

FEB 13 2017

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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NOT FOR PUBLICATION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-16-1230-LNTa  
 )  
 LOUIS C. NEMETH, ) Bk. No. 8:16-bk-11919-CB  
 )  
 Debtor. )  
 )  
 \_\_\_\_\_ )  
 LOUIS C. NEMETH, )  
 )  
 Appellant, )  
 )  
 v. ) **MEMORANDUM\***  
 )  
 AMRANE COHEN, Chapter 13 )  
 Trustee; WELLS FARGO BANK, )  
 N.A., )  
 )  
 Appellees. )  
 \_\_\_\_\_ )

Submitted Without Oral Argument  
on January 19, 2017

Filed - February 13, 2017

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

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

Appearances: Appellant Louis C. Nemeth pro se on brief; Jay K.  
 Chien on brief for appellee Amrane Cohen,  
 Chapter 13 Trustee.

\_\_\_\_\_  
 \* 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 Before: LAFFERTY, TAYLOR, and NOVACK,\*\* Bankruptcy Judges.

2 **INTRODUCTION**

3 Debtor filed a chapter 13<sup>1</sup> plan proposing no ongoing  
4 payments to the mortgage creditor and understating the arrearage  
5 owed to that creditor. The creditor filed an objection to  
6 confirmation. The chapter 13 trustee filed a notice warning that  
7 if the Debtor's plan was not confirmed at the confirmation  
8 hearing, the case could be dismissed upon an oral motion.  
9 Debtor, who appeared pro se, contended at the confirmation  
10 hearing that his obligation to the mortgage creditor had been  
11 discharged in a prior chapter 7 case and that he had rescinded  
12 the obligation. Debtor also contended that the mortgage creditor  
13 was not entitled to payment because it had not filed a proof of  
14 claim to substantiate the debt. At the confirmation hearing, the  
15 chapter 13 trustee informed the court that the Debtor had not  
16 made his first plan payment and was not making mortgage payments.  
17 The bankruptcy court dismissed the case with a 180-day bar to  
18 refiling.

19 We AFFIRM the dismissal; in the meantime, the 180-day bar  
20 has expired, rendering moot the appeal of that aspect of the  
21 court's order.

22 \_\_\_\_\_  
23 \*\* Hon. Charles Novack, United States Bankruptcy Judge for  
24 the Northern District of California, sitting by designation.

25 <sup>1</sup> Unless otherwise indicated, all chapter and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,  
27 "Rule" references are to the Federal Rules of Bankruptcy  
28 Procedure, and "Civil Rule" references are to the Federal Rules  
of Civil Procedure. "LBR" references are to the Local Bankruptcy  
Rules of the Bankruptcy Court for the Central District of  
California.

1 **FACTS**

2 Appellant Louis Nemeth filed a chapter 13 petition on May 5,  
3 2016. This filing began Debtor's third bankruptcy case. Debtor  
4 had previously filed a chapter 7 petition on April 20, 2012 and  
5 received a discharge. A few months later, on November 14, 2012,  
6 he filed a chapter 13 petition, which was dismissed December 3,  
7 2012 for failure to file schedules, statements, or a plan.

8 In this case, Debtor filed the required documents, including  
9 a chapter 13 plan. Debtor listed on Schedule A/13 his residence  
10 in Orange, California with a value of \$620,000.<sup>2</sup> Debtor listed  
11 only two creditors, the IRS and "Nationstar Mortgage, LC" [sic].  
12 The record reflects that Nationstar Mortgage, LLC ("Nationstar")  
13 was the servicing agent for Debtor's secured obligation to Wells  
14 Fargo Bank, National Association, as Trustee for Structured  
15 Adjustable Rate Mortgage Loan Trust Mortgage Pass-Through  
16 Certificates, Series 2007-3 ("Wells Fargo").

17 No secured debt was listed on Schedule D. Schedule E/F  
18 reflected a debt to the IRS of \$35,000, of which \$15,000 was  
19 listed as a priority claim. Debtor also listed an unsecured  
20 nonpriority debt to Nationstar of \$624,000 with the notation "I  
21 do not really owe this debt and it is disputed." Schedules I and  
22 J reflected a monthly net income of \$1,350, and the plan provided  
23 for monthly payments of \$305.43 for 36 months, resulting in a  
24 base plan amount of \$10,995.50; the plan was estimated to pay  
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26 <sup>2</sup> Debtor provided a limited record on appeal. Thus, we have  
27 exercised our discretion to review the bankruptcy court's docket,  
28 as appropriate. See Woods & Erickson, LLP v. Leonard (In re AVI, Inc.), 389 B.R. 721, 725 n.2 (9th Cir. BAP 2008).

1 100% to allowed unsecured claims. The plan included a payment to  
2 secured creditor "Nation Star (disputed)" of \$138.89 per month on  
3 a \$5,000 arrearage claim.

4 On May 19, 2016, Appellee Amrane Cohen, chapter 13 trustee  
5 ("Trustee") filed a "Notice That Trustee May Make an Oral Motion  
6 to Dismiss or Convert This Case for Cause" (the "Notice"). The  
7 proof of service attached to the Notice reflects that it was  
8 served on Debtor. The Notice provided that if the plan was not  
9 confirmed by the court at the initial confirmation hearing,

10 the Court will also consider the Chapter 13 Trustee's  
11 motion to dismiss the case, including dismissal with a  
12 180-day bar against refileing under 11 U.S.C. Section  
13 109(g), or to convert the Chapter 13 Case to Chapter 7,  
14 should the Debtor(s) fail to: (1) comply with 11 U.S.C.  
Section 1307; (2) comply with 11 U.S.C. Section 1322;  
(3) comply with 11 U.S.C. Section 1325; (4) comply with  
Local Bankruptcy Rule 3015-1; and/or, (5) comply with  
orders of the Court.

15 NOTICE IS FURTHER GIVEN that opposition, if any,  
16 to such oral motion by the Trustee may be presented at  
that hearing.

17 Shortly thereafter, Wells Fargo filed an objection to  
18 confirmation. Wells Fargo alleged that it was the holder of a  
19 promissory note and deed of trust against Debtor's residence.  
20 Wells Fargo objected to Debtor's proposed plan on grounds that  
21 the plan was not adequately funded to pay the pre-petition  
22 arrearage of \$152,160.34, did not provide for ongoing payments on  
23 Debtor's secured obligation to Wells Fargo, and that Debtor had  
24 not made any monthly payments since filing his petition. Wells  
25 Fargo also alleged that Debtor had filed the plan in bad faith  
26 because Debtor had not made any payments "in years" and had filed  
27 his prior bankruptcy cases to avoid making payments. The  
28 objection requested that confirmation be denied and the case

1 dismissed with a 180-day bar. The objection was supported by the  
2 declaration of an assistant secretary for Nationstar.

3 In response to the objection to confirmation, Debtor filed  
4 an "Objection with Motion to Strike" alleging that he had never  
5 done business with either Wells Fargo or Nationstar, that in any  
6 event the debt had been discharged in his prior chapter 7 case,  
7 and that Debtor had rescinded the loan. Debtor also noted that  
8 neither Wells Fargo nor Nationstar had filed a proof of claim.  
9 On that basis, Debtor requested the objection to confirmation be  
10 stricken as "an insufficient defense, redundant matter,  
11 immaterial, impertinent, and/or scandalous matter" that would  
12 "unfairly prejudice" Debtor. Attached to Debtor's objection were  
13 copies of certified letters dated April 21, 2015 from Debtor and  
14 Brenda Nemeth to Nationstar and Wells Fargo purporting to rescind  
15 the mortgage.

16 At the confirmation hearing, counsel for Trustee appeared  
17 and informed the court that notice of the plan was insufficient,<sup>3</sup>  
18 that Debtor was one plan payment delinquent, that Trustee would  
19 be filing an objection to exemptions, and that although a post-  
20 petition mortgage payment declaration had been filed, it  
21 indicated that Debtor had not made any payments. Debtor took the  
22 position that he did not need to make payments because neither  
23 Wells Fargo nor Nationwide had filed a proof of claim to  
24 "substantiate their debt." The bankruptcy court told Debtor that

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26 <sup>3</sup> LBR 3015-1(b)(3) requires that the plan be served on  
27 creditors at least 28 days before the 341 meeting. Here, the  
28 plan was served on June 6, 2016; the 341 meeting was scheduled  
for June 14, 2016.

1 he was required to make the ongoing payments regardless of  
2 whether the creditor had filed a proof of claim and noted that  
3 Debtor had already unsuccessfully disputed the obligation in  
4 state court. With that, the bankruptcy court dismissed the case.  
5 Because it was not Debtor's first bankruptcy filing, the court  
6 also imposed a 180-day bar to refileing under § 109(g). The court  
7 entered a written order of dismissal on July 8, 2016. Debtor  
8 timely appealed. The 180-day bar expired January 4, 2017.

### 9 **JURISDICTION**

10 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
11 §§ 1334 and 157(b) (2) (A) and (L). We have jurisdiction under  
12 28 U.S.C. § 158.

### 13 **ISSUE**

14 Did the bankruptcy court abuse its discretion in dismissing  
15 Debtor's bankruptcy case?

### 16 **STANDARD OF REVIEW**

17 We review the bankruptcy court's decision to dismiss a case  
18 for abuse of discretion. Leavitt v. Soto (In re Leavitt),  
19 171 F.3d 1219, 1223 (9th Cir. 1999); Ellsworth v. Lifescape Med.  
20 Assoc., P.C. (In re Ellsworth), 455 B.R. 904, 914 (9th Cir. BAP  
21 2011). In applying this standard, we conduct a two-step inquiry:  
22 (1) we review de novo whether the bankruptcy court identified the  
23 correct legal rule to apply to the relief requested; and (2) if  
24 it did, we consider whether the bankruptcy court's application of  
25 the legal standard was illogical, implausible or without support  
26 in inferences that may be drawn from the facts in the record.  
27 Id. (citing United States v. Hinkson, 585 F.3d 1247, 1261-62 &  
28 n.21 (9th Cir. 2009) (en banc)).

1 We may affirm on any basis supported by the record. Caviata  
2 Attached Homes, LLC v. U.S. Bank, N.A. (In re Caviata Attached  
3 Homes, LLC), 481 B.R. 34, 44 (9th Cir. BAP 2012).

4 **DISCUSSION**

5 Section 1307(c) provides, in relevant part:

6 on request of a party in interest or the United  
7 States trustee and after notice and a hearing, the  
8 court may convert a case under this chapter to a case  
9 under chapter 7 of this title, or may dismiss a case  
10 under this chapter, whichever is in the best interests  
11 of creditors and the estate, for cause, including--

12 (1) unreasonable delay by the debtor that is  
13 prejudicial to creditors;

14 . . .

15 (4) failure to commence making timely payments under  
16 section 1326 of this title[.]

17 The enumerated list of causes in § 1307(c) is not exclusive,  
18 and a bankruptcy court may find cause to dismiss in other  
19 circumstances, such as when a debtor has filed a bankruptcy  
20 petition or plan in bad faith. In re Ellsworth, 455 B.R. at 915.  
21 Although the statute requires "notice and a hearing," a  
22 bankruptcy case may be dismissed sua sponte by the bankruptcy  
23 court pursuant to § 105(a). Tennant v. Rojas (In re Tennant),  
24 318 B.R. 860, 869-70 (9th Cir. BAP 2004).

25 Debtor argues on appeal that the bankruptcy court erred in  
26 dismissing his case because (1) there was no pending motion to  
27 dismiss; (2) the court based its ruling on an erroneous view of  
28 the facts; (3) the court failed to rule on Debtor's motion to  
strike Wells Fargo's objection to confirmation; and (4) the court  
did not make findings of fact or conclusions of law as required  
under Civil Rule 52, applicable in bankruptcy via Rule 7052.

1 Accordingly, Debtor asks us to reverse and remand for further  
2 factual findings and a ruling on Debtor's motion to strike.

3 We find Debtor's arguments unconvincing. In asserting that  
4 there was no pending motion to dismiss, which is essentially a  
5 due process argument, Debtor disregards both the language of the  
6 Notice and the provisions of LBR 3015-1. The Notice explained  
7 that if the Debtor's plan was not confirmed at the confirmation  
8 hearing, the case could be dismissed, including with a 180-day  
9 bar, if the Debtor had not complied with §§ 1307, 1322, 1325 or  
10 LBR 3015-1. LBR 3015-1 provides that a case may be dismissed for  
11 failure to make plan payments (LBR 3015-1(k)(4)) or for failure  
12 to make postpetition mortgage payments (LBR 3015-1(m)).  
13 Section 1307(c)(4) provides that a case may be dismissed for  
14 failure to commence making timely plan payments. Accordingly,  
15 Debtor cannot fairly argue that he was not on notice that the  
16 case could be dismissed at the confirmation hearing.

17 Debtor's second contention, that the bankruptcy court based  
18 its ruling on an erroneous view of the facts, is not supported by  
19 the record. Debtor does not assert that he had made timely plan  
20 payments. Instead Debtor focuses on the plan deficiencies noted  
21 by the bankruptcy court. Debtor insists he owes nothing to Wells  
22 Fargo because the obligation was discharged in Debtor's prior  
23 chapter 7 case and Debtor rescinded the loan. Debtor is correct  
24 that his personal liability was discharged in his chapter 7.  
25 However, this did not eliminate Wells Fargo's security interest  
26 or its ability to enforce that interest via foreclosure, absent  
27 timely payments. See Dewsnup v. Timm, 502 U.S. 410, 418-19  
28 (1992). And there is nothing in the record to suggest that any



1 purported rescission was effective.<sup>4</sup>

2 Debtor also argues that he was not obligated to provide for  
3 Wells Fargo in the plan because Wells Fargo had not filed a proof  
4 of claim, and it was required to prove up its claim. However, a  
5 creditor need not file a proof of claim before plan confirmation,  
6 and a debtor bears the burden of proof on all elements of plan  
7 confirmation. Meyer v. Hill (In re Hill), 268 B.R. 548, 552 (9th  
8 Cir. BAP 2001). The cases Debtor cites to the contrary, Lundell  
9 v. Anchor Construction Specialists, Inc. (In re Lundell),  
10 223 F.3d 1035, 1039-40 (9th Cir. 2000), and Wright v. Holm  
11 (In re Holm), 931 F.2d 620, 623 (9th Cir. 1991), involve claim  
12 objections, which carry different burdens of proof. See  
13 Rule 3001(f). Here, Debtor did not provide any plausible  
14 evidence to support his proposed plan treatment of Wells Fargo.  
15 That said, Debtor was not necessarily required to provide for the  
16 discharged debt to Wells Fargo in his plan, but, to the extent he  
17 did, he was required to comply with § 1325(a)(5) and 1322(b)(2).<sup>5</sup>

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19 <sup>4</sup> To the contrary, assuming the notice of rescission was  
20 made under TILA, it was untimely. See 15 U.S.C. § 1635(f) (an  
21 obligor's right of rescission expires three years after the date  
22 of consummation of the loan transaction). The letters attached  
23 to Debtor's objection/motion to strike indicate the loan date was  
24 January 30, 2007; the letters are dated April 21, 2015, more than  
25 eight years later.

26 <sup>5</sup> Section 1325(a)(5) provides three options for the  
27 treatment of allowed secured claims. Either (1) the holder of  
28 the secured claim must have accepted the plan; (2) the plan must  
provide for the retention of the lien and the value of property  
to be distributed on that claim must be not less than the allowed  
amount of the claim; or (3) the debtor must surrender the  
collateral. Section 1322(b)(2) prohibits modification of the  
rights of holders of claims secured only by a security interest

(continued...)

1 Debtor's plan did not comply with those provisions.

2 Next, Debtor argues that the bankruptcy court erred in not  
3 ruling on Debtor's motion to strike. However, once the  
4 bankruptcy court found grounds to dismiss the case, there was no  
5 purpose to be served by ruling on the motion to strike, which  
6 became moot.

7 Finally, Debtor argues that the bankruptcy court erred by  
8 not making findings of fact and conclusions of law as required  
9 under Rule 7052. Although Rule 7052 requires the bankruptcy  
10 court to make findings and conclusions in contested matters, the  
11 failure to do so does not necessarily require remand if the  
12 record supports the bankruptcy court's ruling. We may consider  
13 any issue supported by the record and may affirm on any basis  
14 supported by the record, even where the issue was not expressly  
15 considered by the bankruptcy court. Fernandez v. GE Capital  
16 Mortg. Servs., Inc. (In re Fernandez), 227 B.R. 174, 177 (9th  
17 Cir. BAP 1998), aff'd, 208 F.3d 220 (9th Cir. 2000) (citing  
18 In re E.R. Fegert, Inc., 887 F.2d 955, 957 (9th Cir. 1989) and  
19 In re Pizza of Hawaii, Inc., 761 F.2d 1374, 1379 (9th Cir.  
20 1985)).

21 Here, the record supports the bankruptcy court's ruling.  
22 Debtor's failure to make plan payments is an adequate ground for  
23 dismissal under § 1307(c)(4) and LBR 3015-1. This circumstance  
24 also supports a finding of unreasonable delay that is prejudicial  
25 to creditors, a ground for dismissal under § 1307(c)(1).

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28 <sup>5</sup>(...continued)  
in real property that is the debtor's principal residence.

1 Debtor also argues that the record does not support the  
2 bankruptcy court's imposition of a 180-day bar. Although we are  
3 not convinced that the imposition of a bar to refiling was  
4 justified without an explicit finding of a willful failure to  
5 abide by an order of the bankruptcy court,<sup>6</sup> this aspect of the  
6 appeal is now moot because the 180 days expired January 4, 2017.  
7 See In re Fernandez, 227 B.R. at 178. Because we cannot fashion  
8 any effective relief from that aspect of the bankruptcy court's  
9 order, we have no jurisdiction to review its propriety.

10 **CONCLUSION**

11 For the reasons explained above, the bankruptcy court did  
12 not abuse its discretion in dismissing Debtor's chapter 13 case.  
13 Accordingly, we AFFIRM.

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<sup>6</sup> Under § 109(g), a 180-day bar to refiling may be imposed  
27 if "the case was dismissed by the court for willful failure of  
28 the debtor to abide by orders of the court, or to appear before  
the court in proper prosecution of the case."