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NOT FOR PUBLICATION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

In re:) BAP No. NV-14-1359-JuKuD
)
 DEBRA SUE PHILLIPS,) Bk. No. NV-11-29783-LED
)
 Debtor.)
)
 _____)
)
 DEBRA PHILLIPS,)
)
 Appellant,)
)
 v.) M E M O R A N D U M ¹
)
 KATHLEEN A. LEAVITT,)
 Chapter 13 Trustee,)
)
 Appellee.)
)
 _____)

Argued and Submitted on March 19, 2015
at Las Vegas, Nevada

Filed - May 8, 2015

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

Honorable Laurel E. Davis, Bankruptcy Judge, Presiding

Appearances: Max Couvillier, III for appellant Debra Phillips;
 Lauren Anne Peña for appellee Kathleen A.
 Leavitt, Chapter 13 Trustee.

Before: JURY, DUNN, and KURTZ, 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 8024-1.

1 Debtor Debra Phillips appeals from the bankruptcy court's
2 order granting the chapter 13 trustee's motion to dismiss under
3 § 1307(c).² At the time the order was entered, Debtor's
4 chapter 13 case was pending without a confirmed plan for more
5 than two years. Because the bankruptcy court did not abuse its
6 discretion in finding cause for dismissal, we AFFIRM.

7 **I. FACTS**

8 Debtor filed both her chapter 13 petition and first plan on
9 December 30, 2011. In her schedules, Debtor listed
10 302 Butterworth Ct., Henderson, Nevada (302 Butterworth) as her
11 principal residence and 303 Butterworth Ct., Henderson, Nevada
12 (303 Butterworth) as a rental property. During the pendency of
13 the case, the bankruptcy court authorized a sale of
14 302 Butterworth.

15 As to 303 Butterworth, on July 16, 2012, Debtor objected to
16 the claim (the Claim) filed by the first trust deed holder, Bank
17 of New York Mellon (Creditor), as untimely. On October 16,
18 2012, the Court entered an order sustaining Debtor's objection;
19 the Claim was allowed to the extent that it was secured by the
20 fair market value of 303 Butterworth and disallowed as to any
21 arrears and unsecured debt. On July 19, 2013, Debtor filed a
22 motion to determine and amend the Claim, requesting that the
23 Claim be deemed amended to state the mortgage balance owed as
24 \$180,000, the fair market value of 303 Butterworth. The Court

25
26 ² Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

1 granted the motion by order entered on August 28, 2013. Based on
2 this valuation of the secured claim, under § 1325(a)(5)(B)(ii),
3 Debtor was allowed to propose a plan that provided for full
4 payment of the Claim in the amount of \$180,000 with appropriate
5 interest over the course of the plan. Although Debtor filed
6 seven proposed plans, she never proposed to pay the \$180,000
7 claim over the life of the plan as required by statute.

8 On October 23, 2013, Debtor amended her schedules to
9 reflect the sale of 302 Butterworth and the change of her
10 principal residence to 303 Butterworth. On the same date Debtor
11 filed the fifth plan, which addressed the Claim by providing for
12 monthly payments of \$904.91 at a fixed interest rate of 3.5%
13 over thirty-six months and extended the maturity date to July
14 2038. Creditor initially objected on the ground that Debtor
15 could not modify 303 Butterworth's secured loan because the
16 property had become Debtor's principal residence.³ Creditor
17 filed a second supplemental objection arguing that even if
18 303 Butterworth was classified as rental property, Debtor did
19 not have sufficient income to pay the \$180,000 value over the
20 proposed thirty-six month plan and that the plan did not provide
21 for the required treatment of the Claim. The treatment provided
22 in the sixth plan was substantially similar to that in the fifth
23 plan except the monthly payments would be made over thirty-seven

24
25 ³ Our panel in Benafel v. One West Bank, FSB
26 (In re Benafel), 461 B.R. 581 (9th Cir. BAP 2011), held that the
27 relevant date for determining whether real property is debtor's
28 principal residence for the purposes of the Bankruptcy Code's
anti-modification provision is the petition date, so this ground
for objection was not persuasive.

1 months, "starting from the 24th month." The Chapter 13 Trustee
2 (Trustee) opposed confirmation on the following grounds: the
3 plan was not feasible as to its treatment of the Claim; the
4 post-petition payments to secured creditors were delinquent; and
5 the plan failed to accurately provide for the Debtor's
6 disposable income. The seventh plan filed on January 4, 2014,
7 was blank as to the Claim. Creditor opposed the seventh plan.

8 At a continued hearing on plan confirmation on February 19,
9 2014, the bankruptcy court denied confirmation of all seven
10 plans. After more than thirty days passed with no new plan
11 proposed, Trustee filed a motion to dismiss under § 1307(c) on
12 March 26, 2014 (Motion to Dismiss). The Motion to Dismiss
13 requested as relief only dismissal, not conversion as allowed by
14 the statute. At the May 1, 2014 hearing on the Motion to
15 Dismiss, the bankruptcy court noted that all seven plans were
16 previously denied at the February 19, 2014 hearing and a new
17 plan had not been filed. Citing little progress since the case
18 filing in 2011, the bankruptcy court granted dismissal. The
19 order granting the Motion to Dismiss was entered on May 8, 2014.
20 Debtor filed a timely notice of appeal.

21 **II. JURISDICTION**

22 The bankruptcy court had jurisdiction over this proceeding
23 under 28 U.S.C. §§ 1334 and 157(b)(2)(A). We have jurisdiction
24 under 28 U.S.C. § 158.

25 **III. ISSUES**

- 26 1. Whether the bankruptcy court erred when it found "cause"
27 under § 1307(c) to dismiss the chapter 13 case; and
- 28 2. Whether the bankruptcy court erred when it did not consider

1 conversion based on the best interests of creditors and the
2 estate.

3 IV. STANDARD OF REVIEW

4 The bankruptcy court's dismissal of a chapter 13 case is
5 reviewed for abuse of discretion. Leavitt v. Soto
6 (In re Leavitt), 171 F.3d 1219, 1223 (9th Cir. 1999).

7 The bankruptcy court abuses its discretion when it applies
8 the incorrect legal rule or when its application of the law to
9 the facts is: (1) illogical; (2) implausible; or (3) without
10 support in inferences that may be drawn from the facts in the
11 record. United States v. Hinkson, 585 F.3d 1247, 1263 (9th Cir.
12 2009) (en banc).

13 V. DISCUSSION

14 Section 1307(c) provides that the bankruptcy court may
15 either dismiss or convert a chapter 13 case to chapter 7 for
16 cause, "whichever is in the best interests of creditors and the
17 estate." This provision first requires the bankruptcy court to
18 consider "cause" based on a list of nonexclusive items
19 designated in § 1307(c)(1)-(11). Nelson v. Meyer
20 (In re Nelson), 343 B.R. 671, 674-75 (9th Cir. BAP 2006). If
21 "cause" exists, the bankruptcy court then decides between
22 conversion and dismissal based on the best interests of
23 creditors and the estate. Id.; de la Salle v. U.S. Bank, N.A.
24 (In re de la Salle), 461 B.R. 593, 605 (9th Cir. BAP 2011).

25 **A. The bankruptcy court did not err in finding cause to** 26 **dismiss Debtor's chapter 13 case.**

27 1) 11 U.S.C. § 1307(c)(5)

28 Two elements must be satisfied to constitute "cause" under

1 § 1307(c) (5): first, denial of confirmation of a plan under
2 § 1325 and second, denial of a request made for additional time
3 to file another plan. § 1307(c) (5); Nelson, 343 B.R. at 675-76.

4 The first element is met. The bankruptcy court denied
5 confirmation of all seven plans at the February 19, 2014
6 hearing. There was no current plan on file as of the May 1,
7 2014 hearing on the Motion to Dismiss.

8 The second element requires "at a minimum, that the court
9 must afford a debtor an opportunity to propose a new or modified
10 plan following the denial of plan confirmation." Id. at 676.
11 Here, Debtor had ample opportunity to propose a new plan during
12 the ten-week period between February 19, 2014, when the prior
13 plans were denied, and May 1, 2014, the date of the hearing on
14 the Motion to Dismiss. Because Debtor had additional time to
15 file an eighth plan after the denial of the prior plans, the
16 second element is satisfied here. After seven ineffectual plan
17 attempts and a ten-week default in proposing an eighth plan,
18 Debtor had plenty of time to propose a viable plan and failed to
19 do so. Accordingly, cause to dismiss exists under § 1307(c) (5).

20 2) 11 U.S.C. § 1307(c) (1)

21 A chapter 13 case may be dismissed based on a finding of
22 "unreasonable delay by the debtor that is prejudicial to
23 creditors." § 1307(c) (1). "A debtor's unjustified failure to
24 expeditiously accomplish any task required either to propose or
25 confirm a chapter 13 plan may constitute cause for dismissal
26 under § 1307(c) (1)." Ellsworth v. Lifescape Med. Assocs., P.C.
27 (In re Ellsworth), 455 B.R. 904, 915 (9th Cir. BAP 2011);
28 de la Salle, 461 B.R. at 605 (finding unreasonable delay and

1 prejudice to creditors where debtors had sufficient time but
2 repeatedly failed to provide for a claim in their plan).

3 Here, Debtor unjustifiably delayed by not proposing a new
4 plan following the denial of the prior plans in February. The
5 bankruptcy court also found that no real progress had been made
6 since the case filing in 2011 and the last hearings in 2013.
7 Debtor's failure to propose a confirmable plan in more than two
8 years supports a finding of cause for dismissal under
9 § 1307(c)(1).

10 3) 11 U.S.C. § 1307(c)(3)

11 The failure to file a plan timely under § 1321 also
12 constitutes cause for dismissal. § 1307(c)(3). Rule 3015
13 provides that a plan is untimely unless it is filed within
14 fourteen days of the petition date. Subsequent plans required
15 by the court are also subject to § 1307(c)(3). Ellsworth,
16 455 B.R. at 916.

17 Here, Debtor failed to propose another plan after the prior
18 seven plans were denied. Debtor only filed the eighth plan
19 after the bankruptcy court granted dismissal at the May 1, 2014
20 hearing. Because Debtor failed to file a plan timely under
21 § 1321, cause for dismissal exists under § 1307(c)(3).

22 **B. The bankruptcy court did not err in not weighing the**
23 **alternatives of conversion or dismissal where Trustee**
24 **waived any request to consider conversion.**

25 The bankruptcy court has a mandatory obligation under
26 § 1307(c) to determine whether dismissal or conversion would be
27 in the best interests of creditors and the estate. Nelson,

1 343 B.R. at 674-75 (noting that the decisions under § 1112(b)⁴
2 informs the analysis of § 1307(c)); Sullivan v. Harnisch
3 (In re Sullivan), 522 B.R. 604, 612 (9th Cir. BAP 2014)
4 (reversing for abuse of discretion where the bankruptcy court
5 failed to consider conversion when it dismissed a chapter 11
6 case under § 1112(b)).

7 Here, Trustee did not request conversion as an alternative
8 to dismissal when proceeding with her motion to dismiss. In so
9 doing, Trustee waived consideration of conversion in her motion
10 to dismiss. Neither did Debtor request that the bankruptcy
11 court consider conversion as an option, and on appeal, Debtor
12 does not argue that conversion to chapter 7 should have been
13 considered, thereby waiving the issue. U.S. v. Ullah, 976 F.2d
14 509, 514 (9th Cir. 1992) ("We will not ordinarily consider
15 matters on appeal that are not specifically and distinctly
16 argued in appellant's opening brief.") (internal quotation marks
17 and citation omitted). Accordingly, the bankruptcy court did
18 not abuse its discretion in not considering conversion as an
19 alternative.

20 VI. CONCLUSION

21 For the reasons stated above, we AFFIRM.
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25 ⁴ While the language in § 1307(c) parallels its chapter 11
26 counterpart, § 1112(b), § 1307(c) differs slightly in providing
27 that the court "may dismiss . . . or may convert" as opposed to
28 § 1112(b)'s "shall convert . . . or dismiss." This minor
variation is without significance because both provisions require
that the court decide between conversion and dismissal based on
"whichever is in the best interests of creditors and the estate."