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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-11-1542-HPaD
)
 6 TATIANA KHAN,) Bk. No. 11-36527
)
 7 Debtor.)
)
 8)
 9 TATIANA KHAN,)
)
 10 Appellant,) **MEMORANDUM¹**
)
 11 v.)
)
 12 JASON M. RUND, Chapter 7)
 13 Trustee; UNITED STATES)
 14 TRUSTEE,)
)
 Appellees.)

Argued and Submitted on May 17, 2012
at Pasadena, California

Filed - June 6, 2012

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

Honorable Sandra P. Klein, Bankruptcy Judge, Presiding

Appearances: Joseph Scott Klapach of Klapach & Klapach argued
 for Appellant Tatiana Khan; Brad D. Krasnoff of
 Lewis Brisbois Bisgaard & Smith LLP argued for
 Appellee Jason M. Rund, Chapter 7 Trustee.

Before: HOLLOWELL, PAPPAS, and DUNN, 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.

1 The debtor appeals the order of the bankruptcy court
2 converting her chapter 11 bankruptcy case to chapter 7. We
3 AFFIRM.

4 **I. FACTS**

5 Tatiana Khan (the Debtor) is an interior designer. Her
6 business, Chateau Allegre, specializes in offering clients rare
7 and valuable antiques and artwork. The Debtor houses her
8 collection of antiques and artwork (the Inventory) at her
9 commercial business property in West Hollywood, California (the
10 Property). The Property also serves as the Debtor's residence.

11 In 2010, the Debtor was indicted for fraud after selling a
12 drawing to Victor Sands (Sands) for \$2,000,000. She represented
13 that the drawing was an original Picasso; instead, it had been
14 forged by an art restorer at her direction. As part of a plea
15 agreement, the Debtor stipulated that she "persuaded clients
16 . . . to purchase art, antiques, and decorative objects by making
17 false representations and material omissions of fact about their
18 origins and their values." The Debtor agreed to pay restitution
19 to Sands, including giving him the rights to any property
20 acquired as a result of her illegal activities, namely, a
21 painting by Willem de Kooning that she bought with the proceeds
22 of the fake Picasso. The Debtor's obligation to Sands was
23 secured by a deed of trust on the Property.

24 The Debtor also had been involved in a dispute with Calvin
25 and Joyce Brack (the Bracks). The Bracks alleged that the Debtor
26 sold them over \$1,500,000 in improperly attributed antiques. To
27 settle the matter, the Debtor agreed to repurchase the antiques
28 for the original purchase price. However, the Debtor did not

1 have the funds available to purchase them without a committed
2 buyer. Consequently, the Bracks hold a claim against the Debtor
3 for \$1,569,225; the Bracks continue to possess the antiques until
4 the debt is paid.

5 On April 28, 2011, Sands scheduled a foreclosure on the
6 Property. The same day, the Debtor filed a chapter 11 bankruptcy
7 petition, but the case was dismissed when the Debtor failed to
8 file required schedules and documents. Sands rescheduled the
9 foreclosure to June 30, 2011. The Debtor filed this chapter 11
10 case on June 20, 2011.

11 According to the Debtor's bankruptcy schedules, the
12 Inventory was valued at \$4,219,045. The Property was listed with
13 a value of \$5,000,000 with Sands' secured claim against it in the
14 amount of \$2,400,057. The Debtor listed the Bracks and the
15 Internal Revenue Service (IRS), which held a priority tax lien in
16 the amount of \$742,810,² as her primary creditors. The bulk of
17 the Debtor's other debts were unsecured claims related to unpaid
18 medical bills.³

19 On July 1, 2011, Sands filed a motion for relief from stay
20 in order to foreclose on the Property. Sands alleged that the
21 Property had been appraised for only \$1,820,000, and that there
22

23
24 ² The IRS filed an amended proof of claim on July 29, 2011,
25 in the secured amount of \$863,864.18 for the 2006 and 2007 tax
26 period. However, by November 2011, the IRS had corrected errors
in the Debtor's 2007 tax return and adjusted its claim to
\$450,025.11.

27 ³ The Debtor suffered a heart attack in 2005, and has since
28 undergone heart surgery. She is 71 years old and in relatively
poor health.

1 were 16 liens (mostly tax liens) against the Property totaling
2 over \$1,000,000.⁴ Sands' unopposed motion was granted, and on
3 July 28, 2011, Sands foreclosed on the Property.

4 On July 27, 2011, a representative from the Office of the
5 United States Trustee (UST) conducted a site visit of the
6 Property. He reviewed the Debtor's books and records and
7 discussed the Debtor's lack of compliance with UST requirements
8 for debtors-in-possession, including providing copies of
9 insurance declarations for all policies covering the Property and
10 the Inventory. He further noted that the Debtor appeared to be
11 in poor health and raised the issue of whether a trustee should
12 be appointed in the case. Later that day, the Debtor's attorney
13 agreed to the appointment of a trustee. The bankruptcy court
14 approved the parties' stipulation; Jason Rund was appointed as
15 the chapter 11 bankruptcy trustee (Trustee) on August 4, 2011.

16 The following day, the Trustee inspected the Property. He
17 brought with him an antiques auctioneer to look at the Inventory
18 and offer a preliminary assessment of its value and condition.
19 The auctioneer estimated that the value of the Inventory was
20 between \$700,000 and \$1,000,000, significantly less than the
21 value attributed to it by the Debtor. On August 9, 2011, the
22 Trustee inspected the Property again, bringing a second antiques
23 auctioneer to assess the Inventory. The second auctioneer made
24 an initial valuation of the Inventory in excess of \$1,000,000,
25 however, both auctioneers emphasized that a full assessment could

26
27 ⁴ Although never submitted to the bankruptcy court, the
28 record on appeal reveals that the Debtor had the Property
appraised in July 2011, for \$2,650,000.

1 only be made once the Inventory was removed from the Property,
2 itemized and inspected.

3 On August 8, 2011, the Trustee filed a motion to convert the
4 Debtor's case from chapter 11 to chapter 7 (Conversion Motion).
5 The Trustee also filed, the same day, an ex-parte application for
6 an order shortening time for a hearing on the Conversion Motion.

7 The Trustee contended that the Property had been foreclosed
8 on by Sands and that the business was not operating - nor could
9 it operate since Sands was proceeding to evict the Debtor from
10 the Property. He asserted that the only foreseeable outcome in
11 the case was an orderly liquidation of the Inventory. The
12 Trustee argued that liquidation would be more efficient and
13 beneficial to the creditors of the estate under chapter 7 because
14 it would (1) save the cost of the plan confirmation process, and
15 (2) allow for the subordination of the IRS's tax lien in favor of
16 the estate's creditors pursuant to § 724(b).

17 The Trustee also sought conversion because he was concerned
18 the Inventory could be damaged or disappear if not liquidated
19 promptly. He noted that once removed to an auction house, the
20 Inventory would be secure and insured, which was not otherwise
21 the case. The bankruptcy court granted the ex-parte application
22 on August 9, 2011, and a hearing was set for August 24, 2011
23 (Hearing Date).

24 On August 11, 2011, the Trustee filed a motion for turnover
25 of the Inventory and to remove the Debtor from the Property
26 (Turnover Motion). Also the same day, the Trustee filed an ex-
27 parte application to hear the motion on shortened time. The
28 Trustee made similar arguments to those made in the Conversion

1 Motion. He contended that due to the foreclosure, there was an
2 enhanced risk of damage or disappearance of the Inventory, for
3 which the Debtor had not provided proof of insurance. The
4 Trustee sought access and turnover of the Inventory to move it to
5 a location where it could be held, evaluated, and auctioned. The
6 Trustee also requested the bankruptcy court to order the Debtor
7 to vacate the Property, using the U.S. Marshals Service to assist
8 with eviction if necessary.

9 The bankruptcy court granted the Trustee's ex-parte
10 application to expedite the hearing on the Turnover Motion,
11 setting it for the Hearing Date.

12 On August 23, 2011, the Debtor's current attorney was
13 substituted for her previous attorney. Also on that date, the
14 bankruptcy court posted a tentative ruling on the Conversion
15 Motion and the Turnover Motion, which was sent to the parties the
16 following day. In the tentative ruling, the bankruptcy court
17 determined that the IRS had not been properly served with the
18 motions and continued the Hearing Date to September 7, 2011,
19 providing that any objections to the motions be submitted by
20 August 31, 2011.

21 Crossing paths with the bankruptcy court's decision to
22 continue the Hearing Date was the Debtor's August 24, 2011, ex-
23 parte application and motion to continue the Hearing Date (Motion
24 to Continue). The Debtor asserted that her previous attorney did
25 not notify her of the Conversion Motion or even counsel her on
26 the ramifications of filing bankruptcy and the requirements of
27 chapter 11. Therefore, she requested a 30-day continuance of the
28 Hearing Date in order to fully respond to the Trustee's

1 contentions. The Debtor contended that the Trustee's assessment
2 of the Inventory's value was grossly inaccurate and requested
3 time to demonstrate the true value of the Inventory.

4 The bankruptcy court entered an order denying the Motion to
5 Continue on August 29, 2011. On August 31, 2011, the Debtor
6 filed an opposition to the Conversion Motion. She did not file
7 an opposition to the Turnover Motion.

8 The Debtor argued against conversion on the basis that her
9 creditors would receive a greater payout if she were able to
10 liquidate the Inventory through the structure of her design
11 business rather than through an auction. The Debtor also argued
12 there was no cause to convert the case because her business was
13 operating and was not dependent on the Property, and because she
14 had the assets and future project commitments to successfully
15 reorganize. She supplied an "Inventory List" cataloging the
16 various items in her collection totaling over \$6,000,000 to
17 demonstrate that the Trustee severely underestimated the value of
18 the Inventory.

19 Alternatively, the Debtor requested dismissal of her case on
20 the basis that her debts were less than what had been scheduled,
21 negating the need for bankruptcy relief. She submitted a
22 declaration from her accountant stating that after corrections to
23 the Debtor's 2007 tax returns and negotiations with the IRS, her
24 tax obligation could be significantly reduced. Furthermore, the
25 Debtor alleged that the debt to Sands had already been
26 extinguished.⁵

27
28 ⁵ The Debtor alleged the market value of the de Kooning
(continued...)

1 Just prior to the September 7, 2011 hearing, the bankruptcy
2 court issued a ten-page written tentative ruling indicating that
3 the Conversion Motion would be granted and the Turnover Motion
4 partially granted (Tentative Ruling). The bankruptcy court
5 determined that there was a substantial or continuing loss to or
6 diminution of the estate because the Property had been lost to
7 foreclosure and, furthermore, given the value of the Inventory
8 (as stated by the Trustee and the auctioneers) and the amount of
9 the IRS's claim, the IRS could seek relief from the stay and gain
10 possession of the Debtor's personal property, including the
11 Inventory.

12 The bankruptcy court also determined that the Debtor failed
13 to provide admissible evidence establishing her ability to
14 rehabilitate or reorganize. As a result, the bankruptcy court
15 found that cause existed to convert the Debtor's chapter 11 case
16 to chapter 7. It further found that it was in the best interest
17 of creditors to convert the case because the IRS's tax lien could
18 be subordinated in a chapter 7. Finally, the bankruptcy court
19 agreed with the Trustee that the Inventory should be turned over
20 to an auction house so that it could be secure, insured, and
21 assessed. However, it declined to order the U.S. Marshals
22 Service to force the Debtor to vacate the Property.

23 The hearing on the Conversion Motion and the Turnover Motion

24
25 ⁵(...continued)
26 painting was \$4,000,000-\$7,000,000 and could "fetch a price
27 significantly above \$11 million." She alleged she had the right,
28 for a limited time, to sell the painting, which was disregarded
by Sands, who sold it for \$350,000. The Debtor therefore alleged
that if Sands had not breached their agreement, the debt to him
would have been satisfied.

1 was held on September 7, 2011. At the close of the hearing, the
2 bankruptcy court announced that it would adopt its Tentative
3 Ruling. Before a final order was entered, the Debtor filed a
4 motion for reconsideration (Reconsideration Motion). The
5 Reconsideration Motion was filed September 14, 2011, along with
6 an ex-parte application to have the motion considered on
7 shortened time.

8 In the Reconsideration Motion, the Debtor asserted that she
9 had new evidence to establish that her business could reorganize,
10 including letters from clients substantiating future business
11 commitments and letters demonstrating the ability to rent
12 alternative warehouse space for the business. The bankruptcy
13 court denied the Reconsideration Motion on September 20, 2011.
14 Also on that date, the bankruptcy court entered the final orders
15 on the Conversion Motion and the Turnover Motion. The Debtor
16 filed this timely appeal.⁶

17
18 ⁶ The Debtor's notice of appeal (NOA) stated that the order
19 being appealed was the "Debtor's Motion to Reconsider and Vacate
20 Court's Order granting Trustee's Motion in part to Convert Case
21 Under Chapter 11 of the Bankruptcy Code to Case Under Chapter 7
22 of the Bankruptcy Code and Trustee's Motion (a) Turnover of
23 Certain Items of Personal Property and (b) to Remove Debtor."
Attached to the NOA was the Order Denying Motion to Reconsider
and the bankruptcy court's order granting, in part, the Turnover
Motion. An Amended NOA was filed October 5, 2011, but it was the
same as the NOA.

24 We construe the NOA as an appeal of the bankruptcy court's
25 decision to convert the case because the Debtor never filed an
26 objection to the Turnover Motion in the bankruptcy court.
27 Moreover, the arguments made by the Debtor in the Reconsideration
28 Motion challenged only the conversion. Furthermore, she does not
address the Turnover Motion in her appellate brief. Accordingly,
she has waived any argument that the bankruptcy court abused its
discretion in granting in part the Turnover Motion, and we do not
(continued...)

1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction under 28 U.S.C.
3 § 157(b)(2)(A) and § 1334(b). We have jurisdiction under
4 28 U.S.C. § 158(a)(3).

5 **III. ISSUES**

6 Did the bankruptcy court abuse its discretion in converting
7 the Debtor's chapter 11 case to chapter 7?

8 Did the bankruptcy court abuse its discretion in denying the
9 Reconsideration Motion?

10 **IV. STANDARDS OF REVIEW**

11 The bankruptcy court's decision to convert a chapter 11 case
12 to chapter 7 is reviewed for an abuse of discretion. Pioneer
13 Liquidating Corp. v. U.S. Trustee (In re Consol. Pioneer Mortg.
14 Entities), 264 F.3d 803, 806 (9th Cir. 2001); Johnston v. JEM
15 Dev. Co. (In re Johnston), 149 B.R. 158, 160 (9th Cir. BAP 1992).
16 A trial court's decision to deny a continuance is reviewed for
17 abuse of discretion. Orr v. Bank of Am., 285 F.3d 764, 783 (9th
18 Cir. 2002). Additionally, the bankruptcy court's denial of a
19 motion for reconsideration is reviewed for an abuse of
20 discretion. Arrow Elec., Inc. v. Justus (In re Kaypro), 218 F.3d
21 1070, 1073 (9th Cir. 2000); Sewell v. MGF Funding, Inc. (In re
22 Sewell), 345 B.R. 174, 178 (9th Cir. BAP 2006).

23 Under the abuse of discretion standard of review, we first
24 determine de novo whether the bankruptcy court identified the

25 _____
26 ⁶(...continued)
27 address the merits of that order in this Memorandum. Captain
28 Blythers, Inc. v. Thompson (In re Captain Blythers, Inc.),
311 B.R. 530, 539 (9th Cir. BAP 2004) (issue not adequately
addressed on appeal is deemed abandoned).

1 correct legal rule to apply to the relief requested. United
2 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).
3 If the bankruptcy court identified the correct legal rule, we
4 then determine under the clearly erroneous standard whether its
5 factual findings and its application of the facts to the relevant
6 law were "(1) illogical, (2) implausible, or (3) without support
7 in inferences that may be drawn from the facts in the record."
8 Id. (internal quotation marks omitted).

9 V. DISCUSSION

10 A. Conversion Motion

11 1. There Must Be Cause To Convert

12 The statutory authority for conversion of a chapter 11
13 bankruptcy case is found in § 1112(b), which provides that the
14 bankruptcy court shall convert or dismiss a case, whichever is in
15 the best interests of creditors and the estate, for cause.⁷
16 11 U.S.C. § 1112(b)(1). Section 1112(b)(4) describes what
17 constitutes cause. However, the enumerated "causes" are not
18 exhaustive, and "the court will be able to consider other factors
19 as they arise, and to use its equitable powers to reach an
20 appropriate result in individual cases." In re Consol. Pioneer
21 Mortg. Entities, 248 B.R. at 375. Thus, the bankruptcy court has
22

23 ⁷ Section 1112(b)(1) provides:

24 Except as provided in paragraph (2) and subsection (c), on
25 request of a party in interest, and after notice and a hearing,
26 the court shall convert a case under this chapter to a case under
27 chapter 7 or dismiss a case under this chapter, whichever is in
28 the best interests of creditors and the estate, for cause unless
the court determines that the appointment under section 1104(a)
of a trustee or an examiner is in the best interests of creditors
and the estate.

1 wide discretion in determining what constitutes cause adequate
2 for conversion under § 1112(b). Id.; Chu v. Syntron Bioresearch,
3 Inc. (In re Chu), 253 B.R. 92, 95 (S.D. Cal. 2000); Greenfield
4 Drive Storage Park v. Calif. Para-Prof'l Servs., Inc. (In re
5 Greenfield Drive Storage Park), 207 B.R. 913, 916 (9th Cir. BAP
6 1997).

7 Here, the bankruptcy court found that cause existed due to
8 the substantial or continuing loss to or diminution of the estate
9 and the absence of a reasonable likelihood of rehabilitation.

10 11 U.S.C. § 1112(b)(4)(A). Both elements must be met. The
11 bankruptcy court found there was substantial loss to the estate
12 because the Property, a scheduled \$5,000,000 asset, had been lost
13 to foreclosure and that "[d]epending on the actual value of
14 Debtor's personal property, the IRS may have a right to relief
15 from the stay to gain possession of the [Inventory]." Tentative
16 Ruling at 5.

17 In making its decision, the bankruptcy court accorded the
18 Debtor's valuation of the Inventory no weight. It found that the
19 Debtor's valuation of the Inventory was not credible given her
20 admission in the criminal case of misrepresenting the value of
21 antiques in her collection. We give special deference to a trial
22 court's credibility determinations. Rule 8013; Anderson v. City
23 of Bessemer City, N.C., 470 U.S. 564, 573 (1985). In any event,
24 the Debtor's evidence of the value of the Inventory was weak.
25 She provided only her own statement of the Inventory's value and
26 a print-out, which listed the individual items comprising the
27 Inventory with an asserted total value of \$6,000,000.

28 Although it was clear that the Inventory was the most

1 significant remaining asset of the Debtor's bankruptcy estate,
2 and that any full appraisal of the Inventory required a fair
3 amount of time, the Debtor did not take steps to value the
4 Inventory prior to the Conversion Motion. Nor did the Debtor
5 provide information from a third party who may have offered a
6 limited assessment of the Inventory's value or offered a limited
7 assessment or appraisal as to any particular pieces that the
8 Debtor believed had been significantly underestimated by the
9 Trustee's auctioneers. Furthermore, the Debtor's contention that
10 the Inventory was worth over \$6,000,000 was inconsistent with the
11 Debtor's bankruptcy schedules, which, two months earlier, valued
12 the Inventory at \$4,200,000.

13 The bankruptcy court found that past sales of antique pieces
14 were of little use in assessing the value of the current
15 Inventory. The bankruptcy court was presented with rough
16 estimates from two auctioneers and the Debtor's unsupported
17 statement regarding the value of the Inventory. We find no abuse
18 of discretion in the bankruptcy court's adoption of the Trustee's
19 evidence of the Inventory's value, especially in light of the
20 bankruptcy court's determination that the Debtor's opinions of
21 value were not credible. See Anderson, 470 U.S. at 574 ("Where
22 there are two permissible views of the evidence, the factfinder's
23 choice between them cannot be clearly erroneous.").

24 Furthermore, the bankruptcy court found that it was
25 speculation on the part of the Debtor that the tax liability
26 would be significantly reduced. The Debtor submitted a
27 declaration from her accountant stating that errors for the 2006
28 and 2007 tax periods were recently corrected and that the

1 accountant believed the Debtor's tax obligation could be reduced
2 to between \$50,000 and \$375,000. But there was no documentation
3 demonstrating the corrected liability figures or corresponding
4 documentation provided by the IRS that indicated it would
5 contemplate negotiating a reduction in the tax liability.

6 Because the auctioneers' assessment of the Inventory's value
7 was as low as \$700,000, the bankruptcy court was concerned that
8 the IRS could successfully exercise its rights to the Inventory,
9 and the estate would lose the asset. Accordingly, the bankruptcy
10 court found there was substantial or continuing loss or
11 diminution of the estate due to the loss of the Property and the
12 potential loss of the Inventory. Given the facts in the record,
13 that finding was not clearly erroneous.

14 Section 1112(b)(4)(A) also requires the bankruptcy court to
15 find that there is an absence of a reasonable likelihood of
16 rehabilitation. The issue of rehabilitation for purposes of
17 § 1112(b)(4)(A) "is not the technical one of whether the debtor
18 can confirm a plan, but, rather, whether the debtor's business
19 prospects justify continuance of the reorganization effort."
20 In re Wallace, 2010 WL 378351 at *4 (Bankr. D. Idaho Jan. 26,
21 2010).

22 The bankruptcy court determined that it was "highly
23 unlikely" that the Debtor would be able to continue to buy and
24 sell antiques given the loss of the Property. Our review of the
25 record supports the bankruptcy court's finding that there was
26 little likelihood that the Debtor could reorganize her business.

27 The record shows that the Debtor lacked the income and sales
28 to demonstrate a reasonable likelihood of rehabilitation. For

1 example, the Debtor's evidence regarding her ability to
2 rehabilitate her business included her declaration, which stated:

3 My business is not dependant upon the [Property].
4 Truly, I do not want to move but if forced to move that
5 does not mean my business cannot continue. If my
6 merchandise is not liquidated but rather I am allowed
7 to continue my business in another location, I believe
8 my business can survive and thrive.

9 I say this because during the [sic] 2009 and 2010 while
10 I was recuperating from my heart surgery, my income was
11 approximately \$100,000.00 per year. . . . Given that my
12 health has improved I anticipate that if allowed to
13 continue selling my merchandise I will be able to earn
14 significantly more than \$100,000.00 per year.

15 Declaration of Tatiana Khan, August 31, 2011 at ¶ 15, 16.

16 Again, in her opening brief on appeal, the Debtor argues
17 that her business has "rebounded to their prior levels" after
18 "taking a hit from the economic recession." However, the
19 documents submitted by the Debtor with her declaration indicate
20 that while the Debtor had gross sales of \$4,062,558 and income of
21 \$446,390 in 2006, and gross sales of \$1,101,318 and income of
22 \$212,282 in 2007 (even after suffering her heart attack), her
23 gross sales dropped to \$82,323 with an income of \$63,877 in 2009;
24 and, slid even further in 2010, with gross sales of only \$55,000
25 and income of \$50,040.

26 The Debtor asserted that she had clients who had committed
27 to design projects that would generate between \$1,700,000 and
28 \$2,200,000 in revenue in the coming year, but there was no
independent evidence such as declarations from the clients to
substantiate the design commitments.⁸ The Debtor also did not
present evidence to demonstrate that she could afford to rent or

⁸ The Debtor alleged that her clientele demanded anonymity.

1 move the Inventory and her business to another location. She
2 only presented evidence establishing that a warehouse space might
3 be available to her. Accordingly, the bankruptcy court's finding
4 that the Debtor's rehabilitation was unlikely was not clearly
5 erroneous. Therefore, we conclude that the bankruptcy court did
6 not err in finding that cause existed to warrant conversion or
7 dismissal pursuant to § 1112(b)(4)(A).

8 Moreover, there is a separate basis in the record to support
9 the bankruptcy court's determination that cause existed. The
10 Debtor's Schedule J indicates that she has no expenses for
11 insurance. She did not provide the Trustee with any
12 documentation indicating that the Property or the Inventory was
13 insured. Section 1112(b)(4)(C) provides that cause for
14 conversion exists when the debtor fails to maintain appropriate
15 insurance that poses a risk to the estate. Indeed, one of the
16 reasons the Trustee sought turnover of the Inventory was to
17 ensure its removal to an auction house that could provide
18 storage, security and insurance.

19 2. Conversion Requires An Absence Of Unusual Circumstances
20 And That It Be In The Best Interests Of Creditors

21 Once a bankruptcy court determines that there is cause to
22 convert or dismiss, it must also: (1) decide whether dismissal,
23 conversion, or the appointment of a trustee or examiner is in the
24 best interests of creditors and the estate; and, (2) identify
25 whether there are unusual circumstances that establish that
26 dismissal or conversion is not in the best interests of creditors
27
28

1 and the estate.⁹ 11 U.S.C. § 1112(b)(1), (b)(2); In re Prod.
2 Int'l Co., 395 B.R. 101, 107 (Bankr. D. Ariz. 2008).

3 The Debtor contended that if the Debtor could continue her
4 business of selling the Inventory to clients, creditors would
5 receive greater payment on their claims than they would under a
6 quick liquidation of the Inventory by the Trustee. Additionally,
7 she contended that she would lose her livelihood if the case were
8 converted. However, she never asserted that her reasons against
9 conversion constituted "unusual circumstances" under
10 § 1112(b)(2). Even if she had, she would also have been required
11 to demonstrate that she could confirm a plan within a reasonable
12 time, and we have already concluded that the bankruptcy court did
13 not err in finding that the Debtor was unable to demonstrate she
14 was ever likely to reorganize or rehabilitate successfully.

15 The Debtor does not assign error to the bankruptcy court's
16 decision to convert, rather than to dismiss, her bankruptcy case.

17
18 ⁹ Section 1112(b)(2) provides:

19 The court may not convert a case under this chapter to a
20 case under chapter 7 or dismiss a case under this chapter if the
21 court finds and specifically identifies unusual circumstances
22 establishing that converting or dismissing the case is not in the
23 best interests of creditors and the estate, and the debtor or any
24 other party in interest establishes that -

25 (A) there is a reasonable likelihood that a plan will be
26 confirmed within the timeframes established in sections
27 1121(e) and 1129(e) of this title, or if such sections do
28 not apply, within a reasonable period of time; and

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

- (i) for which there exists a reasonable justification
for the act or omission; and
- (ii) that will be cured within a reasonable period of
time fixed by the court.

1 Since the Trustee had already been appointed in the case, once
2 cause was established under § 1112(b), the bankruptcy court was
3 not called upon to determine whether the estate's creditors would
4 benefit from keeping the Trustee in place for a proposed
5 liquidation through a chapter 11 plan. It had to simply decide
6 whether to convert or dismiss the case.

7 To that end, the bankruptcy court correctly noted that it is
8 required to decide what is in the best interests of creditors of
9 the estate, not the best interest of the debtor. See Hr'g Tr.
10 (Sept. 7, 2011) at 21. The Trustee asserted that in his business
11 judgment a liquidation in chapter 7 was preferable to liquidation
12 in chapter 11 because the Trustee would have to propose a plan
13 (or respond to a plan proposed by the Debtor), which would
14 increase administrative expenses and reduce the amount of money
15 available to pay creditors. Significantly, none of the creditors
16 objected to conversion or argued for dismissal. Accordingly, the
17 record supports that conversion was in the best interests of the
18 estate's creditors.

19 We note, however, that the bankruptcy court did err in
20 determining that § 724 provided a basis for conversion. The
21 bankruptcy court concluded that "in order for unsecured creditors
22 to benefit, the IRS' lien must be subordinated, which is only
23 allowed in a chapter 7 case." Tentative Ruling at 7.

24 Section 724(b) subordinates the interests of tax lienholders to
25 the interests of priority unsecured creditors, but any remaining
26 proceeds are distributed first to junior lien claimants, next to
27 the tax lienholders, and finally, to the debtor's estate.

28 N. Slope Borough v. Barstow (In re Markair, Inc.), 308 F.3d 1057,

1 1061-62 (9th Cir. 2002); 11 U.S.C. § 724(b)(1)-(6). Therefore,
2 general unsecured creditors are unaffected by § 724(b). Id. at
3 1064; see also H.R. REP. NO. 595, 95th Cong., 1st Sess. 382
4 (1977). Since the Debtor's schedules revealed a lack of priority
5 unsecured creditors, the tax subordination provision of § 724(b)
6 would not benefit the creditors of the estate. Nevertheless, the
7 bankruptcy court's decision to convert the case is supported by
8 other inferences that can be drawn from the record. Therefore,
9 the bankruptcy court did not abuse its discretion in converting
10 the Debtor's chapter 11 case to chapter 7.

11 3. The Debtor Must Demonstrate She Was Prejudiced By The
12 Denial Of The Motion To Continue

13 The Debtor's main argument on appeal is that the bankruptcy
14 court's "rush to judgment" prevented the Debtor from defending
15 against conversion of her case. She frames the principal issue
16 in this case as whether a bankruptcy court abuses its discretion
17 when it sets a hearing on a conversion, which "turns on complex
18 valuations," so quickly that the debtor is unable to obtain
19 documentation to present critical evidence in opposition. See
20 Rappaport v. Bittleman (In re Bittleman), 107 B.R. 230, 232 (9th
21 Cir. BAP 1988) (denial of continuance had effect of depriving
22 party of chance to present his case). She asserts that if she
23 had been given a continuance of the Hearing Date, then she could
24 have established that there was no cause to convert the
25 bankruptcy case.

26 There is no mechanical test for determining when a denial of
27 a continuance is a clear abuse of discretion; it involves a
28 case-by-case analysis. United States v. Kloehn, 620 F.3d 1122,

1 1127 (9th Cir. 2010). Four factors are considered when reviewing
2 denials of requests for continuances: (1) the extent of the
3 appellant's diligence in her efforts to ready her defense prior
4 to the date set for hearing; (2) how likely it is that the need
5 for a continuance could have been met if the continuance had been
6 granted; (3) the extent to which granting the continuance would
7 have inconvenienced the court and the opposing party, including
8 its witnesses; and (4) the extent to which the appellant might
9 have suffered harm as a result of the denial of the continuance.

10 United States v. Flynt, 756 F.2d 1352, 1358-59 (9th Cir. 1985).

11 In order to obtain a reversal of the bankruptcy court's denial of
12 the request for continuance, the Debtor must demonstrate that, at
13 a minimum, she suffered prejudice as a result of the denial. Id.
14 at 1359.

15 The Debtor sought the continuance so that she could provide
16 supporting documentation regarding the value of the Inventory and
17 regarding the reduction in her debts, particularly her debt to
18 the IRS. Additionally, the Debtor argued that she should be
19 allowed time "to explore and present" whether the business could
20 continue at the Property or whether it must move to another
21 location.

22 Allowing the Debtor additional time so that an expert could
23 conduct an appraisal of the Inventory would not have impacted the
24 bankruptcy court's determination that there was a loss or
25 diminution to the estate and that it was unlikely the Debtor
26 would be able to rehabilitate. Even if the Debtor had been able
27 to have the Inventory appraised at a higher value than that
28 estimated by the Trustee's appraisers, the bankruptcy court

1 determined that there had already been a substantial loss to the
2 estate by the loss of the Property. Moreover, if the Debtor's
3 business was operational, as she contends, she would already have
4 considered and made plans for a new location for the business.
5 Thus, the bankruptcy court's finding that cause existed would not
6 have been altered if the matter had been continued.

7 Motions for conversion under § 1112(b) are governed by
8 Rule 9014 and Local Rule 9013-1. Local Rule 9013-1(b) provides
9 that motions and hearings are set pursuant to the individual
10 judge's calendaring instructions. Here, the bankruptcy judge
11 requires a minimum of 14 days notice before a hearing can be
12 calendared, with oppositions to be filed 7 days before the
13 hearing. Thus, it is standard practice for a party to have
14 7 days to oppose a motion. The bankruptcy court continued the
15 Hearing Date for 14 days when it discovered there was a service
16 error. Therefore, the bankruptcy court did not expedite or
17 "[insist] that the trustee's motion to convert be heard on an
18 abbreviated time frame" as the Debtor contends. See, e.g.,
19 Appellant's Opening Brief at 2. Part of the reason the
20 bankruptcy court denied the Motion to Continue was that it had
21 provided the Debtor's new attorney the requisite 7 days to file
22 an opposition. Hr'g Tr. (Sept. 7, 2011) at 17. Indeed, the
23 Debtor had 20 days to prepare an opposition.¹⁰

24 For these reasons, the Debtor has failed to demonstrate that
25

26 ¹⁰ The original deadline for any opposition to the
27 Conversion Motion was August 11, 2011. After the bankruptcy
28 court continued the Hearing Date to September 7, the deadline to
oppose was August 31, 2011.

1 she was prejudiced by the bankruptcy court's denial of the Motion
2 to Continue.

3 **B. Reconsideration Motion**

4 If a motion for reconsideration is filed within 14 days
5 after entry of judgment, it is construed as a motion for relief
6 from judgment under Rule 9023, incorporating Civil Rule 59(e).
7 Am. Ironworks & Erectors, Inc. v. N. Am. Constr. Corp., 248 F.3d
8 892, 898-99 (9th Cir. 2001); In re Captain Bythers, Inc.,
9 311 B.R. at 539. Although styled as a Civil Rule 60 motion for
10 reconsideration, the Debtor filed it, along with a request for
11 the motion to be considered on shortened time, within 14 days of
12 the bankruptcy court's oral ruling on the Conversion Motion and
13 the Turnover Motion.¹¹ Civil Rule 59(e) permits a court to
14 reconsider and amend a previous order, however, "the rule offers
15 an extraordinary remedy, to be used sparingly in the interests of
16 finality and conservation of judicial resources." Kona Enter.,
17 Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000).

18 A motion for reconsideration should not be granted absent
19 "highly unusual circumstances," unless the court is presented
20 with: (1) newly discovered evidence, (2) committed clear error,
21 or (3) there is an intervening change in the controlling law.
22 Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d
23 873, 880 (9th Cir. 2009). A Civil Rule 59(e) motion may not be
24 used to raise arguments or present evidence for the first time
25

26 ¹¹ The orders granting the Conversion Motion and granting,
27 in part, the Turnover Motion were entered September 20, 2011.
28 The Debtor's Reconsideration Motion was filed September 14, 2011,
7 days after the Hearing.

1 when they could reasonably have been raised earlier in the
2 litigation. Id.

3 The Debtor did not contend that there had been a change in
4 controlling law. Therefore, the Debtor was required to
5 demonstrate that new evidence established the viability of the
6 Debtor's reorganization or that the bankruptcy court committed
7 clear error in deciding to convert the bankruptcy case.

8 For evidence to be "newly discovered" for purposes of Civil
9 Rule 59(e), it: (1) must have been discovered after judgment and
10 the movant must have been excusably ignorant of the facts at the
11 time of trial despite due diligence to learn about the facts of
12 the case; (2) the evidence discovered must be of a nature that
13 would probably change the outcome of the case; and (3) the
14 evidence must not be merely cumulative or impeaching. Jones v.
15 Aero/Chem Corp., 921 F.2d 875, 878 (9th Cir. 1990).

16 The Debtor's new evidence included: (1) a letter from an
17 antiques appraiser stating that it would cost between \$25,000-
18 \$30,000 to evaluate the Inventory and take at least 3 weeks to
19 complete; (2) handwritten invoices for Inventory pieces that
20 presumably supported the Debtor's contention that she had a
21 design commitment for a spa in San Diego; (3) a letter from a
22 couple stating they "hope that Tatiana Khan will remain available
23 to us, and supply those rare and special pieces which reflect her
24 unique personal taste" as they construct and furnish a new home
25 in New York; (4) a letter from a "loyal customer" of the Debtor
26 stating he anticipates purchasing \$500,000-\$1,000,000 in
27 furnishings and "hopes the Debtor will be a resource"; and
28 (5) letters from two entities stating that they had warehouse

