”) filed a motion to dismiss the case for subjective bad faith and objective futility and seeks dismissal of the Debtor’s case with prejudice. (ECF No. 17, the “Motion.”) On December 5, 2022, the Debtor filed an objection to the Motion. (ECF No. 40, the “Objection.”) A hearing (the “Hearing”) on the Motion was held on January 3, 2023. For the reasons stated below, the Motion to Dismiss is granted and the Debtor’s case is dismissed with prejudice.

The Debtor and the Movant agree as to the facts alleged in the Motion. (Objection at 1.) Noting the agreement of the parties, and based on the record in this case, the unopposed representations made during the Hearing, and taking judicial notice of certain proceedings, the Court makes the following findings of fact:

1. The Debtor’s sole member and principal is Liqing Lin. The Debtor has no employees. The Debtor’s gross revenue in 2022 was \$291,666 and its gross revenue in 2021 was \$150,000. (Petition, Statement of Financial Affairs.)

2. The Debtor is the sole owner of the real property located at 29 East Pembroke Road, Danbury, Connecticut (the “Property”), which Property is worth \$2.9 million. (ECF No. 47.) Ms. Lin together with certain non-debtor affiliates (the “Affiliates”) operate a restaurant at the Property.

3. On or about September 29, 2015, the Debtor and the Affiliates took out a loan pursuant to a note with Movant’s predecessor-in-interest, which debt was secured by (a) a mortgage of the Property, (b) an assignment of rents from the Property, and (c) a UCC financing statement, which mortgage, assignment, and statement were recorded in the Danbury land records on September 30, 2015.

4. On or about May 20, 2016, the Debtor entered into a second loan pursuant to a second note with the Movant’s predecessor-in-interest, which debt was secured by (a) a mortgage of the Property, (b) an assignment of rents from the Property, and (c) a UCC financing statement, which mortgage, assignment, and statement were recorded in the Danbury land records on June 8, 2016.

5. The Movant’s predecessor-in-interest has assigned the notes and mortgages to the Movant, who presently holds them. The Debt on the notes exceeds \$2.781 million. (Motion Exs. 4-A, 4-B, 4-C.)

6. Payment on the notes ceased in late 2019.

7. On April 1, 2020, the Movant’s predecessor-in-interest initiated foreclosure proceedings against the Debtor, which litigation is titled *Bancorp Bank v. En Dian Development LLC*, Case No. DBD-CV20-6035855-S (Conn. Sup. Ct. Sept. 26, 2022). (Motion Ex. 2.) On July 6, 2021, the Superior Court entered a judgment of strict foreclosure, setting a law day of

September 28, 2021, finding the value of the Property to be less than the Movant's debt in the amount of \$529,847.55. (Motion Ex. 3.) This judgment was never appealed.

8. The Superior Court granted the Debtor's motions to open the judgment and extend the law day three times. However, on March 14, 2022, the Superior Court denied the Debtor's fourth motion to open the judgment and extend the law day, which denial the Debtor appealed. (Motion Ex. 2.) The Movant moved to dismiss the appeal (Motion Ex. 6), which motion the Appellate Court granted, finding the appeal frivolous (Motion Ex. 1.). Upon dismissal of the appeal, the Superior Court reset the law day for September 27, 2022. (Motion Ex. 2.) On September 22, 2022, the Debtor moved again to open the judgment and extend the law day, which motion the Superior Court denied, resetting the law day for October 25, 2022. (Motion Ex. 2.)

9. This Chapter 11 case was filed on October 24, 2022, the day before the rescheduled law day.

10. As of the filing of the Motion, there is a lack of equity in the Property of more than \$871,000 with respect to the Movant's liens caused by the continuing failure to pay amounts due on the notes as well as the failure to pay taxes and utilities. (Motion Exs. 4-A, 4-B, 4-C.)

11. In addition to the Movant, Seacoast National Bank has a third mortgage on the Property and the City of Danbury has a tax lien on the Property. (ECF No. 48.)

12. The City of Danbury has a priority unsecured property tax claim against the Debtor. The Debtor has no other unsecured creditors. (Petition, Schedule E/F.)

13. The Debtor has \$1,902.61 in its debtor-in-possession bank account, which is the same dollar amount the Debtor had its bank account prior to filing this Chapter 11 case. No additional money has flowed into the Debtor's estate since the filing of this Chapter 11 case,

despite representations at the 341 meeting that funds would start flowing into the Debtor's estate in December 2022. (ECF Nos. 41 & 45.)

14. The Debtor and the Movant have not resolved the issues raised in the Motion.

Based upon these findings of fact, and for the reasons stated below, the Court concludes that there is cause to dismiss this case pursuant to 11 U.S.C. §§ 1112(b)(1) and (4), and in accordance with the case of *C-TC 9th Ave. P'ship v. Norton Co. (In re C-TC 9th Ave. P'ship)*, 113 F.3d 1304 (2d Cir. 1997). Further, the Court concludes that there is cause pursuant to 11 U.S.C. § 349(a) to dismiss the case with prejudice with a two-year bar to the Debtor filing another bankruptcy case.

Section 1112(b)(1) states, in pertinent part, that “on request of a party in interest, and after notice and a hearing, the court shall . . . dismiss a case . . . for cause.” Section 1112(b)(4) states that cause includes, in pertinent part, (A) “substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation.” Here, the Movant's first and second lien debt against the only meaningful asset of the estate, which is greater than the value of the Property, continues to grow each day. Furthermore, the Debtor is unable to establish that the Property is generating any income, let alone income for the benefit of the estate. Under these circumstances, it is virtually certain that there will not be any meaningful recovery for unsecured creditors in this case. Therefore, the Court concludes this case is futile, which is cause for dismissal of the Debtor's case. Given that: (i) the only meaningful asset of the Debtor is already the subject of state court foreclosure proceedings in which a final judgment has entered; and (ii) there is only one unsecured creditor in this case, in accordance with 11 U.S.C. § 1112(b), the Court finds that dismissal is in the best interest of creditors rather than conversion to chapter 7.

In *C-TC 9th Ave.*, the United States Court of Appeals for the Second Circuit held that a bad faith filing could also be deemed to be cause for dismissal under § 1112(b)(1). [113 F.3d at 1310–12](#). The Second Circuit listed eight factors to consider in determining whether a filing was in bad faith:

- (1) the debtor has only one asset;
- (2) the debtor has few unsecured creditors whose claims are small in relation those of the secured creditors;
- (3) the debtor’s one asset is the subject of a foreclosure action as the result of arrearages or default on the debt;
- (4) the debtor’s financial condition is, in essence, a two party dispute between the debtor and secured creditors which can be resolved in the pending state foreclosure action;
- (5) the timing of the debtor’s filing evidences an intent to delay or frustrate the legitimate efforts of the debtor’s secured creditors to enforce their rights;
- (6) the debtor has little or no cash flow;
- (7) the debtor can’t meet current expenses including the payment of personal property and real estate taxes; and
- (8) the debtor has no employees.

Id. at 1311. By the Debtor’s own admission, these factors are all present in this case as illustrated in the findings of fact above.¹

The Debtor, however, argues that factors (6) through (8) weigh in favor of denying dismissal at this time because the Debtor should be provided with time to allow its business to recover from the effects of the COVID-19 pandemic. The Court is unpersuaded by this argument. During the Hearing, a series of representations were made that undermine the Debtor’s position. For example, the Movant represented that the Debtor’s problems predate the onset of the COVID-19 pandemic, which representation the Debtor did not contest. In addition, the Office of the United States Trustee represented that during the Section 341 meeting, the

¹ As an enumeration: (1) The Debtor has only one meaningful asset – the Property. (2) The Debtor has only one unsecured creditor, whose claim for \$109,000 is dwarfed by Movant’s claim for roughly \$2.8 million. (3) The Property is the subject of a state court foreclosure action. (4) There are very few creditors other than the Movant and all are subordinate to its debt. (5) The Debtor filed this case the day before the rescheduled law day. (6) The Debtor reflected no incoming cash in its operating reports. (7) The Movant’s claim is increasing because of failure to pay certain taxes and utilities. (8) The Debtor has no employees.

Debtor stated that its cash-flow would turn around in December, which the Debtor's operating report establishes has not occurred.

Therefore, given the clear and uncontroverted presence of all eight *C-TC 9th Ave.* factors, the Court finds the filing was in bad faith, which is additional cause under § 1112(b)(1) to dismiss this case.

Due to the Debtor's bad faith in filing this case the Court finds there is additional cause to dismiss the Debtor's case with prejudice under 11 U.S.C. § 349(a). This case is essentially a two-party dispute. The dispute is the subject of the existing state court foreclosure action, in which final non-appealable judgment has entered. This case was filed on the eve of the rescheduled law day, which the Debtor moved to be reset numerous times and which the Superior Court has ordered will not be reset again. The Debtor has no incoming cash to support a restructuring. There is no will on the part of the Movant to refinance the debt. A two-year ban to filing another case will prevent another filing such as this case, which serves no purpose other than to delay or frustrate the legitimate efforts of the Movant, before the foreclosure action reaches its conclusion.

For the reasons stated above, it is hereby

ORDERED: The Motion is **GRANTED** and the Debtor's case is dismissed pursuant to 11 U.S.C. §§ 1112(b)(1) and (4); it is further

ORDERED: Pursuant to 11 U.S.C. § 349(a), and for the reasons set forth herein, the dismissal of the Debtor's case is with prejudice. The Debtor is barred from filing a bankruptcy case under any chapter of title 11 in any jurisdiction for a period of two years from the date of the entry of this Order.

Dated at Bridgeport, Connecticut this 6th day of January, 2023.

Julie A. Manning
United States Bankruptcy Judge
District of Connecticut

