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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. NC-11-1683-HPaMk
ROBERT YATES JACKSON,)
Debtor.) Bk. No. 11-52517

ROBERT YATES JACKSON,
Appellant,

v.

MEMORANDUM¹

AUDREY BARRIS, Chapter 7
Trustee; United States
Trustee; Ronald C. Johnston,
Appellees.

Argued and Submitted on October 18, 2012
at San Francisco, California

Filed - November 6, 2012

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

Honorable Stephen L. Johnson, Bankruptcy Judge, Presiding

Appearances: Melbourne Brady Weddle, Esq. argued for Appellant
Robert Yates Jackson; Cameron M. Gulden, Esq. of
U.S. Department of Justice, argued for Appellee
United States Trustee.

Before: HOLLOWELL, PAPPAS, and MARKELL, Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 Robert Jackson (the Debtor) challenges the conversion of his
2 chapter 11² bankruptcy case to chapter 7. We AFFIRM.

3 **I. FACTS**

4 The Debtor filed a chapter 7 bankruptcy petition on
5 March 16, 2011. The Debtor's attorney at the time was
6 Christopher Jackson. According to the Debtor's bankruptcy
7 schedules, his primary asset is a four-unit apartment complex
8 (the Property); he lives in one unit and rents the others. The
9 Property is encumbered by six secured notes.

10 On April 27, 2011, creditor Ronald Johnston (Johnston), the
11 holder of a second deed of trust on the Property, filed a motion
12 for relief from stay in order to foreclose. The motion was
13 unopposed and the bankruptcy court granted the motion for stay
14 relief on May 17, 2011 (the MRS).

15 On May 30, 2011, the Debtor, represented by a new attorney,
16 Judson Farley (Farley), filed a motion to convert the case to
17 chapter 11. On June 1, 2011, the bankruptcy court granted the
18 motion to convert (June Conversion Order). In the June
19 Conversion Order, the bankruptcy court set the deadline for
20 filing a plan of reorganization as August 1, 2011, and the
21 deadline for plan confirmation as October 6, 2011. The June
22 Conversion Order also directed the Debtor to keep current on
23 monthly operating reports and to fully cooperate with the United
24 States Trustee (the UST). Finally, the June Conversion Order

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26 ² Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

1 notified the Debtor that a failure to abide by any of the
2 deadlines or directives set by the bankruptcy court could result
3 in a dismissal or conversion of the case sua sponte. The first
4 status conference was set for August 22, 2011.

5 On May 30, 2011, the Debtor filed an adversary proceeding to
6 enjoin Johnston from conducting a sale of the Property so that,
7 as part of his reorganization, the Debtor could attempt to strip
8 the junior liens on the Property and retain his residence (the
9 Adversary Proceeding). Adv. Pro. No. 11-05170. Farley filed an
10 employment application on June 23, 2011.

11 On July 21, 2011, the UST filed a motion to convert the
12 Debtor's bankruptcy case to chapter 7 or dismiss the case on the
13 basis that the Debtor had failed to timely provide documents and
14 amendments to the schedules requested by the UST and to file his
15 monthly operating reports (Motion to Convert/Dismiss). The UST
16 asserted that it had twice requested documents and amendments
17 showing corporate ownership, tenant deposits and rental income
18 from the Property, creditor payments, as well as proof that the
19 Debtor had closed prepetition bank accounts and opened debtor-in-
20 possession accounts. The UST stated that she had given the
21 Debtor until June 29, 2011, to provide the documents and file the
22 amendments, but the Debtor failed to do so. The UST asserted
23 that without the documents and information, she could not
24 determine the Debtor's financial affairs. Accordingly, the UST
25 contended cause existed under § 1112(b)(4)(H) to convert or
26 dismiss the case.

27 On August 1, 2011, the Debtor filed a chapter 11 plan of
28 reorganization and disclosure statement, but did not serve notice

1 of the disclosure statement. On August 19, 2011, the Debtor
2 filed operating reports for June and July. The Debtor's attorney
3 also filed a declaration in opposition to the Motion to
4 Convert/Dismiss, which explained why the June operating report
5 was late-filed and stated that he had met the other requirements
6 in the June Conversion Order because he had filed a plan and
7 disclosure statement.

8 On August 22, 2011, the bankruptcy court erroneously entered
9 an order converting the case to chapter 7. That order was
10 vacated on August 23. Also on August 22, 2011, the bankruptcy
11 court held the status conference along with the hearing on the
12 Motion to Convert/Dismiss. At the hearing, the bankruptcy court
13 denied Farley's employment application and removed Farley from
14 the case. The bankruptcy court found that Farley was ineffective
15 and that no progress was being made in the case. The bankruptcy
16 court decided to continue the hearing so that the Debtor could
17 find another attorney, and if the Debtor declined to do so, that
18 it would likely convert the case and allow a chapter 7 bankruptcy
19 trustee to deal with the Adversary Proceeding.

20 On August 28, 2011, based on its oral ruling at the
21 August 22 hearing, the bankruptcy court issued an Order To
22 Continue Status Conference and Motion to Convert or Dismiss Case
23 to October 6, 2011 (Continuance Order). The Continuance Order
24 directed the UST to file a statement by October 4, 2011,
25 informing the bankruptcy court whether the Debtor was in
26 compliance with the UST's requests for documentation. The
27 Continuance Order also kept the confirmation deadline of
28 October 6, 2011, in place "subject to extension at the hearing

1 only if Debtor has new counsel and said counsel has been employed
2 by October 6, 2011." Furthermore, the Continuance Order required
3 the Debtor to file timely monthly operating reports and warned
4 that the "failure to do so may result in the dismissal or
5 conversion of this case by the court without further notice."

6 On September 29, 2011, Melbourne B. Weddle (Weddle) filed an
7 Application for Appointment of Substitute Counsel (Employment
8 Application). The Employment Application was not filed in the
9 main bankruptcy case, but in another adversary proceeding related
10 to the case. The bankruptcy court denied the Employment
11 Application on October 3, 2011, because it failed to comply with
12 Rule 2014(a). The bankruptcy court found that the Employment
13 Application (1) was not filed in the bankruptcy case; (2) did not
14 identify the scope of Weddle's representation; (3) did not
15 sufficiently disclose Weddle's connections to the Debtor and his
16 creditors; and (4) did not disclose Weddle's compensation
17 arrangements.

18 On October 4, 2011, the UST filed its supplemental statement
19 as required by the Continuance Order. The UST stated that the
20 Debtor still had not filed amendments to his bankruptcy schedules
21 or provided the required information regarding corporate
22 ownership, tenant deposits and rental income related to the
23 Property, lawsuits, and bank accounts. Furthermore, the UST
24 reported that the monthly operating report for August had not
25 been filed. Finally, the UST noted that the Debtor had not
26 obtained a new attorney.

27 On October 5, 2011, the bankruptcy court converted the case
28 to chapter 7 (Final Conversion Order). According to the

1 bankruptcy court, the Debtor had failed to comply with the
2 Continuance Order because he had not provided the documentation
3 requested by the UST, had not been successful in employing a new
4 attorney or confirming a plan by the October 6, 2011 deadline,
5 and had not timely filed his monthly operating reports.

6 On October 17, 2011, the Debtor filed a motion to alter or
7 amend the "Order Denying Application for Appointment of Counsel
8 and Converting Debtor's Case" to prevent manifest injustice
9 (Reconsideration Motion). The Debtor requested that the
10 bankruptcy court (1) permit Weddle to act as interim general
11 counsel for the Debtor and special counsel to the Debtor in the
12 Adversary Proceeding and other adversary proceedings contemplated
13 in the case; (2) grant Weddle additional time to obtain permanent
14 bankruptcy counsel; and (3) vacate the MRS order until the Debtor
15 could obtain an attorney.

16 The Debtor contended that he had been deprived of due
17 process because of his inability to be represented by counsel.
18 In a declaration, Weddle asserted that there was new evidence as
19 to why the Employment Application was insufficient. The "new
20 evidence" was Weddle's explanation that he was unable to obtain
21 information from Farley regarding the basis of Farley's removal
22 in the limited time available, which he contended resulted in the
23 incomplete employment application. The Reconsideration Motion,
24 however, did not assert that the bankruptcy court converted the
25 case without cause or had denied the Debtor procedural due
26 process in the conversion of the case. Indeed, the
27 Reconsideration Motion did not assign any error by the bankruptcy
28 court in converting the Debtor's case. The Debtor did not seek

1 the alteration or amendment of the Final Conversion Order in his
2 requested relief.

3 A hearing on the Reconsideration Motion was held on
4 November 9, 2011. At the hearing, the bankruptcy court
5 summarized the events in the case and reiterated that its
6 decision to convert the case was based on the fact that it was
7 not making progress and the Debtor was not in compliance with his
8 duties under the Bankruptcy Code. The bankruptcy court noted
9 that the Employment Application was defective because it was not
10 filed in the main case and was insufficient. The bankruptcy
11 court stated that "whether you were employed or not, this case
12 was being converted back to a 7 because it wasn't making any
13 progress." Hr'g Tr. (Nov. 9, 2011) at 6:14-16. After Weddle
14 argued that the Debtor wanted to remain in chapter 11 in order to
15 reorganize by stripping off the junior deeds of trust on the
16 four-plex, the bankruptcy court stated that it would take the
17 Debtor's Reconsideration Motion under advisement. The bankruptcy
18 court noted that the Debtor "is in a difficult spot, but
19 Chapter 11 is very challenging, and this case, like so many
20 others, unfortunately isn't making appropriate progress." Id. at
21 8:10-13.

22 The bankruptcy court denied the Reconsideration Motion by
23 written order on November 15, 2011. The bankruptcy court
24 determined that the Debtor did not provide any basis under Fed.
25 R. Civ. P. 60(b) to reconsider its order denying the Employment
26 Application. It reiterated that it "denied the [Employment]
27 Application filed by Mr. Weddle because it did not satisfy the
28 disclosure requirements and was filed in the wrong

1 proceeding. . . . The denial was without prejudice to a further
2 application that was proper.”

3 Furthermore, to the extent that the bankruptcy court
4 understood the Reconsideration Motion as a request to vacate the
5 Final Conversion Order, it again found that there was no basis
6 under Fed. R. Civ. P. 60(b) to do so since the Debtor failed to
7 carry out the obligations set forth in the Continuance Order and
8 failed to fulfil his obligations under the Bankruptcy Code: “The
9 U.S. Trustee’s motion was well-grounded. Nothing in the
10 [Reconsideration] Motion changes these facts.” Finally, the
11 bankruptcy court noted that the MRS had been granted back in
12 May 2011, and no reason was given as to why the MRS was
13 erroneously entered or why reconsideration was warranted. The
14 Debtor timely appealed.

15 **II. JURISDICTION**

16 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
17 § 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.
18 § 158 below.

19 **III. ISSUE**

20 Did the bankruptcy court abuse its discretion in denying the
21 Reconsideration Motion or in converting the bankruptcy case?

22 **IV. STANDARDS OF REVIEW**

23 The bankruptcy court’s decision to convert a chapter 11 case
24 to chapter 7 is reviewed for an abuse of discretion. Pioneer
25 Liquidating Corp. v. U.S. Trustee (In re Consol. Pioneer Mortg.
26 Entities), 264 F.3d 803, 806 (9th Cir. 2001); Johnston v. JEM
27 Dev. Co. (In re Johnston), 149 B.R. 158, 160 (9th Cir. BAP 1992).
28 Additionally, the bankruptcy court’s denial of a motion for

1 reconsideration is reviewed for an abuse of discretion. Arrow
2 Elec., Inc. v. Justus (In re Kaypro), 218 F.3d 1070, 1073 (9th
3 Cir. 2000); Sewell v. MGF Funding, Inc. (In re Sewell), 345 B.R.
4 174, 178 (9th Cir. BAP 2006).

5 A bankruptcy court abuses its discretion if it bases a
6 decision on an incorrect legal rule, or if its application of the
7 law was illogical, implausible, or without support in inferences
8 that may be drawn from the facts in the record. United States v.
9 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc); Ellsworth
10 v. Lifescape Med. Assocs., P.C. (In re Ellsworth), 455 B.R. 904,
11 914 (9th Cir. BAP 2011).

12 **V. DISCUSSION**

13 At the outset, we address what issues are subject to review
14 in this appeal. The order from which the appeal is taken is the
15 order denying the Reconsideration Motion. The Reconsideration
16 Motion's caption reads: "Motion to Alter or Amend Judgment
17 (Order) Re Employment of Counsel." Underneath, is a second
18 title: "Motion of the Debtor Robert Yates Jackson to Alter or
19 Amend Orders Denying Debtor His Right to Substitute Counsel After
20 Court Has Discharged Counsel And Converting Case From a
21 Chapter 11 to a Chapter 7 Case." In the text of the
22 Reconsideration Motion, the Debtor argued that he was denied due
23 process to have counsel represent him in any current or future
24 adversary proceeding, but did not mention representation with
25 respect to conversion. Other than the Reconsideration Motion's
26 second title, it does not make any reference to the Final
27 Conversion Order.

28

1 In his appellate briefs, the Debtor assigns no error at all
2 to the bankruptcy court's denial of the Reconsideration Motion.
3 Instead, the Debtor's appellate briefs assign errors by the
4 bankruptcy court in converting the case to chapter 7. The Debtor
5 contends that the "only issue presented to the panel is whether
6 the bankruptcy court correctly afforded [the Debtor] the full
7 procedural protections provided by law [under § 1112(b)] before
8 the bankruptcy court effected its conversion." Reply at 3.
9 Thus, the Debtor argues that the bankruptcy court (1) failed to
10 comply with § 1112(b) and statutory due process by converting the
11 case sua sponte without a hearing or notice to the Debtor,
12 (2) did not make a finding that there was cause to convert or
13 dismiss the case under § 1112(b); and (3) did not balance whether
14 conversion or dismissal was in the best interests of the
15 creditors. However, none of the § 1112(b) arguments were made to
16 the bankruptcy court. Consequently, they are waived on appeal.
17 Campbell v. Verizon Wireless S-CA (In re Campbell), 336 B.R. 430,
18 434 n.6 (9th Cir. BAP 2005) citing O'Rourke v. Seaboard Sur. Co.
19 (In re E.R. Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. 1989)
20 ("The rule in this circuit is that appellate courts will not
21 consider arguments that are not 'properly raise[d] in the trial
22 courts.").

23 Nevertheless, we have an independent duty to review de novo
24 whether the Debtor was given due process before the Final
25 Conversion Order was entered. Owens-Corning Fiberglas Corp. v.
26 Ctr. Wholesale, Inc. (In re Ctr. Wholesale, Inc.), 759 F.2d 1440,
27 1448 (9th Cir. 1985) (an order is void or unenforceable against a
28 party if it was entered or obtained without due process); GMAC

1 Mortg. Corp. v. Salisbury (In re Loloee), 241 B.R. 655, 661 (9th
2 Cir. BAP 1999).

3 Section 1112(b)(1) provides that only "on request of a party
4 in interest, and after notice and a hearing" may a case be
5 converted or dismissed. Similarly, a sua sponte conversion or
6 dismissal can only be ordered after notice and an opportunity to
7 be heard. In re Bijelonic, 2012 WL 2263289, *5 (C.D. Cal.
8 June 15, 2012). The Bankruptcy Code provides some guidance as to
9 the appropriate requirements:

10 (1) "after notice and a hearing", or a similar phrase –
11 (A) means after such notice as is appropriate in
12 the particular circumstances, and such opportunity for
a hearing as is appropriate in the particular
circumstances; but

13 (B) authorizes an act without an actual hearing if
14 such notice is given properly and if –

15 (I) such a hearing is not requested timely by a
16 party in interest; or

17 (ii) there is insufficient time for a hearing to
be commenced before such act must be done, and the
court authorizes such act[.]

18 11 U.S.C. § 102(1).

19 Adequate notice and adequate opportunity for hearing is a
20 flexible concept that depends on the circumstances of the
21 particular case. Tennant v. Rojas (In re Tennant), 318 B.R. 860,
22 870-71 (9th Cir. BAP 2004). As the Supreme Court ruled:

23 An elementary and fundamental requirement of due
24 process in any proceeding which is to be accorded
25 finality is notice reasonably calculated, under all the
26 circumstances, to apprise interested parties of the
27 pendency of the action and to afford them an
28 opportunity to present their objections. The notice
must be of such nature as reasonably to convey the
required information and it must afford a reasonable
time for those interested to make their appearance.

1 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314
2 (1950) (citations omitted). In other words, we must determine
3 whether the notice given to the Debtor was "reasonably
4 calculated" to give him a meaningful opportunity to oppose the
5 conversion if he so desired. We conclude that it was.

6 The Debtor was provided notice, as early as the entry of the
7 June Conversion Order, that a failure to comply with certain
8 deadlines or cooperate with the UST could result in a sua sponte
9 conversion or dismissal of the case. Additionally, through the
10 Motion to Convert/Dismiss, the Debtor was notified that
11 conversion or dismissal would be pursued unless he provided
12 certain information to the UST. Although the Debtor had paid an
13 attorney to represent him in the case at that time, and the
14 attorney appeared at the August 22 hearing on the Motion to
15 Convert/Dismiss on his behalf, the attorney was not approved by
16 the bankruptcy court due to the bankruptcy court's concern that
17 counsel was ineffective. At that hearing, the bankruptcy court
18 alerted the Debtor to its concern that the case was not
19 progressing, that the Debtor was not complying with his duties
20 under the Bankruptcy Code, and that he faced the possibility of
21 conversion of his case back to a chapter 7.

22 The Debtor also received, in late August 2011, notice of the
23 Continuance Order, which notified the Debtor that failure to cure
24 the deficiencies identified by the UST in the Motion to
25 Convert/Dismiss, failure to timely file monthly operating
26 reports, or failure to have a plan confirmed by October 6, 2011
27 (or at least have substitute counsel appointed by then), could
28 result in the conversion or dismissal of the case sua sponte.

1 Accordingly, the Debtor received more than adequate notice that
2 his case could be converted and he had more than adequate time in
3 order to comply with the Continuance Order before any conversion
4 was ordered by the bankruptcy court.³

5 While the Debtor asserts on appeal that a hearing was
6 necessary under § 1112(b) before the bankruptcy court could
7 convert or dismiss the case, we note that the bankruptcy court
8 made clear on numerous occasions in notices sent to the Debtor or
9 at hearings that it would consider conversion sua sponte if there
10 was not compliance with its orders, most notably the Continuance
11 Order. See also, 11 U.S.C. § 1112(b)(4)(E) (cause exists to
12 convert or dismiss a case when a debtor fails to comply with an
13 order of the court). In any event, a hearing on the Motion to
14 Convert/Dismiss was held on August 22, 2011. Although the
15 bankruptcy court converted the case the day before the continued
16 hearing on the Motion to Convert/Dismiss was scheduled to be
17 held, the continued hearing was unnecessary because the Debtor
18 did not argue that conversion was unwarranted and could not
19 demonstrate compliance with the Continuance Order. Therefore,
20 even if the continued hearing had been held on October 6, it
21 would not have altered the outcome. Under the circumstances, we
22 conclude that the bankruptcy court provided the Debtor due
23 process before it converted the Debtor's bankruptcy case.

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25

26 ³ Although Weddle was not involved in the case prior to
27 September 29, 2011, an examination of the bankruptcy court's
28 docket or conversation with the UST would have notified him of
what actions were required to avoid conversion or dismissal.

1 As we noted above, any argument that the bankruptcy court
2 failed to make a finding that cause existed to convert the case,
3 or that the bankruptcy court should have dismissed rather than
4 converted the case, has been waived. Accordingly, we conclude
5 that the bankruptcy court did not err in entering the Final
6 Conversion Order.

7 **VI. CONCLUSION**

8 For the foregoing reasons, we AFFIRM the orders of the
9 bankruptcy court.

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