



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
February 17, 2021

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:)	Case No.: 21-10230-MKN
)	Chapter 7
ELIZABETH ANN RAMSEY,)	
)	Date: February 10, 2021
Debtor.)	Time: 2:30 p.m.
)	
)	

**ORDER ON AMENDED MOTION FOR CONTINUATION OF AUTOMATIC STAY
AFTER PRIOR DISMISSAL WITHIN YEAR OF FILING PURSUANT TO 11 U.S.C. §
362(c)(3)(B) AND (C)¹**

On February 10, 2021, the court heard the Amended Motion for Continuance of Automatic Stay After Prior Dismissal Within Year of Filing Pursuant to 11 U.S.C. §362(c)(3)(B) and (C) (the “Motion”), brought by Elizabeth Ann Ramsey (“Debtor”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On April 7, 2020, Debtor filed a voluntary Chapter 13 petition commencing Case No. 20-11877-MKN (“Chapter 13 Case”).² Debtor was represented by counsel, Steven L. Yarmy,

¹ In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the above-captioned case as they appear on the docket maintained by the clerk of the court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “NRS” are to provisions of the Nevada Revised Statutes. All references to “FRBP” are to provisions of the Federal Rules of Bankruptcy Procedure. All references to “FRE” are to the Federal Rules of Evidence.

1 Attorney at Law. On her Chapter 13 petition, Debtor identified her residence as 1201 Westlund
 2 Drive, Las Vegas, Nevada 89102 (“Residence”). She attached a list of creditors to her Chapter
 3 13 petition, which included Shamrock Painting, Inc. and Eugene Tumbarello (collectively
 4 “Tumbarello”).³ Debtor did not, however, file any of the information required by Section 521(a),
 5 by way of schedules of assets and liabilities, a statement of financial affairs, or any other
 6 documents.⁴

11 ² Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the
 12 bankruptcy court docket. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). See also
 13 Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1364 (9th Cir.
 14 1998) (taking judicial notice of court filings in a state court case where the same plaintiff
 15 asserted similar claims); Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC
 16 Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015), aff’d sub nom. OMS, LLC v. Bank
 17 of America, N.A., 2015 WL 1271307 (C.D. Cal. 2015)(“The Court may consider the records in
 18 this case, the underlying bankruptcy case and public records.”).

19 ³ On April 15, 2020, Tumbarello filed in the prior Chapter 13 Case a proof of claim
 20 (“Tumbarello POC”) in the amount of \$284,841.78, of which \$274,841.78 was described as
 21 being secured pursuant to an order entered on March 8, 2019 (“March 8, 2019 Order”), by the
 22 Eighth Judicial District Court, Clark County, Nevada (“State Court”), in Case No. A-17-763560-
 23 C, entitled *Eugene Tumbarello, etc. v. Elizabeth Ramsey and Gregg Chambers* (“State Court
 24 Action”). That order granted Tumbarello’s motion to enforce settlement terms, for sale of the
 25 Residence in satisfaction of the settlement, and for attorney’s fees. Debtor’s co-defendant in the
 26 State Court Action currently is a voluntary Chapter 7 debtor in this bankruptcy court, Case No.
 27 20-12895-MKN (“Chambers Chapter 7”), which is assigned for administration to Chapter 7
 28 bankruptcy trustee Ryan A. Andersen. On July 27, 2020, Tumbarello filed a proof of claim in the
 Chambers case in the total amount of \$293,925.79, based in part on the same March 8, 2019
 Order. Tumbarello also commenced an adversary proceeding in the Chambers Chapter 7,
 denominated Adversary No. 20-01119-MKN, seeking a determination that its claims are
 nondischargeable under Sections 523(a)(2, 4 and 6).

⁴ Even though the Debtor did not file schedules or a statement of financial affairs in the
 prior Chapter 13 Case, various creditors filed proofs of claim. Guild Mortgage Company filed a
 proof of claim on May 11, 2020, in the secured amount of \$228,304.46, based on a deed of trust
 against the Residence (“Guild POC”). The proof of claim also attested that there was a default in
 payments totaling \$7,476.29 as of the Chapter 13 petition date.

1 On July 21, 2020, an order was entered granting Tumbarello's uncontested motion to
2 dismiss the Chapter 13 Case and imposing a 180-day bar to commencement of another
3 bankruptcy proceeding.⁵

4 On January 19, 2021, Debtor commenced the current bankruptcy proceeding by filing a
5 voluntary Chapter 7 petition ("Chapter 7 Case"). (ECF No. 1).⁶ Debtor is represented by the
6 same counsel who represented her in the Chapter 13 Case. The current Chapter 7 Case is
7 assigned for administration to Chapter 7 bankruptcy trustee Lenard Schwartz ("Chapter 7
8 Trustee"). The same Residence is identified on the Chapter 7 petition. On the same date, a
9 Notice of Chapter 7 Bankruptcy Case – No Proof of Claim Deadline ("Bankruptcy Notice") was
10 filed. (ECF No. 6). The Bankruptcy Notice was served by first class mail on the parties
11 identified in the mailing matrix provided by the Debtor as well as by electronic notice. (ECF No.
12 16). Parties were informed that the Chapter 7 Trustee would conduct a creditors meeting on
13 February 10, 2021, and that April 12, 2021 is the deadline to pursue objections to discharge or
14 dischargeability of particular debts.

15 On January 21, 2021, Debtor filed the instant Motion. (ECF No. 10). The Motion is
16 supported by the declaration of the Debtor ("Ramsey Declaration"). (ECF No. 11).

17 On January 22, 2021, an order was entered shortening time so that the Motion could be
18 heard on February 10, 2021. (ECF No. 15).⁷

19 ⁵ On December 16, 2020, in the prior Chapter 13 Case, the court heard and denied
20 Debtor's request for relief from the 180-day bar to filing a new case. The 180-day bar date
21 expired on January 17, 2021.

22 ⁶ The Chapter 7 petition was a "bare bones" or "skeleton" petition because it did not
23 include the schedules and statements providing the information required under Section 521)(a).

24 ⁷ The order shortening time was entered at the request of the Debtor that was
25 accompanied by the declaration of her counsel. (ECF Nos. 12 and 13). Counsel's declaration
26 concludes at Paragraph 5 by attesting: "The debtor has filed the instant motion in good faith and
27 will be able to present a feasible and reasonable plan and pay unsecured creditors disposable
28 income." (Emphasis added). Because a plan for payment of creditors from disposable income
is never proposed in a Chapter 7 case, it is not clear whether the Debtor actually intended to seek
a financial adjustment of her finances under Chapter 13 rather than to simply liquidate her
nonexempt assets under Chapter 7.

1 On February 1, 2021, Tumbarello filed an amended opposition to the Motion
2 (“Opposition”). (ECF Nos. 20 and 22).

3 On February 2, 2021, Debtor filed her schedules of assets and liabilities (“Schedules”),
4 statement of financial affairs (“SOFA”), and statement of intention (“Intention Statement”).
5 (ECF No. 23). On the same date, Debtor filed her Chapter 7 Statement of Your Currently
6 Monthly Income (“CMI Statement”) and Chapter 7 Means Test Calculation (“Means Test
7 Statement”). (ECF No. 24).

8 On February 9, 2021, Debtor filed an amended Schedule A/B (“Amended Schedule”).
9 (ECF No. 27). On the same date, Tumbarello filed a supplemental opposition to the instant
10 Motion (“Supplemental Opposition”). (ECF No. 28).

11 DISCUSSION

12 Under Section 362(c)(3)(A), the automatic stay arising from the filing of the current
13 Chapter 7 Case expires after thirty days because the Debtor’s prior Chapter 13 Case was
14 dismissed within one year. Under Section 362(c)(3)(B), the Debtor may seek a continuation of
15 the automatic stay beyond thirty days if she files a motion seeking a continuation before the
16 thirty-day period expires. The hearing on the motion must be completed within the thirty-day
17 period. See 11 U.S.C. § 362(c)(3)(B). If a prior case by an individual debtor was dismissed
18 within one year of the new case due to a debtor’s failure to file (without substantial excuse)
19 documents required by court order or Section 521, a presumption arises that the new case was
20 not filed in good faith. See 11 U.S.C. § 362(c)(3)(C)(i)(II)(aa). To obtain an extension of the
21 automatic stay beyond thirty days, the debtor must rebut the presumption of a lack of good faith
22 by clear and convincing evidence. Id. “[C]lear and convincing evidence ‘indicat[es] that the
23 thing to be proved is highly probable or reasonably certain. This is a greater burden than
24 preponderance of the evidence, ... but less than evidence beyond a reasonable doubt.’” U.S. v.
25 Jordan, 256 F.3d 922, 930 (9th Cir. 2001), quoting Black’s Law Dictionary 577 (7th ed. 1999).

26 In this instance, Debtor’s prior Chapter 13 Case was dismissed, in pertinent part, because
27 she did not file the information required by Section 521(a) without substantial excuse. Debtor
28 commenced her current Chapter 7 Case on January 19, 2021 and the automatic stay arose under

1 Section 362(a). The thirty-day period under 362(c)(3)(A) will expire on February 18, 2021.
 2 Debtor filed the instant Motion on January 21, 2021, and the hearing on the Motion was
 3 concluded on February 10, 2021. Because the Motion is timely and the hearing was concluded
 4 timely, the court determines only whether the Debtor has overcome by clear and convincing
 5 evidence the presumption of a lack of good faith in the commencement of the current Chapter 7
 6 Case.

7 **A. The Record Before the Court.**

8 The evidentiary record before the court includes the Ramsey Declaration, the Schedules
 9 and related documents filed by the Debtor under penalty of perjury, and the matters for which the
 10 court may take judicial notice. The court also considers the oral and written representations of
 11 counsel, as well as the exhibits attached to counsel's written materials. No objections to
 12 consideration of those exhibits has been made and any such objections therefore have been
 13 waived.

14 In her declaration, Debtor attests that she filed the Chapter 13 Case to address the
 15 consequences of the rulings in the State Court Action as it pertains to a homestead she claimed in
 16 the Residence, but that she subsequently realized that she "did not want a chapter 13 plan." See
 17 Ramsey Declaration at ¶¶3 and 4. Debtor attests that the Residence was sold to Tumbarello for
 18 \$55,000.00 pursuant to a sale in execution of the March 8, 2019 Order, but that she redeemed the
 19 Property pursuant to NRS 21.210 by paying the execution sale price and interest within one year.
 20 Id. at ¶¶6 and 7. She attests that the redemption price was paid using her pension funds. Id. at ¶7.
 21 After redeeming the Residence, Debtor attests that she claimed a Nevada homestead exemption
 22 but that the State Court rejected her claim of exemption. Id. at ¶¶9 and 10. Debtor disputes the
 23 factual and legal basis for the State Court's ruling, see id. at ¶¶ 5 and 8, and attests that the ruling
 24 is being appealed. Id. at ¶11. She attests to her belief that she has a great chance of prevailing
 25 on appeal. Id. at ¶12. Debtor further attests that she has substantial equity in the Residence and
 26 has worked out a loan modification with the mortgage lender. Id. at ¶¶15 and 16.

27 In her Schedules and Amended Schedule A/B, Debtor attests that the Residence has a
 28 value of \$420,000.00. She also attests that she has five different retirement or pension accounts,

two of which are described in her Schedules and Amended Schedule A/B as “403(b)” and three of which are described as “IRA.” The accounts range in amount from \$7,335.55 to \$94,841.00.⁸ On her Schedule C, she claims an exemption in the Residence in the amount of \$285,229.82 based on NRS 21.090(1)(l), 115.005, 115.010, and 115.050.⁹ Debtor also claims an exemption in the various retirement or pension accounts based on NRS 21.090(1)(r). On secured creditor Schedule D, Debtor lists Guild Mortgage Company with a claim in the amount of \$222,391.00, secured by collateral having a value of \$0.00, resulting in an unsecured claim in the amount of \$222,391.00. In spite of including Guild Mortgage on secured creditor Schedule D and attesting that the claim is secured by a “Real Estate Mortgage,” Debtor does not identify the real property collateral. Debtor does not list Tumbarello as asserting a secured claim - whether contingent, unliquidated or disputed. On her unsecured creditor Schedule E/F, Debtor does not list Guild Mortgage at all, but lists “Midland Mortgage, A Division of MidFirst Bank” as having a disputed claim in an unknown amount with respect to a mortgage relating to the Residence. She does list Tumbarello as asserting a disputed unsecured claim in an unknown amount based on the March 8, 2019 Order. On her income Schedule I, Debtor attests that she receives monthly gross income of \$5,522.00, out of which \$2,167.00 is deducted as “voluntary contributions for retirement plans.” Those voluntary contributions apparently relate to the five retirement or pension accounts identified in her Schedule A/B. After all deductions including the voluntary retirement contributions are made, Debtor calculates her average monthly income as \$2,116.00. On her expense Schedule J, Debtor attests that she has average monthly expenses totaling \$4,118.00. After deducting her monthly income of \$2,116.00, Debtor attests that her average monthly net income is a negative \$2,002.00.

⁸ In her Amended Schedule A/B, Debtor also adds property constituting a “financial asset” which she describes as “Appeal from Eighth District Court, Clark County, Nevada, Decision Case No. A-17-763560-C, denying (sic) Debtor’s Homestead Exemption to 1201 Westlund Drive, Las Vegas, NV 89102.”

⁹ At the hearing, counsel informed the court that, at the Debtor’s request, the meeting of creditors was continued by the Chapter 7 Trustee to February 24, 2021. (ECF No. 31).

1 In her SOFA, Debtor attests that the Residence was sold at a sheriff's sale on August 1,
2 2019, apparently to enforce the March 8, 2019 Order. She also attests that she redeemed the
3 Residence from the execution sale on July 18, 2020, by paying the sale price of \$55,000.00 and
4 \$6,600.00 in required interest.

5 In her Means Test Statement, Debtor attests that her gross income is \$5,522.13 based on
6 line 11 of the CMI Statement and that she has Internal Revenue Service expense allowances of
7 \$2,291.00, resulting in monthly disposable income of \$3,231.13 under Section 707(b)(2). Over a
8 sixty month period, Debtor apparently attests that she would have \$193,867.80 available to pay
9 creditors.

10 In her Intention Statement, Debtor lists Guild Mortgage as having a claim secured by a
11 real estate mortgage on unidentified property and explains that she will retain the property
12 through "appeal denial homestead exemption." Only Guild Mortgage is listed as a secured
13 creditor and not Tumbarello.

14 In its initial written response, Tumbarello offers five separate exhibits. Exhibit 1 is a
15 copy of this bankruptcy court's July 21, 2020 order dismissing the prior Chapter 13 Case.
16 Exhibit 2 is a copy of the State Court's order signed on July 15, 2019 and entered on July 22,
17 2019,¹⁰ denying Debtor's claim to a homestead exemption in the Residence ("July 22, 2019
18 Order").¹¹ After acknowledging that the Debtor had the burden of proving her entitlement to a
19 claimed homestead exemption, the July 22, 2019 Order provides: "**THE COURT FURTHER**
20 **FINDS** that the homestead asserted by Judgment Debtor ELIZABETH RAMSEY in and to the
21 1201 Westlund property does not apply and that Judgment Debtor ELIZABETH RAMSEY has
22 failed to meet her burden to prove that Judgment Debtor is entitled to the claimed exemptions in
23 the 1201 Westlund property. Maki v. Chong, 119 Nev. 390, 394, 75 P.3d 376, 379 (2003)."

24
25 ¹⁰ The docket of the State Court reflects that the order was filed on July 22, 2019.

26
27 ¹¹ As previously mentioned, the Residence apparently was sold to Tumbarello through a
28 sheriff's sale conducted on August 1, 2019, i.e., after the State Court entered the July 22, 2019
Order denying the Nevada homestead exemption.

Exhibit 3 is a copy, *inter alia*, of the State Court’s order signed on September 30, 2020,¹² denying Debtor’s claim to a homestead exemption in the Residence (“October 8, 2020 Order”).¹³ After again acknowledging that the Debtor had the burden of proving her entitlement to a claimed homestead exemption, the October 8, 2020 Order provides: “**THE COURT FURTHER FINDS** that this Court has ruled in 2019 that any homestead asserted by Judgment Debtor ELIZABETH RAMSEY in and to the 1201 Westlund property does not apply because an individual using fraudulently obtained funds to purchase real property should not be protected by the homestead exemption because the exemption’s purpose is to provide protection to individuals who file the homestead exemption in good faith and that Judgment Debtor ELIZABETH RAMSEY had failed to meet her burden to prove that Judgment Debtor is entitled to the claimed exemptions in the 1201 Westlund property. Maki v. Chong, 119 Nev. 390, 394, 75 P.3d 376, 379 (2003).” (Emphasis underlined.) Exhibit 4 is a copy of a notice of appeal filed on January 21, 2021, in the State Court on behalf of the Debtor (“Notice of Appeal”), with respect to the October 8, 2020 Order, as well as with respect to a subsequent order denying reconsideration. Exhibit 5 is a copy of an unpublished decision of the Nevada Supreme Court in a case entitled Superpumper, Inc. v. Leonard, 2020 WL 1129882 (Mar. 6, 2020). In its Supplemental Opposition, Tumbarello offers two additional exhibits. Supplemental Exhibit 1 is a copy of an unpublished decision of the Ninth Circuit Court of Appeals in a case entitled Bouzaglou v. v. Haworth (In re Bouzaglou), 803 Fed.Appx. 147 (May 1, 2020). Supplemental Exhibit 2 is a copy of the Notice of Appeal indicating that it was electronically filed with the Nevada Supreme Court on January 28, 2021, i.e., after the Debtor commenced her Chapter 7 proceeding on January 19, 2021.

¹² The docket of the State Court reflects that the order was signed on September 30, 2020, but filed on both September 30, 2020, and October 8, 2020. For purposes of the instant order only, this bankruptcy court describes the State Court order by reference to the later date.

¹³ As previously mentioned, Debtor apparently redeemed the Residence on July 18, 2020, after it was sold to Tumbarello through the sheriff’s sale. Thereafter, the State Court again denied Debtor’s claim to the Nevada homestead exemption.

In its proof of claim filed in the Chapter 13 Case, Tumbarello attached as Exhibit 1 a document recorded in Clark County on March 8, 2019. The recorded document includes a copy of the March 8, 2019 Order.¹⁴ Attached as Exhibit 2 to the Tumbarello POC is a copy of Amended Findings of Fact, Conclusions of Law and Judgment signed on November 26, 2019, and entered on November 27, 2019, by the Justice Court for the Las Vegas Township, Clark County, Nevada (“Justice Court”), in an eviction proceeding brought by Tumbarello against the Debtor, denominated Case No. 19C024136. Attached as Exhibit 3 to the Tumbarello POC is a copy of another document recorded in Clark County on January 17, 2020. That document includes a copy of a Judgment by the Justice Court signed and entered on January 16, 2020, awarding attorneys’ fees and costs in favor of Tumbarello in the eviction proceeding. Attached as Exhibit 4 to the Tumbarello POC is a copy of another document recorded in Clark County on March 5, 2020. That document includes a copy of an order of contempt of court by the State Court signed on March 2, 2020, and entered on March 4, 2020, holding the Debtor in contempt and ordering her to pay Tumbarello fees and costs totaling \$23,033.35. Attached as Exhibit 5 to the Tumbarello POC is a copy of a summary prepared by the claimant listing and explaining the various judgments and amounts evidenced by the other exhibits.

B. Analysis.

The court having considered the record concludes that the Debtor has failed to overcome the presumption of a lack of good faith by clear and convincing evidence. The court makes no finding whether or not the Chapter 7 Case was filed in good faith, but concludes only that the Debtor has not met her evidentiary burden. Several reasons lead to this conclusion.

¹⁴ Page 8 of the March 8, 2019 Order includes a paragraph stating, in pertinent part, as follows: “IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs shall be awarded an enforceable and secured interest in and to 1201 Westlund Drive, Las Vegas, Nevada 89102... in the sum of \$221,735.99 and that this sum shall be and hereby is further reduced to Judgment in favor of EUGENE TUMBARELLO and SHAMROCK PAINTING and against Defendants ELIZABETH RAMSEY and GREGG CHAMBERS.” (Emphasis added.) Page 9 of that order also includes a paragraph stating, in pertinent part, as follows: “IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the total Judgment Sum for enforcement of the Settlement Agreement shall be \$221,735.99, that this Judgment Sum shall constitute a deed of trust lien on the...1201 Westlund property and shall accrue post-judgment interest in accordance with the terms of this Judgment.” (Emphasis added.)

First, Section 362(c)(3) applies to individuals who file petitions under Chapter 7, 11 or 13. Section 362(c)(3)(B) creates a presumption that a later case under any of those Chapters is not filed in good faith if there is an earlier case dismissed within the previous year. The consequence of failing to timely overcome the presumption concerns the automatic stay rather than whether the individual will obtain a discharge or will be able to retain property. This reality is pronounced in Chapter 7 proceedings where a lack of good faith is not a basis for dismissal of a case, and, of course, not a basis for denying confirmation of a plan. Compare 11 U.S.C. §707(b) (dismissal for individual consumer Chapter 7 cases for abuse), with 11 U.S.C. §§1325(a)(3) and 1325(a)(7) (Chapter 13 plan confirmation requires plan to be filed in good faith and debtor's filing of Chapter 13 petition to be in good faith) and 11 U.S.C. §1129(a)(3) (Chapter 11 plan confirmation requires plan to be proposed in good faith).¹⁵ Thus, whatever may be the sincerity of Debtor's desire to retain the Residence through filing for bankruptcy protection is of minimal importance to whether the automatic stay continues in effect.

Second, Debtor acknowledges that she commenced the prior Chapter 13 Case and did not oppose dismissal because she later decided that she did not want to file a Chapter 13 plan. She does not dispute that she never filed any of the information required by Section 521(a)¹⁶ Debtor

¹⁵ Lack of good faith is not specified as a basis for dismissal of a case under Section 707, Section 1307, or Section 1112, or for relief from the automatic stay under Section 362(d). Proof of bad faith, however, may provide cause for dismissal, or relief from stay under all three Chapters. See, e.g., In re Zegzula, 2018 WL 6179302 (Chapter 7 dismissed because it was filed in bad faith by a serial filer); Leavitt v. Soto (In re Leavitt), 171 F.3d 1219 (9th Cir. 1999)(Chapter 13 petition dismissed because it was filed in bad faith); In re Korean Western Presbyterian Church of Los Angeles, 2020 WL 3635882 (Bankr.C.D.Cal. Apr. 21, 2020)(Chapter 11 proceeding may be dismissed or a Chapter 11 trustee may be appointed upon a determination that the case was filed in bad faith); In re Blas, 614 B.R. 334 (Bankr.D.Alaska 2019)(Chapter 7 relief from stay granted because of individual debtor's bad faith in pursuing case to prevent home foreclosure); In re Casey, 428 B.R. 519 (Bankr.S.D.Cal. 2010)(Chapter 13 relief from stay may be granted if petition is filed in bad faith); In re 31801 Via Coyote LLC, 2020 WL 1227195 (B.A.P. 9th Cir. Mar. 6, 2020)(Chapter 11 relief from stay granted because of debtor's bad faith formation and acquisition of property immediately prior to filing Chapter 11 petition).

¹⁶ Because the Debtor never filed schedules of assets and liabilities in the Chapter 13 Case, nor a statement of financial affairs, there is no information provided under penalty of perjury reflecting what she owned at that time or what transfers or payments were made during

now has filed the instant Chapter 7 Case through the same legal counsel seeking a discharge of her prepetition debts without having to complete the payments that would be required under a confirmed Chapter 13 plan. See 11 U.S.C. § 1328(a) (“[A]s soon as practicable after completion by the debtor of all payments under the plan...the court shall grant the debtor a discharge of all debts provided for by the plan...”). As previously mentioned, however, Debtor attests in her Means Test Statement that she may have significant monthly disposable income available to pay creditors¹⁷ through Chapter 13.¹⁸ While it is uncertain whether the United States Trustee or a creditor will seek to dismiss the instant Chapter 7 Case for abuse under Section 707(b), Debtor’s deduction of \$2,167.00 each month for voluntary contributions to her retirement plans may or

certain periods before that case was filed. She was represented in the prior Chapter 13 Case by the same counsel representing her in the current Chapter 7 Case. Debtor has identified no substantial change in circumstances from the prior case, such as a change in employment or family obligations, new debts, different assets, retention of more experienced counsel, or the like. Rather than attempting to convert her prior Chapter 13 Case to a case under Chapter 7 as permitted by Section 1307(a), she allowed the prior case to be dismissed simply to file another bankruptcy petition that triggered another automatic stay.

¹⁷ At the hearing, Debtor’s counsel acknowledged that Debtor is current on her monthly mortgage payment, presumably as a result of the loan modification.

¹⁸ It appears that the Means Test Statement form comports with the calculations required by Section 707(b)(2), including the allowance of various monthly expense deductions identified in Section 707(b)(2)(A)(ii, iii and iv). Because Debtor appears to be above median income, she may be required in a Chapter 13 proceeding to apply those same monthly expense deductions to meet the “projected disposable income” requirement for confirmation of a plan under Section 1325(b)(1)(B). See Keith M. Lundin, LUNDIN ON CHAPTER 13, § 94.1, at ¶5. LundinOnChapter13.com (last visited February 14, 2021). A similar projected disposable income result might follow if the Debtor attempts to confirm a plan in a Chapter 11 proceeding that does not pay allowed unsecured claims in full. See 11 U.S.C. § 1129(a)(15)(B). In a Chapter 11 proceeding, Debtor would have a further complication: in addition to contributing disposable income, Debtor likely would face the so-called “double whammy” of having to satisfy the “absolute priority rule” to confirm a Chapter 11 plan. See Zachary v. Cal. Bank & Trust (In re Zachary), 811 F.3d 1191, 1199 (9th Cir. 2016) (“[U]nder...§1129(a)(15), [debtor] ‘must dedicate at least five years’ disposable income to the payment of unsecured creditors, and - unlike a debtor in Chapter 13 - is also subject to the absolute-priority rule (and thus cannot retain any pre-petition property) if he does not pay those creditors in full.’”).

1 may not be subject to challenge.¹⁹ In other words, while the Debtor and other individuals should
 2 be encouraged as a matter of public policy to plan for retirement, it might not be appropriate to
 3 ask creditors to fund a debtor's retirement in a Chapter 7²⁰ proceeding.²¹

4 Third, Debtor has claimed an exemption in the Residence based on the Nevada
 5 homestead provisions. She is permitted to do so because the State of Nevada has opted out of

6
 7 ¹⁹ FRBP 1017(e)(1) requires a motion to dismiss under Section 707(b) to be brought
 8 within sixty days after the first date set for the meeting of creditors. In the instant case, that first
 9 date was February 10, 2021. Because the sixtieth day falls on a Sunday, the deadline to seek
 dismissal under Section 707(b) would fall on Monday, April 12, 2021. That date also is the
 deadline to object to discharge or dischargeability of debts in this Chapter 7 Case.

10 ²⁰ The Means Test Statement begins with the amount of current monthly income taken
 11 from line 11 of Debtor's CMI Statement, i.e., \$5,522.13. Section 541(b)(7) excludes from an
 12 individual's bankruptcy estate "any amount...withheld by an employer from the wages of
 13 employees for payment as contributions to certain employee benefit plans, deferred
 compensation plans, or tax-deferred annuities." See 11 U.S.C. §541(b)(7)(A)(i)(I, II and III).
 14 This section specifically provides that these employer withholding amounts "shall not constitute
disposable income as defined in section 1325(b)(2)." (Emphasis added.) Because the pension
 15 and retirement accounts listed on Debtor's Amended Schedule A/B may include both employer-
 16 withheld funds (403(b)) as well as individual retirement accounts (IRA), the entire \$2,167.00 in
 17 monthly deductions appearing on Schedule I might not be excluded from disposable income in
 18 Chapter 13. Moreover, because only the provisions of Chapter 13 require consideration of a
 19 debtor's disposable income, this exclusion from property of the bankruptcy estate might not
 20 insulate an above-median Chapter 7 debtor from a presumption of abuse under Sections
 707(b)(1) and (b)(2)(A)(i). In other words, the deductions for pensions and retirement
 contributions identified in the Debtor's Schedule I might be safe in Chapter 13, but might not be
 permissible monthly expenses in Chapter 7 under Section 707(b)(2)(A)(ii, iii and iv). The court
 makes no determination regarding these factual and legal issues.

21 ²¹ For a Chapter 13 debtor whose income is above the median for the relevant judicial
 22 district, the "applicable commitment period" for a proposed plan is five years. See 11 U.S.C.
 23 §1325(b)(4)(A)(ii). If an assigned Chapter 13 trustee or a creditor with an allowed unsecured
 24 claim objects to confirmation of a plan that does not pay unsecured claims in full, the debtor
 typically must commit his or her projected disposable income to payment of allowed unsecured
 25 claims for the entire applicable commitment period. See 11 U.S.C. § 1325(b)(1)(B) (if the plan
 26 does not pay allowed unsecured claims in full, the plan must provide that "all of the debtor's
 projected disposable income to be received in the applicable commitment period...will be
 applied to make payments to unsecured creditors under the plan."). In determining disposable
 27 income, the above-median income debtor is permitted to deduct the "[a]mounts reasonably
 28 necessary to be expended" that are identified in Section 707(b)(2)(A) and 707(b)(2)(B). See 11
 U.S.C. § 1325(b)(3).

the limited bankruptcy exemptions otherwise provided under Section 522(d). See NRS 21.090(3). Under FRBP 4003(b)(1), any party in interest, including a bankruptcy trustee or creditor, may object to a claimed exemption “within 30 days after the meeting of creditors...is concluded or within 30 days after any amendment to the...schedules is filed, whichever is later.” Section 522(l) clearly specifies the importance of claiming the exemption: “Unless a party in interest objects, the property claimed as exempt on such list is exempt.” 11 U.S.C. §522(l) (emphasis added). It is well-settled that absent a timely objection before the 30-day deadline expires, the claimed exemption is allowed in bankruptcy even if the exemption lacks a proper legal basis. See Taylor v. Freeland & Kronz, 503 U.S. 638, 643-644 (1992)(“The Bankruptcy Court did not extend the 30-day period. Section 522(l) therefore has made the property exempt. Taylor cannot contest the exemption at this time whether or not Davis had a colorable statutory basis for claiming it.”). In this instance, the deadline to object to Debtor’s exemptions has not commenced because the meeting of creditors was continued to February 24, 2021, and has not been concluded. More important, Debtor has claimed an exemption in the Residence despite prior rulings by the State Court that she is not entitled to a Nevada homestead exemption.²² Debtor filed an appeal from the October 8, 2020 Order, even though she conceded at the hearing that filing the Notice of Appeal was not authorized, was in violation of the automatic stay,²³ and therefore is a void act under well-settled law in this circuit. See Schwartz v. U.S. (In re Schwartz), 954 F.2d 569, 571 (9th Cir.1992) (acts in violation of the automatic stay are *void ab initio*, rather than voidable).²⁴ So while the Debtor could simply rely on the language of Section

²² As previously mentioned at 7-8, supra, in both the July 22, 2019 Order and the October 8, 2020 Order, the State Court concluded that the Debtor could not claim the Nevada homestead exemption, and each time cited the Nevada Supreme Court’s decision in Maki v. Chong, 119 Nev. 390, 394, 75 P.3d 376, 379 (2003). The State Court apparently found that funds had been fraudulently obtained from Tumbarello and were used by the Debtor to acquire the Residence. Under Maki, the State Court’s factual finding appears to have been sufficient to reject the Debtor’s homestead exemption. Compare In re Tarkanian, 562 B.R. 424, 448-450 (Bankr. D.Nev. 2014) (Maki not applied where debtors used their own funds to acquire their residence).

²³ Debtor’s Amended Schedule A/B listed the appeal as a financial asset that she did not originally disclose as property of the Chapter 7 estate. See note 8, supra.

522(l) and hope that parties in interest ignore the deadline to object, the Debtor's claim of a homestead exemption under Nevada law appears to be subject to objection simply based on Nevada principles of issue preclusion. See, e.g., Univ. of Nevada v. Tarkanian, 110 Nev. 581, 598-599, 879 P.2d 1180, 1191 (1994)(issue decided in prior litigation must be identical, the decision must be on the merits and become final²⁵, the party bound must be the same or in privity, and the issue was actually and necessarily litigated).²⁶ Despite the Debtor's belief that she has a good chance of prevailing on appeal, she offers no evidence other than her own optimistic opinion that supports her belief. This hardly constitutes clear and convincing evidence to overcome the statutory presumption that arises in this Chapter 7 Case under Section 362(c)(3)(C)(i)(II)(aa).

Finally, Debtor has presented the Chapter 7 Trustee with a Residence that, according to the Debtor's Schedules, is valued at \$420,000.00 and which is subject to a mortgage having an

²⁴ Whether the deadline to appeal the October 8, 2020 Order expired before the Chapter 7 Case was commenced is not before the court. Likewise, whether the extension of time under Section 108(a) to meet non-bankruptcy deadlines would apply also is not before the court.

²⁵ Because the Notice of Appeal was filed by the Debtor on January 28, 2021, in violation of the automatic stay, it is void and there is no pending appeal of the October 8, 2020 Order. Even if an appeal of the October 8, 2020 Order is pending, however, it is still treated as final and may be afforded issue preclusive effect under Nevada law. See Edwards v. Ghandour, 123 Nev. 105, 115 n.17, 159 P.3d 1086, 1093 n.17 (2007), *abrogated on other grounds* by Five Star Cap. Corp. v. Ruby, 124 Nev. 1048, 194 P.3d 709, 712-713 (2008). See also Bayuk v. Leonard (In re Morabito), 2020 WL 5814364, at *4 (B.A.P. 9th Cir. Sept. 29, 2020).

²⁶ As previously mentioned, Tumbarello was not listed on Debtor's Schedule D as a secured creditor. Instead, Tumbarello is listed on Schedule E/F as having a disputed unsecured claim. Also as previously discussed at note 14, supra, the March 8, 2019 Order created a "secured interest" and a "deed of trust" against the Residence in favor of Tumbarello. Ordinarily, Section 522(f) allows a debtor to avoid the fixing of a judicial lien "to the extent that such lien impairs an exemption to which the debtor would have been entitled..." 11 U.S.C. §522(f)(1)(A). Debtor apparently takes the position that Tumbarello does not have a judicial lien because it was not listed in her Schedule D. If that is the case, Debtor might be hard pressed to seek to avoid Tumbarello's apparent judicial lien that may exist as a result of the March 8, 2019 Order that was recorded in the county records. On the other hand, if there is no timely objection to the Debtor's claim of a homestead exemption, a party in interest would not have standing to challenge the validity of the exemption if the Debtor later seeks relief under Section 522(f)(1). See Jue v. Liu (In re Liu), 2020 WL 718072, at *5 (B.A.P. 9th Cir. Feb. 11, 2020).

1 apparent balance of \$222,391.00.²⁷ By her own numbers, Debtor may have \$197,609.00 of
 2 equity in the Residence, i.e., \$420,000.00 minus \$222,391.00. Despite her own testimony as to
 3 the value of the Residence and the amount owed to the lender, Debtor claims an exemption in the
 4 amount of \$285,229.82 under the Nevada homestead statutes. For that amount to be claimed, the
 5 Residence would have to be worth \$87,620.82 more than the value the Debtor attests. While
 6 these discrepancies may be the result of unintentional errors, the presence of such inconsistencies
 7 militate against a conclusion that the Debtor has provided the clear and convincing evidence
 8 required to grant the Motion.²⁸

9 Under these circumstances, the court concludes that Debtor has not overcome by clear
 10 and convincing evidence the presumption of a lack of good faith. Under Section 362(c)(3)(A),
 11 the automatic stay will “terminate with respect to the debtor” on the 30th day after the Chapter 7
 12 petition was filed, i.e., February 18, 2021.²⁹ The automatic stay in this Chapter 7 proceeding will
 13 not terminate in its entirety as to property of the bankruptcy estate, which currently encompasses
 14 the Residence. See In re Thu Thi Dao, 616 B.R. 103, 116-117 (Bankr.E.D.Cal. 2020).³⁰ Sections
 15

16 ²⁷ As discussed in note 4, supra, the Guild POC filed in the Chapter 13 Case was in the
 17 secured amount of \$228,304.46. It appears that Debtor’s loan modification may have reduced
 18 that balance to \$222,391.00 by the Chapter 7 petition date.

19 ²⁸ In the Tumbarello POC, the value of the Residence is alleged to be \$540,000.00, i.e.,
 20 \$120,000.00 more than suggested in Debtor’s Schedule A/B. It is unclear why the Debtor
 21 attested to a value lower than Tumbarello’s estimate but still claimed a homestead exemption
 22 exceeding her own figures.

23 ²⁹ Termination of the automatic stay as to the Debtor will not prohibit her from seeking
 24 injunctive relief, if necessary, in a court of competent jurisdiction, including through an
 25 adversary proceeding. See, e.g., Lattin v. Midland Mort. Co. (In re Lattin), 461 B.R. 832
 26 (Bankr.D.Nev. 2011) (injunction to prevent foreclosure permissible in successive Chapter 13
 27 proceedings after automatic stay expires under Section 362(c)(3)(A)).

28 ³⁰ Reswick v. Reswick (In re Reswick), 446 B.R. 362 (B.A.P. 9th Cir. 2011) was a
 Chapter 13 case involving an individual debtor who had a prior Chapter 13 proceeding dismissed
 within the prior year. The bankruptcy appellate panel adopted a minority view that Section
 362(c)(3)(A) operates to terminate the automatic stay in its entirety rather than merely “with
 respect to the debtor.” 446 B.R. at 366-367. Neither the Chapter 13 debtor nor the Chapter 13
 trustee had sought or obtained an order under Section 362(c)(3)(B) continuing the automatic
 stay. As a result, the Chapter 13 debtor’s postpetition earnings that otherwise were property of

362(a)(2), 362(a)(3), and 362(a)(4) specifically prohibit Tumbarello from enforcing the March 8, 2019 Order or any other State Court orders against property of the estate, from taking any act to obtain possession or to exercise control over property of the estate, and from taking any act to perfect or enforce any judicial lien or deed of trust against property of the estate. Nothing

the Chapter 13 estate under Section 1306(a)(2), were subject to a postpetition wage garnishment obtained by the debtor's former spouse.

Dao was a Chapter 7 case where the individual debtor had a prior Chapter 7 proceeding dismissed within the prior year. The bankruptcy court distinguished Reswick in light of the burdens and duties on a Chapter 7 trustee, the indefinite duration of estate property resulting from the language of Section 362(c)(1), the narrow language of Section 362(c)(3), and the impact of Sections 362(h)(1) and 362(h)(2) with respect to personal property that might secure a creditor's claim. These concerns were not addressed in Reswick. After addressing each of these concerns, the bankruptcy court in Dao adopted the majority view which limits termination of the automatic stay under Section 362(c)(3)(A) to the individual debtor, while continuing the stay's protection of estate property that may be administered by a Chapter 7 trustee. The reasoning expressed in Dao has particular application in the present case because the automatic stay would otherwise terminate on February 18, 2021, before the Chapter 7 Trustee can examine the Debtor at the continued meeting of creditors on February 24, 2021. The source of the dispute regarding the Debtor's homestead exemption was not described until Debtor filed her Amended Schedule A/B on February 9, 2021, i.e., the day before the initial date set for the creditors meeting. See note 8, supra. Not surprisingly, the Chapter 7 Trustee has made no appearance in connection with the instant Motion because he would have little or no basis to overcome the statutory presumption by clear and convincing evidence. Bankruptcy trustees already face too many pitfalls if they depend on debtors to monitor the interests of creditors and the bankruptcy estate. See, e.g., Samson v. Western Capital Partners, LLC (In re Blixseth), 684 F.3d 865 (9th Cir. 2012) (Chapter 7 debtor's failure to timely file a statement of intention results in all personal property collateral being removed from the estate and the automatic stay terminating even if the debtor failed to schedule the personal property). For these reasons, this court agrees with the analysis articulated by the bankruptcy court in Dao and adopts its rationale in this Chapter 7 case. Compare In re Rinard, 451 B.R. 12 (Bankr.C.D.Cal. 2011) (preliminary injunction granted barring postpetition foreclosure sale of commercial real property by concluding, *inter alia*, that 362(c)(3)(A) terminated the automatic stay solely with respect to the individual Chapter 7 debtor). See also Dao, 616 B.R. at 116 ("Is there a way to harmonize the chapter 13 minority view with chapter 7? Not really. One might attempt to draw a distinction between property of the estate under the control of a chapter 7 trustee and property of the estate under the control of a debtor in possession in chapter 11 or 13. But such an effort seems doomed to create more problems than it resolves.").

prohibits Tumbarello from seeking relief from the automatic stay under Section 362(d)³¹ to avoid the imposition of sanctions under Section 362(k), or seeking other relief in this Chapter 7 Case.³²

IT IS THEREFORE ORDERED that the Amended Motion for Continuance of Automatic Stay After Prior Dismissal Within Year of Filing Pursuant to 11 U.S.C. §362(c)(3)(B) and (C), brought by Elizabeth Ann Ramsey, Docket No. 10, be, and the same hereby is, **DENIED**.

Copies sent via BNC to all parties and via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:

ELIZABETH ANN RAMSEY
1201 Westlund Drive
Las Vegas, NV 89102

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³¹ As mentioned in note 28, supra, Debtor and Tumbarello differ significantly in their estimates of the value of the Residence. It is unclear whether there is a sufficient equity cushion in the Residence to prevent any lienholder from seeking relief from stay under Section 362(d)(1). Although it appears that the Residence is not necessary for an effective reorganization (that the Debtor does not currently seek), it also is not clear how much equity, if any, exists in the Residence. Accordingly, it also is not clear whether relief from stay would be warranted under Section 362(d)(2).

³² Likewise, nothing prohibits the Chapter 7 Trustee from immediately objecting to the Debtor's homestead exemption so that he can attempt to liquidate the Residence for an amount in excess of the existing mortgage. Moreover, if the right to appeal the October 8, 2020 Order is property of the estate that is controlled by the Chapter 7 Trustee rather than by the Debtor in a Chapter 13 or a Chapter 11, can the Chapter 7 Trustee simply abandon any appeal of the State Court rulings in order to liquidate a non-exempt asset for the benefit of creditors of the Chapter 7 estate? If so, could he then rely on the State Court rulings to object to the Debtor's claim to a homestead under Nevada law? Moreover, if Tumbarello still has a lien by way of a judgment or a deed of trust resulting from the March 8, 2019 Order, can the Chapter 7 Trustee sell the Residence free and clear of liens under Section 363(f), with any disputed liens attaching to the proceeds of sale?