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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	AZ-12-1631-KuDPa
6	DAVID HARRY DUDLEY,)	Bk. No.	07-04223
7	Debtor.)		
8	_____)		
9	DAVID HARRY DUDLEY,)		
10	Appellant,)		
11	v.)	MEMORANDUM*	
12	RITA ANN SIMMONS,)		
13	Appellee.**)		
	_____)		

Submitted Without Argument
on January 23, 2014***

Filed - February 26, 2014

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

Honorable Redfield T. Baum, Sr., Bankruptcy Judge, Presiding

*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.

**The notice of appeal named Rita Ann Simmons as a party, and thus Simmons has been listed as an appellee herein. However, Simmons has not filed a responsive brief or otherwise actively participated in this appeal.

***By order entered August 14, 2013, this appeal was deemed suitable for submission without oral argument.

1 Appearances: Harold E. Campbell of Campbell & Coombs, P.C., on
2 brief, for appellant David Harry Dudley.****

3 Before: KURTZ, DUNN and PAPPAS, Bankruptcy Judges.

4 **INTRODUCTION**

5 Debtor David Harry Dudley appeals from an order granting the
6 motion filed by his ex-wife, Rita Ann Simmons, seeking dismissal
7 of his chapter 13¹ bankruptcy case.

8 Dudley's arguments ignore that, at the time of dismissal,
9 the full sixty-month term of his confirmed chapter 13 plan had
10 elapsed, and that he had materially defaulted on his plan
11 obligation to pay Simmons' secured claim. Moreover, Dudley
12 admitted that he had no ability to cure this default, or to
13 otherwise propose a legally permissible plan modification.

14 Not being entitled to a chapter 13 discharge and having run
15 through all of the time afforded to him under his confirmed
16 sixty-month chapter 13 plan, no legitimate bankruptcy purpose
17 would have been served by the preservation of his chapter 13
18 bankruptcy case. Accordingly, dismissal was appropriate, and we
19 AFFIRM.

20 **FACTS**

21 The relevant facts are not in dispute. Dudley and Simmons
22 were parties to contentious divorce proceedings in the Maricopa
23 County Superior Court (Case No. FN2005-091838). The divorce
24

25 ****Campbell filed an opening appeal brief on Dudley's
26 behalf, but he thereafter sought and obtained this Panel's
27 permission to withdraw as counsel for Dudley.

28 ¹Unless specified otherwise, all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 proceedings led to a dissolution decree issued on May 3, 2007.
2 The dissolution decree contained provisions dividing the parties'
3 marital assets and, in relevant part, awarded the parties' former
4 family residence to Dudley as his sole and separate property. In
5 turn, the decree awarded Simmons a lien on the residence to
6 secure Dudley's obligation to pay Simmons \$208,000, which was
7 Simmons' share of the equity in the residence.²

8 Dudley appealed the dissolution decree, and the Arizona
9 Court of Appeals affirmed the decree in part and reversed it in
10 part. See Simmons v. Dudley, 2009 WL 936886 (Ariz. Ct. App.
11 2009). Among other things, Dudley challenged on appeal Simmons'
12 entitlement to the \$208,000 lien against the residence, claiming
13 that the trial court erred when it characterized the residence as
14 community property. But the Court of Appeals affirmed this
15 aspect of the decree. See id. at 3-5.

16 In August 2007, shortly after the state court issued the
17 dissolution decree, Dudley commenced his chapter 13 bankruptcy
18 case. According to Dudley's initial bankruptcy schedules,
19

20 ²Even though the bankruptcy court's dismissal of Dudley's
21 bankruptcy case explicitly was based on the "entire record,"
22 Dudley's excerpts of record only included a handful of documents
23 from the bankruptcy court record. This made our task of
24 reviewing the dismissal more difficult. Even so, when the
25 excerpts of record are incomplete, we can and do look at other
26 record documents otherwise readily available to us by accessing
27 the bankruptcy court's electronic docket and the imaged documents
28 attached thereto. See O'Rourke v. Seaboard Sur. Co. (In re E.R.
Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989)(holding that
BAP can take judicial notice of contents of bankruptcy court
record); see also Ehrenberg v. Cal. St. Univ. (In re Beachport
Entm't), 396 F.3d 1083, 1087-88 (9th Cir. 2005)(holding that BAP
erred by not determining appeal on the merits, when all necessary
parts of the record were readily available).

1 Simmons held an undisputed general unsecured claim in the amount
2 of \$212,904, as well as a \$208,000 claim secured by her judgment
3 lien against the residence. Dudley's initial schedules further
4 reflected that, aside from Simmons, Dudley had only a handful of
5 other unsecured creditors, and that the unsecured debt owed to
6 Simmons was almost ten times the amount of all of Dudley's other
7 unsecured debt combined. Furthermore, the chapter 13 trustee
8 later reported, at one of the hearings on Simmons' case dismissal
9 motion, that Simmons was Dudley's only remaining unsecured
10 creditor, all others having had their claims disallowed.

11 In the initial version of Dudley's chapter 13 plan, Dudley
12 attempted to partially avoid Simmons' \$208,000 judgment lien
13 under § 522(f). Both Simmons and the chapter 13 trustee objected
14 to this provision of the plan, pointing out that it was improper
15 for the debtor to attempt to avoid a lien by plan provision. In
16 response, Dudley filed a motion to avoid the judgment lien under
17 § 522(f). The bankruptcy court denied this motion based on
18 Farrey v. Sanderfoot, 500 U.S. 291 (1991). Dudley did not appeal
19 this ruling.

20 Debtor filed a first amended plan and a second amended plan,
21 both of which provided for Simmons to retain her lien. But
22 neither plan provided any payment to Simmons on account of her
23 secured claim over the course of the plan. Simmons objected,
24 arguing that § 1325(a)(5) required Dudley to pay Simmons' secured
25 claim during the course of the plan. After the parties fully
26 briefed the issue, the bankruptcy court entered an order
27 sustaining Simmons' objection. Dudley did not appeal this ruling
28 either.

1 Dudley's third amended plan finally provided for both
2 Simmons' lien and for the payment of her secured claim during the
3 course of the plan, as follows:

4 Rita Ann Simmons has a divorce judgment lien of
5 \$208,000.00 secured by the real property to secure the
6 payment of her share of the equity in the real
7 property until the payment of the underlying debt under
8 nonbankruptcy law. Debtor will refinance the real
9 property between months 48-60 of the Plan and pay this
10 debt in full. Due to the falling value of the real
11 property, Debtor cannot refinance the house for enough
12 to pay this debt until house values appreciate again,
13 which is not expected until at least month 48 of the
14 Plan.

15 Third Amended Plan (Feb. 9, 2009) at p. 3 of 5.

16 Shortly after the filing of the third amended plan, the
17 Arizona Court of Appeals issued its decision affirming in part
18 and reversing in part the dissolution decree. In re Marriage of
19 Simmons v. Dudley, 2009 WL 936886 (Ariz. Ct. App. 2009). Because
20 the Court of Appeals decision effectively relieved Dudley from
21 the duty to pay certain priority domestic support obligations,
22 Dudley filed his fourth amended plan to address the impact of the
23 Court of Appeals decision on these obligations. The Court of
24 Appeals decision did not alter Simmons' lien and secured claim,
25 and the fourth amended plan generally provided for the same
26 treatment of them. Nonetheless, the fourth amended plan
27 contained a new, additional sentence regarding the parties'
28 rights and duties in the event that Dudley was unable to
refinance the residence, as follows:

In the event Debtor cannot refinance the house, he
retains the option to sell the house (in months 48-60)
and pay Rita Simmons her \$208,000; if the house does
not sell for enough to pay her the \$208,000, any
remaining debt to her will be a general unsecured debt.

1 Fourth Amended Plan (July 7, 2009) at p. 3 of 5.

2 Simmons objected to this new contingency provision.

3 According to Simmons, this was just another improper attempt by
4 Dudley to evade the dictates of § 1325(a)(5), which required
5 Dudley to obtain Simmons' consent to the plan, to surrender the
6 residence to Simmons, or to provide for Simmons' retention of her
7 lien and the payment of her secured claim.

8 The bankruptcy court sustained Simmons' objection, and
9 Dudley filed a motion for reconsideration arguing that, by not
10 allowing Dudley to retain the residence during the course of the
11 plan without providing for payment in full of Simmons' secured
12 claim, the court effectively was declaring the secured debt
13 nondischargeable. Simmons countered that Dudley was not being
14 denied his discharge so long as he presented and fully
15 consummated a confirmable chapter 13 plan - something Dudley so
16 far had been unwilling or unable to do.

17 Before the bankruptcy court ruled on the reconsideration
18 motion, the parties reached agreement on the language regarding
19 the treatment of Simmons' lien and her secured claim, which
20 language was included in a stipulated order confirming Dudley's
21 fourth amended chapter 13 plan. That language was almost
22 identical to the language in Dudley's third amended plan, except
23 that the following additional sentence was added:

24 By virtue of this paragraph, Debtor is not waiving his
25 right to seek modification of the plan later under
11 U.S.C. 1329, if appropriate.

26 Stipulated Order (May 9, 2010) at p. 2 of 4. In essence, Dudley
27 had capitulated on his attempt to include in the plan a
28 contingency provision in the event he was unable to pay off

1 Simmons' secured claim by refinancing the residence.

2 The bankruptcy court entered the stipulated confirmation
3 order in May 2010. In February 2011, Dudley filed a motion
4 seeking to modify his confirmed chapter 13 plan. In the motion
5 Dudley advised the court that, on remand from the Arizona Court
6 of Appeals, the trial court entered another judgment in favor of
7 Simmons and against Dudley, this one for \$45,000 in attorney fees
8 incurred by Simmons in the dissolution proceedings. Dudley
9 asserted that the \$45,000 judgment, along with the \$212,904 he
10 originally scheduled as unsecured debt owing to Simmons, all
11 constituted prepetition divorce-related debt covered by
12 § 523(a)(15) that was dischargeable in chapter 13 pursuant to
13 § 1328(a)(2).

14 Simmons objected to the plan modification motion, arguing
15 that the \$45,000 judgment constituted a domestic support
16 obligation within the meaning of § 523(a)(5) and hence was
17 nondischargeable under § 1328(a)(2). Simmons also contended that
18 at least a portion of the \$45,000 in attorney fees was incurred
19 postpetition.

20 The chapter 13 trustee also filed a response to the motion
21 to modify the plan, pointing out that the confirmed plan required
22 Dudley to turn over to the trustee copies of his 2008, 2009 and
23 2010 tax returns, and also turn over any net tax refunds
24 associated with those returns. At the time, the trustee only had
25 received copies of Dudley's 2008 tax returns, and Dudley had
26 never paid over to the trustee his 2008 tax refunds in the
27 aggregate amount of \$7,382.

28 The parties reached agreement on language modifying the

1 fourth amended chapter 13 plan, which language was incorporated
2 into a stipulated order confirming the modified chapter 13 plan.
3 In relevant part, the agreed-upon modification language required
4 Dudley to pay to Simmons, within 90 days, \$3,000 of the \$45,000
5 judgment, which \$3,000 the parties agreed constituted
6 postpetition attorney fees ("Postpetition Fee Award"). The
7 agreed-upon modification language further required Dudley to pay
8 over to the trustee before the end of month 60 of his chapter 13
9 plan the \$7,382 owed to the trustee on account of the 2008 tax
10 refunds ("Tax Refund Payment"). The bankruptcy court entered the
11 stipulated order in August 2011.

12 Dudley failed to pay the Postpetition Fee Award, the Tax
13 Refund Payment or any amount on account of Simmons' secured
14 claim. Consequently, in September 2012, Simmons filed a motion
15 to dismiss based on Dudley's default on these three obligations.

16 Dudley filed a response to the dismissal motion in which he
17 conceded that the three required payments had not been made.
18 However, he claimed that none of these payment defaults, either
19 jointly or severally, justified dismissal of his bankruptcy case.
20 The Tax Refund Payment, Dudley explained, was supposed to be
21 funded from his 2011 and 2012 tax refunds, and neither his 2011
22 tax return nor his 2012 tax return had yet been filed through no
23 fault on his part. Similarly, Dudley contended that his failure
24 to pay Simmons' secured claim was not his fault, but rather was
25 the result of the residence not being of sufficient value to
26 permit him to refinance. Finally, Dudley argued that, even
27 though the stipulated order confirming his modified fourth
28 amended plan required him to pay the Postpetition Fee Award,

1 payment of that award technically was not part of his chapter 13
2 plan (because it was the payment of a postpetition debt), so the
3 nonpayment of the award should not be grounds for case dismissal.

4 The bankruptcy court held two hearings on the motion to
5 dismiss. Dudley once again conceded that he had not made the
6 three required payments and once again argued that none of these
7 defaults justified dismissal of his bankruptcy case. He further
8 admitted that he had no ability to pay Simmons' secured claim.
9 The chapter 13 trustee also appeared, and he confirmed that
10 Simmons was Dudley's only remaining unsecured creditor.

11 The bankruptcy court gave the parties an opportunity to
12 negotiate a consensual resolution of their differences regarding
13 the defaults. But when the parties' negotiations proved
14 unsuccessful, the bankruptcy court issued a minute entry/order
15 granting Simmons' dismissal motion.³ According to the court,
16 payment of Simmons' secured claim was "one of the most
17 significant parts" of Dudley's chapter 13 plan, and Dudley's
18 failure to pay that claim constituted a material plan default
19 within the meaning of § 1307(c)(6). Therefore, the bankruptcy
20 court concluded, based on that default and the entire record,
21 dismissal of the case was appropriate.

22 _____
23 ³In his appeal brief, Dudley stated that, among other
24 things, he offered to deed the property to Simmons. This
25 statement is misleading in its incompleteness. The record
26 reflects that, at the time of the dismissal hearings, Dudley was
27 not willing to immediately surrender the residence, but rather
28 sought to retain the residence for several additional months in
exchange for his promise to pay rent to Simmons. After being
held at bay during the five years of the plan, and having not
been paid on a number of the obligations Dudley owed her, we can
understand why Simmons found Dudley's offer unacceptable.

1 On November 30, 2012, the bankruptcy court entered an order
2 dismissing Dudley's bankruptcy case, and on December 11, 2012,
3 Dudley timely appealed.

4 JURISDICTION

5 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
6 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.
7 § 158.

8 ISSUE

9 Did the bankruptcy court err when it dismissed Dudley's
10 bankruptcy case?

11 STANDARDS OF REVIEW

12 We review the bankruptcy court's dismissal of a chapter 13
13 bankruptcy case for an abuse of discretion. See Ellsworth v.
14 Lifescape Med. Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 914
15 (9th Cir. BAP 2011). Under the abuse of discretion standard of
16 review, we first "determine de novo whether the [bankruptcy]
17 court identified the correct legal rule to apply to the relief
18 requested." United States v. Hinkson, 585 F.3d 1247, 1262 (9th
19 Cir. 2009) (en banc). And if the bankruptcy court applied the
20 correct legal rule, we then determine whether the court's factual
21 findings were: "(1) illogical, (2) implausible, or (3) without
22 support in inferences that may be drawn from the facts in the
23 record." Id. (internal quotation marks omitted).

24 DISCUSSION

25 A bankruptcy court may dismiss a chapter 13 bankruptcy case
26 only if the interested party requesting dismissal establishes two
27 things: (1) "cause" for dismissal; and (2) that dismissal is in
28 the best interests of creditors and the estate. See § 1307(c);

1 Nelson v. Meyer (In re Nelson), 343 B.R. 671, 675 (9th Cir. BAP
2 2006); see also In re Ellsworth, 455 B.R. at 918.⁴

3 Here, the record amply supported the bankruptcy court's
4 finding of "cause" under § 1307(c)(6). That provision specifies
5 that a "material default by the debtor with respect to a term of
6 a confirmed plan" constitutes cause for dismissal or conversion.
7 Dudley conceded in both the bankruptcy court and in his appeal
8 brief that his plan required payment of Simmons' secured claim
9 and that he did not pay that claim as required. Nor has Dudley
10 explicitly argued that this default was immaterial. Indeed, he
11 conceded at the second dismissal hearing that he had materially
12 defaulted on his plan obligations.

13 Dudley does, however, argue that the default was not his
14 fault, that it resulted from an unexpected failure of the Phoenix
15 housing market to recover after the recession and mortgage crisis
16 this country experienced in and after 2007. Additionally, we
17

18 ⁴Ordinarily, the bankruptcy court also must consider
19 conversion to chapter 7 as an alternative to dismissal. See
20 In re Nelson, 343 B.R. at 675. The bankruptcy court here did not
21 explicitly do so. But no purpose would be served in remanding
22 for explicit consideration of conversion. None of the interested
23 parties desired or advocated for conversion in lieu of dismissal.
24 Indeed, Dudley obviously did not want his case converted to
25 chapter 7 because a chapter 7 discharge would be of no practical
26 use to him. Most of the debt he owed to Simmons was non-support,
27 divorce-related debt, which is not dischargeable in chapter 7
28 cases but is dischargeable in chapter 13. See §§ 523(a)(15),
1328(a)(2). Under these circumstances, we decline to further
address the issue of conversion. See generally United Student
Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 270 n.9 (2010)
(declining to address issue not raised "in the courts below");
Barnes v. Belice (In re Belice), 461 B.R. 564, 569 n.4 (9th Cir.
BAP 2011) (holding that BAP did not need to decide arguments not
raised in the bankruptcy court or on appeal).

1 acknowledge the opinion of one leading treatise that, “[w]hen the
2 default is caused by unexpected circumstances beyond the debtor's
3 control that have been remedied, the court may find that it is
4 not a material default.” 8 Collier on Bankruptcy ¶ 1307.04[6]
5 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2013)(emphasis
6 added).

7 We reject Dudley’s argument on factual grounds. Dudley’s
8 inability to refinance was not unanticipated. Dudley clearly
9 knew that it was possible that the housing market might not
10 recover sufficiently to enable him to repay Simmons’ secured
11 claim by refinancing the residence. In fact, Dudley sought to
12 address this contingency by attempting to add a provision
13 providing alternate treatment for Simmons’ secured claim in the
14 event he was unable to repay this claim by refinancing. But both
15 Simmons and the bankruptcy court rejected this proposed alternate
16 plan treatment because it did not provide for payment in full of
17 Simmons’ secured claim as required by § 1325(a)(5). And
18 ultimately Dudley abandoned his proposed alternate treatment.

19 Additionally, Dudley never remedied the default. He never
20 even attempted to suggest or propose a means of satisfying his
21 plan obligation to fully pay Simmons’ secured claim after he
22 defaulted on that obligation.

23 We also reject Dudley’s argument on legal grounds. In
24 essence, Dudley contends that his unanticipated inability to pay
25 Simmons’ secured claim should absolve him of his plan obligation
26 to pay that claim. This contention is simply wrong. The plan
27 terms were binding on both Dudley and Simmons. See § 1328(a);
28 Brawders v. Cnty. of Ventura (In re Brawders), 503 F.3d 856, 867

1 (9th Cir. 2007) (citing § 1327); Max Recovery, Inc. v. Than
2 (In re Than), 215 B.R. 430, 435 (9th Cir. BAP 1997). And any
3 doubt regarding the meaning of the plan's terms is interpreted
4 against Dudley as the plan proponent. See 8 Collier on
5 Bankruptcy, supra, at ¶ 1328.02. Here, the confirmed plan, and
6 all of Dudley's failed pre-confirmation attempts to obtain relief
7 from his obligation to pay Simmons' secured claim, convince us
8 that Dudley's confirmed plan obligated Dudley to pay Simmons'
9 secured claim regardless of whether he was able to refinance the
10 residence. This also is how the bankruptcy court interpreted the
11 plan. In sum, on this record, we conclude that the bankruptcy
12 court's material default finding was not clearly erroneous.

13 The record also establishes that dismissal was in the best
14 interests of Dudley's creditors and the estate. By the time of
15 the dismissal hearings, Simmons was Dudley's only remaining
16 unsecured creditor. Thus, her best interests were appropriate
17 and sufficient criteria for determining the best interests of
18 creditors. See Schnall v. Fitzgerald (In re Schnall), 2012 WL
19 1888144 (9th Cir. BAP 2012) (citing Goodrich v. Lines, 284 F.2d
20 874, 877 (9th Cir. 1960)).

21 And Simmons persuasively expressed her view that it was in
22 her best interests for Dudley's case to be dismissed. As she
23 stated in her dismissal motion:

24 The Debtor has been attempting to discharge Simmons'
25 otherwise nondischargeable nondomestic support
26 obligations and to extinguish Simmons' secured claim
27 through lien avoidance and multiple Plan revisions for
28 over 60 months now. Simmons remains a co-obligor on
the Debtor's first mortgage and is unable to secure
independent financing for herself as long as that
liability remains unsatisfied. After five (5) years of
Debtor's Chapter 13 Plan proceedings, that secured

1 obligation remains at approximately the same level of
2 principal indebtedness as it was when the Debtor filed
3 his case. And although the Debtor made all sixty (60)
4 Plan Payments to the Trustee in order to keep the stay
5 in effect, enjoy the former marital residence while
6 making interest-only payments and otherwise hold
7 Simmons at bay, the Debtor has failed to make . . . the
8 Judgment Lien Payment. The Debtor's conduct
9 constitutes cause for dismissal of his case under
10 11 U.S.C. § 1307(c) and his case should be dismissed.

11 Motion to Dismiss (Sept 5, 2012) at 3:21-4:6 (citations omitted).

12 The bankruptcy court's comments at the second dismissal hearing
13 indicate that it understood that Simmons' interests were
14 controlling.

15 Dudley argues on appeal that, instead of dismissing his
16 bankruptcy case, the bankruptcy court should have merely granted
17 Simmons relief from the automatic stay to permit her to enforce
18 her judgment lien in accordance with nonbankruptcy law. We
19 understand that Dudley believed that this was in his own
20 interest, but Dudley never has explained why this was in Simmons'
21 interest as his sole unsecured creditor.

22 More importantly, Dudley's argument entirely glosses over
23 the fact that the full sixty-month term of his confirmed
24 chapter 13 plan had elapsed and that Dudley had materially
25 defaulted on his plan obligation to pay Simmons' secured claim.
26 Moreover, he admitted that he had no ability to cure that default
27 or otherwise complete all of his plan obligations in a legally
28 permissible manner. As a result of his inability to satisfy all
of his plan financial obligations, Dudley was not entitled to a
chapter 13 discharge. See Roberts v. Boyajian (In re Roberts),
279 F.3d 91, 93 n.1 (1st Cir. 2002); In re Rivera, 177 B.R. 332,
335 (Bankr. C.D. Cal. 1995); see also Keith M. Lundin & William

1 H. Brown, Chapter 13 Bankruptcy, 4th Edition, § 343.1, at ¶ [7]
2 (Sec. Rev. July 22, 2004, www.Ch13online.com) (indicating that
3 debtor is not entitled to a chapter 13 discharge unless and until
4 all financial obligations in the entire plan have been
5 satisfied); 8 Collier on Bankruptcy, supra, at ¶ 1328.02 (same).

6 Not being entitled to a chapter 13 discharge and having run
7 through all of the time afforded to him under his sixty-month
8 chapter 13 plan, no legitimate bankruptcy purpose would have been
9 served by the preservation of his chapter 13 bankruptcy case.
10 Accordingly, dismissal was appropriate.

11 **CONCLUSION**

12 For the reasons set forth above, we AFFIRM the bankruptcy
13 court's order dismissing Dudley's bankruptcy case.