Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
July 24, 2019

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re:	)	Case No.: 18-17155-MKN
	)	Chapter 11
DANIEL H. ROSENBLUM,	)	
	)	Date: July 10, 2019
Debtor.	)	Time: 10:30 a.m.
	)	

ORDER ON SECURED CREDITOR SHEILA ROSENBLUM'S MOTION TO DISMISS UNDER 11 U.S.C. § 1112(b)(4)(P) FOR DEBTOR'S FAILURE TO PAY POST-PETITION CHILD AND SPOUSAL SUPPORT OBLIGATIONS[1]

On July 10, 2019, the court conducted a hearing on Secured Creditor Sheila Rosenblum's Motion to Dismiss Under 11 U.S.C. § 1112(b)(4)(P) for Debtor's Failure to Pay Post-Petition Child and Spousal Support Obligations ("Motion").[2] At the same time, the court also heard Secured Creditor Sheila Rosenblum's Motion for Exception from the Automatic Stay under 11 U.S.C. §362(b)(2)(B) and (C) and (b)(4), and Waiver of 14-Day Stay Under Rule 4001(a)(3). In addition, the court also conducted a hearing on approval of separate disclosure statements filed in support of competing proposed Chapter 11 plans. The appearances of counsel were noted on the record. After arguments were presented, the matters were taken under submission based on the record before the court.

[1] In this Order, all references to "ECF No." are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "FRE" are to the Federal Rules of Evidence.

[2] The Motion is accompanied by the supporting Declaration of Sheila Rosenblum ("Sheila Rosenblum Declaration") (ECF No. 194) and various exhibits for which she requests the court to take judicial notice.

BACKGROUND[3]

In 1990, Daniel H. Rosenblum ("Debtor") and Sheila Rosenblum married. (First Dismissal Order at 2:4-5; Sheila Rosenblum Declaration, ¶ 4).

In 1994, Debtor and Sheila Rosenblum divorced. (First Dismissal Order at 2:6-7; Sheila Rosenblum Declaration, ¶ 5).

On November 15, 1996, Debtor and Sheila Rosenblum re-married. (First Dismissal Order at 2:8-9; Sheila Rosenblum Declaration, ¶ 6).

On July 8, 2010, Debtor and Sheila Rosenblum executed a Post-Nuptial Agreement ("2010 Post-Nup Agreement"). (First Dismissal Order at 2:10-12; Sheila Rosenblum Declaration, ¶ 8).

On September 27, 2013, Sheila Rosenblum commenced a divorce proceeding ("Divorce Proceeding") against Debtor in the Supreme Court of the State of New York, County of New York ("New York State Court"). (First Dismissal Order at 2:13-16; Sheila Rosenblum Declaration, ¶ 9).

On December 16, 2013, Debtor and Sheila Rosenblum executed another agreement modifying in part the 2010 Post-Nup Agreement ("2013 Agreement"). (First Dismissal Order at 2:17-19; Sheila Rosenblum Declaration, ¶ 8).

On June 22, 2016, Debtor and Sheila Rosenblum entered into a stipulation modifying in part the 2013 Agreement ("2016 Agreement"). (First Dismissal Order at 4:1-3; Sheila Rosenblum Declaration, ¶ 10).

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[3] Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the claims register and docket in the above-captioned Chapter 11 proceeding, including, but not limited to, this court's "Order on Secured Creditor Sheila Rosenblum's Motion to Dismiss for Bad Faith or for Abstention, or in the Alternative, Motion for Relief from the Automatic Stay or Appoint a Trustee," entered on March 15, 2019 ("First Dismissal Order"). (ECF No. 130). See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). See also Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998) (taking judicial notice of court filings in a state court case where the same plaintiff asserted similar claims); Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) ("The Court may consider the records in this case, the underlying bankruptcy case and public records.").

On November 18, 2016, the New York State Court entered an order in the Divorce Proceeding ordering Debtor to pay delinquent child support and maintenance for the months of April 2015 through October 2015 ("November 2016 Order"). See Exhibit "8" to Declaration of Secured Creditor Sheila Rosenblum in Support of Motion to Dismiss for Bad Faith or For Abstention, or in the Alternative, Motion for Relief from the Automatic Stay or Appoint a Trustee ("Sheila Rosenblum Bad Faith Declaration") (ECF No. 43) and Exhibit "2" to Declaration of Daniel M. Lipschutz, Esq. in Support of Sheila Rosenblum's Motion to Dismiss for Bad Faith or For Abstention, or in the Alternative, Motion for Relief from the Automatic Stay or Appoint a Trustee ("Lipschutz Bad Faith Declaration") (ECF No. 44). In pertinent part, the November 2016 Order stated that the court previously "issued its Interim Decision dated October 26, 2016 … granting so much of plaintiff's [i.e. Sheila Rosenblum's] OTSC finding that defendant [i.e. Debtor] is required to pay plaintiff nontaxable maintenance of $62,500 **per month** and child support in the amount of $12,5000 [sic] **per month** …, and that defendant has failed to fully pay the amounts due therefor for the months of April through October 2015 …." Id. at 2 (emphasis added); see also Interim Decision dated October 26, 2016, attached as Exhibit "5" to Sheila Rosenblum Bad Faith Declaration.

On January 12, 2017, a Judgment of Divorce ("JOD"), signed December 23, 2016, was entered in the Divorce Proceeding. (First Dismissal Order at 4:4-6; Sheila Rosenblum Declaration, ¶ 11). In pertinent part, the JOD requires Debtor to pay child support in the manner provided under Article VII of the 2010 Post-Nup Agreement, which states, in pertinent part:

> 1. In the event of an Operative Event as defined in this Agreement, and continuing on the **first day of each month** thereafter until the first to occur of the following: (a) the death of DANIEL, or (b) the death of SHEILA, DANIEL shall pay the following Basic Child Support directly to the WIFE by personal check drawn on a New York Bank, or direct deposit to an account designated by SHEILA, the sum of [redacted] **per year** in total for two children until [child one] is emancipated as defined in Article VIII, at which time Child Support payments shall be reduced to [redacted] **per year** until [child two's] emancipation, when Child Support shall cease.

(First Dismissal Order at 16:3-13) (emphasis added) ("Child Support Provision").[4] The JOD further requires Debtor to pay spousal maintenance to Sheila Rosenblum in the manner provided under paragraph 11 of the 2013 Agreement, which requires Debtor to pay an annual amount to Sheila Rosenblum that "**can** be made in monthly installments …." Id. at 16:20-22 (emphasis added) ("Spousal Maintenance Provision").

On July 20, 2017, Debtor and Sheila Rosenblum entered into another stipulation modifying in part the 2010 Post-Nup Agreement ("July 2017 Agreement"). (First Dismissal Order at 4:7-9; Sheila Rosenblum Declaration, ¶ 10).

On or about December 11, 2017, Debtor and Sheila Rosenblum entered into a settlement agreement ("December 2017 Agreement") that modified, in part, the 2010 Pre-Nup Agreement, the 2013 Agreement, the 2016 Agreement, and the July 2017 Agreement. (First Dismissal Order at 4:10-13).

On September 4, 2018, Sheila Rosenblum filed a motion to appoint a receiver in the Divorce Proceeding ("Receiver Motion") that was accompanied by her "Affidavit of Support." Therein, Sheila Rosenblum attested, in pertinent part:

> **C. Additional Basic Child Support Arrears:** In accordance with the terms of paragraphs [sic] 1 of Article VII of the July 2010 Agreement, defendant [i.e. Debtor] was required to pay me basic child support in the sum of $150,000 per year (or $12,500 per month), subject to a cost of living adjustment ("COLA") measured from July 2010. Since November 15, 2017, defendant has failed to me [sic] any child support. His child support arrears total $140,362.50 (10 months x $14,036.25). I am requesting that the Court issue an order directing the Clerk of the Court to enter a money judgment in that sum in my favor and against defendant.
>
> **D. Additional Spousal Support Arrears:** In accordance with the terms of paragraph 11 of the December 2013 Agreement, defendant was required to pay me, as and for spousal maintenance, the sum of sixty-two thousand five hundred ($62,500) dollars per month (or $750,000 per year). Since November 15, 2017, defendant has failed to me [sic] any spousal support. His spousal support arrears total $625,000 (10 months x $62,500). I am requesting that the Court issue an order directing the Clerk of the Court to enter a money judgment in that sum in my favor and against defendant.

[4] The court redacted certain terms from the above-quoted language because the 2010 Post-Nup Agreement was filed under seal.

Affidavit of Support at ¶¶ 28(C) and (D), attached as Exhibit "2" to Sheila Rosenblum Declaration (emphasis in original).

On September 5, 2018, the New York State Court entered an "Order to Show Cause" in the Divorce Proceeding which stated, in pertinent part:

> LET defendant, Daniel Rosenblum ("defendant"), and his attorneys appear and show cause before the Hon. Michael Katz, at IAS Matrimonial Part 24, at the Courthouse located at 60 Centre Street Room 543, New York, New York, on the 16th day of Oct. 2018 at 9:30 a.m., or as soon thereafter as counsel can be heard, why an order should not be made and entered:
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> …
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> (e) An order pursuant to DRL § 244[5] directing the entry of a money judgment in favor of plaintiff and against defendant in the sum of $140,362.50,

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[5] DRL § 244 states:

> Where a spouse in an action for divorce, separation or annulment, or declaration of nullity of a void marriage, or a person other than a spouse when an action for an annulment is maintained after the death of a spouse, defaults in paying any sum of money as required by the judgment or order directing the payment thereof, or as required by the terms of an agreement or stipulation incorporated by reference in a judgment, such direction shall be enforceable pursuant to section fifty-two hundred forty-one or fifty-two hundred forty-two of the civil practice law and rules. Upon application the court shall make an order directing the entry of judgment for the amount of arrears of child support together with costs and disbursements. The court shall make an order directing the entry of judgment for the amount of arrears of any other payments so directed, together with costs and disbursements, unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears. The court shall not make an order reducing or cancelling arrears unless the facts and circumstances constituting good cause are set forth in a written memorandum of decision. The application for such order shall be upon such notice to the spouse or other person as the court may direct. Such judgment may be enforced by execution or in any other manner provided by law for the collection of money judgments. The relief herein provided for is in addition to any and every other remedy to which a spouse may be entitled under the law; provided that when a judgment for such arrears or any part thereof shall have been entered pursuant to this section, such judgment shall thereafter not be subject to modification under the discretionary power granted by this section; and after the entry of such judgment the judgment creditor shall not hereafter be entitled to collect by any form of remedy any greater portion of such arrears than that represented by the judgment so entered. Such judgment shall provide for the payment of interest on the amount of any arrears if the default was willful, in that the obligated spouse knowingly, consciously and voluntarily disregarded the

> representing child support arrears due pursuant to the parties' agreements, dated December 16, 2013 (the "December 2013 Agreement") and July 8, 2010 (the "Postnuptial Agreement"), and the JOD;
>
> (f) An order pursuant to DRL § 244 directing the entry of a money judgment in favor of plaintiff and against defendant in the sum of $62,500, representing spousal support arrears pursuant to the December 2013 Agreement and the JOD ….

Order to Show Cause at 1-2, attached as Exhibit "1" to Sheila Rosenblum Declaration.

On October 16, 2018, in response to the affidavit filed by Sheila Rosenblum in support of her Receiver Motion, Debtor filed a cross-motion ("Cross-Motion") that includes an Affirmation under penalty of perjury submitted by Debtor's divorce counsel. See Affirmation accompanying Notice of Cross-Motion, attached as Exhibit "3" to Sheila Rosenblum Declaration. The Affirmation included the following statements in response to Paragraphs 28(C) and (D) of Sheila Rosenblum's affidavit:

> D. **Money judgment - $140,362.50.** Defendant consents to the entry of a money judgment by plaintiff against him in the sum of $140,362.50 as requested in paragraph 28C of plaintiff's moving papers.
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> E. **Money judgment - $625,000.** Defendant consents to the entry of a money judgment by plaintiff against him in the sum of $625,000 as requested in paragraph 28D of plaintiff's moving papers.

Affirmation accompanying Cross-Motion at 14. In support of the Affirmation, Debtor filed his own Affidavit attesting that he verified and adopted all of the contents of the Affirmation ("Debtor Affidavit"). See Affidavit of Daniel Rosenblum accompanying Cross-Motion.

On November 13, 2018, the New York State Court held a hearing in the Divorce Proceeding regarding, *inter alia*, Sheila Rosenblum's Receiver Motion and the Debtor's Cross-Motion. See November 13, 2018, New York State Court Hearing Transcript, attached as Exhibit "9" to Lipschutz Bad Faith Declaration. In pertinent part, counsel for Sheila Rosenblum informed the court that the parties consented to the entry of money judgments in the amount of

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> obligation under a lawful court order. Such interest shall be computed from the date on which the payment was due, at the prevailing rate of interest on judgments as provided in the civil practice law and rules.

$140,362.50 for child support arrears and $62,500 for spousal support arrears. Id. at 5:9-25.[6] Debtor's counsel in the Divorce Proceeding did not dispute this representation by Sheila Rosenblum's counsel during that hearing.

On December 1, 2018, prior to the continued hearing in the Divorce Proceeding, Debtor filed his voluntary bankruptcy petition commencing this Chapter 11 reorganization proceeding. (ECF No. 1). He has filed schedules of assets and liabilities ("Schedules") as well as a statement of financial affairs ("SOFA"), in addition to various amendments to those documents during this proceeding. (ECF Nos. 47, 110, and 230). Debtor signed all of the documents under penalty of perjury. On his initial Schedule "E/F," Debtor listed Sheila Rosenblum as having an unliquidated, disputed, priority unsecured claim of $700,000 for a domestic support obligation. In response to question 7 of his SOFA, Debtor attested that he made no payments to insiders, including child support and alimony, within one year before filing bankruptcy. In response to question 9, Debtor listed the Divorce Proceeding with Sheila Rosenblum that is pending in New York State Court.

On December 21, 2018, Debtor filed an amended Schedule "E/F," in which he again listed Sheila Rosenblum as having an unliquidated, disputed, priority unsecured claim of $700,000 for a domestic support obligation. In response to question 7 of his amended SOFA, Debtor again attested that he had made no payments to insiders, including child support and alimony, within one year before filing bankruptcy.

On December 21, 2018, Sheila Rosenblum filed her "Motion to Dismiss Case for Bad Faith or for Abstention, or in the Alternative, Motion for Relief from the Automatic Stay or Appoint a Trustee" ("First Dismissal Motion") (ECF No. 42), along with supporting declarations and exhibits that included the Sheila Rosenblum Bad Faith Declaration and the Lipschutz Bad Faith Declaration. On that same day, Sheila Rosenblum also filed proof of claim number 3 in the amount of $190,787,212.18, of which she attests that $14,102,391.78 constitutes delinquent domestic support obligations entitled to priority of payment under Section 507(a)(1).

[6] It appears that the $62,500 figure for spousal support arrears should have been $625,000 as stated in the October 16, 2018, Affirmation of Debtor's counsel.

On February 11, 2019, Debtor filed another amended Schedule "E/F," in which he no longer listed Sheila Rosenblum as having any claim for a domestic support obligation. In response to question 7 of his amended SOFA, Debtor again attested that he had made no payments to insiders, including child support and alimony, within one year before filing bankruptcy.

On March 15, 2019, the court entered the First Dismissal Order denying without prejudice the First Dismissal Motion.[7] In pertinent part, the court found that both the Child Support Provision and the Spousal Support Provision were ambiguous as to whether Debtor's obligations were owed monthly or annually, and Sheila had otherwise failed to carry her burden under Section 1112(b)(4)(P) by not directing the court to anything in the record clarifying this ambiguity.

On May 10, 2019, an order was entered denying the Debtor's request to extend the exclusive 120-day period for him to file a proposed Chapter 11 plan and required disclosure statement. (ECF No. 180). In addition to denying his request, the order set a deadline of June 3, 2019, for the Debtor to file a proposed plan of reorganization and accompanying disclosure statement. The same order scheduled a hearing for July 10, 2019, for the court to consider approval of a disclosure statement previously filed by Sheila Rosenblum as well as the disclosure statement to be filed by the Debtor. The order also directed that any hearing on confirmation of Sheila Rosenblum's proposed plan of liquidation, as well as the Debtor's proposed plan of reorganization, would commence no later than August 26, 2019.

On May 24, 2019, Sheila Rosenblum filed the instant Motion. (ECF No. 193). On the same date, Sheila Rosenblum also filed "Secured Creditor Sheila Rosenblum's Motion for

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[7] That order also includes a denial without prejudice of Sheila Rosenblum's request to appoint a Chapter 11 trustee under Section 1104(a). See First Dismissal Order at 17-19. The court concluded that Sheila Rosenblum had failed to establish cause for the appointment of a trustee because she had not yet established that the Debtor was delinquent in the payment of his domestic support obligations. Id. at 17. The court also found that Sheila Rosenblum had not demonstrated that appointment of a trustee was in the best interests of other creditors. Id. at 17-18. Finally, the court concluded that the Debtor still had an exclusive opportunity to propose a plan of reorganization. Id. at 18-19. For those reasons, the court concluded that appointment of a Chapter 11 trustee under Section 1104(a) was not appropriate at that time.

Exception from Automatic Stay under 11 U.S.C. §362(b)(2)(B) and (C) and (b)(4), and Waiver of 14-Day Stay Under Rule 4001(a)(3)" ("MEAS"). (ECF No. 191). Both motions were noticed to be heard on July 10, 2019, i.e., the same date and time of the hearing on disclosure statement approval. (ECF Nos. 195 and 196).

On June 3, 2019, Debtor filed his proposed plan of reorganization and proposed disclosure statement ("Debtor Disclosure Statement"). (ECF Nos. 200 and 201).

On June 14, 2019, Sheila Rosenblum filed redlined, first amendments to both her proposed plan ("Sheila Plan") and proposed disclosure statement ("Sheila Disclosure Statement"). (ECF Nos. 208, 209, and 210).

On June 26, 2019, only the Debtor filed an opposition to the instant Motion ("Opposition"). (ECF No. 223).

On July 3, 2019, Sheila Rosenblum filed a reply in support of the instant Motion ("Reply"). (ECF No. 235).

On July 15, 2019, the court entered an order denying approval of the Debtor Disclosure Statement ("DS Denial Order"). (ECF No. 242). On that same day, the court entered an order approving the Sheila Disclosure Statement with modifications and scheduling a hearing on confirmation of the Sheila Plan to commence on August 26, 2019. (ECF No. 243).

On July 17, 2019, the court entered an order denying the MEAS. (ECF No. 246).

DISCUSSION

By the instant Motion, Sheila Rosenblum seeks an order dismissing this case under Section 1112(b)(4)(P) because of Debtor's failure to pay domestic support obligations that first became payable during the post-petition period. By his Opposition, Debtor suggests that Sheila Rosenblum is repeating the same arguments and evidence the court rejected in connection with the First Dismissal Motion, the disposition of which the Debtor asserts is the law of the case. Debtor further asserts that he is current on his pre-petition child support obligations, and that the December 2017 Agreement suspended his obligation to make further payments to Sheila Rosenblum pending conditions precedent that have not yet occurred. Debtor finally argues that

unusual circumstances exist which do not warrant dismissal or conversion of this case because he has filed a plan that will provide a distribution to creditors.

I. Law of the Case.

The law of the case doctrine applies in bankruptcy proceedings. See Fed. Deposit Ins. Corp. v. Kipperman (In re Comm. Money Ctr., Inc.), 392 B.R. 814, 832-33 (B.A.P. 9th Cir. 2008). In Stacy v. Colvin, 825 F.3d 563 (9th Cir. 2016), the circuit panel observed as follows:

> The law of the case doctrine generally prohibits a court from considering an issue that has already been decided by that same court or a higher court in the same case …. The doctrine is concerned primarily with efficiency, and should not be applied when the evidence on remand is substantially different, when the controlling law has changed, or when applying the doctrine would be unjust …. A district court's discretionary decision to apply the law of the case doctrine is reviewed for an abuse of discretion.

825 F.3d at 567 (citations omitted).[8]

Because the doctrine is designed to prevent relitigation of issues that already have been decided, the burden lies with the party opposed to the application of the doctrine to demonstrate a substantial difference in the evidence, a change in controlling law, or that application of the doctrine is unjust. See, e.g., Tate v. Univ. Med. Ctr. of S. Nev., 2016 WL 7045711, at *3-4 (D. Nev. Dec. 2, 2016) (granting motion in limine to prevent plaintiff from relitigation of issues adversely determined by Ninth Circuit in its order of remand); see also In re USA Comm. Mortg. Co., 2010 WL 11538037, at *4 (D. Nev. June 9, 2010) (summarizing the law of the case doctrine).

Sheila Rosenblum has satisfied her burden by offering evidence in support of the current Motion that was not part of the record in connection with the First Dismissal Order—namely, copies of the Receiver Motion and the Cross-Motion. See First Dismissal Order at 4 n.10 ("Neither Sheila's motion nor Daniel's cross-motion were included in the record on the instant Motion, although the transcript of the hearing before the New York State Court reflects the

[8] Not surprisingly, prior dicta, comments, or observations in the case by a trial or appellate court are not to be treated as the "law" of the case. See Gertz v. Robert Welch, Inc., 680 F.2d 527, 533 (7th Cir. 1982), cert. denied, 459 U.S. 1226, 103 S.Ct. 1233, 75 L.Ed. 2d 467 (1983).

matters presented.").[9] Application of the law of the case doctrine to the current Motion is unjust because the additional evidence clarifies the ambiguity the court noted in the First Dismissal Order and further reflects that Debtor is being less than forthright with this court. Finally, the First Dismissal Order was entered without prejudice, which typically counsels against application of the law of the case doctrine. See Los Angeles Trust Deed Mortg. Exch. v. Sec. & Exch. Comm'n, 285 F.2d 162, 165 (9th Cir. 1961) ("This petition was denied (without prejudice), because we did not desire to establish 'the law of the case' without a full scale hearing of all issues which were to be raised on appeal."); Lovell's Am. Car Care, LLC v. Wells Fargo Bank, N.A. (In re Lovell's Am. Car Care, LLC), 438 B.R. 355, at *2 and n.13 (B.A.P. 10th Cir. July 14, 2010) (unpublished) ("Even assuming, without deciding, that both dismissal motions had the same basis, the law of the case doctrine still does not apply because the first dismissal motion was denied by the Bankruptcy Court 'without prejudice.' The United States Supreme Court has described a dismissal without prejudice as a 'dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim.' Thus, an adjudication that is made without prejudice is the opposite of an adjudication on the merits...") (quoting Semtek Intern. Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505, 121 S.Ct. 1021, 149 L.Ed. 2d 32 (2001)).

II. Dismissal under Section 1112(b).

a. General Standard.

Section 1112(b)(1) provides as follows:

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[9] Sheila Rosenblum requests that the court take judicial notice of the copies of the documents filed in the Divorce Proceeding, including her Receiver Motion as well as the Debtor's Cross-Motion. See Motion at 3 n.5, 5 n.6, 10 n.14; Reply at 2 n.5. Debtor does not object to the request for judicial notice of the documents, but suggests that some of the documents contain hearsay, presumably barred under FRE 802. See Opposition at 6 n.2. Unfortunately, the Debtor does not identify the statements in the documents that arguably constitute hearsay. Thus, the court has no basis to rule on the objection, nor would Sheila Rosenblum have a basis to respond. Debtor's unspecified hearsay objection accordingly is overruled. Debtor also argues that Sheila Rosenblum's summary of the December 2017 Agreement violates the best evidence rule, presumably under FRE 1002. A copy of the December 2017 Agreement previously was filed under seal, however, and judicial notice has been taken pursuant to FRE 201. See note 3, supra.

> Except as provided in paragraph (2) and subsection (c), 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). Section 1112(b)(4) provides a non-exclusive list of circumstances constituting "cause." The burden of establishing cause rests with the party seeking relief under Section 1112(b)(1). See Labankoff v. U.S. Trustee (In re Labankoff), 2010 WL 6259969, at *3 (B.A.P. 9th Cir. June 14, 2010); see generally 7 COLLIER ON BANKRUPTCY ¶ 1112.04[4] (Richard Levin and Henry J. Sommer, eds, 16th ed. rev. 2018). Because Section 1112(b)(1) provides the alternatives of conversion or dismissal, the moving party also should demonstrate why the alternative it requests is in the best interests of creditors and the estate. Id. at n.35, citing In re Helmers, 361 B.R. 190, 198 (Bankr. D. Kan. 2007).

The operative command in Section 1112(b)(1) that the court shall convert or dismiss a chapter 11 proceeding is subject to the exception set forth in Section 1112(b)(2). The exception commonly is characterized as a "defense" to conversion or dismissal because the burden of establishing its requirements rests on the opponent. See generally 7 COLLIER ON BANKRUPTCY, ¶ 1112.05[2] (Richard Levin & Henry J. Sommer, eds., 16th ed.). Under Section 1112(b)(2), if the moving party establishes the existence of cause under Section 1112(b)(1), then the opponent can prevent conversion or dismissal if four requirements are met: (1) the court identifies unusual circumstances establishing that such relief is not in the best interests of creditors and the estate; (2) the opponent establishes that there is a reasonable likelihood of confirming a plan in a reasonable amount of time; (3) the opponent establishes that the grounds for relief include an act or omission of the debtor for which there is a reasonable justification; and (4) the opponent establishes that the act or omission can be cured within a reasonable time. See 11 U.S.C. § 1112(b)(2)(A and B) (emphasis added). Because these provisions are in the conjunctive, the opponent to conversion or dismissal under Section 1112(b)(1) has the burden of proving all four requirements.

b. Delinquent Post-Petition Domestic Support Obligations.

Sheila Rosenblum argues that "cause" exists under Section 1112(b)(4)(P), which requires proof of a "failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition." A "domestic support obligation" is defined as follows:

> (14A) The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—
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> (A) owed to or recoverable by—
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> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> (ii) a governmental unit;
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> (B) In the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
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> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
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> (i) a separation agreement, divorce decree, or property settlement agreement;
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> (ii) an order of a court of record; or
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> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental entity; and
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> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A). The amounts owed by Debtor to Sheila Rosenblum under the Child Support Provision and the Spousal Maintenance Provision constitute domestic support obligations established as described in Section 101(14A)(C)(i) and (C)(ii).

Sheila Rosenblum attests that Debtor has not made a single post-petition domestic support payment. See Sheila Rosenblum Declaration, ¶¶ 15, 48, 56, 66, and 67. Debtor does not dispute this contention in his Opposition, nor could he as his monthly operating reports, executed under penalty of perjury, do not list any post-petition payments to Sheila Rosenblum on account

of domestic support obligations. See Monthly Operating Reports, ECF Nos. 89, 118, 149, 150, 197, and 221; see also Opposition at 14:11-13 ("Debtor is currently unable to fulfill payment of child support obligations because he earns roughly $7,500 a month before taxes and living expenses."). Debtor instead argues that the December 2017 Agreement suspended his payment obligations until the occurrence of certain conditions precedent, which have not yet occurred. Debtor's argument, though, is contradicted by his admission in the Debtor Affidavit that he filed under penalty of perjury in October 2018 in support of his Cross-Motion. Under oath, Debtor specifically acknowledged that he was delinquent on his **monthly** spousal maintenance obligations and delinquent on his **monthly** child support payments for a period of ten months after November 15, 2017. That ten-month period clearly extended beyond the December 2017 Agreement that the Debtor now claims to have resulted in a suspension of his monthly payment obligations.[10]

The November 2016 Order entered in the Divorce Proceeding further confirms that Debtor's payment obligations are due on a monthly basis. Although the November 2016 Order was part of the record during the court's consideration of the First Dismissal Motion, Debtor's argument that the December 2017 Agreement altered his payment obligations—a point which he also raised in response to the First Dismissal Motion—created sufficient uncertainty to warrant denial of the First Dismissal Motion without prejudice. The additional materials provided in connection with the instant Motion, however, unambiguously reflect that Debtor's obligations under the Child Support Provision and the Spousal Maintenance Provision remain due on a monthly basis notwithstanding the December 2017 Agreement, and the undisputed evidence before the court reflects that Debtor has not made a single post-petition payment under either provision.

[10] In his Opposition, Debtor alleges that he "has paid his 2018 child support obligations." Opposition at 8:15-16. This allegation is contrary to the Debtor Affidavit wherein the Debtor admitted that he was delinquent in his support obligations in 2018. It also is contrary to his attestation in Question 7 of his SOFA that he has made no payments to insiders, including child support and alimony, within one year before filing bankruptcy. Moreover, Debtor asserts in his Opposition to the instant Motion that he lacks sufficient funds to pay his ongoing child support obligations.

For these reasons, the court finds and concludes that cause has been established under Section 1112(b)(4)(P) for Sheila Rosenblum to obtain relief under Section 1112(b)(1).

As previously mentioned, the court has denied approval of the Debtor Disclosure Statement. Based on the record in this proceeding, including evidence submitted by the Debtor, the court rejected the Debtor's proposed representation to creditors that he has undertaken negotiations to sell shares of stock in ED&F Man Holdings, Ltd. ("ED&F Man"), that would fund payments to his creditors, including his delinquent domestic support obligations, under his proposed individual Chapter 11 plan. See DS Denial Order at 9. Moreover, the court also noted that the Debtor's proposed plan of reorganization included conditions that might prevent a required sale of shares from ever taking place. Id. at 9-10. In other words, the Debtor has taken no steps to ensure the feasibility of his own plan of reorganization, and has proposed a plan that expressly includes provisions to prevent any delinquent domestic support obligations from ever being cured within a reasonable time. On a record that Debtor has largely provided, he has failed to demonstrate that all of the statutory requirements for a defense under Section 1112(b)(2) exist. Moreover, he has offered no authority for an equitable defense to be applied.[11]

The court further concludes that dismissal, rather than conversion to Chapter 7, is in the best interests of creditors and the estate. As the court indicated when denying approval of the Debtor Disclosure Statement, Sheila Rosenblum currently has an allowed claim comprised of, in

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[11] As previously discussed at 12, supra, in addition to demonstrating that there is a reasonable likelihood of a plan being confirmed within a reasonable period of time, an opponent must demonstrate both a "reasonable justification for the act or omission" and that the "act or omission…will be cured within a reasonable period of time." 11 U.S.C. § 1112(b)(2)(B)(i) and (B)(ii). Because Debtor admits that he has made no domestic support payments after he filed his Chapter 11 petition and does not have the income to do so, his alleged justification for not doing so, i.e., an alleged suspension of such obligations under the December 2017 Agreement, does not address the additional requirement that he demonstrate that any such obligations will be cured within a reasonable period of time. Debtor's own proposed plan expressly indicates that his delinquent domestic support obligations might never be paid. Moreover, there is nothing in the record indicating that the Debtor has ever sought from the New York State Court any relief from the domestic support orders and judgments entered in the Divorce Proceeding. Under these circumstances, the court concludes that there is no equitable basis for relief from the requirements of Section 1112(b)(2).

pertinent part, a $65,038,695.31 claim secured by the ED&F Man shares (as defined in the DS Denial Order) and a $14,102,391.78 priority claim for unpaid domestic support obligations. See DS Denial Order at 11. Debtor valued the shares at $45,537,488.15, making it fully encumbered by Sheila Rosenblum's secured claim. Debtor's post-petition earnings are not available to pay creditors in a Chapter 7. See 11 U.S.C. § 541(a)(6) (stating that property of the estate includes "[p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case."). Finally, although Debtor has not claimed on his Schedule "C" an exemption in $7,000 of cash from a checking account and another $6,800 from a "Merrill Lynch/BOA" account, those amounts might be fully encumbered by the allowed secured claim of the Internal Revenue Service ("IRS") in the amount of $95,701.[12] Thus, it appears that a Chapter 7 trustee will have few or no assets to administer.

Conversion to Chapter 7 also would render moot any further efforts by Sheila Rosenblum to confirm her proposed Chapter 11 plan of liquidation. Although her proposed plan provides a means to timely complete a negotiated sale of the ED&F Man shares, the proceeds of which may be used to fund payments to other creditors, see Sheila Plan, § 4.1.1 and Sheila Disclosure Statement at 14:20 to 16:11, none of the Debtor's other creditors has objected to the instant Motion seeking dismissal of the Chapter 11.[13]

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[12] On July 3, 2019, the IRS filed amended proof of claim number 15 in the total amount of $1,279,587.04. The amount of $95,701.00 is claimed to be secured by the Debtor's interests in property. This proof of claim is deemed allowed because no party has filed an objection to it. See 11 U.S.C. § 502(a) ("A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.").

[13] Where cause has been demonstrated, Section 1112(b)(1) also permits the court to appoint a Chapter 11 trustee under Section 1104(a) if it finds such appointment to be in the best interest of creditors and the estate. This section permits a Chapter 11 trustee to be appointed "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause…" or, "if such appointment is in the interests of creditors,…and other interests of the estate…" 11 U.S.C. § 1104(a)(1) and (2). Sheila Rosenblum's prior request to appoint a Chapter 11 trustee was denied because she failed to meet her burden of proof to establish "cause" and her request was premature. See discussion at note 7, supra. None of those reasons to deny a

Based on the record in this case, the court concludes that cause exists under Section 1112(b)(1) to dismiss this Chapter 11 proceeding due to the Debtor's failure to pay post-petition domestic support obligations as required by Section 1112(b)(4)(P).

Additionally, the court concludes that the Debtor has failed to meet his burden under Section 1112(b)(2)(A) of establishing a reasonable likelihood that a plan will be confirmed within a reasonable period, and has failed to meet his burden under Section 1112(b)(2)(B)(ii) of establishing that his postpetition failure to pay domestic support obligations will be cured within a reasonable period.

IT IS THEREFORE ORDERED that Secured Creditor Sheila Rosenblum's Motion to Dismiss Under 11 U.S.C. § 1112(b)(4)(P) for Debtor's Failure to Pay Post-Petition Child and Spousal Support Obligations, Docket No. 193, be, and the same hereby is, **GRANTED**.

IT IS FURTHER ORDERED that the above-captioned Chapter 11 proceeding be, and the same hereby is, **DISMISSED**.

IT IS FURTHER ORDERED that all scheduled hearings in the above-captioned Chapter 11 proceeding are **VACATED**.

Copies sent via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:
DANIEL H. ROSENBLUM
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LAS VEGAS, NV 89109

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requested appointment of a Chapter 11 trustee apply at this time. That request, however, was not renewed in the instant Motion and is not before the court.