

MAY 22 2015

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

NOT FOR PUBLICATION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	NC-14-1414-KiTAD
)		
ROSE M. VILLALON,)	Bk. No.	13-30723
)		
Debtor.)		
_____)		
)		
ROSE M. VILLALON,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
DAVID BURCHARD, Chapter 13)		
Trustee,)		
)		
Appellee.)		
_____)		

Argued and Submitted on May 14, 2015,
at San Francisco, California

Filed - May 22, 2015

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

Honorable Dennis Montali, Bankruptcy Judge, Presiding

Appearances: Albert M. Kun argued for appellant Rose M. Villalon; Lilian Guan Tsang argued for appellee David Burchard, Chapter 13 Trustee.

Before: KIRSCHER, TAYLOR 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 8024-1.

27
28

1 Appellant, chapter 13² debtor Rose M. Villalon, appeals an
2 order of the bankruptcy court dismissing her bankruptcy case prior
3 to confirmation. We AFFIRM.

4 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY³**

5 Rose M. Villalon filed a chapter 13 bankruptcy case on
6 March 29, 2013. Debtor listed two properties on Schedule A:
7 property at 619 Capitol Avenue valued at \$350,000 and property at
8 338 Teddy Avenue valued at \$450,000. Debtor disclosed on
9 Schedule D a debt owing to Wells Fargo Home Mortgage in the amount
10 of \$380,000 and secured by a lien on the 619 Capitol Avenue
11 property. Debtor also disclosed a debt owing to Homecomings
12 Financial, LLC in the amount of \$610,971 and secured by the
13 338 Teddy Avenue property. Nationstar Mortgage, LLC
14 ("Nationstar") filed proof of claim No. 3 on May 22, 2013, and
15 amended its claim on July 22, 2014, asserting a claim of
16 \$612,489.86, which amount includes an arrearage of \$62,933.40,
17 secured by the 338 Teddy Avenue property. Debtor filed an amended
18 schedule D on June 7, 2013, listing Nationstar as the creditor
19 holding a secured claim against the 338 Teddy Ave. property.
20 Debtor filed Schedules I and J on March 29, 2013, reflecting

21
22 ² Unless otherwise indicated, all chapter and section
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
24 "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

25 ³ The parties failed to include in the record on appeal some
26 of the relevant documents; we have exercised our discretion to
27 reach the merits of the appeal by independently reviewing the
28 bankruptcy court's electronic docket and the imaged documents
attached thereto. See O'Rourke v. Seaboard Sur. Co. (In re E.R.
Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1988); Atwood v.
Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9
(9th Cir. BAP 2003).

1 monthly net income of \$2,140; she amended these Schedules on
2 January 27, 2014, reflecting monthly net income of \$1,051. She
3 also disclosed an exempt retirement fund of \$100,000 on
4 Schedule C.

5 Debtor proposed seven chapter 13 plans; Debtor filed these
6 plans on April 11, 2013, June 3, 2013, June 19, 2013, December 19,
7 2013, February 13, 2014, March 28, 2014, and July 3, 2014. The
8 chapter 13 trustee, David Burchard ("Trustee") filed motions to
9 dismiss Debtor's case on June 7, 2013, December 10, 2013,⁴ and
10 May 2, 2014. Nationstar joined in the Trustee's May 2, 2014
11 motion to dismiss.

12 On June 7, 2013, the date the Trustee also filed his first
13 motion to dismiss, Debtor filed a motion to value the 338 Teddy
14 Avenue property. Debtor maintained in her motion:

15 The deed of trust is dated June 16, 2007 and was
16 recorded July 3, 2007 as Document Number 2007-1412876-00
17 of official records in the Office of the Recorder of San
18 Francisco. The original value of the lien was \$450,000,
19 currently it is \$610,971. The current value of the
20 property is \$300,000.

21 (Dkt. No. 31 at 2). Consistent with the foregoing, in a
22 declaration filed by Debtor in opposition to the Trustee's first
23 motion to dismiss, Debtor stated that: she owned a rental
24 property at 338 Teddy Avenue; Nationstar currently held the loan
25 against the 338 Teddy Avenue property; and Debtor believed her
26 rental income would cover the mortgage payments, taxes and
27 insurance after the bankruptcy court determined the value of the
28 338 Teddy Avenue property. (Dkt. No. 41). Following a hearing and

⁴ On February 20, 2014, the Trustee amended his December 10,
2013 motion to dismiss.

1 pursuant to a stipulation between Debtor and Nationstar, the
2 bankruptcy court entered an order on September 21, 2013, valuing
3 the 338 Teddy Avenue property at \$491,000.

4 Debtor then filed on October 2, 2013, a motion seeking to
5 compel Nationstar to produce the original of the promissory note.
6 The bankruptcy court denied that motion on December 6, 2013, in
7 part, because Debtor failed to attest under penalty of perjury
8 that she did not sign certain Nationstar documents and that, as a
9 result, the signatures on the documents were forgeries.

10 Debtor next filed on October 8, 2013, an objection to
11 Nationstar's proof of claim arguing that: the claim did not
12 include a copy of the security agreement and evidence of
13 perfection; it did not include a copy of the assignment upon which
14 it was based; and the alleged security interest was not secured by
15 Debtor's principal residence.

16 Debtor filed yet another motion on February 25, 2014, seeking
17 once again to value Nationstar's collateral. Debtor requested, in
18 the second motion for valuation, that the bankruptcy court
19 determine the amount of Nationstar's claim "based upon all
20 documents and records on file, together with this Motion,
21 Declaration and any such additional documents, records, and
22 evidence which may be presented." (Dkt. No. 91).

23 In his motion to dismiss filed May 2, 2014, the Trustee
24 sought dismissal of Debtor's case under § 1307(c)(1) alleging
25 unreasonable delay which was prejudicial to creditors and under
26 § 1307(c)(4) alleging Debtor's failure to make timely plan
27 payments; the Trustee asserted Debtor owed \$33,764.00 in
28

1 delinquent plan payments.⁵ Nationstar joined in the Trustee's
2 motion. A docket entry made on June 18, 2014, shows the
3 bankruptcy court continued the hearing on the Trustee's May 2,
4 2014 motion to dismiss and ordered Debtor to file an amended plan
5 "that reflects that Nationstar [is] a secured creditor in the
6 amount of \$491,000 by 7/3/14, otherwise the case will be
7 dismissed." Debtor filed a chapter 13 plan on July 3, 2014, that:
8 increased Debtor's plan payments from \$3,625 to \$8,360.86 per
9 month; listed Nationstar as having an estimated secured claim of
10 \$491,000; and provided for a monthly payment to Nationstar with
11 zero percent interest.

12 Prior to the continued hearing, the bankruptcy court entered
13 a docket text order on July 21, 2014, advising Nationstar that it
14 should be prepared to direct the bankruptcy court to where in the
15 record the court could find the assignment of the promissory note.

16 The transcript of the July 23, 2014 continued hearing on the
17 Trustee's motion to dismiss shows that Nationstar satisfied the
18 bankruptcy court that it held the promissory note and, after some
19 discussion, the bankruptcy court advised Debtor's counsel that it
20 would take up separately the consequences of Nationstar's alleged

21
22 ⁵ The figure of \$33,764.00 was based upon Debtor's amended
23 chapter 13 plan filed March 28, 2014, that provided for 60 monthly
payments of \$3,625 each.

24 The Chapter 13 Standing Trustee's Final Report and Account,
25 filed October 17, 2014, states he received \$16,223 by or on behalf
26 of the Debtor during the pendency of the case. Regardless of when
27 Debtor made such payments, Trustee's motion to dismiss and
28 accompanying declaration filed May 2, 2014, establishes Debtor's
delinquent payments as \$33,764. Debtor failed to refute such
delinquency during the July 23, 2014 hearing and, in fact,
confirmed the arrears amount in the colloquy between the court and
Debtor's counsel. Hr'g Tr. (July 23, 2014) 16:19-17:8; 18:23-
20:20.

1 failure to give notice regarding the servicer of the promissory
2 note. Hr'g Tr. (July 23, 2014) 19:8-14.

3 The bankruptcy court then turned its focus to the merits of
4 the Trustee's motion to dismiss, at which point the Trustee
5 explained that Debtor owed approximately \$110,000 in arrears under
6 the terms of her most recent amended chapter 13 plan filed July 3,
7 2014:

8 [T]hat's where we got the 110,000 from, was that in that
9 plan on July 3rd, the payment reflected in the plan is
10 \$8360 a month. And so you go back the number of months
that the case is in existence, and that's what the
arrearage is.⁶

11 Id. at 16:13-17. When asked, Debtor's counsel stated at the
12 July 23, 2014 hearing that Debtor had funds available to make a
13 \$33,000 payment. Id. at 16:22-24. The Trustee urged dismissal,
14 but the bankruptcy court instead gave Debtor an opportunity to
15 cure the default of \$33,764, as identified in the Trustee's
16 motion, plus one additional monthly payment of \$8,360. Id. at
17 18:17-20; 19:22-20:1. The bankruptcy court again continued the
18 hearing on the Trustee's motion to dismiss and ordered during the
19 hearing that Debtor pay \$42,124.00 "by August 6th, or the case
20 will be dismissed." Id. 19:22-20:1.

21 On August 7, 2014, the Trustee filed a declaration that
22 Debtor had failed to pay the Trustee the sum of \$44,124⁷ by
23 August 6, 2014, and to comply with the bankruptcy court's order of

24

25

26 ⁶ The arrearage listed in the Trustee's motion to dismiss was
based on the proposed monthly payment of \$3,625 set forth in
27 Debtor's chapter 13 plan filed March 28, 2014. Doc. No. 99.

28 ⁷ Trustee's declaration contains a typographical error. The
transcript stated \$42,124, not \$44,124.

1 July 23, 2014. On August 7, 2014, the bankruptcy court entered an
2 order dismissing Debtor's case for her failure to comply with the
3 bankruptcy court's July 23, 2014 order. Debtor timely appealed
4 the dismissal of her case.

5 **II. JURISDICTION**

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

8 **III. ISSUE**

9 Did the bankruptcy court abuse its discretion in dismissing
10 Debtor's chapter 13 case?

11 **IV. STANDARD OF REVIEW**

12 We review the bankruptcy court's dismissal of a chapter 13
13 bankruptcy case under any of the enumerated paragraphs of
14 § 1307(c) for abuse of discretion. Ellsworth v. Lifescape Med.
15 Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 914 (9th Cir. BAP
16 2011). A bankruptcy court abuses its discretion if it applies the
17 wrong legal standard, misapplies the correct legal standard, or if
18 its factual findings are illogical, implausible, or without
19 support in inferences that may be drawn from the facts in the
20 record. See TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d
21 820, 832 (9th Cir. 2011) (citing United States v. Hinkson,
22 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

23 **V. DISCUSSION**

24 Debtor contends that three issues exist on appeal: whether
25 the bankruptcy court misconstrued California Civil Code § 2937(b);
26 whether the bankruptcy court erred in concluding that a sufficient
27 assignment to Nationstar existed; and whether the bankruptcy court
28 erred in dismissing Debtor's case prior to confirmation of her

1 plan.

2 The first two issues identified by Debtor on appeal did not
3 affect the bankruptcy court's dismissal of her case. The
4 bankruptcy court dismissed Debtor's bankruptcy case in response to
5 Trustee's motion filed on May 2, 2014, concerning: Debtor's
6 unreasonable delay that [was] prejudicial to creditors; Debtor's
7 delinquency in making plan payments; and Debtor's failure to pay
8 the Trustee the sum of \$42,124 by August 6, 2014, as ordered by
9 the bankruptcy court on July 23, 2014. The only matter properly
10 before the Panel is whether the bankruptcy court abused its
11 discretion in dismissing Debtor's chapter 13 case.

12 A debtor must not impose prejudicial, unreasonable delay on
13 the creditors and must make timely payments to the chapter 13
14 trustee under § 1326(a)(1)(A) according to the amounts proposed by
15 the chapter 13 plan. If the debtor causes unreasonable delay and
16 fails to make timely payments to the chapter 13 trustee in
17 accordance with a court order, the bankruptcy court may convert or
18 dismiss the case after determining which is in the best interests
19 of the creditors and the estate. § 1307(c).⁸

20 Debtor failed to make timely payments during the pendency of
21 the case in direct contravention of § 1326(a)(1)(A) and the
22 bankruptcy court's July 26, 2014 order. Although the bankruptcy
23 court did not make explicit findings, we "may conduct appellate
24

25 ⁸ Trustee and Nationstar requested only dismissal; they
26 waived conversion by not requesting such relief and by not raising
27 it on appeal. The bankruptcy court did not abuse its discretion
28 by not considering conversion as an alternative. Golden v. Chi.
Title Ins. Co. (In re Choo), 273 B.R. 608, 613 (9th Cir. BAP
2002) (issues not raised before the bankruptcy court or in
appellant's opening brief are deemed waived).

1 review 'if a complete understanding of the issues may be obtained
2 from the record as a whole or if there can be no genuine dispute
3 about omitted findings.'" Veal v. Am. Home Mort. Servicing, Inc.
4 (In re Veal), 450 B.R. 897, 919-20 (9th Cir. BAP 2011) (citing
5 Gardenhire v. Internal Revenue Serv. (In re Gardenhire), 220 B.R.
6 376, 380 (9th Cir. BAP 1998), rev'd on other grounds, 209 F.3d
7 1145 (9th Cir.2000)). In reviewing the record in this appeal, a
8 clear basis exists for the court's dismissal ruling.
9 In re Gardenhire, 220 B.R. at 380.

10 Debtor commenced her chapter 13 case on March 29, 2013, and
11 acknowledged Nationstar as a secured creditor in her schedules and
12 numerous chapter 13 plans. Debtor also stipulated that the value
13 of Nationstar's collateral was \$491,000. Rather than proposing a
14 feasible plan that provided for payment of the stipulated amount
15 of Nationstar's secured claim, Debtor proposed infeasible plans
16 and failed to make chapter 13 plan payments to the Trustee.
17 Debtor's bankruptcy case had been pending for over sixteen months
18 when the bankruptcy court dismissed the case on August 7, 2014,
19 for Debtor's failure to make a timely payment of \$42,124; an
20 amount far less than what was due under the terms of the amended
21 chapter 13 plan filed July 3, 2014. The bankruptcy court's
22 dismissal of Debtor's bankruptcy case was not illogical or without
23 support in the record.

24 As evident from the record, the bankruptcy court did not
25 conduct the "best interests of creditors and the estate" analysis
26 before dismissing the case. See In re Schlegel, 526 B.R. at 343
27 n.10. Debtor however failed to raise any issue on appeal
28 concerning whether the bankruptcy court abused its discretion in

1 not explicitly considering the best interests of the creditors and
2 the estate; Debtor has waived this "best interests" issue.

3 In re Choo, 273 B.R. at 613.

4 Even if Debtor failed to waive the "best interests" issue, on
5 this record, any such error is harmless as case dismissal promotes
6 the best interests of creditors and the estate for these reasons:

- 7 (1) Debtor failed to pay the court-ordered payment of \$42,124
8 prior to August 6, 2014; (2) she proposed an amended July 3, 2014
9 plan requiring monthly payments of \$8,360.86, which greatly exceed
10 Debtor's disclosed monthly net income; (3) her most recent amended
11 chapter 13 plan is patently infeasible; and (4) the creditors are
12 being unreasonably delayed from pursuing available nonbankruptcy
13 remedies when the Debtor has failed to propose a confirmable plan
14 through the numerous chapter 13 plans filed by her over 16 months.

15 **VI. CONCLUSION**

16 Based on the foregoing, we conclude that the bankruptcy court
17 did not abuse its discretion in granting the Trustee's motion to
18 dismiss and AFFIRM.

19
20
21
22
23
24
25
26
27
28