FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
March 6, 2013
Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE MIRIAM ONYEABOR, Debtor.	BAP No. UT-11-117
MIRIAM ONYEABOR, Appellant, v. CENTENNIAL POINTE OWNERS ASSOCIATION and LEBR ASSOCIATES, LLC, Appellees.	Bankr. No. 11-24746 Chapter 7 OPINION*

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

Before MICHAEL, ROMERO, and TALLMAN[1], Bankruptcy Judges.

ROMERO, Bankruptcy Judge.

Debtor Miriam Onyeabor appeals the Bankruptcy Court's order converting her Chapter 13 case to a Chapter 7 pursuant to 11 U.S.C. § 1307(c)[2] and the order denying reconsideration of that order. Debtor contends the Bankruptcy Court

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

1 Honorable Howard R. Tallman, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Colorado, sitting by designation.

2 All future references to "Code," "Section," and "§" are to title 11, United States Code, unless otherwise specified. All future references to "Rule" refer to the Federal Rules of Bankruptcy Procedure.

erred in converting her case to a Chapter 7 when it (1) mooted her objection based on a single creditor's standing to file a proof of claim filed jointly with another creditor, and (2) concluded her Chapter 13 petition and plan had not been filed in good faith. After careful review of the record and arguments in this matter, we AFFIRM both orders.[3]

I. Facts

Centennial Pointe Park is a commercial planned unit development consisting of seven adjacent lots located in Salt Lake City, Utah.[4] On April 19, 2000, Centennial Pointe Park's developer, Centennial Pointe, LLC, recorded a Declaration of Covenants, Conditions and Restrictions (the "CC&Rs") with the applicable county registrar.[5] The CC&Rs require each lot owner to pay a pro-rata share of common area expenses as assessed by Centennial Pointe's Property Owner's Association (the "POA") and permit the POA to lien property for unpaid assessments.[6] In August of 2000, Centennial Pointe, LLC unilaterally amended the CC&Rs to clarify and refine certain definitions contained in them which were unclear and recorded them with the applicable county registrar on August 24,

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[3] Accordingly, Appellant's Emergency [] Renewed Rule 7062 Motion to Stay, filed with the Court on February 26, 2013, is DENIED.

[4] *See* Combined Memoranda in opposition to plaintiffs' complaint and a motion to dismiss (sic) ("Debtor's Answer to Second State Action Complaint") at 1, *in* Appendix to Brief of Appellees, Centennial Pointe Property Owners Associates and LEBR Associates ("Supp.App.") at 262.

[5] The CC&Rs were not provided to this Court as part of the appellate record. *But see* Restated Declaration of Covenants, Conditions and Restrictions of Amended Portion of Lot 5, Phase V, Centennial Industrial Park at 1 (mentioning the CC&Rs' recordation), *in* Appellant's Appendix, Brief ("App.") at 152.

[6] *See* Corrected Order on Plaintiffs' Motion for Partial Summary Judgment and Motions to Strike and Judgment at 4, ¶2b, *in* Supp.App. at 226 ("Both sets of CC&Rs provided for an owners association empowered to levy assessments for maintenance of Centennial Pointe's common areas and to lien property for unpaid assessments.").

2000 (the "Restated CC&Rs").[7]

Centennial Pointe, LLC sold: Lot 1 to Debtor on April 24, 2000[8]; Lots 4, 5, 6 and 7 to Paul Bezdjian, a nonparty, in August or September, 2000; Lot 2 to Debtor on September 28, 2000; and Lot 3 to LEBR Associates, LLC ("LEBR") on November 24, 2000.[9] Bezdjian sold Lots 4, 5, 6 and 7 to LEBR in 2003.[10]

Debtor ceased paying the POA's assessments against her lots in October 2002.[11] In 2004, the POA and LEBR[12] (collectively "Appellees") filed suit against Debtor in state court for unpaid POA assessments incurred during the past two years (the "First State Action").[13] Debtor countersued, seeking (1) a

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[7] Restated CC&Rs, *in* App. at 152-85; Utah Court of Appeals Memorandum Decision filed November 13, 2009 at 2, *in* Supp.App. at 409 (concluding "trial court properly determined that Centennial Pointe was within its rights to unilaterally amend the Original CC&Rs" based on recitation of provision in original CC&Rs). *But see* Corrected Order on Plaintiffs' Motion for Partial Summary Judgment and Motions to Strike and Judgment at 3, ¶2a, *in* Supp.App. at 225 ("The undisputed facts and evidence in this matter show, as a matter of law, that the Restated [CC&Rs] of Centennial Pointe recorded in August 2002 (sic) are valid and encumber the entire Centennial [Pointe] development, including Lots 1 and 2 owned by Defendant Myriam Onyeabor.").

[8] Although Debtor's purchase of Lot 1 predated the Restated CC&Rs, it applied as to Lot 1. *See* Corrected Order on Plaintiffs' Motion for Partial Summary Judgment and Motions to Strike and Judgment at 3, ¶2a, *in* Supp.App. at 225 ("the Restated [CC&Rs] are valid and encumber . . . Lots 1 and 2 owned by [Debtor]."); Utah Court of Appeals Memorandum Decision filed November 13, 2009 at 3-4, *in* Supp.App. at 410-11 (concluding Lot 1 and 2 were subject to the Restated CC&Rs).

[9] Debtor's Answer to Second State Action Complaint at 2, *in* Supp.App. at 263; Corrected Affidavit of Paul Bezdjian at 2, *in* Supp.App. at 389.

[10] Corrected Affidavit of Paul Bezdjian at 2, *in* Supp.App. at 389; [Second State Action] Complaint at 2, *in* Supp.App. at 240.

[11] Corrected Order on Plaintiffs' Motion for Partial Summary Judgment and Motions to Strike and Judgment at 5, ¶2c, *in* Supp.App. at 227.

[12] LEBR advanced funds to the POA to cover Debtor's unpaid assessments and to pursue an action against Debtor for unpaid POA assessments. *See* Second State Action Complaint at 2, *in* Supp.App. at 240; Utah Court of Appeals Memorandum Decision filed November 13, 2009 at 3, *in* Supp.App. at 412.

[13] *See LEBR Assocs., LLC and Centennial Pointe Property Owners Ass'n v.*

(continued...)

declaration that she owned her commercial property free and clear of the CC&Rs and (2) damages against Bruce Raile, an officer of LEBR and the POA's Trustee, for, *inter alia,* fraud, assault, trespass, and intentional infliction of emotional distress.[14] The parties filed cross-motions for summary judgment. The state court granted judgment in favor of the POA only, and awarded it damages, interest to date, attorney's fees, and costs totaling $95,213.70, plus interest at the judgment rate of 6.99% from and after the date of entry (the "Judgment").[15] The state court held, *inter alia*, that:

(1) The Restated CC&Rs are valid and encumber the entire Centennial Pointe Development, including Lots 1 and 2 owned by Debtor.[16]

(2) Debtor had actual notice of the Restated CC&Rs by virtue of the fact that she received title work, followed by a policy of title insurance for Lot 2 that expressly disclosed that Lot 2 was encumbered by the Restated CC&Rs.[17]

(3) Debtor had record notice of the Restated CC&Rs as the Special Warranty Deed from Centennial Pointe to Debtor for Lot 2 expressly states that Centennial Pointe's conveyance to her was subject to any

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[13] (...continued)
Onyeabor, Civil No. 040918762, Third Judicial District Court, Salt Lake County, State of Utah. Neither party provided the First State Action Complaint to this Court.

[14] *See* Memorandum in Support of Debtor's Rule 59(E) to Alter or Amend, October 12th Court Order at 8, ¶ 45, *in* App. at 38.

[15] The state court originally entered judgment on October 1, 2007, and corrected it on January 28, 2008, to clarify that the attorney's fee award is part of the judgment amount. Future references to the Judgment are to the Corrected Order on Plaintiffs' Motion for Partial Summary Judgment and Motions to Strike and Judgment, *in* Supp.App. at 223-34.

[16] Judgment at 3, ¶2a, *in* Supp.App. at 225.

[17] *Id.* at 3-4, ¶2a, *in* Supp.App. at 225-26.

restrictions of record.[18]

(4) Debtor, through her conduct and participation in the POA, has ratified the Restated CC&Rs.[19]

(5) Centennial Pointe, LLC had the authority to amend the CC&Rs. The Restated CC&Rs were validly adopted according to the procedures set forth in the CC&Rs, and the Restated CC&Rs are consistent with the general plan and scheme of Centennial Pointe as reflected in the CC&Rs.[20]

(6) Both sets of CC&Rs provided for an owners' association empowered to levy assessments for maintenance of Centennial Pointe's common areas and to lien property for unpaid assessments.[21]

(7) Debtor failed and refused to pay her pro rata share of Centennial Pointe's common expenses. Debtor ceased paying her Centennial Pointe assessments in October 2002.[22]

(8) The POA is entitled to its attorney's fees incurred in prosecuting this action and defending against Debtor's counterclaims and third-party claims.[23]

(9) The POA is entitled to judgment in the amount of $18,749.87 for past due and owing assessments and $5,081.14 accrued as interest,

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18 *Id.* at 4, ¶2a, *in* Supp.App. at 226.

19 *Id.*

20 *Id.* at 4, ¶2b, *in* Supp.App. at 226.

21 *Id.*

22 *Id.* at 5, ¶2c, *in* Supp.App. at 227.

23 *Id.* at 5, ¶2d, *in* Supp.App. at 227.

calculated at the rate of 18% per annum.[24]

(10) The POA is awarded its reasonable attorney's fees in the amount of $68,294.50 and its costs in the amount of $3,088.19, for a combined total of attorney's fees and costs in the amount of $71, 382.69.[25]

(11) Debtor's claims for intentional infliction of emotional distress, fraud, trespass, and assault are dismissed with prejudice.[26]

Debtor appealed the Judgment. The Utah Court of Appeals affirmed the Judgment. The Utah Supreme Court denied Debtor's writ for certiorari of the Utah Court of Appeals' decision. Likewise, the United States Supreme Court denied Debtor's petition for writ of certiorari and her motion for rehearing on the denial of certiorari.

In September 2010, the state court presiding over the First State Action entered a judgment in favor of the POA for an additional $7,916.11 (the "Additional Judgment").[27] The Additional Judgment was for attorney's fees incurred by Appellees to remove a lien Debtor wrongfully filed on LEBR's property.[28]

In October 2010, Appellees commenced an action to foreclose upon liens that accrued for assessments incurred post-Judgment (the "Second State

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[24] *Id.* at 5, ¶2e, *in* Supp.App. at 227.

[25] *Id.* at 6, ¶2f, *in* Supp.App. at 228.

[26] *Id.* at 6-7, ¶¶2g-k, *in* Supp.App. at 228-29.

[27] *See* Judgment Information Statement, *in* Supp.App. at 235-38.

[28] *See* Debtor's Objection to Proof of Claim Filed by Unsecured Creditors LEBR LLC and Centennial Pointe Homeowners' Association's (sic) Pursuant to Rule 3007-1(a) ("Objection to POC #7") at 2, ¶ 2, *in* App. at 15 ("On or about September 15, 2010, creditors received another judgment against Debtor [] for attorney's fees they incurred . . . defending against a Wrongful Lien Injunction.").

Action").[29] Debtor filed a motion to dismiss and argued, *inter alia*, that this second action was duplicative of the First State Action and again challenged the Restated CC&Rs' validity and Appellees' standing to sue for POA assessments.[30] The state court denied Debtor's motion to dismiss.[31]

In March 2011, the state court denied Debtor's motion to stay execution of the Judgment.[32] Debtor then filed a Chapter 13 petition on April 5, 2011 (the "Petition"). She filed a Chapter 13 plan on April 21, 2011 (the "Plan"), proposing to pay $445 per month to the Chapter 13 Trustee for 60 months until the completion of the Plan and unspecified monthly payments directly to the following creditors: America First Credit Union, HSBC/MS, and Jason Nielson.[33] The Plan contained no mention of the Judgments or debts owed for prepetition property taxes.

The Plan drew a number of objections, including one each from the standing Chapter 13 Trustee and Appellees. The Chapter 13 Trustee complained about missing information, procedural violations, and improper deductions.[34] Specifically, the Chapter 13 Trustee alleged Debtor failed to provide him, *inter alia*, with: (1) profit and loss statements for all self-employment income earned during the sixty days prior to the petition date, (2) a business questionnaire for a business operated during the sixty days prior to the petition date, (3) the profit

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29 [Second State Action] Complaint, *in* Supp.App. at 239-54.

30 Debtor's Answer to Second State Action Complaint, *in* Supp.App. at 255-282.

31 Order Denying Defendant's Motion to Dismiss and Motion for Civil Wrongful Lien Injunction, *in* Supp.App. at 323-25. This action appears to remain pending.

32 Minute Entry and Order, *in* Supp.App. at 334-35.

33 Plan, *in* App. at 532-36.

34 Trustee's Objection to Confirmation, *in* Supp.App. at 58-60.

and loss statements used to calculate the Current Monthly Income on Form 22C; and (4) a breakdown of all rental income received for each separate property and all expenses associated with the property. Appellees objected to the Plan, stating: (1) the Petition and Plan were not filed in good faith; (2) the Plan did not provide for payment of Appellees' secured claim; (3) the Plan failed to provide that Appellees would retain their lien against Debtor's property; and (4) the Plan was not feasible as Debtor could not make the payments due under the Plan.[35]

Appellees jointly[36] filed a proof of claim on May 4, 2011 ("POC #7"), asserting a secured claim of $385,097.07.[37] Debtor objected to POC #7, contesting the amount of the claim and its secured status, and challenging LEBR's

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[35] [Appellees'] Objection to Confirmation of Onyeabor's Plan, *in* Supp.App. at 61-63.

[36] LEBR and the POA have acted in tandem in the bankruptcy case, jointly filing all pleadings in the bankruptcy case. Bankruptcy Docket, *in* App. at 682-723. LEBR premised its standing to jointly file POC #7 on its rights to collect funds it loaned to the POA that were used to pay the expenses associated with obtaining judgments against Debtor for unpaid POA assessments. *See* [Appellees'] Objection to Debtor's "Rule 59(e) [sic] to Alter or Amend, October 12th Court Order" at 15-16, *in* App. at 207-08. LEBR has not obtained an assignment of any judgments in the POA's favor. *Id.* at 9, *in* App. at 201.

[37] POC #7, *in* App. at 588-606. Appellees' breakdown of their claim was as follows:

The Judgment	$95,213.70	
Interest accrued on the Judgment (as of Petition Date)	21,221.42 7,916.11	
The Additional Judgment subtotal		$124,351.23
Lot 1	$115,461.92	
Lot 2	115,461.92	
subtotal		$230,923.84*
Misc. costs accrued since July 30, 2010		$ 29,822.00
Total		$385,097.07

Id. at 589. *This figure is the award Appellees sought in the Second State Action. *See* [Second State Action] Complaint at 4, ¶ 16, *in* Supp.App. at 242.

standing to assert the claim.[38] She complained that since obtaining the Judgment and Additional Judgment in the total amount of $124,351.23, LEBR has liened and attempted to execute on all of her properties, without regard to the value of its claim. She points out that LEBR's claim inexplicably rose from $110,402.68 as of January 2010, to $230,461.92 as of September 2010.[39]

In August 2011, Appellees filed a motion to dismiss or, in the alternative, to convert Debtor's bankruptcy case to a case under Chapter 7 for cause under § 1307(c) (the "Motion to Convert")[40] and a motion for relief from stay (the "RFS Motion").[41] On October 6, 2011, the Bankruptcy Court held a hearing to consider three matters: (1) the Motion to Convert, (2) the RFS Motion, and (3) Debtor's Objection to POC #7. Debtor attended the hearing with her counsel Lou Harris. While trying to ascertain what exhibits were admissible without foundation, the Bankruptcy Court admonished Debtor's counsel:

> Mr. Harris, the Court is not going to indulge conferences between you and your client during the hearing. It disrupts the procedures, it disrupts the ECRO proceeding, and that's not how court is conducted. Attorneys converse with the Court. They don't go back to the table and get information from their clients.[42]

The Bankruptcy Court also instructed the parties that the evidentiary focus should be on whether the Petition and Plan had been filed in good faith. Mr.

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38 Objection to POC #7, *in* App. at 14-25.

39 *Id.* at 17-18. We note that there are a dizzying array of numbers, mainly due to interest accrual at various times. Three rounded-figures are key: (1) $385,000 is the amount of POC #7, which Appellees claim is the amount Debtor owed to them, comprised of the Judgment, the Additional Judgment, and the award they seek in the Second State Action; (2) $124,000 is the combined amount of the Judgment and Additional Judgment, which Debtor acknowledged she owed to the POA; and (3) $94,000 is the portion of the $124,000 which Debtor acknowledged was secured, *see* Dec. 13, 2011, Hrg. Tr. at 10, *ll.* 11-12, *in* App. at 642 (Debtor: "The $94,000 I will accept as secured.").

40 Motion to Convert, *in* Supp.App. at 67-69.

41 RFS Motion, *in* Supp.App. at 70-97.

42 Oct. 6, 2011, Hrg. Tr. at 22, *ll.* 9-13, *in* App. at 352.

Harris then advised the court that Debtor wished to proceed *pro se* and he had been relieved of his responsibilities as her attorney.[43] The Bankruptcy Court excused Mr. Harris, and Debtor proceeded *pro se.* Debtor cross-examined Appellees' witness and presented exhibits for admission. After the completion of testimony, the Bankruptcy Court granted Appellees' motion to convert (the "Conversion Order") and mooted Debtor's objection to POC #7.[44]

Shortly thereafter, Debtor filed a motion to alter or amend the Conversion Order.[45] After holding a hearing on the motion, on January 5, 2012, the Bankruptcy Court denied Debtor's motion to alter or amend the Conversion Order (the "Reconsideration Order").[46] Debtor appealed the Conversion Order and the Reconsideration Order to this Court.

II. Appellate Jurisdiction and Standard of Review

We have jurisdiction over this appeal. Debtor timely filed her notice of appeal from the Bankruptcy Court's final order, and the parties have not elected to have the appeal heard by the United States District Court for the District of Utah.[47]

Jurisdictional questions are reviewed *de novo*.[48] Whether a Chapter 13 plan has been proposed in good faith is a factual question subject to the clearly

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[43] *Id.* at 23-24, *ll.* 22-25, 1-2, *in* App. at 353-54.

[44] *See* Conversion Order, *in* App. at 6-8; Bankruptcy Docket, Minute Entry dated 10/06/11, *in* App. at 705 ("The objection is moot because the case was converted to a chapter 7.").

[45] *See* Memorandum in Support of Debtor's Rule 59(E) to Alter or Amend, October 12th Court Order, *in* App. at 28-192.

[46] Reconsideration Order, *in* App. at 525-29.

[47] 28 U.S.C. § 158; Fed. R. Bankr. P. 8001(e); Fed. R. Bankr. P. 8002(a); *In re Vista Foods U.S.A., Inc*., 202 B.R. 499, 500 (10th Cir. BAP 1996) (per curiam) (order converting Chapter 11 case ends discrete controversy and is final order).

[48] *In re Courtesy Inns, Ltd., Inc*., 40 F.3d 1084, 1085 (10th Cir. 1994).

erroneous standard of review.[49] And a bankruptcy court's denial of a motion to alter or amend a judgment is reviewed for abuse of discretion.[50]

III. Discussion

Debtor raises four issues on appeal: (1) the Bankruptcy Court lacked subject matter jurisdiction over the Motion to Convert as it was unripe; (2) the Bankruptcy Court violated due process when it mooted her objection to Appellees' proof of claim and converted her case to a Chapter 7 without first determining LEBR's standing to file a claim and the nature and extent of its claim; (3) the Bankruptcy Court erred in finding her Petition and Plan were not filed in good faith, and (4) the Bankruptcy Court erred in converting her case because (a) Appellees violated Rule 1003(b); and (b) POC #7 was dischargeable under § 523, invalid under the Fair Debt Collection and Practices Act ("FDCPA"), and subject to reduction or disallowance under § 502(k). We will discuss each issue seriatim, as well as whether the Bankruptcy Court erred in denying Debtor's motion to alter or amend the Conversion Order.

1. Subject Matter Jurisdiction & Ripeness of Motion to Convert

As far as we can discern, Debtor claims the Bankruptcy Court lacked subject matter jurisdiction over the Motion to Convert because it was rendered unripe when the Bankruptcy Court mooted her objection to POC #7.[51] She contends mooting her objection to POC #7 left so many unanswered questions that it was error for the Bankruptcy Court to rule on the Motion to Convert, especially when there was so much "uncertainty" and "insufficient facts."[52] In

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[49] *In re Robinson*, 987 F.2d 665, 668 (10th Cir. 1993).

[50] *In re Rafter Seven Ranches, LP*, 362 B.R. 25, 28 (10th Cir. BAP 2007), *aff'd*, 546 F.3d 1194 (10th Cir. 2008).

[51] Appellant's Br. at 20.

[52] As stated by Appellant at the December 7, 2012, oral argument of this (continued...)

other words, her objection to POC #7 must be determined before the Motion to Convert. She argues, "Even, assuming LEBR's motion to convert were found 'live,' it still cannot be [adjudicated] until the plan is no longer 'indefinite.'"[53]

Subject matter jurisdiction refers to a tribunal's power to hear cases.[54] "The question of whether a claim is ripe for review bears on a court's subject matter jurisdiction under the case or controversy clause of Article III of the United States Constitution."[55] The Supreme Court has said, "[R]ipeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'"[56] "The value of deciding is affected by the importance attached to the interests that may be injured, the extent of the anticipated injury, and the probability that the injury will occur."[57] "The ripeness doctrine aims 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements."[58] Ripeness is peculiarly a question of timing.[59]

The Motion to Convert concerns the administration of the estate; thus it is a

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[52] (...continued)
appeal.

[53] Appellant's Br. at 21.

[54] *Morrison v. Nat'l Australia Bank Ltd.*, 130 S.Ct. 2869, 2877 (2010).

[55] *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1498-99 (10th Cir. 1995).

[56] *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977)).

[57] 13B Charles Alan Wright, et al., *Federal Practice & Procedure Jurisd.* § 3532.3 at 146 (3d ed. 2012).

[58] *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1249 (10th Cir. 2011) (quoting *Abbott Labs.*, 387 U.S. at 148), *cert. granted*, 133 S.Ct. 831 (2013).

[59] *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974).

core proceeding of which the Bankruptcy Court had jurisdiction.[60] We reject Debtor's argument that mooting her objection to POC #7 rendered the Motion to Convert unripe. Contrary to Debtor's assertion, the Bankruptcy Court did not fail to answer her objection questions. Instead, the Bankruptcy Court found the answers were moot for purposes of Debtor's Chapter 13 Plan confirmation. In other words, the answers did not matter in terms of determining whether the Plan was feasible. For purposes of the Motion to Convert, the Bankruptcy Court assumed LEBR lacked standing and treated POC #7 as a secured claim in the amount of $94,000 owed to the POA, as acknowledged by Debtor, rather than the full $385,000.[61] Debtor, however, admitted she did not have the current ability to pay the acknowledged secured debt owed to the POA.[62] Thus, Debtor's objection to POC #7 did not hinder or prevent the Bankruptcy Court from ruling on the Motion to Convert.

We also reject Debtor's argument that there were insufficient facts upon which to rule on the Motion to Convert. Courts normally have sufficient information on confirmation or conversion from the documents filed in the case.[63]

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[60] 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(A); *In re Thornton*, 203 B.R. 648, 649 (Bankr. S.D. Ohio 1996).

[61] Dec. 13, 2011, Hrg. Tr. at 10, *ll.* 11-12, *in* App. 642 (Debtor: "The $94,000 I will accept as secured."); Oct. 6, 2011, Hrg. Tr. at 8, *ll.* 22-24, *in* App. at 338 ("Debtor acknowledges that there was a judgment for approximately $124,000, and that that judgment was fully liquidated on appeal.").

[62] Debtor's argument here misses the big picture. She is like a shopper arguing about the price of an item when she does not have the money to pay for the item at the price she agreed upon. Similarly, who manufactured the item is also irrelevant when the purchaser cannot afford to buy it from anyone at the agreed price. Whether POC #7 is valued at $94,000 or $385,000 does not matter when Debtor's finances show she cannot afford to make payments toward POC #7 even if it was valued at $94,000. Whether LEBR had standing to jointly file POC #7 does not matter because even if LEBR lacked standing, POC #7 remains a debt that Debtor owes.

[63] 8 *Collier on Bankruptcy* ¶ 1324.02[3], at 1324-4 (Alan N. Resnick & Henry J. Sommer eds.-in-chief, 16th ed. 2012) ("The court normally has sufficient

(continued...)

Debtor provided the Bankruptcy Court with facts regarding her finances by filing her schedules, statement of financial affairs, and Plan. Debtor's monthly surplus was $425.[64] In addition, Debtor's creditors provided information regarding her debts to them by each filing a proof of claim. The Salt Lake County Treasurer had filed a claim in the amount of $12,975.24 for unpaid property taxes on one lot.[65] At the October 6 hearing, a representative of America First Credit Union testified that it paid $23,558.76 for five years worth of prepetition property taxes on the other lot.[66] In addition, Debtor acknowledged the Judgment for approximately $124,000.[67] The Bankruptcy Court's recitation of numerous figures establishes that it had sufficient pieces of the puzzle to rule on the Motion to Convert.

Finally, Debtor's "indefinite plan" argument is specious. Debtor essentially claims her Plan was "indefinite" because the Bankruptcy Court mooted her claim objection, thus the Motion to Convert was also moot.[68] Debtor argues "the bankruptcy court cannot rely on something (the objection and plan) that the court just declared was [moot]."[69] The Bankruptcy Court, however, did not declare the Plan moot, just Debtor's claim objection. Debtor confuses a claim

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[63] (...continued)
information from the documents filed in the case to determine whether the plan satisfied the requirements of section 1322(a)[.]").

[64] Plan at 1, *in* App. at 532; Amended Schedule I & J, *in* App. at 468-69 (average monthly income was $4,800, average monthly expenses were $4,300, and monthly net income was $500).

[65] Salt Lake County Treasurer's Objection to Confirmation of Plan of Reorganization, *in* Supp.App. at 56-57.

[66] Oct. 6, 2011, Hrg. Tr. at 32-33, *in* App. at 362-63.

[67] *Id.* at 8, *l.* 23, *in* App. at 338. *See also* Judgment at 3-10, *in* Supp.App. at 225-32.

[68] Appellant's Br. at 21-24.

[69] *Id.* at 23.

objection with a motion to convert. A claim objection focuses on a particular claim, while a motion to convert focuses on the feasibility of a Chapter 13 plan, *i.e.*, whether the Debtor has a plan that proposes a way to pay her debts within a five-year period. Debtor's Plan, however, was not feasible because: (1) it failed to identify a method to pay the acknowledged portion of the Judgment and the debt for prepetition property taxes, and (2) Debtor's employment history and earning ability indicated her future income would not increase significantly so as to pay these two debts.[70] Debtor fails to realize that having an "indefinite" plan supports conversion.

Debtor would have the Bankruptcy Court wait until she comes up with a more specific plan before ruling on the Motion to Convert. Debtor, however, had more than six months to come up with a plan that would substantially pay her acknowledged debts, but did not.[71] She also had approximately another three months to file an amended plan before the issuance of the Reconsideration Order, but did not.[72]

2. Due Process

Debtor argues the Bankruptcy Court denied her due process when it (a) prevented her from conferring with her attorney and forced her to fire him at the

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[70] Debtor's ability to pay the debt owed for prepetition property taxes (over $36,000) alone is questionable.

[71] Debtor filed her Chapter 13 petition on April 5, 2011, and her plan on April 21, 2011. The hearing on the Motion to Convert was held approximately six months later on October 6, 2011.

[72] *See* Reconsideration Order at 4, fn 1, *in* App. at 528 ("While this Order affirms the Court's earlier order converting this case to a case under chapter 7, the Court notes that the Debtor is not precluded from proposing a plan that addresses the problems described above and the confirmation issues previously identified by the Chapter 13 Standing Trustee and seeking reconversion of her case to chapter 13."). Debtor filed several amended Chapter 13 plans after the issuance of the Reconsideration Order, as well as a motion to reconvert her case to a Chapter 13. *See* Bankruptcy Docket, Docs. 229, 241, 244, 249, and 253, *in* App. at 692-95. The Bankruptcy Court denied the motion to reconvert. *Id.*, Doc. 262, *in* App. at 691.

October 6 hearing, (b) converted her case without first determining whether the Judgment was a secured or unsecured debt, and (c) mooted her objection based on LEBR's standing. "[T]he Due Process Clause provides that certain substantive rights-life, liberty, and property-cannot be deprived except pursuant to constitutionally adequate procedures."[73] An essential principle of due process is that a deprivation of property be preceded by notice and opportunity for a hearing "appropriate to the nature of the case."[74] Procedural due process ensures that the government will not deprive a party of life, liberty, or property without engaging in fair procedures; substantive due process ensures that the government will not deprive a party of life, liberty, or property for an arbitrary reason regardless of the procedures used to reach that decision.[75]

a. The Bankruptcy Court neither created a hostile environment at the October 6 hearing nor forced Debtor to fire her attorney.

Debtor claims that the Bankruptcy Court created a hostile environment at the October 6 hearing by preventing her from conferring with her attorney and forcing her to fire her attorney. Debtor mischaracterizes what happened at the October 6 hearing. The Bankruptcy Court did not prevent Debtor from conferring with her attorney, it simply admonished that it would not tolerate repeated attorney-client conferences during the hearing.

Nor did the Bankruptcy Court force Debtor to fire her attorney. Rather,

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73 *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

74 *Id.* at 542 (internal quotation marks omitted).

75 *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000); *Curtis v. Okla. City Pub. Schools Bd. of Educ.*, 147 F.3d 1200, 1215 (10th Cir. 1998) ("Assuming a protected property interest, '[s]ubstantive' due process requires only that termination of that interest not be arbitrary, capricious, or without a rational basis.") (internal quotation marks omitted). *See also E. Spire Commc'ns, Inc. v. Baca*, 269 F.Supp.2d 1310, 1324-25 (D.N.M. 2003), *aff'd*, 392 F.3d 1204 (10th Cir. 2004).

Debtor independently decided to proceed *pro se*.[76] Mr. Harris advised the court: "The Debtor believes that she needs to [] continue. And she has at this point taken charge of most of [] her case, and believes she's able to continue as *pro se*. And has relieved me of my responsibilities as her attorney."[77] The Bankruptcy Court excused Mr. Harris, and Debtor proceeded to cross-examine Appellees' witness, offer exhibits into evidence, and present her arguments.

b. The Bankruptcy Court's assumption on October 6, 2012 that the Judgments were secured debts was harmless error.

Debtor argues the Bankruptcy Court erred in converting the case on October 6, 2012 because there was "uncertainty" as to whether the Judgments were secured or unsecured.[78] We reject this argument as specious. On October 6, the Bankruptcy Court assumed the Judgments were secured.[79] On December 13, Debtor admitted $94,000 of the Judgments was secured.[80] Under these circumstances, no harm occurred since Debtor was not entitled to a different outcome, as it makes no difference whether the Appellees hold a secured lien in

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[76] The Bankruptcy Court succinctly explained this at the December 13 hearing: "you didn't have to fire your attorney. I just told Mr. Harris that the way we conduct court isn't by having clients talk to the court through their attorney. I mean, that's generally what we do but you don't go back to the table and ask your client questions and I informed Mr. Harris that we weren't going to conduct the hearing that way." Dec. 13, 2011, Hrg. Tr. at 10, *ll.* 19-24, *in* App. at 642.

[77] Oct. 6, 2011, Hrg. Tr. at 23-24, *ll.* 22-25, 1-2, *in* App. at 353-54.

[78] Appellant's Reply Br. at 24.

[79] Dec. 13, 2011, Hrg. Tr. at 10, *ll.* 3-12, *in* App. 642 (Court: "part of the basis for my [] converting the case, was that this was a secured claim and what I did not do is take specific evidence on the value of the property because I didn't think there was a dispute about whether this claim was secured or not. So, that's the reason for my question as to whether you think this is a secured claim or not. Do I have to take evidence on the value of the property?" Debtor: "The $94,000 I will accept as secured.").

[80] *Id.* at 10, *ll.* 11-12, *in* App. at 642 (Debtor: "The $94,000 I will accept as secured.").

the amount of $94,000, $124,000, or any other amount.[81]

c. The Bankruptcy Court did not deny Debtor due process when it mooted Debtor's objection on LEBR's standing.

Debtor argues that by mooting her objection on LEBR's standing, the Bankruptcy Court denied her due process. She claims that her counsel expected the Bankruptcy Court to rule on LEBR's standing before ruling on the Motion to Convert and had planned on seeking a continuance as to the Motion to Convert. The fact that things did not go as Debtor's counsel planned does not mean she was denied due process. Debtor had notice of the Motion to Convert and the parties fully briefed it.[82] An opportunity to fully brief the issue satisfies the due process requirements.[83]

In any event, LEBR's standing is irrelevant in light of the fact that POC #7 was filed on behalf of both the POA and LEBR. Debtor acknowledged the Judgment and the Additional Judgment.[84] Even if LEBR lacked standing to file POC #7, the POA unquestionably had standing to file it.[85] Thus, POC #7

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[81] *See Wright v. CompGeeks.com*, 429 F. App'x 693, 698 (10th Cir. 2011) (citing *In re Hancock*, 192 F.3d 1083, 1086 (7th Cir. 1999)) (concluding "no-harm, no-foul situation" where the court immediately stayed a sanctions order and scheduled another hearing, and holding that the deprivation of due process at the first hearing was cured by the second hearing).

[82] Motion to Convert, *in* Supp.App. at 67-69; Debtor's Answer to [Appellees'] Objection to Debtor's Chapter 13, Motion to Dismiss, and Motion for Relief From Automatic Stay, Bankruptcy Dkt. No. 124, *in* App. at 707; [Appellees'] Reply Memorandum, Bankruptcy Dkt. No. 130, *in* App. at 706.

[83] *White v. Gen. Motors Corp.*, 908 F.2d 675, 686 (10th Cir. 1990) (citing *Braley v. Campbell*, 832 F.2d 1504, 1515 (10th Cir. 1987) (en banc)).

[84] Oct. 6, 2011, Hrg. Tr. at 8, *ll.* 22-24, *in* App. at 338 ("Debtor acknowledges that there was a judgment for approximately $124,000, and that that judgment was fully liquidated on appeal."); *see also* Objection to POC #7 at 2, *in* App. at 15.

[85] Indeed, Debtor conceded that in her appellate brief. Appellant Br. at 34 ("on [] issue of HOA standing (which appellant never disputed) . . ."). Yet she argues that LEBR hijacked the POA, presumably to call into question the POA's standing to file POC #7. *See* Dec. 13, 2011, Hrg. Tr. at 8-9, *ll.* 15-22, *in* App. 640-41 (Debtor: "When an association is hijacked by non-property owners, not

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remained a debt for which Debtor's Plan should have provided.

Morever, the Utah Court of Appeals has already ruled on LEBR's standing, stating: "Onyeabor's standing argument also lacks merit. Here, LEBR is an aggrieved owner, and the Restated CC&Rs provided that an aggrieved owner, as well as the Owners' Association, could bring suit to enforce payment of dues and other obligations under the Restated CC&Rs."[86] Debtor argues that the Utah court's determination on standing is not a portable amenity to be transported from one courtroom to another.[87] But the state court's determination is entitled to full faith and credit in the Bankruptcy Court.[88]

The preclusive effect of a state judgment is governed by the rules of preclusion of that state.[89] In Utah, issue preclusion applies only when the following four elements are satisfied: (1) the party against whom issue preclusion is asserted was a party to or in privity with a party to the prior adjudication; (2) the issue decided in the prior adjudication was identical to the one presented in the instant action; (3) the issue in the first action was completely, fully, and fairly

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[85] (...continued)
corporate owners, [] the Court has the responsibility to investigate and find out who is sending that association. This Association has been functioning for two years now under the auspice of a man who does not own property in the subdivision."). The Judgment establishes the POA is a creditor. As a creditor, the POA has standing to file a POC under § 501(a) (a creditor may file a proof of claim). Thus, the "hijacked POA" argument does not affect the POA's standing to file POC #7. Rather, it is a state law claim that bears no relevance to the validity and amount of POC #7, whether Debtor has submitted a feasible Plan, and whether she has submitted her Petition and Plan in good faith.

[86] Utah Court of Appeal's Memorandum Decision dated November 13, 2009, at 5, *in* Supp.App. at 297.

[87] Appellant's Br. at 29-30.

[88] 28 U.S.C. § 1738; *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) (The Full Faith and Credit Statute requires a federal court to give "a state-court judgment the same preclusive effect as would be given that judgment under the law of the State from which the judgment was rendered.").

[89] 28 U.S.C. § 1738; *B. Willis, C.P.A., Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1300 (10th Cir. 2008).

litigated; and (4) the first suit resulted in a final judgment on the merits.[90] All four elements are satisfied here. Thus, the doctrine of issue preclusion bars relitigating LEBR's standing since it had been litigated and determined in a prior action.[91] Likewise, the issue of whether Debtor ratified the Restated CC&Rs is also barred from relitigation.[92]

In sum, the Bankruptcy Court converted Debtor's case to a Chapter 7 because "Debtor's present plan fails to treat or address secured claims, the Debtor's plan remains unfeasible and the Debtor has either failed [or] refused to fully disclose all property of the estate and there has been unreasonable delay by the Debtor that has been prejudicial to creditors."[93] The Bankruptcy Court's decision was well-reasoned. Because the Bankruptcy Court did not arbitrarily convert Debtor's case to a Chapter 7, there was no substantive due process violation.

3. The Bankruptcy Court's lack of good faith finding was not clearly erroneous.

Good faith is determined on a case-by-case basis considering the totality of the circumstances.[94] In evaluating a debtor's good faith, courts should consider eleven nonexclusive factors as well as any other relevant circumstances.[95]

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[90] *Moss v. Parr Waddoups Brown Gee & Loveless*, 285 P.3d 1157, 1164 (Utah 2012).

[91] *Melnor, Inc. v. Corey (In re Corey)*, 583 F.3d 1249, 1251 (10th Cir. 2009) ("The doctrine of issue preclusion prevents a party that has lost the battle over an issue in one lawsuit from relitigating the same issue in another lawsuit.").

[92] At oral argument, Debtor argued that she did not ratify the actions of a nonproperty owner.

[93] Reconsideration Order at 4-5, *in* App. at 528-29.

[94] *In re Cranmer*, 697 F.3d 1314, 1318 (10th Cir. 2012).

[95] *Id.* at 1318-19 (citing *Flygare v. Boulden*, 709 F.2d 1344, 1347-48 (10th Cir. 1983)) (Factors relevant to a determination of good faith include: "(1) the amount of the proposed payments and the amount of the debtor's surplus; (2) the

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On appeal, Debtor argues the Bankruptcy Court's finding of lack of good faith has no factual support. She further argues the Bankruptcy Court's reliance upon *Flygare*[96] is misplaced because *Flygare* is factually distinguishable. We reject this argument. Debtor provided or admitted to all the facts necessary for the Bankruptcy Court to determine lack of good faith in filing the Petition and Plan.

She also argues the fact that her case was pending for six months should not be weighed against her because the Bankruptcy Court and LEBR caused five months out of the six-month delay. Debtor misses the point. She had six months to come up with a feasible plan. Upon receiving objections to the Plan, Debtor could have amended her Plan to address the Trustee's and Appellees' concerns if she so desired, but she chose not do so. Debtor counters she could have amended her Plan, but it would have been pointless to do so without a decision from the Bankruptcy Court regarding POC #7, its amount and whether it was secured or unsecured. Even if she believed this, when the Bankruptcy Court asked her how

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[95] (...continued)
debtor's employment history, ability to earn and likelihood of future increases in income; (3) the probable or expected duration of the plan; (4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court; (5) the extent of preferential treatment between classes of creditors; (6) the extent to which secured claims are modified; (7) the type of debt sought to be discharged and whether any such debt is non-dischargeable in Chapter 7; (8) the existence of special circumstances such as inordinate medical expenses; (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act; (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; and (11) the burden which the plan's administration would place upon the trustee."). Since *Flygare* was decided, the Bankruptcy Code was amended to include § 1325(b). That section's "ability to pay" criteria subsumes most of the these factors and, therefore, the good faith inquiry now has a more narrow focus. A bankruptcy court must consider "factors such as whether the debtor has stated his debts and expenses accurately; whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or whether he has unfairly manipulated the Bankruptcy Code." *Educ. Assistance Corp. v. Zellner*, 827 F.2d 1222, 1227 (8th Cir. 1987); *see also In re Robinson*, 987 F.2d 665, 668 n. 7 (10th Cir. 1993).

[96] 709 F.2d 1344.

she would pay the acknowledged portion of the Judgment, she was unable to answer.[97]

The record supports the Bankruptcy Court's finding of lack of good faith in filing the Petition and the Plan. Debtor's Plan made no provision to pay the acknowledged secured debt owed to the POA or the debt owed for prepetition property taxes. Additionally, Debtor's employment history and ability made it unlikely that her income would increase in a manner that would allow her to significantly increase payments. Debtor does not address any of these particular facts. Instead, she conclusively argues that the Plan did address Appellees' claim as unsecured despite no reference to the Judgment whatsoever in the Plan.

Debtor contends the Bankruptcy Court erred in finding the Plan contained numerous inaccuracies and that Debtor had hidden assets.[98] The Plan was inaccurate to the extent it failed to mention the Judgment on page 2 of the Plan under "Treatment of Secured Claims." Thus, the Bankruptcy Court did not err in finding the Plan inaccurate.

Further, the Bankruptcy Court did not err in finding Debtor had either failed or refused to fully disclose all property of the estate. We note Debtor's Schedule A listed the value of each lot at $238,000.[99] Yet, Debtor's Amended Schedule A, submitted after the Conversion Order, listed the value of each lot as significantly more, at $420,000.[100] Inaccuracies in a debtor's schedules support a finding of partial or non disclosure.

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[97] Oct. 6, 2011, Hrg Tr. at 60, *ll.* 4-9, *in* App. at 390 (Court: "How would you propose to pay the $125,000 [] and satisfy the lien?"; Debtor: "I have until the 8th of November to come up with a plan[.]").

[98] Appellant's Reply Br. at 28-29.

[99] Schedule A, *in* Supp.App. at 3.

[100] Amended Schedule A, *in* App. at 452.

4. Applicability of Rule 1003(b), § 502(k), § 523 and FDCPA

Debtor argues the Bankruptcy Court erred in granting the motion to convert because (1) LEBR violated Rule 1003(b)[101] by not inviting 15 other creditors to join the Motion to Convert, and (2) the Judgment is unsecured under § 523 and the FDCPA, and is subject to a 20% reduction pursuant to § 502. None of these statutes are applicable. Rule 1003(b) governs involuntary petitions, not motions to convert. The Judgment is based on POA dues on commercial property so it is not a consumer debt.[102] Thus, the FDCPA and § 502(k), which apply only to consumer debt, are not applicable.[103] Finally, Section 523 does not govern whether a debt is secured or unsecured.[104] In addition, Debtor failed to properly seek a § 523 determination. She must do so by filing an adversary proceeding.[105]

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[101] Rule 1003(b) states:

> If the answer to an involuntary petition filed by fewer than three creditors avers the existence of 12 or more creditors, the debtor shall file with the answer a list of all creditors with their addresses, a brief statement of the nature of their claims, and the amounts thereof. If it appears that there are 12 or more creditors as provided in § 303(b) of the Code, the court shall afford a reasonably opportunity for other creditors to join in the petition before a hearing is held thereon.

[102] Section 101(8) defines "consumer debt" as a "debt incurred by an individual primarily for a personal, family, or household purpose." The FDCPA defines "debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5).

[103] Section 502(k)(1) allows courts to reduce unsecured consumer creditors' claims by up to 20% if they "unreasonably refused to negotiate a reasonable alternative repayment schedule proposed on behalf of the debtor by an approved nonprofit budget and credit counseling agency[.]"

[104] Section 506 governs the secured status of a creditor's allowed claim.

[105] Rule 7001(6) states that a proceeding to determine the dischargeability of debt is an adversary proceeding.

She cannot seek a § 523 determination in her claim objection.[106]

5. The Reconsideration Order

Bankruptcy Rule 9023 makes Civil Rule 59 applicable to bankruptcy proceedings.[107] The standard for granting a motion to alter or amend is very strict, and typically Rule 59(e) motions are denied.[108] Such motions "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment."[109] As stated by the Tenth Circuit, "[t]he purpose for such a motion is to correct manifest errors of law or to present newly discovered evidence."[110]

In her motion to alter or amend the Conversion Order, Debtor alleged procedural and legal errors as grounds for her motion. Debtor's arguments for reconsideration of the Conversion Order are essentially the same arguments she has pressed on appeal. Having rejected all of these arguments, we conclude the Bankruptcy Court did not abuse its discretion in denying Debtor's motion to reconsider.

IV. Conclusion

The Motion to Convert was ripe for determination on October 6, 2011. Because the Bankruptcy Court converted Debtor's case to a Chapter 7 based on her acknowledged debts, Debtor's objection to POC #7 was moot. And because

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[106] Rule 3007(b) provides that "A party in interest shall not include a demand for relief of a kind specified in Rule 7001 in an objection to the allowance of a claim, but may include the objection in an adversary proceeding."

[107] *See, e.g.*, *Comm. for the First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992).

[108] 11 Charles Alan Wright et al., *Federal Practice & Procedure* § 2810.1 at 124-28 (3d ed. 2012).

[109] *Id.* at 127-28 (footnotes omitted).

[110] *Comm. for the First Amendment*, 962 F.2d at 1523 (internal quotation marks omitted).

the record supports the Bankruptcy Court's finding as to lack of good faith in filing the Petition and Plan, the Bankruptcy Court's good faith finding was not clearly erroneous. Finally, having rejected all of Debtor's appellate arguments, we conclude the Bankruptcy Court did not abuse its discretion in denying Debtor's motion to reconsider.

Any motion for reconsideration of this opinion is limited to no more than five pages.[111]

[111] 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."); *In re Salter*, 279 B.R. 278, 283 (9th Cir. BAP 2002) ("the BAP is a court established by Act of Congress" and has the right to exercise powers under § 1651(a)); *In re Winslow*, 17 F.3d 314, 315 (10th Cir. 1994) (filing restrictions imposed *sua sponte*); *Werner v. State of Utah*, 32 F.3d 1446, 1447 (10th Cir. 1994) (citing 28 U.S.C. § 1651) ("A court may impose restrictions commensurate with its inherent power to enter orders 'necessary or appropriate' in aid of jurisdiction."); *In re Armstrong*, 309 B.R. 799, 805-07 (10th Cir. BAP 2004).