

JUN 11 2010

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. WW-10-1060-HRuJu
)	
LEEWARD SUBDIVISION PARTNERS,)	
LLC,)	Bk. No. 09-18457-TTG
)	
Debtor.)	
<hr/>		
)	
LEEWARD SUBDIVISION PARTNERS,)	
LLC,)	
)	M E M O R A N D U M¹
Appellant,)	
)	
v.)	
)	
GDR LENDING, LLC,)	
)	
Appellee.)	
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Argued and Submitted on May 21, 2010
at Pasadena, California

Filed - Jun 11, 2010

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding

Before: HOLLOWELL, RUSSELL² and JURY, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. David E. Russell, Bankruptcy Judge for the Eastern District of California, sitting by designation.

1 Leeward Subdivision Partners, LLC (Leeward) is a single
2 asset real estate debtor who filed a chapter 11³ bankruptcy
3 petition to stave off foreclosure on its property. Leeward
4 proposed a chapter 11 plan, which drew an objection from its
5 primary secured lender, and which garnered no votes by any
6 impaired class. At a combined confirmation hearing and hearing
7 on the secured creditor's motion for relief from stay, the
8 bankruptcy court dismissed Leeward's bankruptcy case sua sponte.
9 In the order denying confirmation and dismissing the case, it
10 also barred Leeward from refiling a bankruptcy case for a period
11 of 90 days. Leeward appeals, contending that the bankruptcy
12 court had no authority to dismiss the case sua sponte or bar
13 refiling without giving Leeward notice and an opportunity to be
14 heard.

15 For the reasons set forth below, we **AFFIRM** the bankruptcy
16 court's denial of confirmation and sua sponte dismissal, but
17 **VACATE** the portion of the order that bars Leeward from refiling a
18 bankruptcy case for a period of 90 days.

19 I. FACTS

20 Leeward is a real estate developer whose sole asset is a
21 12-acre parcel of land near the ferry terminal in Anacortes,
22 Washington (the Property). The Property consists of a west side
23 (waterfront) parcel and an east side parcel. Leeward has spent
24 over seven years acquiring and developing the Property. At the
25 time of the petition date, the Property was surveyed and platted
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27
28 ³ Unless otherwise indicated, all chapter, section and rule
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 for three large condominium complexes (two on the west side) and
2 23 single-family homes.

3 Leeward and GDR Lending LLC (GDR) initially entered into a
4 partnership, in which GDR financed and managed Leeward's
5 development efforts for the Property. However, GDR terminated
6 the partnership after six months and the parties' relationship
7 converted to that of creditor-debtor pursuant to a Loan Request
8 Commitment (the Loan) and promissory note in favor of GDR for
9 \$4.6 million, secured by a first position deed of trust on the
10 Property. Among other things, the Loan provided for a full
11 payment balloon due in October 2007, which was later extended
12 until October 2008. The Loan funds were disbursed to Leeward in
13 advances beginning in August 2006, and ending July 30, 2008.

14 Leeward made no payments on the Loan. In the summer of
15 2009, GDR commenced non-judicial foreclosure proceedings; a
16 trustee's sale was scheduled for August 21, 2009. On August 20,
17 2009, Leeward filed its chapter 11 bankruptcy petition.

18 Leeward owed GDR \$5,763,176 as of November 12, 2009. On
19 November 18, 2009, Leeward filed a combined plan of
20 reorganization (the Plan) and disclosure statement (Disclosure
21 Statement).⁴ In the Plan and Disclosure Statement, Leeward
22 asserted the Property had a value of \$17 million. Its valuation
23 was based on its proposed full development of the Property, which
24

25 ⁴ The Plan provided for 5 classes of creditors: Class 1
26 Administrative Claims; Class 2 Priority Prepetition Wage Claims;
27 Class 3 Prepetition Tax Claims; Class 4 Secured Creditors,
28 divided into Class 4A for the purported first lien position
postpetition lender, Class 4B for GDR, and Class 4C for David
Lueche, an alleged second lienholder on the Property; and,
Class 5 General Creditors.

1 included the creation of 14 single-family homes from the
2 condominium site on the upper west side of the Property. In
3 order to finance the efforts necessary in revising the existing
4 permits, restructuring the lots for utilities and drainage, and
5 marketing the lots for sale, Leeward sought a primed postpetition
6 loan of \$140,000 from Inward Bound. It filed a motion to incur
7 postpetition financing on October 12, 2009.⁵

8 The Plan proposed to treat Inward Bound (if the court
9 granted Leeward's motion to incur postpetition financing) as a
10 "Class 4A Secured Creditor," receiving a first position lien on
11 the east side of the Property and paying Inward Bound from sales
12 after the eventual development of the east side of the Property.⁶
13 The Plan also proposed to transfer the west side of the Property
14 to GDR, a "Class 5A Secured Creditor," in full satisfaction of
15 its claim secured by the entire east and west parcels.

16 GDR filed a response to the Disclosure Statement on
17 December 11, 2009, contending that the Property was only worth
18 \$3.3 million based upon a commercial appraisal report it
19 submitted along with a declaration from the appraiser (the
20 Montgomery Declaration).⁷ On December 18, 2009, the bankruptcy
21

22 ⁵ The hearing on the motion to incur postpetition financing
23 was continued to the same time as the Confirmation Hearing.

24 ⁶ Inward Bound has offered to fund further development and
25 buy and service finished sites after the proposed development has
26 been completed.

27 ⁷ On December 14, 2009, Leeward filed a "Chapter 11 Plan,
28 Plan B," although it was not sent to creditors for consideration
and no disclosure statement for Plan B was ever filed or
approved. Plan B proposed to pay GDR \$3.3 million in full
satisfaction of its claim.

1 court held a hearing on the adequacy of the Disclosure
2 Statement.⁸ The bankruptcy court approved the Disclosure
3 Statement and set the confirmation hearing on the Plan for
4 January 22, 2009 (the Confirmation Hearing).

5 On December 22, 2009, GDR filed a motion for relief from
6 stay (the MRS) and set it for hearing with the Confirmation
7 Hearing (MRS Hearing). GDR argued that Leeward could not confirm
8 its Plan because GDR would not vote to accept any plan that
9 failed to provide full payment of its claim. The MRS sought
10 relief under §§ 362(d)(2)(B) and 362(d)(3). Leeward did not
11 respond to the MRS.

12 On January 15, 2009, all ballots and objections to the Plan
13 were due. On that date, GDR filed an objection to the Plan.
14 Also on that date, Leeward submitted an amended plan of
15 reorganization (the Amended Plan). On January 18, 2010, Leeward
16 filed a notice with the bankruptcy court of its intent to seek
17 confirmation of the Amended Plan at the Confirmation Hearing.
18 However, the Amended Plan does not appear to have been sent to
19 creditors for voting purposes. The Amended Plan altered the
20 Plan's development idea in that it proposed to further subdivide
21 the west and east side parcels for development and sale in order
22 to generate sufficient proceeds to pay off GDR.

23 Despite the fact that Leeward had no accepting class of
24 impaired creditors for either plan⁹, it argued that its Plan and
25

26 ⁸ No transcript of the hearing was submitted in the record
27 on appeal.

28 ⁹ No separate disclosure statement was filed or approved for
the Amended Plan and there is nothing in the record that

(continued...)

1 Amended Plan would be confirmable because it had buyers lined up
2 for developed parcels. The developed parcels, however, depended
3 upon revising Leeward's current permits and approvals, which
4 Leeward asserted would be sought at a February 2, 2010 meeting
5 with the City of Anacortes (the City). However, GDR submitted a
6 declaration, the morning of the Confirmation Hearing, from the
7 City's planning department stating there were no submissions by
8 Leeward to meet with the City (the Larsen Declaration). The
9 bankruptcy court denied Leeward the opportunity to rebut the
10 Larsen Declaration with testimony from Leeward's principal.

11 The bankruptcy court ended the Confirmation hearing by
12 stating:

13 THE COURT: I'm really troubled by the statement of the
14 planning commission that nothing's on the
15 calendar. Somebody's blowing smoke in my
16 [LEEWARD:] ear. I mean, he can testify all he wants - -
17 THE COURT: I'd like to - -
18 No, you're not going to do it. All right.
19 Here's what I'm going to do. No, I'm all
20 done. Here's what I'm going to do in this
21 case. I'll deny confirmation of this plan.
22 We're talking about the original plan here.
23 That's not acceptable. It's not feasible.
24 And I'm going to dismiss this case. It seems
to me that this debtor has been just playing
around with other people's money for a long
period of time. You know, we're so far into
a project, and he's just telling us that, Now
I might have a preliminary hearing before the
council, so then the application can go
forward. Nonsense. The case is dismissed.

25 H'rg Tr., January 22, 2010, at 15: 19-25-16:1-8.

27 ⁹(...continued)
28 demonstrates Leeward sent out new ballots for the Amended Plan.
Therefore, we assume the "Ballot Analysis" filed by Leeward
related to the Plan.

1 On January 26, 2010, the bankruptcy court entered an Order
2 Denying Confirmation of Plan And Dismissing Case (the Denial
3 Order). The Denial Order denied confirmation of the Plan,
4 dismissed the case, and barred Leeward from filing a petition in
5 bankruptcy for a period of 90 days.

6 Leeward filed a Verified Motion for Reconsideration
7 (Reconsideration Motion) on February 9, 2010, asserting that it
8 had new evidence in the form of a declaration from the assistant
9 director of planning for the City stating a meeting to review
10 Leeward's revised development plans and begin the permitting
11 application process had taken place. The bankruptcy court denied
12 the Reconsideration Motion without a hearing on February 11,
13 2010. Leeward timely appealed.

14 GDR scheduled a foreclosure sale for March 12, 2010.
15 However, on February 23, 2010, Leeward filed with the Bankruptcy
16 Appellate Panel a motion for stay pending appeal. The motion was
17 granted without bond on March 2, 2010.

18 **II. JURISDICTION**

19 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
20 § 157(b)(2)(L). We have jurisdiction under 28 U.S.C. § 158.

21 **III. ISSUE**

22 Did the bankruptcy court err by dismissing Leeward's
23 bankruptcy case sua sponte and barring Leeward from refileing for
24 a period of 90 days?

25 Did the bankruptcy court err in denying the Reconsideration
26 Motion?

27 **IV. STANDARDS OF REVIEW**

28 The bankruptcy court's decision whether to confirm a
proposed plan of reorganization is reviewed for an abuse of

1 discretion, but the determination that the plan satisfies the
2 confirmation requirements necessarily requires the bankruptcy
3 court to make certain factual findings, which are reviewed under
4 a clear error standard. Computer Task Group, Inc. v. Brotby
5 (In re Brotby), 303 B.R. 177, 184 (9th Cir. BAP 2003); Acequia,
6 Inc. v. Clinton (In re Acequia, Inc.), 787 F.2d 1352, 1358
7 (9th Cir. 1986). Clear error exists when the reviewing court is
8 left with a definite and firm conviction that a mistake has been
9 committed. In re Brotby, 303 B.R. at 184.

10 The standard for the adequacy of factual findings is
11 "whether they are explicit enough on the ultimate issues to give
12 the appellate court a clear understanding of the basis of the
13 decision and to enable it to determine the grounds on which the
14 trial court reached its decision." Leavitt v. Soto (In re
15 Leavitt), 171 F.3d 1219, 1223 (9th Cir. 1999).

16 We review the bankruptcy court's decision to dismiss a case
17 under an abuse of discretion standard. Id. The bankruptcy
18 court's denial of a Rule 60(b) motion is also reviewed under an
19 abuse of discretion standard. Cossio v. Cate (In re Cossio),
20 163 B.R. 150, 153 (9th Cir. BAP 1994), aff'd, 56 F.3d 70
21 (9th Cir. 1995).

22 We apply a two-part test to determine whether the bankruptcy
23 court abused its discretion: (1) we review de novo whether the
24 bankruptcy court "identified the correct legal rule to apply to
25 the relief requested" and (2) if it did, whether the bankruptcy
26 court's application of the legal standard was illogical,
27 implausible or "without support in inferences that may be drawn
28 from the facts in the record." United States v. Hinkson,
585 F.3d 1247, 1261-63 (9th Cir. 2009).

1 Finally, we may affirm the bankruptcy court on any ground
2 supported by the record. In re Leavitt, 171 F.3d at 1223.

3 **V. DISCUSSION**

4 A. Leeward Was Required To File A Plan With A Reasonable
5 Possibility Of Being Confirmed

6 Leeward's sole asset is the Property; this is a single asset
7 real estate case. 11 U.S.C. § 101(51B)¹⁰. Under the Bankruptcy
8 Code, single asset real estate debtors are subjected to special
9 requirements.

10 In 1994, Congress became concerned about the delay the
11 bankruptcy process had on the rights of secured lenders to
12 foreclose on real property. Therefore, it enacted § 362(d)(3) to
13 minimize the financial risk of secured lenders by requiring
14 single asset real estate debtors with secured debts of less than
15 \$4 million to, within 90 days, file a viable plan of
16 reorganization or begin making contractual interest payments.
17 See generally, Kenneth N. Klee, ONE SIZE FITS SOME: SINGLE ASSET REAL
18 ESTATE BANKRUPTCY CASES, 87 Cornell L. Rev. 1285, 1291-92 (2002);
19 11 U.S.C. § 362(d)(3). The failure to satisfy the 90-day
20 deadline resulted in mandatory stay relief for the moving
21 creditor.

22 In 2001, Congress repealed the \$4 million cap. Now,
23 pursuant to § 362(d)(3), all single asset real estate debtors

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25 ¹⁰ "The term 'single asset real estate' means real property
26 constituting a single property or project, other than residential
27 real property with fewer than 4 residential units, which
28 generates substantially all of the gross income of a debtor who
is not a family farmer and on which no substantial business is
being conducted by a debtor other than the business of operating
the real property and activities incidental." 11 U.S.C.
§ 101(51B).

1 must propose a plan within 90 days, which has a "reasonable
2 possibility of being confirmed within a reasonable time" or pay
3 the secured creditor interest at the contractual non-default
4 rate. If the single asset real estate debtor can do neither, it
5 loses the protection of the § 362(a) stay and "[in] essence, the
6 Chapter 11 case is over." Id. at 1308. Thus, the bankruptcy
7 court must grant stay relief to a moving creditor if the single
8 asset real estate debtor fails to comply with § 362(d)(3).
9 Centofante v. CBJ Dev., Inc. (In re CBJ Dev., Inc.), 202 B.R.
10 467, 470 (9th Cir. BAP 1996).

11 Section 362(d)(3) was added to "ensure that the automatic
12 stay provision [was] not abused, while giving the debtor the
13 opportunity to create a workable plan of reorganization."
14 NationsBank, N.A. v. LDN Corp. (In re LDN Corp.), 191 B.R. 320,
15 326 (Bankr. E.D. Va. 1996) citing S.Rep. No. 168, 103rd Cong.,
16 1st Sess. (1993). But where "debtors with little hope of
17 successfully reorganizing delay the bankruptcy process while
18 secured creditors are left helplessly on the sidelines,"
19 § 362(d)(3) provides relief. Id. at 327.

20 It is in this context that the Confirmation Hearing took
21 place.

22 B. Leeward's Plan Was Not Confirmable

23 In order for a chapter 11 plan to be confirmed, the plan
24 proponent must demonstrate, by a preponderance of the evidence,
25 that the requirements of § 1129 are satisfied. United States v.
26 Arnold & Baker Farms (In re Arnold & Baker Farms), 177 B.R. 648,
27 654 (9th Cir. BAP 1994), aff'd, 85 F.3d 1415 (9th Cir. 1996)
28 cert. denied 519 U.S. 1054 (1997).

1 Leeward could not meet its burden because there was no
2 consenting class of impaired claims that accepted the Plan.
3 Therefore, Leeward could not satisfy either § 1129(a)(8) or
4 § 1129(a)(10). Furthermore, the bankruptcy court determined that
5 the Plan was not feasible and therefore did not satisfy
6 § 1129(a)(11). A plan is considered not feasible if there is no
7 reasonable probability of success. In re Brotby, 303 B.R. at
8 191. "The purpose of section 1129(a)(11) is to prevent
9 confirmation of visionary schemes. . . ." Pizza of Hawaii, Inc.
10 v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.), 761 F.2d 1374,
11 1382 (9th Cir. 1985).

12 The bankruptcy court found that there was no reasonable
13 probability of success for Leeward's Plan because it lacked the
14 approvals and permits necessary to effectuate its development
15 proposal:

16 I'll deny confirmation of this plan. . . . It's not
17 feasible. And I'm going to dismiss this case. It
18 seems to me that this debtor has been just playing
19 around with other people's money for a long period of
20 time. You know, we're so far into a project, and he's
21 just telling us that, Now I might have a preliminary
22 hearing before the council, so then the application can
23 go forward. Nonsense.

24 Hr'g Tr., January 22, 2010, at 15: 19-25-16:1-8.

25 Notably, Leeward does not argue that the bankruptcy court
26 erred in making the determination that the Plan was not feasible.
27 Indeed, Leeward provided no evidence to the bankruptcy court that
28 it had a consenting impaired class, or that it could proceed with
the Plan's development proposal. Therefore, the facts presented
in the record support the bankruptcy court's finding that the

1 Plan was unconfirmable. Accordingly, the bankruptcy court did
2 not abuse its discretion in denying confirmation of the Plan.

3 At issue, however, is whether the bankruptcy court's denial
4 of confirmation of the Plan supported its sua sponte dismissal of
5 the bankruptcy case.

6 C. The Bankruptcy Court Had Authority To Dismiss Leeward's
7 Bankruptcy Case Sua Sponte

8 A bankruptcy court may dismiss a bankruptcy case under
9 § 305:

10 (a) The court, after notice and a hearing, may dismiss a
11 case under this title, or may suspend all proceedings in a
12 case under this title, at any time if --

13 (1) the interests of creditors and the debtor would be
14 better served by such dismissal or suspension[.]

15 11 U.S.C. § 305(a)(1).

16 Additionally, the dismissal of a debtor's chapter 11 case is
17 dealt with in § 1112, which provides for either the conversion of
18 a chapter 11 case to a chapter 7 case or the dismissal of a
19 chapter 11 case under certain circumstances. 11 U.S.C.

20 § 1112(a), (b). Section 1112(b) provides that:

21 on request of a party in interest, and after notice and
22 a hearing, absent unusual circumstances specifically
23 identified by the court that establish that the
24 requested conversion or dismissal is not in the best
25 interest of creditors and the estate, the court shall
26 convert a case . . . or dismiss a case . . . ,
27 whichever is in the best interests of creditors and the
28 estate, if the movant establishes cause."

11 U.S.C. § 1112(b)(1). Thus, if a movant demonstrates cause,
the court must grant relief and determine whether dismissal,
conversion, or appointment of a trustee is in the best interest
of creditors and the estate.

1 Although there was no motion pending before the bankruptcy
2 court to convert or dismiss Leeward's bankruptcy case under
3 either § 305 or § 1112(b), a bankruptcy court may dismiss a case
4 sua sponte if there is cause to do so. Argus Group 1700, Inc. v.
5 Steinman (In re Argus Group 1700, Inc.), 206 B.R. 757, 763 (E.D.
6 Penn. 1997) (collecting cases); In re A-1 Specialty Gasolines,
7 Inc., 238 B.R. 876, 878 (Bankr. S.D. Fla. 1999); C-TC 9th Ave.
8 P'ship v. Norton Co. (In re C-TC 9th Ave. P'ship), 113 F.3d 1304,
9 1312 (2d Cir. 1997). The authority of the court to act on its
10 own is contained in Section 105. Tennant v. Rojas (In re
11 Tennant), 318 B.R. 860, 869 (9th Cir. BAP 2004) (collecting
12 cases). Under § 105, the bankruptcy court has the power to:

13 issue any order, process, or judgment that is necessary
14 or appropriate to carry out the provisions of this
15 title. No provision of this title providing for the
16 raising of an issue by a party in interest shall be
17 construed to preclude the court from, sua sponte,
taking action or making any determination necessary or
appropriate to enforce or implement court orders or
rules, or to prevent an abuse of process.

18 11 U.S.C. § 105(a).

19 "Cause" is defined and enumerated (in a non-exclusive list)
20 in § 1112(b)(4). Marsch v. Marsch (In re Marsch), 36 F.3d 825,
21 828 (9th Cir. 1994). Section 1112(b) "provides the bankruptcy
22 court with the requisite authority to terminate a chapter 11 case
23 based on a showing of unreasonable delay, or continuing losses
24 coupled with the absence of a reasonable likelihood of
25 rehabilitation, or inability to effectuate a plan of
26 reorganization." United Sav. Ass'n of Tex. v. Timbers of Inwood
27 Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs.,
28 Ltd.), 808 F.2d 363, 371 (5th Cir. 1987) (en banc), aff'd

1 484 U.S. 365 (1988). The bankruptcy court must evaluate each
2 debtor's viability and rate of progress in light of the "best
3 interest of the creditors and the estate." Id. at 372; 11 U.S.C.
4 § 1112(b). Therefore, if the debtor's business is so troubled
5 that reorganization is not viable, a conversion or dismissal may
6 be in the best interests of creditors and the estate. Id. at
7 373.

8 The bankruptcy court's findings, along with the facts in the
9 record, support the inference that the Plan had no reasonable
10 possibility of being confirmed within a reasonable time. The
11 following facts are undisputed: (1) Leeward filed bankruptcy on
12 the eve of GDR's foreclosure sale and filed its Plan the 90th day
13 after filing bankruptcy, the last day permissible under
14 § 362(d)(3); (2) GDR waited until after that time to file its
15 MRS; (3) Leeward had very limited cash assets and required the
16 approval (which it did not yet have) of postpetition financing in
17 order to implement its Plan; (4) no impaired class of creditors
18 voted in favor of the Plan; (5) GDR, the major (and possibly the
19 only) secured creditor, voted against confirmation and had filed
20 an unopposed motion for stay relief.¹¹ Moreover, the bankruptcy
21 court found that Leeward was "playing around with other people's
22 money for a long time" and was in no position to effectuate its
23 Plan because the necessary permits had not been submitted for the
24 City's approval.

25 Under these facts, the bankruptcy court did not abuse its
26 discretion when it dismissed Leeward's bankruptcy case.
27 Furthermore, GDR was entitled to stay relief as a matter of law
28

¹¹ GDR asserts that the Class 4C creditor is unsecured.

1 as a result of the bankruptcy court's determination that Leeward
2 did not have a reasonable possibility of confirming its Plan and
3 because it is undisputed that Leeward had not made monthly
4 interest payments to GDR. As noted earlier, in a single asset
5 real estate case, stay relief effectively terminates the chapter
6 11 case. Therefore, we agree with GDR that dismissal was no
7 different than the mandatory grant of stay relief.

8 D. Leeward Was Afforded Adequate Notice And Hearing Before Its
9 Case Was Dismissed

10 Leeward argues that the bankruptcy court could not sua
11 sponte dismiss the bankruptcy case, or bar Leeward from refileing
12 a bankruptcy case for a period of 90 days, without providing
13 Leeward with notice and an opportunity to respond.

14 Leeward contends that Rule 1017 prevents the bankruptcy
15 court from dismissing a case without notice and hearing:

16 (a) Voluntary Dismissal; Dismissal For Want of Prosecution
17 or Other Cause. . . . a case shall not be dismissed on
18 motion of the petitioner, for want of prosecution or
other cause, or by consent of the parties, before a
hearing on notice as provided in Rule 2002.

19 Fed. R. Bankr. P. 1017(a). Rule 2002 requires 20-day notice to
20 the debtor and all creditors and trustees. Fed. R. Bankr.
21 P. 2002(a), (k).

22 However, Rule 1017 is only applicable if the court dismisses
23 a case on a motion. "It does not govern the procedure if the
24 court chooses to proceed under its own authority to act sua
25 sponte in accordance with Section 105(a)." In re Tennant,
26 318 B.R. at 870. Leeward's contention that Rule 9014¹² prevents
27

28 ¹² Rule 9014 mandates that contested matters (such as
(continued...))

1 sua sponte dismissal fails for the same reason. Any conflict
2 between the Rules and § 105(a) is resolved in favor of the
3 Bankruptcy Code. Id. Therefore, as long as the bankruptcy court
4 followed a permitted procedure under § 105(a) of the Code, the
5 Rules do not prohibit a sua sponte dismissal. Id.

6 Section 105(a) empowers the bankruptcy court to enforce the
7 Bankruptcy Code. Both § 305 and § 1112(b) provide for dismissal
8 "after notice and a hearing." 11 U.S.C. §§ 305(a); 1112(b)(1).
9 "Notice and a hearing" is defined in § 102 as "after such notice
10 as is appropriate in the particular circumstances, and such
11 opportunity for a hearing as is appropriate in the particular
12 circumstances." 11 U.S.C. § 102(1)(A).

13 In addition to the statutory requirement of notice, there is
14 a constitutional requirement of due process. Great Pac. Money
15 Markets, Inc. v. Krueger (In re Krueger), 88 B.R. 238, 241
16 (9th Cir. BAP 1988). To meet the requirements of due process,
17 notice must be "reasonably calculated under all of the
18 circumstances to apprise interested parties of the pendency of
19 the action and afford them an opportunity to present their
20 objections." Mullane v. Central Hanover Bank & Trust Co.,
21 339 U.S. 306, 314 (1950).

22 The Bankruptcy Appellate Panel has held that "a dismissal
23 without notice and an opportunity to be heard [is not]
24 appropriate where substantive issues are to be determined."
25 In re Tennant, 318 B.R. at 870. The bankruptcy court here did

26 _____
27 ¹²(...continued)
28 dismissal) "be requested by motion with reasonable notice and
opportunity for hearing afforded to the party against whom relief
is sought." Fed. R. Bankr. P. 9014.

1 make substantive findings. It found that Leeward was unable to
2 demonstrate it had any reasonable likelihood of rehabilitation or
3 ability to effectuate a plan of reorganization and, was "playing
4 around with other people's money" by continuing its case to the
5 detriment of its creditors. However, this substantive
6 determination was made in the context of the Confirmation
7 Hearing, which was set with the MRS Hearing, both of which were
8 properly noticed.

9 Leeward argues that it was "blindsided" by the bankruptcy
10 court's dismissal and that "there were no findings or conclusions
11 entered which warranted the bankruptcy court's abrupt order which
12 circumvented procedural safeguards embedded in the Code and
13 Rules." Appellant's Opening Brief at 4, 19. However, it is
14 difficult to understand how Leeward could have been blindsided by
15 the dismissal given that when Leeward proposed the Plan and set
16 the Confirmation Hearing, Leeward was on notice that the
17 bankruptcy court could make a determination that the Plan did not
18 have a reasonable possibility of being confirmed.

19 Furthermore, because the Confirmation Hearing was also set
20 with the MRS Hearing, Leeward was on notice that the automatic
21 stay could lift since it had not filed any opposition to GDR's
22 MRS. Leeward's Plan did not have the consent of its major
23 secured creditor and otherwise failed to satisfy the requirements
24 of § 1129(a)(8) and (a)(10) and (a)(11). Leeward had not
25 commenced interest payments to GDR. Thus, Leeward knew or should
26 have known dismissal (or conversion) of the case was inevitable.
27 See, e.g., United Student Aid Funds, Inc. v. Espinosa, - U.S. -,
28 130 S.Ct. 1367 (2010) (standing for the proposition that the

1 failure to follow a procedural rule is not a denial of
2 constitutional due process where a party has actual notice).

3 Leeward was afforded the statutory and constitutional due
4 process considerations of notice and hearing because it had
5 notice of the Confirmation Hearing and the MRS Hearing and had
6 the opportunity to present arguments that the Plan had a
7 reasonable likelihood of being confirmed. See, e.g., Pleasant
8 Pointe Apartments, Ltd. v. Kentucky Hous. Corp., 139 B.R. 828,
9 832 n.5 (W.D. Ky. 1992) (stay relief motion requesting "any other
10 relief" and pleadings were sufficient to put debtor on notice
11 that its good faith and possible dismissal were at issue); In re
12 Townco Realty Inc., 81 B.R. 707, 710 (Bankr. S.D. Fla. 1987)
13 (dismissed sua sponte on denial of plan confirmation in single
14 asset real estate case when debtor was unable to demonstrate plan
15 had reasonable probability of success); In re C-TC 9th Ave.
16 P'ship, 113 F.3d at 1312 (debtor had opportunity to address issue
17 of bad faith raised by motion even if no formal evidentiary
18 hearing was held).

19 This is not a situation where the bankruptcy court "must be
20 careful not to deny the protection of the Bankruptcy Code to a
21 debtor whose legitimate efforts at financial rehabilitation may
22 be hidden". In re Strug-Div., LLC, 375 B.R. 445, 449 (Bankr.
23 N.D. Ill. 2007). Nor is it a situation where the debtor should
24 have been afforded the opportunity to demonstrate that its case
25 was legitimate despite being unable to confirm the Plan. See,
26 e.g., In re Argus Group 1700, Inc., 206 B.R. at 761. Leeward is
27 a single asset real estate debtor who did not timely propose a
28 reasonable plan or pay GDR monthly interest payments. As a

1 result, it could not legitimately pursue a reorganization effort
2 over GDR's objection after the 90-day deadline of § 362(d)(3).
3 See, e.g., In re A-1 Specialty Gasolines, Inc., 238 B.R. at 878
4 (sua sponte conversion after stay relief granted because no
5 reasonable possibility of reorganization remained).

6 However, the imposition of the 90-day bar to refiling was
7 not properly noticed. The bankruptcy court made no determination
8 at the time it dismissed Leeward's case at the Confirmation
9 Hearing that a bar to refiling was warranted. With no warning
10 that a bar would be instituted and with no opportunity for
11 Leeward to challenge the imposition of the bar, the bankruptcy
12 court failed to provide Leeward appropriate notice. Accordingly,
13 the bankruptcy court abused its discretion when it barred Leeward
14 from refiling for a period of 90 days.

15 E. The Bankruptcy Court Abused Its Discretion When It Did Not
16 Grant Reconsideration Of The 90-Day Bar To Refiling

17 Leeward filed a Reconsideration Motion under Local Rule
18 9013(d)(2)(h) and Rule 9024, which incorporates Fed. R. Civ. P.
19 60 (Federal Rule 60). Federal Rule 60(b) provides relief from a
20 final judgment or order for reasons including mistake,
21 inadvertence, surprise or excusable neglect; newly discovered
22 evidence; or, any other reason that justifies relief. Fed. R.
23 Civ. P. 60(b)(1), (b)(2), (b)(6).

24 Leeward contended the bankruptcy court relied on the Larsen
25 declaration, which it alleged provided inaccurate information.
26 Leeward submitted as "new evidence" a declaration from the
27 Assistant Director of Planning, Community and Economic
28 Development for the City stating that the preliminary design and
review meeting occurred on February 2, 2010. Leeward contended

1 that as a result of the meeting, the City was expected to approve
2 the restructuring and the application for short-platting the
3 Property for single-family homes. However, the declaration also
4 states that Leeward has not made any formal application to the
5 City to divide the Property or revise its earlier permits.

6 In any event, this "new evidence" is irrelevant to the
7 bankruptcy court's determination that Leeward failed to present a
8 confirmable Plan. The bankruptcy court determined that
9 regardless of whether a preliminary meeting with the City was
10 scheduled, the permits and approvals for development were not in
11 place in order to effectuate the Plan. More importantly, Leeward
12 had to overcome the insurmountable problem of not having a
13 consenting class of impaired creditors vote for the Plan as
14 required by § 1129(a)(10). Therefore, the "new evidence" was not
15 of "such magnitude that production of it earlier would have been
16 likely to change the disposition of the case." Feature Realty,
17 Inc. v. City of Spokane, 331 F.3d 1082, 1093 (9th Cir. 2003)
18 (citation omitted).

19 Leeward also argued it was entitled to relief because the
20 bankruptcy court committed error when it did not provide notice
21 and hearing before the dismissal and bar to refiling. Because we
22 have determined that the Confirmation Hearing and the MRS Hearing
23 provided Leeward appropriate and adequate notice that its case
24 could be converted or dismissed, the bankruptcy court did not err
25 in dismissing Leeward's case sua sponte. However, for the
26 reasons set forth above, the Reconsideration Motion should have
27 been granted with respect to the 90-day bar to refiling.

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VI. CONCLUSION

For the foregoing reasons, we AFFIRM the Denial Order in part, but VACATE the portion of the Denial Order to the extent that it bars Leeward from refiling bankruptcy for a period of 90 days.¹³

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¹³ The issuance of this disposition dissolves the stay pending appeal that was granted by order on March 2, 2010.