

JUN 15 2006

NOT FOR PUBLICATION

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

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

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In re:)	BAP Nos.	EC-05-1377-PaAB
)		EC-05-1491-PaAB
LESLIE ANN TOLAND,)		(Consolidated)
)		
Debtor,)	Bk. No.	04-33742-D-13
_____)		
)		
LESLIE ANN TOLAND,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
SPARTAN MORTGAGE SERVICES;)		
DANTE TROLIO; LAWRENCE MARION;)		
LAWRENCE J. LOHEIT, Chapter 13))		
Trustee,)		
)		
Appellees.)		
_____)		

Submitted Without Argument on May 17, 2006²

Filed - June 15, 2006

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

Honorable Robert S. Bardwil, Bankruptcy Judge, Presiding.

Before: PAPPAS, ALBERT³ and BRANDT Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

² At the request of the parties, and with the Panel's approval, this appeal was submitted without oral argument. BAP Rule 8012-1.

³ The Honorable Theodor C. Albert, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 This is an appeal from orders entered by the bankruptcy court
2 denying confirmation of a chapter 13 plan and dismissing the
3 bankruptcy case. We AFFIRM.

4 **FACTS**

5 Appellant Leslie Ann Toland ("Toland" or "Debtor") filed a
6 petition under chapter 13 of the Bankruptcy Code⁴ on December 2,
7 2004. At the same time, Toland filed her proposed chapter 13 plan
8 (the "Original Plan"). According to her bankruptcy schedules, as
9 later amended, Toland had estimated living expenses of \$2,941 per
10 month, estimated income of \$3,300 per month and excess income
11 available to be paid into the plan of \$360 per month. Toland also
12 claimed an exemption of \$50,000 on the cash proceeds from the sale
13 of her residence pursuant to CAL. CODE CIV. PRO. § 704.703(a)(1).

14 Appellees Spartan Mortgage Services, Dante Trolio and
15 Lawrence Marion (together, the "Creditors"), objected to
16 confirmation of the Original Plan because it was not filed in good
17 faith.⁵ The chapter 13 trustee, Lawrence J. Loheit ("Loheit"),

18 _____
19 ⁴ Unless otherwise indicated, all chapter, section, and
20 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
21 1330 and to the Federal Rules of Bankruptcy Procedure, Rules
22 1001-9036, in effect prior to the effective date of the Bankruptcy
23 Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"),
24 Pub.L. 109-8, 119 Stat. 23 (Apr. 20, 2005).

25 ⁵ Creditors allege that they were victims of a series of
26 fraudulent real estate transactions engineered by Toland and
27 others; that their claims against Toland would be nondischargeable
28 under § 523(a); and that the primary, if not sole, purpose of the
chapter 13 filing was Toland's attempt to secure a discharge of
their claims under § 1328(a). Although the bankruptcy court never
ruled on the good faith objection, and it is thus not directly
implicated in this appeal, the Panel takes note of the legal and
practical consequences of Toland's alleged participation in these
alleged schemes, and the effect on her employment and income.

Toland does not dispute that her real estate appraisers and
sales licenses were revoked and that she was convicted of a felony
(continued...)

1 joined in the Creditors' objection. He also alleged that Toland
2 was no longer employed because her real estate salesperson's
3 license was revoked by the State of California and she could not
4 show that she would be able to make the payments under the
5 proposed plan as required by § 1325(a)(6). And according to
6 Loheit, Toland's plan might also fail the "best interests of
7 creditors test" of § 1325(a)(4) because there was no indication in
8 her plan or schedules that Toland would meet the requirements of
9 the California homestead law requiring her to reinvest the home
10 sale proceeds in a new homestead within six months. Therefore,
11 Loheit argued, the exemption on the proceeds would expire and
12 creditors could receive more under a hypothetical chapter 7
13 liquidation than through her plan.

14 At the hearing on plan confirmation and Loheit's objection to
15 exemption on June 7, 2005, the bankruptcy court agreed with Loheit
16 that Toland had not carried her burden of proof in showing that

17

18 ⁵(...continued)
19 for which she is still on probation. In her Reply Brief to the
20 Creditors' Opposition to Chapter 13 Plan, she states: "Ms. Toland
21 was criminally prosecuted; lost her real estate appraisal
22 business; lost her appraisal license; lost her real estate
23 license; and incurred thousands of dollars in legal fees."
24 Attached to that Reply Brief and incorporated therein was the
25 Decision of the Real Estate Commissioner of California, No. H-4021
26 SAC OAH No. N-2004070138, dated November 18, 2004, which, inter
27 alia, documented the following events: 1) The California Office of
28 Real Estate Appraisers accused Toland of completing real estate
appraisals that violated the Ethics Provisions of the Uniform
Standards of Professional Appraisal Practice. 2) As part of a
criminal plea agreement, Toland stipulated to surrendering her
residential real estate appraisers license, effective August 12,
2003. 3) Toland pled guilty to one felony count of Misprision of
Felony, 18 U.S.C. § 4. She was sentenced to a period of 60 months
probation which will not expire until October 2008. U.S. v.
George, et al., Case No. 02-CR-325-4, U.S. District Court for the
Eastern District of California (Shubb, J.) October 1, 2003. 4)
The Department of Real Estate of the State of California revoked
her real estate salesperson's license, effective December 20,
2004.

1 her plan complied with the requirements of § 1325(a)(4) and (6).⁶
2 Specifically, the court found that more than six months had
3 elapsed since Toland sold the house, that she had not reinvested
4 the house sale proceeds in another homestead as required by CAL.
5 CODE CIV. PRO. § 704.720(b)⁷ and, thus, the proceeds were non-
6 exempt. Since the plan did not account for these funds, the court
7 concluded that the plan was not feasible. As a result, the
8 bankruptcy court denied Toland's motion to confirm the Original
9 Plan.

10 On June 20, 2005, Toland filed an amended plan ("Amended
11 Plan") along with amended schedules B and C. The Amended Plan
12 provided for payments to creditors over a 60-month period, at the
13 rate of \$360 for the first six months and \$660 for the remaining
14 54 months. According to Toland's motion to confirm the Amended
15 Plan, these payments would provide a 7.5 percent payment to the
16 unsecured creditors. In Section IV of the Amended Plan, Toland
17 stated that "Debtor will use proceeds from the sale of her
18 residence in part to fund the plan as necessary."

19 In amended schedules B and C, Toland disclosed that, as of
20 the petition date, she had \$35,977.75 in proceeds of the sale of
21 her residence in her bank account. She claimed an exemption in
22 these funds of \$19,670.00, pursuant to CAL. CODE CIV. PRO.

23
24 ⁶ Since the court determined that the plan could not be
25 confirmed because Toland did not satisfy the requirements of
26 § 1325(a)(4) and (6), the court did not decide whether the plan
was submitted in good faith as required under § 1325(a)(3).

27 ⁷ The court observed that "the debtor's response [to the
28 objection to her exemption] incorrectly states that there is no
requirement that Ms. Toland use the funds to acquire another
homestead. . . . There is a reinvestment requirement for
entitlement to the exemption, pursuant to CAL. CODE CIV. PRO.
§ 704.720(b)."

1 § 703.140(b) (5). Thus, the remaining approximately \$16,000
2 constituted nonexempt cash.

3 Creditors objected to the Amended Plan.⁸ In addition to
4 repeating their good faith objection, Creditors pointed out that
5 Toland's estimated monthly income of \$3,300 in her amended
6 Schedule I was inaccurate. According to Creditors, Toland
7 testified at the § 341 creditors meeting that she was no longer
8 employed and only receiving disability income.

9 On July 26, 2005, Toland replied to Creditors' objection. In
10 addition to addressing the good faith issue, Toland acknowledged
11 that she was no longer employed in the real estate business
12 because her real estate sales license had been revoked. She
13 indicated, however, that she truthfully scheduled her employment
14 and income as of the petition date. Since February 15, 2005,
15 Toland stated that she had been receiving disability benefits.
16 She alleged that with this income and "more than sufficient funds
17 in the bank to fund the plan, the plan complies with 11 U.S.C.
18 Section 1325(a) (6)."

19 Toland filed a Supplemental Reply in Support of Motion to
20 Confirm First Amended Chapter 13 Plan on August 16, 2005. In it,
21 she attempted to justify funding the Amended Plan with the
22 nonexempt house sale proceeds:

23 The Court previously suggested a reluctance to
24 confirm a plan funded in part from the use of
25 nonexempt funds held by the Debtor. Having
26 now researched the issue, it is clear that a
27 plan may be funded by the liquidation of
28 nonexempt assets. See In re Tomasso, 98 B.R.
513; In re Hagel, 1844 B.R. 793 and In re
Burgie, 239 B.R. 406. Furthermore, opposing

⁸ There is no indication in the Excerpts of Record or the docket that Loheit filed an objection to the Amended Plan.

1 counsel has cited no authority for their
2 contention that the funding of a plan using
3 nonexempt assets is not permissible. Finally,
4 it only seems fair that the Debtor should be
permitted to use the nonexempt funds when she
is paying the creditor the value of these
funds.⁹

5 Also on August 16, 2005, Toland filed a Supplemental
6 Declaration in which she indicated, inter alia, that: (a) she had
7 \$9,000 of the nonexempt funds remaining from the sale of her
8 residence; (b) she was using the nonexempt funds to pay living
9 expenses; (c) "I was not aware that I was not permitted to use the
10 funds for day to day living costs"; (d) she was receiving \$1,809.16
11 in worker's compensation payments per month; (e) because she could
12 not return to work until January 2006, she was relying on the
13 nonexempt funds to make ends meet during the interim period; and
14 (f) she expects that she will be able to earn "close to \$3,000"
15 per month when she returns to work.

16 On September 6, 2005, the bankruptcy court conducted a
17 hearing on Toland's motion to confirm the Amended Plan. The court
18 denied confirmation, noting, "Based on the pleadings filed and
19 oral argument presented at the hearing, and on the Debtor's use,
20 to cover personal expenses, of non-exempt funds which were to be
21 used for her Chapter 13 plan payments; and good cause appearing,

22
23 ⁹ Our review of the Excerpts of Record and the bankruptcy
24 case docket does not show that either the bankruptcy court,
25 Creditors or Loheit ever suggested that a plan could not be funded
26 with the nonexempt cash assets. The court made this clear to
27 Toland's counsel at the confirmation hearing, as described below.
28 Far from arguing that Toland could not use nonexempt assets to
fund the plan, in their objection to confirmation of the Amended
Plan, Creditors argue that Toland should use all of the nonexempt
cash to fund the plan: "The debtor's proposed plan is in
violation of § 1322(a) of the Code. The debtor does not
satisfactorily explain why she cannot use all of her non-exempt
cash to help fund the plan in addition to the proposed monthly
payments set forth in the plan."

1 it is ORDERED that the motion is denied." At the hearing, the
2 court explained to Toland's counsel that, while nonexempt assets
3 could be used to fund a plan, that was not the reason the court
4 was denying confirmation:

5 THE COURT: I do understand that a plan can be funded by
6 nonexempt assets. My concern here was that you had a
7 nonexempt bank account and the amount in the account was
8 approximately 16,000 plus something, and the debtor was
9 proposing to use that over time to make her payments,
10 but in the interim she was also dipping into that
11 covering her living expenses, and that is the aspect of
12 the plan that makes it unconfirmable.

13 And, in fact, it's not before the Court, but it
14 appears that there were use of nonexempt funds without
15 court approval, and to the extent - I mean, from the
16 Court's view, that is going to have to be accounted for.
17 So what I have before the Court today is an objection to
18 the plan, and the Court will sustain the objection.

19 . . .

20 MR. FONG [Toland's counsel]: Can I make one last? I
21 should point out that although Mr. Isley [Creditors'
22 counsel]'s objection raised the fact that the creditors
23 are not getting everything they would get in the Chapter
24 7, that's not precisely accurate. The debtor's plan
25 proposes to pay that amount throughout the life of the
26 plan.

27 THE COURT: Mr. Fong, what we have here is a situation
28 where she's saying at least a couple of months ago there
was 16,000 plus dollars of nonexempt assets, going to
use that to pay the plan but she's using that for living
expenses.

MR. FONG: Right.

THE COURT: So what happens at the end of the day when
the rest of that 9,000 - the 16 has dwindled to 9,000
and she converts the case?

MR. FONG: I understand the Court's concern on that one.
And yet, I guess it is a little bit speculative and at
the same time I understand the Court's -

THE COURT: It's not speculative from the standpoint
she's utilizing nonexempt assets postpetition without
court approval.

MR. FONG: Right, I understand that.

1 THE COURT: So, I just think that it leads itself to
2 nothing but problems and the Court won't approve the
confirmation under the circumstances.

3 Hr'g Tr. 3:21 - 6:18 (September 6, 2005).

4 In addition to denying confirmation of the Amended Plan, the
5 court ordered that Toland was prohibited from using the nonexempt
6 assets to pay living expenses until further order of the court.

7 Toland appealed the court's order denying confirmation of the
8 Amended Plan on September 12, 2005.

9 On September 23, 2005, Loheit moved to dismiss or convert the
10 bankruptcy case for cause pursuant to § 1307(c), arguing that
11 Toland had engaged in unreasonable delay that was prejudicial to
12 creditors, that confirmation of Toland's Amended Plan had been
13 denied and that Toland had filed no further plan and may not be
14 able to do so.

15 In response to this motion, on November 16, 2005, Toland
16 filed a Declaration stating that as of the date of the hearing on
17 the Amended Plan (September 6), she had \$7,500 in the bank. As of
18 November 16, 2005, Toland represented she had \$3,500 in the bank.

19 On a November 29, 2005 hearing, to dismiss or convert, the
20 bankruptcy court granted Loheit's motion and dismissed the case.
21 The court's order provides: "Findings of fact and/or conclusions
22 of law having been stated orally on the record and good cause
23 appearing, IT IS ORDERED that the motion is granted. IT IS
24 FURTHER ORDERED that the case is dismissed."¹⁰

25
26 ¹⁰ Appellant did not provide a copy of the transcript of the
27 hearing on November 29, 2005, and the bankruptcy case docket does
28 not contain the transcript. Neither the Excerpts of Record nor
the docket contain any pleadings that discuss the court's findings
of fact or conclusions of law upon which it based its decision to
dismiss the case.

1 Toland timely filed an appeal of the dismissal order on
2 December 13, 2005. The appeals of the denial of confirmation and
3 dismissal of the case were consolidated by Clerk's Order on
4 January 3, 2006.

5 **JURISDICTION**

6 The bankruptcy court had jurisdiction of this action under 28
7 U.S.C. § 1334 and § 157(b)(2). Our jurisdiction is based upon 28
8 U.S.C. § 158(b)(1).

9 **ISSUES ON APPEAL**

10 The appellant designated the following as the issues on
11 appeal:

12 1. Did the court err in finding that the Debtor can not fund
13 the plan using nonexempt funds held in the bank?

14 2. Did the court err in dismissing Debtor's case after
15 finding that the Debtor can not fund the plan using nonexempt
16 funds held in the bank?

17 **STANDARD OF REVIEW**

18 The confirmation of a chapter 13 plan involves mixed
19 questions of fact and law. Factual determinations are reviewed
20 under the clearly erroneous standard, while determinations of law
21 are reviewed de novo. Andrews v. Loheit (In re Andrews), 155
22 B.R. 769, 770 (9th Cir. BAP 1993).

23 The Panel reviews orders of dismissal for an abuse of
24 discretion. In re Loya, 123 B.R. 338, 340 (9th Cir. BAP 1991).
25 In reviewing an order under an abuse of discretion standard, the
26 Panel cannot reverse unless it has a definite and firm conviction
27 that the trial court committed a clear error of judgment in the
28 conclusion it reached upon a weighing of the relevant factors.

1 Solomon v. N. Am. Life and Cas. Ins. Co., 151 F.3d 1132, 1138-39
2 (9th Cir. 1998).

3 **DISCUSSION**

- 4
5 1. The court did not err in denying confirmation
6 of the Amended Plan.

7 As a preliminary matter, the Panel notes that Toland persists
8 in this appeal in misinterpreting the findings of the bankruptcy
9 court and its reasons for denying confirmation of the Amended
10 Plan. Toland's opening brief focuses on why it was error for the
11 bankruptcy court to decide that it was "impermissible to confirm a
12 plan because it is being funded by nonexempt property." As
13 discussed above, an examination of the record reveals no
14 indication that the bankruptcy court denied confirmation because
15 the plan was to be funded with the nonexempt house sale proceeds.
16 On the contrary, the bankruptcy court unambiguously informed
17 Toland's attorney at the hearing on confirmation that:

18 I do understand that a plan can be funded by
19 nonexempt assets. My concern here was that
20 you had a nonexempt bank account and the
21 amount in the account was approximately 16,000
22 plus something, and the debtor was proposing
23 to use that over time to make her payments,
24 but in the interim she was also dipping into
25 that covering her living expenses, and that is
26 the aspect of the plan that makes it
27 unconfirmable.

28 Hr'g Tr. 3:21 - 4:3 (September 6, 2005) (emphasis added). The
bankruptcy court did not deny confirmation of the Amended Plan
because it was funded by nonexempt assets. Instead, the court
denied confirmation because Toland did not carry her burden of
proving that she would be able to make all of the payments
proposed in the Amended Plan.

1 Confirmation of a chapter 13 plan may be denied if the debtor
2 fails to satisfy one or more of the prerequisites of § 1325(a).
3 In re Padilla, 312 B.R. 349, 352 (9th Cir. BAP 1997); KEITH M.
4 LUNDIN, CHAPTER 13 BANKRUPTCY, 3d ed. ¶ 217.1 (2000 & Supp. 2004).
5 Here, the court had clear evidence that Toland would not "be able
6 to make all payments under the plan and to comply with the plan"
7 as required by § 1325(a)(6).

8 Toland's amended Schedule J showed total estimated living
9 expenses of \$2,941 per month. Her amended Schedule I showed
10 projected income of \$3,300 per month. This left \$360 for monthly
11 payments under the plan. Toland's Amended Plan did indeed provide
12 for payments of \$360 per month for the first six months.

13 However, in her Supplementary Declaration, Toland informed
14 the court that she was not earning \$3,300 per month, but in fact
15 was receiving disability payments of \$1,809.16 per month. That
16 amount of income was insufficient to meet her scheduled living
17 expenses and required Toland to draw on the nonexempt house sale
18 proceeds both to meet the \$1,100 per month shortfall in living
19 expenses and to make plan payments. The court noted that the
20 nonexempt cash had declined from \$16,000 in February 2005 to
21 \$9,000 at the time of the confirmation hearing.¹¹ In his exchange
22 with Toland's counsel at the September 6 hearing, the court noted
23 the acceleration in depletion of the nonexempt assets and asked
24 Toland's counsel, "So what happens at the end of the day when the
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26 ¹¹ Of course, the court was unaware at the September 6
27 hearing that, according to Toland's Declaration filed later, the
28 remaining nonexempt funds at the time of the hearing was actually
\$7,500, rather than \$9,000, resulting in deficiency in amounts
needed to fund the Amended Plan.

1 rest of that 9,000 - the 16 has dwindled to 9,000 and she converts
2 the case?" Hr'g Tr. 6:5-7 (September 6, 2005).

3 Simple math shows that the bankruptcy court was justified in
4 not confirming the Amended Plan and enjoining further use of the
5 nonexempt funds.¹² Toland had used over \$7,000 (and while unknown
6 to the court, actually over \$9,000) of the \$16,000 in nonexempt
7 funds since filing her bankruptcy petition. Even viewing Toland's
8 arguments in a favorable light, she would continue to draw down
9 the nonexempt assets for at least another five months until she
10 could return to work. At that rate, the nonexempt funds would be
11 depleted before she could return to work.

12 Finally, even assuming that Toland was able to return to work
13 in February 2006 at the \$3,000 per month income level she expected
14 (an assumption highly suspect in light of Toland's loss of her
15 appraisal and real estate sales licenses and her continuing felony
16 probation through 2008), she would still not have had sufficient
17 income to make the increased monthly payments proposed in the
18 Amended Plan of \$668.

19 The Panel concludes that the bankruptcy court did not err in
20 deciding that the Amended Plan could not be confirmed. Toland's
21 loss of her employment and on-going use of the nonexempt house
22 sale proceeds to pay personal living expenses made it increasingly
23 unlikely that she would be able to make all payments proposed in
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26 ¹² At the September 6 hearing, the court prohibited Toland's
27 use of the nonexempt funds for any purpose. However, from the
28 court's earlier statements, it would appear that the court did not
object to use of the nonexempt funds to make plan payments. It is
also possible that the court may have used the blanket prohibition
as a means to encourage Toland to promptly file a second amended
plan.

1 the Amended Plan, and thus the plan did not comply with
2 § 1325(a)(6). In addition, the Panel rejects as unsupported by
3 the record Toland's contention that the bankruptcy court based its
4 decision on Toland's use of nonexempt funds to make plan payments.

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6 2. The court did not abuse its discretion in
7 dismissing the case.

8 Toland's characterization of the second issue on appeal ("Did
9 the court err in dismissing Debtor's case after finding that the
10 Debtor cannot fund the plan using nonexempt funds held in the
11 bank?") misconstrues the bankruptcy court's reasons for dismissal.
12 The bankruptcy court did not decide that Toland could not fund the
13 plan through use of nonexempt funds. Rather, we will consider the
14 more general question whether the bankruptcy court abused its
15 discretion in deciding that cause existed to dismiss the case.

16 In this respect, Toland has not provided an adequate record
17 on appeal. The court dismissed the case after a hearing conducted
18 on November 29, 2005. The only information in the record
19 concerning the bankruptcy court's decision on dismissal is a civil
20 minute order entered December 1, 2005, which recites: "Findings of
21 fact and/or conclusions of law having been stated orally on the
22 record and good cause appearing, IT IS ORDERED that the motion is
23 granted. IT IS FURTHER ORDERED that the case is dismissed."
24 Toland has not included a transcript of the hearing on appeal so
25 that the bankruptcy court's findings and conclusions may be
26 reviewed by the Panel.¹³ A review of the docket shows no evidence

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28 ¹³ BAP Rule 8006-1 provides that "The excerpts of the record shall include the transcripts necessary for adequate review in light of the standard of review to be applied to the issues by the Panel."

1 that a transcript was ever ordered or prepared. In addition, none
2 of the briefs filed by Toland or Creditors include the details of
3 what occurred at the November 29, 2005, hearing, nor do they
4 recite the court's specific findings or conclusions. In short,
5 because Toland did not provide an adequate record on appeal, this
6 Panel can not effectively review the bankruptcy court's decision
7 to dismiss the bankruptcy case. In re McCarthy, 230 B.R. 414,
8 416 (9th Cir. BAP 1999).

9 In general, if the appellant does not provide a sufficient
10 record to support informed review of trial court determinations,
11 the Panel may, but need not, either dismiss the appeal or affirm
12 the trial court based upon the appellant's inability to
13 demonstrate error. Kyle v. Dye (In re Kyle), 317 B.R. 390 (9th
14 Cir. BAP 2004) (citing Cnty. Commerce Bank v. O'Brien (In re
15 O'Brien), 312 F.3d 1135, 1136-37 (9th Cir. 2002) and others).
16 However, as we observed in Kyle, the Court of Appeals expects us
17 "to consider whether informed review is possible in light of what
18 record has been provided." Kyle, 317 B.R. at 394.

19 In this instance, a review of the facts available to the
20 bankruptcy court at the time it reached its decision to dismiss
21 the case allows us to conclude that the bankruptcy court did not
22 abuse its discretion in dismissing the chapter 13 case. Indeed,
23 it would appear that, under these circumstances, the court was
24 likely compelled to dismiss the case.

25 By November 29, the court had already expressed its concern
26 that depletion of the nonexempt assets would prevent Toland from
27 completing payments under the Amended Plan. Further, the court
28 had enjoined Toland from any further use of nonexempt funds

1 without leave of the court. In support of her motion for a stay
2 of the denial of confirmation pending appeal, Toland submitted a
3 Declaration on November 16, 2005, two weeks before the hearing on
4 dismissal, in which she informed the court that the balance of the
5 nonexempt funds on September 6 was \$7,500, not the \$9,000 that the
6 court had assumed was correct on that date. Further, Toland
7 declared to the court that the balance on November 16 was \$3,500,
8 which represented a further depletion of the funds.¹⁴ Since there
9 is no indication in the record that the court ever authorized
10 Toland's use of the nonexempt funds after the entry of its order
11 prohibiting Toland from doing so, the use of \$2,000 of those funds
12 in only two months is an apparent violation of the court's order.
13 Given Toland's apparent unwillingness to abide by lawful orders of
14 the court, the likelihood that the nonexempt funds would soon be
15 exhausted, and the significant questions concerning Toland's
16 ability to fund a plan through employment, the bankruptcy court
17 reasonably concluded that Toland could not propose a confirmable
18 chapter 13 plan.

19 The willful disobedience of a lawful court order can itself
20 constitute good cause for dismissal of a case. In her appeal of
21 the confirmation order, Toland's Statement of Issues on Appeal,
22 number 2, states "Did the court err in finding that the Debtor
23 cannot use nonexempt funds held in the bank without obtaining
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25 ¹⁴ In their Brief, Creditors brought to the Panel's attention
26 that on December 8, 2005, after the court dismissed the chapter 13
27 case, Toland filed a chapter 7 petition. Her schedules in that
28 case show that Toland had substantially exhausted the nonexempt
funds as of that date. The Panel takes judicial notice of the
docket in Toland's chapter 7 bankruptcy case, No. 05-40863,
Eastern District of California. Schedule C lists total cash
assets of \$980, all of which Toland claims exempt under CAL. CODE
CIV. PRO. § 703.140(b)(5).

1 court permission?" But Toland did not include this issue in her
2 opening brief, so we deem it waived. Law Offices of Neil Vincent
3 Wake v. Sedona Inst. (In re Sedona Inst.), 220 B.R.74, 76 (9th
4 Cir. BAP 1998) (holding that arguments not specifically and
5 distinctly made in an appellant's opening brief are deemed
6 waived). We also note that Toland's motion for stay pending
7 appeal was denied by the court. Consequently, we conclude that
8 Toland acted in violation of the court's order prohibiting her
9 from using nonexempt funds and that the court was aware of this
10 conduct at the time the court entered the order dismissing the
11 case. The Ninth Circuit considers dismissal of the bankruptcy
12 case as one appropriate sanction that may be imposed for violation
13 of a court's lawful order. Thompson v. Housing Authority, 782
14 F.2d 829, 832 (9th Cir. 1986).

15 Loheit premised the motion to dismiss or convert on
16 § 1307(c) (1), alleging that Toland caused unreasonable delay that
17 is prejudicial to creditors; on § 1307(c) (5), in that her first
18 amended plan was denied confirmation; and on § 1307(c) (3), in that
19 she had failed to file a second plan and may not be able to
20 propose a plan. The facts in the record available to the
21 bankruptcy court at the time it ordered dismissal of the chapter
22 13 case show that the bankruptcy court did not abuse its
23 discretion in granting Loheit's motion. And in her Opposition to
24 Trustee's Motion to Dismiss or Convert Case to Chapter 7, Toland
25 suggests that dismissal, rather than conversion, would be in the
26 best interests of Toland and Creditors: "If the court is inclined
27 to grant the motion [to dismiss or convert], Debtor requests the
28 case be dismissed which would give Debtor the opportunity to

1 prosecute the appeal without compromising creditors' efforts to
2 prosecute their alleged claims." Therefore, the bankruptcy court
3 acted properly in dismissing the case, rather than converting it
4 to a chapter 7 case.

5 **CONCLUSION**

6 The decision of the bankruptcy court is AFFIRMED.
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