

APR 12 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NOT FOR PUBLICATION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.                       | EC-16-1187-BJuTa |
|                             | ) |                               |                  |
| YOLANDA CHRISTINE SWARTOUT, | ) | Bk. No.                       | 2:14-bk-22173    |
|                             | ) |                               |                  |
| Debtor.                     | ) |                               |                  |
| _____                       | ) |                               |                  |
| YOLANDA CHRISTINE SWARTOUT, | ) |                               |                  |
|                             | ) |                               |                  |
| Appellant,                  | ) |                               |                  |
|                             | ) |                               |                  |
| v.                          | ) | <b>MEMORANDUM<sup>1</sup></b> |                  |
|                             | ) |                               |                  |
| JAN P. JOHNSON, Chapter 13  | ) |                               |                  |
| Trustee,                    | ) |                               |                  |
|                             | ) |                               |                  |
| Appellee.                   | ) |                               |                  |
| _____                       | ) |                               |                  |

Argued and Submitted on March 23, 2017,  
at Sacramento, California

Filed - April 12, 2017

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

Hon. Christopher D. Jaime, Bankruptcy Judge, Presiding

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Appearances: Eamonn Foster of Northstate Bankruptcy Counseling  
argued for appellant Yolanda Christine Swartout;  
Kristen A. Koo, Staff Attorney, argued for appellee  
Jan P. Johnson, Chapter 13 Trustee.

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Before: BRAND, JURY and TAYLOR, Bankruptcy Judges.

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<sup>1</sup> 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 13<sup>2</sup> debtor Yolanda Christine Swartout ("Debtor")  
2 appeals an order dismissing her bankruptcy case under Civil Rule  
3 41(b) for her counsel's alleged failure to comply with a court  
4 order and an order denying reconsideration of the dismissal order.  
5 We VACATE and REMAND.

6 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

7 Debtor filed her chapter 13 bankruptcy case and original plan  
8 on March 3, 2014. The plan provided for a monthly payment of  
9 \$150.00 for a 60-month term. Jan P. Johnson is the chapter 13  
10 trustee ("Trustee").

11 In October 2014, Debtor filed and moved to confirm her first  
12 amended plan, which increased the monthly payment to \$180.00.  
13 Just prior to filing the amended plan, on October 8, 2014, Debtor  
14 made the \$180.00 October plan payment. Despite this payment,  
15 Trustee initially objected to the amended plan, asserting that  
16 Debtor was delinquent for the October plan payment; under the  
17 local rules monthly payments are due on the 25th of the month.  
18 Trustee later withdrew his objection, and the first amended plan  
19 ("Plan") was confirmed.

20 The language which caused the eventual and ongoing dispute  
21 between Debtor and Trustee is found in Section 6.1 of the Plan:  
22 "To date, Debtor has paid \$1,110.00 into the plan. Debtor will  
23 continue to pay into the plan \$180.00 for the remainder of the  
24 plan."

25 In February 2016, Trustee filed a Notice of Default and

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26  
27 <sup>2</sup> Unless specified otherwise, all chapter, code and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The  
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 Application to Dismiss ("Dismissal Motion"), stating that as of  
2 February 25, 2016, Debtor was delinquent in the amount of \$360.00.  
3 Debtor opposed the Dismissal Motion, noting that it was based on  
4 two alleged delinquencies of \$180.00 each, the second of which  
5 Debtor acknowledged and had now cured. She, however, disputed the  
6 other alleged delinquency, arguing that it was based on confusion  
7 over Section 6.1 of the Plan and that Trustee had raised the  
8 alleged delinquency prior to confirmation but later withdrew the  
9 objection. Debtor explained that Section 6.1, which stated that  
10 she had paid \$1,110.00 into the Plan, included the \$180.00 October  
11 payment made on October 8, 2014, just seven days prior to her  
12 filing of the Plan. Trustee, on the other hand, interpreted  
13 Section 6.1 to mean that although Debtor had paid \$1,110.00 into  
14 the Plan, all amounts due as of October 25, 2014, prior to  
15 October 25, 2014, she would make yet another \$180.00 October  
16 payment. Debtor contended that is not what she intended nor what  
17 the Plan required, and that Trustee's interpretation of the Plan  
18 language led to an absurd result, an extra plan payment at the end  
19 of the term. In closing, Debtor asked the court to find that she  
20 was not in default.

21 The bankruptcy court held an initial hearing on the Dismissal  
22 Motion on April 12, 2016. Trustee's counsel noted that the  
23 default had been cured, so no real controversy existed. However,  
24 she suggested that Debtor's counsel still contact Trustee's office  
25 regarding the disputed Plan language because the delinquency issue  
26 would be ongoing unless resolved. Debtor's counsel, Mr. Foster,  
27 explained that his client was receiving delinquency notices every  
28 month from Trustee's office based on confusion over the language

1 in Section 6.1 of the Plan. Because Debtor had not made the  
2 additional \$180.00 payment in October 2014, as Trustee maintained  
3 should have occurred, he continued to assert that Debtor was  
4 regularly one month behind. Trustee's counsel agreed that the  
5 parties disputed the timing as to when payments were due based on  
6 Section 6.1 of the Plan, contending that Mr. Foster had not  
7 drafted it as clearly as it should have been drafted and that she  
8 had told him previously a motion to modify would be necessary to  
9 correct the issue. The following colloquy then ensued between the  
10 court and Mr. Foster:

11 THE COURT: Well, look here, I'm not modifying a plan  
12 without a motion to modify the plan, and I'm not going  
13 to force the trustee to change the terms of a plan  
14 without a proper motion. If you -

15 MR. FOSTER: I'm not asking for a modification.

16 THE COURT: Well -

17 MR. FOSTER: I'm just asking for the Court to interpret  
18 the plan because the plan doesn't require -

19 THE COURT: And once -

20 MR. FOSTER: -- a payment on -

21 THE COURT: -- I interpret it -

22 MR. FOSTER: -- this one.

23 THE COURT: -- once I interpret it, that's a  
24 modification of what the plan's written, because I'm  
25 picking one version over the other. Look, if you want  
26 to file a motion to modify, I'll shorten the time, and  
27 I'll hear it, and perhaps, if you can discuss it with  
28 the Trustee, there would be no action -

MR. FOSTER: See, I don't want it to be modified. I  
think it's fine.

THE COURT: Well, I think apparently the language needs  
to be cleared up.

MR. FOSTER: All right. All right. That's fine.

1 THE COURT: I will hear it on shortened time if you want  
2 to file the motion. But, in fact, if you want to file  
one, we'll set a hearing date right now.

3 MR. FOSTER: Yeah, I can -- I can get something -- I'm  
4 actually going to be out of the office for the next  
5 week, but I can get something filed by the -- let me  
pull up my calendar. I can get something on the file by  
the 22nd of April. . . .

6 Hr'g Tr. (Apr. 12, 2016) 7:5-8:9.

7 Just after the hearing the court issued Civil Minutes  
8 stating: "MATTER CONTINUED TO 5/10/16 AT 1:00 P.M. MODIFIED PLAN  
9 SHALL BE FILED BY 4/22/16 AND ANY RESPONSE BY TRUSTEE SHALL BE  
10 FILED BY 5/03/16." No civil minute order was entered.

11 On April 20, 2016, Debtor filed a Motion to Compel Trustee to  
12 Acknowledge Debtor's October 2014 Payment. Debtor asked the court  
13 to compel Trustee to acknowledge the October 8, 2014 payment as  
14 the only payment required for October 2014 and to order Trustee to  
15 cease and desist his attempts to force Debtor to make an extra  
16 payment not provided for under the Plan. Trustee did not file a  
17 response.<sup>3</sup>

18 Before the continued hearing on May 10, 2016, the bankruptcy  
19 court issued a tentative ruling. It noted that at the April 12  
20 hearing the court had instructed Debtor to resolve the delinquency  
21 issue by filing a modified plan by April 22, 2016, and that  
22 Mr. Foster had confirmed on the record that a modified plan would

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23  
24 <sup>3</sup> We disagree with the bankruptcy court that interpreting  
25 the language in Section 6.1 of the Plan would constitute a  
26 modification of the Plan or confirmation order. See In re Doty,  
27 129 B.R. 571, 588 (Bankr. N.D. Ind. 1991) (bankruptcy court has  
28 jurisdiction to enter an order interpreting terms and conditions  
of an order confirming a plan if the plan is ambiguous, and such  
an order does not constitute a modification of the confirmation  
order or plan). Thus, the bankruptcy court may resolve this issue  
by consideration of a motion by Debtor to interpret and enforce  
the confirmation order.

1 be filed. Instead, Debtor filed a motion to compel Trustee to  
2 recognize that she is current on her Plan payments and that this  
3 was precisely what the court had ordered Debtor to resolve through  
4 a modified plan, and that Mr. Foster had stated that he would  
5 resolve the dispute through a modified plan. By filing the motion  
6 to compel instead of a modified plan, the court found that Debtor  
7 had willfully disregarded the court's order of April 12, 2016. On  
8 that basis, the tentative ruling concluded that the court would  
9 deny the motion to compel and grant the Dismissal Motion.

10 At the May 10 hearing, the bankruptcy court reemphasized that  
11 at the April 12 hearing Mr. Foster had agreed to file a modified  
12 plan to resolve the delinquency issue. Admitting he had not  
13 reviewed the Civil Minutes from April 12, Mr. Foster stated that  
14 was not his understanding of what transpired. He thought the  
15 Dismissal Motion had been denied because Trustee's counsel  
16 conceded that no controversy existed as Debtor was now current.  
17 He noted his understanding that requesting affirmative relief in  
18 response to the Dismissal Motion was procedurally improper; he  
19 needed to file his own motion seeking relief to resolve the  
20 delinquency issue. However, Mr. Foster alleged, he did not think  
21 he had to file a modified plan to accomplish this. Mr. Foster  
22 contended instead, that filing a modified plan was unnecessary;  
23 the issue was Trustee's misinterpretation of the Plan. The court  
24 was not persuaded and announced it was dismissing Debtor's case  
25 for the reasons stated in the tentative ruling.

26 The bankruptcy court entered a Civil Minute Order dismissing  
27 Debtor's chapter 13 case ("Dismissal Order") and an order denying  
28 Debtor's motion to compel.

1 Debtor filed a timely motion for reconsideration under Civil  
2 Rule 59, incorporated by Rule 9023, followed by an amended motion.  
3 Debtor contended the bankruptcy court lacked subject matter  
4 jurisdiction to continue the hearing on the Dismissal Motion or to  
5 issue any order respecting the Dismissal Motion because Trustee  
6 had withdrawn it as moot. Debtor further contended that ordering  
7 her to file something she did not agree needed to be filed was a  
8 clear mistake of law and provided an unjust result. In any event,  
9 Debtor contended that at the April 12 hearing the court had made  
10 the option of filing a modified plan voluntary, not compulsory,  
11 and Mr. Foster had not affirmatively agreed to file a motion to  
12 modify the Plan; he promised to "file something" within the  
13 required time. The court also had not conditioned continuation of  
14 Debtor's case on her filing a modified plan.

15 Without a hearing, the bankruptcy court denied Debtor's  
16 motion for reconsideration of the Dismissal Order. This timely  
17 appeal followed.

## 18 **II. JURISDICTION**

19 As we explain below, the bankruptcy court had jurisdiction  
20 under 28 U.S.C. §§ 1334 and 157(b)(2)(L). We have jurisdiction  
21 under 28 U.S.C. § 158.

## 22 **III. ISSUES**

- 23 1. Did the bankruptcy court lack subject matter jurisdiction to  
24 enter the Dismissal Order?
- 25 2. Did the bankruptcy court abuse its discretion in dismissing  
26 Debtor's bankruptcy case?
- 27 3. Did the bankruptcy court abuse its discretion in denying  
28 Debtor's motion to reconsider the Dismissal Order?

1 **IV. STANDARDS OF REVIEW**

2 Whether a court has subject matter jurisdiction is a question  
3 of law we review de novo. McCowan v. Fraley (In re McCowan), 296  
4 B.R. 1, 2 (9th Cir. BAP 2003).

5 The bankruptcy court may sua sponte dismiss a case under  
6 Civil Rule 41(b). See Henderson v. Duncan, 779 F.2d 1421, 1423  
7 (9th Cir. 1986). Dismissal of a case under Civil Rule 41(b) is  
8 reviewed for an abuse of discretion. Al-Torki v. Kaempfen, 78 F.3d  
9 1381, 1384 (9th Cir. 1996). The bankruptcy court's denial of a  
10 reconsideration motion is also reviewed for an abuse of  
11 discretion. Cruz v. Stein Strauss Tr. # 1361, PDQ Invs., LLC (In  
12 re Cruz), 516 B.R. 594, 601 (9th Cir. BAP 2014). A bankruptcy  
13 court abuses its discretion if it applies the wrong legal standard  
14 or its findings are illogical, implausible or without support in  
15 the record. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d  
16 820, 832 (9th Cir. 2011).

17 **V. DISCUSSION**

18 **A. The bankruptcy court had subject matter jurisdiction to enter**  
19 **the Dismissal Order.**

20 Debtor contends the bankruptcy court lacked subject matter  
21 jurisdiction to either continue or to enter any order related to  
22 Trustee's Dismissal Motion because the court's jurisdiction is  
23 limited to "cases and controversies." Debtor misses the point.  
24 Although the Dismissal Order appears to have granted Trustee's  
25 motion, the bankruptcy court stated in its tentative ruling,  
26 incorporated into the Dismissal Order and in the Civil Minutes and  
27 Order denying reconsideration, that it dismissed Debtor's  
28 chapter 13 case sua sponte under Civil Rule 41(b) for Mr. Foster's



1 failure to comply with the court's order of April 12 to file a  
2 modified plan. Thus, the question is whether the court had  
3 jurisdiction to dismiss the case under Civil Rule 41(b).

4 "Bankruptcy courts have subject matter jurisdiction over  
5 proceedings 'arising under title 11, or arising in or related to  
6 cases under title 11.'" Wilshire Courtyard v. Cal. Franchise Tax  
7 Bd. (In re Wilshire Courtyard), 729 F.3d 1279, 1285 (9th Cir.  
8 2013) (quoting 28 U.S.C. § 1334(b)). After a bankruptcy plan has  
9 been confirmed, a bankruptcy court has "related to" jurisdiction  
10 over proceedings that have "a close nexus to the bankruptcy plan  
11 or proceeding[.]" Pegasus Gold Corp. v. Goldin (In re Pegasus  
12 Gold Corp.), 394 F.3d 1189, 1194 (9th Cir. 2005). A close nexus  
13 exists where a "matter[ ] affect[s] the interpretation,  
14 implementation, consummation, execution, or administration of the  
15 confirmed plan." In re Wilshire Courtyard, 729 F.3d at 1287  
16 (internal quotation marks omitted).

17 Even though Trustee's counsel stated at the April 12 hearing  
18 that no controversy existed between the parties because Debtor was  
19 technically current as of that date, Mr. Foster agreed that the  
20 delinquency issue and the parties' disagreement over the  
21 interpretation of Section 6.1 of the Plan remained and would  
22 continue to exist until the court resolved it. Thus,  
23 interpretation of the Plan was clearly a live issue, thereby  
24 giving the bankruptcy court, at minimum, "related to" jurisdiction  
25 to continue the hearing and to enter an order dismissing the  
26 chapter 13 case if grounds existed to do so. In addition, the  
27 bankruptcy court reserved jurisdiction over Debtor's chapter 13  
28 case by stating in the confirmation order (drafted by Mr. Foster):

1 "The debtor shall appear in court whenever notified to do so by  
2 the court." Hence, the bankruptcy court had subject matter  
3 jurisdiction to enter the Dismissal Order.

4 **B. The bankruptcy court abused its discretion when it dismissed  
5 Debtor's bankruptcy case without proper notice.**

6 Civil Rule 41(b) provides, in relevant part, that "[i]f the  
7 plaintiff fails . . . to comply with . . . a court order, a  
8 defendant may move to dismiss the action or any claim against it."  
9 As noted above, the bankruptcy court may sua sponte dismiss a case  
10 under Civil Rule 41(b) for failure to comply with a rule or order  
11 of the court. Jaffer v. Sharma (In re Sharma), 2007 WL 7540967,  
12 at \*5 (9th Cir. BAP Apr. 2, 2007) (citing Pierce Cty. v. Schneider  
13 (In re C.S. Crawford & Co.), 423 F.2d 1322, 1325 (9th Cir. 1970)).  
14 Case law is clear that dismissal is an extraordinary remedy that  
15 should not be invoked where the effect would be to punish an  
16 innocent litigant for the transgressions of her lawyer. In re  
17 C.S. Crawford & Co., 423 F.2d at 1325 (citing string of cases).

18 Before dismissing Debtor's case, the bankruptcy court  
19 considered the factors necessary for dismissal under Civil  
20 Rule 41(b) and determined that all five weighed in favor of  
21 dismissal, including the availability of lesser sanctions.  
22 See Malone v. U.S. Postal Serv., 833 F.2d 128, 130 (9th Cir. 1987)  
23 (listing the factors the court must consider before dismissing a  
24 case under Civil Rule 41(b) for failure to comply with a court  
25 order). Debtor contends the bankruptcy court erred in dismissing  
26 her case for Mr. Foster's failure to comply with a court order,  
27 when the Civil Minutes entered on April 12 did not constitute an  
28 "order of the court." Debtor also contends the bankruptcy court

1 erred by not providing any warning that failure to comply with the  
2 April 12 Civil Minutes would result in dismissal.

3 Even assuming the April 12 Civil Minutes or the court's  
4 directive at the April 12 hearing constituted a clear "order,"  
5 which one could reasonably dispute, and that Mr. Foster failed to  
6 comply with it, the bankruptcy court did not provide any warning  
7 whatsoever that failure to file a modified plan would result in  
8 dismissal of Debtor's chapter 13 case. Under Ninth Circuit law,  
9 "involuntary dismissal sua sponte requires that there has been  
10 notice giving a warning that dismissal is imminent." In re  
11 Sharma, 2007 WL 7540967, at \*5 (citing Oliva v. Sullivan, 958 F.2d  
12 272, 274 (9th Cir. 1992) (in cases of sua sponte dismissal under  
13 Civil Rule 41(b) the court has an obligation to warn plaintiff  
14 that dismissal is imminent)). See also Johnson v. U.S. Dept. of  
15 the Treasury, 939 F.2d 820, 825 (9th Cir. 1991) (trial court must  
16 warn plaintiff if dismissal is imminent because dismissal is "the  
17 harshest available penalty"); Hamilton v. Neptune Orient Lines,  
18 Ltd., 811 F.2d 498, 500 (9th Cir. 1987); Franklin v. Murphy, 745  
19 F.2d 1221, 1232 (9th Cir. 1984).

20 Nothing the bankruptcy court stated at the April 12 hearing  
21 or in the April 12 Civil Minutes would have put Debtor on notice  
22 that her case would be dismissed if a modified plan was not filed.  
23 In addition, dismissal was particularly harsh in this case since  
24 Debtor appears to have had no role in Mr. Foster's conduct and she  
25 was otherwise performing under the confirmed Plan. Accordingly,  
26 the bankruptcy court abused its discretion in dismissing Debtor's  
27 chapter 13 case without a proper warning. Because of our decision  
28 here, we need not address Debtor's appeal of the order denying

1 reconsideration of the Dismissal Order.

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**VI. CONCLUSION**

3 For these reasons, we VACATE the Dismissal Order and REMAND  
4 to the bankruptcy court with instruction that Debtor's chapter 13  
5 case be reinstated.

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