SO ORDERED.

SIGNED this 17th day of November, 2017.

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

In re:	)	
	)	Case No. 17-51061
BCL ONE, LLC,	)	Chapter 11
Debtor.	)	
	)	

MEMORANDUM OPINION AND ORDER GRANTING FIRST NATIONAL BANK OF PENNSYLVANIA'S MOTION TO DIMISS BANKRUPTCY CASE WITH PREJUDICE

This matter came on for hearing before the court on November 1, 2017 on the motion ("Motion") of First National Bank of Pennsylvania ("FNB") to dismiss the bankruptcy case of BCL One, LLC ("Debtor") pursuant to 11 U.S.C. § 1112(b) for cause and with prejudice. The Bankruptcy Administrator joined in the Motion and supports dismissal of the case with prejudice. Appearing were Charles M. Ivey, III, attorney for the Debtor; George F. Sanderson, III, attorney for FNB; and William P. Miller, Bankruptcy Administrator. Bobby Clay Lindsay, Jr., designated representative and manager/member of the Debtor, and Samuel Oots, representative of FNB, were also present.

At the hearing, Mr. Lindsay and Mr. Oots gave sworn testimony to the court. The court also accepted into evidence FNB's exhibits 1, 2, and 3 and Debtor's exhibits 1 and 2. Counsel for FNB asked the court to take judicial notice of all of the docket entries, orders, reports, claim registers, and proofs of claim of both the Debtor's current case and the Debtor's previous Chapter 11 case, 17-50141. The court does so, taking judicial notice the entire record in the Debtor's previous case, and of the pleadings in a related adversary proceeding (Adv. Pro. No. 17-06015), which was removed to the bankruptcy court and subsequently remanded to state court following dismissal of the Debtor's prior case.[1] Based on the above, the court finds as follows:

Background

1. The Debtor filed its first voluntary petition for relief under Chapter 11 of Title 11 of the United States Code on February 13, 2017, Case No. 17-50141 (the "Previous Case").

2. FNB is the servicer of a commercial loan evidenced by a promissory note dated January 15, 2009 made by the Debtor and payable to Community Bank of Rowan in the original principal amount of $1,687,250.00 (as thereafter amended or modified, the "Note"), which is secured by a deed of trust securing future

[1] Pursuant to Federal Rule of Evidence 201, a court may "judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b). A court may properly take judicial notice of the existence of each document in a court file, but may only take judicial notice of the truth of facts asserted in documents such as orders, judgments, and findings of fact and conclusions of law because they state the law of the case under the principles of collateral estoppel and res judicata.

advances dated January 15, 2009, executed by the Debtor and recorded on January 15, 2009, in Book 1135, Page 822, Rowan County Registry (the "Deed of Trust"). The Note is also secured by an assignment of rents dated January 15, 2009, executed by the Debtor and recorded on January 15, 2009, in Book 1135, Page 823, Rowan County Registry.

3. The Deed of Trust grants a first priority security interest in certain real property that the Debtor owns. That property is described with particularity in the Deed of Trust and bears the street address of 120 East Council Street, Suites 100 and 300, Salisbury, NC, 28144 (the "Property"). Suites 100 and 300 are office condominium suites; Suite 100 is comprised of 6,303 square feet and Suite 300 is comprised of 892 square feet of Class A office space according to the Appraisal Report of Valbridge Property Advisors, entered into evidence as Debtor's exhibit 1.[2]

4. The Debtor did not file a plan of reorganization in the Previous Case. After a contested hearing on the Debtor's Motion to Extend Exclusivity Period, the court entered an order dated June 12, 2017 denying the Debtor's motion. As set forth in the court's order, the reasons for the denial included the Debtor's failure to generate any income to fund a plan of reorganization since filing its petition despite its representations in each monthly report that it expected rent payments of $6,400.00 per month, the Debtor's failure to present persuasive evidence showing that it was capable of generating greater than minimal income moving forward, and

[2] The appraisal by Valbridge Property Advisors with an effective date of October 2, 2017 shows a value of $1,920,000.00 for the Property. The parties agreed to the admission of the appraisal as an exhibit for purposes of the hearing on the Motion only.

the Debtor's failure to act with diligence—such as seeking authority to use cash collateral—during the pendency of the Previous Case.

5. In the Previous Case, the court entered an order granting FNB's motion for relief from the automatic stay. The reasons for relief, as stated in the July 5, 2017 order, included that there was no equity in the Property, that the Debtor had made no post-petition payments to FNB on the obligations arising from the Note, and that the tenant of the Property, Salisbury Millwork, Inc.,[3] had made no rent payments to the Debtor during the pendency of the bankruptcy case aside from a $500.00 deposit, despite having originally signed a lease obligating the tenant for payments beginning February 2017. The court held that the Property was not necessary for an effective reorganization because there was no reorganization in prospect.

6. Specifically, in its order lifting the stay, the court described the delays and manipulations of the lease:

> The Debtor's Monthly Operating Reports each reflect projected income in the amount of $6,400.00. The May 2017 Monthly Operating Report filed June 22, 2017 reflects accounts receivable of $25,600.00 representing unpaid rent at $6,400.00 per month for the months February-May 2017, in addition to projecting $6,400.00 in rent for June 2017. Mr. Lindsay signed each of the Debtor's Monthly Operating Reports in his capacity as Member/Manager of the Debtor under penalty of perjury in accordance with 28 U.S.C. § 1746.
>
> Additionally, at the March 29, 2017 and June 7, 2017 hearings, counsel for the Debtor represented that the Property was occupied and that rent

[3] Salisbury Millwork, Inc. ("Salisbury Millwork") is an entity 100% owned by Mr. Lindsay. The Debtor is 100% owned by a separate entity, One Twenty, LLC. Mr. Lindsay testified at the hearing on November 1, 2017 that he is the 100% indirect owner of the Debtor.

> payments were forthcoming. Further, at the June 7, 2017 hearing, Mr. Lindsay testified that rent would be forthcoming…
>
> At the hearing [on June 27, 2017], Mr. Lindsay testified that the Debtor had received no income aside from the $500.00 deposit because *no rent was yet due*. Mr. Lindsay testified that on June 1, 2017, the Debtor and Salisbury Millwork, Inc. signed a lease modification agreement changing the start of the lease term to June 2017, raising the monthly rent to $7,250.00, and changing the date due to the end of the month. Mr. Lindsay was unable to provide the court or opposing counsel with a copy of this amended lease.

(Case No. 17-50141, Docket No. 70) (emphasis added).

7. The court entered an order dismissing the Previous Case on July 21, 2017, finding that cause existed pursuant to 11 U.S.C. § 1112(b) as the automatic stay had been lifted on the Debtor's Property, no substantial assets remained in the case, the Debtor had sustained continuing losses during the case, and the Debtor had no prospect of rehabilitation.

8. FNB resumed its foreclosure proceedings and filed a Report of Foreclosure Sale for the Property in Rowan County on September 27, 2017. The Debtor filed its current Chapter 11 case (the "Current Case") on October 6, 2017, one day prior to the expiration of the upset bid period.

9. FNB filed the Motion in the Current Case on October 25, 2017, requesting that the court dismiss the case as a bad faith filing and bar the Debtor from filing any further bankruptcy petitions until FNB has completed its foreclosure proceeding. In the Motion, FNB asserts that the outstanding amount due on the Note as of the petition date of the Current Case is $1,933,916.12. In the Previous Case, FNB filed a proof of claim for $1,836,710.48, admitted into evidence

at the hearing as FNB's exhibit 2. FNB presented credible evidence that, based on an interest rate of 6.25% per annum, a monthly payment on the FNB secured loan would be $14,094.00 for an amortized loan with a standard fifteen-year term and $12,014.00 for a twenty-year amortized loan. This payment is exclusive of the attorney fees added to the loan balance in the proof of claim filed in the Previous Case.

10. In the Current Case, the Debtor indicated on its petition that the Debtor is a single asset real estate case ("SARE") as defined by 11 U.S.C. § 101(51B). In the Previous Case, the Debtor initially filed its petition with the SARE designation, but then filed an Amended Petition on February 28, 2017 checking the box "None of the above" for Debtor's business. At a status hearing on March 29, 2017, counsel for the Debtor conceded that it was a SARE but the petition was not corrected until April 18, 2017.

11. The Debtor's schedules in the Current Case reflect differences from those filed in the Previous Case including:

- On Schedule A/B in the Previous Case, the only asset listed was the Property, valued at $1,450,000.00. In the Current Case, the Debtor listed the Property with a value of $1,920,000.00, a checking account at SunTrust Bank with a balance of $17,231.00, and by amendment to Schedule A/B on the day before the hearing on the Motion, accounts receivable over 90 days old in the amount of $25,100.00.

- On Schedule D in the Previous Case, the Debtor listed the amount owed to the Rowan County Tax Collector as $3,812.08. In the Current Case, the amount is $44,081.94.

- On Schedule E/F in the Previous Case, the Debtor listed only the unsecured debt owed to Yadkin Bank. In the Current Case, the Debtor

also listed $15,000.00 owed to Ferguson, Hayes, Hawkins & DeMay, PLLC for services rendered as counsel in the Previous Case.

12. No improvements were made to the Property between the dismissal of the Previous Case and the filing of the Current Case.

13. In the Current Case, the Debtor has filed a copy of a letter with an attached check in the amount of $9,400.00 from Debtor's counsel to counsel for FNB stating that the Debtor will tender the same amount for each month going forward in connection with its responsibilities under 11 U.S.C. §§ 361 and 362(d)(3). The Debtor has also filed an application to employ a real estate broker to lease Suite 300 pursuant to an exclusive leasing agreement, with a rental rate of $1,500.00 per month.

The Debtor and Salisbury Millwork

Prior to the filing of the Previous Case, the Debtor's tenant for the Property was Summit Developers, Inc., an entity that is owned 100% by Mr. Lindsay and is no longer doing business. At the outset of the Previous Case, the Debtor represented that it had entered into a new lease with Salisbury Millwork. During the pendency of the Previous Case the terms of this new triple net lease between the Debtor and Salisbury Millwork were changed at will. At the status hearing held on March 29, 2017 Debtor's counsel stated to the court that the Debtor "now has a new tenant ….is now receiving … market rent." The amended monthly operating report for March filed on May 8, 2017 showed that the Debtor received $0 in income and the Debtor stated its receivables for 120 E. Council Street at $6,400.00. The monthly operating report for April filed on May 23, 2017 eliminated the $6,400.00 in

receivables with a note that rent would begin in May and that the Debtor received $500.00 as a deposit on $6,400.00 rent beginning May. At the hearing on the Motion to Extend Exclusivity Period on June 7, 2017, Mr. Lindsay stated no lease payments had been received as yet but that "lease payments [from Salisbury Millwork] are set to start immediately…as in this week…" He also testified that the lease payments were to start at $6,400.00 and increase to $8,400.00 in a year, but that the rent payments could be adjusted to meet the adequate protection payments suggested. The monthly operating report for May showed $25,600.00 in receivables with no explanation and no income for the month.

At the hearing on FNB's Motion for Relief from Stay on June 27, 2017, Mr. Lindsay explained that the original lease was to start on February 1, 2017 with monthly payments due at the first of the month, but that lease was amended on June 1 to provide for a lease term to start on June 1, 2017 with rent due before the end of the month. The rent was to be $7,250.00 per month as of June 1, escalating to $9,400.00 after twelve months, and Salisbury Millwork occupied the Property on June 1. As of the day of that hearing, no rent payment had been made as none was yet due per that amendment, and the receivable amount on the May operating report of $25,600.00 was explained as a mistake. Mr. Lindsay did not bring a copy of the lease amendment either to the hearing on June 27 or to his deposition as the representative of the Debtor the previous week.

At the hearing on the present Motion, Mr. Lindsay testified that sometime after the June 27 hearing the Debtor and Salisbury Millwork entered into a further

amended and restated lease agreement to have monthly rent paid at the rate of $6,400.00 effective June 1, 2017 until June 1, 2018, when the rent was to escalate to $9,400.00. In addition, Mr. Lindsay testified that Salisbury Millwork released Suite 300 such that it only has a lease on Suite 100, "as part of the agreement made through the lease...Suite 300...was released by Salisbury Millwork." Mr. Lindsay denied that he had been seeking a tenant for Suite 300 for some time. Although he testified at both the June 7 hearing and the June 29 hearing about trying to find an additional tenant for Suite 300, Mr. Lindsay now equates "actively seeking a tenant" with "hiring a broker," as the Debtor is seeking to do in the Current Case.[4] As to the lease amendment that Mr. Lindsay had described at the June 27 hearing that increased the rent to $7,250.00 beginning June 2017, Mr. Lindsay explained that after the June 27 hearing, "There were changes in circumstance, and changes in the lease negotiations, and changes in the property that was leased after that testimony." As result, the parties later negotiated the monthly rent back down to $6,400.00.

As far as the court can discern, the Debtor and Salisbury Millwork once again amended the lease at some point between the filing of the Current Case and the Debtor's amendment to its Schedule A/B on which the Debtor added accounts receivable of $25,100.00 as an asset. This particular lease amendment provides for

[4] The Debtor filed a motion to employ a real estate broker to lease the unoccupied suite 300 of the Property on the day prior to the hearing on the Motion. The Exclusive Right to Lease Listing Agreement attached to the motion to employ stated that the rent for suite 300 is $1,500.00 per month and the flat fee commission to the broker is $1,000.00. It should be noted that the previously described Valbridge appraisal dated October 2, 2017 indicates the office condominium building is 100% occupied.

rent payments to increase to $9,400.00 beginning October 2017 and includes an obligation to pay "back rent" from February 1. Mr. Lindsay indicated that this back rent was "incurred in the renegotiation" of the lease because "Salisbury Millwork felt an obligation to make up for that period of time…" When asked if "in negotiations" he is negotiating with himself as the manager of the Debtor as well as the President of Salisbury Millwork, he answered, "You could technically present it like that…" The Debtor did not offer a written lease agreement or amendment into evidence at the hearing.

As to the financial stability of Salisbury Millwork as the Debtor's tenant, the only evidence presented by the Debtor at the hearing was Mr. Lindsay's testimony. Mr. Lindsay asserted that (1) he made a management change of Salisbury Millwork in March and has been running the business as President since then;[5] (2) the pipeline of business has significantly increased since April; (3) net income from the first three quarters was approximately $224,000.00 and profitability was stabilizing; (4) Salisbury Millwork currently owes $150,000.00 to "the bank;" (5) Salisbury Millwork anticipates a short-term payment plan with the IRS to solve the issues that were created under previous management; and (6) there are fourteen employees of Salisbury Millwork, six of whom work at the Property with the remaining employees split between two other locations of Salisbury Millwork. Mr. Lindsay could not state at the hearing either the value of the current assets or the amount of cash in the bank for Salisbury Millwork, even as a rough figure, although

[5] Mr. Lindsay admitted to signing the Lease Agreement in February 2017 that identified him as president of Salisbury Millwork, but asserted that the document was in error.

he did testify that collectible accounts receivable were approximately $125,000.00. As to why rent checks were not written in the Previous Case by Salisbury Millwork, Mr. Lindsay stated that, "…there were a lot of changes happening at Salisbury Millwork…Salisbury Millwork wasn't ready to move into the space…the previous tenant hadn't fully vacated the space…" As the previous tenant was Summit Developers, Inc., another 100% owned Lindsay entity, this last comment appears disingenuous to the Court.

Discussion

Whether a Chapter 11 case should be dismissed for bad faith is governed by 11 U.S.C. § 1112(b)(1), which instructs that, "on request of a party in interest, and after notice and a hearing, the court shall . . . dismiss a case under this chapter . . . for cause . . . ." The Fourth Circuit has held that filing in good faith is an implicit requirement in seeking relief under the Bankruptcy Code, and that the absence of good faith can constitute cause for dismissal. *Carolin Corp. v. Miller*, 886 F.2d 693, 698 (4th Cir. 1989). In determining whether a petition is filed in good faith, the moving party has the burden of proof, with the inquiry centering on whether there has been an abuse of the provisions, purpose, or spirit of the Bankruptcy Code. *Deans v. O'Donnell (In re Deans)*, 692 F.2d 968, 972 (4th Cir. 1982). In so doing, courts must evaluate the totality of the circumstances. *Carolin Corp.*, 886 F.2d at 701. When faced with allegations of bad faith in the Fourth Circuit, courts must consider both the objective futility of reorganization as well as the subjective bad faith of seeking relief under the Bankruptcy Code. *Carolin Corp.*, 886 F.2d at 700–

01. In *Carolin Corp.* the debtor subject to dismissal was a first-time debtor, not a repeat Chapter 11 debtor, as is the case here.

When confronted with a serial Chapter 11 debtor whose first case was dismissed for cause prior to confirmation of a plan, some courts have focused on the preclusive effect of the prior dismissal order, requiring a change in circumstances of the debtor in the time between filings. *In re Schwenk*, 120 B.R. 524, 525 (Bankr. D. Neb. 1990) (finding the previous dismissal order was *res judicata* on the issue of the debtor's ability to reorganize under Chapter 11 and a sufficient change of circumstance must have occurred since the dismissal of the previous case to proceed in the second case); *In re Fuhrman*, 118 B.R. 72, 74 (Bankr. E.D. Mich. 1990) ("We must instead determine whether there has been a change in the Debtors' affairs since the dismissal of the second petition which warrants the conclusion that the Court's findings [two months ago], which are conclusively presumed to have been correct when made, are no longer true today."); *In re Rain Tree Healthcare of Winston Salem, LLC,* No. 17-50375 (Bankr. M.D.N.C. July 5, 2017) (J. Kahn) (Memorandum Order Denying Motion for Stay Pending Appeal) ("…[U]nless [the debtor] were able to demonstrate a sufficient change in circumstance to materially affect the bases of the prior ruling, it is bound by the effect of the Previous Dismissal Order.")

Although ostensibly a different analysis, in the case of a serial Chapter 11 filer, both the standards of *Carolin Corp.* and the line of case considering the preclusive effect of a court's prior orders require a change of circumstances from the

time of the prior dismissal order to the filing of the second case. For the Debtor, in the Previous Case, the June 12, 2017 order denying the extension of exclusivity period, the July 5, 2017 order granting FNB relief from the automatic stay, and the July 21, 2017 order dismissing the Previous Case made findings of both the objective futility of the Debtor's reorganization and the subjective bad faith of the principal of the Debtor with the manipulations of the lease and the delays in that case.

In *In re Edybul Foods, Inc.*, No. 02-83997, 2003 WL 1860520 (Bankr. M.D.N.C. Apr. 8, 2003), the debtor filed its second Chapter 11 petition two and one half months after the dismissal of its first case for failure to file its plan of reorganization and disclosure statement. The court, in dismissing the second case due to objective futility and no change in the circumstances of the case since the prior dismissal, acknowledged that the case involved a classic two-party dispute that needed to be resolved in state court. *Id.* at *4. Similarly, in *In re Denton,* No. 17-10510 (Bankr. M.D.N.C. May 23, 2017) this court found that a lack of changed circumstances between a debtor's two filings was indicative of bad faith. In *Denton*, as in *Edybul Foods*, the debtor was indebted to the same entities for approximately similar sums, the same foreclosure remained pending, and the debtor's business remained essentially unchanged.

Here, the dispute between the Debtor and FNB bears the classic hallmarks of a debtor using the bankruptcy court for delay in dealing with its secured creditor. The Debtor is a single asset real estate entity that holds title to the Property. The

Debtor has few other assets and few other creditors. The Debtor lost its insider tenant when Summit Developers, Inc. went out of business. The difficulty in actually obtaining a rent-paying tenant in Salisbury Millwork (still another insider) resulted in the inability of the Debtor to make a payment on its loan that is secured by the Property from January 29, 2016 until a $9,400.00 adequate protection payment was made by the Debtor in the Current Case on October 12, 2017.

As in the Previous Case, the Debtor has a single asset (the Property) and a single tenant (Salisbury Millwork).[6] The litigation between the Debtor and FNB that was removed to this court in the Previous Case and subsequently remanded to state court following dismissal remains pending. Mr. Lindsay admitted at the hearing that the Debtor has not engaged counsel on behalf of the Debtor.[7]

The Debtor filed its petition to forestall FNB's foreclosure proceedings. Yet the Debtor argues that it has experienced a change in circumstances since the dismissal of the Previous Case as (1) it has obtained an appraisal of the Property that shows a value over $1,900,000.00, (2) it now has a viable tenant in Salisbury Millwork, and (3) it is now caught in the crossfire of a dispute between various parties to a participation agreement through which these parties purchased interests in the Note and Deed of Trust as evidenced by a complaint admitted as Debtor's exhibit 2.

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[6] The Debtor hopes to find another tenant for Suite 300 with a real estate broker although its informal search for another tenant in the Previous Case was unsuccessful.

[7] The court entered an order in adversary proceeding 17-6015 granting Debtor's counsel's motion to withdraw on June 28, 2017 and providing for a stay of the proceedings for 14 days after entry of the orders to allow the corporate defendants to obtain substitute counsel. On September 11, 2017, the Debtor had yet to obtain counsel, and the court entered an order remanding the action to state court.

The court cannot find that the Debtor established any change in circumstances related to its tenant. The court has no confidence that Salisbury Millwork will continue to provide a steady, ongoing stream of lease payments at its current monthly amount or a higher one for the Debtor and thus to FNB. FNB's evidence shows that a principal and interest payment at the rate of 6.25% for the balance of the loan would be approximately $12,000.00 to $14,000.00. Although Mr. Lindsay indicated at the hearing that the lease payment could be "renegotiated" if necessary to meet a greater adequate protection payment, this testimony reflects the same manipulation of lease terms that went on in the Previous Case. As the court found in the Previous Case and as the Debtor has demonstrated again in the Current Case, the terms of the lease agreement between the Debtor and Salisbury Millwork are subject to change at any time and these changes may be retroactive.[8] Further, the Debtor presented no credible evidence to show that Salisbury Millwork is indeed a viable tenant. Although Mr. Lindsay testified to Salisbury Millwork's financial capability in a very general manner, there were obvious questions that he could not answer, including even a rough estimate of asset value or cash on hand. After Salisbury Millwork's failure to pay rent throughout the entire pendency of the Previous Case—which resulted in this court's prior finding that Debtor had no prospect of rehabilitation—a simple assertion of "work in the pipeline" for Salisbury Millwork does not counterbalance the questions the court has about the expense of

[8] For example, as previously described, the Debtor renegotiated terms with Salisbury Millwork in June 2017 to change the start of the lease term from February 1 to June 1. The Debtor again renegotiated the lease after the June 27 hearing to change the monthly rent due for June from $7,250.00 to $6,400.00.

three locations, the tax liability issue, and the ongoing expense of a 14-employee payroll. Mr. Lindsay's testimony has consistently reflected that he is either not being forthright, or he is not entirely knowledgeable of the financial affairs of Salisbury Millwork despite admitting that he writes checks for Salisbury Millwork as President. Either way, the court cannot give his testimony regarding the viability of Salisbury Millwork as a tenant or the terms of the lease agreement any weight. Here, the same insider tenant with the same management (Mr. Lindsay) simply yields the same circumstances of the Previous Case, notwithstanding the October 12 adequate protection payment.

The Debtor produced an appraisal of the Property at the hearing that values the Property at $1,920,000.00. The appraisal is based on a market rate of $21.00 per square foot for a triple net lease. It is also based on 100% occupancy despite the fact that Suite 300 is not occupied. Suite 300, which is approximately 900 square feet, is not a triple net lease and is being marketed at a rental rate of $20.00 per square foot. In response to FNB's counsel's re-direct examination as to whether Salisbury Millwork was receiving a below market rental rate for Suite 100, Mr. Lindsay attributed the $17.90 per square foot rental rate to the larger footprint of the leased space. Mr. Lindsay cannot have it both ways, relying on the appraisal for its $1,920,000 value of the Property, but then justifying Salisbury Millworks' rental rate of $17.90 per square foot.

Further, even discounting any questions as to the assumptions made in the appraisal to determine such value, FNB asserts the loan amount on the secured

indebtedness now stands at $1,933,916.12, including attorneys' fees of $250,262.71. No improvements have been made to the Property since the filing of the Previous Case. The fact that the Debtor obtained a professional appraisal for the purposes of this hearing on the Motion with a higher value of the Property than stipulated in the Previous Case does not constitute a material change in the circumstances of the Debtor, but merely a change in tactics.

Lastly, the Debtor points to a complaint filed by Capital Bank, N.A. and First Carolina Bank against FNB on June 2, 2017 in connection with this secured debt. Capital Bank, N.A. and First Carolina Bank are the two participant lenders for the secured indebtedness encumbering the Property and FNB is the servicer. All of the factual allegations in the complaint are dated prior to the filing of the Previous Case, and Mr. Lindsay testified at length during the Previous Case regarding this ongoing dispute and its potential impact on the Debtor. The court has reviewed the complaint and notes that this litigation/controversy between the parties to the participation agreement and the servicer is not a change in circumstances from the Previous Case.

The lack of subjective good faith by the Debtor in filing the Current Case is exemplified by the filing of the Current Case on the next to the last day of the upset bid period following the Report of Foreclosure Sale by FNB. The objective futility of the Debtor's reorganization is exemplified by the ongoing manipulation of the lease terms between the Debtor and Salisbury Millwork; the court believes that the "lease" between the two related parties is not worth the paper it's written on.

Finally, the Debtor has shown no material change of circumstances from the time of the dismissal of the Previous Case to the filing of the Current Case. Therefore, the court determines that it is appropriate to dismiss the Current Case pursuant to 11 U.S.C. § 1112(b), and FNB's Motion is hereby granted.

FNB requested in its motion for the court to bar the Debtor from filing any further bankruptcy petitions until FNB completes the foreclosure of the Property and after the expiration of any relevant upset bid or redemption period. A bankruptcy court may impose a bar from refiling when appropriate. Upon consideration of the Debtor's refiling of a Chapter 11 petition, less than three months after its Previous Case was dismissed for cause, after FNB filed its report of foreclosure sale, and just one day prior to the expiration of the upset bid period, the court hereby bars the Debtor from refiling a Chapter 11 petition for relief for 180 days following entry of this order.

END OF DOCUMENT

PARTIES TO BE SERVED

BCL One, LLC
17-51061 C-11

BCL One, LLC
P.O. Box 4124
Salisbury, NC 28145

Samantha K. Brumbaugh
Ivey, McClellan, Gatton & Siegmund, LLP
100 S. Elm Street, Suite 500
P.O. Box 3324
Greensboro, NC 27402

Charles M. Ivey, III
Ivey, McClellan, Gatton & Siegmund, LLP
100 S. Elm Street, Suite 500
P.O. Box 3324
Greensboro, NC 27402

George F. Sanderson, III
Ellis & Winters, LLP
P.O. Box 33550
Raleigh, NC 27615

Paul A. Fanning
Ward and Smith, P.A.
P.O. Box 8088
Greenville, NC 27835-8088

William P. Miller
Bankruptcy Administrator
101 South Edgeworth St.
Greensboro, NC 27401