IT IS SO ORDERED.

Dated: September 17, 2024

Beth A. Buchanan
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re	)	
	)	
VILLAGE GATE, LLC	)	**Case No. 24-10180**
	)	**Chapter 11**
Debtor-in-Possession	)	**Judge Buchanan**
	)	
	)	

MEMORANDUM OPINION GRANTING MOTIONS TO DISMISS
[Docket Numbers 44 and 46]

[This opinion is not intended for publication or citation.]

This matter is before this Court on the *Motions to Dismiss* filed by the United States Trustee and Pioneer Automotive, LLC; the *Responses* filed by Funding Realty, LLC and Debtor Village Gate, LLC and the United States Trustee's *Reply* [Docket Numbers 44, 46, 59, 61, 62 and 65]. This Court also considers the post-hearing briefs filed by the parties at Docket Numbers 158 – 161 and 173 – 175.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District and is determined to be a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

The United States Trustee ("UST") and Creditor Pioneer Automotive, LLC ("Pioneer") seek to dismiss Village Gate, LLC ("Village Gate")'s bankruptcy case "for cause" pursuant to 11 U.S.C. § 1112(b). They assert that Village Gate filed its bankruptcy petition in bad faith after engaging in prepetition misconduct, including the destruction of evidence, in an attempt to thwart payment of Pioneer's judgment award.[1] An evidentiary hearing was held on April 23, 2024 to consider evidence regarding the motions to dismiss as well as the UST and Pioneer's objections to the Debtor's election to proceed under subchapter V of chapter 11. Following the hearing, this Court carefully reviewed the testimony of the witnesses and the admitted exhibits.[2] For the reasons that follow, this Court concludes that Village Gate, LLC's bankruptcy petition was filed in bad faith. Furthermore, this Court concludes that dismissal is in the best interests of creditors and the estate. Accordingly, the motions to dismiss are granted.

I. FACTS

A. Formation of Village Gate

Debtor Village Gate, LLC ("Village Gate") owns an outdoor mall commonly referred to as the Greenhills Shopping Center located in Cincinnati, Ohio. Village Gate filed a chapter 11

[1] The UST asserted other bases for dismissal in its motion but decided to proceed with only its claim of bad faith at the evidentiary hearing.

[2] Pioneer introduced its Exhibits C, D, H, Q, S, CC, FF, QQ, UU, ZZ, AAA, CCC, DDD, GGG, HHH, III, JJJ, KKK, TTT, VVV, WWW, YYY, ZZZ, and CCCC, DDDD, FFFF, and HHHH [Docket Number 69]. The exhibits, along with the deposition testimony of Martin G. O'Rourke filed at Docket Number 78, were admitted without objection or limitation. The United States Trustee admitted its Exhibits A and F also without objection except that some schedules filed with the bankruptcy petition had been amended at Docket Number 16 [Docket Number 73].

bankruptcy petition on January 30, 2024 through its manager and designated representative, Shlomo (Steve) Rasabi [UST Ex. A].

Mr. Rasabi, was called to testify at the hearing on the UST and Pioneer's motions to dismiss. He is a licensed civil engineer who owns and manages a number of LLCs from his home base in Florida. He has no permanent residence in Ohio.

Mr. Rasabi testified that Village Gate was formed by Yehuda Chelminsky in March of 2016 to purchase the real property comprising the Greenhills Shopping Center. At the time, Mr. Chelminsky signed a resolution on behalf of Village Gate that gave Mr. Rasabi the power to execute any and all documents to purchase and close on the real estate on Village Gate's behalf [Pioneer Ex. Q]. Mr. Rasabi was also made the manager of Village Gate.

Village Gate purchased the property for $1,150,000.00 in March of 2016. The funding for the purchase was provided by Funding Realty, LLC which loaned Village Gate $1,150,000.00 secured by a first mortgage [Pioneer Ex. S] although the initial $100,000.00 was put down by another company, BMI Management, a company owned by Mr. Rasabi. The mortgage to Funding Realty was executed by Mr. Rasabi representing Village Gate as its authorized "member" but he was actually the manager of Village Gate. At the same time that the mortgage was signed, Mr. Rasabi also signed, on behalf of Village Gate, an Assignment of Leases and Rents to Funding Realty to secure payment of the loan [*Id*.]. Upon a default in the repayment of the loan, the Assignment of Leases and Rents provided that Funding Realty could, among other actions, collect the rents directly from Village Gate's tenants [*Id*.].

A separate Line of Credit Note was also executed by Mr. Rasabi as the authorized manager of Village Gate [Pioneer Ex. QQ]. Mr. Rasabi testified that the Line of Credit Note was presented to him at the closing in March of 2016. The Line of Credit Note provided that Funding Realty

would advance up to $1,500,000.00 to Village Gate to be used to repair and improve the condition of the shopping center [*Id*.]. The Line of Credit and Mortgage Note had maturity dates of April 1, 2019 but, Mr. Rasabi testified, they were extended to April 1, 2021 and then an additional five months after that time.

A Resolution of Village Gate states that Funding Realty was the sole and managing member of Village Gate at its origin [Pioneer Ex. Q]. However, Mr. Rasabi testified that at Village Gate's inception, Funding Realty held a 90% membership interest and "RE Equity Invetors Management LLC" ("REIM") held a 10% interest in Village Gate. REIM is a Florida company of which Mr. Rasabi owns a 90% interest. At the time of the bankruptcy filing, REIM owned a 90% interest in Village Gate and Funding Realty owned 10%.

B. Funding Realty's Relationship to Village Gate and Mr. Rasabi

The lender, Funding Realty, was owned by Mr. Chelminsky at the time Village Gate was formed. Mr. Rasabi testified that Funding Realty was basically a servicing company set up to fund and service loans such as the loan to Village Gate. Mr. Chelminsky retired and was succeeded by Martin O'Rourke who became the 100% member of Funding Realty in September of 2021. Mr. Rasabi testified that neither Mr. Chelminsky nor Mr. O'Rourke paid any funds to purchase their membership interests in Funding Realty. Instead, Mr. O'Rourke is paid $50 per hour for his services to own and operate the business.

The transcript of Mr. O'Rourke's deposition dated March 24, 2023 was entered as evidence at the hearing without objection or limitation. During his deposition, Mr. O'Rourke stated that he is a project manager for a roofing company but became the sole owner and managing member of Funding Realty as a side job. He was approached by the then-current managing member, Mr. Chelminsky, who asked if he would like to take on a little responsibility for a few hours a week

monitoring the "incomings and outgoings" of Funding Realty [Docket Number 78, O'Rourke Depo. Tr. p. 8]. For his services, Mr. O'Rourke confirmed that he is paid $50 an hour.

During the deposition, Mr. O'Rourke described Funding Realty as an asset management company with its purpose to monitor transactions on behalf of the true lender of funds, Lloyd's Funding, a Florida LLC owned by Sam Lieblich. Mr. O'Rourke stated that Funding Realty is "doing business as" Lloyd's Funding so it is part of the same company [*Id*., Tr. pp. 22, 116-17].

Mr. O'Rourke stated that Funding Realty has no formal office and no employees. He further stated that he has limited contact with Mr. Chelminsky, who he described as retired, and is not in communication with Lloyd's Funding or its owner, Mr. Lieblich. Mr. O'Rourke stated that he also has no knowledge of Funding Realty's transactions prior to becoming involved with Funding Realty in September of 2021. Instead, Mr. O'Rourke believed that Lloyd's Funding trusted that the loans to Village Gate would be taken care of based on the trusting 40-year relationship between Lloyd's Funding and Mr. Rasabi.

Mr. O'Rourke's communications regarding the Village Gate loans and their repayment were with Mr. Rasabi. Mr. O'Rourke stated that he holds meetings with Mr. Rasabi approximately once a month to review rent revenues and Village Gate expenses. Checks would be written for Village Gate expenses including Mr. Rasabi's management fee that was in the range of $5,000 a month. However, there was no written management agreement with Mr. Rasabi and Mr. O'Rourke relied on Mr. Rasabi to tell him what funds were needed to run the business. Beyond these duties, Mr. O'Rourke stated he was the keeper of Funding Realty's records that he received in a file from Mr. Chelminsky. However, he made clear in his deposition that he had not reviewed the records and had no understanding or knowledge of Funding Realty's operations or transactions before he became the sole owner of Funding Realty in September of 2021.

C. Village Gate Operations and Collection of Rental Income

At the hearing, Mr. Rasabi testified that he makes the executive level decisions for Village Gate. Village Gate has no employees and it is Mr. Rasabi that supervises contractors who maintain and renovate the shopping center.

Village Gate originally collected rents from the Greenhills Shopping Center tenants and deposited the rental income into a Village Gate bank account. However, at the time of the bankruptcy filing, Village Gate had no open bank account. As discussed later in this opinion, in March of 2021, Mr. Rasabi opened an account on behalf Funding Realty at Wright-Patt Credit Union and, subsequently, Village Gate's rental income was deposited into the Funding Realty account.

Amy Newcomer also testified with respect to Village Gate operations. She began working at the Greenhills Shopping Center as an independent contractor for Village Gate in the summer of 2018 doing administrative work like filing records and answering tenant questions. She is on the premises three to five days a week. Ms. Newcomer testified that in her position as an independent contractor for the Shopping Center, she interacted with contractors on premises at the Greenhills Shopping Center and testified that some improvements to the property, including repairs to the roof, had been made. Furthermore, in a portion of the shopping center that had been previously used as a bowling area, there was a lot of construction work.

D. Village Gate's State Court Litigation with Pioneer and Funding Realty

At the heart of the allegations in the motions to dismiss, is the pre-petition protracted litigation between Village Gate and Pioneer, one of the former tenants in the shopping center. In July of 2020 [*see* Pioneer Ex. VVV], Pioneer filed a complaint against Village Gate and Mr. Rasabi upon which Pioneer obtained a default judgment against Village Gate on October 23, 2020 in the

amount of $370,767.00 [Pioneer Ex. JJJ]. The default judgement was based on claims of breach of contract with respect to a broker-agent agreement that Village Gate entered with Pioneer for the selling of Pioneer's business and breach of fiduciary duty with respect to allegations that Village Gate misrepresented the existence of prospective buyers for the business and that Village Gate locked Pioneer out of its premises with substantial business property locked inside [*Id*.]. The default judgment was obtained after Village Gate failed to enter an appearance or respond to the complaint [*Id*.]. Following the default judgment, Pioneer obtained a judgment lien [UST Ex. A, Schedule D].

On November 6, 2020, Village Gate made an appearance in the case and filed a Rule 60(B) motion to set aside the default judgment [Pioneer Ex. VVV]. The motion to set aside the judgment was denied leading to Village Gate appealing the denial [*Id*.]. Village Gate's assignment of errors were overruled and the trial court's judgment denying Village Gate's Rule 60(B) motion was affirmed [*Id*.]. Village Gate filed other appeals and, in the process, Mr. Rasabi confirmed that Village Gate went through a series of attorneys. All appeals were denied including the final entry denying Village Gate's appeal on January 18, 2024, less than two weeks prior to Village Gate's bankruptcy filing [Pioneer Exs. WWW and YYY].

Other litigation between the parties ensued. In 2020, Village Gate filed an eviction action against Pioneer and Pioneer's owner, Matt Vollmar. Mr. Rasabi testified that the eviction was completed and Village Gate's claims were dismissed, but that the case remains pending on claims brought by Pioneer against Village Gate and Mr. Rasabi for destruction of evidence, abuse of process, fraudulent transfers and piercing the corporate veil. In that case, a September 11, 2023 order denies Village Gate's motion for reconsideration and certification that an order was final and

appealable but also warns the parties that if they do not make a substantial effort to comply with discovery, discovery sanctions may be issued [Pioneer Ex. ZZZ].

In a third piece of litigation, Funding Realty filed a foreclosure proceeding against Village Gate. In March of 2023, Pioneer obtained a court order in the foreclosure proceeding to compel discovery with respect to documents verifying payments on a loan. Funding Realty was ordered to fully respond to Pioneer's discovery requests, including disclosure of whether responsive documents have been lost or destroyed [Pioneer Ex. HHHH]. Following that order, Pioneer filed a motion for sanctions against Funding Realty for intentionally withholding documents that the court ordered Funding Realty to produce [Pioneer Ex. CCCC]. Village Gate presented no defenses to the foreclosure. However, summary judgment pleadings were withdrawn and the foreclosure case was set for trial on February 1, 2024. Village Gate's bankruptcy case was filed two days before the trial date.

E. Moving the Collection of Rental Income to a Funding Realty Account and the Accounting of Payments Towards the Loans

Following Pioneer's judgment against Village Gate, the bank account used for the deposit of rents collected from Village Gate tenants was changed such that the rents were no longer deposited in a Village Gate account. Mr. Rasabi testified that Funding Realty authorized him to open a bank account for Funding Realty to collect rent from Village Gate's tenants. On March 15, 2021, Mr. Rasabi signed documents at Wright-Patt Credit Union, including a Business Account Authorization Card and Limited Liability Company Resolution of Authority, as the designated "Member" of Funding Realty even though, he was never a member of Funding Realty [Pioneer Ex. KKK]. Mr. Rasabi also testified that he is the only authorized user on the account and that he represented to tenants of the shopping center that he was a manager of Funding Realty. At around

the same time that the Funding Realty account was opened, Village Gate's only bank account was closed.

Mr. Rasabi disputed Pioneer's assertion that the Wright-Patt Credit Union account he opened for Funding Realty was done in response to Pioneer's attempt to garnish the Village Gate account. He testified that, in fact, the Wright-Patt Credit Union account was opened at Funding Realty's request because of the assignment of rents and Funding Realty's loan maturing.

In his deposition, Mr. O'Rourke stated that from at least September of 2021 to January of 2023, he believed that all Village Gate's rental income from tenants was deposited in the Funding Realty bank account. Although Mr. O'Rourke was the sole managing member of Funding Realty during this time, Mr. O'Rourke stated that he had no dealings with the Funding Realty bank account. Instead, Mr. Rasabi handled the Funding Realty account. Mr. O'Rourke testified that Mr. Rasabi would write checks to move the rents to a separate management account at TD Bank. After subtracting out payment of Village Gate's expenses and Mr. Rasabi's management fee, Mr. O'Rourke estimated that remaining rents collected each month was $20,000 to $25,000 and those rents remained held in the TD Bank account to pay down the loan. Mr. O'Rourke estimated that there was approximately $500,000 held in the Funding Realty TD Bank account at the time of his deposition in March of 2023. When asked how those funds were being applied to the Funding Realty mortgage loan and line of credit, Mr. O'Rourke stated that he thought the funds were only being applied to the line of credit. He did not believe that any funds were applied to the mortgage loan that was in default.

Funding Realty's accounting of payments made by Village Gate and how they were applied is contained in two contrasting ledgers that were the subject of testimony by Mr. Rasabi at the hearing and by Mr. O'Rourke during his deposition. When presented with two Funding Realty

ledgers that Pioneer had obtained through discovery showing vastly differing amounts of interest charged on the loans and what remained owing to Funding Realty as of September of 2021 [Pioneer Exs. C and D], Mr. Rasabi testified that he did not know who prepared the ledgers or from where the information came. During his deposition, Mr. O'Rourke, Funding Realty's sole owner and managing member, was also presented with Funding Realty's differing ledgers. While stating that he prepared one of the two ledgers as a "continuation" of one already in place, he admitted that he had "no idea" who originally prepared the spreadsheet [O'Rourke Depo Tr., p. 79 and Def. Ex. 11 (same as Pioneer Ex. C)]. When asked why there were two different ledgers produced by Funding Realty showing differing interest rates and differing amounts owed for the same loan, Mr. O'Rourke stated that he had "no idea." [O'Rourke Depo. Tr. pp. 84-85].

F. Destruction of Evidence on Village Gate's Computer

In December of 2022, Mr. Rasabi knew that as part of the state court litigation and discovery, Pioneer was requesting to review his desktop computer located in the office at the Greenhills Shopping Center (the "Village Gate computer"). Mr. Rasabi stated that the request was initially refused because the Village Gate computer had a lot of tenant information on it. He said that after the judge ordered it to be turned over to Pioneer, he did arrange for the Village Gate computer to be delivered which occurred while he was out of the country.

Robert Adams was hired by Pioneer to review the Village Gate computer for any traces of intentional data disruption and to look for specific documents relevant to the state court litigation. Mr. Adams is the co-owner and lead forensics analyst of SALIX Limited, a Cincinnati-based litigation support and document management company. Mr. Adams has been an IT professional for thirty years with the last fourteen years devoted to computer forensics and electronic discovery. Based on his experience and accreditations, he was qualified as an expert in computer forensics.

The Village Gate computer was received by Mr. Adams on October 12, 2023 when it was dropped off at his office by Doug Koller, the person Mr. Rasabi arranged to deliver the computer.

Using forensic computer tools and browser history, Mr. Adams was able to determine that on October 10, 2023, two days prior to its delivery, someone used the Google search engine on the Village Gate computer to search for software known as "CCleaner". The software was then downloaded on to the computer. Mr. Adams testified that CCleaner is a data-wiping tool that is widely used to cover tracks on a computer. The software can be used to permanently delete browser history and to overwrite deleted documents to make them unrecoverable. It does this by creating new files and folders in spaces where deleted files might exist using various conventions that often include combinations of the letter "Z" and periods in the file name. It then overwrites the previously deleted data with zeros, rendering the data unrecoverable.

Mr. Adams testified that CCleaner requires specific, intentional end-user action to select, configure, and run the data-wiping functions.

From his investigation of the computer, Mr. Adams found over 16,000 files with the naming convention using combinations of the letter "Z" and periods and other evidence that the CC Cleaner data-wiping program had been run. He determined that the CCleaner program had been run at least four times effectively destroying the files that Pioneer had been investigating on the Village Gate computer. He concluded that all of this was done within 48 hours of when the computer had been dropped off to his office.

Ms. Newcomer also testified regarding the Village Gate computer turned over to Pioneer. Prior to that time, she had used the computer to email and draft and save documents and Excel spreadsheets as part of her work for Village Gate. The Village Gate computer had been the main computer she used to do her administrative work until January of 2023. At that point, the computer

was dismantled meaning the monitor was removed, the mouse was taken off and it was unplugged. She thought it was dismantled after Pioneer first requested the computer but not because of the request. Instead, it had become unreliable so a new lap top computer was purchased in January of 2023. After that, the old one was only used to surf the internet. It sat in an open area of a Village Gate office where contractors or tenants might also be able to use it. She testified that she was unfamiliar with the CCleaner software and did not download or use it.

G. Village Gate's Bankruptcy Filing

Village Gate filed its chapter 11 bankruptcy petition on January 30, 2024 [UST Ex. A (Petition at Docket Number 1), as amended by Docket Number 16].[3] In its amended schedules, Village Gate listed $3,484,810.21 in secured debts. Of that amount, Village Gate listed $3,042,538.30 owed to Funding Realty on the first mortgage and line of credit and $370,767.00 owed to Pioneer with respect to its judgment secured by a judgment lien. Village Gate listed the value of the property securing those claims, the Greenhills Shopping Center, as $1,365,000.00. The total value of Village Gate's assets was listed as $1,425,500.00.

Village Gate listed $107,439.58 in unsecured debts with $55,000 of that amount owed to REIM for its management services. Another $31,000 of the unsecured debts listed is owed to Greater Cincinnati Waterworks but Mr. Rasabi testified that much of that amount is disputed.

[3] At the hearing, the parties agreed to admission of Village Gate's schedules filed as UST's Exhibit A with the acknowledgment that the schedules were amended at Docket Number 16 to correct some information regarding the secured claims owed to Funding Realty. Where there is a discrepancy, the amounts reflected in this opinion are from the amended schedules.

II. LEGAL ANALYSIS

A. Establishing "Bad Faith" as Cause for Dismissal Pursuant to § 1112(b)

The United States Trustee and Pioneer seek to dismiss Village Gate's chapter 11 case "for cause" pursuant to 11 U.S.C. § 1112(b). This provision provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."11 U.S.C. § 1112(b)(1). The party seeking dismissal of a chapter 11 bankruptcy case bears the burden of proving, by a preponderance of the evidence, that cause exists for dismissal. *In re Creekside Senior Apartments, L.P.*, 489 B.R. 51, 60 (B.A.P. 6th Cir. 2013).

If the movant establishes "cause," the court is required to dismiss or convert the case, whichever is in the best interests of the creditors and the estate, unless the exception in § 1112(b)(2) applies or the court appoints an examiner or a chapter 11 trustee under § 1104. 11 U.S.C. § 1112(b)(1); *In re Four Wells Ltd.*, 2016 Bankr. LEXIS 1673, at *44, 2016 WL 1445393, at *15-16 (B.A.P. 6th Cir. April 12, 2016) ("Once a bankruptcy court determines that 'cause' exists under § 1112(b)(1), it is under an obligation to dismiss the case, unless [§ 1112(b)(2) applies]."); *Sullivan v. Harnisch (In re Sullivan)*, 522 B.R. 604, 612 (B.A.P. 9th Cir. 2014) (holding where a court determines that cause exists to convert or dismiss a case, the court must also determine if § 1112(b)(2) applies and "decide whether dismissal, conversion, or the appointment of a trustee or examiner is in the best interest of creditors and the estate").

Whether cause exists to dismiss a case under § 1112(b) is a matter of judicial discretion to be determined based on the particular facts and circumstances of each case. *Creekside*, 489 B.R.

at 60 ("In determining whether cause exists to dismiss a case under § 1112(b), a court must engage in a case-specific factual inquiry which focuses on the circumstances of each debtor." (internal citations and quotation marks omitted)); *Four Wells Ltd.*, 2016 Bankr. LEXIS 1673, at *27, 2016 WL 1445393, at *9 (observing that the existence of cause "is a question left to the sound discretion of the bankruptcy court") (internal citations and quotation marks omitted)); *In re Forum Health*, 444 B.R. 848, 856 (Bankr. N.D. Ohio 2011) ("What constitutes cause is a matter of judicial discretion to be determined on a case by case basis.") (internal citations and quotation marks omitted)).

Section 1112(b)(4) provides a non-exclusive list of circumstances that may constitute "cause" for dismissal of a chapter 11 case. *In re Peak Serum, Inc.*, 623 B.R. 609, 619 (Bankr. D. Colo. 2020). These include such factors as 1) a substantial or continuing loss or diminution of the estate and an absence of a reasonable likelihood of rehabilitation; 2) gross mismanagement of the estate; and 3) a failure to comply with court orders. 11 U.S.C. § 1112(b)(4). Most of the factors provided for in § 1112(b)(4) contemplate failures or misconduct on the part of a debtor that occurs at a time after the bankruptcy petition is filed. Consequently, these factors suggest that a debtor should be given some "breathing room" and an opportunity to move towards reorganization prior to the filing of a motion to dismiss. With respect to this case, it is still early with very little opportunity to work towards reorganization given the amount of time dedicated to dealing with the motions to dismiss, objections to the subchapter V designation, and other ongoing litigation in this case. Consequently, the case would not fit neatly into the statutory list of circumstances that constitute cause for dismissal.

However, the UST and Pioneer do not focus on the statutorily listed bases, but, rather, raise bad faith in the filing of the bankruptcy petition as cause for dismissal. It is well-settled in the Sixth

Circuit that a debtor's bad faith in filing a chapter 11 case may serve as cause for dismissal under § 1112(b). *In re Lee*, 467 B.R. 906, 917 (B.A.P. 6th Cir. 2012) (citing *Trident Assocs. Ltd. Partnership v. Metro. Life Ins. Co. (In re Trident Assocs. Ltd. Partnership),* 52 F.3d 127, 130 (6th Cir.1995)). Again, the party seeking dismissal of a case under § 1112(b) must demonstrate a debtor's bad faith, by a preponderance of the evidence. *Lee,* 467 B.R. at 917.

No single test for determining whether a petition is filed in bad faith exists. *Id.* Instead, it is a fact specific and flexible determination that must be made on a case-by-case basis by looking at the totality of the circumstances. *Id.* However, to assist courts in conducting their careful, flexible analysis, the Sixth Circuit has articulated eight factors that may be "meaningful" in evaluating bad faith and many of them are similar to the statutory factors found in § 1112(b)(2) except that they are more focused on the Debtor's pre-petition conduct and, consequently, are more relevant to this case:

1. The debtor has one asset.

2. The pre-petition conduct of the debtor has been improper.

3. There are only a few unsecured creditors.

4. The debtor's property has been posted for foreclosure, and the debtor has been unsuccessful in defending against the foreclosure in state court.

5. The debtor and one creditor have proceeded to a standstill in state court litigation, and the debtor has lost or has been required to post a bond which it cannot afford.

6. The filing of the petition effectively allows the debtor to evade court orders.

7. The debtor has no ongoing business or employees.

8. The lack of possibility of reorganization.

Trident, 52 F.3d at 131 (citing *Laguna Assocs. Ltd. P'ship v. Aetna Cas. & Sur. Co. (In re Laguna Assocs. Ltd. P'ship),* 30 F.3d 734, 738 (6th Cir.1994)); *Webb MTN, LLC v. Whaley* (*In re Webb*

MTN, LLC, 2008 U.S. Dist. LEXIS 10030, at *8, 2008 WL 361402, at *3 (E.D. Tenn. Feb. 8, 2008). While these factors are some indicia of bad faith, the Sixth Circuit cautions that "'no list is exhaustive of all the conceivable factors which could be relevant when analyzing a particular debtor's good faith.'" *Laguna*, 30 F.3d at 738 (further citations omitted).

The UST and Pioneer argue that Village Gate's bankruptcy filing ticks the boxes of many of the *Trident* factors. This Court agrees. Village Gate's only significant asset is the real estate comprising the shopping center, it has very limited unsecured debts in number and amount, and it has no employees. Furthermore, the bankruptcy filing was precipitated by pre-petition state court litigation with its judgment lien creditor, Pioneer.

However, as this Court has previously determined in connection with Village Gate's ultimately unsuccessful choice to proceed under subchapter V of chapter 11, Village Gate is what the Bankruptcy Code defines as "single asset real estate." See 11 U.S.C. § 101(51B). In such cases, some *Trident* factors are always or almost always present: limited assets beyond the real estate, few unsecured creditors, limited business operations, no employees, and, often, a pre-petition dispute with a secured creditor. *See In re 530 Donelson, LLC*, 2024 Bankr. LEXIS 1218, at *11, 2024 WL 2703146, at *5 (Bankr. M.D. Tenn. May 24, 2024). While the full list of *Trident* factors are still to be considered, these particular factors should seldom be controlling in single-asset real estate cases. *Id*. "Otherwise, there is no purpose in having a separate category of bankruptcy – single-asset real estate cases – in the Bankruptcy Code." *Id*. *See also In re Cambridge Woodbridge Apartments, LLC*, 292 B.R. 832, 838-39 (Bankr. N.D. Ohio 2003). Instead, the proper focus is put on other factors supporting bad faith in such cases. *530 Donelson*, *LLC*, 2024 Bankr. LEXIS 1218, at *12, 2024 WL 2703146, at *5 (focusing on allegations of prepetition misconduct, evasion of state court orders, and other additional circumstances that the court found to be meaningful).

Accordingly, this Court looks to other factors to determine bad faith. In a case replete with Pioneer's accusations of collusion, sham transactions and pre-petition litigation misconduct, the evidence Pioneer presented at the hearing creates a surprisingly thin record. Pioneer failed to introduce many of the documents that would have provided the background necessary to fully understand the parties' prepetition relationship and the timing of critical events in the three state court lawsuits in which Pioneer alleges misconduct. When this Court requested that the parties connect the evidentiary dots in post-hearing briefing, Pioneer filed a brief relying, in part, on documents that were not introduced or admitted at the hearing [See Docket Number 160, (relying on exhibits attached to the O'Rourke deposition but not admitted at the evidentiary hearing on the motions to dismiss)]. Those documents, if introduced at the hearing, would be subject to evidentiary objection and requirements of authentication and admissibility. Because they were not introduced at the hearing, they were not considered by this Court in this opinion. Accordingly, this Court reviewed the testimony and documents actually admitted to determine whether the factual record from the evidentiary hearing supports a finding of bad faith by the preponderance of the evidence.

In this case, Pioneer asserts that Village Gate, through its manager and designated representative Mr. Rasabi, engaged in prepetition misconduct designed to thwart payment of Pioneer's judgment. Pioneer asserts that Mr. Rasabi's close relationship with Village Gate's lender, Funding Realty, allowed it to move Village Gate's rental income out of a Village Gate account and into a Funding Realty account in an effort to limit Pioneer's ability to access those funds and to obscure whether those funds were being used to properly pay down the secured debts owed to Funding Realty. The evidence presented at the hearing, while limited, supports these allegations.

Less than five months after Pioneer's judgment, Funding Realty exercised its rights under the assignment of rents and leases to collect all rents from Village Gate tenants directly. Although not a member of Funding Realty, Mr. Rasabi himself opened the Funding Realty account into which the rents were deposited by presenting himself as a member of Funding Realty on the documents presented to Wright-Patt Credit Union to open the account [Pioneer Ex. KKK]. He also testified to presenting himself as a manager of Funding Realty to Village Gate's tenants. Mr. Rasabi testified that he was the only authorized user of the Funding Realty bank account. Furthermore, Mr. O'Rourke made clear during his deposition that even though he was the sole owner and member of Funding Realty, he had no interaction with the Funding Realty bank account and relied on Mr. Rasabi to determine what checks needed to be written from the account to pay Village Gate expenses, including Mr. Rasabi's management fees.

Under typical circumstances, a lender's decision, upon default, to exercise its contractual rights under an assignment of rents to collect rent directly from a borrower's tenants would not be indicative of bad faith on the part of the borrower. However, the relationship between Funding Realty and Village Gate has not been a typical lender-borrower relationship. Both Mr. O'Rourke and Mr. Rasabi's testimony made clear that when Mr. O'Rourke became the owner and sole member of Funding Realty in September of 2021 for no consideration and with no knowledge of the lending transactions that underlies Funding Realty's business, he was intended to be nothing more than a figurehead. Indeed, when presented with contrasting Funding Realty ledgers of the Village Gate loan accounting, he admitted he had no idea who prepared the ledgers or the source of the information they contained.

Instead of Mr. O'Rourke, it was Mr. Rasabi, Village Gate's manager, that controlled the Funding Realty account activities. As such, Mr. Rasabi was working both sides of the lender-

borrower relationship. And in this dual capacity, Mr. Rasabi was able to route Village Gate's rental income away from its own account and into one in the name of Funding Realty effectively cutting off any ability by Pioneer to garnish the account while, at the same time, continuing to pay Village Gate's expenses and his own management fee out of Funding Realty's account.

This effort to avoid paying Pioneer's judgment, alone, might have been insufficient to support bad faith. However, Village Gate's intentional destruction of evidence in the state court litigation with Pioneer tips the scale.

Mr. Rasabi knew that Pioneer had requested the computer in discovery in December of 2022, but the computer was not turned over to Mr. Adams, Pioneer's computer forensics expert, until October 12, 2023. Mr. Rasabi testified that he did not immediately turn the computer over in discovery because the computer contained tenant information including Social Security, personal information and addresses. He testified that he wanted his attorneys to check first and make sure that it was proper to do so. When the Judge eventually ordered the computer to be turned over to Pioneer, Mr. Rasabi stated that he arranged to have it delivered while he was out of the country.

However, according to Mr. Adams's convincing and unrefuted testimony, within the 48 hour period prior to the delivery of the Village Gate computer, someone downloaded and used data-wiping CCleaner software to intentionally destroy the computer's data. Certainly, the timing of the destruction of evidence on the Village Gate computer within two days of its delivery to Pioneer suggests intentional conduct aimed at preventing Pioneer from accessing the data.

Nonetheless, Village Gate attempts to paint a different picture. Ms. Newcomer, Mr. Rasabi's assistant, testified that, after January of 2023, the computer no longer worked well and was left dismantled and unplugged in Village Gate's open office space. She testified that tenants and others had unlimited access to the office area and could use the Village Gate computer to surf

the Internet. Village Gate's attorney speculates that, because it was left in open office space, tenants, contractors or others might have downloaded and ran the CCleaner software in an effort to hide their own misconduct, such as nefarious Internet surfing.

From this Court's point of view, however, Mr. Rasabi and Ms. Newcomer's testimony regarding the Village Gate computer begs a different question: If the computer contained sensitive tenant information, as suggested by Mr. Rasabi, such that he and his state court attorneys spent months refusing to turn it over to Pioneer in discovery, why would he allow Ms. Newcomer to leave the computer accessible in an open area of Village Gate's office to be used by tenants and others to surf the Internet? Based on the fact that the data wiping occurred within a 48 hour period prior to when the Village Gate computer was turned over to Pioneer in discovery, this Court draws a more probable inference: the evidence on the computer was intentionally destroyed to keep it out of Pioneer's hands. While no one disputes that Mr. Rasabi was out of the country at the time that the Village Gate computer was delivered, Mr. Rasabi's significant involvement in the state court litigation and control over Village Gate's actions lead to the conclusion that the data wiping was done at his direction.

In addition, the timing of Village Gate's bankruptcy filing suggests an effort to use the bankruptcy process as another step in evading the Pioneer judgment and other state court battles with Pioneer. Village Gate's bankruptcy petition was filed less than two weeks after Village Gate exhausted all appeals in the state court case in which Pioneer obtained its judgment and two days prior to the trial set in the foreclosure action with Pioneer and Funding Realty that also involved discovery disputes between the parties.

In his closing remarks during the hearing on the motions to dismiss, the former subchapter V trustee stated that there is trouble in the water of this bankruptcy case. He just was not sure if it

was enough to sink the ship. While no single factor may be sufficient to sink the ship as the former subchapter V trustee so artfully stated, when adding the troubling factors together, this Court concludes that they are. In particular, this Court considers Mr. Rasabi's dual representation of both lender and borrower to move Village Gate's rental income to a Funding Realty account that he controlled, the timing of Village Gate's bankruptcy filing in relation to occurrences in the state court litigation with Pioneer, and, in particular, the intentional destruction of evidence on a Village Gate computer to keep it out of Pioneer's hands. These factors combine to lead this court to the conclusion that Village Gate's bankruptcy petition was filed in bad faith and that "cause" has been established by a preponderance of the evidence.

B. Determining Whether Dismissal, Conversion or Appointment of a Chapter 11 Trustee is in the Best Interests of Creditors and the Estate

Upon a finding of cause, § 1112(b) provides that, a court "shall" dismiss a chapter 11 case or convert it to one under chapter 7, whichever is in the best interests of the creditors and the estate, unless the exception in § 1112(b)(2) applies or the court appoints an examiner or chapter 11 trustee under § 1104(a). *See* 11 U.S.C. § 1112(b)(1). Having determined that cause exists and the exception under § 1112(b)(2)[4] does not apply, the options available to this Court are limited to dismissal, conversion, or appointment of a chapter 11 trustee or examiner—whichever is in the

[4] In order to defeat dismissal or conversion under the § 1112(b)(2) exception, this Court must identify unusual circumstances that exist establishing that converting or dismissing the case is not in the best interests of the creditors and the estate and, in addition, the debtor or any other party in interest must establish each of the following elements: "(i) the reasonable likelihood that a plan will be confirmed within a reasonable period of time; (ii) the grounds for granting dismissal include an act or omission of the debtor (other than in paragraph 4(A)) for which there exists reasonable justification; and (iii) the act or omission will be cured within a reasonable period of time fixed by the court." *In re Forum Health*, 444 B.R. 848, 859–60 (Bankr. N.D. Ohio 2011) (summarizing § 1112(b)(2)(A) and (B) requirements). In this instance, this Court has not identified unusual circumstances to support that converting or dismissing the case is not in the best interests of creditors and the estate. Furthermore, neither Village Gate nor Funding Realty, the parties objecting to dismissal, has established the other § 1112(b)(2)(A) and (B) requirements nor argued that this exception applies.

best interests of creditors and the estate. *In re Cal. Palms Addiction Recovery Campus, Inc.*, 2022 Bankr. LEXIS 1628, at *38, 2022 WL 2116643, at *15 (Bankr. N.D. Ohio June 10, 2022) ("After a finding of cause, the court's discretion is limited; it must grant some form of relief unless § 1112(b)(2) applies." (internal citations and quotation marks omitted)). Once cause for relief is shown under § 1112(b), a court has wide discretion to determine which alternative is in the best interests of creditors and the estate. *Sullivan*, 522 B.R. at 612 ("If cause is established, the decision whether to convert or dismiss the case falls within the sound discretion of the court."); *Cal. Palms*, 2022 Bankr. LEXIS 1628, at *43, 2022 WL 2116643, at *17 ("[A] bankruptcy court has wide discretion to either convert or dismiss [a chapter] 11 case." (citations omitted)).

Pioneer and the UST argue that Village Gate's case should be dismissed so that Pioneer can return to state court to pursue its state court remedies. Alternatively, Funding Realty advocates for conversion to chapter 7. Funding Realty asserts that anything that could be accomplished in state court could also be accomplished in this Court by a chapter 7 trustee, including determining the extent and validity of liens, the evaluation and resolution of potential avoidance actions, and the sale of Village Gate's real property if appropriate.

While advocating for a specific outcome, none of the parties analyzed which outcome would be in the best interest of creditors and the estate.

Conversion to chapter 7 does not appear to be a viable alternative. Funding Realty asserts that it is undersecured with respect to Village Gate's only significant asset, the real property comprising the shopping center. Converting to chapter 7, then, would not benefit creditors or the estate since a liquidation of the real estate would not afford a distribution to creditors other than Funding Realty. While this Court must consider the interests of all creditors, including Funding Realty, it is unclear how a chapter 7 trustee could feasibly administer the sale of Funding Realty's

collateral or conduct an investigation of Funding Realty's secured claims with respect to such collateral. While § 506(c) may provide a basis for a chapter 7 trustee to recover estate expenses associated with preserving or disposing of a secured party's collateral, the trustee may not be able to recover his or her compensation under § 326(a). *See generally*, 4 Colliers on Bankruptcy, ¶506.05[1] (Richard Levin & Henry J. Sommer eds., 16th) ("[I]n any instance in which a trustee has expended estate funds to preserve or dispose of a secured creditor's collateral, the trustee's recovery under section 506(c) is to reimburse the estate for the trustee's expenditure; it is not compensation to the trustee"); *In re McCarty*, 2015 Bankr. LEXIS 2673, at *13-20, 2015 WL 4747185, at *6 (Bankr. S.D. Ohio, July 30, 2015) (noting that "there is a split of authority as to whether a trustee's statutory commission relating to the sale of particular property falls within the parameters of 'costs and expenses of preserving, or disposing of, such property,' and thus may be surcharged to a creditor's collateral and recovered for the estate pursuant to § 506(c)."). Nor has Funding Realty expressly agreed to a surcharge of its collateral to compensate the estate for the disposition of its collateral or investigation into the validity or extent of its liens. As such, it is more likely that a chapter 7 trustee would abandon the estate's interest in the shopping center making the conversion to chapter 7 a futile exercise.

Another option under § 1112(b) is the appointment of an examiner. An examiner can investigate and evaluate Pioneer's allegations regarding the validity of Funding Realty's secured position and also evaluate any avoidance actions that might exist. But, there is conflicting authority as to whether an examiner may bring avoidance actions if they do exist; or instead, if those actions would have to be brought by the debtor if no trustee is appointed. *See Official Committee of Asbestos Personal Injury Claimants v. Sealed Air Corp. (In re W.R. Grace & Co.)*, 285 B.R. 148, 156 (Bankr. D. Del. 2002) (concluding that the statutory language of § 544 and Third Circuit

precedent allows for the trustee (or debtor acting as trustee) to bring an avoidance action but not an examiner but noting contrary case law). This Court is doubtful, given the close relationship between Mr. Rasabi and Funding Realty, that Village Gate would bring an avoidance action against Funding Realty should such a claim exist. Even if an examiner were able to prosecute an avoidance action on behalf of the estate, it is uncertain how an examiner would be compensated for doing so if the examiner was ultimately unsuccessful in such litigation.

That leaves the appointment of a chapter 11 trustee. Presumably, a chapter 11 trustee would propose a liquidating plan of reorganization, which again raises the same concerns regarding the benefit to creditors given Funding Realty's undersecured lien position. The resources available to cover the costs of administration are once more unclear. The costs to the estate may be higher in chapter 11 than chapter 7 since a chapter 11 trustee would need to be compensated for his or her hourly services in administering the estate and operating the debtor's business, plus having sufficient funds to pay quarterly fees. While there may be greater flexibility for a negotiated "carve-out" from Funding Realty's collateral to cover such costs of administration, Funding Realty has not asked for the appointment of a chapter 11 trustee nor has it offered a carve-out from its collateral. Accordingly, on the record currently before this Court, the appointment of a chapter 11 trustee seems neither feasible nor in the best interest of creditors and the estate.

Dismissal, on the other hand, will return all parties to their prepetition status. Village Gate may continue to operate the Greenhills Shopping Center for the benefit of its creditors and tenants. Village Gate, Funding Realty, and Pioneer may litigate to conclusion their respective disputes in state court. And the bankruptcy estate will be relieved of the costs of administration for what appears to be of little to no benefit to creditors as a whole. Accordingly, this Court concludes that dismissal of this chapter 11 case is in the best interest of creditors and the estate.

III. CONCLUSION

For the reasons stated herein, the Motions to Dismiss filed by the United States Trustee and Pioneer Automotive, LLC [Docket Numbers 44 and 46] are GRANTED. Village Gate, LLC's bankruptcy case will be dismissed by separate order.

SO ORDERED.

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