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JEANNE A. NAUGHTON, CLERK
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U.S. BANKRUPTCY COURT
NEWARK, N.J.
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JUDICIAL ASSISTANT

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In Re: **Rudolf H. Hendel and Catherine G. Lin-Hendel,** Debtors.	Case No.: 20-10237 Hearing Date: February 9, 2021 Judge: Sherwood
Rudolf H. Hendel and Catherine G. Lin-Hendel, Plaintiffs, vs. **Harrison Byck and Kasuri Byck LLC,** Defendants.	Adv. Pro. No.: 20-01511

DECISION AND ORDER RE: DISMISSAL OF CHAPTER 11 CASE

The relief set forth on the following pages, numbered two (2) through seven (7), is hereby **ORDERED**.

HONORABLE JOHN K. SHERWOOD
UNITED STATES BANKRUPTCY JUDGE

Dated: March 22, 2021

WHEREAS:

1. This matter is before the Court on various motions including a motion to convert this case to Chapter 7 or dismiss the case by the Office of the United States Trustee. (Doc.194). The Court heard oral argument on February 9, 2021 and set forth its preliminary view on the record that it was inclined to dismiss the case because the Debtors were unable to confirm a Chapter 11 plan.[1] The Court denied confirmation of the Debtors' plan on December 23, 2020. (Doc.184). For legitimate personal reasons, Dr. Lin-Hendel was unable to participate in the oral argument, so the Court gave her the opportunity to submit a written argument, which she did on February 23, 2021. (Doc. 207). She supplemented her argument on March 5, 2021 and March 8, 2021. (Docs. 210, 211, 212). The Court has reviewed Dr. Lin-Hendel's submissions, and for the reasons set forth on the record on February 9, 2021 as supplemented below, this Chapter 11 case will be dismissed.
2. To the Court, the most significant issue was the treatment of the mortgages against the Debtors' residence in Summit, New Jersey. The first mortgage was held by Wilmington Trust which had obtained a foreclosure judgment on August 16, 2019 in the amount of $1,462,559.23. (Doc. 167-4). The foreclosure judgment established that Wilmington Trust was the holder of the mortgage as well as the amount of the debt and the validity of the mortgage.[2] The Debtors were advised that if they had any issues with the entry of the foreclosure judgment, they could seek relief from the State Court that entered it or file an appeal in the State Court system. Since the Debtors arguably had the right to cure and

[1] This is the Debtors' second Chapter 11 case – the first was dismissed in 2018.
[2] The doctrine of *res judicata* provides that parties cannot relitigate issues that have previously been decided by a court of competent jurisdiction. Under the doctrine of *res judicata*, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *See In re Matunas*, 261 B.R. 129, 131 (Bankr. D.N.J. 2001) (internal citations omitted).

maintain the first mortgage under their Chapter 11 plan (Docs. 135, 153), it was necessary to look at the interest rates under the mortgage documents. The plan provided Wilmington Trust's claim would be paid at a fixed interest rate of 2%. (See Doc. 153, pp. 4-6). Wilmington Trust contended that the proper interest rate was 4.25%. The evidence in the record concerning the interest rate is summarized below.

(a) The original note between the Debtors and Bank of America dated August 10, 2006 called for interest at an adjustable rate of the "Index" plus 2% rounded up to the nearest .125%, with a cap of 10.2%. (Doc. 167-1). It appears that this is the only statement about the loan history that is not disputed.

(b) In 2011, the Debtors and Bank of America discussed and then entered into a loan modification agreement. The Debtors contend that the agreement was reached in July 2011 and changed the interest rate to a fixed 2% rate for the remainder of the term. There are no documents in the record that memorialize this loan modification agreement. The only evidence offered by the Debtors other than their testimony was a "screen shot" from a personal computer that had references to folders for a 2011 "B of A Refinance". (Doc. 105, Ex.1). At best, this exhibit confirms that there were loan modification discussions between Bank of America and the Debtors in 2011 – something Wilmington Trust does not contest. Next, the Debtors offer statements from Bank of America which show that the interest rate on the loan during 2016 (and before that) was 2%. (Doc. 105, Ex. 2-3). Again, this is not a point of contention for Wilmington Trust. The statements attached as Exhibit 3 reflect that the interest rate on the loan was to remain at 2% through November 2016 which, as set forth below, is

consistent with the loan modification terms that Wilmington Trust suggests were agreed to by the Debtors in November 2011.

(c) Wilmington Trust produced various documents signed by the Debtors memorializing a loan modification transaction as of November 17, 2011. The modification called for a 2% interest rate for 5 years (through November 2016) which increased to 4.25% starting in November 2018. (Doc. 167-6). The transaction was structured as an amendment to the original note dated August 10, 2006. Again, the bank statements produced by the Debtors suggest that interest was being charged at a rate consistent with the November 2011 loan modification.

(d) Thus, the Court was presented with a situation where both parties agreed that a loan modification had occurred in 2011. Wilmington Trust produced documents supporting its understanding of the terms of the modification and the Debtors did not. Though the Debtors argue that the November 2011 loan modification transaction was a sham and was not in their best interests, there is no evidence of a July 2011 loan modification at a fixed 2% interest rate. It is also worth noting that this occurred almost ten (10) years ago, and it is difficult to prove the existence of such an old agreement without documents that memorialize it. Under the circumstances, the Debtors did not carry their burden to impose a 2% interest rate on Wilmington Trust under the Chapter 11 plan.

3. Many of the arguments by the Debtors in this case have been a rehash of their claims that various parties, including Bank of America, Wilmington Trust, Chubb Insurance, their former neighbors, various law firms and China, have conspired to steal their internet patents. The Debtors have been engaged in litigation with these parties for years in the

New Jersey Federal and State Courts. The Court has advised the Debtors that they were free to pursue appeals or other legitimate challenges to the decisions of these Courts.[3] For example, in a matter before the United States District Court, District of New Jersey, the Debtors made assertions relating to the mortgage lender's misconduct in the context of a 2019 loss mitigation request, conspiracies to steal the Debtors' internet patents, and issues with their neighbors, but ultimately were not successful.[4] In addition to the District Court litigation, the record reflects that the State Court matter between the Debtors and their neighbors was heavily litigated and appealed from 2013 until 2019 with no success. (Doc. 165-1). The Bankruptcy Court does not serve as a Court of Appeals over decisions rendered by the New Jersey Superior Court or the United States District Court.

4. The focus of this Court has been whether the Debtors could restructure their mortgage debts and pay a fair dividend to other creditors. The proposal to pay Wilmington Trust at 2% under the Chapter 11 plan could not be approved for the reasons set forth above. The plan was not confirmed for other reasons set forth on the record at the confirmation hearing on December 16, 2020. (Doc. 184). For example, the proposed treatment of the second mortgage held by MEB Loan Trust IV was improper because it attempted to change the interest rate, modifying the terms of the mortgage against the Debtors' residence.[5] The loan had a variable interest rate and the Debtors proposed to lock in an interest rate of between 2.24% and 2.49% for 5 years or more. (*See* Doc. 153, Claim 10-1). Furthermore,

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[3] In 2019, the Debtors filed a lawsuit in the United States District Court, District of New Jersey, before Judge Madeline Cox Arleo where many of the arguments raised by the Debtors here were raised and rejected by Judge Arleo. (*See* attachment to Doc. 46).

[4] *Id*.

[5] Under "Chapter 11's anti-modification provision, § 1123(b)(5), provides that 'a plan may [] modify the rights of holders of a secured claim, other than a claim secured only by a security interest in real property that is the debtor's principal residence.'" *Wissel v. Deutsche Bank Nat'l Tr. Co.*, 619 B.R. 299, 311 (Bankr. D.N.J. 2020).

the plan failed to treat the unsecured creditors class fairly. The plan proposed to pay unsecured creditors a one-time ten (10) cents on-the-dollar payout on all claims in the amount of $4,360.50 while the Debtors kept substantial equity on their property.[6] (Doc. 153, pp. 14-15). The Debtors' residence under the plan is valued at $2,828,854.00, which may be a low estimate because no appraisal has been conducted on the property since 2011.[7] (Doc. 153, p. 14). Nevertheless, using a value of $2.8 million, the Debtors' proposal to pay general unsecured creditors $4,360.50 in a lump sum payment (ten cents on the dollar) is insufficient. A plan may only be confirmed if each holder of an impaired claim either accepts the plan or will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of this title on such date. 11 U.S.C. § 1129(a)(7)(A)(ii). This provides another basis for denial of confirmation.

5. Also on the February 9, 2021 Court calendar was the Debtors' motion for reconsideration of the order denying discharge of the Bank of America mortgage and the order denying the objection to Fay Servicing's claim. (Doc. 195). The motion is denied because Wilmington Trust holds a foreclosure judgment and for the reasons set forth above.

6. Furthermore, considering the dismissal of this Chapter 11 case, the Debtors' pending adversary proceeding against Harrison Byck and Kasuri Byck LLC will be dismissed without prejudice.[8] The date of alleged misconduct in the adversary proceeding is April 3,

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[6] The amount claimed by unsecured creditors and Claim 11 totals about $43,605.00.
[7] The Debtors schedule their residential property at a value of $5,900,000 in their schedules (Doc. 15).
[8] Adv. Pro. No. 20-01511 (*Hendel et al. v. Byck et al.*); Dismissal of a bankruptcy case normally results in dismissal of related adversary proceedings, but the court has discretion to retain jurisdiction. *Porges v. Gruntal & Co.* (*In re Porges*), 44 F.3d 159, 162-63 (2d Cir. 1995) (although the "general rule favors dismissal" of adversary proceedings

2018, thus the statute of limitations has not yet been exhausted. (*See* Case No. 16-27152-JKS, Doc. 121).

THEREFORE, IT IS ORDERED:

1. The motion by the Office of the United States Trustee to dismiss this Chapter 11 case (Doc. 194) is granted.
2. The Debtors' motion for reconsideration (Doc. 195) is denied.
3. The Debtors' pending adversary proceeding against Harrison Byck and Kasuri Byck LLC, Adv. Pro. No. 20-1511, is dismissed without prejudice.

when the underlying bankruptcy case is terminated, this is not "automatic"). The statute of limitations on legal malpractice is six (6) years and the Debtors are free to pursue this action elsewhere. N.J.S.A. § 2A:14-1.