UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
	:	
AAGS HOLDINGS LLC,	:	
	:	Chapter 11
	:	Case No. 19-13029 (SMB)
Debtor.	:	

MEMORANDUM DECISION DENYING MOTION OF QPS 23-10 DEVELOPMENT LLC FOR ENTRY OF AN ORDER (I) DISMISSING CHAPTER 11 CASE, OR, IN THE ALTERNATIVE, (II) EITHER (A) DETERMINING THAT THE AUTOMATIC STAY DOES NOT APPLY TO PURCHASE AGREEMENT OR (B) VACATING STAY WITH RESPECT TO PRUCHASE AGREEMENT

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STUART M. BERNSTEIN
United States Bankruptcy Judge:

The Debtor, AAGS Holdings LLC, entered into an Agreement of Purchase and Sale ("PSA") with QPS 23-10 Development LLC ("QPS") to purchase real property. The

PSA scheduled the closing for 10:00 a.m. on September 20, 2019 and stated that time was of the essence ("TOE"). When the parties failed to agree to an adjournment, the Debtor filed its chapter 11 petition at 10:16 a.m. on September 20, 2019. QPS moves to dismiss the case on the basis of bad faith or, in the alternative, determine that the automatic stay either does not apply to the PSA or vacate the automatic stay so that QPS can terminate the PSA ("*Motion*").[1]

The Court denied the *Motion* from the bench and this memorandum explains its reasoning.

BACKGROUND

The relevant factual background is set forth in the *Motion* and in the *Declaration of Kevin Maloney* ("*Maloney Decl.*") (ECF Doc. # 7) filed in support of the Motion. Where applicable, the background also draws on facts presented in the *Declaration of Justin Elrich* ("*Elrich Decl.*")[2] and the *Declaration of Gary Segal* ("*Segal Decl.*"),[3] which are both appended to the Debtor's response ("*Response*").[4]

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[1] *Motion of QPS 23-10 Development LLC for Entry of an Order (I) Dismissing Chapter 11 Case, or, in the Alternative, (II) Either (A) Determining That the Automatic Stay Does Not Apply to Purchase Agreement or (B) Vacating Stay with Respect to Purchase Agreement*, dated Oct. 3, 2019 (ECF Doc. # 6).

[2] *Declaration of Justin Elrich in Support of Debtor's Opposition to the Motion of QPS 23-10 Development LLC for Entry of an Order (I) Dismissing Chapter 11 Case, or, in the Alternative, (II) Either (A) Determining That the Automatic Stay Does Not Apply to Purchase Agreement or (B) Vacating Stay with respect to Purchase Agreement*, dated October 19, 2019 (ECF Doc. # 25-1).

[3] *Declaration of Gary Segal in Support of Debtor's Opposition to the Motion of QPS 23-10 Development LLC for Entry of an Order (I) Dismissing Chapter 11 Case, or, in the Alternative, (II) Either (A) Determining That the Automatic Stay Does Not Apply to Purchase Agreement or (B) Vacating Stay with respect to Purchase Agreement*, dated October 22, 2019 (ECF Doc. # 25-2).

[4] *Debtor's Opposition to the Motion of QPS 23-10 Development LLC for Entry of an Order (I) Dismissing Chapter 11 Case, or, in the Alternative, (II) Either (A) Determining That the Automatic Stay Does Not Apply to Purchase Agreement or (B) Vacating Stay with respect to Purchase Agreement*, dated October 22, 2019 (ECF Doc. # 25).

On July 17, 2019, the Debtor and QPS entered into the PSA for the sale of real property located at 23-10 Queens Plaza South, Queens, New York ("Property") for the purchase price of $27,500,000. Gary Segal, a principal of the Debtor, signed the PSA on behalf of the Debtor and delivered a down payment of $100,000 into escrow. The PSA included the following provision relating to time of the closing:

> The closing of the transaction contemplated hereby (the "**Closing**") shall occur at 10:00 A.M., New York City Time on September 20, 2019 (such date, as the same may be adjourned by Seller pursuant to Section 2.3 hereof, being herein referred to as the "**Closing Date**"). TIME SHALL BE OF THE ESSENCE WITH RESPECT TO PURCHASER'S AND SELLER'S OBLIGATIONS TO CLOSE ON THE CLOSING DATE.

(PSA § 4.1 (boldface and underlining in the original).)[5] The PSA included three possible locations for the closing: (i) the office of Pryor Cashman, QPS's attorney, (ii) the office of the Purchaser's lender or the lender's attorneys or (iii) through an escrow maintained by a mutually agreeable title company. (PSA § 4.2.) The parties ultimately agreed the closing would be virtual, rather than in person, and the executed documents would be held in escrow and released on the Closing Date. (*Motion* at ¶ 11.)

The PSA did not automatically terminate if the Closing did not occur by the Closing Date. It provided that if the Debtor was unable to close by the Closing Date and QPS was ready, willing and able to perform, QPS "shall be entitled to terminate this Agreement and retain the Downpayment and any interest thereon as and for full and complete liquidated and agreed damages for Purchaser's

[5] A copy of the PSA is annexed to the *Maloney Decl.* as Exhibit B.

Default, and thereupon this Agreement shall terminate and be of no further force or effect . . . ." (PSA § 10.1.) The PSA could only be terminated in writing, (PSA § 17), and in the event of termination by QPS, notice had to be sent to the Debtor and the escrow agent at the addresses listed in the PSA. (*See* PSA § 14.)

The Debtor's obligation to close was not conditioned on its ability to obtain financing. (PSA § 3.3.) Nevertheless, the day before the scheduled Closing, Justin Erlich of Churchill Real Estate ("Churchill"), the Debtor's proposed lender, emailed Kevin Maloney of QPS at 4:29 p.m. requesting a call. (*Maloney Decl.*, Exhibit D.) During their conversation, Mr. Maloney indicated that QPS was amenable to a reasonable extension request. (*Erlich Decl.* at ¶ 2.) At 6:42 p.m., however, Dan Kaplan of QPS informed Mr. Erlich "[w]e are happy to grant an extension on the following conditions," which consisted of additional down payments required for each week extending the Closing Date up to four weeks and a specific release of future litigation.[6] (*Maloney Decl.*, Exhibit D.) Two minutes later, Kaplan followed up with a second email

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[6] Below is the full list of conditions required by QPS in order to consent to an extension of the Closing Date:

> 1. Purchase Price stays the same at $27.5
>
> 2. For a one week extension, Buyer puts up $500K hard deposit with title and the cash distribution goes from $1.2MM to 700k(9/20-9/27)
>
> 3. For an additional week (9/27-10/4), Buyer puts up an additional $500K with title hard deposit ($1MM aggregate) and the cash distribution goes from $1.2MM to $200K ($1.2 MM - $500K - $500K)
>
> 4. For an additional week (10/4-10/11), Buyer puts up an additional $200K hard deposit with title ($1.2MM aggregate) and the cash distribution goes from $1.2MM to $0 ($1.2MM - $500K - $500K - $200K)
>
> 5. We will grant a fourth one week extension as of right (10/11-10/18) if all hard deposit monies are released from escrow.
>
> 6. Brad Zackson agrees to release Maloney / Hakim against any future litigation.

(*Maloney Decl.*, Exhibit D.)

stating "Apologies – Of course, this is subject to executed formal documentation." (*Maloney Decl.*, Exhibit D.) The Debtor could not meet the conditions and the Closing was not adjourned. (*Motion* at ¶ 15.)

On September 20, 2019, at 10:16 a.m., the Debtor filed a voluntary petition under chapter 11. (ECF Doc. #1). The principal issue is whether the Debtor's right to purchase the Property terminated pre-petition when the parties failed to close by 10:00 a.m.

DISCUSSION

A. The PSA Did Not Terminate Pre-Petition

The PSA is governed by New York law. (PSA § 15.) When asked to interpret contractual language, the question under New York law is "whether the contract is unambiguous with respect to the question disputed by the parties." *Law Debenture Tr. Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 465 (2d Cir. 2010) (quoting *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir. 2002)). Ambiguity presents a question of law. *Id.* "Unless otherwise indicated, words should be given the meanings ordinarily ascribed to them and absurd results should be avoided." *World Trade Ctr. Props., LLC v. Hartford Fire Ins. Co.*, 345 F.3d 154, 184 (2d Cir.2003) (quoting *Newmont Mines Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 135 (2d Cir.1986)). A contract is ambiguous if it "could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Int'l Multifoods*, 309 F.3d at 83 (internal quotation marks and citation omitted); *accord Cont'l Ins. Co. v. Atl. Cas. Ins. Co.*, 603 F.3d 169, 180 (2d Cir. 2010); *Maverick Tube*,

595 F.3d at 466. An agreement is not ambiguous if it has a definite and precise meaning, and unambiguous language does not become ambiguous because a party urges a different interpretation that strains the language beyond its ordinary meaning. *Maverick Tube*, 595 F.3d at 467; *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992). Where the dispute concerns a provision of the contract, the Court must consider the contract "as a whole to ensure that undue emphasis is not placed upon particular words and phrases," *Bailey v. Fish & Neave*, 868 N.E.2d 956, 959 (N.Y. 2007); *accord Maverick Tube*, 595 F.3d at 468, and "seek to give '[e]ffect and meaning . . . to every term of [a] contract.'" *XL Specialty Ins. Co. v. Level Glob. Inv'rs, L.P.*, 874 F. Supp. 2d 263, 284 (S.D.N.Y. 2012) (quoting *Reda v. Eastman Kodak Co.*, 649 N.Y.S.2d 555, 557 (N.Y. App. Div. 1996)).

Under New York law, parties to a contract for the sale of real property containing a TOE provision "must tender performance on the law day unless the time for performance has been extended by mutual agreement." *Grace v. Nappa*, 389 N.E.2d 107, 109 (N.Y. 1979). The failure of a party "to perform on that date constitutes a material breach of the contract." *184 Joralemon, LLC v. Brklyn Hts Condos, LLC*, 985 N.Y.S.2d 588, 591 (N.Y. App. Div. 2014). A material breach allows the non-breaching party to elect to terminate the contract or continue it. *Kamco Supply Corp. v. On the Right Track, LLC*, 49 N.Y.S.3d 721, 728 (N.Y. App. Div. 2017); *Awards.com v. Kinko's, Inc.*, 834 N.Y.S.2d 147, 156 (N.Y. App. Div. 2007), *aff'd* 925 N.E.2d 926 (N.Y. 2010)). Some courts have nevertheless held that the contract terminates (*i.e.*, automatically) if the parties do not close by the time set forth in the TOE clause, *Southhold Devel. Corp.*, 134 B.R. 705, 709 (E.D.N.Y. 1991) (citing *Rhodes v. Astro–Pac, Inc.*, 378 N.Y.S.2d 195,

197 (N.Y. App. Div. 1976), *aff'd*, 363 N.E.2d 347 (N.Y. 1977)), but the parties may provide otherwise in their agreement. Thus, if the contract grants the non-breaching party the option to terminate upon appropriate notice, the contract does not terminate unless the non-breaching party exercises the option to terminate in accordance with the contract. *See Markham Gardens L.P. v. 511 9th LLC*, 954 N.Y.S.2d 811, 815 (N.Y. Sup. Ct. 2012).

QPS never gave notice of its election to terminate the PSA prior to the bankruptcy filing and any effort to exercise that right post-bankruptcy would have violated the automatic stay and been a nullity. *48th Street Steakhouse, Inc. v. Rockefeller Group, Inc.* (*In re 48th Street Steakhouse, Inc.*), 835 F.2d 427, 431 (2d Cir. 1987), *cert. denied*, 485 U.S. 1035 (1988). For this reason, QPS alternatively requests a declaration that the automatic stay does not prevent termination of the PSA but if it does, the Court should grant relief from the automatic stay to allow QPS to terminate the PSA.

In fact, QPS has no right to terminate the PSA because the Debtor was not in default when it filed its bankruptcy petition. QPS reads the PSA to require the Closing to occur by 10:00 a.m. on September 20, 2019 and argues that since it did not close at that time, it terminated sixteen minutes before the Debtor filed its chapter 11 petition. (*Motion* at ¶ 31 ("In this case, it is incontrovertible that the chapter 11 case was commenced ***after*** the expiration of the TOE closing deadline. The notice of case commencement indicates that the filing occurred at 10:16 a.m. on September 20, 2019, which is after the TOE Closing Date, as expressly defined in the PSA. The PSA was at an end when the Debtor failed to close on the specified TOE Closing Date.") (emphasis in original)); *Reply to Debtor's Opposition to Motion of QPS 23-10 Development LLC for*

Entry of an Order (I) Dismissing Chapter 11 Case, or, in the Alternative, (II) Either (A) Determining That the Automatic Stay Does Not Apply to Purchase Agreement or (B) Vacating Stay with Respect to Purchase Agreement, dated Oct. 26, 2019 ("*QPS Reply*") at ¶ 13 (same) (ECF Doc. # 30) .) In contrast, the Debtor contends that the Closing had to occur on that day and since it filed at 10:16 a.m. on that day, the PSA was still live and the Debtor acquired an additional sixty days to close under 11 U.S.C. § 108(b).[7]

The PSA uses the defined term "Closing Date" but the definition is not entirely clear. The PSA scheduled the Closing for 10:00 a.m. on September 20, 2019, or at such other time to which it may be adjourned, and defined the scheduled and possible adjourned dates collectively as the "Closing Date." "Closing Date" could mean the day and time (as QPS argues) or just the day (as the Debtor argues).

However, QPS's interpretation leads to an absurd result because the TOE clause cannot mean that the Closing must occur by 10:00 a.m. Although the parties decided to close in escrow, the PSA contemplated that they might close in person at the offices of Pryor Cashman or the Debtor's lender or the lender's attorney. If the parties had to close by 10:00 a.m. or the PSA terminated, when did they have to show up at one of the

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[7] Section 108(b) states:

> (b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of-
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 60 days after the order for relief.

designated offices for a physical closing? The PSA does not say. Furthermore, a Closing may take time or the buyer could be stuck in traffic. The only reasonable interpretation of the TOE is that the Closing was scheduled for 10:00 a.m. at the designated office but the "Closing Date" referred to the day of the month (September 20, 2019) and not the time of day (10:00 a.m.) Otherwise, the parties would have had to appear and close simultaneously.

QPS's own actions confirm its understanding. One day before the scheduled closing, QPS's attorney sent instructions ("Instructions") to the escrow agent, Royal Abstract of New York, LLC ("Royal").[8] The Instructions defined the "Closing Date" as September 20, 2019 without any reference to the time of day. (Instructions at 1.) The Instructions included a list of requirements the Debtor had to meet and stated that if all of the requirements "have not been satisfied by 5:00 pm EST on the Closing Date," Royal was authorized to return the escrowed documents to QPS's attorney. (*Id.* at 2 ¶ D.) The Court does not read the Instruction as a unilateral agreement to adjourn the Closing but as an expression of QPS's own understanding that "Closing Date" referred to September 20, 2019, and the Debtor had until 5:00 p.m. to deliver payment and the required documentation.

Finally, case law supports the Debtor's interpretation of the TOE clause. In deciding whether a party has materially breached a TOE clause, a court looks only to the "law day" and not the time of day, if any, specified in the contract. *Gray v. Wallman &*

[8] The Instructions are attached as Exhibit A to the *Declaration of Joseph M. Marger in Support of Debtor's Opposition to the Motion of QPS 23-10 Development LLC for Entry of an Order (I) Dismissing Chapter 11 Case, or, in the Alternative, (II) Either (A) Determining That the Automatic Stay Does Not Apply to Purchase Agreement or (B) Vacating Stay with Respect to Purchase Agreement*, dated October 22, 2019 ("*Marger Decl.*") (ECF Doc. # 25-3).

Kramer, 585 N.Y.S.2d 46, 48 (N.Y. App. Div. 1992) (reversing grant of summary judgment where an issue of fact existed as to whether the defendant could have completed performance by the end of the "law day" despite the time for closing being set for 10:00 a.m.); *Wolf v. Atai*, 527 N.Y.S.2d 481, 482 (N.Y. App. Div. 1988) ("Since the plaintiffs were ready to perform their contractual obligations on the day chosen by the defendant as a closing date, the defendant should not be allowed to claim that the plaintiffs were in breach of contract, merely because they were unable to perform promptly at 10:00 a.m."); *533 Park Ave. Realty LLC v. Park Ave. Bldg. & Roofing Supplies LLC*, Index No. 8313/14, 2015 WL 13699314, at *12 (N.Y. Sup. Ct. 2015) ("each party must tender performance on law day rather than the law hour") (internal citations and quotations omitted), *rev'd on other grounds* 68 N.Y.S.3d 110 (N.Y. App. Div. 2017); *Christopher St. Operating, Inc. v. 189 E. Third St. Realty, LLC*, Index No. 603296/08, 2010 N.Y. Misc. LEXIS 1358, at *30 (N.Y. Sup. Ct. 2010) (denying summary judgment because questions of fact existed as to whether the defendant would be able to close by the end of the day where the "defendant may have had the right to close at any time on the day of November 7, 2008.").[9] QPS's authorities do not discuss whether the time of

[9] QPS attempts to distinguish the Debtor's authorities arguing that "[i]n those cases, a party was actually ***trying*** to close, and the court determined that it was not a breach of the TOE provision if the closing had not concluded by the time specified in the TOE provision." (*QPS Reply* at ¶ 22) (emphasis in original). However, none of the cases cited by the Debtor support this reading. In *Wolf v. Atai*, the defendant cancelled the closing, which began at 10:00 a.m., before the plaintiffs were able to return with a necessary document at 1:00 p.m. 527 N.Y.S.2d at 482. The court held that the defendant's unilateral cancellation of closing was unjustified because the plaintiffs were ready to perform on the chosen law day. *Id.* The plaintiffs' appearance at the closing at 10:00 a.m. was not material to the court's holding. The court in *533 Park Ave. Realty LLC* rejected the plaintiff's argument that the defendants waived the TOE provision by beginning the closing at 12:13 p.m. rather than 10:00 a.m., the closing time stated in the agreement. 2015 WL 13699314, at *12. Finally, in *Christopher St. Operating, Inc.*, the court denied both parties' motions for summary judgment because it found material issues of fact as to whether the defendant would have been able to perform by the end of the closing day. 2010 N.Y. Misc. LEXIS 1358, at *30. The presence of defendant's counsel at closing at 10:00 a.m. was immaterial to the central question whether the defendant would have been able to close by the end of the day. *Id.*

day was relevant and do not support its argument that the closing must occur by the time of day set forth in the PSA. *See Westreich v. Bosler*, 934 N.Y.S.2d 37 (N.Y. Sup. Ct. 2011), *aff'd*, 965 N.Y.S.2d 467 (N.Y. App. Div. 2013) (granting summary judgment to defendant where plaintiff's failure to appear for closing on the specified day, not time of day, was an unexplained default); *Zelmanovitch v. Ramos*, 750 N.Y.S.2d 310 (N.Y. App. Div. 2002) (denying specific performance to plaintiff who failed to attend the scheduled closing allegedly because the defendants were not prepared to close).[10]

At the time the Debtor filed this chapter 11 case, the PSA was a live, executory contract and did not terminate post-petition pursuant to its terms. *See COR Route 5 Co., LLC v. Penn Traffic Co.* (*In re Penn Traffic Co.*), 524 F.3d 373, 381 (2d Cir. 2008) (stating that a contract may be executory at the time of the bankruptcy filing but cease to be executory if it expired post-petition by its terms). Because the PSA was live, Bankruptcy Code § 108(b) extended the Closing Date by sixty days.[11] Thus, the only

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[10] The Debtor also contends that QPS was not ready, willing and able to close on the Closing Date because QPS was unable to deliver certain documents required under the PSA. Ari Tran, QPS's real estate counsel, submitted a declaration stating that QPS was "ready, willing, and able to close" on the Closing Date. (*Declaration of Ari L. Tran*, dated October 24, 2019 ("*Tran Decl.*") at ¶ 9 (ECF # 32). QPS provided proof of delivery to Royal of both the deed and the certification confirming QPS's representations and warranties ("Certification") prior to the Closing Date. (*Tran Decl.* at ¶¶ 6-7.) The Debtor's contrary contention, on the other hand, was based on hearsay, to wit, Gary Segal's assertion that an unidentified person associated with the Debtor's prepetition real estate counsel, Reed Smith LLP ("Reed Smith"), advised him that QPS had not submitted the deed, Certification, or proof of ability to pay transfer taxes to either the Debtor or Reed Smith. (*Segal Decl.* at ¶ 4.) This hearsay is insufficient to controvert QPS's evidence that it delivered the deed and Certification to Royal. Further, the declaration submitted by a Reed Smith attorney, Joseph Marger, does mention this alleged communication to the Debtor. (*See Marger Decl.*) Finally, the transfer taxes were to be paid from the proceeds that the Debtor never delivered. (*Tran Decl.* at ¶ 8.)

[11] The two cases cited by QPS support this proposition. In *In re Empire Equities Capital Corp.*, 405 B.R. 687 (Bankr. S.D.N.Y. 2009), the debtor filed a chapter 11 petition just before its right to exercise an option under an option contract had expired for the explicit purpose of extending its time to close the transaction and avoid forfeiture of its down payment. *Id.* at 688-89. The counterparty to the option contract moved for relief from the automatic stay in order to terminate the contract or, in the alternative, to compel the rejection of the contract. *Id.* at 688. The court first ruled that the debtor's failure to exercise its option by the time of the essence deadline was both a material and incurable default. *Id.* at 691. Therefore, the contract could not be assumed by the debtor pursuant to section 365(d)(2), which

question is whether the Court should dismiss the chapter 11 case or grant relief from the automatic stay because the Debtor filed this case in bad faith for the sole purpose of getting the sixty day extension.

B. The Debtor's Alleged Bad Faith

Section 1112(b)(1) of the Bankruptcy Code provides that a case may be dismissed "for cause." "Cause" includes numerous, specified grounds, *see* 11 U.S.C. § 1112(b)(4), but the list is illustrative, not exhaustive. *See In re C-TC 9th Ave. P'ship*, 113 F.3d 1304, 1311 (2d Cir. 1997). It is well settled that a finding that a case was filed in bad faith can constitute "cause" for dismissal under section 1112(b)(1). *See In re SGL Carbon Corp.*, 200 F.3d 154, 160 (3d Cir. 1999) (collecting cases); *C-TC*, 113 F.3d at 1310. In addition, the same finding of a bad faith filing may justify relief from the automatic stay. *See In re AMC Realty Corp.*, 270 B.R. 132, 140 (Bankr. S.D.N.Y. 2001) ("Cause, for either

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requires a debtor in possession, with certain exceptions, to cure its non-monetary defaults. *Id.* However, this incurable default did not prevent the debtor in *Empire* from extending its deadline to perform under the option contract pursuant to section 108(b) because the latter section extends the time to perform and not just the time to cure a default. Based on this reasoning, the *Empire* Court denied the motion to lift the automatic stay and held that the debtor had sixty days from the petition date to perform under the option contract. *Id.* at 693.

Similarly, in *In re New Breed Realty Enters., Inc.*, 278 B.R. 314 (Bankr. E.D.N.Y. 2002), the debtor filed a petition for chapter 11 one day prior to its deadline to complete closing. The Court stated that even if section 108(b) applied to extend the closing date, the additional sixty-day period had already expired and to the extent the Court had authority to extend the period further, the debtor had failed to show cause for the extension. *Id.* at 318. The portion of the opinion holding that the debtor could not then assume the contract under section 365 because it was unable to cure its default is not instructive.

Finally, the Court does not decide whether Bankruptcy Code § 365 or Bankruptcy Code § 108(b) governs the time within which the Debtor must assume the PSA. *See Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1215 (3d Cir. 1984) ("We hold, however, that section 108(b) does not apply to curing defaults in executory contracts. Section 365 specifically governs the time for curing defaults in executory contracts, and thus, it controls here.").

dismissal or relief from the stay, may be found based on enumerated factors, including bad faith . . .") (internal citation and quotation marks omitted).

A petition is filed in bad faith "if it is clear that on the filing date there was no reasonable likelihood that the debtor intended to reorganize and no reasonable probability that it would eventually emerge from bankruptcy proceedings." *Baker v. Latham Sparrowbush Assocs.* (*In re Cohoes Indus. Terminal, Inc.*), 931 F.2d 222, 227 (2d Cir.1991); *accord In re Kingston Square Assocs.*, 214 B.R. 713, 725 (Bankr.S.D.N.Y.1997) ("The standard in this Circuit is that a bankruptcy petition will be dismissed if both objective futility of the reorganization process and subjective bad faith in filing the petition are found.") (emphasis omitted). In *C–TC*, the Second Circuit identified several badges that support a finding that a chapter 11 case was filed in bad faith:

> (1) the debtor has only one asset;
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> (2) the debtor has few unsecured creditors whose claims are small in relation to those of the secured creditors;
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> (3) the debtor's one asset is the subject of a foreclosure action as a result of arrearages or default on the debt;
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> (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;
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> (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;
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> (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
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> (8) the debtor has no employees.

C–TC, 113 F.3d at 1311 (quoting *Pleasant Pointe Apartments, Ltd. v. Kentucky Hous. Corp.*, 139 B.R. 828, 832 (W.D. Ky. 1992)). Although these factors are generally applied

in single asset real estate cases, they are appropriate to apply in this case because it, too, is essentially a single asset real estate case concerning the Property.

While courts in this Circuit look to these factors in assessing lack of good faith, "courts repeatedly caution, however, not to apply such factors mechanically." *In re 68 W. 127 St., LLC,* 285 B.R. 838, 844 (Bankr. S.D.N.Y. 2002). Ultimately, an inquiry into whether a petition was filed in bad faith requires the court to consider the entire view of the facts and circumstances – no one factor is determinative. *See In re Encore Prop. Mgmt. of W. New York, LLC,* 585 B.R. 22, 30 (Bankr. W.D.N.Y. 2018) ("In determining whether good faith is absent (and bad faith is present), the court must consider the totality of the circumstances—not one single factor.").

Admittedly, several *C-TC* factors are present. The Debtor has only one asset; it is a contract vendee under the PSA. In addition, it does not appear to have any cash flow or employees. Furthermore, the Debtor's schedules list slightly more than $1 million in unsecured debt but ignore the Debtor's $27 million debt to QPS even if that debt is contingent on assumption of the PSA. Furthermore, the Debtor filed this case on the "eve" of the potential termination of the PSA that would have resulted from its failure to close by September 20, 2019.

Despite these indicia of bad faith, Second Circuit has recognized "there is a considerable gap between delaying creditors, even secured creditors, on the eve of foreclosure and the concept of abuse of judicial purpose." *In re Cohoes Indus. Terminal, Inc.*, 931 F.2d at 228 (internal citations omitted). The evidence proffered by QPS does not show that the Debtor filed the chapter 11 case without any intention to reorganize.

Indeed, the Debtor immediately filed a plan, the confirmation hearing is imminent and the plan identifies a clear, quick path out of chapter 11 that will allow the Debtor to cure its monetary defaults and purchase the Property in accordance with the PSA.

QPS further argues that a debtor who files bankruptcy to take advantage of a specific provision of the Bankruptcy Code files in bad faith, citing *In re Integrated Telecom Express, Inc.*, 384 F.3d 108 (3d Cir. 2004). There, the debtor filed for chapter 11 solely to cap the claim of its landlord pursuant to Bankruptcy Code § 502(b)(6). *Id.* at 129. The Third Circuit ruled that the filing was in bad faith because the debtor was not in any financial distress and was not attempting to preserve any value for its creditors that they would not have received outside the bankruptcy process. *Id.* The Third Circuit did not hold, as QPS implies, that it is bad faith to file bankruptcy to take advantage of a provision of the Bankruptcy Code:

> Just as a desire to take advantage of the protections of the Code cannot establish *bad* faith as a matter of law, that desire cannot establish *good* faith as a matter of law. Given the truism that every bankruptcy petition seeks some advantage offered in the Code, any other rule would eviscerate any limitation that the good faith requirement places on Chapter 11 filings.

Id. at 127-28 (emphasis in original).

Unlike the debtor in *Integrated Telecom* the Debtor in this case is in financial distress; it did not have the funds to close on the Closing Date or pay its other creditors and needed some more time. If the Debtor does not purchase the Property pursuant to the Plan, it will be an empty shell with no money to pay anyone. Although the *C-TC* factors discussed earlier may imply bad faith, the totality of the circumstances show that the Debtor has not filed its petition in bad faith but instead, has properly invoked a

protection provided for in the Bankruptcy Code to pay its creditors and reorganize through ownership of the Property.

Lastly, QPS has failed to demonstrate that the chapter 11 filing was objectively unreasonable. In order to reorganize, the Debtor needs to come up with approximately $30 million to pay QPS and its other obligations. It immediately filed a plan that depends on exit financing in that approximate amount and proposes to pay all creditors in full. The Debtor had a lender pre-petition (the lender had requested an adjournment of the Closing) and needed more time to finalize the financing. The Debtor now claims it has secured its financing and will have to prove it at the confirmation hearing to demonstrate feasibility. *See* 11 U.S.C. § 1129(a)(11). Thus, the question comes down to confirmability of the plan, not bad faith. Either the Debtor will have the money to close by the confirmation hearing (proving that the filing was objectively reasonable) or it will not (resulting in the dismissal of the case).

Accordingly, the *Motion* is denied. The Court has considered the remaining arguments made by QPS and concludes that they lack merit. Submit order.

Dated: New York, New York
November 12, 2019

/s/ *Stuart M. Bernstein*
STUART M. BERNSTEIN
United States Bankruptcy Judge