

NOT FOR PUBLICATION

APR 03 2017

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-16-1303-FLKu
)		
DENNIS D. WINDSCHEFFEL,)	Bk. No.	2:15-bk-19933-SK
)		
Debtor.)		
_____)		
)		
DENNIS D. WINDSCHEFFEL,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
MONTEBELLO UNIFIED SCHOOL)		
DISTRICT,)		
)		
Appellee.)		
_____)		

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

Filed - April 3, 2017

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

Honorable Sandra R. Klein, Bankruptcy Judge, Presiding

Appearances: _____
Evan L. Smith argued on behalf of appellant Dennis
D. Windscheffel; Jeffrey T. Vanderveen argued on
behalf of appellee Montebello Unified School
District.

Before: FARIS, LAFFERTY, and KURTZ, 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 Debtor Dennis D. Windscheffel appeals from the bankruptcy
3 court's order dismissing his chapter 11¹ case for bad faith. He
4 contends that the court erred by relying on judicially-created
5 bad faith tests, rather than the statutory factors in
6 § 1112(b)(4), in finding cause to dismiss. Mr. Windscheffel's
7 argument is meritless and unsupported by any legal authority.
8 Accordingly, we AFFIRM.

9 **FACTUAL BACKGROUND**

10 **A. Prepetition events**

11 Mr. Windscheffel and his company, Fitness Profile, Inc.
12 ("FPI"), operated after-school programs for Appellee Montebello
13 Unified School District ("MUSD"). MUSD filed suit against
14 Mr. Windscheffel and FPI in the superior court of Los Angeles,
15 alleging that Mr. Windscheffel and FPI had breached certain
16 agreements with MUSD and committed fraud, breach of contract, and
17 conversion of public funds.

18 Following a bench trial, the state court found that
19 Mr. Windscheffel had converted over \$400,000 in public school
20 funds and commingled or mismanaged money that the state and
21 federal governments had granted to MUSD to provide educational
22 services to needy children. The state court awarded MUSD damages
23 of \$2,171,609 (including punitive damages of \$802,000) and
24 attorneys fees and costs of \$672,623.96, with interest at ten
25 percent per annum.

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27
28 ¹ Unless specified otherwise, all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 Mr. Windscheffel and FPI filed an appeal in the state court,
2 but he claimed that he was unable to post the required
3 supersedeas bond to stay enforcement of the judgment. He filed
4 bankruptcy to avoid posting the bond and to stay MUSD's
5 collection efforts.

6 **B. Mr. Windscheffel's chapter 11 filing**

7 On June 22, 2015, Mr. Windscheffel filed a voluntary
8 chapter 11 petition. His schedules included MUSD's state
9 judgment claim for \$2,171,609. (MUSD subsequently filed a claim
10 in the amount of \$2,843,926.96.) He listed only two other
11 unsecured creditors with claims totaling approximately \$500.

12 **C. The Motion to Dismiss**

13 On June 23, 2016, MUSD filed a motion to dismiss
14 Mr. Windscheffel's chapter 11 case ("Motion to Dismiss") for bad
15 faith. MUSD argued that Mr. Windscheffel only filed for
16 bankruptcy for the purpose of delaying collection of the state
17 court judgment without obtaining a supersedeas bond. It said
18 that his amended plan was a thinly veiled attempt to avoid the
19 state court's award of punitive damages, attorneys' fees, and
20 interest because it proposed to pay 49.22 percent of MUSD's
21 claim, which was (not coincidentally) the approximate amount of
22 the state court judgment without punitive damages, attorneys'
23 fees, and interest.

24 Before filing his opposition to the Motion to Dismiss,
25 Mr. Windscheffel filed his second amended plan. He proposed
26 that, "[i]n the event that the MUSD Judgment is not reversed upon
27 appeal, the Debtor will present MUSD with the best offer he is
28 able to obtain for the sale of Debtor's real and personal

1 property. MUSD shall have the right to disapprove any sale
2 agreement that the Debtor presents."² According to the second
3 amended disclosure statement filed concurrently with the second
4 amended plan, Class 6(b) (general unsecured creditors) included
5 MUSD, the two unsecured creditors with minor claims, and, for the
6 first time, the law firm of Musick, Peeler & Garrett LLP, which
7 was handling Mr. Windscheffel's state court appeal (although the
8 law firm did not file a proof of claim).

9 In opposition to the Motion to Dismiss, Mr. Windscheffel
10 argued that he sought bankruptcy relief because he could not
11 afford to obtain a supersedeas bond. He said that he filed for
12 bankruptcy protection to preserve and maximize his assets for the
13 benefit of MUSD and other unsecured creditors. He also contended
14 that his proposal to pay MUSD less than 100 percent of its claim
15 was not in bad faith, because "MUSD could not choke any more out
16 of Mr. Windscheffel in satisfaction of that judgment than it
17 could through Mr. Windscheffel's Plan." Importantly,
18 Mr. Windscheffel did not challenge MUSD's recitation of the legal
19 standard for bad faith or discuss the factors enumerated in
20 § 1112(b)(4).

21 The bankruptcy court issued its tentative ruling that
22 indicated its intention to grant the Motion to Dismiss. In a
23 detailed, twenty-page memorandum, the court examined the various
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25 ² In its tentative ruling, the bankruptcy court noted that
26 the first amended plan had proposed that each general unsecured
27 creditor would be paid 49.22 percent and contained an addendum in
28 which Mr. Windscheffel proposed to pay MUSD \$1.4 million. In
contrast, the second amended plan did not include a proposal to
pay MUSD any particular percentage or amount.

1 tests for finding "cause" to dismiss a petition for bad faith.
2 It noted that a determination of bad faith requires a case-by-
3 case assessment of multiple factors and acknowledged that various
4 courts have considered different factors establishing bad faith,
5 including Marsch v. Marsch (In re Marsch), 36 F.3d 825 (9th Cir.
6 1994), In re Mense, 509 B.R. 269 (Bankr. C.D. Cal. 2014), Chu v.
7 Syntron Bioresearch, Inc. (In re Chu), 253 B.R. 92 (Bankr. S.D.
8 Cal. 2000), and In re Erkins, 253 B.R. 470 (Bankr. D. Idaho
9 2000). It undertook a detailed, point-by-point examination of
10 the various factors outlined in Erkins, Mense, and Chu and found
11 that the factors supported a finding of bad faith under all of
12 the tests.

13 The bankruptcy court also correctly noted that, if it finds
14 cause, it must decide whether dismissal or conversion is in the
15 best interest of the creditors and the estate. It stated that
16 dismissal was in the best interest of the creditors because it
17 would allow MUSD to resume collecting the judgment and prevent
18 Mr. Windscheffel from diminishing the estate's assets. It
19 further stated that dismissal was preferable to conversion
20 because of the costs and fees associated with a chapter 7 case.³

21 At the hearing on the Motion to Dismiss, the bankruptcy
22 court primarily engaged in a colloquy with counsel for
23 Mr. Windscheffel regarding certain factors of the various tests:
24 Mr. Windscheffel's intention to delay collection of the state

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26 ³ The court also correctly noted that, if it decided to
27 dismiss the case, it would also have to consider whether to
28 dismiss the case with or without prejudice. Ultimately, the
court dismissed the case without prejudice. No one challenges
this aspect of the court's ruling.

1 court judgment; the value of his assets; his proposal to pay MUSD
2 only the compensatory damages award and not the punitive damages
3 or attorneys' fees and costs; the late inclusion of the law firm
4 as an unsecured creditor; and his proposal to only pursue
5 liquidation and pay MUSD after the state court litigation had
6 concluded with a final, unappealable judgment. Critically,
7 Mr. Windscheffel did **not** take issue with the court's reliance on
8 case law such as Erkins, Mense, and Chu in determining bad faith
9 and did **not** argue that the court was restricted to the enumerated
10 factors in § 1112(b)(4).

11 The court granted the Motion to Dismiss and entered its
12 order adopting its tentative ruling in whole and dismissing
13 Mr. Windscheffel's chapter 11 case. Mr. Windscheffel timely
14 appealed.

15 **JURISDICTION**

16 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
17 §§ 1334 and 157(b)(1) and (2)(A). We have jurisdiction under 28
18 U.S.C. § 158.

19 **ISSUE**

20 Whether the bankruptcy court abused its discretion in
21 dismissing Mr. Windscheffel's chapter 11 petition for bad faith.

22 **STANDARDS OF REVIEW**

23 "We review de novo whether the cause for dismissal of a
24 Chapter 11 case under 11 U.S.C. § 1112(b) is within the
25 contemplation of that section of the Code. We review for abuse
26 of discretion the bankruptcy court's decision to dismiss a case
27 as a 'bad faith' filing." In re Marsch, 36 F.3d at 828 (citing
28 Stolrow v. Stolrow's, Inc. (In re Stolrow's, Inc.), 84 B.R. 167,

1 170 (9th Cir. BAP 1988)); see Hutton v. Treiger (In re Owens),
2 552 F.3d 958, 960 (9th Cir. 2009); Sullivan v. Harnisch (In re
3 Sullivan), 522 B.R. 604, 611 (9th Cir. BAP 2014).

4 The Panel must apply a two-part test to determine whether
5 the bankruptcy court abused its discretion. United States v.
6 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).

7 First, we consider de novo whether the bankruptcy court applied
8 the correct legal standard. Id. Then, we review the bankruptcy
9 court's factual findings for clear error. Id. at 1262 & n.20;
10 see Eisen v. Curry (In re Eisen), 14 F.3d 469, 470 (9th Cir.
11 1994) (the bankruptcy court's finding of "bad faith" is reviewed
12 for clear error). A bankruptcy court abuses its discretion if it
13 applied the wrong legal standard or its findings were illogical,
14 implausible, or without support in the record. See
15 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th
16 Cir. 2011).

17 DISCUSSION

18 **A. The bankruptcy court did not err in determining that** 19 **Mr. Windscheffel filed his petition in bad faith and** 20 **dismissing his case for cause.**

21 Section 1112(b) (1) provides that "the court shall convert a
22 case under this chapter to a case under chapter 7 or dismiss a
23 case under this chapter, whichever is in the best interests of
24 creditors and the estate, for cause" § 1112(b) (1).

25 Mr. Windscheffel agrees that filing a chapter 11 in bad
26 faith can constitute "cause" under § 1112(b) (1). The Ninth
27 Circuit has so held. "Although section 1112(b) does not
28 explicitly require that cases be filed in 'good faith,' courts
have overwhelmingly held that a lack of good faith in filing a

1 Chapter 11 petition establishes cause for dismissal.” In re
2 Marsch, 36 F.3d at 828 (citations omitted).

3 Instead, Mr. Windscheffel contends that the court considered
4 impermissible factors in determining that he filed his petition
5 in bad faith. He points out that § 1112(b)(4)(A)-(P) list types
6 of “cause” warranting dismissal. He acknowledges that the list
7 of factors is not exhaustive, but argues that the courts’
8 creation of other bases for “cause” exceeds authority granted by
9 Congress.

10 This contention is wrong for multiple reasons.

11 First, he never presented it to the bankruptcy court, and,
12 absent exceptional circumstances, this panel will not consider an
13 issue raised for the first time on appeal. See Yamada v. Nobel
14 Biocare Holding AG, 825 F.3d 536, 543 (9th Cir. 2016).

15 Mr. Windscheffel has not identified any exceptional
16 circumstances.

17 Second, Mr. Windscheffel’s brief in support of his
18 contention does not comply with Rule 8010(a)(1)(E) because it
19 does not include citations to any authority supporting this
20 proposition. See United Student Funds, Inc. v. Wylie (In re
21 Wylie), 349 B.R. 204, 215 (9th Cir. BAP 2006).

22 Third, he cannot reconcile his argument with the plain
23 language of the statute. Section 1112(b)(4) says that the term
24 “cause **includes**” the enumerated factors. (Emphasis added.)
25 Congress specifically provided that the terms “‘includes’ and
26 ‘including’ are not limiting.” § 102(3). This proves that
27 Congress did not intend to limit “cause” to the listed items and
28 deliberately empowered the courts to expand that list as

1 appropriate.

2 Fourth, he fails to offer any workable limiting principle.
3 We agree that the bankruptcy court's power to define "cause"
4 under § 1112(b)(4) has limits. But Mr. Windscheffel fails to
5 explain where he thinks the limits should be placed or how a
6 court could determine whether it has transcended those limits.⁴

7 Fifth, the only specific reason he offers to limit the test
8 is specious. He argues that the bad faith analysis wastes court
9 time and resources. We doubt the sincerity of Mr. Windscheffel's
10 concern for the judiciary's time management.⁵ In any event, the
11 courts will not shy away from a necessary analysis merely because
12 it is complex, difficult, or time consuming.

13 We find no error in the bankruptcy court's thorough and
14 careful analysis. We have said that the bankruptcy court must
15 consider the totality of the circumstances when determining
16 whether the debtor acted in bad faith. Courts have developed
17 helpful lists of circumstantial factors that might indicate bad

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19 ⁴ Mr. Windscheffel argues that using the established tests
20 for a bad faith filing "is no more appropriate than the conduct
21 of 19th Century employers who posted signs stating 'No Irish need
22 apply.'" This argument is puzzling at best and offensive at
23 worst. We surely agree that the debtor's national origin has no
place in the bad faith analysis. But there is no indication that
the bankruptcy court in this case paid any attention to
Mr. Windscheffel's national origin.

24 ⁵ In fact, the bankruptcy court observed that
25 Mr. Windscheffel made the court's task more difficult by failing
26 to provide substantive analysis or competent evidence: "Again
27 it's not the Court's responsibility to dig through the record and
28 try to infer what debtor may or may not have the ability to do
and in fact one of the cases goes into an analysis of the
debtor's efforts to post a bond but inability to do so and
there's no evidence of that in the record."

1 faith. The bankruptcy court does not have to consider all of the
2 factors, nor does it have to weigh them equally. A bankruptcy
3 court may find one factor dispositive or may find bad faith even
4 if none of the factors are present. See Mahmood v. Khatib (In re
5 Mahmood), BAP No. CC-16-1210-TaFC, 2017 WL 1032569, at *4 (9th
6 Cir. BAP Mar. 17, 2017).

7 In the present case, the bankruptcy court acknowledged that
8 there is no single test within the Ninth Circuit to determine
9 whether a debtor acts in bad faith when he files a bankruptcy
10 petition to stay appellate proceedings in state court and avoid a
11 supersedeas bond. We find no error in the court's use of the
12 Erkins, Mense, and Chu tests. Those tests include factors that
13 this Panel has endorsed previously. In St. Paul Self Storage
14 Ltd. Partnership v. Port Authority of St. Paul (In re St. Paul
15 Self Storage Ltd. Partnership), 185 B.R. 580 (9th Cir. BAP 1995),
16 we said:

17 To determine whether a debtor has filed a petition in
18 bad faith, courts weigh a variety of circumstantial
factors such as whether:

- 19 (1) the debtor has only one asset;
- 20 (2) the debtor has an ongoing business to
reorganize;
- 21 (3) there are any unsecured creditors;
- 22 (4) the debtor has any cash flow or sources of
income to sustain a plan of reorganization or to
make adequate protection payments; and
- 23 (5) the case is essentially a two party dispute
capable of prompt adjudication in state court.

24 185 B.R. at 582-83 (citations omitted). We have also utilized a
25 more expansive list of factors. See, e.g., In re Stolrow's,
26 Inc., 84 B.R. at 171 (considering eight factors). In any event,
27 we recognize that there is no single test to determine bad faith,
28 and the bankruptcy court did not err in selecting the factors

1 relevant to this case.

2 Therefore, the bankruptcy court did not err in finding cause
3 to dismiss Mr. Windscheffel's chapter 11 petition based on bad
4 faith.

5 **B. Mr. Windscheffel's performance of his duties as a debtor in**
6 **possession does not overcome a bad faith determination.**

7 Mr. Windscheffel contends that the bankruptcy court failed
8 to consider that he was faithfully performing all of his required
9 obligations as a debtor in possession. The bankruptcy court did
10 not err.

11 We rejected an almost identical argument in St. Paul, where
12 the debtor claimed that it did not file its bankruptcy petition
13 in bad faith. To "support this contention, [d]ebtor refers to
14 the fact that it filed a proposed disclosure statement and plan,
15 filed all monthly operating reports, and paid all quarterly fees
16 to the United States Trustee." 185 B.R. at 583. We rejected
17 this argument: "notwithstanding Debtor's reverence for form, the
18 substance of this case indicates that the bankruptcy court's
19 finding of bad faith was not clearly erroneous nor did it abuse
20 its discretion when dismissing the case." Id.

21 If a debtor's timely filing of operating reports, compliance
22 with various reporting requirements, and work toward
23 reorganization rebutted a finding of bad faith, then every debtor
24 who complied with the bare minimum of procedural requirements
25 would be immunized from a bad faith finding. In re Mahmood, 2017
26 WL 1032569, at *5. This is not the law. Mr. Windscheffel's
27 postbankruptcy compliance with the rules does not excuse his bad
28 faith commencement of the case.

1 **C. The bankruptcy court properly considered the interests of**
2 **other unsecured creditors.**

3 Mr. Windscheffel contends that the bankruptcy court failed
4 to consider the interests of the other unsecured creditors. This
5 is a frivolous argument.

6 If a bankruptcy court determines that there is cause to
7 convert or dismiss, it must also: (1) decide whether dismissal,
8 conversion, or the appointment of a trustee or examiner is in the
9 best interests of creditors and the estate; and (2) identify
10 whether there are unusual circumstances that establish that
11 dismissal or conversion is not in the best interests of creditors
12 and the estate. §§ 1112(b)(1), (2); In re Sullivan, 522 B.R. at
13 612. This is a discretionary decision. In re Sullivan, 522 B.R.
14 at 612.

15 The bankruptcy court explicitly considered the interests of
16 the three other unsecured creditors. It declined to characterize
17 the law firm representing Mr. Windscheffel in the state court
18 action as an unsecured creditor in Class 6(b): the law firm did
19 not file a proof of claim; Mr. Windscheffel only added the law
20 firm as an unsecured creditor after MUSD filed its Motion to
21 Dismiss; and the law firm's fees for postbankruptcy services were
22 not authorized by the court. The remaining unsecured creditors
23 held combined claims totaling about \$500. The court noted that
24 their claims were negligible, especially in light of MUSD's \$2.1
25 million claim. It correctly focused on the interest of MUSD, the
26 predominant unsecured creditor.

27 Mr. Windscheffel also claims that, if he liquidates his
28 properties, the state and federal taxing agencies will receive

1 substantial tax revenue. Once again, we question the sincerity
2 of Mr. Windscheffel's concern for the public fisc. In any event,
3 the taxing authorities would also benefit if Mr. Windscheffel's
4 assets were liquidated outside of bankruptcy.

5 The court did not abuse its discretion in its consideration
6 of the interests of other creditors.

7 **D. The allegedly deficient service on two federally insured**
8 **deposit institutions does not void the dismissal order.**

9 Finally, Mr. Windscheffel argues for the first time on
10 appeal that MUSD failed to properly serve the Motion to Dismiss
11 on two federally insured depository institutions.⁶ Essentially,
12 he argues that, because the two banks were not served properly,
13 the order on appeal is void. Mr. Windscheffel's argument flies
14 in the face of binding precedent.

15 We have stated:

16 [P]ersonal jurisdiction is an individual right.
17 Parsons v. Plotkin (In re Pac. Land Sales, Inc.), 187
18 B.R. 302, 309 (9th Cir. BAP 1995). In asserting that
19 the bankruptcy court did not have personal jurisdiction
20 over the doctor participants due to defective service
of process, [appellant] is attempting to assert the
doctors' individual constitutional rights to due
process. He has no standing to do so. Id. at 310.

21 Korneff v. Downey Reg'l Med. Ctr.-Hosp., Inc. (In re Downey Reg'l
22 Med. Ctr.-Hosp., Inc.), 441 B.R. 120, 128 (9th Cir. BAP 2010).

23 In other words, the dismissal order is not void, because
24 Mr. Windscheffel cannot assert the two banks' rights on their

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26 ⁶ Mr. Windscheffel filed a request for judicial notice
27 asking that we take judicial notice of two documents from the
28 FDIC website purporting to show that Synchrony Bank and Ally
Financial are federally insured deposit institutions. We grant
the request for judicial notice.

1 behalf.

2 Moreover, Mr. Windscheffel did not raise the issue of
3 allegedly defective service with the bankruptcy court, either in
4 writing or at the hearing on the motion. As we stated above, we
5 will not consider new arguments for the first time on appeal.
6 See Yamada, 825 F.3d at 543.

7 Thus, Mr. Windscheffel cannot successfully challenge the
8 dismissal order on the basis that other parties were not properly
9 served.

10 **CONCLUSION**

11 For the reasons set forth above, the bankruptcy court did
12 not abuse its discretion in dismissing Mr. Windscheffel's case.
13 Therefore, we AFFIRM.

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