

DEC 09 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NOT FOR PUBLICATION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.	WW-15-1089-KuJuTa
)		
RENEWABLE ENERGY, INC.,)	Bk. No.	15-10421
)		
Debtor.)		
_____)		
)		
RENEWABLE ENERGY, INC.,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
UNITED STATES TRUSTEE,)		
)		
Appellee.)		
_____)		

Argued and Submitted on November 17, 2016
at Pasadena, California

Filed - December 9, 2016

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Marc L. Barreca, Bankruptcy Judge, Presiding

Appearances: Edward P Weigelt argued for appellant Renewable
Energy, Inc.; Thomas Buford argued for appellee
United States Trustee.

Before: KURTZ, JURY and TAYLOR, 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.

1 **INTRODUCTION**

2 On the United States Trustee's motion, the bankruptcy court
3 converted debtor Renewable Energy Inc.'s bankruptcy case from
4 chapter 11 to chapter 7.¹

5 In the bankruptcy court, Renewable Energy conceded that
6 cause for conversion or dismissal existed under § 1112(b)(4)(C)
7 because it could not afford to purchase liquor liability
8 insurance covering its continued operation of a bar. But
9 Renewable Energy claimed that dismissal was a better option than
10 conversion because it might be able to retain possession of the
11 leased premises in which its businesses had operated and it might
12 be able to sell those businesses as going concerns. The
13 bankruptcy court disagreed, finding that the interests of
14 Renewable Energy's creditors and the bankruptcy estate were
15 better served by conversion rather than dismissal.

16 Because the bankruptcy court's finding regarding the
17 interests of creditors and the estate was not clearly erroneous,
18 we AFFIRM.

19 **FACTS**

20 Most of the relevant facts are not in dispute. Renewable
21 Energy occupied two units in a commercial building located in
22 Seattle, Washington. In one of these two units, Renewable Energy
23 operated a bar. In the other, Renewable Energy was supposed to
24

25
26 ¹Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. All "Local Rule" references are to
the Local Bankruptcy Rules for the Western District of
Washington.

1 operate a restaurant, but the restaurant was non-operational
2 during the time Renewable Energy's chapter 11 case was pending.
3 Renewable Energy filed its chapter 11 petition shortly before
4 being evicted from the leased premises. The landlord's successor
5 in interest, Wells Fargo Bank, as trustee for a commercial
6 mortgage pool securitization trust,² asserted that Renewable
7 Energy's leases had expired by their own terms and that Renewable
8 Energy also was in default under the leases for nonpayment of
9 rent and for not keeping the leased premises properly insured.³
10 For its part, Renewable Energy asserted that it did not owe the
11 alleged past-due rent to Wells Fargo and that Wells Fargo had
12 improperly interfered with its use and enjoyment of the leased
13 premises. According to Renewable Energy, it held a \$500,000
14 claim against Wells Fargo for interfering with Renewable Energy's
15 proposed sale of its restaurant business to a third party and for
16 its improper handling of the eviction proceedings. As reflected
17 in its schedules, Renewable Energy's only other significant asset
18 was roughly \$400,000 of unencumbered restaurant equipment.

19 Within one month of Renewable Energy's chapter 11 petition
20 filing, the United States Trustee filed a motion to dismiss or
21

22 ²Wells Fargo's full official designation in the underlying
23 case was: "Wells Fargo Bank, N.A., as Trustee for the Registered
24 Holders of Credit Suisse First Boston Mortgage Securities Corp.,
Commercial Mortgage Pass-Through Certificates, Series 2007-C5."

25 ³We can and do take judicial notice of the parties' filings
26 in Renewable Energy's bankruptcy case. See O'Rourke v. Seaboard
27 Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th
28 Cir. 1989). The record indicates that the bankruptcy court was
aware of and considered these filings when it entered the order
on appeal. Additionally, the parties have referenced these
filings in their appeal briefs without objection.

1 convert the case under § 1112(b). The sole ground offered in
2 support of the motion was Renewable Energy's failure to provide
3 to the United States Trustee proof that it held a liquor
4 liability insurance policy. The United States Trustee argued
5 that Renewable Energy's lack of such insurance exposed its
6 bankruptcy estate to an unacceptable risk of postpetition liquor-
7 related liability and hence constituted cause for dismissal or
8 conversion under § 1112(b).

9 The United States Trustee noticed its motion to dismiss or
10 convert for hearing on March 6, 2015. According to the United
11 States Trustee, the roughly 16 days' notice it provided was more
12 than sufficient because Local Rule 2015-1(c) only required seven
13 days notice when a lack of insurance was the basis for the
14 requested relief.

15 Renewable Energy filed a one-page response to the United
16 States Trustee's motion. It did not oppose the timing of the
17 motion or the amount of notice given. Nor did it request a
18 continuance of the March 6, 2015 hearing. In fact, Renewable
19 Energy admitted in its response that liquor liability insurance
20 was prohibitively expensive and conceded that cause existed to
21 dismiss the case.

22 At the hearing on the motion to dismiss or convert,
23 Renewable Energy reiterated the admissions and concessions it had
24 made in its response. But it opposed conversion of the case from
25 chapter 11 to chapter 7. It pointed out to the court that the
26 amount of debt involved (as reflected in its schedules) was
27 relatively small and that its \$400,000 in unencumbered restaurant
28 equipment was far more valuable if sold as part of a going

1 concern rather than piecemeal on a liquidation basis. Renewable
2 Energy expressed its hope that it could reach a deal with Wells
3 Fargo that would allow it to retain possession of the premises,
4 reopen the restaurant, sell it as a going concern, and pay
5 creditors in full. Therefore, Renewable Energy posited, its
6 bankruptcy case should be dismissed rather than converted.

7 The United States Trustee favored conversion over dismissal.
8 The United States Trustee urged that the creditors of the estate
9 would be fully, immediately and better served if the restaurant
10 equipment was liquidated in chapter 7. In making its argument
11 for conversion, the United States Trustee accepted as true the
12 accuracy of Renewable Energy's representations in its schedules
13 regarding the value of its equipment and the amount of claims
14 held by its creditors.

15 Wells Fargo also appeared at the hearing and sided with the
16 United States Trustee. Wells Fargo further indicated that it had
17 no interest in attempting to continue to work with Renewable
18 Energy as tenant in the premises.

19 After acknowledging and accepting Renewable Energy's
20 concession that its lack of liquor liability insurance
21 constituted cause for either conversion or dismissal, the
22 bankruptcy court proceeded to consider which of those two options
23 was in the best interests of creditors and the estate. The
24 bankruptcy court determined that the creditors and the estate
25 would be best served by conversion rather than dismissal. In
26 particular, the bankruptcy court focused on the undisputed fact
27 that Renewable Energy had a free and clear asset (the restaurant
28 equipment) which could be administered to pay off the debts owed

1 to Renewable Energy's creditors. The bankruptcy court thus
2 ordered the bankruptcy case converted from chapter 11 to
3 chapter 7. The bankruptcy court entered the conversion order on
4 March 6, 2015, and Renewable Energy timely appealed.

5 **JURISDICTION**

6 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
7 §§ 1334 and 157(b)(2)(A), and we have jurisdiction under
8 28 U.S.C. § 158.⁴

9 **ISSUE**

10 Did the bankruptcy court abuse its discretion when it
11 converted Renewable Energy's bankruptcy case from chapter 11 to
12 chapter 7?

13 **STANDARDS OF REVIEW**

14 We review the bankruptcy court's order converting Renewable
15 Energy's chapter 11 case to chapter 7 for an abuse of discretion.
16 Pioneer Liquidating Corp. v. U.S. Trustee (In re Consol. Pioneer
17 Mortg. Entities), 264 F.3d 803, 806 (9th Cir. 2001).

18 A bankruptcy court abuses its discretion if it applies an
19 incorrect legal standard or misapplies the correct legal
20 standard, or if its factual findings are illogical, implausible
21 or without support in the record. United States v. Hinkson,
22 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

24
25 ⁴This appeal is not moot. The parties represented at oral
26 argument that the chapter 7 trustee has been holding estate funds
27 from the sale of the restaurant equipment pending resolution of
28 this appeal. If Renewable Energy were to prevail on appeal and
if its bankruptcy case were dismissed on remand, the funds
currently held by the trustee presumably would be turned over to
Renewable Energy upon dismissal.

1 **DISCUSSION**

2 Section 1112 governs dismissal and conversion of chapter 11
3 cases. As set forth in § 1112(b), if the bankruptcy court finds
4 "cause" to dismiss or convert, the court is required to decide
5 which of several actions will best serve the interests of the
6 debtor's creditors and the estate. It must:

7 (1) decide whether dismissal, conversion, or the
8 appointment of a trustee or examiner is in the best
9 interests of creditors and the estate; and (2) identify
10 whether there are unusual circumstances that establish
11 that dismissal or conversion is not in the best
12 interests of creditors and the estate.

13 Sullivan v. Harnisch (In re Sullivan), 522 B.R. 604, 612 (9th
14 Cir. BAP 2014). The bankruptcy court has an independent duty to
15 consider the impact of dismissal and conversion and to decide
16 which alternative is in the best interest of all creditors. Id.
17 at 612-13.

18 Here, the bankruptcy court considered the impact of these
19 two alternatives and decided that Renewable Energy's creditors
20 would be better served by conversion under the undisputed facts
21 of the case. Those facts established that Renewable Energy's
22 creditors likely could be paid in full if the estate's
23 unencumbered assets were liquidated by a chapter 7 trustee and
24 the proceeds distributed to creditors.

25 The bankruptcy court did not explicitly consider the
26 appointment of a trustee or an examiner, or the potential
27 existence of unusual circumstances that might have militated
28 against dismissal or conversion under § 1112(b)(2). Even so,
Renewable Energy did not seek in the bankruptcy court the
appointment of a trustee or examiner as an alternative to

1 conversion, nor has it discussed these alternatives in its appeal
2 brief. As a result, Renewable Energy has forfeited its right to
3 raise these alternatives on appeal. Kenny G Enters., LLC v.
4 Casey (In re Kenny G Enters., LLC), 2014 WL 4100429, *12 (Mem.
5 Dec.) (9th Cir. BAP Aug. 20, 2014); see also Christian Legal
6 Soc'y v. Wu, 626 F.3d 483, 487-88 (9th Cir. 2010) (stating that
7 appellate court would not consider matters not "specifically and
8 distinctly argued in appellant's opening brief.").

9 As for the applicability of § 1112(b)(2)'s unusual
10 circumstances rule, that rule does not apply under the undisputed
11 facts of this case. Renewable Energy admitted to the bankruptcy
12 court that it had not purchased liquor liability insurance and
13 that it could not afford to do so. As a result, there was no way
14 Renewable Energy could have satisfied the unusual circumstances
15 rule's cure requirement set forth in § 1112(b)(2)(B)(ii), and,
16 hence, the unusual circumstances rule indisputably was
17 inapplicable.

18 Renewable Energy argues on appeal that its admitted failure
19 to procure liquor liability insurance might not have constituted
20 "cause" under § 1112(b)(4)(C). As Renewable Energy puts it,
21 because Washington law does not require all bars to maintain
22 liquor liability insurance, the bankruptcy court should not have
23 viewed its failure to obtain such insurance as cause to dismiss
24 or convert. As a threshold matter, we are loathe to consider
25 this argument because the bankruptcy court relied upon Renewable
26 Energy's concession that its failure to obtain liquor liability
27 insurance constituted "cause" under § 1112(b)(4)(C). See Mano-Y
28 & M, Ltd. v. Field (In re Mortg. Store, Inc.), 773 F.3d 990,

1 998-99 (9th Cir. 2014) (holding that issue not raised in the
2 bankruptcy court was forfeited); Barnes v. Belice (In re Belice),
3 461 B.R. 564, 569 n.4 (9th Cir. BAP 2011) (same).

4 Even if we were to consider this argument, it has no merit.

5 Whatever the position of the state of Washington might be
6 regarding bars such as Renewable Energy's carrying liquor
7 liability insurance, Renewable Energy's failure to carry such
8 insurance posed a genuine risk to both Renewable Energy's
9 creditors and the public. The United States Trustee and the
10 bankruptcy court recognized this risk, and the bankruptcy court
11 correctly determined that liquor liability insurance was an
12 "appropriate" type of insurance for purposes of § 1112(b)(4)(C).

13 See In re Daniels, 362 B.R. 428, 435-36 (Bankr. S.D. Iowa 2007)
14 (holding that chapter 11 debtor attorney's failure to obtain
15 legal malpractice liability insurance posed a risk both to the
16 estate and to the public); see also 7 Collier on Bankruptcy
17 ¶ 1112.04 [6][c] (16th ed. 2015) (stating that 1112(b)(4)(C)
18 requires the chapter 11 debtor to maintain the types of insurance
19 necessary to mitigate the risks to the estate and the public
20 arising from the debtor's continued operations).

21 Renewable Energy's bond argument similarly lacks merit.
22 According to Renewable Energy, the bond that Wells Fargo was
23 required to post in order to move forward with the eviction
24 proceedings sufficiently protected its creditors. Once again,
25 Renewable Energy could have raised this argument in the
26 bankruptcy court but failed to do so. Regardless, it is plain
27 that the bond did not sufficiently protect Renewable Energy's
28 creditors. The bond only addressed one type of risk: the risk

1 that Renewable Energy ultimately would prevail in the eviction
2 proceedings but would incur compensable damages in the process.
3 Renewable Energy has not pointed to anything in the record
4 indicating that the bond would have protected its creditors or
5 the public from any other type of risk associated with Renewable
6 Energy's continued operations.

7 Renewable Energy additionally argued that, in order for the
8 bankruptcy court to find cause under § 1112(b)(4), the United
9 States Trustee was required to demonstrate: (1) an ongoing and
10 continuing loss to or diminution of the estate; and (2) the
11 absence of a reasonable likelihood of reorganization. Renewable
12 Energy misconstrues the statute. Any of the factors individually
13 set forth in § 1112(b)(4) can, by themselves, constitute cause
14 for conversion or dismissal of a chapter 11 case. In re Products
15 Int'l Co., 395 B.R. 101, 110 (Bankr. D. Ariz. 2008) (holding that
16 the factors constituting cause set forth in the statute are meant
17 to be read in the disjunctive). Accord, 7 Collier on Bankruptcy,
18 supra, at ¶ 1112.04[6]. Thus, having established the existence
19 of one of the grounds for dismissal or conversion under
20 § 1112(b)(4) - a failure to maintain appropriate insurance - the
21 United States Trustee was not required to establish any
22 additional cause for the relief it requested in its motion to
23 dismiss or convert.

24 Renewable Energy further contends that the bankruptcy court,
25 in choosing conversion over dismissal, ignored the debtor's
26 interests and all of the economic benefits its businesses as
27 going concerns could provide to suppliers, employees and the
28 community. There are two significant problems with this

1 contention. First, the statute necessarily requires the
2 bankruptcy court to focus on the interests of the estate's
3 creditors and not on the debtor's interests. See generally
4 Shulkin Hutton, Inc., P.S. v. Treiger (In re Owens), 552 F.3d
5 958, 961 (9th Cir. 2009) ("the court must consider the interests
6 of all of the creditors"). And second, Renewable Energy assumes
7 without any factual basis that it would have been able to
8 realize, going forward, the claimed benefits to itself, to its
9 suppliers, and to its employees. The record before the
10 bankruptcy court indicated otherwise. Renewable Energy's
11 contention simply ignores the dire situation it was confronted
12 with at the time. It was forced to file bankruptcy shortly
13 before being evicted by Wells Fargo, and Wells Fargo appeared at
14 the hearing on the United States Trustee's motion and made it
15 clear that it had no interest in consensually resolving its
16 battle with Renewable Energy for possession of the leased
17 premises. Under these circumstances, the bankruptcy court's
18 finding that the interests of Renewable Energy's creditors and
19 its bankruptcy estate were best served by conversion rather than
20 dismissal was not clearly erroneous.

21 Renewable Energy only makes one other comprehensible
22 argument on appeal. Renewable Energy maintains that it did not
23 have sufficient time or opportunity to present evidence
24 demonstrating that dismissal was a better option than conversion.
25 The bankruptcy court was required to ensure that the United
26 States Trustee gave Renewable Energy sufficient notice and
27 opportunity to respond to the motion as was appropriate under the
28 circumstances. §§ 102(1), 1112(b)(1); In re Kenny G Enters.,

1 LLC, 2014 WL 4100429, *9. Renewable Energy was given roughly
2 sixteen days advance notice of the hearing on the motion to
3 dismiss or convert, and it never asked the bankruptcy court for a
4 continuance. Thus, it is difficult to comprehend how Renewable
5 Energy credibly can claim that it was denied a sufficient
6 opportunity to present its case.

7 Moreover, the undisputed facts in the record amply supported
8 the bankruptcy court's choice of conversion over dismissal, and
9 Renewable Energy has not on appeal pointed us to any other facts
10 that might have materially altered that choice. Nor are we
11 independently aware of any such facts. In the absence of any
12 indication of prejudice, any alleged lack of notice or due
13 process fails to justify reversal. Rosson v. Fitzgerald
14 (In re Rosson), 545 F.3d 764, 777 (9th Cir. 2008); see also
15 In re Bartle, 560 F.3d 724, 729-30 (7th Cir. 2009)
16 ("[appellant's] substantial rights must have been affected by the
17 [notice] error, and that is true only if [the appellant] had a
18 response to the [appellee's] motion that might have altered the
19 court's decision.").

20 To the extent Renewable Energy could have argued that the
21 governing procedural rules required a longer notice period than
22 was given, we disagree. While Rule 2002(a)(4) generally requires
23 twenty-one days advance notice of a hearing on a motion to
24 dismiss or convert, Rule 9006(c) permitted the bankruptcy court
25 to reduce that amount of time. In re Bartle, 560 F.3d at 728-29.
26 This is what the bankruptcy court did by way of its Local Rule
27 2015-1(c), which provides:

28 Insurance. If the debtor in possession fails timely to

1 provide the United States trustee with proof of
2 insurance or insurance renewal, the United States
3 trustee may move to convert or dismiss the case on
4 7 days' notice to the debtor, parties who have
5 requested notice, and any committee, unless the court
6 allows a shorter period on a showing of exigent
7 circumstances.

8 In any event, if Renewable Energy took issue with the United
9 States Trustee's compliance with Rule 2002(a)(4) or its reliance
10 on Local Rule 2015-1(c), it was incumbent upon Renewable Energy
11 to raise these issues both in the bankruptcy court and on appeal.
12 It did not do so, and thus it has forfeited these issues.

13 In re Mortg. Store, Inc., 773 F.3d at 998-99; Christian Legal
14 Soc'y, 626 F.3d at 487-88.

15 **CONCLUSION**

16 For the reasons set forth above, we AFFIRM the bankruptcy
17 court's conversion of Renewable Energy's bankruptcy case from
18 chapter 11 to chapter 7.
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