

OCT 23 2012

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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. CC-11-1482-PaKiRn
)	
PAULA MARIE OLIVER,)	Bankr. No. 11-13132-MT
)	
Debtor.)	
_____)	
)	
PAULA MARIE OLIVER,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
UNITED STATES TRUSTEE, ²)	
)	
Appellee.)	
_____)	

Submitted Without Oral Argument
on September 20, 2012³

Filed - October 23, 2012

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

Honorable Maureen Tighe, Bankruptcy Judge, Presiding

Appearances: Appellant Paula Marie Oliver pro se on brief.

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.

² Although named as an appellee by appellant, the U.S. Trustee did not appear in the bankruptcy court or in this appeal.

³ Although the Panel advised appellant that oral argument would not be held unless she requested it, appellant, in a letter on June 5, 2012, made a request for argument. Despite this, appellant did not appear at the scheduled argument.

1 Before: PAPPAS, KIRSCHER and RENN,⁴ Bankruptcy Judges.

2

3 Appellant Paula Marie Oliver ("Debtor") appeals the order of
4 the bankruptcy court dismissing her chapter 13⁵ bankruptcy case.

5 We AFFIRM.

6

FACTS⁶

7 This appeal arises out of a chapter 13 case commenced by
8 Debtor on March 14, 2011. Bankr. Case No. 11-13132. However, on
9 January 5, 2010, she had filed an earlier chapter 13 petition,
10 Bankr. Case No. 10-10098 (the "First Bankruptcy"). In the
11 Schedule A filed in the First Bankruptcy, Debtor claimed to be the
12 owner of property in Tarzana, California (the "Property"). The
13 First Bankruptcy was dismissed on February 15, 2010, for Debtor's
14 failure to make required plan payments. Debtor did not appeal
15 that dismissal.

16 On April 15, 2010, the Property was sold at a foreclosure
17 sale to Bank of New York as Trustee for the Certificateholders
18 CWALT, Inc. Alternative Loan Trust 2006-OA11 Mortgage Pass-through
19 Certificates, Series 2006-OA11 ("BONY"). A trustee's deed upon
20 sale conveying title to the Property to BONY was recorded on

21

22 ⁴ The Honorable Thomas M. Renn, United States Bankruptcy
23 Judge for the District of Oregon, sitting by designation.

24 ⁵ Unless otherwise indicated, all chapter, section and rule
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

26 ⁶ Debtor is a pro se appellant who provided few excerpts of
27 record and whose brief is difficult to understand. We have
exercised our discretion to consult the bankruptcy court's docket
28 in Debtor's bankruptcy case to assist us in ascertaining the
relevant facts. O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert,
Inc.), 887 F.2d 955, 958 (9th Cir. 1989).

1 April 26, 2010, in the Official Records of Los Angeles County.

2 BONY commenced an unlawful detainer action against Debtor and
3 others on August 17, 2010, seeking, among other things, Debtor's
4 eviction from the Property. Bank of New York v. Oliver, et al.,
5 Case no. 10B05053 (Superior Court, Los Angeles County, August 17,
6 2010) (the "State Court Proceedings").

7 As noted above, Debtor filed the chapter 13 petition
8 initiating the bankruptcy case in this appeal on March 14, 2011
9 (the "Bankruptcy on Appeal"). Bankr. Case No. 11-13132. Again,
10 on her Schedule A she claimed ownership of the Property. Debtor
11 filed a chapter 13 plan on March 29, 2011, in which she proposed
12 to make sixty payments of \$3,000 per month.

13 BONY objected to confirmation of the plan on April 19, 2011,
14 and moved to dismiss the bankruptcy case, because Debtor no longer
15 owned the Property.

16 There were a number of deficiencies in Debtor's bankruptcy
17 petition and schedules and, on April 26, 2011, the bankruptcy
18 court set a hearing for May 5, 2011, to allow Debtor to explain
19 her position.

20 In addition, the original § 341(a) meeting of creditors in
21 this case was scheduled to occur on April 20, 2011 (the "First
22 § 341(a) Meeting"). On April 22, 2011, Debtor wrote a letter to
23 the bankruptcy court stating that she was unaware of the
24 creditors' meeting date and requesting that the § 341(a) meeting
25 be rescheduled. Following the hearing on May 5, 2011, the court
26 granted Debtor's request and rescheduled the § 341(a) meeting for
27 June 15, 2011 (the "Second § 341(a) Meeting").

28 Despite having rescheduled it, on May 12, 2011, the

1 bankruptcy court improvidently entered an order dismissing the
2 case for Debtor's failure to attend the First § 341(a) Meeting.
3 Debtor moved to vacate the dismissal. The bankruptcy court
4 vacated the dismissal by order entered June 7, 2011, and again
5 reset the § 341(a) meeting, this time for July 13, 2011 (the
6 "Third § 341(a) Meeting").

7 On June 29, 2011, the bankruptcy court again improvidently
8 entered an order dismissing the case for Debtor's failure to
9 attend the Second § 341(a) Meeting. The clerk closed the case on
10 June 30, 2011. Later that same day the bankruptcy court set aside
11 the clerk's order and reopened the case for further
12 administration. On July 7, 2011, the clerk issued a Notice
13 Vacating the Dismissal Order and once again reset the § 341(a)
14 meeting for July 27, 2011 (the "Fourth § 341(a) Meeting"). The
15 docket reflects that Debtor was notified of the date for the
16 Fourth § 341(a) Meeting by mail on July 8, 2011.

17 According to a letter sent by Debtor to the bankruptcy court
18 on August 4, 2011, she had contacted the chapter 13 trustee on
19 July 26, 2011, the day before the scheduled Fourth § 341(a)
20 Meeting, and requested that it be postponed because she had
21 another court appearance on that date. Apparently anticipating
22 dismissal, Debtor prematurely moved to vacate the dismissal.

23 By order entered August 8, 2011, the bankruptcy court
24 dismissed the bankruptcy case for Debtor's failure to attend the
25 Fourth § 341(a) Meeting and/or failure to make post-petition
26 payments to the chapter 13 trustee. The bankruptcy court denied
27 the premature motion to vacate dismissal on August 12, 2011.

28 Debtor filed a timely appeal of the dismissal order on

1 August 22, 2011.

2 **Events Subsequent to the Appeal**

3 Although an appellate court does not ordinarily consider
4 events in the bankruptcy court after the appeal is filed, it may
5 do so when "extraordinary circumstances" occur that affect the
6 relief that may be offered. Brown & Cole Stores, LLC v.
7 Associated Grocers, Inc. (In re Brown & Cole Stores, LLC),
8 375 B.R. 873, 877 (9th Cir. BAP 2007)(quoting Frankfurth v.
9 Cummins (In re Cummins), 20 B.R. 652, 653 (9th Cir. BAP 1982)
10 (taking judicial notice of post-appeal voluntary dismissal of a
11 case)); accord Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d
12 1066, 1071 (9th Cir. 2006) (taking judicial notice of a settlement
13 agreement reached in a case after the appeal was filed). Because
14 we believe this case presents good cause to do so, the Panel takes
15 judicial notice of the following post-appeal events as shown on
16 the docket of the bankruptcy court.

17 Even though the dismissal order was not stayed, BONY filed a
18 motion for relief from stay to proceed to evict Debtor on
19 April 13, 2012. The bankruptcy court granted relief from stay to
20 proceed with eviction by order entered May 29, 2012. Debtor did
21 not appeal the May 29 order granting stay relief. Instead, she
22 filed yet a third chapter 13 petition on June 4, 2012. Bankr.
23 Case No. 12-15188 (the "New Bankruptcy"). BONY again moved for
24 relief from stay. The court granted the stay relief motion on
25 August 8, 2012, and, further, granted authority to the sheriff or
26 marshal to carry out an eviction regardless of any future
27 bankruptcy filing by Debtor for 180 days. Debtor's motion to
28 vacate the order on August 10, 2012, was denied by the court the

1 same day. The time to appeal the relief from stay and
2 reconsideration/vacatur has expired. There is no indication in
3 the docket of the New Bankruptcy that Debtor attended the § 341(a)
4 meeting or made any payments to the trustee, although it remains
5 open at this time.

6 JURISDICTION

7 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
8 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158.

9 ISSUE

10 Whether the bankruptcy court abused its discretion in
11 dismissing Debtor's bankruptcy case for failure to attend the
12 § 341(a) meeting of creditors and/or to make payments to the
13 chapter 13 trustee.

14 STANDARD OF REVIEW

15 The bankruptcy court's decision to dismiss a chapter 13 case
16 is reviewed for abuse of discretion. Ellsworth v. Lifescape Med.
17 Assocs., PC (In re Ellsworth), 455 B.R. 904, 914 (9th Cir. BAP
18 2011).

19 DISCUSSION

20 Debtor presumably sought relief in this appeal so that she
21 may reorganize her debts, prevent eviction from her home and
22 prevent wage garnishment. But as discussed above, events during
23 the pendency of this appeal render the Panel's ability to grant
24 Debtor that relief unnecessary or futile.

25 Debtor's New Bankruptcy remains open. If possible, she may
26 propose to reorganize her debts in that case. Debtor has also had
27 a full and fair opportunity in the New Bankruptcy to prevent
28 eviction from her home. The bankruptcy court in the New

1 Bankruptcy granted relief to BONY to proceed with Debtor's
2 eviction, and prohibited Debtor from interfering with that
3 eviction for 180 days. Debtor did not appeal that final order.

4 Although, in theory, the Panel might overturn the bankruptcy
5 court's dismissal of the Bankruptcy on Appeal, clearly, the relief
6 Debtor seeks in the Bankruptcy on Appeal, because of subsequent
7 events, is now of no consequence. However, while we could
8 possibly dismiss this appeal as moot, we elect instead to dispose
9 of this appeal on the merits.

10 Debtor objects to the dismissal of the Bankruptcy on Appeal
11 based on the numerous clerical errors made in the bankruptcy
12 court. Although it is clear that the first two dismissals of the
13 case were improvident, they were properly and promptly corrected
14 by the bankruptcy court. However, there were no clerical errors
15 made in connection with the order dismissing the bankruptcy case
16 for a third time on August 8, 2011, the order that is the subject
17 of this appeal. The bankruptcy court did not abuse its discretion
18 in entering that dismissal.

19 The August 8 dismissal was entered because Debtor had not
20 attended the Fourth § 341(a) Meeting and/or had not made the
21 payments to the chapter 13 trustee required by § 1326(a)(1).
22 Because we conclude that the bankruptcy court did not abuse its
23 discretion in dismissing the bankruptcy case for failure to attend
24 the Fourth § 341(a) Meeting, we do not reach the question whether
25 the court should have dismissed the case for failure to make the
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1 payments required by § 1326(a)(1).⁷

2 A chapter 13 debtor "must appear and submit to examination
3 under oath at a meeting of creditors under section 341(a) of this
4 title." § 343. A bankruptcy court may dismiss a petition for the
5 unexcused failure by the debtor to attend the § 341(a) meeting of
6 creditors. Bernard v. Coyne (In re Bernard), 40 F.3d 1028, 1030
7 (9th Cir. 1994); In re Burgos, 476 B.R. 107, 113 (Bankr. S.D.N.Y.,
8 2012) (chapter 13 debtor's unexcused failure to attend § 341(a)
9 meeting is grounds for dismissal); In re Yensen, 187 B.R. 676,
10 677-78 (Bankr. D. Idaho 1995) (chapter 13 debtor's willful failure
11 to attend § 341(a) meeting was grounds for dismissal).

12 Debtor missed the First § 341(a) Meeting on April 20, 2011.
13 Two days later, she requested that the bankruptcy court reschedule
14 the meeting which, after a hearing on May 5, 2011, the court reset
15 for June 15, 2011. The Second § 341(a) Meeting and Third § 341(a)
16 Meeting were cancelled as a result of the clerical errors
17 discussed above. However, on July 8, 2011, Debtor was notified of
18 the new date for the Fourth § 341(a) Meeting. She apparently
19 waited until the day before the scheduled hearing to request the
20 chapter 13 trustee to reschedule that meeting because of a
21 conflict with other court proceedings. The trustee's office
22 declined to do so and directed Debtor to attend the meeting.

23
24 ⁷ Because of an inadequate record, we are unable to
25 determine if a party in interest had moved for dismissal and if
26 Debtor had notice of possible dismissal for failure to make the
27 payments, which are requirements for dismissal under § 1307(c)(4)
28 ("failure to commence making timely payments under section 1326 of
this title"). However, there are adequate grounds for dismissal
for failure to attend the Fourth § 341(a) Meeting. We may affirm
the bankruptcy court on any basis supported in the record. United
States v. Hemmen, 51 F.3d 883, 891 (9th Cir. 1995); Leavitt v.
Soto (In re Leavitt), 209 B.R. 935, 940 (9th Cir. BAP 1997).

1 Debtor elected not to attend the § 341(a) meeting and waited until
2 August 4, 2011, to explain to the bankruptcy court the reasons for
3 her absence. Under the facts of this case, the bankruptcy court's
4 denial of Debtor's request for yet another § 341(a) meeting and
5 dismissal of her bankruptcy case, in part for failure to attend
6 the Fourth § 341(a) Meeting, was not an abuse of discretion.

7 Debtor's sole defense to the dismissal for failing to attend
8 the Fourth § 341(a) Meeting was that she was not given a hearing
9 before the bankruptcy court so she could explain her actions.
10 However, Debtor was notified at the beginning of the case of the
11 consequences of failing to attend the § 341(a) meeting. In
12 particular, the Notice of Chapter 13 Bankruptcy Case Meeting to
13 Creditors & Deadlines sent to Debtor on March 13, 2011, cautioned
14 that:

15 Appearance by debtor(s) and the attorney for the
16 debtor(s) is required at both the Section 341(a) meeting
17 and the confirmation hearing. Unexcused failure by the
18 debtor(s) to appear at either the Section 341(a) meeting
19 and/or the confirmation hearing may result in dismissal
20 of the case.

21 Despite this notice, Debtor failed to attend the First § 341(a)
22 Meeting. Even so, Debtor was given an opportunity at the May 5,
23 2011, hearing to explain her failure to attend the First Meeting,
24 and the court in the exercise of its discretion granted her a new
25 hearing date for the creditors' meeting. The subsequent clerical
26 errors in dismissing the case and resetting the hearing dates were
27 regrettable, but should have impressed on Debtor the importance of
28 attending the § 341(a) meeting and that dismissal would follow for
29 failure to attend. She was notified of the Fourth § 341(a)
30 Meeting date in sufficient time to ask to continue it, but delayed

