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NOT FOR PUBLICATION

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-14-1427-TaKuPe
)		
MIRIAM M. LOPEZ,)	Bk. No.	2:14-bk-12175-BB
)		
Debtor.)		
_____)		
MIRIAM M. LOPEZ,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
DAVID A. GILL, Chapter 7)		
Trustee,)		
)		
Appellee.)		
_____)		

Argued and Submitted on July 23, 2015
at Pasadena, California

Filed - September 3, 2015

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

Honorable Sheri Bluebond, Chief Bankruptcy Judge, Presiding

Appearances: Wendolyn E. Arnold argued for appellant; Matthew
F. Kennedy argued for appellee.

Before: TAYLOR, KURTZ, and PERRIS,** 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 8024-1(c)(2).

** The Honorable Elizabeth L. Perris, United States
Bankruptcy Judge for the District of Oregon, sitting by
designation.

1 **INTRODUCTION**

2 The bankruptcy court denied Miriam A. Lopez's motion to
3 convert her chapter 7¹ bankruptcy case to one under chapter 13.
4 We AFFIRM the bankruptcy court's denial; but, we REVERSE its
5 decision to deny the motion with prejudice, and we REMAND the
6 matter with instructions that the bankruptcy court strike the
7 "with prejudice" language from its order.

8 **FACTS²**

9 The Debtor began her chapter 7 case with schedules that
10 contained incomplete information. In amended bankruptcy
11 schedules, the Debtor made numerous corrections. These included
12 the scheduling of a \$4,000 tax refund ("Tax Refund") that she
13 received post-petition and additional vehicles.

14 The Debtor also amended her claimed exemptions, but she did
15 not claim any exemption in the Tax Refund. Nonetheless, she
16 turned this money over to her bankruptcy attorney, Montaz M.
17 Gerges ("Gerges"). The Trustee correctly, but unsuccessfully,
18 sought recovery from Gerges; Gerges continued to hold the tax
19 refund as of the oral argument in this appeal.

20 From this already rocky start, the Debtor's chapter 7 case
21 moved forward neither swiftly nor successfully. Eventually,
22 after months of what the Trustee characterized as
23

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

26 ² We exercise our discretion to take judicial notice of
27 documents electronically filed in the underlying bankruptcy
28 case. See Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),
293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 "stonewalling," the Debtor filed a motion seeking to convert her
2 chapter 7 case to one under chapter 13 ("Conversion Motion").³
3 She, however, failed to support her motion with either evidence
4 or case specific legal argument.

5 The Trustee opposed. He alleged bad faith conduct but also
6 asserted that conversion would be futile because the Debtor had
7 no excess income available to fund a plan.

8 In response, Gerges, on behalf of the Debtor, leveled a
9 personal attack on the Trustee; he contended that the Trustee
10 was untrustworthy and only sought assets, including the Tax
11 Refund, for personal gain. The Debtor also submitted a
12 declaration stating that: "[s]oon after [the initial § 341(a)
13 meeting], the trustee began bullying and intimidating [her] for
14 not disclosing the [Tax Refund]." The Debtor attested that the
15 Trustee informed her that he would object to case dismissal,
16 that he threatened to sue her "for everything [she] had," and
17 that she could "then go sue [Gerges]."

18 Prior to the hearing, the bankruptcy court issued a
19 tentative ruling,⁴ noting that it was not required to convert if
20 doing so would be futile. It posed two questions to the Debtor
21

22 ³ During this time, the Trustee filed objections to some
23 of the Debtor's claimed exemptions and moved for turnover of
24 estate assets and a second extension of the deadline to object
25 to the Debtor's discharge. The bankruptcy court sustained the
26 Trustee's objections and granted his requested relief, from
which order the Debtor also appeals. We dispose of that appeal
in a separate memorandum decision.

27 ⁴ The August 27, 2014 tentative ruling is not in the
28 record. It was instead obtained from the bankruptcy court's
website: <http://www.cacb.uscourts.gov/>.

1 related to issues of chapter 13 eligibility and plan
2 feasibility; namely, whether the Debtor had any disposable
3 income and how value would be delivered to creditors in
4 chapter 13. The tentative ruling stated that, to the extent the
5 Debtor did not have regular income and solely proposed to
6 liquidate assets, case conversion was inappropriate.

7 Both the Trustee and an attorney for the Debtor (but not
8 Gerges) appeared at the hearing. The record indicates that the
9 bankruptcy court was receptive to case conversion, provided,
10 however, that the Debtor and Gerges complied with their duties
11 and responsibilities under the Code, cooperated with the
12 Trustee, and provided evidence that the Debtor was eligible for
13 chapter 13 and capable of proposing a feasible plan. Thus,
14 after hearing argument, it did not deny the Conversion Motion.

15 Instead, the bankruptcy court continued the matter,
16 contingent on three requirements: (1) Gerges' immediate turnover
17 of the Tax Refund to the Trustee; (2) the Debtor providing the
18 Trustee with access to the three scheduled vehicles; and (3) the
19 Debtor's submission of a supplemental declaration explaining her
20 workers' compensation benefits. The bankruptcy court made clear
21 that the three conditions were disjunctive; thus, if the Debtor
22 and Gerges failed to comply with any one of the conditions, the
23 bankruptcy court would deny the Conversion Motion. The Debtor's
24 attorney expressly agreed to provide the declaration and tacitly
25 agreed to all conditions as he raised no argument against the
26 conditioned continuance.

27 Compliance with the conditions, however, did not happen.
28 Gerges did not timely turnover the Tax Refund. Instead, he

1 filed a premature notice of appeal. As a result, Trustee's
2 counsel filed a declaration and notified the bankruptcy court of
3 the failure to comply with the Tax Refund condition. The
4 bankruptcy court immediately entered an order denying the
5 Conversion Motion "with prejudice." The Debtor then filed a
6 supplemental notice of appeal.

7 **JURISDICTION**

8 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
9 §§ 1334 and 157(b)(2)(A) and (O). We have jurisdiction under
10 28 U.S.C. § 158.

11 **ISSUE**

12 Whether the bankruptcy court erred in denying the
13 Conversion Motion.

14 **STANDARD OF REVIEW**

15 We review the bankruptcy court's denial to convert from
16 chapter 7 to chapter 13 for an abuse of discretion. A
17 bankruptcy court abuses its discretion if it applies the wrong
18 legal standard, misapplies the correct legal standard, or if its
19 factual findings are illogical, implausible, or without support
20 in inferences that may be drawn from the facts in the record.

21 See TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832
22 (9th Cir. 2011) (citing United States v. Hinkson, 585 F.3d 1247,
23 1262 (9th Cir. 2009) (en banc)).

24 We may affirm on any basis supported by the record. Heers
25 v. Parsons (In re Heers), 529 B.R. 734, 740 (9th Cir. BAP 2015).

26 **DISCUSSION**

27 Section 706(a) provides that a chapter 7 debtor may convert
28 her case to one under chapter 13. The right to convert is

1 ultimately conditioned on the debtor's ability to qualify as a
2 chapter 13 debtor. Marrama v. Citizens Bank of Mass., 549 U.S.
3 365, 372-73 (2007). One basis for disqualification is
4 § 1307(c), which provides for case dismissal or conversion to
5 chapter 7 "for cause." Id. Another basis for disqualification
6 is § 109(e), which establishes eligibility requirements "that a
7 [c]hapter 7 debtor must satisfy *before* conversion to
8 [c]hapter 13." Id. at 380 (emphasis in original). As a
9 threshold eligibility matter, "[o]nly an individual with regular
10 income" qualifies for chapter 13. 11 U.S.C. § 109(e); see also
11 id. § 101(30) (defining an "individual with regular income" as
12 one "whose income is sufficiently stable and regular to enable
13 such individual to make payments under a plan under chapter 13
14").

15 The Debtor argues that she did not act in bad faith such
16 that she was ineligible for chapter 13. She contends that,
17 based on Marrama, the Trustee bore the burden of showing bad
18 faith conduct, which he failed to do. The Debtor also renews
19 her accusations of wrongdoing by the Trustee, noting that
20 neither the United States Trustee nor any other creditors
21 objected to her conversion request.

22 As the Trustee agreed at oral argument, however, the
23 bankruptcy court did not base its denial of the Conversion
24 Motion squarely on bad faith conduct. Instead, it continued the
25 matter contingent on the Debtor's - and by extension, Gerges' -
26 compliance with the three disjunctive conditions. When Gerges
27 failed to comply with the first condition, the bankruptcy court
28 determined, in effect, that the Debtor would not propose a

1 feasible plan. On this record, this determination was not
2 erroneous.

3 The record shows that, at the hearing, Debtor's counsel did
4 not argue against the bankruptcy court's imposed conditions.
5 Thereafter the Debtor and Gerges were on notice of the
6 consequences for noncompliance. Rather than comply with the
7 first condition, Gerges filed a premature notice of appeal. In
8 doing so, he signaled that compliance with the two other
9 conditions would not occur. To date, there has been no
10 compliance with any of the bankruptcy court's three directives;
11 this triple failure was fatal to the Debtor's conversion
12 request.

13 The bankruptcy court could not convert the case where the
14 Debtor was not eligible for chapter 13 or where conversion would
15 be futile based on a lack of plan feasibility. The record
16 clearly reflects the bankruptcy court's eligibility and
17 feasibility concerns. Rather than deny the Conversion Motion
18 outright, it properly requested minimal compliance with
19 chapter 7 debtor duties and additional information and evidence
20 essential to a determination that the Debtor qualified for
21 chapter 13 and was capable of proposing a feasible and
22 confirmable chapter 13 plan. The bankruptcy court implicitly
23 determined that in the absence of such compliance, information,
24 and evidence, the record before it did not justify conversion.
25 The record adequately supports its determination.

26 That said, the bankruptcy court's denial of the Conversion
27 Motion "with prejudice" is problematic. Prior to entry of the
28 order, nothing in the record suggested that denial with

1 prejudice was even a remote consequence of noncompliance. In
2 opposing the Conversion Motion, the Trustee did not request a
3 denial with prejudice. Nor did he request it at the hearing.
4 In fact, there is no reference to "prejudice" at the hearing.
5 The first time that the request arises is in the declaration of
6 Trustee's counsel, advising the bankruptcy court of Gerges'
7 failure to turnover the Tax Refund. The bankruptcy court
8 entered the order denying the Conversion Motion with prejudice
9 promptly after receiving the Trustee's declaration and without
10 affording Debtor any opportunity to be heard on the "with
11 prejudice" request.

12 "Due process requires notice reasonably calculated, under
13 all the circumstances, to apprise interested parties of the
14 pendency of the action and afford them an opportunity to present
15 their objections." United Student Aid Funds, Inc. v. Espinosa,
16 559 U.S. 260, 272 (2010) (internal quotation marks and citation
17 omitted). Here, while the Debtor clearly had notice of the
18 Trustee's opposition to the Conversion Motion, neither she nor
19 Gerges were informed of the possibility that an adverse
20 adjudication could be a permanent bar to conversion; in this
21 respect, the opportunity for objection was improperly denied.
22 Given the permanency of the decision and that the relief at
23 issue involved an absolute right under the Bankruptcy Code, the
24 inclusion of "with prejudice" in the denial order constituted
25 error.

26 **CONCLUSION**

27 Based on the foregoing, we AFFIRM the bankruptcy court's
28 decision to deny the Conversion Motion. But, we REVERSE its

1 decision to do so with prejudice and REMAND the matter to the
2 bankruptcy court, with instructions that it strike the "with
3 prejudice" language from the order.

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