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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NOT FOR PUBLICATION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

5	In re:)	BAP No.	NC-14-1198-KuPaJu
6	AARON JEAN,)	Bk. No.	13-12072
7	Debtor.)		
8	_____)		
9	MICHAEL JABLONOWSKI;)		
10	CATHERINE DALE-JABLONOWSKI,)		
11	Appellants,)		
12	v.)	MEMORANDUM*	
13	AARON JEAN,)		
14	Appellee.)		
	_____)		

Argued and Submitted on October 23, 2014
at San Francisco, California

Filed - November 21, 2014

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

Honorable Alan Jaroslovsky, Chief Bankruptcy Judge, Presiding

Appearances: Peter Goldstone argued for appellants Michael
Jablonowski and Catherine Dale-Jablonowski; Brian
Anthony Barboza argued for appellee Aaron Jean.

Before: KURTZ, PAPPAS and JURY, Bankruptcy Judges.

*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 **INTRODUCTION**

2 Michael Jablonowski and Catherine Dale-Jablonowski are
3 judgment creditors of the debtor, Aaron Jean. They challenged
4 Jean's chapter 13¹ bankruptcy petition and his proposed plan,
5 claiming that both the petition and the plan were filed in bad
6 faith. After an evidentiary hearing, the bankruptcy court found,
7 based on the totality of the circumstances, that Jean's petition
8 and plan were both filed in good faith. Accordingly, the court
9 denied the Jablonowskis' motion to dismiss Jean's case and
10 overruled their objection to his plan.

11 On appeal, the Jablonowskis attempt to characterize their
12 issues with the bankruptcy court's rulings in a number of
13 different ways. However, at bottom, the Jablonowskis' appeal is
14 nothing more than their disagreement with the bankruptcy court's
15 good faith findings. Because those findings are not clearly
16 erroneous, we AFFIRM.

17 **FACTS**

18 In 2007, Jean purchased from the Jablonowskis a parcel of
19 residential real property located on Cavedale Road in Glen Ellen,
20 California, for \$500,000. Jean paid \$75,000 in cash and financed
21 the balance by executing a \$425,000 note in favor of the
22 Jablonowskis. The note was secured by a first trust deed against
23 the property.

24
25
26 ¹Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

1 In 2011 and early 2012, Jean and the Jablonowskis engaged in
2 negotiations for the potential payoff or restructuring of the
3 loan. During those negotiations, Jean's father-in-law Paul Belo
4 sometimes negotiated on Jean's behalf. The parties' testimony
5 regarding these negotiations differed significantly. The
6 Jablonowskis testified that both Jean and Belo threatened that
7 Jean would file bankruptcy if the Jablonowskis did not agree to
8 the restructuring or payoff terms that Jean and Belo were
9 proposing. For his part, Jean denied that he ever threatened to
10 file bankruptcy. Belo did not testify in the bankruptcy court
11 proceedings, but the record does include a letter that Belo sent
12 the Jablonowskis during the course of negotiations in which Belo
13 pointed out that, if the negotiations turned out to be
14 unsuccessful, Jean likely would commence a bankruptcy case, which
15 would increase the time and expense for the Jablonowskis to
16 recover the property.

17 According to the Jablonowskis, both Belo and Jean also
18 threatened to "remove fixtures, plumbing, copper wiring, drywall,
19 and cabinetry from the improvements" on the property. The
20 Jablonowskis further claimed that Jean "self-reported" to county
21 officials certain unpermitted improvements he made to the
22 property essentially to punish the Jablonowskis for refusing to
23 accept his debt restructuring or payoff proposals.

24 At some point, Jean stopped making his mortgage payments and
25 negotiations between the parties broke down. The Jablonowskis
26 thereafter filed a lawsuit in the Sonoma County Superior Court
27 (Case No. SCV-251584) for breach of the promissory note, for
28 judicial foreclosure, and for waste of the real property

1 collateral securing the loan. The parties stipulated to a
2 judgment entitling the Jablonowskis to foreclose, but the waste
3 cause of action only was resolved by judgment after a jury trial.
4 The jury found that Jean was liable for bad faith waste on two
5 separate grounds. First, the jury found that Jean committed bad
6 faith waste in the amount of \$9,263.37 by failing to pay real
7 property taxes on the property even though he had the financial
8 means to do so. And second, the jury found that Jean also
9 committed bad faith waste by making unpermitted improvements to
10 the property, which diminished the property's value by \$35,000.
11 Based on the jury's findings that Jean had committed bad faith
12 waste, the state court entered judgment in favor of the
13 Jablonowskis and against Jean for \$44,263.37 on the waste cause
14 of action.

15 The Jablonowskis then sought to recover their fees and costs
16 of roughly \$130,000. After the state court issued a tentative
17 ruling indicating that it would grant the Jablonowskis' request
18 for fees and costs but before entry of a final order granting the
19 request, Jean commenced his chapter 13 bankruptcy case.

20 In response to Jean's petition filing and his proposed
21 chapter 13 plan, the Jablonowskis filed both an objection to
22 Jean's plan and a motion to dismiss his bankruptcy case. The
23 Jablonowskis contended that the bankruptcy petition was filed in
24 bad faith and that the plan was not proposed in good faith. In
25 support of these contentions, the Jablonowskis relied in part on
26 Jean's pre-bankruptcy conduct, particularly the state court
27 findings of bad faith waste and the threats to file bankruptcy
28 Jean allegedly had made.

1 The Jablonowskis further claimed that Jean intentionally
2 filed inaccurate schedules, omitting the \$130,000 owed to their
3 counsel for fees and costs and including \$75,000 allegedly owed
4 to Belo, which the Jablonowskis asserted was actually a gift.
5 The Jablonowskis acknowledged that Jean listed their counsel as a
6 creditor but pointed out that Jean scheduled their counsel's fees
7 and costs claim in the amount of "\$0.00" and listed the claim as
8 contingent, disputed and unliquidated even though Jean had done
9 nothing to challenge the fees and costs claim in the state court,
10 which had issued a tentative ruling indicating that it was
11 prepared to grant in full the request for fees and costs.

12 The Jablonowskis also took issue with Jean's valuation of
13 the real property subject to the foreclosure proceedings. The
14 Jablonowskis argued that Jean in his Schedule A undervalued his
15 "current interest" in the property at \$0 because the property had
16 not yet actually been foreclosed upon. The Jablonowskis
17 additionally argued that Jean overvalued the property in his
18 Schedule D at \$350,000 given that the Jablonowskis' appraiser had
19 testified during the state court trial that the property only was
20 worth \$270,000.

21 The Jablonowskis presented as their most compelling argument
22 their claim that Jean filed the petition to "defeat" their state
23 court litigation. To support this claim, they pointed out that
24 Jean commenced his bankruptcy case just before the state court
25 finalized its award of fees and costs. They also pointed out
26 that, aside from the \$75,000 "phantom" debt owed to Belo and the
27 debts owed to the Jablonowskis and their counsel, Jean's debts
28 were relatively minimal and his creditors were few. The

1 Jablonowskis further posited that, in a chapter 7 case, the
2 judgment debt for bad faith waste would be nondischargeable under
3 § 523(a)(6) as a debt arising from a willful and malicious
4 injury. Finally, they opined that Jean's proposed plan payments
5 to unsecured creditors of \$500 per month for sixty months were
6 unrealistic, given that Jean had calculated his disposable income
7 as \$371.73 per month.

8 In response to the Jablonowskis' allegations of bad faith,
9 Jean declared that he never intended to harm the Jablonowskis by
10 not paying the real property taxes or by making unpermitted
11 improvements to the property. He further claimed that his
12 schedules were accurate and complete, and that he believed that
13 his proposed plan payments of \$500 per month for five years were
14 feasible if he remained frugal and organized over that time
15 period. He also denied that the \$75,000 loan from Belo was
16 spurious. Finally, Jean disputed the notion that he filed the
17 petition in order to avoid the consequences of the Jablonowskis'
18 state court litigation. Rather, Jean insisted, he filed his
19 chapter 13 bankruptcy case because he did not have the means to
20 pay all of his debts and because, given his age and financial
21 condition, he would never be able to pay his debts in full.

22 After an evidentiary hearing, the bankruptcy court ruled
23 against the Jablonowskis on both their plan objection and on
24 their motion to dismiss. The court apparently accepted as true
25 most of the Jablonowskis' account of Jean's pre-bankruptcy
26 conduct regarding the property, the loan restructuring

1 negotiations, and the state court lawsuit.² Nonetheless, the
2 court determined that these pre-bankruptcy events carried
3 relatively little weight in considering whether Jean's petition
4 and chapter 13 plan were filed in good faith. The court also
5 indicated that there were no material inaccuracies or omissions
6 in Jean's bankruptcy schedules.

7 What the court considered most critical in assessing Jean's
8 good faith was Jean's proposal to make plan payments of \$500 per
9 month for sixty months. The court found that the proposed plan
10 payments were substantial and represented a significant recovery
11 for Jean's creditors. The court further indicated that, while
12 the proposed monthly payments exceeded his disposable income, the
13 payment amount was still feasible and reflected an earnest
14 attempt by Jean to pay his creditors as much as his finances and
15 the chapter 13 process permitted.

16 Rather than abusing the bankruptcy process by using it to
17 avoid the consequences of the state court litigation, the court
18 concluded that Jean was properly using his chapter 13 case to pay
19 as much as he could to his creditors, including the Jablonowskis,
20 for the maximum period of time permitted for a chapter 13 plan.

21 The bankruptcy court entered orders on April 3, 2014,
22 denying the Jablonowskis' motion to dismiss and confirming Jean's
23 plan, and the Jablonowskis timely appealed.

24
25 ²The bankruptcy court did not find that Jean personally
26 threatened to file for bankruptcy relief. Instead, the court
27 seemed to accept Jean's testimony that any comments regarding his
28 potential bankruptcy filing were attributable to others. In
addition, the court referred to the \$75,000 that Belo gave Jean
for the down payment on the real property as a loan rather than a
gift.

1 factual findings are not clearly erroneous unless they are
2 "illogical, implausible, or without support in the record." Retz
3 v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010).

4 **DISCUSSION**

5 A chapter 13 petition which is filed in bad faith may
6 constitute "cause" for dismissal under § 1307(c). See Leavitt v.
7 Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999); Eisen
8 v. Curry (In re Eisen), 14 F.3d 469, 470 (9th Cir. 1994) (per
9 curiam). "To determine if a petition has been filed in bad faith
10 courts are guided by the standards used to evaluate whether a
11 plan has been proposed in bad faith." In re Eisen, 14 F.3d at
12 470. In making both determinations, a bankruptcy court needs to
13 review the "totality of the circumstances." Id.

14 In In re Leavitt, the Ninth Circuit held that, when
15 considering whether a chapter 13 case should be dismissed because
16 it was filed in bad faith, the bankruptcy court should consider,
17 among other factors:

- 18 (1) whether the debtor misrepresented facts in his
19 petition or plan, unfairly manipulated the Bankruptcy
20 Code, or otherwise filed his chapter 13 petition or
21 plan in an inequitable manner;
22 (2) the debtor's history of filings and dismissals;
23 (3) whether the debtor intended to defeat state court
24 litigation; and
25 (4) whether egregious behavior is present.

26 In re Leavitt, 171 F.3d at 1224 (citations and internal quotation
27 marks omitted).³

28 ³The record reflects that the bankruptcy court placed the
burden of proof on Jean to demonstrate his good faith for
purposes of both plan confirmation and the Jablonowskis'
dismissal motion. In In re Ellsworth, we acknowledged that the
(continued...)

1 The Jablonowskis claim that the bankruptcy court did not
2 properly apply In re Leavitt's totality of the circumstances
3 test. We disagree. In denying the Jablonowskis' dismissal
4 motion and in confirming Jean's plan, the bankruptcy court
5 considered all relevant factors as presented by the parties. It
6 weighed the evidence presented and inferred from the totality of
7 the circumstances that Jean's bankruptcy petition and plan were
8 filed in good faith. It is implicit in the court's written
9 decision, and in the comments it made during the evidentiary
10 hearing, that the court found no material omissions or
11 misrepresentations in Jean's filings, no unfair manipulation of
12 the Code, no inequity in Jean's petition or plan, and no
13 egregious behavior. Nor did Jean have a history of prior
14 bankruptcy filings or dismissals.

15 As for the relationship between Jean's petition filing and
16 the state court litigation, the bankruptcy court inferred from
17 the entirety of the circumstances that Jean did not file for
18 bankruptcy relief to "defeat" the state court litigation.
19 Instead, the court found that Jean's chapter 13 petition and plan

21 ³(...continued)
22 debtor bore the burden of proof on the good faith issue for plan
23 confirmation purposes, but we questioned (without deciding the
24 issue) whether for purposes of a case dismissal motion the movant
25 or the debtor should bear the burden of proof regarding good
26 faith. See In re Ellsworth, 455 B.R. at 918-919. In any event,
27 because the bankruptcy court held that Jean bore the burden and
28 had met this burden, any error by the court in placing the burden
of proof on Jean as the debtor would not aid the Jablonowskis'
case for reversal on appeal. In other words, for purposes of
this appeal, any error regarding the burden of proof was
harmless, and we must ignore harmless error. Van Zandt v. Mbunda
(In re Mbunda), 484 B.R. 344, 355 (9th Cir. BAP 2012).

1 constituted an earnest and good-faith attempt to deal with the
2 judgment debt resulting from the state court litigation. The
3 court found particularly persuasive that Jean had proposed to
4 make plan payments of \$500 per month - more than the amount of
5 his disposable income - for sixty months (the maximum time period
6 permitted for a chapter 13 plan). In the parlance of In re Retz
7 and Hinkson, we cannot say that the bankruptcy court's inferences
8 or its findings were illogical, implausible or without support in
9 the record. Consequently, we have no basis to overturn these
10 inferences and findings.

11 The Jablonowskis further contend that the bankruptcy court
12 disregarded the evidence they presented, which they believe was
13 sufficient to support a finding that Jean filed his petition and
14 plan in order to defeat the Jablonowskis' state court litigation.
15 The record reflects that the court did not ignore the
16 Jablonowskis' evidence, but rather chose to give it little
17 weight. The court found Jean's evidence more persuasive and
18 ultimately chose to credit Jean's account of his reasons for
19 filing his petition and plan over the account offered by the
20 Jablonowskis. The bankruptcy court's choice between these two
21 accounts does not constitute reversible error. As the Supreme
22 Court aptly put it: "[w]here there are two permissible views of
23 the evidence, the fact finder's choice between them cannot be
24 clearly erroneous." Anderson v. City of Bessemer City, N.C.,
25 470 U.S. 564, 574 (1985).

26 The Jablonowskis' remaining arguments on appeal hinge on
27 their assertion that the judgment debt Jean owed them would be
28 nondischargeable in a chapter 7 bankruptcy case. The

1 Jablonowskis contend that the judgment against Jean for bad faith
2 waste qualifies as a nondischargeable debt under § 523(a)(6).
3 That section excepts from discharge debts arising from willful
4 and malicious injuries. We are skeptical that the Jablonowskis'
5 contention is correct. The elements necessary to establish bad
6 faith waste are insufficient by themselves to support a
7 nondischargeability claim under § 523(a)(6). Section 523(a)(6)
8 requires a very specific mental state on the part of the debtor -
9 intent to injure or actual knowledge that injury is substantially
10 certain to occur. See Kawaauhau v. Geiger, 523 U.S. 57, 61-62
11 (1998); Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1208
12 (9th Cir. 2001). In contrast, a cause of action for bad faith
13 waste does not require any particular state of mind. See Fait v.
14 New Faze Dev., Inc., 207 Cal.App.4th 284, 299 (2012) (holding
15 that bad faith waste occurs "whenever the owner's impairment of
16 the value of the security is not caused by the economic pressures
17 of a market depression, whether the owner acts recklessly,
18 intentionally, maliciously, or with some other mental state.").

19 Moreover, it is clear from the record that the state court
20 jury verdict did not include any findings regarding Jean's mental
21 state. Thus, the Jablonowskis' assertion that the judgment debt
22 would be nondischargeable under § 523(a)(6) is entirely
23 speculative, and hence it offers little or no support for their
24 claim that Jean filed his chapter 13 petition and plan in bad
25 faith.

26 Even if the judgment debt would be nondischargeable in a
27 chapter 7 case, Jean's attempt to discharge that debt in a
28 chapter 13 case does not, by itself, constitute bad faith. See

