

MAY 29 2013

NOT FOR PUBLICATION

SUSAN M SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

1 In re: ) BAP No. AZ-12-1320-MkJu  
2 )  
3 PETER F. BRONSON AND SHERRI L. ) Bk. No. 08-00777  
4 BRONSON, )  
5 )  
6 Debtors. )  
7 )  
8 \_\_\_\_\_ )  
9 )  
10 PETER F. BRONSON; SHERRI L. )  
11 BRONSON, )  
12 Appellants, )  
13 )  
14 v. ) **MEMORANDUM\***  
15 )  
16 THOMAS M. THOMPSON, )  
17 )  
18 Appellee. )  
19 \_\_\_\_\_ )

Submitted Without Oral Argument  
on May 16, 2013

Filed - May 29, 2013

Appeal from the United States Bankruptcy Court  
for the District of Arizona

Honorable George B. Nielsen, Jr., Bankruptcy Judge, Presiding

Appearances: Appellants Peter Bronson and Sherri Bronson on  
brief pro se; Jimmie D. Smith on brief for  
appellee Thomas M. Thompson.

Before: MARKELL, DUNN and JURY, Bankruptcy Judges.

\_\_\_\_\_  
\*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 balloon payment for the remaining balance due in September 2007.  
2 When the Bronsons defaulted on the balloon payment, TMT commenced  
3 nonjudicial foreclosure proceedings. In furtherance thereof, TMT  
4 recorded in October 2007 a notice of trustee's sale, which  
5 provided for an auction sale to be held on January 29, 2008.

6 **B. Bankruptcy Filings, Relief from Stay and Foreclosure**

7 On January 28, 2008, the day before the scheduled trustee's  
8 sale, the Bronsons filed their chapter 11 bankruptcy petition.  
9 As a result of the automatic stay, the trustee's sale could not  
10 be held as scheduled. Before he could proceed with the trustee's  
11 sale, TMT had to obtain relief from the automatic stay not only  
12 in the Bronsons' bankruptcy case but also in the bankruptcy case  
13 of the Bronsons' business associate Mark Taylor, who claimed to  
14 hold a junior security interest against the Office Building. TMT  
15 obtained relief from stay in the Bronsons' bankruptcy case as of  
16 November 19, 2008 and in Taylor's bankruptcy case as of June 30,  
17 2009. The trustee's sale was held on July 13, 2009, at which TMT  
18 was the successful bidder based on a credit bid of \$200,000. A  
19 trustee's deed was recorded on July 17, 2009.

20 **C. Nondisclosure Lawsuit and Allowance of Judgment Claim**

21 Even though the Bronsons had lost title to the property by  
22 way of the foreclosure, this did not end the litigation between  
23 the parties. In 2007, the Bronsons had commenced a lawsuit  
24 against TMT in the Gila County Superior Court (Case No. 2007-  
25 0264), alleging among other things breach of contract,  
26 nondisclosure, concealment and fraud ("Nondisclosure Lawsuit").  
27 The Bronsons claimed that TMT had wrongfully failed to disclose  
28 asbestos contamination in the Office Building.

1 At the time of the trustee's sale, the Nondisclosure Lawsuit  
2 was still pending.<sup>4</sup> Ultimately, however, TMT prevailed in that  
3 action. In June 2010, the Gila County Superior Court entered  
4 summary judgment in favor of TMT with respect to all of the  
5 Bronsons' claims and awarded TMT his attorney's fees and costs in  
6 that action in the amount of \$26,426.00 ("Gila Judgment").

7 TMT filed a motion in the bankruptcy court seeking to have  
8 the Gila Judgment allowed as an administrative expense. The  
9 Bronsons duly opposed that motion. After a hearing on the  
10 matter, the bankruptcy court declined to allow the Gila Judgment  
11 as an administrative expense claim but instead entered an order  
12 allowing it as a prepetition unsecured claim ("Gila Judgement  
13 Claim Allowance"). The Bronsons never appealed either the Gila  
14 Judgment or the Gila Judgement Claim Allowance.

#### 15 **D. Deficiency Lawsuit**

16 Meanwhile, in October 2009, Thompson filed an adversary  
17 complaint against the Bronsons asserting that he was entitled to  
18 a deficiency judgment against them under A.R.S. § 33-814(A)  
19 ("Deficiency Lawsuit").<sup>5</sup>

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21 <sup>4</sup>The Bronsons removed the Nondisclosure Lawsuit to the  
22 bankruptcy court in September 2009, but the bankruptcy court  
23 entered an order in December 2009 remanding that matter to the  
Gila County Superior Court.

24 <sup>5</sup>A.R.S. § 33-814(A) provides in relevant part:

25 [W]ithin ninety days after the date of sale of trust  
26 property under a trust deed pursuant to § 33-807, an  
27 action may be maintained to recover a deficiency  
28 judgment against any person directly, indirectly or  
contingently liable on the contract for which the trust  
(continued...)

1 Three principal issues arose in the Deficiency Lawsuit:  
2 (1) whether TMT actually incurred attorney's fees in enforcing  
3 his rights under the Note and the Deed of Trust, (2) the  
4 reasonableness of any such fees, and (3) whether the amount of  
5 debt that the Bronsons owed TMT actually exceeded the fair market  
6 value of the Office Building at the time of the foreclosure sale.  
7 The Bronsons initially raised each of these issues in a Civil  
8 Rule 12(b)(6) motion to dismiss. In ruling on that motion, the  
9 bankruptcy court held that TMT needed to amend his complaint to  
10 allege the amount of fees actually incurred and to allege that  
11 those fees were reasonable. But the court otherwise denied the  
12 Bronsons' dismissal motion.

13 Over the next two years, the parties litigated over the two  
14 fee-related issues (jointly, "Fee Issues") but largely ignored  
15 the third issue regarding the fair market value of the Office  
16 Building ("FMV Issue"). At the January 8, 2010 hearing on the  
17 Bronsons' dismissal motion, the Bronsons orally requested that  
18 the court set a hearing to determine the FMV Issue. The court,  
19 however, indicated that TMT first should file his amended  
20 complaint and that the Bronsons should answer that complaint.  
21 The court further suggested that the Bronsons should bring up  
22

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23 <sup>5</sup>(...continued)

24 deed was given as security . . . . In any such action  
25 against such a person, the deficiency judgment shall be  
26 for an amount equal to the sum of the total amount owed  
27 the beneficiary as of the date of the sale, as  
28 determined by the court less the fair market value of  
the trust property on the date of the sale as  
determined by the court or the sale price at the  
trustee's sale, whichever is higher.

1 their request for a hearing on the FMV Issue at the next status  
2 conference (scheduled for February 2010), but the Bronsons did  
3 not do so. The litigation subsequently focused on the Fee Issues  
4 because TMT filed in May 2010 a summary judgment motion seeking  
5 partial summary adjudication of the Fee Issues. As the Bronsons  
6 have admitted, TMT's summary judgment motion did not address the  
7 FMV Issue at all. The Bronsons filed a cross-motion for partial  
8 summary judgment in September 2010, but that motion like TMT's  
9 motion only addressed the Fee Issues.

10 The court never explicitly stated that it was denying the  
11 cross-motions for summary judgment, but it did orally rule at a  
12 hearing held on September 30, 2010, that it needed an evidentiary  
13 hearing on the Fee Issues. At the same hearing, the court  
14 indicated that it was aiming to cut off both discovery and  
15 dispositive motions by no later than December 2010.

16 The court set trial on the Fee Issues for April 2011;  
17 however, shortly before the scheduled trial date, the Bronsons'  
18 attorney obtained permission to withdraw as counsel.<sup>6</sup> As a  
19

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20 <sup>6</sup>According to the Bronsons' former counsel, he felt  
21 compelled to withdraw because he felt that his life and his  
22 girlfriend's life were being threatened as a result of his  
23 litigation efforts against TMT. The Bronsons followed up with  
24 their own list of events and occurrences which they felt  
25 demonstrated that TMT's influence over others in the local area  
26 was causing them to experience hostility and unfair treatment  
27 from, among others, the local state courts and the local police  
28 department. But the claims of misconduct and improper influence  
are based largely on hearsay and conjecture. Even the Bronsons  
admitted that it was not possible for them to directly tie TMT to  
the events and occurrences they were complaining about. More  
importantly, the only relief the Bronsons sought in conjunction  
with the above-reference alleged events was for the bankruptcy

(continued...)

1 result, TMT did not present his case in chief on the Fee Issues  
2 until May 24, 2011, and the Bronsons did not present their  
3 defense case on the Fee Issues until September 15, 2011. After  
4 closing arguments by both sides and the filing of a closing  
5 statement ("Closing Statement") by the Bronsons, the court on  
6 October 30, 2011 entered judgment in TMT's favor on the Fee  
7 Issues and further purported to finally determine that TMT was  
8 entitled to a deficiency judgment in the amount of \$18,574.

9 The Bronsons filed a series of motions seeking relief from  
10 the deficiency judgment. These motions caused the bankruptcy  
11 court to partially reconsider its October 30, 2011 judgment.  
12 While the court upheld its ruling on the Fee Issues, the court  
13 concluded that the parties had never litigated the FMV Issue.  
14 Accordingly, the court vacated the portions of the October 30,  
15 2011 judgment purporting to finally determine that TMT was  
16 entitled to a deficiency judgment.<sup>7</sup> The court set the FMV Issue  
17 for trial in May 2012, but before that trial occurred, the court  
18 vacated the trial date in light of the conversion of the case to  
19 chapter 7, as discussed below.

20  
21 <sup>6</sup>(...continued)  
22 court: (1) to permit withdrawal of their counsel, (2) to grant a  
23 continuance of the pending litigation, and (3) to "order" an FBI  
24 investigation. The court permitted the withdrawal and granted  
25 the continuance. And as for the FBI investigation, the  
26 bankruptcy court later correctly pointed out that it had no  
27 authority to "order" the FBI to do anything. Oddly, the Bronsons  
28 apparently never attempted to contact the FBI themselves.

<sup>7</sup>The Bronsons filed an appeal from the court's partial  
denial of their motions for relief from the deficiency judgment,  
but we dismissed that appeal as interlocutory by order entered  
August 29, 2012 (BAP No. AZ-12-1058).

1 **E. Plan Confirmation Proceedings**

2 During the course of the chapter 11 proceedings, the  
3 Bronsons proposed two plans. The Bronsons' first proposed plan  
4 was premised on the sale or refinancing of the Office Building.  
5 The Bronsons abandoned that plan shortly after TMT foreclosed on  
6 the Office Building. The Bronsons thereafter proposed an amended  
7 plan. The amended plan provided three sources of funding:  
8 (1) proceeds from litigation against TMT; (2) proceeds from  
9 litigation and judgments against others; and (3) sale of a parcel  
10 of real property known as the "Railroad Property" or as the  
11 "Commercial Land." TMT objected to the Bronsons' amended plan.  
12 TMT argued that the amended plan did not satisfy the best  
13 interests of creditors test under § 1129(a)(7). TMT further  
14 argued that the proposed means of funding the amended plan would  
15 be insufficient in light of the actual value of the Railroad  
16 Property and the value of the Bronsons' litigation and judgments  
17 against others. In addition, according to TMT, the amended plan  
18 did not meet the requirements of § 1129(a)(15) (which requires  
19 debtors under certain circumstances to commit their projected  
20 disposable income to plan funding) and § 1129(a)(9) (which  
21 generally requires debtors to pay allowed administrative claims  
22 in full upon confirmation). TMT also claimed that the plan was  
23 not proposed in good faith, as required by § 1129(a)(3).

24 In response to TMT's plan objections, the Bronsons contended  
25 that, in light of TMT's foreclosure on the Office Building, all  
26 of TMT's claims against the Bronsons had been satisfied, and so  
27 TMT no longer held any allowable claim against the Bronsons'



1 bankruptcy estate.<sup>8</sup> Therefore, the Bronsons reasoned, TMT had no  
2 standing to object to their amended plan.

3 The bankruptcy court held multiple hearings on the Bronsons'  
4 amended plan and considered the issues referenced above as well  
5 as other issues. Ultimately, the court sustained most of TMT's  
6 objections to plan confirmation, as reflected in the court's  
7 order entered on January 21, 2011.<sup>9</sup> Even though the Bronsons'  
8 bankruptcy case remained in chapter 11 for another 14 months  
9 before the court converted the case to chapter 7, the Bronsons  
10 never filed a new proposed plan attempting to cure the defects  
11 the court had identified in their amended plan.

12 **F. TMT's Motions to Convert**

13 TMT filed his first motion to dismiss or convert ("First  
14 Conversion/Dismissal Motion") in February 2009. The bankruptcy  
15 court in effect let the First Conversion/Dismissal Motion trail  
16 the confirmation proceedings. When the Bronsons abandoned their  
17 initial proposed plan in July 2009 (in light of the foreclosure  
18 of the Office Building), the court set the First  
19 Conversion/Dismissal Motion for hearing. The Bronsons opposed  
20 that motion, and on September 22, 2009, the bankruptcy court  
21 orally ruled on that motion. The court wanted to give the  
22 Bronsons another opportunity to propose a confirmable plan, but  
23 the court also acknowledged TMT's complaints regarding the

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24  
25 <sup>8</sup>Of course, this contention was the subject of the  
26 Deficiency Litigation, which has not been fully resolved.

27 <sup>9</sup>While the voluminous record contains multiple transcripts,  
28 neither party provided us with the transcript from the  
January 11, 2011 hearing on plan confirmation, held just before  
the court entered its order sustaining TMT's objections.

1 Bronsons' delay in moving their chapter 11 case forward. With  
2 these considerations in mind, the court orally ruled that the  
3 Bronsons would have until October 22, 2009, to file an amended  
4 plan and disclosure statement. If the Bronsons did not timely do  
5 so, the court indicated it was prepared to convert the case. If  
6 the Bronsons did timely file an amended plan and disclosure  
7 statement, the court indicated that this would "moot out" the  
8 First Conversion/Dismissal Motion.<sup>10</sup>

9 Consistent with the bankruptcy court's ruling, the Bronsons  
10 filed their amended plan and disclosure statement on October 22,  
11 2009. As mentioned above, the Bronsons proposed to fund and  
12 effectuate their amended plan through the proceeds from various  
13 lawsuits and judgments and by selling the Railroad Property. As  
14 also mentioned above, TMT objected to the amended plan based in  
15 part on the Bronsons' alleged noncompliance with various portions  
16 of § 1129(a) and in part on the allegedly minimal value of the  
17 assets the Bronsons proposed to use for plan funding.

18 Roughly one year later, in October 2010, while the battle  
19 over the amended plan was still ongoing, TMT filed a "Renewed  
20 Motion to Convert Case to Chapter 7." ("Second Conversion/  
21 Dismissal Motion"). TMT's grounds for conversion or dismissal  
22 were similar to his objections to the amended plan. More  
23 specifically, TMT asserted:

- 24 • The Bronsons' chapter 11 case was two and one half years  
25 old, and still they had not been able to confirm a plan.

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26  
27 <sup>10</sup>The bankruptcy docket indicates that the bankruptcy court  
28 never entered a written order memorializing its oral ruling on  
the First Conversion/Dismissal Motion.

- 1 • During the pendency of the chapter 11 case, the Bronsons had  
2 accrued unpaid administrative expenses in excess of  
3 \$100,000.
- 4 • The Bronsons had scheduled roughly \$375,000 in general  
5 unsecured debts, none of which had been paid or otherwise  
6 resolved.
- 7 • The Bronsons had not managed to sell any of the real  
8 property assets they had proposed selling in either of their  
9 proposed plans.
- 10 • The Bronsons had not been successful in most of their  
11 litigation against others and had not collected from most of  
12 those parties against whom they held judgments.<sup>11</sup>
- 13 • The Bronsons' chapter 11 operating reports showed little  
14 cash on hand, even though the Bronsons had not made any  
15 payments on account of either unsecured claims or  
16 administrative claims during the course of their chapter 11  
17 case.
- 18 • The Bronsons had little regular income and had not shown any  
19 willingness to contribute other nonexempt assets towards the  
20 funding of their proposed amended plan.
- 21 • The Bronsons' creditors would be best served by the  
22 liquidation of the Bronsons' assets by a chapter 7 trustee.

23 Second Conversion/Dismissal Motion (Oct. 28, 2010) at pp. 1-3.

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24  
25 <sup>11</sup>The Bronsons were successful in their litigation against  
26 the Arizona Department of Environmental Quality ("ADEQ"). As a  
27 result of a state appellate court judgment in their favor and a  
28 subsequent settlement, the Bronsons apparently obtained a  
recovery of \$33,000. But the record indicates that the amount  
recovered only served to defray a portion of the attorney fees  
and costs the Bronsons incurred in that litigation.

1           The Bronsons opposed the Second Conversion/Dismissal Motion.  
2 The Bronsons argued that, but for TMT, their amended plan already  
3 would have been confirmed, as TMT was the only person who had  
4 objected to their amended plan. The Bronsons further argued that  
5 TMT had no standing either to object to their plan or to seek  
6 conversion of their case. According to the Bronsons, all of  
7 TMT's claims had been satisfied by his foreclosure on the Office  
8 Building, and all of the claims TMT had asserted since that  
9 foreclosure were meritless.

10           Even though the bankruptcy court sustained most of TMT's  
11 objections to the Bronsons' amended plan in January 2011, and  
12 even though the Bronsons did not thereafter propose a new plan,  
13 the bankruptcy court did not hold a hearing on the the Second  
14 Conversion/Dismissal Motion until April 12, 2012. A week before  
15 the hearing on the Second Conversion/Dismissal Motion, the  
16 Bronsons filed a motion to continue that hearing. In support of  
17 their motion to continue, the Bronsons argued that the court  
18 should first resolve all of the disputes concerning TMT's claims  
19 and concerning the Deficiency Lawsuit. According to the  
20 Bronsons, once they had prevailed in those disputes, TMT would no  
21 longer have any claims against the Bronsons, and hence TMT would  
22 have no standing in the Bronsons' bankruptcy case. Therefore,  
23 the Bronsons reasoned, they would be able to move forward with a  
24 new plan and disclosure statement without any interference from  
25 TMT. The bankruptcy court denied the continuance motion without

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27 ///

28 ///

1 explaining its reasoning.<sup>12</sup>

2 At the April 12, 2012 hearing, before permitting either side  
3 to argue, the bankruptcy court expressed its concerns regarding  
4 the viability of the Bronsons reorganizing under chapter 11. It  
5 asked the Bronsons to address whether they had the financial  
6 resources to fund a chapter 11 plan. In particular, the court  
7 asked the Bronsons to update the court on the prospective revenue  
8 sources the Bronsons relied upon in support of their amended  
9 plan. More specifically, the court asked the Bronsons whether  
10 any progress had been made to sell the Railroad Property. The  
11 court also noted that the Nondisclosure Lawsuit, another  
12 prospective source of plan funding, had been decided against the  
13 Bronsons. In addition, the court asked the Bronsons for an  
14 update regarding their efforts to collect on judgments they had  
15 obtained against third parties.

16 The Bronsons did not address the court's questions and  
17 concerns. Instead, they recapitulated the contentions they had  
18 made in their written opposition to the Second  
19 Conversion/Dismissal Motion, particularly the need to complete  
20 their litigation with TMT.

21 The court was not persuaded by the Bronsons' presentation.  
22 After each side argued, the court orally announced its findings  
23 and conclusions. First, the court concluded that TMT had  
24 standing. Based on § 1109(b) and prior decisions of this Panel,

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25  
26 <sup>12</sup>Notwithstanding the absence of explicit reasoning for the  
27 denial of the continuance motion, the record indicates that the  
28 bankruptcy court disagreed with the Bronsons' belief that  
resolving their disputes with TMT was going to enable the  
Bronsons to propose and effectuate a confirmable plan.

1 the bankruptcy court held that TMT was a party in interest  
2 entitled to oppose the Bronsons plan and to seek conversion even  
3 though the Bronsons disputed his claims.

4 The court then went on to address the merits of the  
5 conversion motion. According to the court, cause existed under  
6 § 1112(b) to dismiss or convert. The court further noted that  
7 based on the particular circumstances of the Bronsons' case,  
8 conversion was appropriate. In so ruling, the court pointed to  
9 several circumstances, including but not limited to the  
10 following: (1) the length of time the case had been pending  
11 without a confirmed plan (over four years); (2) the various  
12 defects evident in the last plan the Bronsons had proposed, which  
13 the court had ruled upon in January 2011 (over 14 months prior);  
14 and (3) the Bronsons' inability to demonstrate any tangible  
15 progress toward proposing and funding a new confirmable plan.

16 The following statement by the bankruptcy court is  
17 representative of the court's findings regarding the Bronsons'  
18 failure to address the issues critical to proposing and  
19 effectuating a confirmable plan:

20 It appears that there have been money judgments that  
21 . . . the State Court [has] entered against the  
22 Debtors [in the Nondisclosure Lawsuit]. I have no  
report or no understanding on the [Railroad Property]  
or any current marketing efforts.

23 It's -- I have no information on the collection of  
24 funds from the stock judgment. I have no indication  
25 that they -- the prosecution of a collection action or  
26 a liability action against the law firm Tidmore Lerma.  
27 There's no amended plan on file. There's no disclosure  
28 statement on file. Instead the clear preference is to  
continue to litigate against Mr. Thompson on his  
bankruptcy claim and that seems to also require a need  
to involve the FBI into this case. And I'm told that  
although the FBI has been talked about, apparently the  
Bronsons have not talked to the FBI in connection with

1           this matter.

2           I don't have a good answer to my question that we  
3           started this hearing with . . . . And that is, is  
4           there a viable Chapter 11 plan such to make it useful  
5           to continue this four year old litigation[?]

6 Hr'g Tr. (April 12, 2012) at 26:4-22.

7 **G.    The Bronsons' Reconsideration Motion**

8           On April 17, 2012, the bankruptcy court entered its order  
9           converting the case, and on April 27, 2012, the Bronsons filed a  
10          motion for relief from that order under Civil Rule 60(b)  
11          ("Reconsideration Motion"). While most of the Bronsons'  
12          arguments in the reconsideration motion reiterate their prior  
13          arguments, the Bronsons sought for the first time to present to  
14          the court an appraisal dated April 27, 2012, valuing the Office  
15          Building as of the date of TMT's foreclosure at \$640,000 - far in  
16          excess of the amount owed to TMT at the time of foreclosure.  
17          Based on this new appraisal, the Bronsons made two new arguments:  
18          (1) that they clearly had a meritorious defense that would cause  
19          them to prevail in the Deficiency Lawsuit; and (2) that they now  
20          had grounds to assert a cause of action against TMT for unjust  
21          enrichment, because TMT otherwise would receive a windfall from  
22          his purchase of the Office Building based on a \$200,000 credit  
23          bid. In their reply in support of their Reconsideration Motion,  
24          the Bronsons further requested that the court recuse itself based  
25          on the Bronsons' perception of bias.

26          The bankruptcy court held a hearing on the Reconsideration  
27          Motion on June 1, 2012. After finding no grounds to recuse  
28          itself, the bankruptcy court denied the Reconsideration Motion,  
in essence holding that the new information presented - the new

1 appraisal - would not have had any impact on the court's  
2 § 1112(b) ruling.

3 The bankruptcy court entered its order denying the  
4 Reconsideration Motion on June 5, 2012, and the Bronsons timely  
5 appealed on June 15, 2012.

#### 6 JURISDICTION

7 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
8 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.  
9 § 158.

#### 10 ISSUES

- 11 1. Did the bankruptcy court err when it converted Bronsons'  
12 chapter 11 bankruptcy case to chapter 7 pursuant to  
13 § 1112(b)(1)?
- 14 2. Did the bankruptcy court err in ruling on the Second  
15 Conversion Motion without first resolving the Deficiency  
16 Lawsuit?

#### 17 STANDARD OF REVIEW

18 Historically, we have reviewed a bankruptcy court's decision  
19 to convert a chapter 11 case to chapter 7 for abuse of  
20 discretion. See, e.g., Greenfield Drive Storage Park v. Cal.  
21 Para-Professional Servs., Inc. (In re Greenfield Drive Storage  
22 Park), 207 B.R. 913, 916 (9th Cir. BAP 1997); Johnston v. Jem  
23 Dev. Co. (In re Johnston), 149 B.R. 158, 161 (9th Cir. BAP 1992).  
24 While the 2005 amendments to the Bankruptcy Code in some respects  
25 limited the bankruptcy court's discretion in this context, see  
26 In re Prods. Int'l Co., 395 B.R. 101, 108 (Bankr. D. Ariz. 2008),  
27 it still is appropriate in this appeal to conduct the same type  
28 of analysis we ordinarily utilize when reviewing the bankruptcy



1 court's exercise of its discretion. Under the abuse of  
2 discretion standard, we first determine de novo whether the court  
3 identified the correct legal rule to apply. And if the court  
4 identified the correct legal rule, we then review the court's  
5 findings of fact to determine whether those findings were  
6 "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in  
7 inferences that may be drawn from the facts in the record.'" United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009)  
8 (en banc) (quoting Anderson v. City of Bessemer City, N.C.,  
9 470 U.S. 564, 577 (1985)).

11 We also review for an abuse of discretion the bankruptcy  
12 court's decision not to continue the final hearing on the Second  
13 Conversion Motion until after resolution of the Deficiency  
14 Lawsuit. See Orr v. Bank of Am., 285 F.3d 764, 783 (9th Cir.  
15 2002); Khachikyan v. Hahn (In re Khachikyan), 335 B.R. 121, 125  
16 (9th Cir. BAP 2005).

#### 17 DISCUSSION

18 As amended by the Bankruptcy Abuse Prevention and Consumer  
19 Protection Act of 2005 ("BACPA")<sup>13</sup> and the Bankruptcy Technical  
20 Corrections Act of 2010 ("BTCA"),<sup>14</sup> § 1112(b) generally requires  
21 a bankruptcy court to dismiss, convert, or appoint a chapter 11  
22 trustee or examiner if it finds "cause." See 11 U.S.C.  
23 § 1112(b)(1);<sup>15</sup> see also In re Prods. Int'l Co., 395 B.R. at

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24  
25 <sup>13</sup>Pub. L. 109-8, 119 Stat. 23 (Apr. 20, 2005).

26 <sup>14</sup>Pub. L. 111-327, 124 Stat 3557 (Dec. 22, 2010).

27 <sup>15</sup>Among other things, BTCA clarified that appointment of a  
28 trustee or an examiner was an additional alternative to

(continued...)

1 107-08; 7 COLLIER ON BANKRUPTCY, ¶ 1112.04[7] (Alan N. Resnick &  
2 Henry J. Sommer, eds., 16th ed. 2013).<sup>16</sup>

3  
4 <sup>15</sup>(...continued)

5 conversion or dismissal. In this appeal, conversion is the only  
6 relevant alternative because the bankruptcy court found that  
7 conversion was in the best interests of creditors and because the  
8 Bronsons have not asserted on appeal that the bankruptcy court  
instead should have selected one of the other two alternatives to  
conversion.

9 <sup>16</sup>Upon finding cause, the court's obligation to dismiss,  
10 convert or appoint a trustee or examiner is not absolute.  
11 Section 1112(b) identifies certain exceptions to this general  
12 requirement. The main exception is set forth in § 1112(b)(2),  
13 which provides that the court "may not" convert or dismiss a  
14 chapter 11 case notwithstanding the existence of cause if it  
"finds and specifically identifies unusual circumstances  
15 establishing that converting or dismissing the case is not in the  
16 best interests of creditors and the estate," and the following  
17 additional circumstances are established:

18 (A) there is a reasonable likelihood that a plan will  
19 be confirmed within the timeframes established in  
20 Sections 1121(e) and 1129(e) of this title, or if such  
21 sections do not apply, within a reasonable period of  
22 time; and

23 (B) the grounds for converting or dismissing the case  
24 include an act or omission of the debtor other than  
25 under paragraph (4)(A)--

26 (i) for which there exists a reasonable justification  
27 for the act or omission; and

28 (ii) that will be cured within a reasonable period of  
time fixed by the court.

At the hearing on the Second Conversion/Dismissal Motion, the  
bankruptcy court in essence found that there was not a  
"reasonable likelihood" of plan confirmation "within a reasonable  
period of time." § 1112(b)(2)(A). We perceive no error in this  
finding, nor have the Bronsons pointed us to any. Thus, the  
exception set forth in § 1112(b)(2) does not apply under the  
facts of this case.

1 Here, the bankruptcy court correctly identified the two-step  
2 test it needed to consider in applying § 1112(b). As the court  
3 put it, it first had to determine if cause existed to act  
4 under § 1112(b); and second, if cause existed, it had to  
5 determine which remedy, conversion or dismissal, was in the best  
6 interest of creditors. See Nelson v. Meyer (In re Nelson),  
7 343 B.R. 671, 675 (9th Cir. BAP 2006); see also In re Prods.  
8 Int'l Co., 395 B.R. at 108; 7 COLLIER ON BANKRUPTCY, supra, at  
9 ¶ 1112.04[7].

10 In finding "cause" sufficient to satisfy the first step of  
11 the two-step test, the bankruptcy court first noted that the  
12 types of cause enumerated in § 1112(b)(4) are not exhaustive,  
13 citing St. Paul Self Storage Ltd. P'ship v. Port Authority  
14 (In re St. Paul Self Storage Ltd. P'Ship), 185 B.R. 580, 582 (9th  
15 Cir. BAP 1995). Indeed, we have held that bankruptcy courts  
16 enjoy wide latitude in determining whether the facts of a  
17 particular case constitute cause for conversion or dismissal  
18 under § 1112(b). See Pioneer Liquidating Corp. v. U.S. Trustee  
19 (In re Consol. Pioneer Mortg. Entities), 248 B.R. 368, 375 (9th  
20 Cir. BAP 2000), aff'd, 264 F.3d 803 (9th Cir. 2001); see also  
21 In re Greenfield Drive Storage Park, 207 B.R. at 916. This wide  
22 latitude is driven in part by common sense. Having presided over  
23 the often lengthy and complex reorganization proceedings, the  
24 bankruptcy court has a familiarity with the parties and the  
25 issues that puts it in the best position to make the "cause"  
26 determination under § 1112(b). In addition, the wide latitude  
27 afforded to bankruptcy courts is consistent with the legislative  
28 history accompanying § 1112(b): "the court will be able to

1 consider other factors as they arise, and to use its equitable  
2 powers to reach an appropriate result in individual cases.'"  
3 In re Consol. Pioneer Mortg. Entities, 248 B.R. at 375 (quoting  
4 H. Rept. No. 95-595, 95th Cong., 1st Sess. 405-06 (1977),  
5 reprinted in 1978 U.S.C.C.A.N. 6362).

6 In determining whether cause exists under § 1112(b), the  
7 bankruptcy court must balance the debtor's continuing desire to  
8 remain in chapter 11 against the prospects for a successful  
9 reorganization. Even before all confirmation-related litigation  
10 has played out, when it becomes apparent to the court that the  
11 debtor will not be able to confirm and effectuate a plan within  
12 the foreseeable future, the bankruptcy court should exercise its  
13 discretion under § 1112(b) to dismiss or convert. See 7 COLLIER  
14 ON BANKRUPTCY, supra, at ¶ 1112.04[5].

15 This is precisely how the bankruptcy court here assessed the  
16 Bronsons' reorganization prospects. The bankruptcy court  
17 essentially found that the Bronsons were fixated on the  
18 Deficiency Lawsuit and had given no consideration to moving  
19 forward with a new plan in the fourteen months since the court  
20 had sustained TMT's objections to their amended plan. Moreover,  
21 the court noted that, even if the Bronsons ultimately were to  
22 prevail in the Deficiency Lawsuit, such success in and of itself  
23 would not enable the Bronsons to confirm and effectuate a plan.  
24 The Bronsons have not disputed that they had over \$300,000 in  
25 general unsecured debt and over \$100,000 in administrative  
26 expenses. And yet, when the court asked the Bronsons to provide  
27 information on the status and value of assets that potentially  
28 could fund their plan, the Bronsons basically ignored the court's

1 inquiry.

2 In sum, after four years in chapter 11 and over 14 months  
3 since the Bronsons' last attempt to confirm a plan, the Bronsons  
4 demonstrated an inability or unwillingness to move forward with  
5 the plan process without first resolving their disputes with TMT.  
6 The bankruptcy court's conclusion that this constituted "cause"  
7 under § 1112(b) was not illogical, implausible or without support  
8 in the record. See Hinkson, 585 F.3d at 1261-62. Accordingly,  
9 the bankruptcy court did not err in finding cause to convert.

10 On appeal, the Bronsons insist that they ultimately would  
11 have prevailed in the Deficiency Lawsuit, either by way of a  
12 favorable ruling on the Fee Issues or a favorable ruling on the  
13 FMV Issue, or both. According to the Bronsons, once they  
14 prevailed, both TMT's objection to their amended plan and TMT's  
15 motion to convert no longer would have been an obstacle to their  
16 reorganization efforts.

17 For purposes of this appeal, we are willing to assume  
18 without actually deciding that the Bronsons would have prevailed  
19 in the Deficiency Lawsuit. But even if they would have prevailed  
20 in that lawsuit, this would not establish that the chapter 11  
21 issues - the plan defects and the Second Conversion/Dismissal  
22 Motion - would have simply disappeared. The Bronsons apparently  
23 believed that their success in the Deficiency Lawsuit would have  
24 established that TMT lacked standing. We disagree. Regardless  
25 of the outcome of the Deficiency Lawsuit, TMT already had an  
26 allowed claim for over \$25,000 in the Bronsons' bankruptcy case.  
27 The Bronsons never appealed either the Gila Judgment or the Gila  
28

1 Judgment Claim Allowance, from which TMT's allowed claim arose.<sup>17</sup>

2 By virtue of the Gila Judgment Claim Allowance, TMT was the  
3 holder of an allowed unsecured claim with a concrete stake in the  
4 outcome of the Bronsons' chapter 11 case and had standing to be  
5 heard on all aspects of the Bronsons' chapter 11 case. See  
6 § 1109(b). As a matter of law, the outcome of the Deficiency  
7 Lawsuit would not have altered the Gila Judgment or the Gila  
8 Judgment Claim Allowance because those were final judgments or  
9 orders that the Bronsons never appealed. See generally United  
10 Student Aid Funds, Inc. v. Espinosa, 130 S.Ct. 1367, 1376, 1380  
11 (2010) (holding that bankruptcy court's final order was binding  
12 and that appellant could not later collaterally attack that order  
13 when the appellant had notice of the proceedings leading up to  
14 the entry of the order but never appealed the order). In short,

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16  
17 <sup>17</sup>After the bankruptcy court granted the Gila Judgment Claim  
18 Allowance, TMT filed a new proof of claim - Claim Number 20 -  
19 with a copy of the Gila Judgment Claim Allowance attached.  
20 Presumably, TMT filed Claim Number 20 to ensure that its allowed  
21 claim would appear on the claims register and be properly  
22 accounted for in the Bronsons' bankruptcy case. Remember, the  
23 Gila Judgment Claim Allowance arose not from a proof of claim but  
24 rather from TMT's motion for allowance of an administrative  
25 expense. The Bronsons duly opposed TMT administrative expense  
26 motion, but the bankruptcy court ultimately decided, after  
27 holding a hearing on the motion, to deny the claim as an  
28 administrative expense but allow it as a general unsecured claim.  
Without TMT's filing of Claim Number 20, TMT's allowed unsecured  
claim based on the Gila Judgment Claim Allowance would not have  
shown up on the claims register. We acknowledge that the  
Bronsons have filed an objection to Claim Number 20 and that the  
bankruptcy court has not yet disposed of this claim objection.  
Nonetheless, we know of no legal doctrine that would permit the  
Bronsons to collaterally attack the Gila Judgment Claim  
Allowance, a final order that was not appealed, by filing an  
objection to Claim Number 20.

1 TMT would not have lost his standing to be heard in the Bronsons'  
2 chapter 11 case even if the Bronsons had prevailed in the  
3 Deficiency Lawsuit.

4 The Bronsons' reliance on the Deficiency Lawsuit also is  
5 misplaced for a second, independent reason. Prevailing in that  
6 lawsuit might have freed the Bronsons from some of TMT's claims,  
7 but it would not have established their ability to fund or  
8 effectuate a confirmable chapter 11 plan. Put another way, even  
9 if the Bronsons successfully rid themselves of TMT's deficiency  
10 claim, the bankruptcy court had an independent duty to deny plan  
11 confirmation unless the plan requirements set forth in § 1129(a)  
12 were satisfied. Varela v. Dynamic Brokers, Inc. (In re Dynamic  
13 Brokers, Inc.), 293 B.R. 489, 498-99 (9th Cir. BAP 2003) (stating  
14 that bankruptcy courts have an independent duty to verify that  
15 all confirmation requirements are satisfied, regardless of  
16 whether a creditor objects). But the Bronsons had no answer for  
17 the bankruptcy court's questions and concerns regarding how they  
18 were going to propose and effectuate a confirmable plan of  
19 reorganization satisfying all of § 1129(a)'s requirements. At  
20 the hearing on the Second Conversion/Dismissal Motion, the court  
21 noted all of the defects that had prevented confirmation of the  
22 Bronsons' amended plan fourteen months prior, and the Bronsons  
23 were unable to explain how those defects would be remedied. All  
24 they did was point to their expectation that they ultimately  
25 would prevail in the Deficiency Lawsuit. As indicated by our  
26 discussion set forth above, the Bronsons' response was wholly  
27 inadequate to address the court's questions and concerns.

28 In sum, the Bronsons' expected outcome in the Deficiency

1 Lawsuit did not demonstrate that they were capable of confirming  
2 a viable plan in the foreseeable future or that conversion to  
3 chapter 7 was inappropriate.

4         The Bronsons only explicitly make one other argument in  
5 their opening brief: that, if the bankruptcy court had honored  
6 their evidentiary hearing requests, they would have been able to  
7 demonstrate to the court that TMT and his counsel were guilty of  
8 misconduct and concealment.

9         The Bronsons' evidentiary hearing argument is difficult to  
10 follow. The court did hold evidentiary hearings in the  
11 Deficiency Lawsuit. As best we can tell from their appeal brief,  
12 the Bronsons are upset because the bankruptcy court did not  
13 convene separate hearings to address their allegations that TMT  
14 and his counsel were guilty of misconduct and concealment.  
15 Specifically, the Bronsons contend that TMT and his counsel  
16 failed to make required disclosures under Civil Rule 26(a),  
17 failed to respond to their informal discovery requests, and did  
18 not have a legitimate factual basis for claiming that the FMV of  
19 the Office Building was equal to or less than the amount of TMT's  
20 credit bid.

21         As a threshold matter, we note that the Bronsons have not  
22 pointed us to, nor has our independent review of the record  
23 revealed, that the Bronsons ever filed in the bankruptcy court a  
24 discreet formal motion seeking sanctions under either Rule 9011  
25 or under Rule 7037. In addition, it does not appear that the  
26 Bronsons ever complied with the procedural requirements of  
27 Rule 9011(b)(2).

28         But even if the Bronsons had satisfied the relevant



1 procedural requirements for relief under either Rule 7037 or  
2 9011, they still have not explained how they thereby could have  
3 overcome the fact that their amended plan did not satisfy the  
4 requirements set forth in § 1129(a), or the fact that they did  
5 not appeal and could not collaterally attack the Gila Judgment  
6 Claim Allowance, which conclusively established TMT's standing as  
7 a creditor in the Bronsons' chapter 11 case.

8 Furthermore, most of the Bronsons' concealment/misconduct  
9 allegations do not withstand scrutiny. For instance, the  
10 Bronsons complain most about the alleged failure of TMT and his  
11 counsel to disclose facts concerning TMT's foreclosure and  
12 subsequent resale of a parcel of commercial real property located  
13 on Broad Street in Globe, Arizona ("Broad Property"). According  
14 to the Bronsons, TMT purchased the Broad Property in June 2008 at  
15 a foreclosure sale for a credit bid of \$384,000 and resold the  
16 Broad Property to a third party in 2009 for \$420,000 ("Broad  
17 Sale"). The Bronsons contend that the the Broad Sale established  
18 the value of the Broad Property, which in turn established the  
19 value of the Office Building, by "extrapolation." Therefore, the  
20 Bronsons conclude, TMT and his counsel should have disclosed the  
21 Broad Property and its sale in the Deficiency Lawsuit and in  
22 various relief from stay proceedings preceding the Deficiency  
23 Lawsuit.

24 We disagree with the Bronsons' analysis and conclusion for  
25 at least three reasons. First, just because the Bronsons  
26 believed that the Broad Property was comparable to the Office  
27 Building does not necessarily make it so for valuation and  
28 disclosure purposes. Second, relief from stay proceedings are

1 contested matters, and there is no Civil Rule 26(a) duty to  
2 disclose in contested matters. See Rule 9014(c). And third, to  
3 the extent TMT and his counsel generally had a duty to disclose  
4 in the Deficiency Lawsuit under Civil Rule 26(a), the Bronsons  
5 already were aware of the key facts regarding the Broad Property  
6 and the Broad Sale by the time they filed their Civil  
7 Rule 12(b)(6) motion to dismiss, as they recited those facts in  
8 their dismissal motion. Consequently, that the bankruptcy court  
9 did not enforce this supposed disclosure duty in the Deficiency  
10 Lawsuit was at worst harmless error, when the Bronsons obviously  
11 already knew the key facts regarding the Broad Property and the  
12 Broad Sale by the time they filed their dismissal motion. As an  
13 appellate court, we must ignore harmless error. See Litton Loan  
14 Serv'g, LP v. Garvida (In re Garvida), 347 B.R. 697, 704 (9th  
15 Cir. BAP 2006).

16 The Bronsons also suggest in their appeal brief that the  
17 bankruptcy court "rushed to convert" their chapter 11 bankruptcy  
18 case to chapter 7 while at the same time depriving them of an  
19 evidentiary hearing on the FMV Issue in the Deficiency Lawsuit.  
20 As we explained above, however, no aspect of the Deficiency  
21 Lawsuit was going to resolve in the Bronsons' favor the defects  
22 in their amended plan or the apparent cause for conversion under  
23 § 1112(b).

24 Moreover, the bankruptcy court record tells a much different  
25 story regarding why the Second Conversion/Dismissal Motion was  
26 heard before the FMV Issue. The Bronsons brought two motions in  
27 the Deficiency Lawsuit that explicitly sought relief based on the  
28 FMV Issue. The first was their Civil Rule 12(b)(6) motion filed

1 in November 2009. The court denied this dismissal motion, and  
2 the Bronsons have not argued on appeal that the bankruptcy court  
3 erred by denying their dismissal motion. Nor do we independently  
4 perceive any error in this ruling. The Bronsons did not again  
5 bring a motion focusing on the FMV Issue until March 2012, when  
6 they filed a motion for a judgment on the pleadings. In the  
7 interim between these two filings the litigants hotly contested  
8 the Fee Issues and largely ignored the FMV Issue. Significantly,  
9 in September 2010, when they were still represented by counsel,  
10 the Bronsons filed their own summary judgment motion focusing on  
11 the Fee Issues. If they were anxious to refocus attention on the  
12 FMV Issue, we do not understand why they did not address the FMV  
13 Issue in that motion. At a minimum, this would have forced TMT  
14 to come forward and provide some evidentiary support for his  
15 lower valuation of the Office Building.

16 Meanwhile, the Second Conversion/Dismissal Motion was filed  
17 in October 2010, but the bankruptcy court did not hear it until  
18 April 2012, roughly 18 months later. We cannot fathom how the  
19 Bronsons can characterize this as a "rush to judgment" on the  
20 motion to convert. In any event, the record reflects that the  
21 setting of hearings on the FMV Issue and on the Second  
22 Conversion/Dismissal Motion was not a unilateral decision of the  
23 court governed by whim, but rather was a function of the parties'  
24 conduct and how they chose to litigate their disputes.

25 The Bronsons devote none of their appellate brief to arguing  
26 that the bankruptcy court erred in denying their Reconsideration  
27 Motion or erred in denying the recusal request they made in their  
28 reply in support of their Reconsideration Motion. We decline to

1 address these issues because the Bronsons chose not to argue them  
2 on appeal.<sup>18</sup> See Brownfield v. City of Yakima, 612 F.3d 1140,  
3 1149 n.4 (9th Cir. 2010) (citing Greenwood v. F.A.A., 28 F.3d  
4 971, 977 (9th Cir. 1994)); Van Zandt v. Mbunda (In re Mbunda),  
5 484 B.R. 344, 350 n.4 (9th Cir. BAP 2012).

6 **CONCLUSION**

7 For the reasons set forth above, we AFFIRM the bankruptcy  
8 court's conversion order and the bankruptcy court's order denying  
9 the Reconsideration Motion.

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<sup>18</sup>Nonetheless, we note that the bankruptcy court carefully  
27 considered whether recusal was appropriate during the June 1,  
28 2012 hearing on the Reconsideration Motion. Suffice it to say we  
perceive no error in this recusal analysis or in the court's  
decision against recusal.