NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP Nos. CC-09-1176-MkMoPa
	)	CC-09-1249-MkMoPa
BRENDA DUNN,	)	(Related Appeals)[*]
	)	
Debtor.	)	Bk. No. RS 08-28660-MJ
	)	
BRENDA DUNN,	)	
	)	
Appellant,	)	
	)	
v.	)	**MEMORANDUM**[**]
	)	
JASON M. RUND, Chapter 7 Trustee; CHASE HOME FINANCE, LLC,	)	
	)	
Appellees.	)	

Argued and Submitted on January 22, 2010
at Pasadena, California

Filed - February 4, 2010

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

Honorable Meredith A. Jury, Bankruptcy Judge, Presiding

Before: MARKELL, MONTALI and PAPPAS, Bankruptcy Judges.

[*]While not formally consolidated, these two related appeals were heard at the same time, were considered together, and we are issuing a single memorandum decision disposing of both appeals. A copy of the decision shall be filed in each appeal.

[**]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.

INTRODUCTION

Debtor Brenda Dunn ("Dunn") appeals two orders of the bankruptcy court, one dismissing her bankruptcy case and the other terminating the automatic stay. We AFFIRM both orders.

FACTS

Dunn filed a petition under chapter 13[1] on December 30, 2008. Shortly thereafter, Dunn filed her bankruptcy schedules, listing her interest in a single-family residence located in Riverside, California (the "Residence").[2] According to Dunn's schedules, the Residence had a value of $524,000 as of the date of the bankruptcy filing. The schedules further reflect that the

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[1]Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, and all "Civil Rule" references are to the Federal Rules of Civil Procedure. All local rule references are to the Local Rules of the United States Bankruptcy Court for the Central District of California.

[2]Dunn has provided us with little in the way of excerpts of record to work with. For instance, she did not provide us with copies of her bankruptcy schedules and statements, nor do we have the transcripts from the April 22 and April 29, 2009, preliminary hearings on the relief from stay motion. We nonetheless have exercised our discretion to independently review the electronic docket from the underlying bankruptcy case, and the imaged documents attached thereto. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989); Atwood v. Chase Manhattan Mrtg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003). Utilizing the entire bankruptcy court record, we have done our best to reconstruct what transpired without the benefit of the missing transcripts. See generally Ehrenberg v. Cal. State Fullerton (In re Beachport Enter.), 396 F.3d 1083, 1087-88 (9th Cir. 2005). The fact remains, however, that appellant Dunn bears the burden of providing us a complete record to evaluate her claims, and bears the consequences of failing to meet that burden. Cashco Financial Services, Inc. v. McGee (In re McGee), 359 B.R. 764, 774-75 (9th Cir. BAP 2006).

Residence was encumbered by a deed of trust securing a debt in the amount of $635,865.42 (the "Deed of Trust"), with a monthly payment obligation of $3,700, including impounds for real property taxes and insurance.

1. Events leading up to the order terminating the stay.

On March 23, 2009, Chase Home Finance, LLC ("Chase") filed a motion for relief from the automatic stay. Chase used the mandatory form required by Local Rule 4001-1(b)(1). In its form motion, Chase indicated that its request for relief from stay was based solely on § 362(d)(1), and that its interest in the Residence was not adequately protected.

The form motion itself does not provide any further specificity regarding the grounds for relief, but the attached form declaration indicates that Chase's motion was founded upon missed payments. According to the declaration, Dunn's monthly payment was $4,679.35. It also alleged that Dunn had not paid her mortgage in over eighteen months; it alleged that she had missed fifteen prepetition payments as well as three postpetition payments.[3] Chase's moving papers contained no allegations or evidence regarding the value of the Residence.

Dunn opposed the relief from stay motion. In her written opposition, Dunn asserted that the monthly payment amount was only $3,747.90. According to Dunn, she never received any notice from Chase that the interest rate had been adjusted on the Adjustable Rate Note ("Note") secured by the Deed of Trust. Dunn

[3]The aggregate amount of missed prepetition payments was $69,334.47, while the aggregate amount of missed postpetition payments was $14,038.05.

further asserted that she had sent certified funds to Chase in satisfaction of the three postpetition payments Chase claimed were in arrears. Dunn supported her assertion by attaching to her opposition copies of certified funds checks made payable to Chase, along with proof of mailing.

Preliminary hearings on the relief from stay motion were held on April 22, 2009, and April 29, 2009. Following the April 22, 2009 hearing, both parties filed supplemental declarations. Dunn's supplemental declaration, filed on April 22 after the first hearing, contained a more legible copy of the proof of mailing in an effort to support Dunn's assertion that Chase had received from Dunn certified funds in the amount of $7,495.80 – the amount that Dunn claimed she owed for her January 2009 and February 2009 postpetition payments. Dunn's supplemental declaration also attached copies of two letters, one dated March 27, 2009, in which she requested that Chase send her a full accounting of amounts paid and owed on the Note and Deed of Trust, and another dated January 9, 2009, in which she asked Chase for written verification that her postpetition payments to Chase did not include impounds for payment of real property taxes and insurance for the Residence.

Chase filed two supplemental declarations on April 27, 2009. In the first of these, the Supplemental Declaration of Adriana Rojas, Chase offered evidence that Dunn was notified in writing of two interest rate changes in accordance with the terms of the Note. The first notice of interest rate change, applicable to the postpetition monthly payments due for January through April 2009, became effective on November 1, 2008, and specified that

Dunn's new monthly payment amount was $4,679.35. The second notice of interest rate change, applicable to the postpetition monthly payment due for May 2009, became effective on May 1, 2009, and specified that Dunn's new monthly payment amount was $4,097.35. The Rojas Declaration also stated that Chase had no record of receipt of Dunn's $7,495.80 check.

The second declaration, that of Tami Scholtz (an employee of Chase's law firm), addressed Dunn's allegation that she delivered a $7,495.80 check to Chase. The declaration stated that Ms. Scholtz contacted the bank on which the check apparently was drawn, "Wells Fargo & Company," and spoke to "Laurie" from that bank's check verification department, who opined that the check was invalid, and who declined to verify it as genuine.

The only written account available to us of what transpired at the April 29, 2009 hearing is in the court's hearing minutes. The minutes indicate that the court set a continued hearing on the relief from stay motion for May 20, 2009. The minutes further indicate that the court directed Dunn to pay Chase an additional $11,571.05[4] in certified funds on or before the date

[4]While the bankruptcy court did not state in its minutes how it arrived at the sum of $11,571.05, that amount apparently reflects the following calculations, which are consistent with specific amounts due as set forth in the record:

1. The difference between the amount Dunn claimed to have paid postpetition for January through March 2009, and the amount charged by Chase for the same period:	$2,794.35
2. Plus, the postpetition payment due April 1, 2009:	$4,679.35
3. Plus, the postpetition payment due May 1, 2009:	$4,097.35
4. Total:	$11,571.05

of the continued hearing.

The bankruptcy court held its final hearing on the relief from stay motion on May 20, 2009. Unlike the prior two hearings, Dunn has provided us with the transcript from this hearing. The transcript indicates that the court accepted the evidence of Chase regarding duly notifying Dunn of the interest rate and payment amount changes, and credited Chase's evidence over Dunn's account of telephone conversations she had with Chase, which according to Dunn, led her to believe that the amount she tendered by check for January through March equaled the amount she owed for those months.

The court then turned to the dispute regarding the missing Wells Fargo check in the amount of $7,495.80. The court first noted that Chase had "no explanation for what happened with the cashier's check that was signed for by Mr. Collins [a Chase employee]." The court then asked Dunn if she had been able to trace receipt of the funds from the check, at which time the following colloquy ensued:

> MS. DUNN: Yes, I started to work on it, your Honor. But then, when I found out I was laid off from work, I converted to a Chapter 7, because I can't make the payments.
>
> THE COURT: Okay. I did note that this case is now Chapter 7. It was a 13 before. And thank you, because somewhere I had not actually connected that until right when you said it. Then the motion is granted. The stay is lifted.
>
> MR. DUARTE: Thank you, your Honor.
>
> THE COURT: Ms. Dunn, all I can say is, if you get reinstated to work, I would suggest you continue a dialog with Chase, but if you actually have been laid off work and have no income, it's going to be real hard to save your house. So the motion is granted.

The minutes from the May 20, 2009, hearing are pertinent. They indicate that the court granted the relief from stay motion based on Dunn's "default." That is to say, it appears that the basis on which the bankruptcy court granted relief was Dunn's default in her obligation to pay the $11,571.05 in certified funds.[5]

On May 21, 2009, the court entered its form order granting relief from the stay to enable Chase to pursue proceedings to foreclose upon and obtain possession of the Residence (the "Relief From Stay Order"). Notably, the Relief from Stay Order references both § 362(d)(1) and § 362(d)(2) as grounds for granting relief from the stay. We assume that the reference to § 362(d)(2) reflects a clerical error on the part of Chase, which drafted the order, because Chase never alleged § 362(d)(2) as grounds for relief,[6] nor did Chase ever allege or offer any evidence of an element essential to a request for relief under § 362(d)(2): that Dunn had no equity in the Residence.[7] Accordingly, we construe the Relief from Stay Order as granting relief solely under § 362(d)(1).

2. Events leading up to the case dismissal order.

On May 18, 2009, just prior to the final relief from stay hearing, Dunn voluntarily converted her case from chapter 13 to

[5]At oral argument before this panel, Dunn admitted that, as of the date of the May 20, 2009 hearing, she had not paid, nor was she able to pay at that time, the $11,571.05.

[6]Rule 9013 requires that all motions "state with particularity the grounds therefor . . . ." Chase's relief from stay motion did not state at all, with particularity or otherwise, that it was based on § 362(d)(2).

[7]See § 362(d)(2)(A); § 362(g)(1).

chapter 7, pursuant to § 1307(a). The conversion caused the bankruptcy court to file and serve on May 19, 2009, a Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors & Deadlines (the "First Meeting Notice"). The First Meeting Notice scheduled the meeting of creditors pursuant to § 341(a) for June 22, 2009, and advised Dunn pursuant to § 343 that "*[t]he Debtor . . . must be present at the meeting to be questioned under oath by the trustee and by creditors.*" (Italics in original.) The record reflects that Dunn did not appear for the June 22, 2009, § 341(a) meeting. Consequently, on June 24, 2009, the chapter 7 trustee issued a Notice of Continued Meeting of Creditors And Appearance of Debtor (the "Second Meeting Notice"). The Second Meeting Notice scheduled the continued § 341(a) meeting for July 15, 2009, and stated in relevant part:

> You [Dunn] failed to appear at the 341(a) meeting previously scheduled in your matter. You are further notified that in the event you do not appear at said time and place, a motion to dismiss your case will be filed by the Trustee.

On July 13, 2009, Dunn filed a request for voluntary dismissal of her chapter 7 case. According to the request, Dunn no longer desired to be in bankruptcy because she was a plaintiff in a state court lawsuit in Riverside County Superior Court.

On July 17, 2009, the chapter 7 trustee filed a request for dismissal of Dunn's bankruptcy case based on her failure to attend the June 22, 2009, meeting of creditors and the July 15, 2009, continued meeting of creditors. Based on the trustee's request for dismissal, the bankruptcy court clerk's office entered on July 20, 2009, a form Order and Notice of

Dismissal For Failure to Appear At 341(a) Meeting of Creditors (the "Dismissal Order"). Apparently not yet aware of the Dismissal Order, Dunn filed on that same date a Notice of Hearing in furtherance of her own request for voluntary dismissal of her case. The Notice of Hearing represented that a hearing had been scheduled on Dunn's dismissal request for August 18, 2009; however, the docket entry for the Notice of Hearing contains a clerk's office notation reflecting the dismissal of the case based on Dunn's non-appearance at the § 341(a) meetings.

Dunn timely appealed both the Relief from Stay Order, on May 22, 2009, and the Dismissal Order, on July 22, 2009.

On December 31, 2009, among other things, Dunn sought a stay pending appeal of Chase's foreclosure action. This panel denied that request on January 4, 2010, and denied her request for reconsideration of that denial on January 12, 2010, (which was combined with a request, also denied, that the members of the merits panel recuse themselves). On January 21, 2010, the day before oral argument, she appealed that order to the Ninth Circuit.

Notwithstanding the denial of a stay, Dunn indicated at oral argument that Chase had not completed its foreclosure sale of the Residence due, in part, to the fact that Dunn's co-owner recently filed for bankruptcy protection.[8]

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[8]Our review of the Central District of California's electronic docketing system indicates that the co-owner of the Residence, Ms. Sabrina Latrice Buck, filed a bankruptcy petition as of January 12, 2010, (See Central District of California Bankruptcy Case No. 10-10786).

(continued...)

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (G), and we have jurisdiction under 28 U.S.C. § 158.

On January 21, 2010, Dunn filed an appeal to the Ninth Circuit from our interlocutory order denying reconsideration entered January 12, 2010, which among other things denied Dunn's request that the judges assigned to determine the merits of Dunn's appeals recuse themselves. While the filing of a notice of appeal often divests us of jurisdiction, when the notice of appeal concerns an interlocutory order, as it does here, we retain jurisdiction. See Ruby v. Sec'y of the Navy, 365 F.2d 385, 388 (9th Cir. 1966).

ISSUES

1. Did the bankruptcy court correctly determine that "cause" existed to dismiss Dunn's chapter 7 bankruptcy case?

2. Was Dunn denied due process when her bankruptcy case was dismissed?

3. Did the bankruptcy court abuse its discretion in granting Chase relief from stay under § 362(d)(1)?

STANDARDS OF REVIEW

An order dismissing a chapter 7 bankruptcy case for "cause" is reviewed for abuse of discretion. Sherman v. SEC (In re Sherman), 491 F.3d 948, 969-70 (9th Cir. 2007). Similarly, an

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[8](...continued)

While Ms. Buck's interest is not disclosed in Dunn's bankruptcy schedules, other papers filed by the parties in Dunn's bankruptcy case reflect Ms. Buck's status as co-owner of the Residence, co-debtor on the Note and co-trustor of the Deed of Trust.

order granting relief from the automatic stay is reviewed for abuse of discretion. Kronemyer v. American Contractors Indem. Co. (In re Kronemyer), 405 B.R. 915, 919 (9th Cir. BAP 2009).

We apply a two-part test to determine whether the bankruptcy court abused its discretion. See United States v. Hinkson, 585 F.3d 1247, 1261-63 (9th Cir. 2009) (en banc). Under Hinkson, we must first review any legal issues raised on appeal (for instance, whether the bankruptcy court identified and utilized the correct legal rule) under the de novo standard of review. Id.

In the context of an appeal from an order of dismissal under § 707(a), one of the legal issues frequently presented is whether the *type* of conduct in question constitutes "cause" for dismissal, which issue we review de novo. Sherman, 491 F.3d at 969.

Assuming that we find no reversible error given the legal issues raised, Hinkson then requires us to review any factual issues raised under the clearly erroneous standard. See Hinkson, 585 F.3d at 1261-62. This standard requires us to affirm the court's factual findings unless those findings are "illogical, implausible, or without support in inferences that may be drawn from the record." Id. at 1263. To the extent that an appellant challenges the bankruptcy court's application of the facts to the relevant law, and to the extent that this application was essentially factual in nature, we similarly must affirm that application if it is logical, plausible and supported by inferences that may be drawn from the facts in the record. Id.

Due process challenges to a bankruptcy court's orders are reviewed de novo. Price v. Lehtinen (In re Lehtinen), 564 F.3d 1052, 1058 (9th Cir. 2009).

DISCUSSION

1. Dunn's failure to appear at the § 341 meeting of creditors was adequate grounds for dismissal of her chapter 7 case.

Section 707(a) governs dismissal of a chapter 7 case for cause. § 707(a) provides, in full:

> (a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including-
> (1) unreasonable delay by the debtor that is prejudicial to creditors;
> (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
> (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

The types of conduct enumerated in § 707(a) as cause are not exclusive. Neary v. Padilla (In re Padilla), 222 F.3d 1184, 1191 (9th Cir. 2000), partially superseded by statute on other grounds, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23. Whether a particular type of conduct can constitute cause under § 707(a) is a question of law that we review de novo. Id. Dunn has not raised this issue in her brief, so she arguably has waived it, but we will briefly address it. In the Ninth Circuit, we determine whether a particular type of conduct can constitute cause for dismissal via a two-step process:

> First, we must consider whether the circumstances asserted to constitute "cause" are "contemplated by any specific Code provision applicable to Chapter 7 petitions."

> . . . If the asserted "cause" is contemplated by a specific Code provision, then it does not constitute "cause" under § 707(a) . . . . If, however, the asserted "cause" is not contemplated by a specific Code provision, then we must further consider whether the circumstances asserted otherwise meet the criteria for "cause" for [dismissal] under § 707(a).

Sherman, 491 F.3d at 970 (citing Padilla, 222 F.3d at 1193-94).

No other section of the Bankruptcy Code provides a remedy for a debtor's failure or refusal to attend the § 341(a) meeting of creditors. Thus, unlike the types of conduct analyzed in Sherman and Padilla, a debtor's non-appearance at two or more § 341(a) meetings satisfies the first prong of the Sherman-Padilla test. As for the second prong, we agree with the bankruptcy court that failure to attend both the initial § 341(a) meeting and a continuance thereof constitutes cause under § 707(a).

Congress meant for the types of cause expressly listed in § 707(a) to be illustrative. See Padilla, 222 F.3d at 1191; Dinova v. Harris (In re Dinova), 212 B.R. 437, 442 (2d Cir. BAP 1997) (citing H.R.Rep. No. 595, 95th Cong., 1st Sess. 380 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 94 (1978)).[9] In other

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[9]Dinova holds that it is inappropriate to automatically dismiss a case on the ex parte request of the trustee based on the debtor's failure to attend the § 341(a) hearing. Id. at 443-45. According to Dinova, § 707(a) always requires a prior opportunity for hearing, after adequate notice, on whether there is cause for dismissal under the particular facts of each case. Id. at 445-46. In Tennant v. Rojas (In re Tennant), 318 B.R. 860 (9th Cir. BAP 2004), we upheld a procedure of the bankruptcy court where it sua sponte dismissed a chapter 13 case after a debtor failed to cure deficiencies in its bankruptcy filing within fifteen days by filing missing schedules and statements required by § 521(1). In Tennant, the bankruptcy court gave (continued...)

words, the types of cause enumerated in § 707(a) provide us with guidance as to whether non-appearance at § 341(a) meetings constitutes cause under § 707(a). The second and third types of cause enumerated in § 707(a) consist of narrowly-drawn conduct pointing to specific procedural requirements associated with bankruptcy filings and mandated by statute. See § 707(a)(2) (providing for dismissal for failure to comply with 28 U.S.C. § 1930); § 707(a)(3)(providing for dismissal for failure to comply with § 521(a)(1)). Quite similarly, § 343 requires a debtor to appear and submit to examination at the § 341(a) meeting of creditors, but does not specify what happens when the debtor does not comply. In short, it is appropriate to apply § 707(a) to debtors who do not comply with their duties under § 343.

The bankruptcy court reached the same conclusion, and implemented a Local Rule to effectuate that conclusion and to provide uniform procedures for dismissal for non-appearance at § 341(a) meetings. Local Rule 1017-2(b) specifies that non-appearance at the § 341 meeting constitutes cause for dismissal. Local Rule 1017-2(b) provides:

(...continued)
notice of the deficiency and the impending dismissal at the time of the deficient bankruptcy filing. In contrast, in Dinova, the only warning of dismissal was contained in the initial notice of the bankruptcy filing and the § 341 meeting, before any noncompliance had occurred. Tennant distinguishes Dinova on this basis. However, to the extent Dinova suggests that it never is appropriate to dismiss a bankruptcy case under § 707(a) based on ex parte procedure, Tennant implicitly rejected that notion.

> **(b) Dismissal of Chapter 7 Case for Failure to Attend Meeting of Creditors.** The failure of a chapter 7 debtor to appear at the initial meeting of creditors and any continuance thereof is cause for dismissal of the case. The court will dismiss the case upon the trustee's request for dismissal and certification that the debtor has failed to appear at two meetings of creditors.[10]

Dunn argues for the first time in her appeal brief that she telephoned the trustee's office on July 13, 2009, and that an employee in the trustee's office told her on that date that she did not need to appear at the continued § 341(a) meeting in light of her pending appeal from the relief from stay order.[11] This alleged advice was incorrect as a matter of law. A pending

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[10]As a remedy for any cases improvidently dismissed under Local Rule 1017-2(b), Local Rule 1017-2(d) provides a procedure for reinstatement of such cases:

> **(d) Reinstatement.**
>
> (1) A case dismissed for the failure to timely file a required document or for failure to appear at the meeting of creditors may be reinstated on motion of the petitioner pursuant to FBRP 9024, provided that all required documents are filed, or on motion of another party.
>
> (2) In the event a case is reinstated, the court may impose such sanctions as it deems just and reasonable.

Dunn did not seek relief under either Rule 9024 or Local Rule 1017-2(d), nor did any other party.

[11]Although the Panel generally declines to consider arguments not raised before the bankruptcy court, In re E.R. Fegert, Inc., 887 F.2d at 957, we deem it appropriate to consider this argument here. See id.; Pizza of Hawaii, Inc. v. Shakey's Inc. (In re Pizza of Hawaii, Inc.), 761 F.2d 1374, 1379 (9th Cir. 1985)(reviewing court has discretion to consider issues presented by record on appeal even if not raised before bankruptcy court).

appeal in a bankruptcy case does not deprive the bankruptcy court of jurisdiction over unrelated proceedings in the same bankruptcy case. Sherman, 491 F.3d at 967 (citing Bennett v. Gemmill (In re Combined Metals Reduction Co.), 557 F.2d 179, 201-03 (9th Cir. 1977)). Further, Dunn's decision to ignore the written warning of dismissal in the Second Meeting Notice based on her uncorroborated account of an alleged telephone conversation was a dubious choice at best.

In any event, this alleged telephone conversation is factually irrelevant for purposes of our analysis because, at the time it supposedly occurred, Dunn was affirmatively seeking voluntary dismissal of her bankruptcy case. Thus, the threat of impending dismissal for not attending the § 341 meeting logically would not have changed Dunn's motivation to attend the § 341 meeting regardless of whether or not she believed that the alleged telephone conversation superseded the written warning of dismissal contained in the Second Meeting Notice.

Dunn has not otherwise challenged the bankruptcy court's determination that non-appearance at two or more meetings of creditors constitutes cause for dismissal, and based on our analysis set forth above, we agree with the bankruptcy court that such non-appearance does constitute cause for dismissal under § 707(a).

2. The notice and opportunity for hearing afforded to Dunn was likely inadequate, but Dunn was not prejudiced thereby.

We have determined that Dunn's failure to appear at both the initial § 341(a) meeting and the continued § 341(a) meeting constituted cause for dismissal, but we also must determine

whether Dunn had adequate notice and opportunity for hearing before her case was dismissed. Section 707(a) in relevant part requires that a case be dismissed "only after notice and a hearing." Similarly, Rule 1017(a) specifies that a case shall not be dismissed without "a hearing on notice."[12]

The Bankruptcy Code gives some guidance as to what notice and hearing mean:

> (1) "after notice and a hearing", or a similar phrase-
>
> > (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but
> >
> > (B) authorizes an act without an actual hearing if such notice is given properly and if-
> >
> > > (i) such a hearing is not requested timely by a party in interest; or
> > >
> > > (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act[.]

§ 102(1).

Adequate notice and adequate opportunity for hearing is a flexible concept that depends upon the circumstances of the particular case. Tennant, 318 B.R. at 870-71. Further,

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[12]While Dunn has not specifically argued that she was denied due process, we must look at the issue independently, because a judgment may be void or unenforceable against a party if it was entered or obtained without due process of law. Owens-Corning Fiberglass Corp. v. Ctr. Wholesale, Inc. (In re Ctr. Wholesale, Inc.), 759 F.2d 1440, 1448 (9th Cir. 1985). "If the notice is inadequate, then the order is void." GMAC Mortgage Corp. v. Salisbury (In re Loloee), 241 B.R. 655, 661 (9th Cir. BAP 1999).

> [a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)(citations omitted). See also Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1978) ("[t]he purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing."). In other words, we must determine whether the notice given to Dunn was “reasonably calculated” to give her a meaningful opportunity to oppose the dismissal if she so desired.

In this case, we tend to doubt that Dunn had a meaningful opportunity to oppose the dismissal of her chapter 7 case. The First Meeting Notice did not warn at all of potential dismissal, and the Second Meeting Notice only said that, in the event that Dunn did not appear at the continued § 341(a) meeting, “a motion to dismiss your case will be filed by the trustee.”

If the purpose of this statement was to alert Dunn of a dismissal without a hearing, the content of this notice was misleading. The filing of a motion suggests that Dunn would be given notice of the motion and an opportunity to oppose the motion. Instead, the trustee apparently invoked the procedure

set forth in Local Rule 1017-2(b), which provides for dismissal upon ex parte request of the trustee, without the formalities of advance notice to interested parties or an opportunity to oppose before dismissal.

In In re Tennant, 318 B.R. at 870-71, we upheld a procedure, and the notice given thereunder, that provided for automatic, sua sponte dismissal of a chapter 13 case based on the debtor's failure to cure all defects in its bankruptcy filing by submitting within 15 days all missing schedules and statements required by statute. A comparison of the notice given to the debtor in Tennant with the notice given to Dunn, here, is instructive. In Tennant, the bankruptcy court's notice provided in relevant part that, if the debtor did not timely file the missing schedules and statements, the Court would "dismiss your case without further notice . . . ." 318 B.R. at 864.

In contrast, the trustee here did not advise Dunn that, if she failed to appear as specified in the Second Meeting Notice, the trustee would request and could receive immediate dismissal of Dunn's case without any opportunity for her to be independently heard. There was not even a reference to the Local Rule authorizing such a summary procedure.[13] As a consequence, Dunn may have been operating under the belief that she would know about any subsequent dismissal motion, and would have an opportunity to oppose it if she so desired.

[13]It may be that there was an independent obligation upon Dunn to know the content of the Central District of California's local rules, but given our disposition below, we need not reach this issue. Suffice it to say that, as a pro se litigant, Dunn did not know from the notices she received that she would be subject to a summary procedure.

That being said, however, we hold that any deficiency in the notice that the trustee gave to Dunn was harmless error given Dunn's then-pending requests to dismiss her case. When an appellant offers no evidence of prejudice, any deficiency in providing due process to the appellant is harmless. Rosson v. Fitzgerald (In re Rosson), 545 F.3d 764, 776 (9th Cir. 2008); City Equities Anaheim, Ltd. v. Lincoln Plaza Dev. Corp. (In re City Equities Anaheim, Ltd.), 22 F.3d 954, 959 (9th Cir. 1994). See also People of State of Ill. ex rel. Hartigan v. Peters, 871 F.2d 1336, 1340 (7th Cir.1989) ("As other courts have suggested, one circumstance we may consider in evaluating the sufficiency of notice is whether the alleged inadequacies in the notice prejudiced the appellant."); United Food & Commercial Workers Union v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984) (summons which specified incorrect amount of time for filing answer did not require dismissal of lawsuit absent showing of prejudice).

The record establishes that, at the time the trustee requested dismissal, and at the time the bankruptcy court granted the dismissal request, Dunn was affirmatively seeking voluntary dismissal of her chapter 7 case. Thus, even if the trustee had given adequate notice of his requested dismissal, Dunn still would not have opposed the trustee's dismissal request in this particular instance because Dunn also wanted the case dismissed at that time.

We are mindful of the fact that, within a few days of the Dismissal Order being entered, Dunn apparently changed her mind about the desirability of having her case dismissed and

thereafter filed her appeal from the Dismissal Order. Based on our review of her appeal brief, we suspect that Dunn became dissatisfied with the dismissal of her case when she learned from the order of dismissal its legal effect: that her discharge and the automatic stay both had been vacated as a result of the dismissal. However, due process generally does not require a moving party to advise adverse parties of the legal impact of the party's motion if the motion is granted; rather, our system of justice requires each party, with or without the assistance of counsel, to discern for themselves the potential legal consequences of pending judicial proceedings. See, e.g., Acequia, Inc. v. Clinton (In re Acequia, Inc.), 787 F.2d 1352, 1359-60 & n.12 (9th Cir. 1986) (concluding that shareholder had adequate notice that evidence of his misconduct was relevant to, and would be considered at, plan confirmation hearing, where disclosure statement filed in support of plan outlined allegations of shareholder's misconduct).

In sum, we conclude that the absence of any showing of prejudice is fatal to any claim that the Dismissal Order was issued in violation of Dunn's due process rights.

3. The bankruptcy court did not abuse its discretion when it granted Chase's motion for relief from stay.[14]

a. Procedural issue – lack of formal findings.

Rule 4001 provides that a motion for relief from the automatic stay is subject to the provisions governing contested

[14]We note that our affirmance of the Dismissal Order implicates § 362(c). Under that subsection, the stay terminated upon dismissal by operation of law regardless of the efficacy of the Relief From Stay Order. Thus, as soon as our judgment affirming the Dismissal Order becomes final and non-appealable, Dunn's appeal from the Relief From Stay Order becomes moot.

matters, set forth in Rule 9014. Rule 9014(c) incorporates, and makes applicable to contested matters, the provisions of Rule 7052, which, in turn, incorporates Civil Rule 52.

Civil Rule 52 provides in pertinent part:

> (a) Effect. In all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58. . . . It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court.

The bankruptcy court here made no formal findings, either orally or in writing. However, we have sufficient information from our review of the bankruptcy court record to afford us a full understanding of the issues raised by this appeal. Accordingly, any error by the bankruptcy court in not entering formal findings in the record was harmless. See Jess v. Carey (In re Jess), 169 F.3d 1204, 1208-09 (9th Cir. 1999); Swanson v. Levy, 509 F.2d 859, 860-61 (9th Cir. 1975).

b. Substantive issue – cause for relief from stay.

In relevant part, § 362(d)(1) enables a creditor to obtain an order terminating the automatic stay to pursue foreclosure proceedings against estate property "for cause." The type of cause explicitly referenced in § 362(d)(1) is lack of adequate protection, but it is only an example of cause for relief, rather than the exclusive grounds for relief, under § 362(d)(1). See Ellis v. Parr (In re Ellis), 60 B.R. 432, 435 (9th Cir. BAP 1985). What constitutes cause to terminate the stay is determined on a case-by-case basis. Delaney-Morin v. Day (In re Delaney-Morin), 304 B.R. 365, 369 (9th Cir. BAP 2003)

(citing MacDonald v. MacDonald (In re MacDonald), 755 F.2d 715, 717 (9th Cir. 1985)). The party seeking to preserve the stay, in this instance the debtor, has the burden of proof to establish that there is no cause to terminate the stay. In re Ellis, 60 B.R. at 435; § 362(g).

In Ellis, we held that a failure to make postpetition payments, by itself, can constitute cause under § 362(d)(1). Id.[15] Accord, In re Delaney-Morin, 304 B.R. at 369.[16]

Based on our review of the record, we conclude that the bankruptcy court did not abuse its discretion when it terminated the automatic stay for cause. Apparently, the bankruptcy court

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[15]Some courts have declined to terminate the stay in the face of unpaid postpetition payments if the debtor establishes that the creditor's interest is protected by an adequate equity cushion. See, e.g., In re Avila, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004). This line of cases is not apposite here because Dunn has offered no evidence that would tend to indicate that there is any equity cushion to protect Chase's interest in the Residence even if postpetition payments are not made. To the contrary, Dunn's schedules indicate that the Residence is fully encumbered by Chase's deed of trust.

[16]In Delaney-Morin, we reversed the bankruptcy court's relief from stay order because the bankruptcy court granted the motion after a preliminary hearing that was noticed as a non-evidentiary hearing. Id. at 371. The debtor therein was unable to attend this hearing and the movant alleged for the first time at this hearing, without presenting any competent evidence in support, the non-payment of certain postpetition amounts due. Id. at 370. We concluded that the bankruptcy court erred in granting the motion based on the non-payment of these postpetition amounts. Id. at 371. Here, by contrast, the record reflects that the $11,571.05 in postpetition payments due was raised at the April 29, 2009 preliminary hearing, and that Dunn had defaulted on payment of this amount as of the time of the May 20, 2009 final hearing. Since Dunn attended both of these hearings, was patently aware of the significance of the postpetition amounts due, and conceded at the final hearing that she couldn't make the payments, the facts of Delaney-Morin are distinguishable.

granted relief under § 362(d)(1) because, by the time of the final relief from stay hearing on May 20, 2009, Dunn had defaulted on post-petition payments in the aggregate amount of $11,571.05.[17] Further, Dunn disclosed during the May 20, 2009, hearing that she had been "laid off from work" and "can't make the payments" thereby admitting that she had no means to make postpetition payments going forward. Simply put, on the record before us, we perceive no error of law or fact in the bankruptcy court's decision to grant relief under § 362(d)(1), and thus we must affirm. Hinkson, 585 F.3d at 1261-63.

The only argument that Dunn makes in her appeal brief why relief from stay should not have been granted is that she converted her bankruptcy case from chapter 13 to chapter 7 just before the May 20, 2009 final hearing on the relief from stay motion. According to Dunn, in light of the appointment of a chapter 7 trustee, and in light of the trustee's interest in property of the estate (including the Residence), the bankruptcy court should not have granted Chase's relief from stay motion. In other words, Dunn argues that the conversion of her case and/or the appointment of a chapter 7 trustee somehow defeats Chase's relief from stay motion.

Dunn cites no authority to support her novel legal argument, nor are we aware of any. To the contrary, § 362(d)(1) applies

[17]To the extent that the May 20, 2009, hearing transcript suggests that the court terminated the stay on alternative or different grounds, that does not change our analysis. The record supports granting relief from stay based on the nonpayment of postpetition amounts due, and we may affirm on that basis. See Canino v. Bleau (In re Canino), 185 B.R. 584, 594 (9th Cir. BAP 1995).

not only to cases under chapter 13, but also to cases under chapter 7. See, e.g., In re MacDonald, 755 F.2d at 716-17.[18]

CONCLUSION

For the reasons set forth above, we AFFIRM the order dismissing Dunn's bankruptcy case, and AFFIRM the order terminating the stay to permit Chase to complete its foreclosure proceedings.

[18]Local Rule 4001-1(c)(1)(B)(ii) requires service of a motion for relief from stay on the chapter 7 trustee in chapter 7 cases, but the bankruptcy court can exercise its discretion to waive the requirement of a Local Rule "as it deems appropriate, in the interests of justice." Local Rule 1001-1(d). Requiring service in this case on the chapter 7 trustee (after Dunn converted the case to chapter 7 on the eve of the final relief from stay hearing) would have served no legitimate purpose, but rather would have needlessly delayed the conclusion of the relief from stay proceedings. Dunn's schedules indicated that there was no equity in the Residence for the chapter 7 trustee to garner for the benefit of the estate, nor have we seen anything else to suggest that there was any such equity.