

JUL 15 2016

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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NOT FOR PUBLICATION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

In re:) BAP No. CC-15-1344-FKiKu
)
 LYDIA ONG SANDERS,) Bk. No. 8:15-bk-14615-TA
)
 Debtor.)
)
)
 LYDIA ONG SANDERS,)
)
 Appellant,)
)
 v.) **MEMORANDUM***
)
 UNITED STATES TRUSTEE,**)
)
 Appellee.)
)

Argued and Submitted on June 23, 2016
at Pasadena, California***

Filed - July 15, 2016

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

Honorable Theodor C. Albert, Bankruptcy Judge, Presiding

Appearances: Richard Lawrence Antognini argued for Appellant
Lydia Ong Sanders.

* 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.

** The United States Trustee did not file an answering brief or otherwise participate in this appeal.

*** Oral argument in this matter was consolidated with the appeal in Sanders v. Cohen (In re Sanders), BAP No. CC-15-1284-FKiKu.

1 Before: FARIS, KIRSCHER, and KURTZ, Bankruptcy Judges.

2 **INTRODUCTION**

3 Appellant/chapter 11¹ debtor Lydia Ong Sanders appeals the
4 bankruptcy court's summary dismissal of her bankruptcy case at
5 the time she filed the petition. The court did so without notice
6 or an opportunity for a hearing, based solely on the fact that
7 she and her husband had recently filed numerous bankruptcy
8 petitions. We find that the bankruptcy court deprived
9 Mrs. Sanders of due process. Accordingly, we VACATE the
10 dismissal order and REMAND this case to the bankruptcy court.

11 **FACTUAL BACKGROUND²**

12 Mrs. Sanders and her husband, Marshall Samuel Sanders, have
13 initiated a combined total of nine bankruptcy petitions since
14 2010. Mrs. Sanders has filed four petitions in the Central
15 District of California, including the petition from which this
16 appeal arises.³

17 Prior to the instant appeal, Mrs. Sanders most recently
18 filed a chapter 11 bankruptcy petition on October 29, 2014. That
19 case was dismissed on November 19, 2014 for failure to file her
20

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

23 ² We have exercised our discretion to review the bankruptcy
24 court's docket, as appropriate. See Woods & Erickson, LLP v.
25 Leonard (In re AVI, Inc.), 389 B.R. 721, 725 n.2 (9th Cir. BAP
2008).

26 ³ Mrs. Sanders filed a chapter 7 case in June 2010 and
27 received a discharge in September 2010; she filed a chapter 13
28 case in December 2013, which was dismissed in March 2014 with a
180-day bar on refiling; and she filed a chapter 11 case in
October 2014, which was dismissed in November 2014.

1 schedules, statements, or a plan. The court did not impose any
2 bar against refiling a bankruptcy petition.

3 On September 22, 2015, Mrs. Sanders again attempted to file
4 a chapter 11 petition. Mrs. Sanders' filings included an
5 Application for Individuals to Pay the Filing Fee in
6 Installments. Her husband filed the documents in the clerk's
7 office and waited to receive conformed copies.

8 The clerk returned to Mr. Sanders the Order Approving
9 Payment of Filing Fee in Installments with a handwritten note by
10 the bankruptcy judge stating, "denied - dismiss w. 180-day bar.
11 This debtor and husband have filed 9 cases in only about 4
12 years."

13 The court entered the order and notice of dismissal on the
14 same day. Mrs. Sanders timely appealed.

15 JURISDICTION

16 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
17 §§ 1334 and 157(b)(1). We have jurisdiction under 28 U.S.C.
18 § 158.

19 ISSUE

20 Whether the bankruptcy court violated due process by
21 dismissing Mrs. Sanders' petition without notice or a hearing.⁴

22 STANDARD OF REVIEW

23 "Whether an appellant's due process rights were violated is
24 a question of law we review de novo." DeLuca v. Seare

25
26 ⁴ Although Mrs. Sanders' statement of issues on appeal
27 refers to violations of the Federal Rules of Bankruptcy Procedure
28 and the local rules, the argument in her opening brief focuses
solely on the alleged denial of due process. As such, we only
address the due process issues raised therein.

1 (In re Seare), 515 B.R. 599, 615 (9th Cir. BAP 2014) (citing
2 Miller v. Cardinale (In re DeVille), 280 B.R. 483, 492 (9th Cir.
3 BAP 2002), aff'd, 361 F.3d 539 (9th Cir. 2004)); see also HSBC
4 Bank USA, Nat'l Ass'n v. Blendheim (In re Blendheim), 803 F.3d
5 477, 497 (9th Cir. 2015) ("Whether adequate notice has been given
6 for the purposes of due process is a mixed question of law and
7 fact that we review de novo."). "De novo review requires that we
8 consider a matter anew, as if no decision had been made
9 previously." Francis v. Wallace (In re Francis), 505 B.R. 914,
10 917 (9th Cir. BAP 2014) (citations omitted).

11 DISCUSSION

12 **A. Due process generally requires notice and an opportunity to** 13 **be heard.**

14 The sole issue on appeal concerns whether the bankruptcy
15 court violated Mrs. Sanders' due process rights by dismissing her
16 petition without notice or an opportunity to be heard.

17 Generally speaking, a court must give sufficient notice of
18 its intention to dismiss a case and the opportunity for
19 interested parties to be heard. See Tennant v. Rojas
20 (In re Tennant), 318 B.R. 860, 870 (9th Cir. BAP 2004) ("the
21 concept of procedural due process requires a notice and an
22 opportunity to be heard" (citing Muessel v. Pappalardo
23 (In re Muessel), 292 B.R. 712, 717 (1st Cir. BAP 2003))).

24 According to the United States Supreme Court:

25 An elementary and fundamental requirement of due
26 process in any proceeding which is to be accorded
27 finality is notice reasonably calculated, under all the
28 circumstances, to apprise interested parties of the
pendency of the action and to afford them an
opportunity to present their objections. The notice
must be of such nature as reasonably to convey the

1 required information, . . . and it must afford a
2 reasonable time for those interested to make their
appearance[.]

3 Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950)
4 (internal citations omitted).

5 Section 1112(b) provides that, "after notice and a hearing,"
6 a court may dismiss a chapter 11 case "for cause."

7 Section 102(1) defines the phrase "after notice and a hearing":

8 (1) "after notice and a hearing", or a similar phrase -

9 (A) means after such notice as is appropriate in
10 the particular circumstances, and such opportunity
11 for a hearing as is appropriate in the particular
circumstances; but

12 (B) authorizes an act without an actual hearing if
such notice is given properly and if -

13 (i) such a hearing is not requested timely by
14 a party in interest; or

15 (ii) there is insufficient time for a hearing
16 to be commenced before such act must be done,
and the court authorizes such act[.]

17 "[T]he concept of notice and a hearing is flexible and
18 depends on what is appropriate in the particular circumstance."

19 In re Tennant, 318 B.R. at 870 (citing Great Pac. Money Markets,

20 Inc. v. Krueger (In re Krueger), 88 B.R. 238, 241 (9th Cir. BAP

21 1988)). A procedure may be "perfectly appropriate" if it

22 "notifies the debtor of the deficiencies of his petition and

23 dismisses the case sua sponte without further notice and a

24 hearing when the debtor fails to file the required forms within a

25 deadline." Id. at 870-71 (citing Minkes v. LaBarge

26 (In re Minkes), 237 B.R. 476, 478-79 (8th Cir. BAP 1999)).

27 However, we have acknowledged that the "flexible" notice and

28 hearing requirement does not allow a bankruptcy court to

1 steamroll over a party's due process rights. Id. at 871 (citing
2 Dinova v. Harris (In re Dinova), 212 B.R. 437, 443-44 (2d Cir.
3 BAP 1997)).

4 **B. The court violated due process by failing to afford**
5 **Mrs. Sanders adequate notice and the right to be heard prior**
6 **to dismissing her bankruptcy petition.**

7 In the present case, the bankruptcy court dismissed
8 Mrs. Sanders' petition at the clerk's office filing window. It
9 did not give her any notice prior to dismissing her petition, nor
10 did it allow her an opportunity to present arguments to the court
11 or rectify any deficiencies. This was an error.

12 Section 102(d) requires only such notice and opportunity for
13 hearing as is "appropriate in the particular circumstances." But
14 it was not "appropriate" to dismiss Mrs. Sanders' case (by way of
15 a handwritten note on an unrelated form) without giving
16 Mrs. Sanders any semblance of prior notice or any opportunity for
17 a hearing.

18 This was not a harmless error. See Rosson v. Fitzgerald
19 (In re Rosson), 545 F.3d 764, 776-77 (9th Cir. 2008) ("Because
20 there is no reason to think that, given appropriate notice and a
21 hearing, Rosson would have said anything that could have made a
22 difference, Rosson was not prejudiced by any procedural
23 deficiency."). Mrs. Sanders could have pointed out that the only
24 reason the court gave for dismissing her case is invalid: no rule
25 or statute allows for summary dismissal solely because a debtor
26 and her spouse have filed a particular number of bankruptcy cases
27 in a given time period. But the bankruptcy court did not give
28 her a chance to say this or anything else.

We acknowledge that the dismissal of Mrs. Sanders'

1 chapter 11 case may have been inevitable. The Sanders family's
2 record of filings and dismissals does not bode well. Further, it
3 is nearly impossible for an unrepresented debtor to navigate the
4 complexities of a chapter 11 case. Nevertheless, a court may not
5 "cut to the chase" in a manner that deprives a party of due
6 process.

7 Accordingly, the bankruptcy court erred when it dismissed
8 Mrs. Sanders' petition without giving her notice of its intent to
9 dismiss the case and affording her an opportunity to be heard on
10 that issue.⁵

11 **CONCLUSION**

12 For the reasons set forth above, we VACATE the bankruptcy
13 court's dismissal of Mrs. Sanders' bankruptcy petition and REMAND
14 the case to the bankruptcy court.

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25 ⁵ Arguably, the present appeal may be moot, since the
26 180-day bar on filing has since expired, and Mrs. Sanders may
27 file a new petition. But the improper dismissal of this case
28 might still prejudice Mrs. Sanders because she and her husband
would have filed **ten** bankruptcy cases in six years. In other
words, if we allow the court's order to stand, Mrs. Sanders may
never be able to get past the filing window.