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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6 In re:) BAP No. NC-05-1293-KRyB
7)
7 CANDIE JILL NELSON,) Bk. No. 05-10660
8)
8 Debtor.)
9)
9 CANDIE JILL NELSON,)
10)
10 Appellant,)
11)
11 v.) **O P I N I O N**
12)
12 MICHAEL H. MEYER, Chapter)
13 13 Trustee,)
14)
14 Appellee.)
15)

Argued and Submitted on March 24, 2006
at San Francisco, California

Filed - May 15, 2006

Appeal from the United States Bankruptcy Court
of the Northern District of California

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

Before: KLEIN, RYAN* and BRANDT, Bankruptcy Judges.

*Hon. John E. Ryan, United States Bankruptcy Judge for the
Central District of California, sitting by designation.

1 KLEIN, Bankruptcy Judge:
2

3 The debtor appeals the order dismissing her chapter 13 case.
4 We conclude, first, that the court did not comply with the two-
5 step requirement of 11 U.S.C. § 1307(c) to determine "cause" and
6 then to weigh the alternatives of conversion or dismissal based
7 on the "best interests of creditors and the estate," and, second,
8 that § 1307(c) (5) "cause" based on denial of confirmation of a
9 plan requires that the court allow the debtor an opportunity to
10 revise the rejected plan. Hence, we REVERSE and REMAND.
11

12 FACTS

13 Appellant, Candie J. Nelson, filed the pro se chapter 13
14 case in which this appeal arises on March 29, 2005, after having
15 been involved in prior bankruptcy cases.

16 She was a chapter 13 debtor from December 30, 1999, until
17 voluntarily dismissing the case on September 24, 2001.

18 In October 2002, she became the debtor in two chapter 7
19 cases, one involuntary and one voluntary. We affirmed the order
20 for relief in the involuntary case. BAP No. NC-03-1170-PMaMc
21 (Feb. 9, 2004). The ultimate outcome was a settlement in which
22 \$60,000 was recovered from a relative under avoiding powers and
23 the debtor waived discharge pursuant to 11 U.S.C. § 727(a) (10).

24 The debtor's company, Viva Mexico, LLC, was the debtor in a
25 no-asset chapter 7 case that was filed and closed during the
26 pendency of her consolidated individual chapter 7 cases.

27 In this chapter 13 case, she initially scheduled unsecured
28 claims of \$324,382.00.

1 Her chapter 13 plan proposed to pay the trustee \$50.00 per
2 month for 36 months based on monthly income of \$1,208.00 and
3 expenses of \$1,158.00 as reflected in Schedules I and J.

4 The chapter 13 trustee, appellee Michael Meyer, objected to
5 plan confirmation based on ineligibility and lack of good faith.
6 The ineligibility argument was that the schedules listed more
7 than the statutory limit of \$307,675.00 in unsecured nonpriority
8 debt and did not include undischarged debts from her prior
9 chapter 7 cases. The good faith argument was that \$50.00 per
10 month for 36 months was too little in light of the prior waiver
11 of chapter 7 discharge.

12 The debtor filed responses to the objection in which she
13 professed her good faith, asserted that her scheduled income and
14 expenses demonstrated the limits of her ability to pay, and
15 reported that she had amended schedules to delete an erroneously-
16 scheduled debt and, thus, to conform with chapter 13 debt limits.

17 At the confirmation hearing (which the court had continued
18 once at the debtor's request with a warning expressing doubt
19 about the merits of the plan), the court denied confirmation
20 without reaching the eligibility question.¹ It reasoned that a
21 plan with 36 monthly payments of \$50.00 can only be confirmed in
22 "very extenuating circumstances" and that the presence of chapter
23 7 nondischargeable debt rendered the plan unconfirmable.²

24
25 ¹THE COURT: First of all, there's an issue as to
eligibility, but let's set that aside. Tr. 6/20/05, at 2.

26
27 ²THE COURT: Well, first of all, in the 20 years I've been
on the bench I've approved such small payments maybe four or five
28 times for very extenuating circumstances, like somebody under a
(continued...)

1 Without affording an opportunity to modify the plan after
2 denying confirmation, the court ruled that the case would be
3 dismissed. On appeal, the debtor complains that she was prepared
4 to extend the plan to 60 months but had no chance to do so.

5 The court subsequently entered a sixteen-line "Memorandum re
6 Dismissal," accompanied by an order dismissing the case. The
7 memorandum noted that the sole support for the plan's payment
8 provisions was the debtor's assertion that \$50 per month was all
9 she could afford. The legal reasoning appeared to be that the
10 combination of a small dividend and the chapter 7
11 nondischargeable status of her debts precluded confirmation.³

12 There were no other findings of fact or conclusions of law
13 addressing either plan confirmation or dismissal. Nor was there
14 an order denying confirmation. This timely appeal ensued.

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18 ²(...continued)
serious disability. That's number one.

19
20 Number two, is you had your discharge denied in a chapter 7
21 case. That means all your debts are nondischargeable. Having
lost your discharge, you can't come in and try to use a Chapter
22 13 and for \$1800 to buy it back. Tr. 6/20/05, at 2.

23 ³The court explained: "The court has almost never confirmed
24 Chapter 13 plans calling for such minuscule payments, even absent
25 other negative considerations. In this case, there are two
26 negative considerations. First, her debts are so high that
dividing \$1800 amongst them makes their dividend microscopic.
Secondly, and most importantly, Nelson's discharge was denied in
a prior Chapter 7 case filed less than three years ago; all of
the debts in this case were debts when that case was filed."

27 Hence, it ruled "since all of the debts are nondischargeable
28 and both the payments and the dividend are next to nothing, the
plan cannot be confirmed." Memorandum re Dismissal at 1-2.

1 (2000) ("whichever is in the best interest [sic] of creditors and
2 the estate, for cause"),⁵ with 11 U.S.C. § 1307(c); In re Henson,
3 289 B.R. 741, 752-53 (Bankr. N.D. Cal. 2003).

4 Sections 1307(c) and 1112(b) establish a two-step analysis
5 for dealing with questions of conversion and dismissal. First,
6 it must be determined that there is "cause" to act. Second, once
7 a determination of "cause" has been made, a choice must be made
8 between conversion and dismissal based on the "best interests of
9 the creditors and the estate." Ho, 274 B.R. at 877; accord,
10 Rollex Corp. v. Assoc'd Materials, Inc. (In re Superior Siding &
11 Window, Inc.), 14 F.3d 240, 242 (4th Cir. 1994), cited by In re
12 SGL Carbon Corp., 200 F.3d 154, 159 n.8 (3d Cir. 1999); In re
13 Erkins, 253 B.R. 470, 477 n.5 (Bankr. D. Idaho 2000); Henson, 289
14 B.R. at 749-54; In re Shockley, 197 B.R. 677, 680 (Bankr. D.
15 Mont. 1996); In re Staff Inv. Co., 146 B.R. 256, 260-61 (Bankr.
16 E.D. Cal. 1993); 7 COLLIER ON BANKRUPTCY § 1112.04[6] (Alan N.
17 Resnick & Henry J. Sommer, eds., 15th ed. rev. 2005) ("COLLIER"); 8
18 id. § 1307.4.

19 The court did not approach the question of dismissal through
20 the mandatory two-step analysis of determining "cause" and then
21 weighing alternatives.
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25 ⁵This part of § 1112(b) was reworded by the Bankruptcy Abuse
26 Prevention & Consumer Protection Act of 2005, Pub. L. 109-8
27 ("2005 Act"), to: "whichever is in the best interests of
28 creditors and the estate, if the movant establishes cause." 11
U.S.C. § 1112(b) (2006). The 2005 Act does not apply here, as
this case was filed before its effective date.

1 II

2 The outcome of this appeal turns on the initial statutory
3 requirement that there be a determination of "cause."

4 The Bankruptcy Code designates items of "cause" in a
5 nonexclusive list at § 1307(c)(1)-(10).⁶ Since the triggering
6 event was denial of plan confirmation, we search the list for an
7 applicable "cause."⁷

8
9 A

10 The statutory "cause" that applies to denial of plan
11 confirmation is § 1307(c)(5): "denial of confirmation of a plan
12 under section 1325 of this title and denial of a request made for
13 additional time for filing another plan or a modification of a
14 plan."⁸ 11 U.S.C. § 1307(c)(5) (emphasis supplied).

15
16 ⁶The version of § 1307(c) applicable to this appeal
17 designates ten items of "cause." The 2005 Act added an eleventh
18 item (nonpayment of domestic support obligations that first come
19 due postpetition). 11 U.S.C. § 1307(c)(11) (2006). The 2005 Act
20 also inserted, as new § 1307(e), a twelfth designation of cause
(not filing certain tax returns) that is subject to the same
analysis of conversion or dismissal, "whichever is in the best
interest[s] of the creditors and the estate." 11 U.S.C.
§ 1307(e) (2006). It did not otherwise alter § 1307(c).

21 ⁷We need not concern ourselves with items not enumerated in
22 the statute because the court made none of the findings that
23 would be required in order to describe an alternative form of
"cause" not named in the nonexclusive statutory list.

24 ⁸Thus, the § 1307(c) language pertinent to this appeal is:

25 the court may convert a case under this chapter to a case
26 under chapter 7 of this title, or may dismiss a case under
27 this chapter, whichever is in the best interests of
creditors and the estate, for cause, including - ... (5)
28 denial of confirmation of a plan under section 1325 of this
title and denial of a request made for additional time for
(continued...)

1 The conjunction "and" in § 1307(c) (5) means that there are
2 two essential elements that each must be satisfied in order to
3 constitute "cause" to convert or dismiss a case following the
4 denial of confirmation of a plan: (1) denial of confirmation;
5 and (2) denial of a request for time to file a new or a modified
6 plan. As written, the requirements of § 1307(c) (5) are
7 cumulative and mandatory. Id. In other words, both elements
8 must exist in order to constitute "cause" to dismiss or convert a
9 chapter 13 case under that authority.

10 In this instance, the first element under § 1307(c) (5) is
11 plainly satisfied because the court denied confirmation of the
12 debtor's plan.

13 The second element under § 1307(c) (5), however, presents a
14 problem because there was no "denial of a request made for
15 additional time for filing another plan or a modification of a
16 plan." Although the debtor did not request additional time for
17 filing another plan or modifying the plan, the court did not
18 afford her an opportunity to make such a request after it denied
19 plan confirmation.

20 We are persuaded that the second element of § 1307(c) (5)
21 requires, at a minimum, that the court must afford a debtor an
22 opportunity to propose a new or modified plan following the
23 denial of plan confirmation.⁹ See 8 COLLIER ¶ 1307.04 (debtor

24
25 ⁸(...continued)
26 filing another plan or a modification of a plan;

27 11 U.S.C. § 1307(c) (5) (2000).

28 ⁹We need not reach, and do not decide, the further question
(continued...)

1 should normally be given at least one opportunity to submit
2 modified plan). Because the court did not offer the debtor such
3 an opportunity, the second element of § 1307(c)(5) was not
4 satisfied. It follows that there was no "cause" to dismiss or
5 convert the chapter 13 case under that authority.

6
7 B

8 The policy underlying the second element of § 1307(c)(5)
9 relating to a request for time to try again is that chapter 13
10 plan confirmation is an iterative process. A debtor who wishes
11 to submit to the rigors of living for a number of years in the
12 straightjacket of a plan that represents one's "best efforts" to
13 pay creditors should, in principle, be permitted the latitude to
14 correct perceived deficiencies in proposed plans.

15 This case illustrates the purpose of the policy. The debtor
16 has indicated on appeal a desire to propose a 60-month plan,
17 instead of the 36 months initially proposed. It is also possible
18 that she will sharpen her pencil and either project increases in
19 disposable income or propose a mechanism for capturing increases
20 in such income during the life of a plan. In other words, she

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22 ⁹(...continued)
23 whether § 1307(c)(5) "cause" could ever be invoked when a debtor
24 does not actually request additional time. Although the second
25 element of § 1307(c)(5) could be read literally to enable a
26 debtor to block dismissal or conversion based on § 1307(c)(5)
27 "cause" by rejecting an opportunity to revise a plan, that
28 further question is not presented here. No such opportunity was
afforded. We note, however, that a debtor who declines to revise
a plan after denial of confirmation becomes vulnerable to
§ 1307(c)(1) "cause" for unreasonable delay by the debtor that is
prejudicial to creditors. 11 U.S.C. § 1307(c)(1). The court
here, however, made no findings pertinent to unreasonable delay
by the debtor or to prejudice to creditors.

1 Lacking a record that would enable us to have a complete
2 understanding of the issues, we will not review the denial of
3 confirmation of the initial plan. See Leavitt v. Soto (In re
4 Leavitt), 171 F.3d 1219, 1223 (9th Cir. 1999). Nor, if the
5 debtor modifies her plan, would such review be useful.¹¹ If, on
6 remand, the debtor does not proceed diligently, she may become
7 vulnerable to dismissal or conversion based on unreasonable delay

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9 ¹⁰(...continued)
10 of the analysis. The controlling Ninth Circuit analysis remains
11 totality of the circumstances. See Ho, 274 B.R. at 876-77. This
12 appeal illustrates the problem with the Warren list. Although
13 the bankruptcy court emphasized the existence of chapter 7
14 nondischargeable debt (which is listed in Warren), no reported
15 decision of ours, or of the Ninth Circuit, has actually held that
16 the presence of such debt suffices to deny plan confirmation.

17 Second, important aspects of Warren are obsolete. It was
18 decided in 1988 in the midst of doubts about the legitimacy of
19 the "chapter 20" strategy of serially proceeding under chapter 7
20 to discharge debt and then in chapter 13 to deal with debt not
21 discharged in the chapter 7 case. In 1991, the Supreme Court
22 upheld the chapter 20 strategy. Johnson v. Home State Bank, 501
23 U.S. 78, 87 (1991). That decision necessarily affects the Warren
24 analysis regarding the quantum of the burden of persuasion and,
25 perhaps, the laundry-list. Thus, while the narrow holding of
26 Warren may retain vitality, its rationale must be construed and
27 qualified in light of subsequent case law developments.

28 ¹¹The record, however, compels us to note for purposes of
proceedings on remand that the court incorrectly stated the law
when it asserted that chapter 13 plans calling for small payments
can be confirmed only in "very extenuating circumstances" and
reported that it has "almost never confirmed Chapter 13 plans
calling for such minuscule payments." It is settled that there
is no substantial-repayment requirement for chapter 13 plan
confirmation and that each plan must be assessed on a case-by-
case basis. E.g., Goeb, 675 F.2d at 1389-91 ("we decline to
impose a substantial-repayment requirement" and "bankruptcy
courts cannot substitute a glance at the amount to be paid under
the plan for a review of the totality of the circumstances"); Ho,
274 B.R. at 876-77 (same) Warren, 89 B.R. at 92 (same); Kenneth
N. Klee & Frank N. Merola, Ignoring Congressional Intent: Eight
Years of Judicial Legislation, 62 AM. BANKR. L.J. 1, 18-19 (1987).

1 prejudicial to creditors under § 1307(c)(1).

2 The court will be free on remand to examine the debtor's
3 good faith under the totality-of-the-circumstances analysis and
4 to determine whether there is some form of "cause" that would
5 warrant either conversion or dismissal.¹²

6
7 CONCLUSION

8 The Bankruptcy Code contemplates in § 1307(c)(5) that
9 chapter 13 debtors be afforded more than one opportunity to
10 confirm a chapter 13 plan before the case is dismissed or
11 converted following denial of plan confirmation. As one of the
12 elements of § 1307(c)(5) "cause" was missing, mere denial of
13 confirmation did not constitute the requisite cause. We REVERSE
14 the order dismissing the case and REMAND for further proceedings
15 consistent with this decision.

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¹²In view of our conclusion, we need not address the
28 debtor's argument that a separately-noticed motion to dismiss or
convert was required before the court could act in that respect.