

AUG 10 2017

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NOT FOR PUBLICATION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

In re:) BAP No. CC-16-1377-LTaKu
)
 CONCHITA C. ANG,) Bk. No. 6:16-bk-16362-MH
)
 Debtor.)
 _____)
)
 CONCHITA C. ANG,)
)
 Appellant,)
)
 v.) **MEMORANDUM***
)
 PETER CHRISTOPHER ANDERSON,)
 U.S. Trustee; ROD DANIELSON,)
 Esquire, Chapter 13 Trustee;)
 WELLS FARGO BANK, N.A.,)
)
 Appellees.)
 _____)

Submitted Without Argument on July 27, 2017

Filed - August 10, 2017

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

Honorable Mark D. Houle, Bankruptcy Judge, Presiding

Appearances: Conchita C. Ang, Appellant, pro se on brief;
 Ramona D. Elliott, P. Matthew Sutko, John
 Postulka, Peter C. Anderson and Nancy S.
 Goldenberg on brief for Appellee Peter C.
 Anderson, U.S. Trustee; Megan E. Lees of Aldridge
 Pite, LLP on brief for Appellee Wells Fargo Bank,
 N.A.; no appearance by Appellee Rod Danielson,
 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 KURTZ, Bankruptcy Judges.
2

3 **INTRODUCTION**

4 Debtor Conchita C. Ang appeals the bankruptcy court's
5 dismissal of her chapter 13¹ case pursuant to § 1307(c) as a bad
6 faith filing. Because Debtor has not demonstrated that the
7 bankruptcy court abused its discretion in dismissing her case,
8 we AFFIRM.

9 **FACTS**

10 Debtor filed a skeletal chapter 13 petition and list of
11 creditors on July 18, 2016. Schedules, a plan, and other
12 initial filings were due August 1, 2016. Debtor requested an
13 extension of time to file those documents, which the bankruptcy
14 court denied. Debtor timely filed the required documents on
15 August 1, 2016. On her schedules, Debtor listed Wells Fargo
16 Home Mortgage and Bayview Loan Servicing as her only creditors,
17 and she identified them as nonpriority unsecured creditors with
18 disputed claims. Schedules I and J showed that Debtor had
19 negative disposable income, while the proposed plan called for
20 payments of \$99 per month for 60 months.

21 This case was Debtor's eighth bankruptcy filing since
22 2009.² Five of the previous seven cases were dismissed for
23 failure to file initial documents, one was dismissed for failure
24 to appear at the 341(a) meeting, and one was dismissed under

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

28 ²Debtor also filed a chapter 7 case in 1992; documents for
that case are not available electronically.

1 § 109(g). The following chart details Debtor's prior cases:

2 Filing date	3 Case No.	4 Reason for dismissal	5 Date of dismissal
6 10/7/2009	7 09-33860-SB (13)	8 failure to file documents timely	9 10/23/2009
10 11/4/2009	11 09-36630-SB (13)	12 failure to file documents timely	13 11/30/2009
14 1/5/2010	15 10-10206-PC (13)	16 failure to file documents timely	17 1/27/2010
18 3/5/2010	19 10-16188-EC (7)	20 failure to appear at 341(a) meeting	21 5/20/2010
22 12/14/2010	23 10-50038-CB (13)	24 failure to file documents timely	25 1/6/2011
26 12/14/2011	27 11-47560-MJ (13)	28 failure to file documents timely	1/5/2012
8/8/2012	12-28439-MH (13)	multiple filings (\$ 109(g) bar)	10/16/2012

14 In view of this history, Appellee Peter C. Anderson, United
15 States Trustee ("UST") filed a motion to dismiss Debtor's case
16 as a bad faith filing and requested the bankruptcy court impose
17 a bar to refiling of up to two years. In support of his motion,
18 the UST cited Debtor's numerous unprosecuted prior filings that
19 he asserted were designed to delay or frustrate creditors' state
20 law remedies.

21 In response, Debtor asserted she did not intend to file her
22 latest case in bad faith and certainly "never intended to
23 deceive, mislead, or abuse the bankruptcy system." Rather, she
24 maintained she lacked the requisite knowledge and fell victim to
25 unskilled lawyers and "so called experts." She also stated that
26 no filing bar had ever been imposed, even though her 2012
27 bankruptcy case had been dismissed with a bar to refiling.

28 As to her current filing, Debtor stated that approximately

1 six weeks before she filed, she hired an attorney and, with the
2 attorney's assistance, submitted a loan modification to Wells
3 Fargo, N.A. ("Wells Fargo"), which it denied shortly before its
4 non-judicial foreclosure scheduled for July 19, the day after
5 she filed her bankruptcy petition. Debtor stated that she was
6 forced to file the instant bankruptcy case to "preserve her
7 residence."

8 Debtor also asserted that in 2009, she entered into a loan
9 modification agreement with Wachovia Mortgage that reduced the
10 principal amount of her mortgage debt. She further stated that
11 despite her repeated demands, Wells Fargo had refused to
12 "validate" the amount she claims as her debt. Debtor stated
13 that she intended to file an adversary proceeding in the
14 bankruptcy case to "challenge and discover the true identity of
15 alleged creditor [Wells Fargo] and to prove that they are
16 attempting to deceive [Debtor], defraud this Court, and
17 attempting to steal [Debtor's] residence." Debtor also pointed
18 out that she had timely filed all of the required documents in
19 the instant bankruptcy case.

20 Debtor attached to her opposition several unauthenticated
21 documents and a declaration stating that she had filed the
22 bankruptcy case "in good faith and with every sincere intention
23 to continue the Chapter 13 plan, conditional on alleged creditor
24 [Wells Fargo's] ability to prove their standing as THE true
25 legal Creditor with standing to receive payments toward a valid
26 and verified Proof of Claim."

27 In the meantime, Wells Fargo filed an objection to
28 confirmation of Debtor's proposed chapter 13 plan. It alleged

1 that it was the holder of a \$960,000 promissory note executed by
2 Debtor in October 2007 that was secured by a deed of trust on
3 Debtor's residence in Redlands, California.³ Wells Fargo
4 objected to Debtor's proposed plan on the grounds that (1) the
5 plan did not provide for the cure of a prepetition arrearage of
6 \$331,716.40 (which included 82 pre-petition payments); and
7 (2) the plan was not feasible given that Debtor's schedules
8 showed negative disposable income of \$1,029.76.

9 Prior to the hearing on the UST's motion to dismiss, the
10 bankruptcy court issued a tentative decision granting the motion
11 with a 180-day bar to refiling based on a determination that
12 Debtor had filed the case in bad faith. The court's tentative
13 decision was based on Debtor's multiple bankruptcy filings, the
14 fact that Debtor's schedules indicated she had no disposable
15 income to fund a chapter 13 plan, Debtor's failure to commence
16 an adversary proceeding against Wells Fargo, Debtor's lack of
17 admissible evidence in support of her opposition, and "the lack
18 of any detail in Debtor's declaration other than generic
19 averments of good faith."

20 At the hearing on September 22, 2016, the bankruptcy court
21 noted that Debtor had not complied with the court's direction to
22 file a written response to the chapter 13 trustee's objections
23 to confirmation by September 15, 2016.⁴ The bankruptcy court

24
25 ³According to the objection to confirmation, the original
26 lender was World Savings Bank, FSB, which changed its name to
27 Wachovia Mortgage, FSB on December 31, 2007. Wachovia merged
28 with Wells Fargo Bank in 2009.

⁴No formal objection to confirmation by the chapter 13
(continued...)

1 also noted that Debtor had not paid Wells Fargo since 2009,
2 instead using the bankruptcy process to stop Wells Fargo's
3 foreclosure efforts. After permitting Debtor to argue at
4 length, the court adopted its tentative ruling as final. An
5 order dismissing the case with a 180-day bar to refileing was
6 entered on October 12, 2016, and Debtor timely appealed.

7 **JURISDICTION**

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

11 **ISSUE**

12 Did the bankruptcy court abuse its discretion in dismissing
13 Debtor's chapter 13 case?

14 **STANDARD OF REVIEW**

15 We review the bankruptcy court's dismissal of a chapter 13
16 bankruptcy case for abuse of discretion. Ellsworth v. Lifescape
17 Medical Assoc., P.C. (In re Ellsworth), 455 B.R. 904, 914 (9th
18 Cir. BAP 2011) (citing Leavitt v. Soto (In re Leavitt), 171 F.3d
19 1219, 1224 (9th Cir. 1999)). To determine whether the
20 bankruptcy court has abused its discretion, we conduct a
21 two-step inquiry: (1) we review de novo whether the bankruptcy
22 court identified the correct legal rule to apply to the relief
23 requested and (2) if it did, whether the bankruptcy court's

24 ⁴(...continued)
25 trustee appears on the bankruptcy court docket. The docket
26 reflects that the initial confirmation hearing took place on
27 September 1, 2016. Based on comments made at the September 22
28 hearing, it appears that the trustee raised its objections at the
September 1 hearing, including an allegation that Debtor's debts
exceeded the § 109(e) limits.

1 application of the legal standard was illogical, implausible or
2 without support in inferences that may be drawn from the facts
3 in the record. United States v. Hinkson, 585 F.3d 1247, 1261-62
4 & n.21 (9th Cir. 2009) (en banc). If the bankruptcy court did
5 not identify the correct legal rule, or its application of the
6 correct legal standard to the facts was illogical, implausible,
7 or without support in inferences that may be drawn from the
8 facts in the record, then the bankruptcy court has abused its
9 discretion. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d
10 820, 832 (9th Cir. 2011).

11 DISCUSSION

12 **A. Preliminary Matter - Appellee's Motion to Strike Extra-** 13 **Record Materials**

14 Debtor attached several exhibits to her reply brief,
15 including amended Schedules I and J. Those amended schedules
16 were never filed in the bankruptcy court and thus were not
17 before the bankruptcy court when it considered the motion to
18 dismiss. The UST filed with the BAP clerk a motion to strike
19 those documents on grounds that they were not part of the record
20 in the bankruptcy court. The UST also moved to strike any
21 argument in the reply brief that relied upon the improperly
22 submitted documents.

23 As a reviewing court, we do not consider papers not filed
24 with or admitted into evidence by the bankruptcy court. See
25 Graves v. Myrvang (In re Myrvang), 232 F.3d 1116, 1119 n.1 (9th
26 Cir. 2000); Kirshner v. Uniden Corp. of Am., 842 F.2d 1074, 1077
27 (9th Cir. 1988). Accordingly, the UST's motion to strike is
28 GRANTED.

1 **B. The bankruptcy court did not abuse its discretion in**
2 **dismissing Debtor's chapter 13 case.**

3 Under § 1307(c), a bankruptcy court, upon request of a
4 party in interest and after notice and a hearing, may dismiss a
5 chapter 13 case for "cause." The statute lists 11 enumerated
6 grounds for dismissal. Although not specifically listed, bad
7 faith is "cause" for dismissal under § 1307(c). Leavitt v. Soto
8 (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999) (citing
9 Eisen v. Curry (In re Eisen), 14 F.3d 469, 470 (9th Cir. 1994)).
10 In determining whether dismissal is warranted for bad faith, the
11 bankruptcy court is to consider the totality of the
12 circumstances. Id. Specifically, the court is to consider:

- 13 (1) whether the debtor misrepresented facts in his petition
14 or plan, unfairly manipulated the Bankruptcy Code, or otherwise
15 filed his chapter 13 petition or plan in an inequitable manner;
16 (2) the debtor's history of filings and dismissals;
17 (3) whether the debtor only intended to defeat state court
18 litigation; and
19 (4) whether egregious behavior is present. Id.

20 The bankruptcy court need not find fraudulent intent to
21 conclude that a case was filed in bad faith. Id.

22 Here, the bankruptcy court considered (1) Debtor's history
23 of numerous skeletal filings, noting that the Debtor had not
24 adequately explained why she failed to prosecute those filings;
25 (2) Debtor's schedules, which showed she had no disposable
26 income to fund a chapter 13 plan; (3) Debtor's failure to
27 commence an adversary proceeding against Wells Fargo, despite
28 alleging that Wells Fargo lacked standing to enforce the

1 promissory note secured by a deed of trust on Debtor's real
2 property; (4) Debtor's failure to present admissible
3 documentation in support of her opposition to the UST's motion;
4 and (5) the lack of any detail in Debtor's declaration other
5 than generic averments of good faith.⁵

6 Debtor argues that the bankruptcy court should not have
7 dismissed her case because (1) she filed all the required
8 documents in the instant case; (2) the UST filed a false
9 declaration claiming that Debtor had failed to file schedules;
10 (3) her multiple prior filings did not prove she acted in bad
11 faith; (4) the bankruptcy court combined the hearings on
12 confirmation and the UST's motion to dismiss without notice,
13 posted a tentative "prejudicial" decision before reviewing all
14 evidence and hearing all testimony, and failed to give Debtor
15 advance notice of the tentative; and (5) the bankruptcy court
16 refused to admit and review supporting documents Debtor had
17 filed in response to the UST's motion to dismiss and Wells
18 Fargo's objection to confirmation.⁶

19 Debtor's arguments do not support the conclusion that the
20 bankruptcy court abused its discretion in dismissing her case.
21 First, the bankruptcy court did not dismiss the case for
22 Debtor's failure to file documents. Twice during the hearing on
23

24 ⁵Although the bankruptcy court did not make an explicit
25 finding that the case had been filed to thwart foreclosure ("only
26 to defeat state court litigation"), the record - including
27 Debtor's own declaration - supports such a finding.

27 ⁶Debtor included declarations with her opening and reply
28 briefs. However, as noted, we do not consider evidence that was
not before the bankruptcy court when it ruled.

1 the motion to dismiss, the bankruptcy court explicitly
2 acknowledged that Debtor had timely filed the required documents
3 and stated that it was not basing its decision on a failure to
4 do so. Hr'g Tr. (Sept. 22, 2016) at 20:21-21:5; 30:1-14.

5 Second, a debtor's history of filings and dismissals is a
6 salient factor in determining bad faith. In re Leavitt,
7 171 F.3d at 1224. Debtor did not sufficiently explain her prior
8 numerous unprosecuted filings. She provided no admissible
9 documentary evidence in opposition to the motion to dismiss, and
10 her declaration testimony was conclusory and implausible.
11 Although Debtor alleged that her numerous bankruptcy filings
12 were due to bad advice, the bankruptcy court found that after
13 having several cases dismissed for failure to file documents,
14 this explanation was implausible. Additionally, in making its
15 bad faith finding, the bankruptcy court considered Debtor's lack
16 of disposable income to fund a plan and her failure to take any
17 steps to determine whether Wells Fargo was the creditor to whom
18 she should be making her mortgage payments despite having
19 disputed Wells Fargo's standing for seven years.

20 Third, Debtor's arguments that the bankruptcy court
21 combined the hearings on confirmation and the motion to dismiss
22 without notice and failed to give her advance notice of the
23 tentative were not raised in the bankruptcy court and are
24 therefore waived. See Concrete Equip. Co. v. Virgil Bros.
25 Constr., Inc. (In re Virgil Bros. Constr., Inc.), 193 B.R. 513,
26 520 (9th Cir. BAP 1996). In any event, these arguments are not
27 supported by the record. Debtor was served with notice of the
28 September 22 hearing on the motion to dismiss, and she appeared

1 at that hearing. She was also served with notice of the
2 original confirmation hearing on September 1, and it is apparent
3 from the transcript of the September 22 hearing that she
4 appeared at the September 1 hearing at which the bankruptcy
5 court continued the matter to September 22. Hr'g Tr. (Sept. 22,
6 2016) at 5:11-6:20. Moreover, the bankruptcy court gave Debtor
7 an opportunity to read the tentative decision and permitted her
8 to argue extensively thereafter.

9 Finally, Debtor has not demonstrated that the bankruptcy
10 court erred in not considering the documentary evidence she
11 submitted in support of her opposition to the motion to dismiss
12 and Wells Fargo's objection to confirmation. None of the
13 documents attached to Debtor's oppositions were properly
14 authenticated. And Wells Fargo's objection to confirmation was
15 not adjudicated at the September 22 hearing because it was
16 mooted by the court's ruling on dismissal.

17 In Debtor's reply brief, she argues that she does not have
18 negative income and attaches amended schedules to prove it.
19 However, as discussed above, those schedules were never filed in
20 the bankruptcy court and were not before the bankruptcy court
21 when it ruled. As noted, we do not consider papers not
22 presented to the bankruptcy court in the first instance, and we
23 are granting the UST's motion to strike those exhibits. Debtor
24 also argues that Wells Fargo's proof of claim, which was filed
25 after the bankruptcy court ruled, does not support its claim.
26 Again, this proof of claim was not before the bankruptcy court
27 when it ruled, and in any event, any determination regarding
28 Wells Fargo's claim would not have occurred in the context of

1 the motion to dismiss. Debtor also complains that Wells Fargo
2 filed a joinder in this appeal without notice; Debtor, however,
3 listed Wells Fargo's counsel as a party in interest in her
4 notice of appeal. More importantly, she has not explained how
5 Wells Fargo's joinder is prejudicial to her. The joinder states
6 only: "PLEASE TAKE NOTICE that Appellee, Wells Fargo Bank, N.A.,
7 hereby joins in Co-Appellee, Peter C. Anderson, United States
8 Trustee's Opening Brief." Thus, the joinder does not raise any
9 issues beyond those addressed in the UST's brief.

10 We need not address the bankruptcy court's imposition of a
11 six-month bar to refiling. That period expired April 12, 2017.
12 Accordingly, the issue is moot. Fernandez v. GE Capital
13 Mortgage Servs. (In re Fernandez), 227 B.R. 174, 178 (9th Cir.
14 BAP 1998).

15 **CONCLUSION**

16 Debtor has not shown that the bankruptcy court abused its
17 discretion in dismissing her chapter 13 case as a bad faith
18 filing. Accordingly, we AFFIRM.