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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
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Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE M. JULIA HOOK, also known as Mary Julia Hook, also known as Julia Hook and DAVID L. SMITH, also known as David Lee Smith, also known as David Smith, Debtors.	BAP No. CO-07-106
DAVID L. SMITH, Appellant, v. COLORADO DEPARTMENT OF REVENUE, UNITED STATES TRUSTEE, UNITED STATES OF AMERICA, and RTD, Appellees.	Bankr. No. 06-15511-SBB Chapter 11 OPINION*

Appeal from the United States Bankruptcy Court
for the District of Colorado

Before McFEELEY, Chief Judge, CLARK[1], and NUGENT, Bankruptcy Judges.

CLARK, Bankruptcy Judge.

In this appeal, debtor David Smith ("Appellant") seeks reversal of the bankruptcy court's dismissal of his Chapter 11 case pursuant to 11 U.S.C.

* This unpublished opinion is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] Honorable Glen E. Clark, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Utah, sitting by designation.

§ 1112(b).[2] We affirm.

I. BACKGROUND

Debtors Julia Hook and David Smith (jointly, "Debtors") filed a petition for Chapter 11 relief on August 18, 2006. On December 12, 2006, the Internal Revenue Service ("IRS") filed a Proof of Claim for taxes owed for 1994 through 1996, and for 2001 through 2006. The 1994-96 portion of the claim ("Tax Judgment") had, at that time, been determined by the United States Tax Court and affirmed by the Tenth Circuit Court of Appeals in the total amount of $448,144.80, and was listed in the Proof of Claim as "secured." The remainder of the IRS claim totaled $807,980.38, of which it listed $176,636.51 as "unsecured" and $631,343.87 as "priority."[3]

Debtors filed two adversary proceedings that relate to the IRS's claim. On August 31, 2006, they filed an adversary complaint against the United States, the IRS, and several IRS agents for damages and other relief ("AP I"). On September 25, 2006, more than two months prior to the filing of the IRS's Proof of Claim, Debtors filed another adversary proceeding against the IRS seeking a determination of their tax liability for the tax years 1992-2006 ("AP II"). After the Proof of Claim was filed, Debtors filed an objection to it, incorporating the allegations and demands for relief they had made in AP I and AP II. The bankruptcy case and both adversary proceedings were assigned to Judge Campbell, who granted defendants' motion to dismiss in AP I on January 4, 2007, and in AP II on January 5, 2007. Debtors have appealed both of those dismissals

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[2] A number of other appeals are pending in the district court from decisions in adversary proceedings within Debtors' bankruptcy case, and the BAP has recently decided another related appeal as well. *Hook v. Manzanares (In re Hook)*, BAP No. CO-07-102, 2008 WL 2663370 (10th Cir. BAP July 8, 2008).

[3] Proof of Claim filed by the IRS *in* Appendix of Appellee United States of America at 188 (the unsecured portion of the claim includes penalties and interest on those claims).

to the United States District Court for the District of Colorado.

On January 10, 2007, Debtors filed a motion to extend the exclusivity period for filing of their plan, set forth in 11 U.S.C. § 1121,[4] which was denied by Judge Campbell on February 12, 2007.[5] On February 1, 2007, the IRS moved to dismiss Debtors' case for "cause" under § 1112(b). In August 2007, Judge Campbell, *sua sponte*, recused himself from Debtors' bankruptcy case and from APs I and II. The case and the two adversary proceedings were reassigned to Judge Brooks. After an evidentiary hearing, Judge Brooks granted a motion to dismiss the bankruptcy case on September 11, 2007. On September 21, 2007, Debtors filed a "Motion to Reconsider, Alter, Amend and/or Vacate Order and Judgment Dismissing Bankruptcy Case," attaching to it "Debtors' Proposed Plan of Reorganization and Disclosure Statement." The bankruptcy court entered written findings of fact and conclusions of law on the dismissal motion on October 19, 2007,[6] and on the same day, denied Debtors' motion for reconsideration. Debtors timely filed their Notice of Appeal on October 22, 2007. Debtors' motions for a stay pending appeal were denied by the bankruptcy court on October 30, and by the BAP on October 31, 2007. Debtors' renewed motion for stay was denied by the BAP on November 6, and their motion for a rehearing

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[4] Unless otherwise noted, all further statutory references in this decision are to provisions of the Bankruptcy Code, Title 11 United States Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

[5] On appeal, Appellant states that the bankruptcy court denied Debtors' motion "without fixing a date by which a plan must be submitted." Reply Brief for Debtors-Appellants ("Reply Br.") at 5. Although the bankruptcy case docket indicates that Debtors' motion was denied (Appellants' Appendix ("App."), Vol. 1 at 20), the docket does not indicate the court's reasoning nor whether a new date was set. Since Appellant did not provide this Court with a copy of the order as part of the appellate record, the Appellant's statement cannot be confirmed.

[6] The order states that it was entered "*nunc pro tunc* September 11, 2007." Findings of Fact and Conclusions of Law at 4, *in* App., Vol. 1 at 72.

of that motion was denied on November 20, 2007.[7]

II. APPELLATE JURISDICTION

The bankruptcy court's order dismissing Debtors' Chapter 11 case fully and finally resolved the parties' dispute in the bankruptcy system. The Debtors' post-judgment motion, filed within ten days of that decision, is deemed to be a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e), which is made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 9023.[8] Pursuant to Federal Rule of Bankruptcy Procedure 8002(b), Debtors' notice of appeal, filed within ten days of entry of the order denying their post-judgment motion, was timely. No party elected to have the appeal heard by the District Court. Therefore, this Court has jurisdiction over this appeal.

III. ISSUE AND STANDARD OF REVIEW

The only issue on appeal is whether the bankruptcy case was properly dismissed pursuant to § 1112(b). Bankruptcy courts have broad discretion under this provision, and this Court therefore reviews the decision to dismiss only for abuse of discretion.[9] "Under the abuse of discretion standard[,] 'a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'"[10] However, to the extent that its ultimate conclusion depends upon them, the bankruptcy court's factual

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[7] On March 6, 2008, after briefing of the appeal had been completed, debtor Julia Hook filed a notice of dismissal of this appeal, for herself only, and the case caption was amended accordingly. Thus, debtor David Hook is now the only Appellant.

[8] *Buchanan v. Sherrill*, 51 F.3d 227, 230 n.2 (10th Cir. 1995).

[9] *Hall v. Vance*, 887 F.2d 1041, 1044 (10th Cir. 1989).

[10] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991)).

findings are reviewed for clear error, and its legal conclusions are reviewed *de novo*.[11]

IV. DISCUSSION

A. Dismissal

Section 1112(b)(1) provides, in pertinent part, that "on request of a party in interest, and after notice and a hearing . . . the court shall . . . dismiss a case under this chapter . . . if the movant establishes cause." Subsection (b)(4) of that section provides that "the term 'cause' includes":

> (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;
>
> . . .
>
> (J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court[.]

As noted in the legislative history of § 1112, this "list is not exhaustive. The court will be able to consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases."[12] Nonetheless, the list is instructive regarding the types of conduct that will justify imposition of the statute's remedies, which include failures to carry out the debtor's duties in a timely manner without excuse.

In *Hall v. Vance*, the court held that "[d]ismissal under § 1112(b)(2)[13] is appropriate where the debtor's failure to file an acceptable plan after a reasonable

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[11] *In re JE Livestock, Inc.*, 375 B.R. 892, 894 (10th Cir. BAP 2007).

[12] H.R. Rep. No. 95-595 at 406 (1977).

[13] This provision of the statute, which pre-dates its amendment in 2005, authorized dismissal for "inability to effectuate a plan." *In re Woodbrook Assocs.*, 19 F.3d 312, 316 (7th Cir. 1994). Thus, "dismissal is proper if the court determines that it is unreasonable to expect that a plan can be confirmed in the [C]hapter 11 case." *Id.* (internal quotation marks omitted). *Accord In re Sunflower Racing, Inc.*, 226 B.R. 665 (D. Kan. 1998).

time indicates its inability to do so[.]"[14] In that case, the Tenth Circuit affirmed a bankruptcy court's dismissal based on failure to file an acceptable plan within eight months of the petition. Similarly, the court in *In re Sunflower Racing*, noting that bankruptcy courts have discretion under § 1112(b) to decide "when enough is enough," affirmed the bankruptcy court's dismissal of a case that "had been pending for over two years with no confirmable plan proposed by the Debtor[.]"[15]

Here, the bankruptcy court dismissed Debtors' case because of their failure to file a plan for over a year, which the court found constituted "undue delay" under the circumstances of the case. Appellant does not deny that Debtors failed to prepare even a draft plan in the thirteen months that their case was pending. Instead, he insists that formulation of a plan was "impossible" until their disputed debts had been established. Appellant maintains that Debtors attempted to resolve their disputed debts by filing adversary proceedings, and that they were not responsible for any delay that may have occurred in those actions. He also points out that the Bankruptcy Code contains no specific deadline for the filing of a plan, and that the IRS also could have filed a plan.

However, the bankruptcy court determined on the evidence before it that Debtors had ample time to have submitted a plan and disclosure statement, but failed, without reasonable excuse, to do so. In reaching its conclusion, the court noted that, although Debtors had significant equity in their assets and substantial, though inconsistent, income, they had not even attempted to use those assets to devise any kind of a payment plan. The court also noted that the Debtors continued to dispute the portion of the IRS claim that had been fully and finally

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[14] *Hall v. Vance*, 887 F.2d 1041, 1044 (10th Cir. 1989).

[15] *In re Sunflower Racing, Inc.*, 226 B.R. at 670 (also citing cases that found "unreasonable delay"in a 15-month period and in a 16-month period).

determined by the United States Tax court, reduced to judgment, and affirmed by the Tenth Circuit, all prior to the filing of Debtors' petition. The court considered that dispute, which included an objection to the IRS proof of claim, the filing of two adversary proceedings, and appeals of the bankruptcy court's dismissals of their complaints, to be to the detriment of other creditors by allowing the IRS claim to continue to grow. While the court acknowledged that some delay was inherent in such proceedings, and that Debtors are entitled to assert their legal rights, it found that the delay of the proceedings as a whole was more attributable to Debtors than to anyone else. Finally, although the judge stopped short of entering a finding on the issue of bad faith, he noted that he was unable to find "good faith," and suggested that Debtors may have improperly used the bankruptcy proceedings as a "refuge from timely, effective litigation and dispute resolution" in what was essentially a two-party dispute.[16]

> The errors claimed by Appellant are essentially that:
>
> 1. Resolution of the IRS's claim was thwarted by its vexatious and bad faith conduct, along with the bankruptcy court's lack of impartiality, but Debtors' efforts to prove this were hampered by the bankruptcy court's denial of their pre-trial motions;
>
> 2. Debtors established that dismissal was not in the best interests of their "legitimate" creditors and, therefore, the bankruptcy court was required to, but did not, specifically find unusual circumstances that would overcome that evidence; and,
>
> 3. The bankruptcy court failed to hold a hearing on the motion to dismiss within 30 days, as required by § 1112(b)(3).

The principal defect in all of these arguments is Appellant's failure to provide any record support for the claims. It is axiomatic that simply saying that something is so, even repeatedly, does not make it so. However, Appellant relies almost exclusively on general statements of error and restatements of Debtors' allegations, while failing to specify valid evidentiary or legal support for his

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[16] Transcript of September 11, 2007, Evidentiary Hearing at 186-87, *in* App. Vol. III at 528-29.

claims.

Federal Rule of Bankruptcy Procedure 8010 requires that appellate briefs include an argument section that "contain[s] the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."[17] Thus, the Tenth Circuit has repeatedly held that inadequately briefed appellate arguments are waived, noting that since "[j]udges are not like pigs, hunting for truffles buried in briefs," an appeals court should "decline to speculate as to the possible legal basis" for a claim of error.[18]

The argument section of Appellant's briefs consist nearly entirely of allegations, made without legal or evidentiary support.[19] Such assertions are insufficient to establish error on appeal. The bankruptcy court held an evidentiary hearing, considered the evidence, and rendered a clear and valid statement of the reasons for its decision. Not only does that decision appear to have been well within the bankruptcy court's discretion, but Appellant's failure to adequately address his claims of error on appeal is also a basis upon which to affirm.

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[17] *See also* Fed. R. App. P. 28(a)(9)(A) (appellant's argument must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies").

[18] *FDIC v. Schuchmann*, 235 F.3d 1217, 1230 n.11 (10th Cir. 2000) (quoting *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1546 (10th Cir. 1995)). *See also Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998); *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

[19] For example, Debtors contend in their brief that "Judge Brooks arbitrarily denied" their pre-trial motions. Reply Br. at 9. As support for this broad contention, Debtors cite the entire evidentiary hearing transcript. Debtors further assert that the Commissioner of the IRS "clearly 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons' in filing and pursuing [the IRS's] Proof of Claim and their Motion to Dismiss Debtors' Chapter 11 Bankruptcy Case." Opening Brief for Debtors-Appellants at 10. This statement is made without any citation to the record whatsoever.

Nonetheless, we briefly discuss each of Appellant's principal claims.[20] First, Appellant asserts that the IRS, rather than Debtors, caused the proceedings to be delayed, and that the Debtors were denied an adequate opportunity to prove that fact. In this respect, both sides at times attempted to convince the bankruptcy court that the other had a long-standing practice of delay, dating back at least to the time of the proceedings before the Tax Court. The bankruptcy court, however, repeatedly emphasized that the only relevant delay was that between the filing of the petition and the hearing, and that any prior delay was tangential, at best. Moreover, the relevant delay involved proposal of a plan for the repayment of creditors, rather than the ultimate resolution of any particular claim. Thus, Appellant's continued focus on conduct that took place prior to the bankruptcy proceedings, or in the related adversary proceedings, does not advance his cause. In any event, Appellant needed to provide this Court with specific record support for such factually intensive findings. This, Appellant has utterly failed to do, at least in any legally meaningful way.

Appellant also contends that Debtors "established" that dismissal was not in their creditors' best interests. As such, he asserts error in the bankruptcy court's failure to find "unusual circumstances" that would overcome that proof, citing § 1112(b)(1). The most significant defect in this argument is that Appellant has not even attempted to explain why dismissal was not in his creditors' best interests, nor has he directed this Court to any record evidence that he contends supports that assertion. In addition, Appellant has misinterpreted the statute. Section 1112(b)(1) provides that dismissal or conversion "shall" be granted upon a motion that is supported by cause, "absent unusual circumstances specifically

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[20] Although, on pages 10-11 of his opening brief, Appellant lists 4 pre-trial motions that he contends were "arbitrarily denied" by the bankruptcy court, he fails to meaningfully present appellate argument as to any of them. We discuss here only the arguments to which Appellant gave more than such a superficial "kitchen sink" reference.

identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate[.]" This provision allows the court to deny the motion if doing so would be in furtherance of the best interests of the creditors or the estate. It does not compel the court to refute evidence that dismissal would not be in the creditors' best interest, even if such evidence existed.

Finally, Appellant asserts that the bankruptcy court erred by failing to hold a hearing on the IRS's motion to dismiss within 30 days, as required by § 1112(b)(3), and that this failure allowed the court to consider an inappropriate time frame. Section 1112(b)(3) provides that "[t]he court shall commence the hearing on a motion under this subsection not later than 30 days after filing of the motion, and shall decide the motion not later than 15 days after commencement of such hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits established by this paragraph." To begin with, Appellant fails to identify any objection to the hearing date in the record and, in fact, appears to have raised this issue for the first time at the oral argument of the appeal. "An appellate court should not consider new issues not properly raised before the court below."[21] Also, even assuming that there were no compelling circumstances that prevented an earlier hearing, the statutory "right" to have the hearing conducted within 30 days plainly belongs to the moving party, rather than to the Debtors. In any event, Debtors could have used the extra time between the motion and the hearing to prepare and propose a plan. Though their failure to do so, even within the extended period of time, may well have contributed to the bankruptcy court's finding of undue delay, factors that are within a debtor's control cannot be used to support his claims of error on appeal.

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[21] *In re Cozad*, 208 B.R. 495, 498 (10th Cir. BAP 1997).

B. Motion to Reconsider

Orders on motions for reconsideration are reviewed for abuse of discretion.[22] Debtors argued nothing new to the bankruptcy court in their post-judgment motion that was not available or considered at the time the adversary was dismissed. Instead, Debtors simply relied on their untimely provision of a proposed disclosure statement and plan. As noted by the bankruptcy court:

> The Debtors' Motion to Reconsider is six paragraphs in length, the first four paragraphs are a recitation of the procedural background in this case. Paragraph five simply states that 'The findings of fact and conclusions of law made at the September 11, 2007 hearing were clearly erroneous and contrary to law.' Paragraph six informs the Court that the 'Debtors' proposed Disclosure Statement and Plan or Reorganization are attached hereto and incorporated herein by reference for all purposes.' The Debtors requests [sic] the Court to reinstate their Chapter 11 case in the 'interest of justice.' "

Order Denying Debtors' Motion to Reconsider, Alter and/or Vacate Order and Judgment Dismissing Bankruptcy Case at 2, *in* App. Vol. 1 at 62. Thus, Debtors failed to identify an appropriate ground for reconsideration of the dismissal.[23] The sole basis for the motion was the proposed plan, which the bankruptcy court considered and found to be insufficient. The bankruptcy court noted that the Debtors' proposed plan was both incomplete and deficient with respect to the specifics of performance. Moreover, the court determined that a plan that consisted of "[c]ontinued and incessant litigation and repeated, routine appeals of all decisions of courts [was] not a plan of reorganization," but was "instead, a strategy for interminable dispute." Quite simply, Debtors failed to convince the bankruptcy court that their untimely submission of an inadequate plan after their case had been dismissed was a valid basis for reconsideration of the dismissal.

However, Appellant insists that Debtors proffered a "sensible, cogent, and

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[22] *In re Rafter Seven Ranches LP*, 362 B.R. 25, 28 (10th Cir. BAP 2007).

[23] *See In re Zamora*, 251 B.R. 591, 595 (D. Colo. 2000) (reconsideration is only justified when there is an intervening change in controlling law, new evidence, or a need to correct a clear error or prevent manifest injustice).

articulate" plan, and that they did so at the bankruptcy court's own suggestion. Again, Appellant fails adequately to support his statements regarding the proposed plan. He neither discusses the specifics of the plan, nor explains how it was an abuse of discretion to reject it. Even more significantly, Appellant fails to address the bankruptcy court's determination that the reconsideration motion failed to state adequate grounds for post-judgment relief. Therefore, there is no basis upon which this Court could conclude that the bankruptcy court made a clear error of judgment or exceeded the permissible bounds of choice by denying Debtors' motion to reconsider.

V. CONCLUSION

Dismissal of Appellant's bankruptcy case is therefore AFFIRMED.