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SUSAN M. SPRAUL, CLERK
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NOT FOR PUBLICATION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.	CC-15-1328-KiTaKu
6	MINON MILLER,)	Bk. No.	2:13-bk-35116-RK
7	Debtor.)		
8	_____)		
9	MINON MILLER,)		
10	Appellant,)		
11	v.)	MEMORANDUM¹	
12	EDWARD GILLIAM,)		
13	Appellee.)		
	_____)		

Submitted Without Oral Argument
on September 22, 2016

Filed - October 13, 2016

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

Honorable Robert N. Kwan, Bankruptcy Judge, Presiding

Appearances: _____
Appellant Minon Miller, pro se, on brief;
Appellee Edward Gilliam, pro se, on brief.

Before: KIRSCHER, TAYLOR and KURTZ, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have, it has no precedential value. See 9th Cir. BAP Rule 8024-1.

1 Chapter 7² debtor Minon Miller appeals an order granting the
2 motion of creditor Edward Gilliam to dismiss her bankruptcy case
3 for bad faith under § 707(b)(3)(A). The bankruptcy court also
4 dismissed Debtor's case with prejudice under § 349(a), with a
5 permanent bar to refiling. We AFFIRM.³

6 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

7 A. Prepetition events

8 1. History of state court litigation between the parties

9 Debtor, a self-employed income tax preparer and casual
10 longshoreman, and Gilliam met in March 2007, when Debtor entered
11 into a lease, with option to buy, for Gilliam's home in Carson,
12 California ("Kemp home"). The Kemp home rental spawned the
13 non-stop, contentious litigation that has been going on between
14 them ever since, to the point where Gilliam obtained a permanent
15 restraining order against Debtor.

16
17 ² Unless specified otherwise, all chapter, code and rule
18 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

19 ³ Gilliam objects to certain documents Debtor submitted as
20 part of her excerpts of the record. Specifically, he objects to
21 Exhibits 1, 2, 3, 4, 5, 6, 19, 20, 23, 24, 25, 26, 27, 28, 29, 30,
31, 33, 34, 35, 39, 40, 41, 42, 43, 44, 45, 46 & 47 on the basis
22 of "lack of foundation" and/or "relevance." For starters, what
23 Gilliam raises are trial-level objections not suitable for an
24 appeal. Moreover, Debtor's Exhibits 1-6, 23-30 & 39-46 were
admitted at trial and therefore are appropriately part of the
appellate record. Thus, Gilliam's request that we not consider
these Exhibits is DENIED.

24 This leaves his objection to Exhibits 19, 20, 31, 33, 34, 35
25 & 47. Debtor attempted to offer these Exhibits at trial; they
26 consist of documents from either Gilliam's own bankruptcy case or
documents from state court proceedings between the parties. The
27 bankruptcy court rejected these Exhibits based on lack of
relevance. However, because Debtor challenges the court's
28 decision to not admit these Exhibits, it is appropriate for us to
consider them. Therefore, Gilliam's request that we not consider
Exhibits 19, 20, 31, 33, 34, 35 & 47 is also DENIED.

1 Through multiple legal actions, Gilliam recovered against
2 Debtor: (1) a judgment in one of three unlawful detainer actions;
3 (2) an award for attorney's fees in a Civil Harassment action; and
4 (3) a default judgment, after prove up hearings, for fraudulent
5 conveyances, malicious prosecution and injunctive relief. The
6 state court subsequently added Debtor's limited liability company,
7 Nonim, LLC ("Nonim"), the entity receiving the fraudulent
8 conveyances, as a party liable under the judgments.

9 To aid in execution of Gilliam's outstanding judgments
10 against Debtor and Nonim, the state court appointed a receiver.
11 Although the Receiver never received any documents from Debtor, he
12 did obtain important Nonim financial records from third parties,
13 which the bankruptcy court relied upon for its finding of Debtor's
14 bad faith. The Receiver obtained Nonim's checking account bank
15 statements from Wells Fargo for the periods of January to April
16 2012 and January to August 2013. Debtor was the only signatory on
17 Nonim's bank accounts. The Receiver also obtained records from
18 the Santa Barbara Tax Program Group ("TPG"). TPG was the third
19 party tax return processing firm that did electronic filings of
20 income tax returns for Debtor. As shown by the bank and TPG
21 statements and as explained by Debtor, she prepared tax returns as
22 MTD Miller Income Tax Service and electronically filed them for
23 her clients through TPG; the fees Debtor earned were paid from her
24 client's tax refunds, and TPG electronically deposited these fees
25 into a Nonim checking account.

26 TPG prepared annual accounting statements of the fees
27 deposited into Nonim's bank account in 2012 and 2013. The
28 statement for 2012 reflected deposits of \$422,616.15 into Nonim's

1 checking account, with the majority of the funds being deposited
2 between January and April 2012. Thus, Nonim's gross income for
3 2012 was \$422,616.15, as reflected by the tax return preparation
4 fees paid by TPG for that year. This was corroborated by Nonim's
5 bank statements from January through April 2012, which reflected
6 TPG deposits totaling \$404,036.15. In 2013, TPG deposited
7 \$102,810.67, with the majority of the funds being deposited
8 between February and May 2013. Thus, Nonim's gross income for
9 2013 was \$102,810.67. Nonim's bank statements from February
10 through May 2013 reflected the respective TPG deposits totaling
11 \$102,810.67. Therefore, in 2012 and 2013 Nonim had a gross income
12 of \$523,426.82 from fees generated by Debtor's personal services
13 as a tax return preparer.

14 On September 25, 2013, the state court granted the Receiver's
15 motion to abandon Nonim's leased premises, as there were no funds
16 to pay the rent. That same day the Receiver's office notified
17 Debtor by email that she could pick up the keys to her office. A
18 few weeks later, Debtor filed the instant bankruptcy case.

19 **2. Gilliam's bankruptcy filings and related litigation with**
20 **Debtor**

21 The litigation between Debtor and Gilliam did not stop with
22 the state court. Gilliam filed three bankruptcy cases in 2008;
23 the first two were dismissed for failure to file documents.
24 During the course of Gilliam's third case, Debtor filed a § 523
25 dischargeability action against him. Debtor was unsuccessful and
26 Gilliam was awarded \$27,800 in attorney's fees. Debtor also
27 unsuccessfully sought to have Gilliam's discharge revoked under
28 § 727(d).

1 The bankruptcy court also found Debtor in contempt for filing
2 state court actions against Gilliam in violation of the discharge
3 injunction. Debtor was ordered to dismiss the state court
4 actions. When Debtor failed to dismiss them, the bankruptcy court
5 found her in contempt for a second time.

6 **3. Debtor's prior bankruptcy filings and related litigation**
7 **with Gilliam**

8 Debtor is no stranger to bankruptcy either. By her own
9 admission, she has filed five previous cases, two of which were
10 not disclosed until the chapter 7 trustee discovered them. Her
11 first case was filed in 1985 (2:85-06506); she received a
12 discharge. Her second case was filed in 1997 (2:97-28727). She
13 appears to have received a discharge in that case. Her third
14 case, a chapter 7 (2:05-47679), was filed eight years later on
15 October 14, 2005. She received a discharge in that case in July
16 2006. Her fourth case, her first chapter 13 (2:11-32470), was
17 filed on March 30, 2011, and dismissed on April 27, 2011, for
18 failure to file documents. Her fifth case, a second chapter 13
19 (2:11-32470), was filed on May 24, 2011. It was dismissed for bad
20 faith on Gilliam's motion.

21 **B. Postpetition events**

22 **1. Debtor's instant bankruptcy filing**

23 Debtor filed this chapter 7 case, her sixth bankruptcy case,
24 on October 15, 2013. She indicated that most of her debts were
25 consumer debts.

26 Debtor listed a 100% interest in Nonim in her Schedule B,
27 noting the entity was insolvent. Debtor's Schedule F reflected a
28 total unsecured debt of \$245,936, a good portion of which was

1 attributed to Gilliam. Debtor filed two Schedule I's. In one she
2 declared gross monthly income of \$2,397.44 as a casual
3 longshoreman; in the other, she declared in response to Item No. 7
4 that she was a self-employed tax preparer for fourteen years and
5 had regular income of \$3,000 per month from the operation of her
6 business. Debtor did not attach any detailed statement for her
7 business as instructed by Item No. 7. She indicated that,
8 although Nonim was insolvent, her tax preparer license was current
9 and that she would work as an independent contractor.

10 In her SOFA, Debtor declared in Item No. 18 that she was a
11 member of Nonim and that it was "DBA: MTD Miller Income Tax
12 Service (Tax Prep)" from 2010 to the present. For Item No. 1,
13 Debtor stated that her income from Nonim for 2012 and 2013 was
14 "approx. 98,500.00" and "approx. 45,877.00," respectively.

15 **2. Gilliam's motion to dismiss Debtor's chapter 7 case**

16 Gilliam moved to dismiss Debtor's case for bad faith under
17 § 707(b)(3)(A) on November 12, 2013, which was followed by an
18 amended motion on November 14, 2013 ("Motion to Dismiss").
19 Gilliam contended that Debtor's case, which coincidentally was
20 filed exactly eight years after receiving her last chapter 7
21 discharge, was another serial and abusive filing to avoid paying
22 his valid judgments.

23 Debtor opposed the Motion to Dismiss. She contended that her
24 case had not been filed in bad faith but was filed because her
25 financial position had changed: her business was insolvent and
26 her income was insufficient to pay her medical expenses. She then
27 spent a great deal of time discussing the background of the
28 Default Judgment, arguing that Gilliam obtained it fraudulently.

1 She also accused Gilliam of engaging in fraud in his chapter 7
2 bankruptcy case. Debtor also disputed that her second chapter 13
3 case was dismissed for bad faith. She accused Gilliam of getting
4 the bankruptcy court to sign an order saying the case was
5 dismissed for bad faith, even though (she claimed) the bankruptcy
6 court had made no such ruling at the dismissal hearing.

7 One day before the hearing on the Motion to Dismiss, Gilliam
8 filed a "supplemental motion to dismiss," which essentially was a
9 reply brief to the Motion to Dismiss. Gilliam contended that he
10 would have filed it sooner had he been timely served with Debtor's
11 opposition. Gilliam now requested that Debtor's case be dismissed
12 with prejudice under § 349(a) with a four-year refiling bar.
13 Gilliam also contended that Debtor had grossly under-reported her
14 income for the years 2012 and 2013, noting that Nonim/Debtor had
15 collected over \$500,000 in fees during that two-year period.

16 An initial hearing on the Motion to Dismiss was held on
17 December 3, 2013. The bankruptcy court noted the lateness of
18 Gilliam's supplemental brief but decided that, because the matter
19 would be set for trial, Debtor would have an opportunity to
20 respond to any new allegations he raised.

21 **3. Trial on the Motion to Dismiss**

22 At trial the Receiver, Gilliam and Debtor testified. Because
23 Debtor was appearing pro se and was called by Gilliam as an
24 adverse witness, the bankruptcy court went to painstaking lengths
25 to explain to Debtor how her testimony would proceed. The record
26 shows that the court treated her with great leniency and allowed
27 her to provide narrative testimony.

28 For SOFA Item No. 1, Debtor testified that she reported the

1 approximate net earnings she received as an "employee" from Nonim
2 for 2012 and 2013, not the gross earnings of Nonim, which she
3 alleged was the way someone at the court-sponsored bankruptcy
4 clinic told her to report her income. When asked why the reported
5 income figures for 2012 and 2013 were "approximate," Debtor
6 explained that she subtracted out what she "guesstimated" Nonim's
7 expenses were for those years. She had to "guesstimate" expenses
8 and income because she had not yet filed any tax returns for her
9 or for Nonim for 2012 and 2013. Trial Tr. (June 12, 2014) 252:14-
10 255:3; 270:1-25; 294:1-296:12; 298:4-12; 299:15-23; 300:6-301:2;
11 301:11-302:4. She asserted that she did not know how to report
12 earnings for Nonim, a single member LLC. Id. at 296:17-297:4.
13 Debtor explained that she had the option of reporting Nonim's
14 income as a sole proprietorship, in which case the income flowed
15 to her personally, or as a corporation; her intent was to file
16 Nonim's taxes as a corporation. Id. at 253:16-254:1.

17 The bankruptcy court questioned Debtor extensively about what
18 she contended were legitimate and deductible business expenses of
19 Nonim, which were recorded in the submitted bank statements. In
20 particular, the court asked about multiple disbursements for hair
21 salons, spas, restaurants, high-end clothing and shoe stores,
22 hotels, and trips to New Orleans and Las Vegas. Debtor explained
23 that these expenses were incurred for the purpose of attracting
24 low-income clients, which made up a large part of her business,
25 and employee training and incentives. Id. at 272:1-293:17.
26 Regarding multiple, large cash withdrawals in 2012, Debtor
27 explained that most were for payroll for her independent
28 contractors, who she paid with cashier's checks. Debtor testified

1 that information regarding who was paid with these checks was in
2 books she could not locate. Id. at 277:12-278:4, 280:23-281:6,
3 281:7-12.

4 Debtor asserted that she filed this chapter 7 case because
5 she had been ill and incurred significant medical expenses. Id.
6 at 329:6-24. She also stated that she could not pay her bills
7 because of the receivership. Debtor contended that she was unable
8 to do any tax preparation since July 2013 because she was locked
9 out of her office and had no access to her business records. Id.
10 at 329:25-332:2. In sum, Debtor explained that she had to file
11 this case because of her insufficient income, her failed business
12 and her "mountains of medical bills." Id. at 346:4-13. Her only
13 evidence of medical expenses, however, was her bankruptcy
14 schedules. Out of the \$245,936 listed as unsecured debt in her
15 Schedule F, Debtor listed approximately \$25,616.46 in medical
16 debt.

17 After hearing testimony from the witnesses, the bankruptcy
18 court ordered the parties to file additional briefing on the
19 issues of (1) whether Debtor should have reported Nonim's gross or
20 net income in her bankruptcy schedules and SOFA; and
21 (2) In re Mitchell, 357 B.R. 142 (Bankr. C.D. Cal. 2006), which
22 set forth factors a court can consider when dismissing a chapter 7
23 case for bad faith under § 707(b)(3)(A). Trial was continued for
24 closing argument.

25 In his brief on the LLC tax issue and Mitchell factors,
26 Gilliam argued that, under the Federal Tax Code, a business entity
27 with only one owner must make an election to be treated as a
28 corporation or the default is that the entity will be disregarded.

1 Because Debtor had not filed, or showed any evidence of filing,
2 Form 8832 (Entity Classification Election) with the Internal
3 Revenue Service, Gilliam argued that Debtor had not made the
4 election to have Nonim treated as a separate entity. Thus, it was
5 to be treated as a sole proprietorship. Accordingly, argued
6 Gilliam, as the sole member of Nonim, Debtor had to disclose
7 Nonim's gross income in her SOFA. Gilliam alleged Debtor had
8 failed to disclose \$324,116 of income for 2012 and \$71,687.30 for
9 2013, for a total understatement of income of \$395,803.30.

10 At the continued trial Debtor claimed that she had filed a
11 Form 8832 with the IRS (but apparently did not have a copy of it
12 to submit that day), the bankruptcy court, thus, agreed to reopen
13 evidence for the limited purpose of allowing Debtor to produce a
14 conformed copy of Form 8832 and be cross-examined. Trial again
15 was continued.

16 On the final day of trial, Debtor testified that she sent her
17 Form 8832 to the IRS in July 2010 by certified mail seeking to
18 have Nonim treated as a corporation. As reflected in the General
19 Instructions for Form 8832, the IRS informs taxpayers within
20 60 days of filing whether or not the election to treat an LLC as a
21 corporation has been accepted. Debtor admitted she had not
22 received an approval letter but alleged that she believed the IRS
23 approved the election because she had the proof of mailing.
24 Debtor also testified that she followed up with the IRS via a
25 letter in December 2011 to check the status of the election, but
26 she said nothing about whether the IRS got the letter or indicated
27 that it was or was not approved. Trial Tr. (Nov. 12, 2014)
28 10:1-11:24, 12:24-13:12, 17:11-13.

1 **4. The bankruptcy court's ruling**

2 The bankruptcy court issued its Order, 39-page Memorandum
3 Decision and separate 45-page Findings of Fact and Conclusions of
4 Law for the Motion to Dismiss on September 9, 2015. The court
5 determined that Gilliam had met his burden and proved that
6 Debtor's chapter 7 case had been filed in bad faith and should be
7 dismissed with prejudice under § 349(a). This appeal followed.

8 **II. JURISDICTION**

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

11 **III. ISSUES**

- 12 1. Did the bankruptcy court abuse its discretion in dismissing
13 Debtor's case for bad faith?
14 2. Did the bankruptcy court abuse its discretion in dismissing
15 Debtor's case with prejudice?

16 **IV. STANDARDS OF REVIEW**

17 Whether an appellant's due process rights were violated is a
18 question of law we review de novo. DeLuca v. Seare (In re Seare),
19 515 B.R. 599, 615 (9th Cir. BAP 2014).

20 We review the bankruptcy court's finding of "bad faith" for
21 clear error, and its decision to dismiss a case with prejudice for
22 abuse of discretion. Leavitt v. Soto (In re Leavitt), 171 F.3d
23 1219, 1223 (9th Cir. 1999); Ng v. Farmer (In re Ng), 477 B.R. 118,
24 125 (9th Cir. BAP 2012) (dismissal under § 707(b). Factual
25 findings are clearly erroneous if they are illogical, implausible
26 or without support in the record. Retz v. Samson (In re Retz),
27 606 F.3d 1189, 1196 (9th Cir. 2010).

28 The bankruptcy court's evidentiary rulings are also reviewed

1 for abuse of discretion. Ardmor Vending Co. v. Kim (In re Kim),
2 130 F.3d 863, 865 (9th Cir. 1997). To reverse on the basis that
3 an evidentiary ruling was erroneous, we must conclude not only
4 that the bankruptcy court abused its discretion but also that the
5 error was prejudicial. See McEuin v. Crown Equip. Corp., 328 F.3d
6 1028, 1032 (9th Cir. 2003). An evidentiary ruling is prejudicial
7 if it is more probable than not that the erroneous ruling tainted
8 the judgment. Id.

9 A bankruptcy court abuses its discretion if it applies the
10 wrong legal standard, misapplies the correct legal standard, or if
11 its factual findings are clearly erroneous. TrafficSchool.com,
12 Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

13 **V. DISCUSSION**

14 Debtor's brief borders on incomprehensible. It raises a
15 number of arguments, many of which are not relevant or are not
16 supported with any legal authority or even citation to the record.
17 Debtor also asserts that her second chapter 13 case was not
18 dismissed for bad faith; it clearly was. Notably, the bankruptcy
19 court found much of her testimony not credible. We give great
20 deference to the bankruptcy court's findings when they are based
21 on its determinations as to the credibility of witnesses.
22 In re Retz, 606 F.3d at 1196.

23 Before we discuss Debtor's arguments that go more to the
24 bankruptcy court's finding of bad faith, we begin by discussing
25 what appear to be due process or evidentiary arguments.

26 First, we reject her overall complaint that the bankruptcy
27 court could not consider Gilliam's supplemental (reply) brief
28 filed in support of the Motion to Dismiss. Granted, in that

1 brief, Gilliam raised new arguments: that Debtor's case should be
2 dismissed with prejudice under § 349(a) with a four-year refiling
3 bar and that she had grossly under reported her income for the
4 years 2012 and 2013. The bankruptcy court, however, did not
5 consider those late arguments at the scheduled hearing on
6 December 3, 2013. Rather, because of the nature of the dispute,
7 which appeared to be evolving as it went along, the court decided
8 to set the matter for trial; the court thereby ensured Debtor's
9 right to due process. Debtor was given several months to file a
10 written response to those new arguments (and any other arguments
11 Gilliam raised), but she failed to provide any written response.
12 She also failed to file a trial brief. Thus, Debtor's argument
13 that the bankruptcy court denied her due process by considering
14 the December 2 brief or that it was prohibited from considering
15 the brief lacks merit. See Tennant v. Rojas (In re Tennant),
16 318 B.R. 860, 870 (9th Cir. BAP 2004) (concept of procedural due
17 process requires notice and an opportunity to be heard).

18 Also, to the extent Debtor disputes the bankruptcy court's
19 admission of Nonim's bank statements over her objection at trial,
20 she has shown neither abuse of discretion nor the requisite
21 prejudice. McEuin, 328 F.3d at 1032. Even without the bank
22 statements, other facts in the record support a bad faith finding.
23 Plus, Debtor's primary objection appears to be that Gilliam should
24 not have been able to offer the bank statements because he did not
25 conduct discovery. We fail to see the point. Gilliam obtained
26 the bank statements, whose authenticity was not disputed by
27 Debtor, from the Receiver. We presume, however, that Gilliam
28 otherwise would have requested them from Debtor in discovery, that

1 she would have produced them and that they would reflect the same
2 information. In addition, Gilliam listed the bank statements on
3 his exhibit list filed several months before trial; Debtor had
4 both notice that they would be at issue and the time necessary to
5 object.

6 The same is true with the exhibits Debtor tried to offer at
7 trial regarding Gilliam's prior bankruptcy case. Although she
8 fails to list them in her brief, they appear to be Debtor's
9 Exhibits 19, 20, 31, 32, 33, 34 and 35. The bankruptcy court
10 denied their admission based on the lack of relevance. The court
11 determined that events which transpired in Gilliam's bankruptcy
12 case and his conduct in state court proceedings were irrelevant in
13 determining whether Debtor's bankruptcy case was filed in bad (or
14 good) faith. The bankruptcy court's decision to exclude evidence
15 is reviewed under an abuse of discretion standard. See McEuin,
16 328 F.3d at 1032. We conclude that the bankruptcy court did not
17 abuse its discretion in excluding these Exhibits based on the lack
18 of relevance.

19 Finally, Debtor argues the bankruptcy court erred by allowing
20 "independent people to review this case and provide influential
21 opinions" for its decision, which she suggests was "possible fraud
22 upon the court." It is not clear what Debtor is arguing here; she
23 fails to provide any facts to explain her argument. Therefore, we
24 are unable to address it.

25 **A. The bankruptcy court did not abuse its discretion by**
26 **dismissing Debtor's chapter 7 case for bad faith under**
§ 707(b) (3) (A) .

27 **1. Dismissal under § 707(b) (1) and (b) (3) (A)**

28 Under § 707(b) (3) (A), a chapter 7 case may be dismissed as

1 abusive under § 707(b) (1) if the debtor filed the case in bad
2 faith.⁴ Section 707(b) provides, in relevant part:

3 (b) (1) After notice and a hearing, the court, on its own
4 motion or on a motion by . . . any party in interest, may
5 dismiss a case filed by an individual debtor under this
6 chapter whose debts are primarily consumer debts . . . if
7 it finds that the granting of relief would be an abuse of
8 the provisions of this chapter . . . (3) In considering
under paragraph (1) whether the granting of relief would
be an abuse of the provisions of this chapter in a case
in which the presumption in paragraph (2) (A) (i) does not
arise or is rebutted - the court shall consider - (A)
whether the debtor filed the petition in bad faith[.]

9 The moving party bears the burden of proof to support a § 707(b)
10 motion by a preponderance of the evidence. See Aspen Skiing Co.
11 v. Cherrett (In re Cherrett), 523 B.R. 660, 669 (9th Cir. BAP
12 2014).

13 Section 707(b) was added to the Code by the Bankruptcy Abuse
14 Prevention and Consumer Protection Act of 2005 (BAPCPA). Since
15 BAPCPA, the Ninth Circuit Court of Appeals has not established a
16 standard for determining a finding of "bad faith" in chapter 7
17 cases under § 707(b) (3) (A). However, some bankruptcy courts have
18 established such a standard in cases including In re Mitchell,
19 357 B.R. 142 (Bankr. C.D. Cal. 2006). In Mitchell, the bankruptcy
20 court utilized a nine-part test borrowing both from the Ninth
21 Circuit's pre-BAPCPA "substantial abuse" test and from chapter 11

22
23 ⁴ The bankruptcy court correctly noted that although Gilliam
24 did not allege the presumption of abuse arose in this case under
25 § 707(b) (2) based on Debtor's Means Test, the court may still
26 dismiss a chapter 7 case for abuse under the alternative test of
27 § 707(b) (3). See Drury v. United States Trustee (In re Drury),
28 2016 WL 4437555, at *7 (9th Cir. BAP Aug. 23, 2016) (§ 707(b) is
framed to consider the presumptive abuse question first, and
resorts to the bad faith (or totality of the circumstances)
analysis only if debtor survives the means test) (citing Egebjerg
v. Anderson (In re Egebjerg), 574 F.3d 1045, 1048 (9th Cir.
2009)); In re Ng, 477 B.R. at 126; Reed v. Anderson (In re Reed),
422 B.R. 214, 229-30, 233 (C.D. Cal. 2009).

1 and 13 bad faith cases. Id. at 153-56 (citing Price v. United
2 States Trustee (In re Price), 353 F.3d 1135, 1139-40 (9th Cir.
3 2003) (using a six factor test to determine "substantial abuse"
4 under pre-BAPCPA § 707(b)); In re Leavitt, 171 F.3d at 1224
5 (employing a four factor test to dismiss bad faith chapter 13 case
6 with prejudice). The Mitchell court set forth the following
7 nonexclusive factors to be considered in determining whether to
8 dismiss a chapter 7 case for bad faith under § 707(b) (3) (A):

- 9 1. Whether debtor has a likelihood of sufficient future
10 income to fund a chapter 11, 12 or 13 plan which would pay a
substantial portion of the unsecured claims;
- 11 2. Whether debtor's petition was filed as a consequence of
12 illness, disability, unemployment, or other calamity;
- 13 3. Whether debtor obtained cash advances and consumer goods
on credit exceeding his or her ability to repay;
- 14 4. Whether debtor's proposed family budget is excessive or
extravagant;
- 15 5. Whether debtor's statement of income and expenses
16 misrepresents debtor's financial condition;
- 17 6. Whether debtor made eve of bankruptcy purchases;
- 18 7. Whether debtor has a history of bankruptcy petition
19 filings and dismissals;
- 20 8. Whether debtor has invoked the automatic stay for improper
purposes, such as to delay or defeat state court litigation;
- 21 9. Whether egregious behavior is present.

22 Id. at 154-55.

23 In addition to these factors, the Ninth Circuit in Leavitt
24 indicated that whether the debtor misrepresented facts in his or
25 her bankruptcy filings, unfairly manipulated the Bankruptcy Code,
26 or otherwise filed the petition in an inequitable manner should

1 also be considered. 171 F.3d at 1224.⁵ See also United States
2 Trustee v. Gjurovich (In re Gjurovich), 2010 WL 9485971, at *4
3 (Bankr. E.D. Cal. Nov. 3., 2010) (considered factors in both
4 Mitchell and Leavitt to dismiss chapter 7 case with prejudice
5 under § 707(b) (3) (A) and § 349(a)).

6 This Panel has utilized both the tests in Mitchell and
7 Leavitt when considering bad faith dismissals under
8 § 707(b) (3) (A). See Johnson v. Vetter (In re Johnson), 2014 WL
9 2808977, at *6 (9th Cir. BAP June 6, 2014) (utilizing Mitchell
10 factors for § 707(b) (3) (A) dismissal, but utilizing Leavitt
11 factors for determining whether dismissal with prejudice under
12 § 349(a) was proper); In re Drury, 2016 WL 4437555, at *7
13 (utilizing Leavitt factors for dismissal); In re Franco, 2016 WL
14 3227154, at *5 (9th Cir. BAP June 2, 2016) (utilizing Leavitt
15 factors for chapter 7 dismissal with prejudice). Despite the
16 factors used, however, no single factor is considered dispositive.
17 In re Johnson, 2014 WL 2808977, at *6; In re Mitchell, 357 B.R. at
18 154.

19 2. Analysis

20 The bankruptcy court considered the factors in Mitchell to
21 determine that Debtor had filed her chapter 7 case in bad faith.
22 It found that factors 3, 4, 6 and 9 were not relevant, a
23 conclusion that Gilliam does not dispute. However, it found that

24
25 ⁵ Leavitt set forth the following non-exclusive factors for
26 the court to consider: (1) whether the debtor has stated
27 inaccurate facts in his or her bankruptcy filings, attempted to
28 improperly manipulate the Bankruptcy Code, or otherwise pursued
bankruptcy relief in an inequitable manner; (2) the debtor's prior
bankruptcy case filings and dismissals; (3) the motivation for the
debtor's bankruptcy case filing, including any intent to impede
state court litigation; and (4) any egregious conduct.

1 factors 1, 2, 5, 7 & 8 were present and weighed in favor of
2 Debtor's bad faith.

3 **Factors 1 & 5. Likelihood that debtor will have sufficient**
4 **future income to fund a chapter 11 or 13 plan and that**
5 **debtor's statement of income and expenses misrepresents**
6 **financial condition**

7 The bankruptcy court found that Debtor had seriously
8 misrepresented her income and, thus, her ability to pay debt by
9 omitting a significant amount of income from her SOFA and by
10 timing her bankruptcy filing to artificially lower her stated
11 current monthly income ("CMI").

12 One major dispute in the case was whether Debtor, as the
13 single member of her LLC, was required to report the gross or net
14 income of Nonim in her SOFA. Debtor contended she was required to
15 report only Nonim's "net" income because she had made an election
16 by filing Form 8832 to have Nonim treated as a corporation for
17 federal income tax purposes. The question became whether the
18 election had in fact been made. Ultimately, the bankruptcy court
19 decided that even if the election had been made, it did not matter
20 for bankruptcy reporting purposes. Citing Cal. Corp. Code
21 § 17202,⁶ the court first determined under California law that as
22 a single member LLC, all profits and losses of Nonim would be
23 allocated to Debtor regardless of the entity classification for
24 tax purposes. Debtor complains that in reaching this

25 ⁶ Cal. Corp. Code § 17202 provides:

26 The profits and losses of a limited liability company shall
27 be allocated among the members, and among classes of members,
28 in the manner provided in the operating agreement. If the
operating agreement does not otherwise provide, profits and
losses shall be allocated in proportion to the contributions
of each member.

1 determination, the court erroneously presumed Nonim had not been
2 classified as a corporation. The court did seem to presume this
3 fact without actually making that determination.

4 Nonetheless, regardless of the court's reliance on Cal. Corp.
5 Code § 17202, it was correct that Debtor was required to report
6 the "gross" income of Nonim in her SOFA. Paragraph 1 of the SOFA
7 requires debtors to "State **the gross amount of income** the debtor
8 has received from employment, trade, or profession, **or from**
9 **operation of the debtor's business**" (emphasis added). The
10 "Definitions" in the SOFA provide, in relevant part:

11 An individual debtor is "**in business**" for the purpose of
12 this form **if the debtor is or has been, within six years**
13 **immediately preceding the filing of this bankruptcy case,**
14 any of the following: an officer, director, managing
15 executive, or owner of 5 percent or more of the voting or
16 equity securities of a corporation; a partner, other than
17 a limited partner, of a partnership; **a sole proprietor or**
18 **self-employed full-time or part-time**[.]

19 Clearly, Debtor had been "in business" within six years prior to
20 filing the instant case.

21 The bankruptcy court found that the SOFA instructions are
22 "clear and explicit that gross income from the Debtor's business
23 was required to be disclosed on the [SOFA] and that Debtor
24 disregarded the official instructions and disclosed only net
25 income of her business rather than gross income, which she admits
26 was only approximate and which was not supported by any
27 substantiation whatsoever." Mem. Dec. at 22. The court found
28 that by not reporting the gross income of Nonim, Debtor materially
understated her income in years 2012 and 2013 by \$381,049.82. In
addition, the court found that because Debtor reported only the
net income of Nonim and not its gross income and expenses,

1 creditors and interested parties were deprived of information
2 critical for the evaluation of Debtor's income-generating
3 capability and the reasonableness of any claimed expenses against
4 gross income. Given the large amount of money involved, the court
5 found that Debtor's failure to disclose Nonim's gross income on
6 her SOFA "was deliberate and was intended to minimize the amount
7 of the previous years' income she had to disclose on her schedules
8 and thereby obscure her true ability to pay debt." Id.

9 Debtor continues to argue that she had to report only the net
10 income of Nonim because she made the election that Nonim be
11 treated as a corporation. We agree with the bankruptcy court that
12 even if true, this made no difference for bankruptcy reporting
13 purposes. Consequently, Debtor was required to report the "gross"
14 income of Nonim in her SOFA for years 2012 and 2013. Even if she
15 was not, as the bankruptcy court correctly noted, what she did
16 disclose lacked any certainty because she admitted at trial that
17 her stated income figures from Nonim were "guesstimations."

18 The bankruptcy court also found that Debtor's use of Nonim's
19 funds for personal expenses had further misrepresented her true
20 income for the years 2012 and 2013. Id. at 23-26. In 2013 alone
21 Debtor had withdrawn \$101,040 in cash from Nonim's checking
22 account and made check card purchases of \$9,944.26.

23 After a painstaking review of Nonim's bank statements from
24 2013, the court found that many of the expenses were of a personal
25 nature and not related to Debtor's tax return preparation
26 business. The court found Debtor's testimony that expenses for
27 clothing and related accessories, personal grooming and vacation
28 travel were to attract low-income clients and for employee

1 incentives not credible based on a lack of corroborative evidence.
2 No witness or documentary evidence supported Debtor's allegation
3 that expenses, such as a prom dress for her daughter in alleged
4 payment for work at Nonim, leisure travel for Debtor and certain
5 relatives to New Orleans as a "reward" for their alleged tax
6 preparation assistance, and gift cards at Ugg and Michael Kors as
7 "rewards" for others for their alleged referrals of potential
8 clients, had a business purpose.

9 Therefore, having concluded that these expenses were mostly
10 personal expenses, the bankruptcy court attributed them to Debtor
11 as additional income not reported on her SOFA. The court also
12 found that Debtor had failed to establish with any documentary
13 evidence the business purpose for the large amount of cash
14 withdrawals.

15 Debtor argues that it is not uncommon for a business to have
16 raffles or to provide employee incentives. This contention may be
17 true, but the bankruptcy court chose not to believe Debtor's
18 testimony on this issue. In light of the record, we conclude that
19 the bankruptcy court's choice not to believe Debtor's explanations
20 for these expenses was not clearly erroneous. Anderson v. City of
21 Bessemer City, N.C., 470 U.S. 564, 574 (1985) ("[w]here there are
22 two permissible views of the evidence, the factfinder's choice
23 between them cannot be clearly erroneous."). Debtor also argues
24 that it was Gilliam's burden to show these expenses were not for
25 business purposes. She is incorrect. As a debtor in bankruptcy
26 it was Debtor's obligation and burden to show that her income and
27 expenses were properly calculated and reported in her bankruptcy
28 schedules and SOFA, not Gilliam's. See Cusano v. Klein, 264 F.3d

1 936, 946 (9th Cir. 2001) (debtor has a duty to prepare schedules
2 carefully, completely and accurately).

3 The bankruptcy court also found that Debtor's bankruptcy
4 filing was strategically timed for the purpose of understating her
5 income and ability to pay debt. Mem. Dec. at 26-30. The court
6 found that Debtor deliberately chose October 15 as her filing date
7 in an attempt to manipulate the Means Test calculation in order to
8 hide her true income earning ability. Due to the seasonal nature
9 of Debtor's work as a tax return preparer, the court found that
10 the October 15 bankruptcy filing date served to omit the maximum
11 amount of income which Debtor would have been required to include
12 in her Means Test. October 15 is exactly six months after the
13 general tax return due date April 15, or the end of tax season.
14 As a tax return preparer, Debtor's income is largely concentrated
15 in the few months leading up to April 15. Therefore, the court
16 reasoned that filing six months after April 15 meant that Debtor's
17 CMI reported on her Means Test vastly understated her actual
18 financial status because it is limited to a six-month lookback.

19 In the court's view, a truer picture of Debtor's regular
20 annual income was found from reviewing her actual income, based on
21 her financial records considered on a yearly basis, rather than on
22 a truncated basis from the CMI of the Means Test, which relied on
23 only a six-month lookback from April to September 2013. Looking
24 at Debtor's gross receipts from Nonim for the previous twelve
25 months between October 1, 2012 though September 30, 2013, revealed
26 a much greater ability of Debtor to repay creditors than what was
27 reflected in her bankruptcy schedules.

28 For example, TPG records showed that it paid Nonim tax return

1 preparation fees of \$310.00 in October 2012. From February
2 through May 2013, TPG paid Nonim tax return preparation fees of
3 \$102,810.67, which was corroborated by Nonim's bank records.
4 Therefore, Debtor's total gross income for the fiscal year of
5 October 1, 2012 through September 30, 2013, based on fee income
6 paid by TPG, was \$103,120.67, which yielded a monthly income
7 average of \$8,593.38. This amount exceeded the \$5,956.00 in
8 average monthly gross receipts Debtor reported on her Means Test.
9 The court reasoned that if one added the difference in these two
10 figures (\$2,637.38) to Debtor's declared total CMI of \$5,511.00,
11 it would have yielded an adjusted total CMI of \$8,148.38, which
12 multiplied by twelve months would have yielded an adjusted
13 annualized CMI of \$97,780.56. This would have exceeded Debtor's
14 declared applicable median family income of \$75,656.00 for a
15 family of four in California, or the applicable median family
16 income of \$67,401 for a family of three in California, which
17 Debtor should have declared. The court reasoned that Debtor would
18 have then had to list her living expense deductions in order to
19 determine whether or not a presumption of abuse should have arisen
20 under § 707(b)(2), which she did not have to do because she
21 declared an annualized CMI of less than the applicable median
22 family income in the state, thus evading further scrutiny for
23 abuse under § 707(b)(2).

24 Debtor contends the bankruptcy court erred in determining
25 that "tax season" is from January 1 to April 15; rather, she
26 argues taxes are prepared year round. This argument is a non-
27 starter. The fact remains that Debtor made virtually all of her
28 income from tax return preparation between the months of January

1 and April, as reflected in the TPG fee payments and Nonim's bank
2 statements for 2012 and 2013. She also contends the court
3 incorrectly factored in its analysis twelve months of Nonim's
4 earnings instead of six months. Debtor fails to provide any legal
5 argument or cite to any authority establishing that the court
6 could not go outside the six-month lookback in the Means Test for
7 the purpose of determining whether her case was filed in bad
8 faith.

9 Finally, the bankruptcy court found that Debtor had the
10 ability to continue working as a tax return preparer and earn
11 sufficient income to repay her debts. Mem. Dec. at 30-33.
12 Precisely, the court found that Debtor's occupation as a tax
13 return preparer allowed her to make an income without relying on a
14 separate entity for employment, as evidenced by the fact that she
15 was and is self-employed as a tax return preparer and operated her
16 tax return preparation business either as a sole proprietor or as
17 the sole member of Nonim. Debtor's "excuse" that she could no
18 longer work with her previous clients because she felt it would be
19 "embarrassing" was "not credible." Id. at 30-31. Plus, this
20 testimony contradicts what Debtor stated in her Schedule I, that
21 although Nonim was insolvent her tax preparer license was current
22 and that she would work as an independent contractor.

23 The bankruptcy court rejected Debtor's argument that the
24 Receiver's takeover of Nonim's premises adversely affected her
25 ability to generate income. The Receiver took over the premises
26 between July and September 2013. This appeared to have minimal
27 impact on Debtor's tax preparation business because nearly all of
28 the tax preparation income was generated between January and April

1 2013. The court also rejected Debtor's argument that because of
2 the Receiver's takeover during that time she lost clients and the
3 ability to file any extensions by October 15, 2013. The evidence
4 showed that in 2012 only 11 out of 1,321 fee distribution entries
5 for Debtor's clients were for tax returns processed and paid after
6 June 15. Thus, the inference was that very few of Debtor's
7 clients in 2013 would have been filing tax returns after the
8 general tax return date of April 15. More importantly, noted the
9 court, the Receiver's occupancy for those three months in 2013 did
10 not impede Debtor – an independent and self-employed tax return
11 preparer – from continuing to prepare tax returns in the future.

12 We perceive no clear error in any of these findings and
13 conclude that the bankruptcy court did not err in determining that
14 Gilliam had established the first and fifth factors in Mitchell.

15 **Factors 7 & 8. Debtor's history of bankruptcy filings and**
16 **dismissals and whether debtor invoked the automatic stay for**
17 **improper purposes, such as to delay or defeat state court**
18 **litigation**

19 It is "bad faith to file bankruptcy to impede, delay, forum
20 shop, or obtain a tactical advantage regarding litigation ongoing
21 in a nonbankruptcy forum – whether that nonbankruptcy forum is a
22 state court or a federal district court." In re Silberkraus,
23 253 B.R. 890, 904 (Bankr. C.D. Cal. 2000), aff'd, 336 F.3d 864
24 (9th Cir. 2003). The bankruptcy court analyzed these two factors
25 together and found by a preponderance of the evidence that Debtor
26 was improperly invoking the automatic stay for strategic state
27 court litigation purposes by repeatedly filing for bankruptcy.
28 Mem. Dec. at 33-38. Hence, this also supported dismissal of
Debtor's chapter 7 case for bad faith under § 707(a)(3)(A).

1 The bankruptcy court determined that Debtor's second
2 chapter 13 case filing and bad faith dismissal highlighted the
3 admitted fact that her prior bankruptcy case filings were
4 motivated by her effort to defeat Gilliam's state court litigation
5 efforts. In reviewing the tentative ruling for the dismissal, the
6 bankruptcy court considered Judge Robles's findings that "Debtor
7 understated her income," and that the "mere fact that Debtor is
8 abusing the Court system to avoid paying her judgments and to
9 avoid following the Court's order in providing documents for a
10 debtors' exam" was sufficient evidence for a dismissal for bad
11 faith. The court also considered Judge Robles's findings that the
12 "timing of Debtor's two bankruptcy cases appears to have been to
13 avoid the production of documents and a fee award," which
14 evidenced an "unfair manipulation" of the bankruptcy system, a
15 "history of filings and dismissals," and "Debtor's intent to
16 defeat state court litigation." Judge Robles concluded by finding
17 that Debtor had not provided a "justification for the timing" of
18 her bankruptcy filings. At the dismissal hearing, Judge Robles
19 observed that the situation was really about a state court dispute
20 between Debtor and Gilliam (Debtor's admitted only creditor at the
21 time) that found its way into bankruptcy court. He then announced
22 his intent to dismiss the case for bad faith and signed the
23 dismissal order.

24 The bankruptcy court went on to find that Debtor's intent to
25 defeat Gilliam's state court litigation efforts continued prior to
26 her filing this chapter 7 case on October 15, 2013. The Default
27 Judgment of \$53,555.42 was entered December 17, 2012, for claims
28 of fraudulent conveyance, malicious prosecution, and injunctive

1 relief. The judgment specifically amended prior judgments to
2 include Nonim and granted injunctive relief ordering Debtor and
3 Nonim not to transfer any assets without court permission. The
4 evidence of Nonim's bank statements showed numerous and
5 substantial cash and purchase card withdrawals by Debtor from
6 Nonim's bank accounts after the state court issued the injunction,
7 which included the \$101,040 in cash withdrawals and the \$9,944.26
8 in check card purchases. The bankruptcy court found that these
9 transfers made by Debtor were without state court authorization in
10 violation of the injunction because Debtor offered no evidence to
11 show otherwise. She does not dispute this finding on appeal. As
12 further evidence of her intent to defeat Gilliam's state court
13 litigation efforts, the bankruptcy court noted the Receiver's
14 demand letters and testimony that Debtor had failed to comply with
15 his multiple demands for turnover of Nonim's books and records.⁷

16 Ultimately, the bankruptcy court found:

17 [B]ased on the evidence of Debtor's history of bankruptcy
18 filings and dismissals, which show that these filings
19 were strategically timed to aid Debtor's state court
20 litigation position with respect to Creditor as indicated
21 by the timing and sequence of Debtor's actions to defeat
22 Creditor's collection efforts and bankruptcy filings
23 after unfavorable results in Creditor's collection
24 litigation against her, including transfer of her tax
25 return preparation business to a controlled entity,
26 Nonim, held by the state court to be a fraudulent
27 transfer, and transfers of funds and assets belonging to
28 her and her controlled entity, Nonim, in violation of the
state court's injunction order, this factor showing
Debtor's continued abuse of the bankruptcy system weighs
in favor of dismissal for bad faith.

26 ⁷ Because Debtor had resumed control over Nonim's premises
27 after September 25, 2013, the court also found that she had
28 complete access to her books and records, which would have allowed
her to determine with accuracy the gross income from Nonim as
opposed to her admitted "guesstimations." Mem. Dec. at 37-38.

1 Mem. Dec. at 38.

2 We see no clear error in any of these findings and conclude
3 that the bankruptcy court did not err in determining Gilliam had
4 established the seventh and eighth Mitchell factors.

5 **Factor 2. Consequence of illness, disability, unemployment
6 or other calamity**

7 One mitigating factor in determining bad faith under
8 § 707(b) (3) (A) is "whether the debtor's petition was filed as a
9 consequence of illness, disability, unemployment, or some other
10 calamity." In re Mitchell, 357 B.R. at 155. The bankruptcy court
11 found by a preponderance of the evidence that Debtor's chapter 7
12 case was not filed as a consequence of "illness, disability,
13 unemployment, or some other calamity." We also perceive no clear
14 error in this finding.

15 Debtor testified that one of the main reasons she filed this
16 chapter 7 case was due to medical bills she had incurred both
17 before and after the filing because of a recent illness, blood
18 transfusion, hospital stay and surgery. Despite her testimony,
19 the bankruptcy court found that Debtor had not offered any
20 specific details about her medical condition and how it affected
21 her ability to work and earn income, either in the past or the
22 future. Nor had she offered any evidence to corroborate her
23 "conclusory testimony" on her medical condition or treatment; she
24 did not call any expert witnesses to testify as to her medical
25 condition or treatment and provided no written documentation to
26 corroborate her health claims. Mem. Dec. at 39-40. The only
27 documentary evidence Debtor provided to support her contention of
28 illness was her Schedule F, which indicated that her alleged

1 medical condition occurred in 2012. However, observed the court,
2 in 2013 Debtor had earned \$102,810.67 in gross income from tax
3 preparation fees paid to Nonim, which evidenced that her medical
4 condition did not impair her ability to earn substantial income
5 from her self-employment as an income tax return preparer and
6 repay her debts. We also note that the medical debts she claimed
7 in her Schedule F make up a fairly small portion of her claimed
8 unsecured debt of over \$245,000.

9 The only error Debtor assigns here is that Gilliam failed to
10 produce any evidence to show that she has not suffered, or is not
11 suffering, from the illness that she claims. Because this is a
12 mitigating factor as to Debtor's bad faith, it is her burden to
13 establish that her illness consequently led her to file this
14 chapter 7 case. While Debtor contends that her health issues are
15 "private," she claims to have the bills to evidence her
16 debilitating medical condition. Why she did not present them at
17 trial is unknown. Unfortunately, the bills do her no good now.

18 Given the evidence, the bankruptcy court's proper application
19 of the law and Debtor's failure to establish that the court's
20 finding of "bad faith" was clearly erroneous, we conclude that the
21 bankruptcy court did not abuse its discretion in dismissing
22 Debtor's chapter 7 case for bad faith under § 707(b) (3) (A).

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1 **B. The bankruptcy court did not abuse its discretion by**
2 **dismissing Debtor's chapter 7 case with prejudice under**
3 **§ 349(a).**⁸

4 **1. Governing law**

5 Once a court has determined that cause to dismiss exists, it
6 must then decide what form of dismissal should apply. Ellsworth
7 v. Lifescape Med. Assocs., P.C. (In re Ellsworth), 455 B.R. 904,
8 922 (9th Cir. BAP 2011). Section 349(a) establishes a general
9 rule that dismissal of a case is without prejudice but expressly
10 grants a bankruptcy court the authority to dismiss the case with
11 prejudice which "bars further bankruptcy proceedings between the
12 parties and is a complete adjudication of the issues."

13 In re Leavitt, 171 F.3d at 1223-24. Functionally, then, a
14 dismissal with prejudice is equivalent to a judgment under
15 § 523(a) that each debt that would have been discharged is now
16 nondischargeable. In re Ellsworth, 455 B.R. at 921-22.

17 Upon a finding of bad faith, a bankruptcy court may dismiss a
18 case with a permanent bar to refile for bankruptcy to discharge
19 existing, dischargeable debt. In re Leavitt, 171 F.3d at 1224
20 (bad faith is "cause" for dismissal with prejudice under
21 § 349(a)).

22 When dismissing with prejudice courts are to consider the
23 following factors: (1) whether debtor misrepresented facts in the
24 petition, unfairly manipulated the Bankruptcy Code, or otherwise
25 filed in an inequitable manner; (2) debtor's history of filing and

26 ⁸ Section 349(a) provides, in relevant part, that "[u]nless
27 the court, for cause, orders otherwise, the dismissal of a case
28 under this title does not . . . prejudice the debtor with regard
to the filing of a subsequent petition under this title, except as
provided in section 109(g) of this title."

1 dismissals; (3) whether debtor only intended to defeat state court
2 litigation; and (4) whether egregious behavior is present.

3 In re Leavitt, 171 F.3d at 1224. Although Leavitt involved a
4 chapter 13 case, we believe the same standards for dismissing a
5 chapter 7 case with prejudice would also apply. See
6 In re Johnson, 2014 WL 2808977, at *7 (applying Leavitt factors
7 to chapter 7 dismissal with prejudice under § 349(a));

8 In re Mitchell, 357 B.R. at 154.

9 **2. Analysis**

10 The bankruptcy court determined that, based on the
11 evidentiary record, Gilliam had established by a preponderance of
12 the evidence that the "drastic remedy" of dismissing Debtor's
13 bankruptcy case with prejudice was warranted. Mem. Dec. at 41-44.

14 Although the court did not expressly refer to the Leavitt
15 factors in its decision to dismiss Debtor's case with prejudice,
16 it appears to have applied the standard set forth in Leavitt by
17 finding that: (1) Debtor misrepresented her income on her SOFA by
18 substantially understating her business income for 2012 and 2013;
19 she reported only Nonim's "net" income, when the SOFA clearly
20 stated that she was to disclose "gross" income from Nonim or any
21 other business; (2) Debtor had access to Nonim's 2012 and 2013
22 bank statements showing \$506,846.82 in deposits representing
23 Debtor's gross business income from tax return preparation fees
24 through Nonim, yet she chose to only disclose a total of \$144,377
25 from this business for these years, which she admitted were
26 "guesstimations;" (3) Debtor's multiple bankruptcy filings,
27 including this one, demonstrated her intent to hinder, delay and
28 defraud Gilliam in his collection efforts on judgments from both

1 the state and bankruptcy courts; (4) the state court found that
2 Debtor had fraudulently conveyed her sole proprietorship tax
3 return preparation business to her self-created LLC, which she
4 controlled as the single member; and (5) Debtor ignored and
5 disobeyed the state court's order that she individually and
6 through Nonim not transfer any of their assets as demonstrated by
7 Nonim's bank account records showing substantial cash and purchase
8 card withdrawals by Debtor after the judgment and injunction were
9 issued against Debtor and Nonim in December 2012. Arguably, the
10 bankruptcy court made findings against Debtor on all four of the
11 Leavitt factors.

12 Debtor raises two arguments here, neither of which has any
13 merit. First, she contends that because Gilliam did not request
14 that her case be dismissed with prejudice until his late-filed
15 supplemental brief on December 2, 2013, the bankruptcy court could
16 not consider this relief. We already addressed a similar argument
17 above. Because Gilliam filed the brief (a reply) only one day
18 before the initial hearing on his Motion to Dismiss, the
19 bankruptcy court reserved ruling on it and set the matter for
20 trial. At the hearing on December 3, 2013, Debtor asked for an
21 opportunity to respond to the brief, which the court gave her.
22 Despite having many months to file a written response, Debtor
23 failed to do so. It was also clear at trial, as evidenced by his
24 trial brief, that Gilliam was seeking dismissal with prejudice.
25 Thus, Debtor had notice of his claim for relief, and the court was
26 free to consider it. In fact, Gilliam requested only a four year
27 refiling bar, but apparently in considering the egregiousness of
28 Debtor's conduct, the bankruptcy court felt that a permanent bar

1 was more appropriate. On this same note, Debtor contends the
2 bankruptcy court "lacked jurisdiction" to decide if her case could
3 be dismissed with prejudice. Even if Gilliam had not requested
4 such relief, the court certainly had "jurisdiction" over the
5 issue.

6 Because the bankruptcy court applied the correct legal test
7 under Leavitt and its factual finding of bad faith is supported by
8 the record, which in turn supports a finding of "cause" to dismiss
9 with prejudice under § 349(a), we cannot conclude that dismissing
10 Debtor's chapter 7 case with prejudice was an abuse of discretion.

11 **VI. CONCLUSION**

12 For the foregoing reasons, we AFFIRM.

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