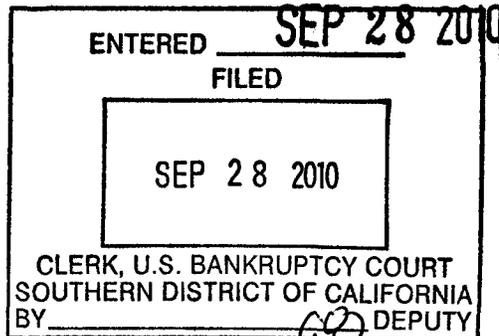


WRITTEN DECISION - NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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In re:  
500 WEST BROADWAY, L.P.,  
Debtor.  
Bankruptcy Case No. 10-03532-A11

Adv. Proc. No. 10-90152-A11

MEMORANDUM DECISION

500 WEST BROADWAY, L.P.,  
Plaintiff,

v.

CITY OF SAN DIEGO, a municipal corporation and political subdivision of the State of California, acting by and through its City Council, commissions, committees, staff, agencies, departments and officials;  
The SAN DIEGO HOUSING COMMISSION, a political subdivision of the State of California and agency of the City of San Diego; the CITY OF SAN DIEGO REDEVELOPMENT AGENCY, a political subdivision of the State of California,  
Defendants.

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**I.**

**INTRODUCTION**

The City of San Diego ("City"), the City of San Diego Redevelopment Agency ("Redevelopment Agency") and the San Diego Housing Commission ("Commission") (collectively "Defendants"), have moved the Court to abstain from hearing this adversary proceeding under 28 U.S.C. § 1334(c); or alternatively, for an order dismissing the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). For the reasons more fully set forth below, the Court grants the motion to abstain.

**II.**

**FACTUAL BACKGROUND**

The Debtor, 500 West Broadway, L.P. ("Plaintiff"), is a limited partnership that owns and renovated the mixed-use facility that includes low income rental units, hotel rooms, a restaurant, a fitness center and conference rooms located on the property at 500 West Broadway, San Diego 92101 ("Hotel"). Plaintiff leases the Hotel pursuant to a ground lease with the Armed Services YMCA of the USA ("Lessor"). There is an option to purchase the fee interest that is first exercisable in 2013, and is personal to Plaintiff. As a condition to its exercise, the property must remain operational as a hotel.

Plaintiff financed a portion of the renovations with a loan from the Redevelopment Agency, a political subdivision of the State of California established by the City to alleviate conditions of blight and assure affordable housing within certain areas of the City. As a condition to the rehabilitation loan, the Plaintiff entered into an Agreement Affecting Real Property ("AARP"), agreeing to restrict and reserve 52 units of the 260 units in the Hotel for affordable single-room occupancy ("SRO") for a period of 30 years ("affordability covenants"). The AARP provides the affordability covenants shall be a covenant running with the land which shall be enforceable by the Redevelopment Agency and the City, and shall bind the Plaintiff and its successors. Plaintiff recorded the AARP on April 30, 2003.

1 The Plaintiff filed for Chapter 11 relief on March 4, 2010. It filed this adversary  
2 proceeding shortly thereafter. The complaint states five claims for relief, but the two  
3 declaratory relief claims essentially determine the outcome of the complaint. Both  
4 declaratory relief claims turn wholly upon California law. The first declaratory relief claim  
5 seeks a declaration that the affordability covenants in the AARP are unenforceable under  
6 California real property law. The second declaratory relief claim seeks to invalidate San  
7 Diego's SRO zoning ordinance as applied to Plaintiff, based upon an interpretation of the  
8 term "residential hotel" in the Ellis Act. The Ellis Act is protective legislation which seeks  
9 to balance the social policy interests of certain urban municipalities in retaining SRO hotel  
10 rooms for very low income, elderly or disabled persons with the economic interests of  
11 property owners in maximizing their return by higher use development.

12 Defendants responded with this motion to abstain; or alternatively, to dismiss the  
13 complaint for failure to state a claim.

### 14 III.

### 15 LEGAL ANALYSIS

16 In determining whether to abstain under 28 U.S.C. § 1334(c)(1), this Court is guided  
17 by *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1166 (9th Cir. 1990), which laid out the  
18 relevant factors in deciding whether discretionary abstention is appropriate. These factors  
19 are:  
20

21 1. **The effect or lack thereof on the efficient administration of the estate if**  
22 **the court recommends abstention:** Plaintiff claims that prompt resolution of the dispute  
23 is critical to the success of its reorganization. Plaintiff argues that if the Court abstained,  
24 Plaintiff would have to exhaust its administrative remedies (which it has not even  
25 commenced) and then, if unsuccessful, would have to file a state court complaint requesting  
26 the same relief. Unfortunately for Plaintiff, this is a problem of its own making.

27 Some history is appropriate here. This is not the Plaintiff's first visit to the  
28 bankruptcy court. In 2005, this Plaintiff filed for Chapter 11 relief and confirmed a plan of

1 reorganization with most of the same problems present in the former case as in the current  
2 one. In the first case, the Plaintiff was subject to the same "affordability covenants" that  
3 depressed its ability to generate hotel revenue at market rates. The Plaintiff was aware of  
4 the Defendants' unwillingness to release it from these covenants. Despite this Court's  
5 misgivings about the Plaintiff's lack of profitability, a Chapter 11 plan was confirmed in  
6 2006. The Plaintiff "solved" its problem then by relying on the financial strength of Alliant,  
7 a former limited partner who took over the general partners' management and pledged to  
8 contribute what was necessary to keep the doors open, pending the Plaintiff's exercise of the  
9 purchase option in 2013.

10 Plaintiff took no steps in the first case to address its dispute with the Defendants,  
11 postponing this fight for another day. Plaintiff has acknowledged that it continued to  
12 experience financial problems upon emerging from its prior bankruptcy case, and the Hotel  
13 has required an additional \$2,956,430 in post-confirmation cash infusions to remain open.<sup>1</sup>  
14 Now, the Plaintiff claims the Court must promptly adjudicate this dispute because the  
15 outcome determines the course of its reorganization. The Court believes the delay attendant  
16 to pursuing this through the administrative process and then state court, if necessary, is  
17 self-inflicted and should not be a reason for this Court to exercise jurisdiction.

18 2. **The extent to which state law issues predominate:** This factor favors  
19 abstention. The fourth and fifth claims for relief--for lien avoidance and preservation of any  
20 avoided lien--are pled for the purpose of creating an independent basis for "core"  
21 jurisdiction. While these claims cite to various sections of the Bankruptcy Code which arise  
22 under or arise in a bankruptcy case, they are devoid of any theory by which the Plaintiff can  
23 achieve its avoidance and recovery remedies, except by granting its request for a declaration  
24 that the affordability covenants are unenforceable under State law. It is unclear what, if  
25 anything, these claims for relief add other than a facial appearance of a federal cause of  
26 action on which to hang "core" jurisdiction.

27  
28 <sup>1</sup> See Declaration of Brian Doran filed in Support of First Day Motions at ¶ 10 and Ex. "B" [Main Case doc. No. 7]

1           3.       **The difficulty or unsettled nature of applicable law:** This factor favors  
2 abstention as well. It is uncontroverted that interpretation of the term "residential hotel" as  
3 used in Health and Safety Code § 50519 is an issue of first impression. As such, it is  
4 unsettled. Further, as this action involves a dispute over land use and zoning designed to  
5 protect the availability of low income housing within the City, the Court believes the state  
6 court is better-suited to decide this issue of first impression involving sensitive social policy  
7 and local concern. *See In re Eastport Assoc.*, 935 F.2d 1071, 1077-78 (9th Cir. 1991)  
8 (noting that land use is a sensitive area of social policy and courts are justified in abstaining  
9 to allow resolution of state land use issues by the state courts).

10           Additionally, the restrictive covenant dispute is more difficult than Plaintiff  
11 represents. Plaintiff relies on a simple application of Civil Code § 1468 which addresses the  
12 criteria to create a covenant running with real estate. However, Defendants argue the  
13 "affordability covenants" are governed by California's Community Redevelopment Law in  
14 Health and Safety Code § 33330 *et seq.*

15           4.       **The presence of a related proceeding commenced in the state court or**  
16 **other nonbankruptcy court:** There is no pending state court action because this matter is  
17 not yet ripe for adjudication in the state courts. Plaintiff has failed to exhaust its  
18 administrative remedies. Had Plaintiff requested a permit to demolish or convert this  
19 project as required by the SRO zoning ordinance, or requested an administrative  
20 determination that the Hotel was exempt from the SRO zoning ordinance as applied, the  
21 Plaintiff would likely know by now whether it had suffered an injury and ripeness would not  
22 be an issue. Because Plaintiff's own inaction caused the problem, this factor favors  
23 abstention.

24           5.       **The jurisdictional basis, if any, other than 28 U.S.C. § 1334:** For the  
25 reasons set forth in the analysis in factor #2 above, this factor favors abstention.

26           6.       **The degree of relatedness or remoteness of the proceeding to the main**  
27 **bankruptcy case:** While it is clearly important for the Plaintiff to have a determination  
28 whether it may be relieved of the "affordability covenants" for purposes of yet another

1 reorganization, the predominate claims in this proceeding are merely "related to" the  
2 bankruptcy case within the meaning of 28 U.S.C. § 1334(b).

3 7. **The substance rather than form of an asserted "core" proceeding:** This  
4 factor favors abstention for the reasons set forth in factor #2 above. The substance of this  
5 proceeding is non-core despite the attempt in the fourth and fifth claims for relief to  
6 manufacture a federal claim.

7 8. **The feasibility of severing the state law claims from core bankruptcy**  
8 **matters to allow judgment to be entered in the state court with enforcement left to the**  
9 **bankruptcy court:** This factor easily favors abstention. Upon entry of a judgment by the  
10 state court on the first through third claims for relief, there may be nothing left to litigate.  
11 The balance of the complaint could be disposed of by summary judgment.

12 9. **The burden on the bankruptcy court's docket:** While this Court could  
13 find time to hear this matter, the dockets are presently quite full. Further, the Court has no  
14 special expertise in this specialized area of state law.

15 10. **The likelihood that commencement of the action in the bankruptcy court**  
16 **involves forum shopping:** This case involves obvious forum shopping. Despite knowing  
17 of this dispute for years, Plaintiff elected not to make the appropriate applications with the  
18 local agencies. This bankruptcy case was filed and adversary proceeding commenced to  
19 bypass these agencies and the state court system. This factor strongly favors abstention.

20 11. **The existence of the right to a jury trial:** There may be a right to jury trial  
21 for some of the claims.

22 12. **The presence in the action of non-debtor parties:** All of the Defendants  
23 are non-debtor parties.

24 Based on the foregoing analysis, the factors favoring abstention clearly outnumber  
25 and outweigh the factors against abstention. As observed by my colleague in *In re Hatfield*,  
26 2009 WL 2849538 (Bankr. N.D. Cal. 2009):

1 Of particular importance is the inefficiency and cumbersome  
2 procedure involved in trying non-core claims, even if no jury  
3 trial is necessary. The cumbersomeness of that process  
4 increases the burden on the court which is of significant  
5 importance because the court's docket has become very crowded  
6 in 2009 as a result of the economic downturn. The burden of  
7 resolving the non-core matters at issue is not justified by any  
8 advancement of the administration of the bankruptcy case.

9 Id. at \*2. If anything, Judge Carlson's concerns expressed in 2009 have magnified in 2010.

10 Plaintiff also contends that abstention requires a pending state court action.

11 However, Plaintiff's cited cases are distinguishable because they involved removed actions.

12 *See e.g. In re Roman Catholic Bishop of San Diego*, 374 B.R. 756, 761 (Bankr. S.D. Cal.

13 2007) (personal injury actions removed from state court). In removed actions, abstention

14 under 28 U.S.C. § 1334(c) does not apply, and the remand statutes are the proper method to

15 return removed actions to the state court. *In re Lazar*, 237 F.3d 967, 981-82 (9th Cir. 2001);

16 *see also* 1 Resnick & Sommer, *Collier on Bankruptcy*, ¶ 3.05[3] at 3-56 (16th ed. 2010).

17 Accordingly, abstention is appropriate although there is no pending state court action.

18 The Court's decision to abstain makes it unnecessary to reach the dismissal

19 arguments. Although the Court recognizes the Plaintiff will likely face another motion to

20 dismiss in the state court raising many of the same arguments, this was Plaintiff's tactical

21 decision and not a problem of the Court's making. A decision on the underlying merits of

22 the state law claims as applied to Plaintiff is better left to the state courts. Accordingly, the

23 Court will sever the state law claims from this proceeding and abstain in favor of a decision

24 by the state courts. Pending such a decision, the balance of the complaint will be stayed or

25 it may be dismissed by Plaintiff without prejudice.

#### 26 IV.

#### 27 CONCLUSION

28 The Court grants the Defendants' motion to abstain from hearing this adversary proceeding under 28 U.S.C. § 1334(c). The Court finds that the factors discussed above

1 weigh heavily in favor of abstention. Simply put: Plaintiff caused its own urgent timing  
2 predicament, and it is forum shopping. Additionally, although this factor is not  
3 determinative, the Court is persuaded this type of land use dispute belongs in the state  
4 courts. Because the Court is abstaining, it is unnecessary to decide the dismissal  
5 arguments. Defendants are directed to prepare and lodge an order in accordance with this  
6 Memorandum Decision within ten days of its entry.

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DATED: 20 Sept 2010

  
LOUISE DE CARL ADLER, JUDGE  
United States Bankruptcy Court