

MAY 11 2009

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP Nos.	CC-08-1175-MoMkH
)		CC-08-1200-MoMkH
7	MICHELLE EARDLEY,)		(Related Appeals)
)		
8)	Bk. No.	LA 08-14524 VK
	Debtor.)		
9	_____)		
)		
10	MICHELLE EARDLEY,)		
)		
11	Appellant,)		
)		
12	v.)	M E M O R A N D U M ¹	
)		
13	U.S. BANK NATIONAL ASSN.,)		
	successor-in-interest to)		
14	FEDERAL DEPOSIT INSURANCE)		
	CORP., as receiver for DOWNEY)		
15	SAVINGS & LOAN ASSN., F.A.,)		
)		
16	Appellee.)		
17	_____)		

Argued and Submitted on March 18, 2009
at Pasadena, California

Filed - May 11, 2009

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

Hon. Victoria S. Kaufman, Bankruptcy Judge, Presiding.

Before: MONTALI, MARKELL and HOLLOWELL, 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 The debtor appeals two orders: (1) an order dismissing her
2 chapter 13² case and imposing a permanent bar on refiling and (2)
3 an order granting in rem relief from the stay pursuant to section
4 362(d)(4). We AFFIRM in part and REVERSE in part the dismissal
5 order, and we DISMISS as moot the order granting in rem relief
6 from the automatic stay.

7 **I. FACTS**

8 A. Procedural History Relating to Dismissal

9 On April 7, 2008, appellant Michelle Eardley ("Debtor")
10 filed her chapter 13 petition, five days after the bankruptcy
11 court dismissed (with a 180-day bar to refiling) the bankruptcy
12 case of her mother, Thelma Spirtos ("Spirtos"). In their
13 respective schedules, Debtor and Spirtos listed ownership
14 interests in certain real property in Whittier, California (the
15 "Property").

16 On April 7, 2008, the bankruptcy court issued a notice of
17 Debtor's bankruptcy, setting a hearing on confirmation of
18 Debtor's plan for June 25, 2008, and a section 341 meeting for
19 May 22, 2008; the notice was served on April 9, 2008. On April
20 23, 2008, Debtor filed her chapter 13 plan but did not serve it
21 on creditors. According to Debtor's opening brief, the chapter
22 13 trustee ("Trustee"), Nancy K. Curry, suggested at the section

23
24 ²Unless otherwise indicated, all chapter, section and rule
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
27 enacted and promulgated after the effective date of The
28 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, 119 Stat. 23 ("BAPCPA"), because the case from
which this appeal arises was filed after its effective date
(generally October 17, 2005).

1 341 meeting that the confirmation hearing would be continued to
2 August 6, 2008, because Debtor had not served the plan on all
3 creditors.

4 Neither the court nor any party issued a notice continuing
5 the confirmation hearing. To the contrary, on June 17, 2008, the
6 clerk of the bankruptcy court filed and served a notice stating
7 that the "initial chapter 13 confirmation hearing will go forward
8 on June 25, 2008, at 1:30 p.m. as set forth in the Notice of
9 Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines
10 served on April 9, 2008."

11 On May 14, 2008, Downey Savings and Loan Association, F.A.,
12 ("Downey")³ filed "Objections to Confirmation of Proposed Plan
13 (A) Bad Faith, (B) Multiple Bankruptcy Cases," showing the
14 hearing date as June 25, 2008. On page 4 of the objection, after
15 arguing that the case had not been filed in good faith, Downey
16 requested that confirmation be denied "and the within case
17 dismissed with a 180 day bar to refiling." In the last sentence
18 of the objection, Downey repeated its request that confirmation
19 be denied and the case be dismissed "with a bar to refiling."
20 No separate motion to dismiss was filed, nor was additional
21 notice given that Downey was seeking dismissal of the case or a
22 bar order.

23 On or about June 20, 2008, the bankruptcy court issued a
24 tentative decision indicating that it would deny confirmation and

25
26 ³On February 17, 2009, this panel granted a motion of U.S.
27 Bank, N.A., as successor-in-interest to the FDIC as receiver for
28 Downey, to be substituted as appellee in place of Downey. For
convenience, we will still continue to refer to Downey regardless
of the substitution.

1 dismiss Debtor's case with a bar on refiling.⁴ In response to
2 this tentative decision, Debtor filed a 26-page (plus exhibits)
3 request for continuance which addressed the merits of the
4 tentative decision. In addition, responding to the court's
5 observation that Debtor seemingly had not complied with the
6 filing requirements of section 521(a) (and that her case might
7 therefore be subject to automatic dismissal under section
8 521(i)), Debtor filed a certification that she was self-employed
9 for the entire 60-day period prior to the petition date and
10 received no payment advices from any other employer.

11 On June 24, 2008, the bankruptcy court entered an order
12 denying Debtor's request to continue the confirmation hearing.
13 The court also issued a revised tentative decision adding
14 italicized language specifically addressing arguments made in
15 Debtor's request for continuance. On June 25, 2008, the
16 bankruptcy court entered an order denying confirmation and
17 dismissing Debtor's case with a permanent bar to refiling.⁵

18 The order states that the relief is based on the court's
19 findings and conclusions "as stated on the record" and as set
20 forth in the tentative decision. Debtor has not provided a copy
21

22 ⁴A copy of this June 20 tentative decision is not in the
23 record, although Debtor concedes on pages 12-13 of her Opening
24 Brief in CC-08-1175 that she read the tentative decision on June
25 21, 2008.

26 ⁵The order states that "[s]hould Debtor wish to file a
27 voluntary petition, [she] may file a motion seeking leave of the
28 Court to do so. Leave will only be granted upon payment of a
full filing fee, presentation of complete schedules and statement
of financial affairs and a determination by the Court that the
case is being filed in good faith."

1 of a transcript of the June 25 hearing at which the court
2 apparently announced findings and conclusions "on the record."⁶
3 Debtor filed a timely notice of appeal on July 3, 2008,
4 commencing BAP No. CC-08-1175.

5 B. Procedural History of the Section 362(d)(4) Motion

6 On May 19, 2008, Downey filed a motion seeking relief from
7 the automatic stay pursuant to section 362(d)(1) and (d)(4).
8 In seeking in rem relief from the stay under section 362(d)(4),
9 Downey alleged that Debtor's filing of her petition was part of a
10 scheme to delay, hinder, and defraud creditors involving (1) the
11 transfer of ownership of the Property without Downey's consent or
12 court approval or (2) multiple bankruptcy filings affecting the
13 Property.

14 As noted above, the court dismissed Debtor's case on June
15 25, 2008. It did not reserve jurisdiction over the pending
16 motion for relief from stay. On June 30, 2008, Downey filed a
17 supplement to its motion for relief from stay stating
18 (incorrectly) that the "Court has retained jurisdiction to hear
19 the Motion."⁷

20 On July 7, 2008, the bankruptcy court held a hearing on the
21 motion for relief from stay. Before the hearing, the court
22 issued a tentative decision denying relief under section
23 362(d)(1) as moot, but granting in rem relief under section
24 362(d)(4). On July 23, 2008, the court entered its order holding

25
26 ⁶We learned at oral argument that Debtor did not appear at
the June 25 hearing.

27 ⁷Counsel for Downey conceded at oral argument that the
28 bankruptcy court made no express reservation of jurisdiction.

1 that the filing of the petition was part of a scheme to delay,
2 hinder, and defraud creditors involving multiple bankruptcies
3 affecting the Property. The order provided that it was binding
4 and effective in any bankruptcy case purporting to affect the
5 Property filed within two years. Debtor filed a timely notice of
6 appeal on August 1, 2008, giving rise to BAP No. CC-08-1200.⁸

7 On February 19, 2009, Downey filed a motion with this panel
8 to supplement the record to include a trustee's deed resulting
9 from the nonjudicial foreclosure sale of the Property to
10 Pacifica.⁹ By separate order, we are granting the motion.¹⁰ The
11 sale occurred on August 8, 2008. As a result of this sale,
12 Downey contends that the appeal of the order granting it relief
13 from the stay is moot.

14 C. Underlying Substantive Facts

15 On August 10, 1999, Spirtos executed a promissory note in
16 the amount of \$500,000 in favor of Downey. To secure repayment
17 of the note, she executed a deed of trust against the Property.

18
19 ⁸The notice of appeal also referred to a separate order
20 dated July 21, 2008, granting relief from the automatic stay to
21 Pacifica First National, Inc. ("Pacifica"). On October 21, 2008,
22 this panel entered an order stating that the appeal of the
23 Pacifica order was untimely and that the appeal would be
24 dismissed as to that order unless Debtor filed a response no
25 later than October 29, 2008. No response was filed

26
27 The July 21 order grants Pacifica in rem relief under
28 section 362(d) (4) as to the Property.

⁹The legal description of the property contained in the
Pacifica trustee's deed is identical to the property description
contained in Downey's motion for relief from stay.

¹⁰We will also grant Debtor's request for judicial notice
filed on March 24, 2009.

1 On March 14, 2005, Spirtos executed a quitclaim deed transferring
2 her interest in the Property to Debtor and herself as joint
3 tenants. On September 26, 2006, Spirtos and Debtor executed a
4 quitclaim deed transferring their interests in the Property to
5 themselves and Jon Eardley ("Mr. Eardley") as joint tenants. Mr.
6 Eardley is Debtor's husband, although he and Debtor have
7 separated. Both quitclaim deeds reflect that "[t]his is a
8 bonafide gift and the grantor received nothing in return."

9 On May 29, 2007, the bankruptcy court granted Downey relief
10 from the automatic stay in Spirtos' 1984 bankruptcy case (84-
11 13757) to allow it to pursue its remedies against the Property.
12 Mr. Eardley and Spirtos filed a state court action to halt the
13 foreclosure (Spirtos I). On October 22, 2007, Debtor commenced a
14 state court action against Downey and Pacifica (Spirtos II),
15 seeking injunctive and declaratory relief with respect to the
16 Property.

17 Although Debtor did not serve Downey or Pacifica with the
18 Spirtos II complaint and did not provide them with correct notice
19 of the hearing on it,¹¹ Debtor obtained an order from state court
20 on October 26, 2007, staying all nonjudicial foreclosure
21 proceedings against the Property. On October 29, 2007, Downey
22 and Pacifica obtained a ruling from the state court vacating the

24 ¹¹Mr. Eardley contacted a secretary at Downey and indicated
25 that he would be seeking ex parte relief in state court, but did
26 not say when or where. He also left a voicemail message with
27 Downey's outside state court counsel stating that he was "moving
28 ex parte for an order stopping all non-judicial foreclosure
proceedings" on June 24, but did not say in which court. Counsel
for Downey and Pacifica appeared in state court on October 24,
but Mr. Eardley and Debtor did not appear.

1 October 26 stay. The state court found that "the application for
2 a stay contained intentionally false representations."¹²

3 On the same day that the state court vacated the stay
4 against the foreclosure proceedings (October 29), Spirtos filed a
5 chapter 13 case. On November 29, 2007, Downey filed a motion to
6 dismiss Spirtos II (commenced by Debtor, not Spirtos), alleging
7 that Debtor had filed the complaint without obtaining prefiling
8 authorization as required by a vexatious litigant order
9 previously entered against her.

10 Spirtos filed a notice and petition of removal of both
11 actions (Spirtos I and II) to bankruptcy court. On March 3,
12 2008, the bankruptcy court denied a motion to remand Spirtos II
13 to state court, holding that the action was automatically
14 dismissed when Debtor failed to obtain prefiling authorization in

15
16 ¹²Mr. Eardley, acting on behalf of himself even though he
17 was not a party to the Spirtos II action, filed a notice of
18 appeal of this interlocutory order. Debtor has introduced no
19 evidence that she or Mr. Eardley posted a bond or obtained a stay
20 pending appeal. Under California law, the order vacating the
21 stay order is self-executing and is not stayed pending appeal.
22 See Bulmash v. Davis, 24 Cal. 3d 691, 697-99, 597 P.2d 469, 157
23 Cal. Rptr. 66 (1979) (an order vacating a judgment was not
24 stayed, as the order was self-executing; the vacated judgment was
25 not reinstated merely because a party appealed the order vacating
26 the judgment); see also 4 Cal. Jur. 3d Appellate Review § 408
27 (updated 2009) (California law grants stay pending appeal only on
28 judgments or order commanding or forbidding some act; when a
judgment or order is self-executing or has intrinsic effect, no
stay goes into effect unless a writ of supersedeas is issued by
the appellate court); 9 B.E. Witkin, California Procedure, Appeal
§ 276 ("It is a fundamental principle that a stay of enforcement
can only operate on a judgment commanding or permitting some act
to be done. Where the judgment is effective by itself, without
any additional act, it is said to be 'self-executing,' and there
is nothing to restrain. Hence, no stay can be obtained except in
rare cases when a writ of supersedeas will issue.").

1 accordance with the vexatious-litigant order.¹³

2 On April 2, 2008, the bankruptcy court entered an order
3 dismissing Spirtos' chapter 13 case with a 180-day bar to
4 refiling. Five days later, Debtor filed her chapter 13 case.
5 She scheduled the Property as an asset of the estate, but did not
6 show that Downey or Pacifica held a security interest (albeit
7 disputed) in the Property. Her plan did not provide for any
8 treatment of Downey, Pacifica or creditors holding judgment
9 liens.

10 On June 5, 2008, Debtor filed a motion for postpetition
11 financing seeking approval of a "reverse mortgage" to secure a
12 "priming" loan in the amount of \$797,000 to be used to "pay off"
13 creditors holding liens against the Property. The court noted,
14 however, that the secured creditors had filed claims in her case
15 and in Spirtos' case in an amount exceeding \$950,000 (plus an
16 additional claim in the amount of \$19,000 to Irene Moreno as
17 reflected in the financing motion). For this and other reasons,
18 the court denied the financing motion.

19 In its tentative decisions (initial and revised) regarding
20 confirmation and dismissal, the bankruptcy court stated that
21 Debtor had not filed her case in good faith and had not proposed
22

23 ¹³Notwithstanding the removal (which was filed by Spirtos
24 even though she was not a party in Spirtos II), the state court
25 entered an order on December 18, 2007, dismissing Spirtos II
26 retroactive to November 25, 2007, holding that the action was
27 automatically dismissed under California Code of Civil Procedure
28 section 391.7(c) because of Debtor's non-compliance with the
vexatious litigant order. Therefore, both the state court and
the bankruptcy court dismissed the Spirtos II action, and Debtor
did not appeal those dismissals.

1 her plan in good faith.¹⁴ The court noted the litigation history
2 of Debtor, Mr. Eardley and Spirtos, described in detail various
3 inconsistencies and misstatements in Debtor's schedules, and
4 discussed how the plan was defective.

5 The court also noted that although Debtor stated she had a
6 monthly income of \$7,000 and monthly disposable income of \$709,
7 she was proposing to pay only \$610 a month under her plan. Even
8 though her plan stated that she would be paying unsecured
9 nonpriority creditors in full, the aggregate payments to
10 unsecured creditors under the plan totaled only \$19,965 although
11 Debtor's Schedule F reflected that she owed \$244,772 in
12 undisputed, unsecured debt. Based on this tentative decision and
13 on findings in the unsupplied record, the court entered an order
14 denying confirmation and dismissing Debtor's case with a
15 permanent bar to refiling.

16
17 ¹⁴In the revised tentative decision, the court observed that
18 in her Schedule I and Form B22C, the Debtor represented that she
19 had a monthly income of \$7000 (with a projected disposable
20 monthly income of \$709.50). Debtor had indicated in her
21 Statement of Financial Affairs that she had not been self-
22 employed for the six months prior to the petition date, but she
23 did not file any payment advices showing that she had received an
24 income from any other employer. The bankruptcy court noted that
25 if Debtor had received income from an employer within 60 days
26 prior to the petition date but had failed to file payment advices
27 within 45 days after the petition date, the case was subject to
28 automatic dismissal under section 521(i)(1).

24 In response to this observation, Debtor filed a
25 certification that she had been self-employed for the six months
26 prior to the petition date and had received no income from any
27 other employer. In its revised tentative decision, the
28 bankruptcy court acknowledged receiving the certification and
noted the conflict between it and Debtor's response to Question
18 of her statement of financial affairs.

1 **II. ISSUES**

2 1. Is the appeal of the section 362(d)(4) order moot?

3 2. Did the bankruptcy court provide Debtor with meaningful
4 notice and opportunity to respond before dismissing her chapter
5 13 case with a permanent bar to refiling?

6 3. If so, did the bankruptcy court err in dismissing her
7 case with a bar to refiling?

8 **III. JURISDICTION**

9 The bankruptcy court had jurisdiction to enter the order
10 denying confirmation of the chapter 13 plan and dismissing the
11 case under 28 U.S.C. § 157(b)(2)(A) and (L) and § 1334. We have
12 jurisdiction over the appeal of that order under 28 U.S.C. § 158.

13 We do not have jurisdiction over the appeal of the order
14 granting in rem relief from the automatic stay as that appeal is
15 moot. As Pacifica has already foreclosed on the Property,
16 reversal of the section 362(d)(4) order as to Downey would not
17 enable Debtor to obtain the relief she seeks: retention of the
18 Property.

19 We lack jurisdiction over appeals that are moot. Baker &
20 Drake, Inc. v. Pub. Serv. Comm'n of Nev. (In re Baker & Drake,
21 Inc.), 35 F.3d 1348, 1351 (9th Cir. 1994). As the Ninth Circuit
22 noted in Focus Media, Inc. v. Natl. Broad. Co. Inc. (In re Focus
23 Media, Inc.), 378 F.3d 916, 922 (9th Cir. 2004), bankruptcy
24 appeals become moot when events occur that make it impossible for
25 the appellate court to fashion effective relief. Here, Debtor
26 did not timely appeal the order granting relief from the
27 automatic stay to Pacifica, resulting in a nonjudicial
28 foreclosure sale stripping Debtor of any interest in the

1 Property.¹⁵ Because of that foreclosure sale, reversing the
2 order granting Downey relief from the automatic stay would not
3 alter the outcome: Debtor no longer holds an interest in the
4 Property to protect.¹⁶ Inasmuch as we cannot fashion effective
5 relief, the appeal of the section 362(d)(4) order is moot. We
6 therefore will dismiss BAP No. 08-1200 for lack of jurisdiction.

7 **IV. STANDARDS OF REVIEW**

8 We review a bankruptcy court's decision to dismiss the
9 bankruptcy case for abuse of discretion. Leavitt v. Soto (In re
10 Leavitt), 171 F.3d 1219, 1223 (9th Cir. 1999). We review
11 findings of bad faith for clear error. Id. We review questions
12 regarding due process de novo. Molski v. Gleich, 318 F.3d 937,

14 ¹⁵Because the foreclosure sale was non-judicial, Debtor
15 retained no post-sale redemption rights in the Property. Vista
16 Del Mar Assocs., Inc. v. West Coast Land Fund (In re Vista Del
Mar Assocs., Inc.), 181 B.R. 422, 425 (9th Cir. BAP 1995).

17 ¹⁶At oral argument, Mr. Eardley appeared on behalf of Debtor
18 and argued that the Pacifica foreclosure sale was void because of
19 the October 27, 2007, order in Spirtos II staying all non-
20 judicial foreclosures with respect to the Property. As
21 previously noted, however, the state court vacated the October 27
22 order on October 29, 2007, holding that "the application for a
23 stay contained intentionally false representations." Mr.
24 Eardley, a non-party to the Spirtos II action, filed a notice of
25 appeal of the order vacating the October 27 order. He did not
26 obtain a stay pending appeal or post a bond. As we discuss in
27 footnote 12, supra, California law does not automatically impose
28 a stay on self-executing orders such as the order vacating the
October 27 order. Mr. Eardley's appeal of the October 29 order
did not reinstate the October 27 order. Bulmash, 24 Cal. 3d at
697-99.

26 As Debtor has not presented us with any order by a state
27 court invalidating the Pacifica foreclosure sale, it remains
28 valid for the purposes of determining mootness. The appeal of
the section 362(d)(4) order is therefore moot.

1 951 (9th Cir. 2003).

2 **V. DISCUSSION**

3 A. Sufficiency of Notice

4 Section 1307(c) permits a bankruptcy court "upon request of
5 a party in interest" and "after notice and a hearing" to dismiss
6 a chapter 13 case for cause. Rule 1017(f)(1) provides that the
7 contested matter provisions of Rule 9014 apply to section 1307(c)
8 requests for dismissal. Rule 9014(a) requires relief in a
9 contested matter to be requested by motion and "reasonable notice
10 and opportunity for hearing" to be afforded the party against
11 whom relief is sought. Here, Downey did not file a motion for
12 dismissal and did not set such a motion for hearing in accordance
13 with Local Rule 9013-1 of the bankruptcy court. By itself, the
14 insertion of two sentences requesting dismissal (with a bar on
15 refiling) into an objection to confirmation does not provide the
16 notice and opportunity for hearing contemplated by the federal
17 and local rules.¹⁷ But the case must be considered in the
18 context of what happened after that: the court's issuance of a
19 detailed tentative ruling to which Debtor had sufficient
20 opportunity to respond at length.

21 A bankruptcy court has the power to dismiss a case sua
22 sponte under section 105(a). Tennant v. Rojas (In re Tennant),
23 318 B.R. 860, 869 (9th Cir. 2004). Rule 1017(c) does not apply
24 to such sua sponte dismissals. Id. at 869-70. Nonetheless,

25
26 ¹⁷We are not deciding today whether incorporating a request
27 for dismissal into an objection to confirmation satisfies Rule
28 1017 and 9014. We do note, however, that burying the request in
the text and not even referring to a request for dismissal in the
title of the objection is insufficient.

1 notice and an opportunity for hearing must be provided with
2 respect to a sua sponte dismissal. Id. at 870.

3 The Ninth Circuit has held that a court must give the party
4 against whom relief is directed “‘a meaningful opportunity to be
5 heard.’” Rosson v. Fitzgerald (In re Rosson), 545 F.3d 764, 775
6 (9th Cir. 2008) (emphasis in original), quoting Law Offices of
7 David A. Boone v. Derham-Burk (In re Eliapo), 468 F.3d 592, 603
8 (9th Cir. 2006).¹⁸ As we observed in Tennant, a dismissal based
9 on a determination of substantive issues (such as bad faith),
10 requires more notice than a dismissal based on narrow procedural
11 grounds (such as failure to file requisite documents).

12 In this case, Debtor learned about the bankruptcy court’s
13 intent to dismiss her case on the bad faith grounds approximately
14 five days prior to the hearing, which she believed had been
15 continued. Nonetheless, Debtor was given sufficient notice to
16 enable her to file a 26-page response (plus exhibits) and to
17 correct some of the deficiencies noted by the court (such as the
18 failure to file payment advices).

19 In addition, on April 7, the court set the June 25
20 confirmation hearing; while the chapter 13 trustee may have
21 discussed continuing the June 25 hearing, no notice or order
22

23 ¹⁸Rosson upheld a one-hour notice by the bankruptcy court to
24 the debtor that his case would be converted to chapter 7. While
25 the Ninth Circuit criticized the short notice given, it observed
26 that the debtor had sufficient time to seek reconsideration.
27 When he did, he was unable to make a sufficient showing why
28 conversion was improper. Here, as explained, Debtor had ample
time to respond to the threatened dismissal and did so. She then
failed to attend the hearing that led to the dismissal, even
though her request for a continuance did not mention any conflict
or other reason why she would be unable to attend.

1 continuing the hearing was filed. Debtor should have known that
2 the bankruptcy court could conceivably deny confirmation at that
3 hearing.

4 While courts ordinarily must afford a debtor an opportunity
5 to amend a plan before dismissing a chapter 13 case for "cause,"
6 (Nelson v. Meyer (In re Nelson), 343 B.R. 671, 676 (9th Cir. BAP
7 2006)), an amendment of the plan would have been futile here as
8 the court found that the case itself had been filed in bad faith.
9 Section 1325(a)(7) requires a court to find that a case was filed
10 in good faith in order to confirm a chapter 13 plan. Even if the
11 Debtor had revised her plan drastically, a revision would not
12 mitigate any bad faith in the filing of the petition itself.¹⁹

13 We believe that the Debtor had a meaningful opportunity to
14 be heard on the court's proposed dismissal of her case. The
15 hearing date had been set for at least two months and the court
16 had not issued any notice or order changing that date. In May,
17 Downey requested a dismissal in its objection to confirmation of
18 Debtor's plan. Debtor had sufficient notice of the court's
19 intent to dismiss the case to enable her to file a lengthy
20 response addressing the substance of the tentative ruling; the

21
22 ¹⁹Debtor argues that the bankruptcy court did not provide
23 sufficient notice of its intent to dismiss her case for failing
24 to file payment advices as required section 521(a)(1)(B)(iv).
25 The bankruptcy court did not dismiss her case for that reason; to
26 the extent Debtor was self-employed and received no income from
27 any other employers during the six months preceding the petition
28 date, she was not required to file such payment advices. The
court merely observed in its June 24 tentative decision that if
Debtor had indeed received such income from other employers and
failed to file the payment advices, her case would have been
automatically dismissed by section 521(i) on the 45th day
following the date of her petition.

1 court took that response into account in its ultimate
2 disposition. For these reasons, we believe that the court's
3 dismissal satisfied the standards for notice set forth in Rosson
4 and Tennant.

5 That said, we do not believe that the bankruptcy court
6 provided sufficient notice of its intent to impose a lifetime bar
7 on refiling. Downey did not request a lifetime bar, and we could
8 find no published cases imposing such a bar.²⁰ The Bankruptcy
9 Code does not contain a provision specifically permitting such a
10 drastic measure. An imposition of such a significant sanction
11 requires more than the notice given here. While the Debtor could
12 have anticipated dismissal as a consequence of an inability to
13 confirm a plan, she had no warning before the court's first
14 tentative decision that a lifetime bar was possible. We
15 therefore reverse the dismissal order to the extent that it
16 imposes a lifetime bar on refiling.

17 B. Substance of the Dismissal

18 The court can determine that a debtor filed a case in bad
19 faith based on a pattern of conduct, and may impute bad faith
20 from the timing and circumstances of the filing. Eisen v. Curry
21 (In re Eisen), 14 F.3d 469 (9th Cir. 1994). The court can also
22 consider the filings and acts of family members and other real
23 property titleholders when determining the bad faith of a debtor.

24
25 ²⁰Furthermore, most courts imposing refiling bans do so for
26 a limited period of time and in cases where the debtor had filed
27 multiple petitions. See, e.g., In re Craighead, 377 B.R. 648,
28 656 (Bankr. N.D. Cal. 2007) (court imposed three-year bar on
refiling where debtor had filed six cases and family members had
filed 22 cases). This case was Debtor's first case.

1 Craighead, 377 B.R. at 655.

2 In Leavitt, the Ninth Circuit affirmed a dismissal "with
3 prejudice" of a chapter 13 case. "A dismissal with prejudice
4 bars further bankruptcy proceedings between the parties and is a
5 complete adjudication of the issues." Leavitt, 171 F.2d at 1223-
6 24. A dismissal with prejudice, therefore, is not unlike a bar
7 on refiling; both are extraordinary remedies. In order to
8 dismiss a chapter 13 bankruptcy case with prejudice for bad
9 faith, a court must consider the "totality of the circumstances"
10 and should consider the following factors:

11 (1) whether the debtor misrepresented facts in his
12 petition or plan, unfairly manipulated the Bankruptcy
13 Code, or otherwise filed his Chapter 13 petition or
14 plan in an inequitable manner;

15 (2) the debtor's history of filings and dismissals;

16 (3) whether the debtor only intended to defeat state
17 court litigation; [and]

18 (4) whether egregious behavior is present[.]

19 Id. at 1224 (internal quotations and citations omitted). The
20 bankruptcy court here took into account each of these factors
21 when it dismissed the case. It considered the misrepresentations
22 by Debtor in her schedules,²¹ the inadequacies of her plan, the
23 history of litigation in state court and bankruptcy court, and

24 ²¹Debtor contended that she did not schedule the Downey and
25 Pacifica as entities holding security interests in the Property
26 because she was not the obligor on the promissory note secured by
27 the deeds of trust on the Property. Schedule D requires a debtor
28 to disclose all encumbrances on real property in which the debtor
claims an ownership interest, whether disputed or not. Debtor is
an attorney; she should understand the significance of the deeds
of trust against the Property and her explanation for omitting
them is unavailing.

1 the timing of the petition (within days of dismissal of Spirtos'
2 case for bad faith). These factors favored dismissal.

3 In light of the litigation history involving Debtor, Mr.
4 Eardley and Spirtos over the Property, and in light of the
5 multiple filings affecting the Property, the bankruptcy court did
6 not clearly err in finding that Debtor acted in bad faith when
7 she filed her petition, particularly when that filing occurred
8 five days after Spirtos' case was dismissed for bad faith. In
9 light of that finding, Debtor cannot propose any plan that will
10 satisfy section 1325(a)(7) (requiring a finding that the petition
11 was filed in good faith before a plan can be confirmed). Under
12 such circumstances, dismissal of the case was not an abuse of
13 discretion. Leavitt, 171 F.3d at 1223-25.

14 VI. CONCLUSION

15 For the foregoing reasons, we DISMISS the appeal of the
16 section 362(d)(4) order (BAP No. 08-1200) as moot and AFFIRM the
17 dismissal order but REVERSE that portion of the dismissal order
18 imposing a lifetime ban on refiling.