NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	) BAP No. SC-06-1453-PaMkB
ECV DEVELOPMENT, LLC,	) Bk. No. 06-02001
Debtor.	)
ECV DEVELOPMENT, LLC,	)
Appellant,	)
v.	) **M E M O R A N D U M**[1]
EMERALD BAY FINANCIAL, INC.; C.N.A. FORECLOSURE SERVICES, INC.; UNIFIED MORTGAGE SERVICES, INC.; BETTY WALLACE,	)
Appellees.	)

Argued and Submitted on May 17, 2007
at Pasadena, California

Filed - June 15, 2007

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

Honorable John J. Hargrove, Bankruptcy Judge, Presiding

Before: PAPPAS, MARKELL[2] and BRANDT, 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.

[2] The Honorable Bruce A. Markell, United States Bankruptcy Judge for the District of Nevada, sitting by designation.

This is an appeal from an order dismissing the chapter 11[3] bankruptcy case filed by debtor ECV Development, LLC ("ECV"), as a bad faith filing. We AFFIRM.

FACTS

In December 2000, Frank Avila ("Avila") purchased a house on 4.73 acres in El Centro, California (the "Property"). He thereafter subdivided the Property into 24 lots, one with the house and 23 vacant.

Avila formed Olive XXIII, LLC ("Olive") on May 14, 2002, and conveyed the Property to Olive. On August 27, 2002, Appellee Emerald Bay, Inc. ("Emerald Bay") made 23 loans of $32,000 each to Olive, allegedly[4] secured by Deeds of Trust on each of the vacant lots; a loan of $134,000, secured by a Deed of Trust on the improved lot with building; and a loan of $54,000.

At some point, Emerald Bay[5] assigned its interests under the notes and trust deed to private investors and to Emvest Mortgage

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

[4] We say "allegedly" because a considerable dispute arose concerning which parcels secured which loans. For our purposes, it is uncontroverted that Avila originally owned the Property, that he formed Olive and conveyed the Property to Olive, and that Emerald Bay (itself or through one of its controlled companies), made the loans described above to Olive.

[5] Besides Emerald Bay, the other Appellees in this appeal are Unified Mortgage Services, Inc. ("Unified") and CNA Foreclosure Services, Inc. ("CNA"). Unified is an affiliate of Emerald Bay and provides mortgage servicing for Emerald Bay. CNA is an affiliate of Emerald Bay and provides foreclosure services for Emerald Bay. Appellee Betty Wallace is identified as a Trust Deed Holder, but has not taken an active role in this appeal.

Fund, Inc. ("Emvest").[6] Then, at some later time, Emerald Bay alleges that it bought back "some of those notes and now holds an 'interest in the subject property.'"[7]

Olive failed to make the required payments on the $54,000 note, and then later failed to make payments on all of the $32,000 notes and the $134,000 note. The record does not disclose the date(s) of the defaults.

Emvest scheduled a foreclosure sale on the Property on October 8, 2003. Olive filed a chapter 11 bankruptcy on October 7, 2003 (the "Olive I" bankruptcy), one day prior to the foreclosure sale. In its schedule D, Olive listed a secured claim by Emvest of $881,000, based on "8/2/02 8/27/02 Deed of Trust Lots 1-24."

On June 9, 2004, the bankruptcy court, acting sua sponte, issued an order to show cause requiring Olive to explain why the chapter 11 case should not be dismissed. The court supported its order with a six-page "Recitation of Deficiencies in Support of Order to Show Cause Why This Chapter 11 Case Should not be Dismissed or Converted to Chapter 7." In the Recitation, the bankruptcy court noted that the case was "replete with examples of applications and motions without required information or notice,

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[6] Emvest is a mortgage broker at times affiliated with Emerald Bay. A permanent receiver to oversee Emvest was appointed by U.S. District Court for the Southern District of California in an action entitled SEC v. Emvest Mortgage Fund, LLC, et al. The date of the receiver's appointment is not clear in the record.

[7] Emerald Bay would later, in its motion to dismiss the bankruptcy case now on appeal, assert that it initiated the foreclosure attempt on October 8, 2003. We are unable to determine from the record whether Emvest initiated the foreclosure on its own behalf or on behalf of Emerald Bay.

delays and amendments to correct earlier errors;" that Olive was making adequate protection payments, but had no funds and had not requested authorization to incur debt; that Olive did not serve all creditors with notice of the bankruptcy proceedings, including two creditors owed over $280,000 who were not on the service list or Olive's schedules; and that Olive had proposed a financing plan that, in the court's words, was "essentially a plan of reorganization . . . without the benefit of a disclosure statement."

At the June 24, 2004 show cause hearing, it was revealed that the previous three months of adequate protection payments the bankruptcy court had earlier ordered be paid to secured creditors by Olive had been financed by the AtVantage Group, Inc. ("AtVantage"). The bankruptcy court questioned James Deffner, AtVantage's attorney, and concluded that these payments were a gift, having not been approved by the court or the U.S. Trustee. At the end of the hearing, the court, in strong language, decided to dismiss the case.

> Before you can implement the powers and the benefits under the bankruptcy code, there's one solid foundation that must be laid and that is procedural due process, which means that you can't change people's interests without giving them adequate notice so that they can be heard and that their positions can be before the court and evaluated and adjudicated. What's happened in this case is over a period of time the court has come to the conclusion that it does not have confidence in the representations that have been made to the court in this regard. The court is unsure of what is being asserted before the court is even correct or in some cases improved and that caused me - and I've been on the bench here 28 and a half years. I've sat on hundreds of chapter 11s, possibly even thousands at this point - and in all

> those cases I have never issued an order such as the order I issued on June the 9th and that's exactly what my problems are in this particular case.

Tr. Hr'g 33:13 – 34:4 (June 24, 2004). The bankruptcy court's order dismissing Olive I was entered on June 24, 2004.

On June 29, 2004, Olive sought an injunction in state superior court to prevent Emerald Bay from foreclosing the Property scheduled for August 10, 2004. On August 4, 2004, the superior court denied the motion because Olive's claims were not strong enough to justify imposition of an equitable remedy.

On August 9, 2004, Daniel Holbrook ("Holbrook"), the principal of AtVantage, paid $165,951.33 to Emerald Bay allegedly to satisfy the $54,000 loan. On August 9, 2004, based on this payment, the prior adequate protection payments made by AtVantage in the Olive I bankruptcy, and upon the promises of Holbrook, Olive, acting through Avila, executed a quitclaim deed to the Property in favor of AtVantage.[8]

On December 3, 2004, Holbrook and other employees of AtVantage drafted articles for a limited liability company, ECV. The articles provided that ECV would have three managers, Craig Boucher, Lansing Eberling and Ron Ramos. There was one member of

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[8] Although Avila would later assert that he never agreed to convey title to AtVantage in signing the quitclaim deed, a state court in the subsequent Imperial County Action, infra, in which both AtVantage and Olive were parties, determined that the chain of title to the Property was "undisputed" and that the quitclaim deed transferred title from Olive to AtVantage (and, according to the state court, it was also undisputed that the subsequent grant deed from AtVantage to ECV transferred title of the Property to ECV.).

the company, AtVantage, which was wholly owned by Holbrook.[9]

On March 23, 2005, AtVantage transferred title to the Property to ECV by grant deed. ECV executed a promissory note in favor of AtVantage for $406,619, which note was secured by a deed of trust against the Property recorded on May 27, 2005.

On March 29, 2005, ECV filed a suit against Emerald Bay and Olive in superior court (the "Imperial County Action") alleging that the underlying notes and deeds of trust were invalid. A contested hearing was held on June 2, 2005, at which ECV was granted a preliminary injunction preventing foreclosure. However, the state court noted that it had serious doubts whether ECV would eventually prevail in the action.

Emerald Bay and other defendants moved for summary judgment in the Imperial County Action. On May 26, 2006, the state court granted the motion. A judgment was entered in state court on June 6, 2006, dismissing all counts of ECV's complaint.

On June 26, 2006, Olive filed another chapter 11 bankruptcy petition ("Olive II"), and listed the Property as an asset of the Olive II bankruptcy estate.

On July 25, 2006, the state court denied ECV's motion for

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[9] There is some confusion in the record whether AtVantage was one company or two: AtVantage and Custom Advantage Home Builders ("Custom Advantage"). Custom Advantage is a construction company at least partly owned by Holbrook. We do not know from the record the extent of ownership or control Holbrook exercised over Custom Advantage. However, Custom Advantage, according to the Holbrook Declaration, only owned 10 percent of ECV while the remaining 90 percent was owned by AtVantage which was in turn 100 percent owned by Holbrook. We note that the Holbrook Declaration was ruled inadmissible in its entirety by the bankruptcy court. However, this particular fact was within the direct knowledge of Holbrook and no party has questioned Holbrook's control of ECV.

reconsideration in the Imperial County Action. On July 28, 2006, ECV filed a "bare bones" chapter 11 bankruptcy petition ("ECV I"). The ECV I schedules listed the Property as an asset of the ECV I bankruptcy estate.

On July 31, 2006, ECV appealed the summary judgment and denial of reconsideration in the Imperial County Action.[10]

On August 22, 2006, the § 341(a) hearing in ECV I occurred. Boucher, one of the managers of ECV, testified that:

- ECV had no employees, income or expenses;
- ECV's real property taxes, if paid, were paid by AtVantage, a wholly owned Holbrook entity;
- AtVantage paid the compensation of managers of ECV, the fees of ECV's law firm and the $100,000 cash bond for the Imperial County Action;
- there were no current commitments to finance home construction on the Property, and no current offers to purchase the Property;
- a bank account had been opened for ECV on August 22, 2006, with funds provided by AtVantage and Custom Advantage.
- Holbrook wholly owned AtVantage, and was part-owner of Custom Advantage.

On September 8, 2006, the bankruptcy court dismissed Olive II as a bad faith filing and imposed a 180-day bar. On the same day, Judge Hargrove, who also presided in Olive II, conducted a status conference in ECV I at which he directed Holbrook to submit a statement detailing the relationship between AtVantage and ECV.

On September 25, 2006, Emerald Bay, CNA and Unified moved to dismiss or convert ECV I as a bad faith filing (the "Dismissal

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[10] The judgment in the Imperial County Action was appealed to the California Court of Appeals. The court of appeals has not yet reached a decision.

Motion") On October 12, 2006, Betty Wallace, a trust deed holder, filed a joinder in the motion to dismiss.

On October 6, 2006, Holbrook filed a declaration regarding the relationship between ECV and AtVantage, as well as other facts related to the ECV bankruptcy (the "Holbrook Declaration").

A hearing was held on November 9, 2006, regarding the motion to dismiss or convert at which counsel for ECV and the movants appeared. Early in the hearing, the bankruptcy court disposed of the Holbrook Declaration:

> MR. SUNNEN [counsel for Emerald Bay]: Mr. Holbrook did file something in connection with the status conference on October the 13th. We filed a lengthy objection to hearsay, lack of foundation and testimony from an improper party. I'm going to object to anything that was put in that declaration.
> As the court recalls -
>
> THE COURT: Yeah, I would sustain. I've looked at that. I've sustained those objections. . . . There's absolutely no foundation. The declaration is substantially all hearsay.

Tr. Hr'g 13:21 - 14:5 (November 9, 2006).

After considering arguments of counsel and the record, the bankruptcy court then dismissed ECV I as a bad faith filing. It explained:

> On this record, I've gone through these pleadings, and this record supports a dismissal of this case today. In this court's view, this is a classic bad faith filing.
>
> I have reiterated early on in today's proceeding the chronology involving this property; and to summarize, again, the Arnold case, the ninth circuit case, is the authority for this court to proceed, and it basically incorporates the 1986 Fifth Circuit['s] In re Little Creek Development case dealing with a dismissal for cause under section 1112(b).

> I'll recite those again for the record.
>
> The debtor had one asset such as a tract of undeveloped or developed real estate. That fits right in here.
>
> The secured creditors' liens encumber this tract. They do.
>
> There is generally no employees except for the principals.
>
> Little or no cash flow, and no available sources of income to sustain a plan of reorganization or to make adequate protection payments. That factor holds true here. Nothing has been shown to this court to the contrary.
>
> There are typically few, if any, unsecured creditors whose claims are relatively small. That's the case here.
>
> The property has usually been posted for foreclosure because of arrearages on the debt. The property's been in foreclosure for years.
>
> Number 6, the debtor and one creditor may have proceeded to a standstill in state court litigation, and the debtor has lost or has been required to post a bond which cannot be afforded. It's just right out of the book in Little Creek, exactly what's happened here in this case.
>
> Seven, there are sometimes allegations of wrongdoing by the debtor or its principals. Unclear on that.
>
> New debtor syndrome may have occurred in which a one-asset entity has been created or revitalized on the eve of the foreclosure to isolate the insolvent property and its creditors. There's some of that here.

Tr. Hr'g 34:8 - 35:16.

The bankruptcy court entered its order dismissing the case as a bad faith filing on November 28, 2006, memorializing the findings it recited on the record at the hearing on November 9, 2006.

> Based on the arguments of counsel, the Court grants the motion to dismiss finding that the existence of good faith depends on an amalgam

> of factors and not upon a specific fact. In re Arnold, 806 F.2d 937 (9th Cir. 1986). The Arnold court cited Matter of Little Creek Dev. Co., 779 F.2d 1068, 1072-73 (5th Cir. 1986) which set for a nonexclusive list of factors for the court to consider. The court finds that this Debtor has many of the factors set forth in Little Creek that warrant dismissal of this case.
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> * sole asset is undeveloped real property
> * secured creditor's liens encumber the property
> * no cash flow
> * no unsecured creditors
> * property posted for foreclosure/debtor unsuccessful in defending actions against foreclosure in state court
> * no employees.

ECV filed a timely appeal of the dismissal order on December 7, 2006.[11]

JURISDICTION

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

ISSUES

Whether Appellees had standing to move to dismiss the bankruptcy case.

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[11] Following the filing of the appeal, on January 8, 2007, ECV filed a motion for stay pending appeal before the bankruptcy court. On the same day, ECV filed another, second petition for relief under chapter 11, Case no. 07-00052-JH-11 ("ECV II"). On January 18, 2007, the bankruptcy court denied the motion for stay pending appeal. On March 7, 2007, ECV filed a motion for stay pending appeal with the Panel. On March 19, our motions panel denied any relief because ECV "had not established sufficient grounds for a stay pending appeal. See Wymer v. Wymer (In re Wymer), 5 B.R. 802, 806 (9th Cir. BAP 1980)." ECV v. Emerald Bay, BAP no. SC-06-1453 (March 19, 2007).

Whether this appeal is moot because ECV has filed a second chapter 11 petition.

Whether the bankruptcy court abused its discretion in dismissing ECV's chapter 11 bankruptcy case as a bad faith filing.

STANDARDS OF REVIEW

We review orders of dismissal of a chapter 11 case for abuse of discretion. Marsch v. Marsch (In re Marsch), 36 F.3d 825, 828 (9th Cir. 1994) (dismissal for bad faith filing is reviewed for abuse of discretion); St. Paul Self Storage Ltd. P'ship v. Port Auth. (In re St. Paul Self Storage Ltd. P'ship), 185 B.R. 580, 582 (9th Cir. BAP 1995). We review a finding of bad faith for clear error. Marsch, 36 F.3d at 828.

Whether an entity has standing to make a motion in the trial court is a jurisdictional question that we review de novo. Nat'l Org. for Women v. Scheidler, 510 U.S. 802, 803 (1994). Whether an appeal is moot is a jurisdictional matter that we examine de novo. U.S. Trustee v. Joseph (In re Joseph), 208 B.R. 55, 57 (9th Cir. BAP 1997).

DISCUSSION

I.

Before addressing the substance of the bankruptcy court's decision to dismiss ECV's bankruptcy case, two procedural matters raised by the parties will be addressed. ECV challenges the standing of Appellees to bring a motion to dismiss in the bankruptcy court. In addition, Appellees argue that this appeal is moot insofar as effective relief cannot be granted because,

during the pendency of this appeal, ECV filed a second chapter 11 case.

A. Appellees Emerald Bay, CNA and Unified had standing in the bankruptcy case to move for dismissal.

ECV argues that Appellees Emerald Bay, CNA and Unified did not have standing in the bankruptcy court to move for dismissal of ECV I. According to ECV, Emerald Bay originated the loans on the Property, but subsequently assigned all beneficial interest away to other investors; ECV argues CNA and Unified are merely servicing agents for the alleged debts.

Appellees do not address the standing issue in their Opening Brief. However, a review of the record indicates that this issue was fully briefed at the bankruptcy court, and discussed at the hearing on November 9, 2006.

Emerald Bay[12] asserts Appellees have standing based upon their status as a judgment creditor arising in the Imperial County Action. Indeed, a judgment was entered in favor of Appellees Emerald Bay, CNA, and Unified in which Appellees were awarded costs of suit as against ECV. Appellees submitted a Memorandum of Costs to the superior court in the amount of $5,630.95. This Memorandum of Costs was discussed at the hearing on the motion to dismiss:

> MR. HEINEN [Counsel for ECV]: In that Judgment [in the Imperial County Action], there is a Judgment for Emerald Bay Financial, Wild Rock, Unified Mortgage Services and Lenders'

[12] We need not consider whether CNA and Unified have standing independently of Emerald Bay. The record establishes that they are entities controlled by Emerald Bay.

> Reconveyance. None of those entities are the holders of any notes in this case. And so my point being –
>
> THE COURT: But they are creditors.
>
> MR. HEINEN: They are not creditors. They became creditors by virtue of a memorandum of costs.
>
> THE COURT: They are creditors. They are creditors.
>
> MR. HEINEN: Based on a memorandum of costs. But they're not secured creditors.
>
> THE COURT: That doesn't make any difference. They're creditors. They can bring a motion to –
>
> MR. HEINEN: I'm not disagreeing.
>
> THE COURT: – dismiss.
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> MR. HEINEN: – I'm not disagreeing.
>
> THE COURT: This is not a relief from stay. They can bring a motion to dismiss. They're creditors.

Tr. Hr'g 15:20 – 16:13.

As can be seen in this colloquy, ECV's counsel admits that Appellees Emerald Bay, CNA and Unified are creditors of ECV, but argues that they are not secured creditors. The bankruptcy court correctly points out that whether Appellees are secured or unsecured creditors is irrelevant – any creditor may prosecute a motion to dismiss.

Section 101(10)(A) defines a creditor as an entity that has a claim against the debtor that arose at the time of or before the entry of the order for relief. Appellees' claim arose on June 8, 2006, when the state court entered its judgment awarding costs as against ECV in the Imperial County Action. ECV filed its voluntary chapter 11 petition on July 28, 2006. Therefore, for

purposes of the bankruptcy case, Appellees have a claim against ECV, and are thus creditors.

Section 1109 governs the "right to be heard" in chapter 11 cases, and § 1109(b) provides that a "party in interest . . . may appear and be heard on any issue in a case under this chapter" and defines "party in interest" to include "a creditor." Section 1112(b) indicates that dismissal of a chapter 11 case may be sought via the "request of a party in interest," thereby conferring express standing on creditors to move for dismissal of a chapter 11 case. Johnston v. JEM Dev. Co. (In re Johnston), 149 B.R. 158, 161 (9th Cir. BAP 1992)(creditor may move to dismiss under § 1112(b)).

We conclude that the bankruptcy court correctly decided that Appellees Emerald Bay, CNA and Unified had statutory standing under § 1112(b) to move to dismiss ECV's chapter 11 case.

B. This appeal is not moot.

Appellees note that during this appeal, ECV filed a second chapter 11 case on January 8, 2007, which is currently pending before the bankruptcy court. Appellees therefore suggest that we cannot grant ECV effective relief in this appeal (i.e., reversal of the dismissal order in ECV I). If we were to grant such relief, Appellees argue, inconsistent and inequitable results may occur in the two bankruptcy cases.

Appellees misconstrue the concept of mootness. Mootness does not rest on the possibility that relief may be undesirable or arguably inequitable. The critical focus in the mootness inquiry is whether it is "impossible" to fashion effectual relief. The

Ninth Circuit discussed this concept in In re Patullo, 271 F.3d 898, 901 (9th Cir. 2001):

> [t]he mootness inquiry focuses upon whether we can still grant relief between the parties. . . . If an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal is moot and must be dismissed. . . .

(Emphasis added.) The Patullo decision is consistent with a long line of cases in our circuit that restrict appellate mootness[13] to situations where "events may occur that make it impossible for the appellate court to fashion effective relief." Focus Media, Inc. v. Nat'l Broad. Co., Inc. (In re Focus Media, Inc.), 378 F.3d 916, 922 (9th Cir. 2004)(citing Bennett v. Gemmill (In re Combined Metals Reduction Co.), 557 F.2d 179, 187 (9th Cir. 1977)).

It is not impossible for us to fashion relief for ECV. Appellees, in their Opening Brief at p. 23, concede that "effective relief could conceivably be fashioned," although they suggest that it would be inequitable. This Panel, like all federal courts, is under "the virtually unflagging obligation . . . to exercise the jurisdiction given them." Colo. River Conservation Dist. v. United States, 424 U.S. 800, 817-18 (1976). If fashioning effective relief is not "impossible," we are under an obligation to exercise our statutory jurisdiction.

Appellees express concern that, if we reverse, the Property may constitute property of two different bankruptcy estates, thus

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[13] We are dealing here only with mootness that arises as a result of an intervening act before the appeal ends, and not mootness that may arise as a matter of law such as a change in statutory law or binding precedent.

violating the "single estate rule."[14] But even if that is true, to the extent any "rule" has been violated, that violation occurred in the filing of ECV's second chapter 11 case, and that violation should logically be addressed in the second, not this, bankruptcy case.[15]

In sum, it is not impossible for us to fashion effective relief in this appeal and, thus, it is not moot.[16]

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[14] "Appellees respectfully request that applicable Ninth Circuit precedent be followed and this Panel determine that it cannot fashion relief in Appellant's appeal as the Appeal and subsequent Chapter 11 filing violate the 'single estate rule.'" Appellees' Opening Brief at 24. As a general principle, the single estate rule was addressed by the Panel in In re Grimes, 117 B.R. 531 (9th Cir. BAP 1990): "Property cannot be an asset of two bankruptcy estates simultaneously." Id. at 535 (citing Bateman v. Grover (In re Berg), 45 B.R. 899, 903 (9th Cir. BAP 1984); see also In re Saylors, 869 F.2d 1434, 1438 (11th Cir. 1989).

[15] The automatic stay arising in ECV's second bankruptcy case does not apply to this appeal stemming from the first bankruptcy case. In Parker v. Bain, 68 F.3d 1131, 1135-36 (9th Cir. 1995), the court held that the automatic stay only applies to appeals when the action or proceeding was originally brought against the debtor. And even if the motion to dismiss the first chapter 11 case can be considered to be an action against the debtor, "the automatic stay does not apply to proceedings initiated against the debtor in the same bankruptcy court where the debtor's bankruptcy proceedings are pending." Snavely v. Miller (In re Miller), 397 F.3d 726, 730 (9th Cir. 2005). Both of ECV's bankruptcy cases were filed in the same bankruptcy court before the same judge.

[16] At oral argument on May 17, 2007, Appellees' counsel informed us that the Property was sold in a foreclosure sale on April 2, 2007, to the note holders, but that a trustee's deed had not yet been executed and recorded. Ordinarily, the sale of the debtor's principal asset under these circumstances would raise additional mootness considerations. However, there is at least one other significant potential asset of this bankruptcy estate, a $100,000 security bond on deposit with the clerk of the Imperial County Superior Court, which ECV listed in its amended schedule B filed on November 8, 2006.

Further, although presumably difficult, it is not impossible for ECV to undo the foreclosure sale in an equitable proceeding in state court under Cal. Civ. Code § 3412. The validity of the notes is the subject of the appeal of the Imperial County Action

(continued...)

II.

The bankruptcy court did not abuse its discretion in dismissing ECV's bankruptcy case for bad faith.

A chapter 11 case may be dismissed under § 1112(b)(1) "if the movant establishes cause." Section 1112(b)(4) provides a non-exclusive listing of events and circumstances constituting cause for dismissal. However, if the petition was filed in bad faith, cause for dismissal exists. In re Arnold, 806 F.2d 937 (9th Cir. 1986).[17] The ultimate decision whether to dismiss a chapter 11

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[16](...continued)
currently before the California Court of Appeals. Further, it is questionable whether the note holders qualify as bona fide purchasers for value of the Property. Melendrez v. D & I Investment, Inc. , 127 Cal. App.4th 1238, 1251 (Cal. Ct. App. 2005)(bona fide purchaser is one "who acquires a property interest for valuable consideration, in good faith, without actual or constructive notice of another's asserted rights in the property."). Thus, the mortgage foreclosure may not have conclusively passed title to the Property as usually occurs under California law when a trustee issues a deed to a bona fide purchaser. Nguyen v. Calhoun, 105 Cal. App.4th 428, 441 (Cal. Ct. App. 2003).

For these reasons, we conclude that the sale of the Property on April 2, 2007, did not moot this appeal.

[17] Section 1112(b) was substantially amended by The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). The revised subsection (b) mandates (rather than allows the bankruptcy court to exercise discretion as under pre-BAPCPA) that the bankruptcy court convert or dismiss a chapter 11 case, whichever is in the best interests of creditors and the estate, if the movant establishes cause, absent unusual circumstances. The bankruptcy court must "specifically identify" the circumstances that support the court's finding that conversion or dismissal is not in the best interests of the creditors and estate. § 1112(b)(1). The new subsection allows an exception where the debtor establishes that there is a reasonable likelihood that a plan will be confirmed within the time frame of § 1121(e), or a reasonable period, and that the grounds for granting such relief include an act or omission for which there is a reasonable justification or that the act or omission will be cured within a reasonable time. § 1112(b)(2). Finally, BAPCPA expands to 16 from 10 the number of types of conduct or circumstances that the (continued...)

case is submitted to the discretion of the bankruptcy judge. In re St. Paul Self Storage Ltd. P'ship, 185 B.R. at 582.

Arnold adopted as indicia of a bad faith those factors earlier articulated in In re Little Creek Dev. Co., 779 F.2d 1068, 1072-73 (5th Cir. 1986):

> Determining whether the debtor's filing for relief is in good faith depends largely upon the bankruptcy court's on-the-spot evaluation of the debtor's financial condition, motives, and the local financial realities. Findings of lack of good faith in proceedings based on §§ 362(d) or 1112(b) have been predicated on

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[17](...continued)
term "cause" includes. § 1112(b)(4).

This bankruptcy case was filed after the effective date of BAPCPA, and thus, the amended version of § 1112(b) applies. The bankruptcy court determined that cause existed for dismissal. Moreover, neither of the safe-harbor conditions found in new § 1112(b)(2)(A) or (B) have been established. ECV has not persuasively argued in this appeal that there is a reasonable likelihood that a plan can be confirmed if the dismissal is set aside. Moreover, we take it as axiomatic that there cannot be a reasonable justification for a bad faith filing.

The parties have not argued, nor do we assume or decide, that the BAPCPA amendments to § 1112(b) were intended to supplant or overrule existing case law recognizing a debtor's bad faith in filing a chapter 11 case as "cause" for dismissal. There is no helpful appellate case law interpreting the revised subsection. However, several bankruptcy courts have noted that amended § 1112(b), which limits the court's discretion to decline to dismiss or convert if cause is shown, seemingly lowers the barriers to dismissal, and thus it is unlikely that cause found under prior case law based on bad faith will not also constitute good cause for dismissal under BAPCPA. In re 3 Ram, Inc., 343 B.R. 113, 118 (Bankr. E.D. Pa. 2006); In re Incredible Auto Sales, LLC, 2007 Bankr. LEXIS 1305 *13 (Bankr. D. Mont. 2007)("If cause for conversion or dismissal exists because the debtor filed its chapter 11 case in bad faith, then section 1112(b)(2) would not apply because, by determining that the debtor filed the case in bad faith, the court would foreclose a reasonable justification for the filing. In addition, a bad faith determination would likely constitute 'unusual circumstances' demonstrating that section 1112(b)(2) should not be applied."); see also In re Daniels, 2007 Bankr. LEXIS 299 (Bankr. D. Iowa 2007); In re Causey, 2006 Bankr. LEXIS 1137 (Bankr. D.Ga. 2006)(applying an expanded list of factors based on Little Creek).

> certain recurring but non-exclusive patterns, and they are based on a conglomerate of factors rather than on any single datum. Several, but not all, of the following conditions usually exist. The debtor has one asset, such as a tract of undeveloped or developed real property. The secured creditors' liens encumber this tract. There are generally no employees except for the principals, little or no cash flow, and no available sources of income to sustain a plan of reorganization or to make adequate protection payments pursuant to 11 U.S.C. § 361, 362(d)(1), 363(e), or 364(d)(1). Typically, there are only a few, if any, unsecured creditors whose claims are relatively small. The property has usually been posted for foreclosure because of arrearages on the debt and the debtor has been unsuccessful in defending actions against the foreclosure in state court. Alternatively, the debtor and one creditor may have proceeded to a stand-still in state court litigation, and the debtor has lost or has been required to post a bond which it cannot afford. Bankruptcy offers the only possibility of forestalling loss of the property. There are sometimes allegations of wrongdoing by the debtor or its principals. The "new debtor syndrome," in which a one-asset entity has been created or revitalized on the eve of foreclosure to isolate the insolvent property and its creditors, exemplifies, although it does not uniquely categorize, bad faith cases.[18]

Our decisions on bad faith filings have been informed both by the Little Creek and Arnold rulings, as well as our own emphasis on examination of the "totality of the circumstances" in

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[18] The Little Creek factors for bad faith have also been adopted, with occasional variation, by the majority of circuits. C-TC 9th Ave. P'ship v. Norton Co. (In re C-TC 9th Ave. P'ship), 113 F.3d 1304, 1311 (2d Cir. 1997); Udall v. FDIC (In re Nursery Land Dev.), 91 F.3d 1414, 1416 (10th Cir. 1996); Laguna Assocs. Ltd. P'ship v. Aetna Cas. & Sur. Co. (In re Laguna Assocs. Ltd. P'ship), 30 F.3d 734, 738 (6th Cir. 1994); In re Phoenix Piccadilly, 849 F.2d 1393, 1394-95 (11th Cir. 1988).

determining good and bad faith issues.[19] For example, in In re Stolrow's Inc., 84 B.R. 167, 171 (9th Cir. BAP 1988), we applied the Little Creek factors and determined that most did not apply, and that the bankruptcy court had other valid reasons for refusing to dismiss the case. Our decision in St. Paul Self Storage examined the application of five indicia, and we concluded that the presence of those indicia indicated that the debtor was unreasonably deterring or harassing creditors and the court was justified in dismissing the case. 185 B.R. at 583.

In this case, at the conclusion of the November 9, 2006 hearing, the bankruptcy court announced its findings of fact concerning the Little Creek factors, determining that six of the eight were present in connection with the filing of ECV's chapter 11 bankruptcy petition. The court found that:

- ECV has only one major asset – undeveloped real property. Tr. Hr'g 34:15-17.
- The secured creditors' liens encumber the tract. Tr. Hr'g 34: 18-19.
- ECV has no employees other than principals. Tr. Hr'g 34:20-21.

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[19] Indeed, the Fifth Circuit in Little Creek cited our earlier decision in In re Thirtieth Place, Inc., 30 B.R. 503 (9th Cir. BAP 1983). "The abrupt ruling of the bankruptcy court here contrasts with the approach of the Ninth Circuit Bankruptcy Appellate Panel in Thirtieth Place, which considers the determination of this question [whether to dismiss a case for bad faith] to require an examination of all the particular facts and circumstances in each case. 30 B.R. at 505. In reversing a bankruptcy court determination that had rejected a creditor's motion to dismiss the case or lift the stay, the Bankruptcy Appellate Panel thoroughly analyzed the debtors condition. . . ."

The Arnold court also cited to Thirtieth Place and our "totality of the circumstances" approach to bad faith filing in support of its requirement that the existence of good faith depends on an "amalgam" of factors and not upon a specific fact. Arnold, 806 F.2d at 939.

- ECV has no cash flow or income and no resources to sustain a plan of reorganization. "This is a non-working company." Tr. Hr'g 34:22-25.
- There are few unsecured creditors. Tr. Hr'g 35:1-2.
- The Property has been in foreclosure for years and ECV was unsuccessful in defending actions against foreclosure in state court. Tr. Hr'g 35:3-10.

The bankruptcy court noted that it had considered an amalgam of factors, and had not relied upon any specific fact. This approach is consistent with the instructions of the Ninth Circuit in Arnold. 806 F.2d at 939; see also Marsch v. Marsch (In re Marsch), 36 F.3d 825, 828 (9th Cir. 1994)("The existence of good faith depends on an amalgam of factors and not upon a specific fact.).

An additional factor concerned the bankruptcy court. It observed that ECV had been less than diligent in presenting a plan of reorganization to the court and its creditors: "What bothers me is that this Debtor is sitting back, apparently doing nothing. I've got to prompt the creditor to get a plan filed. If there's going to be a plan and there is something legitimate about this operation, why wasn't a plan filed right away? This is not a complex case as far as a plan." Tr. Hr'g 23:21-24. The court's concern is consistent with our rulings on bad faith filing. See In re Thirtieth Place, Inc., 30 B.R. 503, 505 (9th Cir. BAP 1983)(good faith will not ordinarily be denied where there is an attempt to affect a speedy efficient reorganization"). See also In re Marsch, 36 F.3d at 828 ("The test is whether a debtor is attempting to deter and harass creditors or attempting a speedy,

efficient reorganization on a feasible basis.").[20]

On appeal, ECV does not challenge the individual findings of the bankruptcy court. Rather, it asserts a two-pronged objection. First, it suggests that application of the bad faith indicia is particularly harsh in cases with one asset, and it cites to a bankruptcy court decision noting that it takes a "Sisyphean effort" to avoid a finding of bad faith in a single asset case. In re Victoria Ltd. P'ship, 187 B.R. 54, 58-62 (Bankr. D. Mass 1995).[21]

ECV's second objection to the bankruptcy court's analysis is that the court applied the wrong legal standard in deciding whether the chapter 11 case had been filed in bad faith. Rather than Arnold and Little Creek, ECV suggests that the correct standard is the one discussed in Carolin Corp. v. Miller, 886 F.2d 693, (4th Cir. 1989), which held that, in addition to the subjective factors in Little Creek, a moving party must also prove objective futility of any possible reorganization. Carolin , 886 F.2d at 702.

No other court of appeals has accepted the Carolin rule that, in addition to other accepted bad faith factors, to obtain dismissal, a movant must show that no reorganization is possible. Indeed, the Eighth Circuit has explicitly rejected the Carolin

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[20] Although the bankruptcy court did not make a specific finding regarding feasibility of reorganization, it did determine that ECV had "no available sources of income to sustain a plan of reorganization." Tr. Hr'g 34:22-23.

[21] We note that, unlike in the Ninth Circuit, the Little Creek factors have not been expressly adopted in the First Circuit.

rule. Cedar Shore Resort, Inc. v. Mueller (In re Cedar Shore Resort, Inc.), 235 F.3d 375, 380 (8th Cir. 1989)("We decline to adopt the Carolin test and hold a Chapter 11 petition may be dismissed for bad faith alone where the circumstances warrant."). Carolin is not controlling in this circuit; Arnold is. We therefore also decline to make "objective futility" a requisite factor in reviewing whether a chapter 11 case has been filed in bad faith.

The bankruptcy court's findings of fact are not clearly erroneous and are supported by ample evidence in the record. Its decision that ECV I was filed in bad faith was based on an amalgam of nearly all the factors presented in Little Creek, the standard adopted by our circuit in In re Arnold. We conclude that the bankruptcy court did not abuse its discretion in dismissing ECV's bankruptcy case for bad faith.

CONCLUSION

We AFFIRM the bankruptcy court's order dismissing the bankruptcy case as a bad faith filing.