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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

1 In re:)
2) BAP No. EC-17-1075-KuFS
3 CHARITY MAE SEYMOUR,) EC-17-1106-KuFS
4) (consolidated)
5 Debtor.) Bk. No. 16-bk-27693-RSB
6)
7 CHARITY MAE SEYMOUR,)
8)
9 Appellant,)
10 v.) M E M O R A N D U M *
11)
12 RUSSEL D GREER, Chapter 13)
13 Trustee; U.S. BANK, NATIONAL)
14 ASSOCIATION; FORD MOTOR)
15 COMPANY LLC,)
16)
17 Appellees.)

Submitted Without Argument
on October 26, 2017**

Filed - November 9, 2017

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

Honorable Robert S. Bardwil, Bankruptcy Judge, Presiding

20 _____
21 Appearances: Charity M. Seymour, pro se on brief; Lee S.
22 Raphael and Cassandra J. Richey of Prober &
23 Raphael on brief for appellee U.S. Bank, N.A.
24 _____

24 * This disposition is not appropriate for publication.
25 Although it may be cited for whatever persuasive value it may
26 have (see Fed. R. App. P. 32.1), it has no precedential value.
27 See 9th Cir. BAP Rule 8013-1.

27 ** By order entered on September 25, 2017, a motions panel
28 determined these appeals suitable for submission on the briefs
and record without oral argument.

1 Before: KURTZ, FARIS, and SPRAKER, Bankruptcy Judges.

2 Charity Mae Seymour (Debtor) appeals from the bankruptcy
3 court's orders: (1) dismissing her chapter 13¹ case under
4 § 1307(c)(4) because her plan payments were insufficient (BAP
5 No. EC-17-1075); and (2) denying her motion for reconsideration
6 of an order sustaining the objection of appellee, U.S. Bank
7 National Association (Bank), to Debtor's chapter 13 plan on the
8 ground that the motion was moot because the order dismissing her
9 case was entered and there was no stay pending appeal (BAP
10 No. EC-17-1106). For the reasons explained below, we AFFIRM
11 both orders.

12 I. FACTS

13 A. The Dispute Between Debtor And Bank²

14 In August 2006, Debtor borrowed \$582,250 (Loan) from Remae
15 Mortgage Corporation. In exchange for the Loan, Debtor executed
16 an Adjustable Rate Note (Note) and a Deed of Trust (Deed of
17 Trust) against real property located on Magnolia Street in
18 Stockton, California (Property). In April 2008, Debtor
19 defaulted under the Loan documents. Foreclosure proceedings
20

21 ¹ Unless otherwise indicated, all chapter and section
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
23 "Rule" references are to the Federal Rules of Bankruptcy
24 Procedure and "Civil Rule" references are to the Federal Rules of
Civil Procedure.

25 ² Some of the background facts are taken from a previous
26 case involving Debtor and her dispute with Bank of America, N.A.
27 and others with respect to the foreclosure of her property.
28 Seymour v. Bank of Am., N.A. (In re Seymour), BAP No. EC-11-1669-
MkDJu, 2013 WL 1736471 (9th Cir. BAP April 23, 2013). Bank, as
trustee, is the successor in interest to the mortgagee's
interest.

1 were commenced and a trustee's sale was scheduled.

2 In response to the commencement of the foreclosure
3 proceedings, Debtor filed a civil action in the United States
4 District Court for the Eastern District of California against
5 her mortgage lender (Bank's predecessor) alleging, among other
6 things, violations of the Truth in Lending Act, wrongful
7 foreclosure, mortgage origination fraud, and fraudulent
8 assignment. The district court dismissed the action as against
9 certain defendants in June 2010 with prejudice, and Debtor
10 stipulated to dismissal of the remaining defendants in December
11 2010. Debtor's motion for relief from the dismissal was denied
12 in June 2011. The Ninth Circuit Court of Appeals affirmed the
13 district court's order in November 2011.

14 In conjunction with her civil action, Debtor used the
15 bankruptcy process to avoid foreclosure. She filed a chapter 13
16 case in the bankruptcy court for the Eastern District of
17 California, followed by a chapter 11 case. Both cases were
18 dismissed.

19 Debtor also filed a chapter 7 case in June 2011 and
20 initiated an adversary proceeding against Bank and others,
21 seeking to enjoin them from foreclosing on her residence. Bank
22 moved to dismiss her complaint, which the bankruptcy court
23 granted without leave to amend in November 2011. The bankruptcy
24 court held, among other things, that Debtor lacked standing to
25 prosecute the adversary complaint, explaining that the complaint
26 raised claims that arose prior to the filing of her bankruptcy
27 case and thus those claims were property of her bankruptcy
28 estate which could be only pursued by her chapter 7 trustee.

1 Debtor appealed the dismissal ruling to this Panel. The
2 Panel modified the bankruptcy court's dismissal order to clarify
3 that the adversary proceeding was dismissed based on Debtor's
4 lack of standing, as the chapter 7 trustee had the exclusive
5 right to sue on behalf of the estate. The Panel affirmed the
6 dismissal order, as modified. See In re Seymour, 2013 WL
7 1736471. The Ninth Circuit Court of Appeals affirmed the
8 Panel's decision in May 2015. 601 F. App'x 572 (9th Cir. May 4,
9 2015). Debtor received her chapter 7 discharge on October 13,
10 2011.

11 To date, no foreclosure sale has occurred, and Debtor has
12 made no payments for almost nine years.

13 **B. Bankruptcy Events**

14 Debtor filed this chapter 13 case on November 18, 2016. In
15 her opening brief, Debtor states that she filed this case to
16 challenge the security interest and validity of Bank's in rem
17 lien rights.

18 **1. Debtor's Chapter 13 Plan And Amended Plan**

19 Debtor filed her chapter 13 plan on December 2, 2016. The
20 plan provided for monthly payments of \$1,260.39 to the
21 chapter 13 trustee (Trustee) for 36 months. Debtor's plan did
22 not provide for mortgage payments, instead stating that Debtor
23 would avoid Bank's lien on her Property via an adversary
24 proceeding. Debtor listed Bank's claim as unsecured in the
25 amount of \$45,374.07 (this amount apparently was for property
26 taxes that Bank had advanced on her behalf). Her plan also
27 provided for a 90% dividend to class 7 unsecured claims which
28 totaled approximately \$45,374.07 - the same amount of Bank's

1 claim.

2 In an additional provision to the plan, Debtor contended
3 that the plan was feasible dependent on filing an adversary
4 proceeding to void Bank's mortgage. Debtor maintained that
5 although she lacked standing to bring her adversary complaint
6 against Bank in her chapter 7 case, she now intended to quiet
7 title by asking Trustee or the bankruptcy court to disallow
8 Bank's claim in rem, as part of a plan to repay the property
9 taxes improperly paid by Bank and quiet her title to the real
10 property. Debtor cited numerous authorities, including Johnson
11 v. Home State Bank, 501 U.S. 78 (1991), which she argued stood
12 for the proposition that a chapter 13 debtor could use the lien
13 avoidance provisions in the Bankruptcy Code. Debtor asserted
14 that her standing to pursue the avoidance of Bank's lien had
15 been "restored."

16 Bank objected to the plan, contending that Debtor failed to
17 provide for the maintenance of post-petition payments, used an
18 improper procedure for avoidance of Bank's lien, and filed the
19 case in bad faith. Bank also argued that the plan was not
20 feasible and that Debtor's plan attempted to modify its original
21 Note and Trust Deed/Mortgage in direct violation of
22 § 1322(b)(2). Finally, Bank asserted that it was owed the
23 amount of \$580,000 and arrears in about the same amount.

24 Ford Motor Credit Company LLC (FMCC) also objected to the
25 plan since it did not provide for any payments to FMCC in
26 relation to Debtor's car debt.

27 Finally, Trustee objected, contending that the plan:
28 (1) failed the liquidation test since Debtor's schedules showed

1 \$161,000 in nonexempt assets for distribution; (2) was not
2 proposed in good faith since it failed to provide for payment to
3 FMCC; and (3) was not feasible since Debtor failed to provide
4 for amounts owing to Bank.

5 After these objections, Debtor "re-noticed" the
6 confirmation hearing to a later date and filed an amended plan
7 on February 1, 2017. Her amended plan provided for installments
8 to FMCC directly by Debtor and increased plan payments to
9 \$1,396.96. No significant changes were made to the treatment of
10 Bank.

11 **2. Trustee's Motion To Dismiss**

12 On February 14, 2017, Trustee filed a motion to dismiss
13 (MTD) Debtor's case and filed notice of the hearing scheduled
14 for February 28, 2017. Trustee's dismissal request was based on
15 § 1307(c)(1) - unreasonable delay that was prejudicial to
16 creditors - and § 1307(c)(4) - payments were not current under
17 the plan. Trustee submitted the declaration of his employee,
18 Leticia Macias, who declared that as of February 14, 2017,
19 Debtor was in default of her plan payments by \$273.14.³

20 **3. The Bankruptcy Court's Ruling On Bank's Objection To 21 Debtor's Original Plan**

22 Two weeks prior to the scheduled February 28, 2017 hearing
23 on Trustee's MTD, the bankruptcy court sustained Bank's
24 objection to Debtor's original plan. In a detailed ruling, the
25 court reviewed the history of Debtor's court filings and the
26

27 ³ The difference between Debtor's original plan payments and
28 her amended plan payments was \$136.57. Therefore, Debtor was two
months in arrears based on the \$273.14 used by Trustee.

1 lack of merit in her positions. The bankruptcy court noted:

2 With this latest bankruptcy case, the debtor seeks
3 exactly what she sought in her district court action
4 and her adversary proceeding in her chapter 7 case -
5 she seeks to extinguish the Bank's lien against her
6 residence without paying anything to the Bank except,
7 apparently, property taxes the Bank appears to have
8 advanced on her behalf. . . . The Bank, on the other
9 hand has submitted evidence that the Bank is owed
10 pre-petition arrears of \$560,484. The Bank contends,
11 and the debtor does not deny, she has made no payments
12 in almost nine years.

13 The court further discussed Debtor's additional provision
14 to her plan by refuting her authorities that allegedly stood for
15 the proposition that she could avoid Bank's lien in her
16 chapter 13 case. The court noted that Debtor's standing to
17 pursue her claims against Bank for violations of the Trust in
18 Lending Act, Wrongful Foreclosure, and so on was not magically
19 revived simply because she filed a chapter 13 case. Rather,
20 Debtor failed to schedule her claims against Bank in her chapter
21 7 case and, therefore, the claims remained property of the
22 estate in that case, even though the case was closed. § 554(d);
23 Cheng v. K&S Diversified Invs., Inc. (In re Cheng), 308 B.R.
24 448, 461 (9th Cir. BAP 2004) ("Property of the estate that is
25 not scheduled or otherwise administered by the time the case is
26 closed remains property of the estate forever.").

27 The bankruptcy court concluded that Debtor had no standing
28 to challenge Bank's **in rem** rights; that is, its right to
foreclose on its collateral if it is not paid. Therefore,
Debtor's chapter 13 plan could not be confirmed. The bankruptcy
court held that: "The proposed plan violates § 1325(a)(5) and
is not proposed in good faith, as required by § 1325(a)(3)."
In a footnote, the court noted that although Debtor had filed an

1 amended plan, Bank's treatment was essentially the same in the
2 two plans. Therefore, the amended plan did not moot the present
3 objection.

4 On February 14, 2017, the bankruptcy court entered a minute
5 order sustaining Bank's objection.

6 On February 28, 2017, Debtor filed a motion for
7 reconsideration of the bankruptcy court's order. She argued,
8 among other things, that the findings in the district court case
9 and her chapter 7 case did not preclude her from pursuing her
10 claims against Bank.

11 **4. The Bankruptcy Court's Ruling On Trustee's MTD**

12 Also on February 28, 2017, the bankruptcy court heard
13 Trustee's MTD. Debtor did not file an opposition to the MTD or
14 appear at the hearing. The bankruptcy court ruled: "Plan
15 delinquency is cause for dismissal. Accordingly, the motion
16 will be granted, the case is dismissed." The court entered an
17 order dismissing the case on March 1, 2017. Debtor filed a
18 notice of appeal on March 14, 2017, thereby commencing BAP
19 No. 17-1075.

20 **5. The Bankruptcy Court's Ruling On Debtor's Motion for**
21 **Reconsideration**

22 On March 28, 2017, the bankruptcy court issued a final
23 ruling, denying Debtor's motion for reconsideration of its order
24 sustaining Bank's objections to confirmation of Debtor's
25 original plan. The court found the motion moot because Debtor's
26 case was dismissed and she had not obtained a stay pending
27
28

1 appeal.⁴ Despite stating that no appearance was necessary,
2 Debtor appeared at the hearing. The bankruptcy court advised
3 her that it had made a final ruling on her motion for
4 reconsideration and no further argument was necessary. Debtor
5 attempted to inform the court that she had filed a motion to
6 vacate/reconsider the dismissal order (as described below).
7 Debtor stated that she intended to appeal the court's ruling,
8 and the proceedings concluded.

9 The bankruptcy court entered the order denying her motion
10 for reconsideration on March 28, 2017. Debtor filed a notice of
11 appeal from this ruling on April 10, 2017, thereby commencing
12 BAP No. 17-1106.

13 **6. Debtor's Ex Parte Motion To Vacate The Dismissal**

14 Also on March 28, 2017, Debtor filed an ex parte motion to
15 vacate the dismissal or for a stay of the dismissal order
16 pending appeal. Debtor argued that her amended plan included a
17 "detailed computation that spread the \$273 over the remaining
18 34 payments at the time." She stated that she assumed that it
19 was clear the \$273 was provided for in the amended plan. Debtor
20 also challenged the court's mootness finding regarding her
21 motion for reconsideration. According to Debtor, the dismissal
22 order was dated March 1, 2017, and her motion for
23 reconsideration was filed February 28, 2017. Debtor asserted
24 that the bankruptcy court had "some days to weigh the erroneous
25

26 ⁴ In separate orders, the bankruptcy court overruled FMCC's
27 and Trustee's objections to Debtor's original plan on the basis
28 of mootness due to the dismissal. The court also denied Debtor's
motion to confirm her plan on mootness grounds.

1 \$273 issue in relation to the magnitude and impact of her motion
2 for reconsideration" where she alleged Bank had committed fraud.
3 The bankruptcy court did not rule on this motion.

4 **7. Procedural Matters After Appeal**

5 These appeals were subsequently consolidated by a one-judge
6 order on May 23, 2017. Debtor filed a motion to stay the
7 dismissal order in this court because Bank argued in its brief
8 that these appeals would become moot upon the close of the
9 bankruptcy case which was anticipated in the next ten days or
10 so. The Panel denied her motion.

11 **II. JURISDICTION**

12 The bankruptcy court had jurisdiction over this proceeding
13 under 28 U.S.C. §§ 1334 and 157(b) (2) (A). We have jurisdiction
14 under 28 U.S.C. § 158.

15 **III. ISSUES**

16 Did the bankruptcy court abuse its discretion in dismissing
17 Debtor's case?

18 Did the bankruptcy court abuse its discretion in denying
19 Debtor's motion for reconsideration on the order sustaining
20 Bank's objection to her original plan?

21 **IV. STANDARDS OF REVIEW**

22 We review the bankruptcy court's dismissal of a chapter 13
23 bankruptcy case under any of the enumerated paragraphs of
24 § 1307(c) for abuse of discretion. Ellsworth v. Lifescape Med.
25 Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 914 (9th Cir. BAP
26 2011).

27 Denial of a motion to amend or alter a judgment under Civil
28 Rule 59(e) is reviewed for an abuse of discretion. Dixon v.

1 Wallowa Cty., 336 F.3d 1013, 1022 (9th Cir. 2003).

2 To determine whether the bankruptcy court abused its
3 discretion, we conduct a two-step inquiry: (1) we review de novo
4 whether the bankruptcy court “identified the correct legal rule
5 to apply to the relief requested” and (2) if it did, whether the
6 bankruptcy court’s application of the legal standard was
7 illogical, implausible or “without support in inferences that
8 may be drawn from the facts in the record.” United States v.
9 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).

10 We may affirm on any basis sustained by the record. Heers
11 v. Parsons (In re Heers), 529 B.R. 734, 740 (9th Cir. BAP 2015).

12 V. DISCUSSION

13 Section 1307(c) provides that on request of a party in
14 interest and after notice and a hearing, the bankruptcy court
15 may convert a chapter 13 case to chapter 7 or dismiss the case,
16 whichever is in the best interests of creditors and the estate,
17 for cause. The use of the word “may” in § 1307(c) indicates
18 that dismissal of a case is a discretionary decision of the
19 trial court. Sievers v. Green (In re Green), 64 B.R. 530 (9th
20 Cir. BAP 1986).

21 The record shows that Debtor’s plan payments were short in
22 the amount of \$273.14. The requirement to make plan payments
23 under § 1307(c) (4) applies when a debtor commences making
24 payments but then pays less than the plan requires. See
25 In re Mallory, 444 B.R. 553, 558 (S.D. Tex. 2011) (citing
26 In re Jenkins, No. 09-36433-H3-13, 2010 WL 56003, at *2 (Bankr.
27 S.D. Tex. Jan. 5, 2010) (finding cause for dismissal of a case
28 in which the debtor commenced making the payments required in

1 the proposed plan but paid an amount less than required)).
2 There was thus "cause" for dismissal. See § 1307(c)(4). We
3 find no abuse of discretion with the bankruptcy court's decision
4 to dismiss Debtor's case.⁵

5 On appeal, Debtor does not contend that she made the
6 payments. Instead, she maintains that she missed the hearing on
7 Trustee's MTD because she was busy drafting her motion for
8 reconsideration of the court's order sustaining Bank's objection
9 to her plan. Therefore, she "forgot" about the hearing and her
10 forgetfulness should be considered "a mistake or excusable
11 neglect." In addition, Debtor maintains that the \$273 shortfall
12 was immaterial and, in any event, she corrected the deficiency
13 in her first amended plan to make up the missed payments over
14 the next 34 months.

15 Debtor did not properly raise these arguments in the
16 bankruptcy court. Debtor failed to contest Trustee's MTD and
17 did not appear at the hearing. After the bankruptcy court
18 ruled, she raised the very same arguments she raises now for the
19 first time in her ex parte motion to vacate/reconsider the
20 dismissal order. Arguments raised for the first time in a
21 motion for reconsideration are generally deemed waived. See
22 United States v. Foreman, 369 F.3d 776, 797 n.12 (4th Cir. 2004)
23 (It is a "well-established principle that arguments raised for
24

25 ⁵ Trustee did not request conversion as an alternative under
26 § 1307(c). Therefore, the bankruptcy court did not err in
27 dismissing the case without discussing whether conversion was
28 appropriate. See Velasquez v. Burchard (In re Velasquez), BAP
No. NC-15-1175-TaJuKi, 2016 WL 4259952, at *2 n.5 (9th Cir. BAP
Aug. 9, 2016).

1 the first time in a motion for reconsideration are generally
2 deemed waived."). Furthermore, the bankruptcy court never
3 issued a ruling in connection with her motion. We do not
4 consider Debtor's arguments for the first time on appeal. See
5 O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.),
6 887 F.2d 955, 957 (9th Cir. 1989) ("The rule in this circuit is
7 that appellate courts will not consider arguments that are not
8 'properly raise[d]' in the trial courts.").

9 In light of our decision, Debtor's appeal of the bankruptcy
10 court's order denying her motion for reconsideration of the
11 order sustaining Bank's objection to Debtor's original plan is
12 moot. Since Debtor's bankruptcy case was dismissed, the goal of
13 rehabilitation through confirmation of Debtor's plan is no
14 longer at issue. See GTE Cal., Inc. v. FCC, 39 F.3d 940, 945
15 (9th Cir. 1994) (case is moot if the issues presented are no
16 longer live and there fails to be a "case or controversy" under
17 Article III of the Constitution).⁶

18 Debtor also requested sanctions against Bank in her reply
19 brief, contending that Bank filed its responsive brief one day
20 late. A request for sanctions must be filed as a separate
21 motion. See Rule 8020.

22 VI. CONCLUSION

23 For the reasons stated, we AFFIRM.
24
25
26

27 ⁶ Debtor filed another chapter 13 case on September 14, 2017
28 (Case No. 17-26123).