

**United States Bankruptcy Court  
Northern District of Illinois  
Eastern Division**

**Transmittal Sheet for Posting Opinions**

**Will this Opinion be Published?** No

**Bankruptcy Caption:** In re 318 Retail, LLC

**Bankruptcy No.:** 22 BK 02485

**Date of Issuance:** July 28, 2022

**Judge:** Jacqueline P. Cox

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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

|                       |   |                         |
|-----------------------|---|-------------------------|
| In re 318 Retail, LLC | ) | Bankr. No. 22-02485     |
|                       | ) |                         |
| Debtor.               | ) | Chapter 7 (Involuntary) |
|                       | ) |                         |
| _____                 | ) | Judge Jacqueline P. Cox |

**Order Denying the Receiver’s Motion for Dismissal and/or Abstention (Dkt. 36)**

The court-appointed Receiver, James E. Sullivan, a retired state court judge, requests that this involuntary bankruptcy case filed by creditor Republic Bank be dismissed or that this court exercise its discretion and abstain or suspend all proceedings in this case pursuant to Bankruptcy Code sections 303 and 305(a) as well as Federal Rule of Civil Procedure (“Fed. R. Civ. P.”) 12(b)(6) and Federal Rule of Bankruptcy Procedure (“Fed. R. Bankr. P.”) 1011. Receiver’s Motion for Dismissal and/or Abstention (“Motion”), Docket 36. Creditor Metropolitan Tower Condominium Association joined the Receiver’s motion on July 22, 2022. Docket 55.

**I. Background**

This court’s May 27, 2022 Amended Order includes a summary of the parties and the domestic relations case that has been pending for eleven years. Order at Docket 29.

The Receiver argues herein that Republic Bank acted in bad faith in filing this involuntary case in an effort to avoid adverse rulings made in state court, including its failure to get trial court rulings reversed on appeal. *See* Motion, Docket 36, ¶ 2; *see also In re Marriage of Lum & D’Angelo*, 2021 Ill App. (1st) 210981-U, ¶¶ 1-3 (Ill. App. Ct. Dec. 28, 2021) (affirming the circuit court’s order denying Republic Bank’s Motion to vacate an order appointing the receiver).

**II. Standards for Dismissal or Abstention**

Courts have to examine several factors in deciding whether to dismiss or suspend a

bankruptcy case. Doing so entails exercising discretion after evaluation of several factors on a case-by-case basis. *In re Int'l Zinc Coatings & Chems. Corp.*, 355 B.R. 76, 82 (Bankr. N.D. Ill. 2006). The operative Bankruptcy Code section, § 305(a)(1), permits dismissal or abstention if “the interests of creditors and the debtor would be better served by such dismissal or suspension.” 11 U.S.C. § 305(a)(1). Courts consider several factors in their determinations: “(1) the presence of unsettled issues of non-bankruptcy law; (2) the availability of another forum to decide those issues; (3) economy and efficiency of administration; (4) any prejudice to the parties; and (5) the purpose of the bankruptcy.” *See In re Int'l Zinc Coatings & Chems. Corp.*, 355 B.R. at 82 (citations omitted). The court may also assess the estate’s assets and the parties’ motivations. *Id.*

The main issue herein is that the debtor’s property, a condo space in a retail setting has not been occupied; it has not generated income for a very long time. The movant reports that it has been on the market for many years and has been vacant since 2005. Receiver’s Reply Brief, Docket 56, ¶ 17. Dismissing the bankruptcy case or suspending these proceedings herein would leave the receivership in place for an asset that has been out of economic circulation for too long. The Receiver’s prospects of selling or leasing it are basically non-existent.

#### **A. Presence of Unsettled Issues of Non-Bankruptcy Law**

There are no issues of unsettled non-bankruptcy law. This case involves uncomplicated issues of domestic relations, mortgage foreclosure and receivership law. The court does not suspect that the petitioning creditor, Republic Bank, filed this involuntary case to obviate a state court’s interpretation of law. While the Receiver argues that Republic Bank has failed a number of times to “disrupt” the Receivership Court’s jurisdiction, this court disagrees with that characterization. That would be true if Republic Bank filed this case without any legal basis.

## **B. The Availability of Another Forum**

The state court forum is available. However, it has not been able to sell or otherwise dispose of the Debtor's real estate to date. The bankruptcy forum disposes of debtors' assets very quickly and efficiently; the chapter 7 trustees do so routinely.

## **C. Economy and Efficiency of Administration**

The domestic relations case of the Debtor's principal, Louis D. D'Angelo, has been pending for eleven years. The secured debt that Republic Bank seeks to enforce matured in 2019. The bank has been paying the Debtor's real estate taxes and insurance expenses. Leaving the property in the Receiver's possession would prolong and increase this burden on the bank with limited prospect that a sale is likely.

Having a chapter 7 trustee administer the real estate will not prejudice the Receiver. He has not been able to secure a solid offer during the two years he has been authorized to do so.

When the court asked if there was equity in the property, no one asserted that there was. The court has been told throughout the proceedings that the secured lender, Republic Bank, is likely to be the only creditor to receive anything once the real estate gets sold.

The Receiver can seek compensation in the bankruptcy case pursuant to Bankruptcy Code § 543(c)(2): "The court, after notice and a hearing, shall . . . provide for the payment of reasonable compensation for services rendered and costs and expenses incurred by such custodian . . . ." 11 U.S.C. § 543(c)(2).

### **1. The Duty to Turnover Property to the Bankruptcy Estate**

None of the parties mentioned § 543, which requires that a custodian, which includes receivers, deliver to the bankruptcy trustee any property of the debtor in the custodian's possession.

11 U.S.C. § 543(b). Receivers appointed by state courts are custodians pursuant to § 101(11): “[t]he term custodian means . . . (A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title.” 11 U.S.C. § 101(11).

After notice and a hearing, the bankruptcy court may excuse compliance with § 543(b) “if the interests of creditors and, if the debtor is not insolvent, of equity security holders would be better served by permitting a custodian to continue in possession of such property . . . .” 11 U.S.C. § 543(d)(1). The Receiver has not asked to remain in possession. By not seeking such by now, the opportunity to be excused from complying with section 543(b) has been waived.

#### **D. Prejudice to the Parties**

No party will be prejudiced by having the Debtor’s assets and debts administered under the bankruptcy system. No party will lose anything by having a chapter 7 trustee dispose of the Debtor’s property. Its disposal is likely to occur sooner in bankruptcy than outside bankruptcy.

#### **E. Bankruptcy Purpose**

Does this bankruptcy case serve any bankruptcy purpose? According to the chapter 7 trustee it does, as he stated during the proceedings that he expects to receive something for administrative or unsecured creditors. If only the secured creditor is to receive sale proceeds, no such purpose might exist.

In mentioning that a bankruptcy sale is likely to proceed sooner under the Bankruptcy Code, where the domestic relations case has been pending for eleven years without final resolution, this court does not criticize the state court. The husband in that case appears to have a complicated economic profile, with interests in many properties. *See* Motion, Docket 36, Exhibit A, p. 1-3 (Agreed Order Appointing Receiver, *Lum v. D’Angelo*, No. 11 D 007463 (Ill. Cir. Ct. Aug. 21,

2020)). The Receiver is responsible for several interests; the chapter 7 trustee can concentrate on the Debtor's one real estate interest at issue here, which may allow him to sell the real property in issue quicker.

Denial of the Receiver's motion to dismiss or suspend proceedings (i.e., abstain) is necessitated by Republic Bank's economic reality. It has had to pay the debtor's real estate taxes and insurance for several years, since at least 2019 when the loan matured.

In addition, this court finds that this is not a two-party dispute that should be returned to state court. This matter involves Mr. D'Angelo's family, the Receiver as well as the Debtor and its many creditors.

### **III. Eligibility for Involuntary Bankruptcy**

The Receiver mentioned that this case may not be eligible for involuntary bankruptcy relief because only one (1) creditor has petitioned for such. The Bankruptcy Code requires that three (3) creditors with claims totaling at least \$18,600 more than the value of any lien on property of the debtor petition for involuntary relief. 11 U.S.C. § 303(b)(1). If there are fewer than 12 creditors, one or more creditors that hold claim(s) totaling at least \$18,600 more than the value of any lien on property of the debtor may petition for involuntary relief. 11 U.S.C. § 303(b)(2). The Receiver has alluded to this problem but has not specifically asserted it as a basis for dismissal or suspension of proceedings herein.

The record reflects that Republic Bank's lien secures a debt totaling between \$2.4 million to \$2.5 million.<sup>1</sup> That is a difference of \$100,000. Section 303 requires that the petitioning creditors

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<sup>1</sup> The Petition states that \$505,847.25 is "the amount of the claim above the value of any lien." Petition, Docket No. 1, p. 3. Republic Bank now claims that the current indebtedness due and owing under the Mortgage and Note "exceeds \$2,500,000, and . . . is increasing by the day." Docket 26, ¶ 7; *see also* Motion, Docket 36, ¶ 10.

hold claims against the debtor that are not contingent as to liability or the subject of a bona fide dispute as to liability or amount. 11 U.S.C. § 303(b). The Receiver argues that because he and the bank differ as to the amount of the secured debt, it is disputed. Motion, Docket 36, ¶¶ 9-10. The debt would be disputed if its existence was seriously in dispute. It is not. Whether the bank's legal expenses are recoverable and in what amount does not make the debt disputed; there is a question of the debt's amount, not its existence.

The Receiver relies on a 2010 Bankruptcy Court ruling for its position that where a creditor's claim is disputed, it cannot be a petitioning creditor in an involuntary bankruptcy case. See Motion, Docket 36, ¶ 9 (citing *In re Skyworks Ventures, Inc.*, 431 B.R. 573, 577 (Bankr. N.J. 2010)). There a law firm filed an involuntary bankruptcy petition against its client, the parent company, after its subsidiary and the subsidiary's creditors reached settlement to withdraw an involuntary bankruptcy petition against the subsidiary. See *In re Skyworks Ventures, Inc.*, 431 B.R. at 575-76. After paying \$900,000 of the law firm's \$1,100,000 bill, the parent contested that it owed the remaining \$200,000. *Id.* The law firm was found to have filed the involuntary petition against the parent in bad faith, likely to induce payment on its disputed claim by being an impediment to withdrawal of the petition against the subsidiary. *Id.* at 577. The law firm was ordered to pay the parent company reasonable attorney's fees, costs and punitive damages as authorized under 11 U.S.C. § 303(i)(1). *Id.* at 580. Republic Bank has not acted in bad faith as did the petitioning creditor in that case. That case does not help the Receiver.

The Receiver argues that involuntary cases are justified where a debtor dissipates its assets or makes improper transfers. Motion, Docket 36, ¶¶ 11-14 (citations omitted). Republic Bank credibly responded that allowing the Receivership to continue indefinitely while it pays the

property's real estate taxes and insurance expenses amounts to a form of dissipation of the bank's resources. Republic Bank's Response, Docket 48, ¶¶ 8, 18. The court agrees and finds that this does not amount to bad faith on the bank's part.

After this court entered the order for relief on June 10, 2022, the Debtor's principal filed a list of creditors disclosing 18 creditors on July 13, 2022. List of Creditors, Docket 52.<sup>2</sup> The Receiver would have had to analyze whether each creditor's claim(s) were contingent as to liability or the subject of a bona fide dispute as to liability or amount and if such non-contingent, undisputed claims aggregate at least \$18,600 more than the value of any lien on property of the debtor. No such analysis has been pursued. 11 U.S.C. § 303(b). This issue has been waived.

In any event, the issue of eligibility under 11 U.S.C. § 303 is not jurisdictional; it can be waived unless timely pursued. *Adams v. Zarnel (In re Zarnel)*, 619 F.3d 156, 164-70 (2d Cir. 2010) (“[T]he Supreme Court has clarified the distinction between ‘two sometimes confused or conflated concepts: federal-court ‘subject matter’ jurisdiction over a controversy; and the essential ingredients of a federal claim for relief . . . . In a unanimous decision, the Court held that a clear statement by Congress was required to construe a threshold limitation on coverage as jurisdictional.” (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 503, 515-16 (2006))). The Supreme Court ruled that “[w]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.” *See Arbaugh v. Y & H Corp.*, 546 U.S. at 516.

#### **IV. Abstention**

If abstention is appropriate, the court should prefer “permissive” rather than “mandatory”

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<sup>2</sup> On July 7, 2022, the Debtor's principal filed a “Voluntary Petition” under Chapter 7 on the Debtor's behalf. *See* Docket No. 51. This petition included a list of schedules.



abstention. Permissive, or discretionary abstention, is governed by 28 U.S.C. § 1334(c)(1), which provides that “[n]othing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.” *See In re Repurchase Corp.*, 329 B.R. 832, 835 (Bankr. N.D. Ill. 2005) (citing § 1334(c)(1)). The court considers the following factors when determining if permissive abstention is appropriate:

(1) the effect of abstention on the efficient administration of the estate; (2) the extent of how state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of applicable state law; (4) the presence of a related proceeding commenced in state court; (5) any jurisdictional basis other than 28 U.S.C. § 1334; (6) the degree of relatedness of the proceeding to the main bankruptcy case; (7) the substance rather than the form of any asserted core proceeding; (8) the feasibility of severing state law claims to allow judgment to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of the bankruptcy court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping; (11) the existence of a right to a jury trial; and (12) the presence of non-debtor parties.

*Matter of Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 6 F.3d 1184, 1189 (7th Cir.1993) (citations omitted); *see also In re Hearthside Baking Co., Inc.*, 391 B.R. 807, 817 (Bankr. N.D. Ill. 2008) (citations omitted).

No single factor is “determinative” in a decision to abstain because “each factor’s degree of relevance and importance is dependent on the circumstances of each case.” *In re Repurchase Corp.*, 329 B.R. at 836 (citations omitted).

The court finds that abstention is not appropriate because maintaining this matter in bankruptcy court does not prejudice any party and is not an effort to forum shop. Both the state court and the federal bankruptcy court are focused on the same goal, the sale of the Debtor’s property. Also, a chapter 7 trustee can get the property sold in the near future. That is preferable to waiting

for a sale in a domestic relations case that has been pending for eleven years.

**V. Conclusion**

The Receiver's Motion to Dismiss and/or Abstain (Docket 36) is Denied.

**Date:** July 28, 2022

**Enter:** \_\_\_\_\_  
Hon. Jacqueline P. Cox  
U.S. Bankruptcy Judge