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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NOT FOR PUBLICATION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. | AZ-11-1326-JuKiCl |
| |) | | |
| SUNNYSLOPE HOUSING LIMITED |) | Bk. No. | 11-02441 |
| PARTNERSHIP, |) | | |
| |) | | |
| Debtor. |) | | |
| |) | | |
| <hr/> FIRST SOUTHERN NATIONAL BANK, |) | | |
| |) | | |
| Appellant, |) | | |
| |) | | |
| v. |) | M E M O R A N D U M * | |
| |) | | |
| SUNNYSLOPE HOUSING LIMITED |) | | |
| PARTNERSHIP, |) | | |
| |) | | |
| Appellee. |) | | |
| <hr/> |) | | |

Argued and Submitted on January 18, 2012
at Phoenix, Arizona

Filed - February 1, 2012

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

Honorable Randolph J. Haines, Bankruptcy Judge, Presiding

Appearances: Dale C. Schian, Esq. of Schian Walker, P.L.C.
argued for appellant First Southern National
Bank; Bradley Pack, Esq. of Engleman Berger, P.C.
argued for appellee Sunnyslope Housing Limited
Partnership.

* 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 Before: JURY, KIRSCHER, and CLARKSON,** Bankruptcy Judges.

2 Appellant, First Southern National Bank ("FSNB"), appeals
3 the bankruptcy court's order denying its motion for relief from
4 stay (the "MRS").¹ We AFFIRM.

5 **I. FACTS**

6 Chapter 11² debtor, Sunnyslope Housing Limited Partnership,
7 is an Arizona limited partnership. Sunnyslope Housing, LLC
8 ("SH,LLC") is debtor's general partner and is owned by Reid
9 Butler ("Butler"). RBC Tax Credit Equity, LLC and RBC tax
10 Credit Manager II, Inc. (affiliates of the Royal Bank of Canada)
11 are debtor's limited partner and special limited partner
12 (collectively, the "Limited Partners").

13 Debtor's sole asset is an apartment project in Phoenix,
14 Arizona, which it operated as an affordable housing community.
15 The affordable housing restrictions recorded against the
16 property gave debtor tax credits in the amount of \$539,973 per
17 year.

18 Butler owns Butler Housing Company, which acted as the
19

20 ** Hon. Scott C. Clarkson, Bankruptcy Judge for the Central
21 District of California, sitting by designation.

22 ¹ FSNB also appealed the bankruptcy court's order denying
23 its motion for summary judgment on dismissal of the bankruptcy
24 case. Appellee-debtor moved to dismiss this portion of the
25 appeal as untimely. The Panel granted debtor's motion on
December 9, 2011. Therefore, this appeal addresses only the MRS
order.

26 ² Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure and "Civil Rule" references are to the Federal Rules of
Civil Procedure.

1 developer of the apartment complex. Financing for the
2 acquisition, construction and development of the project was
3 provided by an \$8.5 million loan funded from the sale of
4 municipal bonds³ (the "Capstone Loan"), secured by a first deed
5 of trust; a \$3 million loan from the City of Phoenix (the "City
6 Loan"), secured by a second deed of trust; a \$500,000 loan from
7 the State of Arizona (the "Arizona Loan"), secured by a third
8 deed of trust; and equity financing provided by an affiliate of
9 the Royal Bank of Canada (the "RBC").

10 From the outset, debtor experienced a number of challenges,
11 which included a significant increase in construction costs and
12 the downturn of the real estate market. To add to its troubles,
13 the RBC, which had injected millions of dollars into the
14 project, ceased funding debtor's operations, which caused debtor
15 to default under its loan agreements.

16 In September 2010, HUD sold all right, title and interest
17 in the Capstone Loan and Capstone Deed of Trust to FSNB for just
18 over \$5 million. Thereafter, FSNB filed a complaint against
19 debtor in the Arizona state court requesting the appointment of
20 a receiver. On October 21, 2010, the state court appointed a
21 receiver. The receiver entered into market-rate leases that
22 moderately increased the cash flow of the property. Also,
23 pursuant to his duties under the receiver order, the receiver
24 commenced marketing efforts to sell the property. Because of
25 those efforts, a buyer agreed to purchase the property for
26

27 ³ The Secretary of Housing and Urban Development ("HUD")
28 insured the repayment of the Capstone Loan.

1 \$7.65 million.

2 On November 1, 2010, FSNB noticed a trustee's sale of the
3 property.

4 On January 31, 2011, SH,LLC filed an involuntary petition
5 for relief against debtor under chapter 11 to prevent the
6 trustee's sale.

7 On February 16, 2011, FSNB filed the MRS.⁴ Debtor and the
8 City of Phoenix (the "City") filed timely objections. The City
9 expressed its concern that if FSNB foreclosed, the affordable
10 housing restrictions on the apartment project would be
11 extinguished to the detriment of the City's interest and the
12 public's interest in maintaining the supply of affordable
13 housing that was the purpose for which public funds were
14 expended to construct the Property. The Limited Partners filed
15 a position statement supporting the MRS.

16 On March 2, 2011, the court held the initial hearing on the
17 motion. The Minute Entry reflects that the court authorized
18 Butler to appear as debtor's counsel at that hearing,⁵ scheduled
19 a final evidentiary hearing on April 20, 2011, and ordered the
20 parties to submit a joint pretrial statement by April 4, 2011
21 (which they did).

22

23

24

25 ⁴ The motion was actually titled as an "Emergency Motion For
26 An Order Either: (1) Dismissing Bankruptcy Case; (2) Granting
Relief From the Automatic Stay; or (3) Excusing Turnover."

27

28 ⁵ Butler was a licensed attorney in Arizona and admitted to
practice before the bankruptcy court.

1 On March 14, 2011, FSNB filed an emergency motion⁶ for
2 summary judgment seeking the dismissal of the bankruptcy case.

3 On April 11, 2011, the bankruptcy court denied FSNB's
4 motion for summary judgment and treated the petition as a
5 voluntary filing by SH, LLC on behalf of debtor. The Minute
6 Entry Order also reflects that the court informed Butler that
7 debtor must be represented by counsel at the April 20, 2011
8 evidentiary hearing on the MRS or the case would be dismissed.

9 On April 18, 2011, debtor moved to continue the MRS
10 evidentiary hearing because of its need for funds that were held
11 by various entities. Debtor asserted that although it had its
12 counsel in place, the funds were needed to pay administrative
13 fees. At the April 20, 2011 evidentiary hearing on the MRS, the
14 court heard debtor's motion for the continuance. From what we
15 can tell, FSNB claimed an interest in a portion of the funds
16 which debtor sought to have released. As a result, FSNB
17 requested a continuance of the MRS evidentiary hearing to
18 May 17, 2011, which the court granted. On its own, the court
19 continued the hearing from May 17 to May 19, 2011.

20 At the May 19, 2011 evidentiary hearing,⁷ FSNB provided no
21 witnesses and relied on the statements set forth in the parties'
22 joint pretrial statement and its loan documents, which were

24 ⁶ Despite the "emergency" title, the court did not schedule
25 the hearing on an emergency basis.

26 ⁷ At the time of the final hearing, the bankruptcy court had
27 not yet determined whether debtor was a single asset real estate
28 debtor subject to the requirements under § 362(d)(3). The court
made that determination by Minute Entry Order entered on June 27,
2011.

1 stipulated into evidence. Because it was undisputed that debtor
2 had no equity in the property under § 362(d)(2)(A), the focus of
3 the hearing was on § 362(d)(2)(B) and whether the property was
4 necessary to an effective reorganization.

5 Butler testified about debtor's prospects for an effective
6 reorganization. He testified that debtor would continue to
7 operate the apartment project as an affordable housing community
8 and opined that the project was worth approximately \$3.5
9 million. Butler further testified that FSNB would receive
10 payments of interest on its secured claim and debtor would
11 negotiate for the repayment of the City Loan and the State Loan
12 over a period of forty years. Butler explained that the funding
13 of debtor's plan would occur through net operating income
14 ("NOI") and a cash infusion from new investors interested in the
15 benefits of the tax credits. Finally, Butler testified that
16 debtor already had a firm commitment from a qualified investor
17 to purchase the equity interests of debtor and obtain the
18 benefit of the tax credits for at least \$1.2 million.

19 After hearing Butler's testimony, the bankruptcy court
20 questioned Butler about certain aspects of the proposed plan:
21 namely, how the property's NOI would improve over past
22 performance, whether the City or the State of Arizona supported
23 the project as an affordable housing for reasons other than the
24 money they loaned to it, and what Butler or his companies would
25 get out of the plan. Butler explained that the property had
26 occupancy problems, but with marketing and the assistance of a
27 management company that had expertise in the affordable housing
28 area, the property could generate the \$200,000 per year to

1 provide payments to FSNB. Butler also explained that the City
2 and State of Arizona had put \$3.5 million of public funds in the
3 project in order to maintain it as a long-term affordable
4 housing project. Finally, Butler testified that he was not
5 looking to be repaid the monies he had put into the project.
6 Rather, at most, his companies would receive an asset management
7 fee.

8 In the end, the bankruptcy court decided that debtor had
9 met its burden of proof under § 362(d)(2)(B). The court
10 acknowledged that the proposed plan had feasibility problems,
11 but that the standard for proving feasibility was not that high
12 for purposes of debtor's burden of proof under § 362(d)(2)(B).
13 The court found that based on Butler's testimony, debtor's
14 proposed plan could likely pass the feasibility standards under
15 § 1129(a)(11). The bankruptcy court also found that it was
16 possible debtor could meet the best interests test under
17 § 1129(a)(7) if it paid FSNB the value of the property as it
18 existed at that point in time; i.e., as an affordable housing
19 property. Next, the court discussed whether debtor could get an
20 accepting impaired class if FSNB's lien was stripped down and
21 its deficiency claim classified with all the other debt.
22 Relying on Heartland Fed. Savings & Loan Assoc. v. Briscoe
23 Enters., Ltd. (Matter of Briscoe Enters., Ltd., II), 994 F.2d
24 1160 (5th Cir. 1993), the court found support for the separate
25 classification of FSNB's unsecured deficiency claim. Last, the
26 court found there was no evidence that the value of the property
27 was declining and thus FSNB would not be harmed by the continued
28 existence of the stay. The court denied FSNB's motion by Minute

1 Entry Order entered on May 24, 2011. FSNB timely appealed the
2 order.

3 II. JURISDICTION

4 The bankruptcy court had jurisdiction over this proceeding
5 under 28 U.S.C. §§ 1334 and 157(b)(2)(G). We have jurisdiction
6 under 28 U.S.C. § 158.

7 III. ISSUE

8 Did the bankruptcy court err by denying FSNB's MRS?

9 IV. STANDARDS OF REVIEW

10 We review for abuse of discretion orders denying relief
11 from an automatic stay. Moldo v. Matsco, Inc. (In re Cybernetic
12 Servs.), 252 F.3d 1039, 1045 (9th Cir. 2001); Sun Valley
13 Newspapers, Inc. v. Sun World Corp. (In re Sun Valley
14 Newspapers, Inc.), 171 B.R. 71, 74 (9th Cir. BAP 1994).

15 In applying our abuse of discretion test, we first
16 'determine de novo whether the [bankruptcy] court
17 identified the correct legal rule to apply to the
18 relief requested.' If the bankruptcy court identified
19 the correct legal rule, we then determine whether its
20 'application of the correct legal standard [to the
21 facts] was (1) illogical, (2) implausible, or
22 (3) without support in inferences that may be drawn
from the facts in the record.' If the bankruptcy court
did not identify the correct legal rule, or its
application of the correct legal standard to the facts
was illogical, implausible, or without support in
inferences that may be drawn from the facts in the
record, then the bankruptcy court has abused its
discretion.

23 USAA Fed. Sav. Bank. v. Thacker (In re Taylor), 599 F.3d 880,
24 887-88 (9th Cir. 2010)(citing United States v. Hinkson, 585 F.3d
25 1247, 1261-62 (9th Cir. 2009)).

26 V. DISCUSSION

27 Section 362(d)(2) requires the bankruptcy court, on request
28 of a party in interest, to grant relief from the automatic stay

1 when there is no equity in a property and the property is not
2 necessary for an effective reorganization. According to the
3 record, it was undisputed that debtor did not have equity in the
4 property. Therefore, the burden of proof shifted to debtor to
5 show that the property was necessary for an effective
6 reorganization. § 362(g).

7 Property is necessary for an effective reorganization for
8 purposes of § 362(d)(2)(B) if "the property is essential for an
9 effective reorganization *that is in prospect*. This means . . .
10 that there must be 'a reasonable possibility of a successful
11 reorganization within a reasonable time.'" United Sav. Ass'n
12 Tex. v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365,
13 375-76 (1988) (emphasis in original) (quoting In re Timbers of
14 Inwood Forest Assoc., Ltd., 808 F.2d 363, 370-71 & nn. 12-13
15 (5th Cir. 1987) (en banc)). In light of the standard espoused
16 in Timbers, we have interpreted the "effective reorganization"
17 requirement under § 362(d)(2)(B) as requiring the debtor to
18 prove that a proposed plan "is not patently unconfirmable and
19 has a realistic chance of being confirmed.'" Sun Valley
20 Newspapers, Inc. v. Sun World Corp. (In re Sun Valley
21 Newspapers, Inc.), 171 B.R. 71, 75 (9th Cir. BAP 1994) (internal
22 citations omitted). We have further acknowledged that the
23 debtor's burden of proof under § 362(d)(2)(B) may be viewed as a
24 "moving target" – less stringent in the early stages of the case
25 and more difficult as time progresses. Id.

26 By its citation to Timbers, it is clear that the bankruptcy
27 court identified the correct legal rule to apply in evaluating
28 debtor's burden under § 362(d)(2)(B). Hr'g Tr. May 19, 2011 at

1 27:10-15. It is the court's application of this rule that FSNB
2 disputes in this appeal. FSNB argues that the bankruptcy court
3 clearly erred in reaching its decision because (1) the stay
4 relief trial was not held until four months after the petition
5 was filed and (2) debtor presented no evidence that a
6 confirmable plan, i.e., one that satisfies all sections of the
7 Code, including § 1129, was in prospect. In effect, FSNB
8 advocates that debtor's burden of proof at the MRS evidentiary
9 hearing was essentially the same as its burden would have been
10 at confirmation due to the length of time that had passed.

11 This position, however, is contrary to the rules in Timbers
12 and In re Sun Valley Newspapers. Neither case holds that
13 debtor's burden of proof under § 362(d)(2)(B) requires debtor to
14 show that its reorganization plan is confirmable under § 1129,
15 even in later stages of the case. Otherwise, the relief from
16 stay hearing would be converted into a confirmation hearing,
17 which is something we warned against in In re Sun Valley
18 Newspapers, 171 B.R. at 75 (noting that a relief from stay
19 hearing should not be converted into a confirmation hearing).⁸

20 Focusing on the "moving target" analysis in In re Sun
21 Valley Newspapers, debtor contends that because its case was in
22 the early stages, its burden of proof under § 362(d)(2)(B) was
23 especially light. "In the early stage of the case, 'the burden
24 of proof . . . is satisfied if the debtor can offer sufficient
25 evidence to indicate that a successful reorganization is

26 _____
27 ⁸ Indeed, the statutory requirement under § 362(d)(2)(B)
28 that debtor prove the property is necessary for an effective
reorganization is not contained in § 1129.

1 "plausible".'" In re Sun Valley Newspapers, 171 B.R. at 75.
2 Plausible means "superficially reasonable, appearing worthy of
3 belief." Merriam-Webster's Dictionary, [http://merriam-
5 webster.com](http://merriam-
4 webster.com).

5 In its reply brief, FSNB contends that debtor's burden
6 should be greater because the MRS was not resolved until 108
7 days into the case, which was near the end of the exclusivity
8 period. "Near the end of exclusivity period, 'the debtor must
9 demonstrate that a successful reorganization within a reasonable
10 time is "probable".'" In re Sun Valley Newspapers, 171 B.R. at
11 75. "Probable" means more likely than not. Merriam-Webster's
12 Dictionary, <http://merriam-webster.com>.

13 Although FSNB argues for a more stringent standard of
14 proof, other facts, besides the length of time necessary to
15 complete the MRS hearing, suggest that debtor's case was still
16 in the early stages at the time the court made its decision to
17 deny FSNB's motion. After all, the bankruptcy court did not
18 enter the order for relief until April 12, 2011, and just over a
19 month later, the MRS was resolved. The 120-day exclusivity
20 period under § 1121(c)(2) was not set to expire for another
21 three months. Further, the facts demonstrate that during the
22 first four months of debtor's bankruptcy, debtor was utilizing
23 the time to (1) defend the MRS which FSNB filed just two weeks
24 after the filing, (2) defend FSNB's summary judgment motion to
25 dismiss its case, and (3) obtain counsel and the release of
26 funds. Thus, one could conclude that even at 108 days into the
27 case, debtor's reorganization was still in the "early stages."

28 In any event, pinpointing the exact stage of a bankruptcy

1 proceeding is a fact intensive endeavor. In re Ashgrove
2 Apartments of DeKalb Cnty., Ltd., 121 B.R. 752, 756 (Bankr. S.D.
3 Ohio 1990) (noting that each case is different and must be
4 viewed on its own with the facts of each case being fully
5 considered). However, we are not fact finders and it is not
6 crystal clear from the record as to exactly which "moving
7 target" burden of proof the bankruptcy court applied.
8 Nonetheless, the key point for purposes of this appeal is that
9 the bankruptcy court explicitly recognized that debtor's burden
10 of proof under § 362(d)(2)(B) was not as high as that for
11 confirmation at that particular stage of the case.⁹

12 Therefore, rather than resolving the "moving target"
13 dispute raised by the parties, we take our guidance from the
14 more general principles set forth in In re Sun Valley Newspapers
15 regarding debtor's burden of proof. Namely, that the debtor
16 must show that its proposed plan (1) was not patently
17 unconfirmable and (2) had a realistic chance of being confirmed.
18 171 B.R. at 75. We next consider whether there was sufficient
19 evidence to support the bankruptcy court's factual findings on
20 these issues.

21 "A finding is clearly erroneous when there is no evidence
22 in the record supportive of it and also, when, even though there
23 is some evidence to support the finding, the reviewing court, on

24
25 ⁹ At the evidentiary hearing, the court stated: "I don't
26 think the evidence today would satisfy the feasibility test if we
27 were at a confirmation hearing, but I don't think the standard
28 . . . at a stay relief stage of the case is quite that high."
Hr'g Tr. May 19, 2011, at 72:6-7. "And as I suggested, the
testimony at the confirmation hearing is going to have to be a
lot better than it was today." Id., at 74:9-11.

1 review of the record, is left with a definite and firm
2 conviction that a mistake has been made in the finding."
3 United States v. Gypsum Co., 333 U.S. 364, 395 (1948). We may
4 have a definite and firm conviction that a mistake has been made
5 if the bankruptcy court's interpretation of the facts was
6 illogical, implausible, or without support in the record.
7 United States v. Hinkson, 585 F.3d 1247, 1261-62 & n. 21 (9th
8 Cir. 2009) (en banc) (quoting Anderson v. City of Bessemer City,
9 470 U.S. 564, 577 (1985)) (explaining that the clearly erroneous
10 standard of review is an element of the clarified abuse of
11 discretion standard). The clearly erroneous standard does not
12 permit us to conduct a de novo review of the evidence, but it
13 does allow this Panel to consider whether there was enough
14 evidence in the record to support the factual findings of the
15 bankruptcy court. See Civil Rule 52(a), incorporated by, Rule
16 7052(a). Further, our review under the clearly erroneous
17 standard is more deferential with respect to determinations
18 about the credibility of witnesses. Anderson, 470 U.S. at 575.

19 At the outset, we disagree with FSNB's sweeping statement
20 in its opening brief that debtor provided no evidence to meet
21 its burden of proof under § 362(d)(2)(B). Butler's live
22 testimony was evidence. FSNB complains that Butler's testimony
23 consisted of unsubstantiated hopes and speculations, but this
24 assertion is based on the lack of corroborating evidence and
25 Butler's lack of personal knowledge.¹⁰ Thus, FSNB's claim of

26 _____
27 ¹⁰ FSNB also complains that much of Butler's testimony
28 included hearsay or lacked foundation, but FSNB failed to
(continued...)

1 error in this appeal actually touches on issues concerning the
2 weight of the evidence and credibility.

3 Although debtor presented no evidence corroborating
4 Butler's testimony at the hearing, FSNB fails to point to any
5 countervailing evidence in the record that conclusively
6 contradicted Butler's testimony. Rather, in its appellate
7 brief, FSNB points only to facts in the record that may suggest
8 another outcome; i.e., that debtor had no chance of having its
9 proposed plan confirmed since the project was "doomed from the
10 start". However, "[w]here there are two permissible views of
11 the evidence, the factfinder's choice between them cannot be
12 clearly erroneous." Anderson, 470 U.S. at 574. Our role in
13 this appeal is not to reweigh the evidence presented to the
14 bankruptcy court. Id. at 575.

15 In addition, FSNB had the opportunity to challenge Butler's
16 credibility through cross-examination. We must assume that its
17 efforts did not convince the bankruptcy court because, in the
18 end, the court's decision apparently rested entirely on Butler's
19 credibility. The bankruptcy court accepted, as true, Butler's
20 proffer that the NOI from the property would rise once the
21 property was properly marketed and managed. The court also
22 accepted, as true, Butler's proffers that the value of the
23 property was \$3.5 million and that a capital contribution to

24
25 ¹⁰(...continued)
26 identify any specific testimony that it considered inadmissible.
27 Moreover, FSNB did not object to any of the testimony at the
28 hearing. We do not consider this argument raised for the first
time on appeal. Cold Mountain v. Garber, 375 F.3d 884, 891 (9th
Cir. 2004).

1 debtor would be made. "[W]hen the [bankruptcy] court's decision
2 is based on testimony that is coherent and plausible, not
3 internally inconsistent and not contradicted by external
4 evidence, there can almost never be a finding of clear error."
5 Anderson, 470 U.S. at 575.

6 FNSB attempts to point out inconsistencies by comparing
7 Butler's testimony to the disclosure statement and plan that
8 debtor eventually filed. However, as noted by FSNB, those
9 documents were filed after the MRS was resolved and therefore
10 could not have been relevant to the bankruptcy court's
11 determination on May 19th. Consequently, we cannot consider the
12 argument about the alleged inconsistencies in the evidence at
13 all. We thus conclude that there was an evidentiary basis for
14 the bankruptcy court to reach the conclusions that it did
15 regarding Butler's testimony.

16 Having accepted Butler's testimony as true, the bankruptcy
17 court then simply used § 1129 as a guidepost to determine
18 whether debtor's proposed plan had a realistic chance of being
19 confirmed. Hence, the court identified the issues of
20 feasibility (§ 1129(a)(11)), the best interests test
21 (§ 1129(a)(7)(A)(ii)), whether an impaired class would accept
22 debtor's plan (§ 1129(a)(10)), and the absolute priority rule
23 and the new value corollary (§ 1129(b)(2)(B)(ii)), as trouble
24 spots for its consideration. However, to that end, the court
25 did not rule, as a matter of law, that debtor's plan was
26 confirmable, as FSNB appears to suggest and argue in its brief.

27 Based on the evidence in the record, it was well within the
28 bankruptcy court's discretion to find that debtor's plan was

1 probably feasible, especially when the feasibility hurdle is not
2 that high at the relief from stay stage of the proceedings. It
3 was also within the court's discretion to find that debtor could
4 likely meet the best interests test by paying FSNB the value of
5 the property, as an affordable housing project.¹¹ Moreover, the
6 bankruptcy court's conclusion that debtor may be able to get an
7 impaired class to accept the plan by separately classifying
8 FSNB's deficiency claim was supported by the Fifth Circuit's
9 decision in Matter of Briscoe, 994 F.2d 1160. Finally, because
10 there was some evidence of a new value contribution through
11 Butler's testimony, which the bankruptcy court must have found
12 credible, it was within the bankruptcy court's discretion to
13 conclude, as it did, that the absolute priority rule could be
14

15 ¹¹ The best interests test requires that a reorganization
16 plan either garner acceptance from each holder of an impaired
17 claim or interest or provide such holder with "property of a
18 value, as of the effective date of the plan, that is not less
19 than the amount that such holder would so receive or retain if
20 the debtor were liquidated under chapter 7 . . . on such date."
21 §1129(a)(7)(A)(ii). Butler testified the value was \$3.5 million
22 and courts generally allow an owner of property to give his
23 opinion on value. See Barry Russell, Bankruptcy Evidence Manual
24 § 701:2 (2011 ed.). Butler also owned the company which
25 developed the property. Moreover, the "value" referred to under
26 the best interests test is "as of the effective date of the
27 plan." The extent of FSNB's allowed claim had not yet been
28 determined at the MRS evidentiary hearing, nor was such a
valuation required at that time.

24 In December 2011, in connection with debtor's proposed plan,
25 the bankruptcy court entered a Minute Entry Order finding that
26 the value of FSNB's secured claim was \$2.6 million. FSNB has
27 appealed that order to the district court. [Bankr. Ct. Dkt. No.
28 281.] See Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),
293 B.R. 227, 233 n.9 (9th Cir. BAP 2003) (authorizing reviewing
court to take judicial notice of pleadings docketed in the
bankruptcy court).

1 satisfied. In sum, we conclude that the bankruptcy court's
2 factual findings on the § 1129 issues were supported by the
3 evidence in the record. Therefore, those findings are not
4 clearly erroneous. Having applied the correct legal standard to
5 its factual findings, the court did not abuse its discretion in
6 denying FSNB's MRS.

7 Finally, FSNB argues that the bankruptcy court erred by not
8 granting its MRS under § 362(d)(1). That section states that
9 the court shall grant relief from stay "for cause, including the
10 lack of adequate protection of an interest in property of such
11 party in interest." FSNB argues that cause exists because
12 debtor filed its petition in bad faith and there is a lack of
13 adequate protection. The record shows that FSNB did not argue
14 the issue of debtor's bad faith at the evidentiary hearing. If
15 an issue is not raised in the bankruptcy court, we will not
16 usually consider it for the first time on appeal. Beck v. Pace
17 Int'l Union, 427 F.3d 668, 674 (9th Cir. 2005), rev'd on other
18 grounds, 127 S.Ct. 2310 (2007). Moreover, the record shows that
19 the bankruptcy court found no evidence that the value of the
20 property was declining. FSNB does not direct us to a part of
21 the record where evidence of deterioration in value was
22 presented. Without evidence on the adequate protection issue,
23 we cannot possibly conclude that the court erred.¹²

24 VI. CONCLUSION

25 For the reasons stated, we AFFIRM.

26
27
28 ¹² As noted above, FSNB chose to present limited evidence at
the final evidentiary MRS hearing.