FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
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Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE STEVEN E. MUTH, also known as Steve, also known as Stephen, Debtor.	BAP No. CO-13-055
STEVEN E. MUTH, Appellant, v. KIMBERLY MUTH, ERNEST MUTH, LINDA SEASE, JOSE HURDAGO, SECURITIES AND EXCHANGE, HECKENBACK SUAZO & DAVE LLP, WINK & WINK, P.C., LITVAK LITVAK MEHRTENS AND EPSTEIN, P.C., CREDIT SERVICE, ENHANCRCVR CO., METRO COLLECTION, HWARFIELD, MIDLAND MCM, BUDGET CTRL, STELLAR REC, AFNI, REVENUE ENTERPRIZE, NCO FIN/35, BRS, APOLLO CREDIT, FST PREMIER BANK, and HSBC BANK, Appellees.	Bankr. No. 12-26897 Chapter 11 OPINION*

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

Before THURMAN, Chief Judge, CORNISH, and MICHAEL, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

Debtor Steven Muth ("Debtor") appeals both the bankruptcy court's dismissal of his Chapter 11 bankruptcy and its award of attorney's fees to appellee Kimberly Muth ("Kimberly"), Debtor's former spouse. The bankruptcy court dismissed Debtor's bankruptcy case "for cause" under 11 U.S.C. § 1112(b)(1).[1] Grounds for the dismissal were: 1) absence of a reasonable likelihood of Debtor's rehabilitation, and 2) Debtor filed his petition in bad faith. We AFFIRM the dismissal and the award of attorney fees to Kimberly.

I. BACKGROUND

Debtor and Kimberly have been litigating issues related to their divorce and the custody and support of their minor child for several years. In 2007, Debtor filed a motion in his and Kimberly's divorce proceeding to modify his child support obligation. The state court determined Debtor's motion to be "frivolous, groundless and vexatious," and awarded Kimberly the attorney's fees she incurred responding to Debtor's motion. In April 2010, the state court entered a judgment in the amount of $37,487 plus interest in favor of Kimberly and against Debtor. When Debtor filed his bankruptcy petition on August 13, 2012, Kimberly was actively pursuing collection of her judgment against him in state court.

In July 2012, Kimberly learned that Debtor had received a federal income tax refund of nearly $22,000 that was attributable to a joint tax return she and Debtor jointly filed. Kimberly obtained a state court order directing Debtor to endorse the check to Kimberly and deliver it to her counsel. Debtor delivered the check, but did not endorse it, which led Kimberly to file a motion for contempt of court against him.[2] Kimberly also sought to garnish Debtor's fiancé, Linda Sease

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[1] Unless otherwise indicated, all further statutory references in this decision will be to the Bankruptcy Code, which is Title 11 of the United States Code.

[2] Debtor claimed at trial that he only received a directive to deliver the check, not to endorse it, and that he had been willing to endorse it, but the state court provided an endorsement before he could do so.

("Sease"), on the ground that Sease and Debtor were hiding his assets in an attempt to avoid collection. Sease resisted the garnishment and the related discovery requests, and the garnishment issues were set for hearing in state court on August 21, 2012. Kimberly's motion for contempt against Debtor was also pending at that time.

However, eight days prior to the scheduled garnishment hearing, Debtor filed a petition for Chapter 11 bankruptcy relief, which automatically stayed the state court proceedings. In his initial bankruptcy filings, Debtor omitted any reference to Sease, her assets, and her expenses, although he and Sease had been cohabiting for some time prior to the filing. Although Debtor amended his Schedules I & J several times, he ultimately listed his average monthly income on Schedule I as $4,294 per month, and his monthly expenses on Schedule J as $4,094, leaving him with "net" (available) income of $200 per month. Debtor listed his employer of six months as "Bernina Internatinal" (sic), and his occupation as "Sales."[3] Debtor also indicated on Schedule I that he expected to receive twice yearly bonuses in the total gross amount of $15,000, annually. However, as Debtor had not yet received a bonus by the time he testified at trial, the bankruptcy court found his expected bonuses to be "uncertain windfalls which may or may not occur."

Kimberly filed a proof of claim in Debtor's bankruptcy, seeking approximately $54,000 as a non-dischargeable domestic support obligation.[4] Sease also filed a proof of claim in Debtor's bankruptcy, asserting Debtor owed her $112,351 for loans she had made to him. Although Debtor objected to

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[3] At trial, Debtor testified that Bernina, a sewing machine company, is the parent company of his direct employer "Melcor," an embroidery software and hardware company. Transcript of Feb. 5, 2013, hearing ("Trans. 2/5") at 133, *in* Muth Amended [Appellant]'s Appendix, BAP docket no. 56 ("AA 309") at 227.

[4] § 523(a)(5) excepts a "domestic support obligation" from discharge in bankruptcy.

Kimberly's claim, the bankruptcy court denied his objection and allowed the claim. Debtor's father, Ernest Muth, did not file a proof of claim, but was listed by Debtor as holding a claim of $100,000 in his list of his 20 largest unsecured creditors.[5] The Securities & Exchange Commission ("SEC") filed a proof of claim, for approximately $925,000, owed to it by Debtor as the result of fines that had been imposed on him for securities violations.

Kimberly filed a motion to dismiss Debtor's bankruptcy pursuant to § 1112(b)(1), asserting as "cause" that Debtor had no reasonable likelihood of rehabilitation, and that the bankruptcy had been filed in bad faith. An evidentiary hearing was held on Kimberly's motion over the course of three separate days in 2013: January 16, February 5, and June 11. At all three hearings, Debtor represented himself without assistance of counsel, despite the bankruptcy court judge's admonishment that he should retain counsel.[6]

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[7] A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[8] An order dismissing a

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[5] This figure was later amended to $90,000.

[6] *See, e.g.,* Partial Transcript of Jan. 16, 2013, hearing ("Trans. 1/16-1") at 8, *in* Appendix, BAP docket no. 57 ("AA 686") at 630; Trans. 2/5 at 6, *in* AA 309 at 100.

[7] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

[8] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

debtor's bankruptcy is final for purposes of appeal.[9] Since neither party elected to have this appeal heard by the United States District Court for the District of Colorado, the parties have consented to appellate review by this Court.

III. ISSUES AND STANDARD OF REVIEW

1. Was Debtor's Chapter 11 bankruptcy properly dismissed for cause, based on findings that his petition was filed in bad faith and he lacked ability to confirm a plan?

We review a bankruptcy court's "for cause" dismissal of a case under an abuse of discretion standard, while the findings in support of dismissal are reviewed for clear error.[10] Debtor's appeal primarily questions the bankruptcy court's findings of bad faith. A finding of bad faith, "viewed in the totality of the circumstances, is clearly erroneous only if [the appellate court] is left with the definite and firm conviction that a mistake has been committed."[11]

2. Was Debtor denied due process because the bankruptcy court did not: 1) provide him with counsel; 2) accept his trial exhibits; or 3) issue a subpoena compelling Kimberly to appear and testify at trial?

"We review whether bankruptcy court proceedings violated a party's due process rights *de novo*."[12] "*De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision."[13]

IV. DISCUSSION

A. Deficiencies of Appellate Record

In any appeal, it is the appellant's responsibility to provide the appellate

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[9] *Bass v. Parsons (In re Parsons)*, 272 B.R. 735, 746 (D. Colo. 2001).

[10] *In re Armstrong*, 303 B.R. 213, 218 (10th Cir. BAP 2004).

[11] *Id.* at 218-19 (internal quotation marks omitted).

[12] *State Bank of S. Utah v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1083 (10th Cir. 1996).

[13] *Jantz v. Karch (In re Karch)*, 499 B.R. 903, 906 (10th Cir. BAP 2013).

court with transcripts of the lower court's proceedings that are necessary for appellate review of that court's findings and conclusions, and failure to do so is grounds for summary affirmance.[14] Specifically, Bankruptcy Rule 8009(b)[15] mandates that appellants provide an appendix to their opening brief that includes, among several other items, a "transcript or portion thereof, if so required by a rule of the bankruptcy appellate panel." An associated local rule, 10th Cir. BAP L.R. 8009-3, specifies that "the appendix constitutes the record on appeal" in the BAP, and subsection (f) of that rule mandates that an appendix "contain all transcripts necessary for this court's review."

In this case, the appellate record has "evolved" over time and has never been presented in an organized or coherent manner. Debtor initially filed his opening brief and a completely inadequate, two-page appendix on October 2, 2013. Kimberly filed her appellate brief, responding to Debtor's October 2 brief, on October 17. On the same day, Debtor filed another opening brief, and thereafter filed three "amended" opening briefs on October 21, November 6, and December 11, 2013.[16] Debtor filed a document titled "Appellant's Amended Appendix" on November 6, and two such documents were docketed on December 12. On November 13, Debtor also filed 294 pages that were docketed as

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[14] *In re Walker*, CO-08-018, 2008 WL 2640442, at *2 (10th Cir. BAP July 7, 2008). *See also Anstine v. Centex Home Equity Co., LLC (In re Pepper)*, 339 B.R. 756, 761 (10th Cir. BAP 2006) (without a transcript and exhibits from the trial, court cannot review bankruptcy court's factual findings and will summarily affirm its decision); *Lopez v. Long (In re Long)*, 255 B.R. 241, 245 (10th Cir. BAP 2000) (without a transcript, record is inadequate for review and court may summarily affirm the bankruptcy court); *In re Rambo*, 209 B.R. 527, 530 (10th Cir. BAP 1997), *aff'd*, 132 F.3d 43 (10th Cir. 1997) (lack of a transcript needed to review the record warrants affirmance).

[15] Fed. R. Bankr. P. 8009(b). Unless otherwise indicated, all further rule references in this decision will be to the Federal Rules of Bankruptcy Procedure.

[16] The last of Debtor's Amended Opening Briefs was actually filed almost a month after his "Reply Brief" on November 13, 2013.

"Documents filed by Appellant."[17] Debtor's final appendices, docket entries 56 and 57, are a 309-page, 4-part document ("AA 309") and a 686-page, 3-part document ("AA 686"), respectively. AA 309 and AA 686 were not labeled as two volumes of the same appendix.[18] Significantly, AA 686 contains only one partial transcript, consisting of the first and last 30-minute portions of the proceedings on January 16, 2013, which was the date of the first of the three evidentiary hearings on Kimberly's motion to dismiss. AA 309 contains transcripts of the remaining evidentiary hearings. Even more significantly, both AA 309 and AA 686 were filed nearly two months *after* the filing of Kimberly's response brief, which asserted lack of a transcript as a ground to affirm.

To summarize, Debtor filed hundreds of pages of briefs, appendices, and transcripts that were largely repetitious, disorganized, and submitted long after the appropriate time for their consideration. However, this Court gave Debtor two extensions for filing his appendix, both of which were given after appellee's brief had been filed. An order entered on October 23, 2013, extended the time for Debtor to file his appendix until November 6, and an order entered on November 27 gave him until December 11 to file a "compliant" appendix. Debtor untimely

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[17] This filing consists entirely of the trial transcripts, except for the first partial transcript of day one of the trial.

[18] It appears that Debtor may have intended AA 686 to be an addendum to the brief he filed one day earlier, whereas AA 309 was intended to be his official "appendix." AA 309 has a cover page that identifies it as "Muth Amended [Appellant]'s Appendix," while AA 686 has no cover page, is separately paginated, and begins with a Table of Contents. Both AA 309 and AA 686 include a copy of Debtor's amended opening brief, filed on December 11, 2013. Moreover, the transcripts in AA 309 appear to be an appendix to that appendix, since the Table of Contents ends in the middle of page one, then page two references "Appendix I, II, III, and IIII [sic]" the last three of which are labeled with a docket number and a date only. "Appendices II, III, and IIII [sic]" are each transcripts of one of the three trial dates, except that Appendix IIII is a "Second Partial Transcript" of the first trial day, which does not include the first and last 30 minutes of the proceedings on that day, which were separately transcribed (and included as a partial transcript of that day's proceedings) in AA 686.

filed his appendix (or appendices) on December 12, and his appeal was dismissed on December 13, based on untimeliness of the appendix, failure to include a copy of the notice of appeal in the appendix, and failure to file a proof of service for his November 6 amended opening brief. The appeal was later reopened by Clerk's Office order, based upon Debtor's procedurally curative filings.

These orders, coupled with Debtor's obvious ignorance of the requirements and Kimberly's failure either to object to the requested extensions or to seek leave to file an amended responsive brief once the appendices were finally accepted, lead this Court to conclude that, at least on some level, the problems with the appellate record in this case have been waived. However, problems with Debtor's "record" references in his briefs are even more substantial than his filing of late and ungainly transcripts. Debtor's briefs set forth the bankruptcy court's findings and conclusions (not always with complete accuracy), followed either by a statement of "no objection," or his objection thereto. In support of his version of the facts, Debtor sometimes refers to "exhibits," which are actually selected portions of trial transcripts. At other times, he cites documents that do not appear to have been admitted at trial, and are often not even included in the appendices. To the extent he refers to the actual trial transcripts, Debtor relies almost exclusively on his own testimony, and many of the cited transcript portions do not support the statements he makes in his brief.[19]

Rule 8010(a)(1) establishes the form required for appellants' briefs in bankruptcy appeals. Significantly, that Rule includes the following mandate:

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[19] An issue arose at trial over Debtor's attempts to enter two huge binders of documents into evidence. One of the binders ("the black one") was given to Kimberly's counsel at the end of the first trial day, while the other ("the blue one") was presented at the beginning of the second trial day, nearly three weeks later. *See* discussions regarding the evidence/binders in Trans. 2/5 at 3-4, 6-7, 17, 68, 88, 97-98, *in* AA 309 at 97-98, 100-01, 111, 162, 182, 191-92. It is not only difficult to determine what documents Debtor refers to in his briefs, it is nearly impossible to determine from the record before us whether those documents were actually even admitted at trial.

> The brief of the appellant shall contain under appropriate headings and in the order here indicated:
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> > (E) An argument. The argument may be preceded by a summary. The argument shall contain 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*.[20]

Bankruptcy Rules are certainly not the only authority to set such standards. In fact, it has long been black-letter law that one taking an appeal from a trial court's decision has the burden to prove error, and that errors of fact require specific citations to the record.[21] Moreover, appellate courts need not "sift through the record" to find support for an appellant's claims of error.[22]

Despite the deficiencies in both the appellate record and Debtor's briefs, this Court reviewed the entire trial transcript, both of Debtor's final two appendices, and the parties' briefs, in an effort to consider the merits of the issues on appeal. We discuss each of the principal issues in turn.

B. Bad Faith Dismissal

Under certain circumstances constituting "cause," a Chapter 11 bankruptcy case must either be dismissed or converted to a Chapter 7:

> Except as provided in paragraph (2) and subsection (c) [neither of which is applicable to the present appeal], on request of a party in interest, and after notice and a hearing, the court *shall* convert a case under this chapter to a case under chapter 7 or *dismiss* a case under this chapter, whichever is in the best interests of creditors and the estate, *for cause* unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best

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[20] Fed. R. Bankr. P. 8010(a)(1)(E) (emphasis added).

[21] *See, e.g., United States v. Rodriguez–Aguirre*, 108 F.3d 1228, 1238 n.8 (10th Cir. 1997) (appellant bears the burden of proving error and providing essential citations to the record).

[22] *SEC v. Thomas*, 965 F.2d 825, 827 (10th Cir. 1992). *See also Rajala v. Taylor (In re Taylor)*, 495 B.R. 28, 33 n.18 (10th Cir. BAP 2013) (pro se status does not excuse a party's obligation to comply with fundamental procedural requirements).

interests of creditors and the estate.[23]

Thus, the threshold issue facing the bankruptcy court was whether there was "cause" to dismiss Debtor's case under § 1112(b). Subsection (4) of that provision lists sixteen non-exclusive situations that establish cause. "Although a debtor's bad faith in filing a petition is not an enumerated ground for dismissal under § 1112(b), courts have overwhelmingly held that proof of such an allegation may be 'cause' for dismissal."[24]

Among the facts the bankruptcy court relied upon in concluding that Debtor's petition had been filed in bad faith are the following:

> 1. Debtor had been litigating against his ex-wife, Kimberly, for many years in their state court domestic case. Despite repeated warnings not to do so, Debtor continued to include "exaggerated or defamatory accusations" about Kimberly in his written and oral statements to the bankruptcy court, which suggested he was motivated by a desire to harm her.
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> 2. Kimberly's claim against Debtor was based on an award to her of attorney's fees for Debtor's motion to reduce his child support obligation, which the state court had determined to be "frivolous." Although her claim was valid, Debtor objected to Kimberly's proof of claim. His objection was overruled.
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> 3. In connection with Kimberly's efforts to collect her award, she learned Debtor had received a substantial check from the IRS, payable to both Debtor and Kimberly. The state court subsequently ordered Debtor to endorse the check and deliver it to Kimberly's counsel, and Debtor delivered the check but did not endorse it. Debtor also attempted to use the check, which belonged at least partially to Kimberly, to fully settle her claim against him, even though the total check was significantly less than Kimberly's claim. Kimberly filed a Motion for Contempt against Debtor in state court based on his failure to endorse the check.
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> 4. Debtor had been living with Sease for several years and was

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[23] 11 U.S.C. § 1112(b)(1) (emphasis added).

[24] *In re First Assured Warranty Corp.*, 383 B.R. 502, 543 (Bankr. D. Colo. 2008). *See also, In re Pac. Rim Invs., LLP,* 243 B.R. 768, 772 (D. Colo. 2000); *In re Melendez Concrete, Inc.*, No. 11–09–12334, 2009 WL 2997920, at *3 (Bankr. D. N.M. Sept. 15, 2009); *In re G3 Marina Adventures L.L.C.*, No. 10-81266, 2010 WL 4736212, at *3 (Bankr. E.D. Okla. Nov. 16, 2010). In any event, Debtor has not challenged the bases the bankruptcy court relied on for dismissal; only the sufficiency of the evidence that supports them.

engaged to marry her, yet he and she claimed that she had been paying his expenses for almost all of that time as "loans" that he had agreed to repay. For the years leading up to his petition filing, Debtor had no bank accounts of his own. When he had a paycheck or other income, he would endorse it to Sease and she would deposit it into her account for repayment of his "debt" to her.

5. When Debtor needed cash, money for his son, or bills paid, Sease would get the money or pay the bill from her account. Sease kept ledgers of debits and credits to her account that were on behalf of Debtor. Sease also "charged" Debtor for some expenses that weren't actually paid, such as $1,000 per month for rent, and every few months Debtor would execute a promissory note to Sease for prior "debts," based on her accounting. The notes were the only evidence of Sease's claim. In particular, there was no written agreement between Debtor and Sease that pre-dated the payments or the notes.

6. The state court handling Kimberly's collection action reviewed Debtor's financial relationship with Sease and found it to be "incredible" that Sease expected repayment of the expenditures that she made on his behalf.

7. From December 2010 to August 2011, Debtor deposited an average of about $4,400 per month in Sease's account.[25] After that time, the deposits stopped almost entirely.

8. Learning some of these facts led Kimberly to garnish Sease, seeking to collect on her judgment against Debtor, and also to submit requests for discovery to Sease in order to learn the details of their financial relationship. Sease resisted both the garnishment and the discovery by filing a Traverse of Garnishment and a Motion for Protective Order in the state court.

9. Debtor filed his bankruptcy petition on August 13, 2012, eight days before the Sease garnishment issues were scheduled to be heard in state court, and while Kimberly's Motion for Protective Order against him was pending. The filing of the bankruptcy petition stayed those state court proceedings.

10. Debtor's initial bankruptcy filings omitted any statement of Sease's income and expenses, despite the fact that they were cohabiting. Debtor's amended Schedules I and J disclosed Sease's income and expenses, showing her net, after expenses were subtracted, to be *negative* $3,188 per month. Debtor listed Sease as a landlord and creditor to whom he pays $1,000 for rent, $250 for purchase of a car, and $67 for vehicle insurance, per month. No written documentation of these "agreements"was produced at trial. Sease is Debtor's second largest unsecured creditor, behind the SEC.

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[25] By our calculations, deposits into Sease's account from Debtor totaled $28,341 from December 30, 2010 through August 31, 2011, for an average of $3,542 per month in that time. For a full year thereafter, no deposits were credited to Debtor.

> Debtor's third largest unsecured creditor is his father, Ernest Muth, whose debt was scheduled by Debtor in the amount of $90,000.
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> 11. Debtor's testimony at trial was not credible, and he was evasive and reluctant to answer questions. His attempts to divert money from his estate to his fiancé and his father suggested a motive to avoid his creditors.
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> 12. In addition, evidence from other forums indicated Debtor had "engaged in a long pattern of financial malfeasance and living through others, which even included risking social security payments intended for his son's leukemia treatment. At trial, Debtor indicated that he saw nothing wrong with his use of his son's money for investment purposes.
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> 13. The Colorado state court had found, in proceedings related to his divorce from Kimberly, that Debtor had "critically misrepresented his business/legal expenses on his tax forms," and had claimed personal expenses as business expenses.
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> 14. The SEC previously determined that Debtor had defrauded customers over an extended time period and caused substantial losses to them while generating income for himself, and had failed to acknowledge the wrongfulness of his conduct.
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> 15. Sease's advances to Debtor were not loans, but rather a commingling of funds that was intended to keep assets out of his name and away from his creditors. Neither Debtor nor Sease testified credibly regarding their financial dealings.

Debtor's effort to establish clear error in these findings consists almost entirely of statements he and Sease made to the contrary. However, the record contains ample evidence that does support the findings, and the existence of contrary evidence does not render a finding of fact clearly erroneous. It is the bankruptcy court's job to consider all of the evidence and to render findings, and it is particularly within the purview of the factfinder to make determinations of credibility and the weight to be given the evidence.[26] Indeed, "[w]here there are two permissible views of the evidence, the factfinder's choice between them

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[26] *See* Fed. R. Bankr. P. 8013 ("due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses"). *See also Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 856 (1982) (appellate court may not substitute its judgment regarding the weight to evidence for that of the trial court, since that determination "is the special province of the trier of fact"); *In re Kline*, NM-98-009, 1998 WL 637276, at *4 (10th Cir. BAP Sept. 14, 1998) (credibility of testimony and evidence is within the purview of the bankruptcy court).

cannot be clearly erroneous."[27] Therefore, if a trial court's findings of fact are "plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."[28]

Since the bankruptcy court chose to discount Debtor's testimony and rely on other evidence, this Court cannot reverse its findings unless they are unsupported by evidence in the record. They are not.

C. No Reasonable Likelihood of Rehabilitation

Debtor's bankruptcy case was also dismissed on the basis that he was unable to fund a confirmable plan. "Dismissal under § 1112(b)(2)[29] is appropriate where the debtor's failure to file an acceptable plan after a reasonable time indicates its inability to do so whether the reason for the debtor's inability to file is its poor financial condition, the structure of the claims against it, or some other reason."[30] With respect to Debtor's plan, the bankruptcy court noted that Debtor's stated income only exceeded his expenses by $200 per month, while he admitted owing in excess of $1 million in unsecured debt (over $800,000 of which was priority debt owed to the SEC and Kimberly). Moreover, the expenses of Debtor's "household" exceeded his and Sease's combined monthly incomes by

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[27] *Lone Star Steel Co. v. United Mine Workers of Am.*, 851 F.2d 1239, 1242 (10th Cir. 1988).

[28] *Id.*

[29] Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 amendments to the Bankruptcy Code, § 1112(b) allowed bankruptcy courts discretion to dismiss or convert a case "for cause." Sub-paragraph (b)(2) defined one of ten non-exclusive grounds for cause as "inability to effectuate a plan." The 2005 amendments made dismissal or conversion mandatory upon a showing of cause, and sets forth similar non-exclusive grounds for cause in § 1112(b)(4)(A)-(P), several of which involve debtor's inability to rehabilitate and inability or failure to file, confirm, or effectuate substantial consummation of a plan.

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

nearly $3,000 per month. Although Debtor testified that he expected to receive twice yearly bonuses from his new employer, he had not received any such bonuses at the time of trial, and the bankruptcy court found that future bonuses were "uncertain windfalls which may or may not occur." Finally, Debtor provided no hard evidence that he actually earned what he claimed to earn in his schedules, and his prior earnings record had been erratic.

Significantly, the claims asserted by both the SEC and Kimberly are given "priority" by § 507, and must be paid in full under any proposed plan.[31] Even accepting Debtor's income statements and predictions at face value, those figures are far below what would be needed to pay off even the SEC's claim under a plan. Debtor's $200 per month available income plus his "expected" $15,000 annual bonuses would provide a total of $17,400 annually, or $1,450 per month for plan payments. At that rate, it would take over 46 years to pay just the SEC's claim in full.[32]

Debtor's Chapter 11 was dead on arrival. It had only a remote chance of ever resulting in a confirmed plan. In fact, the bankruptcy was a waste of judicial

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[31] §§ 507(a)(1)(A) (domestic support obligations) and (G) (governmental penalty), and 1129(a)(9)(B) (claims specified in § 507(a)(1) must be paid in full unless the holder agrees otherwise). The bankruptcy court specifically noted that Debtor had provided no evidence that either of these parties would accept a reduced amount for their claims.

[32] The bankruptcy court also concluded that Debtor's intention to retain his retirement account would violate the "absolute priority rule," which is codified in § 1129(b). Sections 1129(b)(1) and (b)(2)(C)(ii) provide that a plan must "not discriminate unfairly," must be "fair and equitable" to each class of interests that is both impaired by the plan and does not accept it, and that fairness and equity require that no claim holder that is junior to an unsecured class will receive or retain an interest in any property under the plan. Whether a debtor's retention of exempt property can violate the absolute priority rule is a matter of some dispute. *Compare In re Brown*, 498 B.R. 486, 498-500 (Bankr. E.D. Pa. 2013), *aff'd*, 505 B.R. 638 (E.D. Pa. 2014) (absolute priority rule applies to non-exempt property only), *with In re Gosman*, 282 B.R. 45, 48-49 (Bankr. S.D. Fla. 2002) (debtor's retention of exempt property violates absolute priority rule). Since that precise issue was not fully briefed in this appeal, and because resolution of it is not necessary to our affirmance of the bankruptcy court's order, we decline to address it herein.

resources, and represents yet another attempt by Debtor to avoid repaying friends and family, whom he used to further his own financial gain. Debtor abused the protections provided by the bankruptcy system to thwart lawful debts to his former wife, father, girlfriend, and the SEC. This conduct was clearly detailed in the bankruptcy court's findings of fact and conclusions of law, to which we ascribe no error.

D. Denial of Due Process

Debtor also asserts that the bankruptcy court violated his right to due process by denying him assistance of counsel, disallowing his exhibits at trial, and failing to subpoena Kimberly for trial. Our review of Debtor's due process arguments reveals them to be without merit.

With respect to the "denial" of assistance of counsel, it should first be noted that there is no constitutional right to appointed counsel in civil actions.[33] Moreover, the record reflects that the bankruptcy court repeatedly advised Debtor to obtain counsel. Despite this advice, Debtor did not file a request for counsel until the day before the first day of trial. The bankruptcy court advised Debtor that he would not sign an order authorizing employment of an attorney until the Debtor's request had been properly served. Also, as the trial was ready to commence, the Debtor would have to proceed whether or not he had counsel to assist him.[34] The appellate record does not indicate that Debtor ever pursued the request for counsel again.

Regarding Debtor's assertion that he was denied an opportunity to present documentary evidence at trial, the record establishes that Debtor attempted to

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[33] *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24–28 (1981); *In re Hall*, No. 09-4091, 2010 WL 996469 (D. Kan. Mar. 17, 2010).

[34] Debtor's application to employ Edward Levy as "Limited Litigation Counsel" indicated that counsel had been given a $1,900 retainer, post-petition, by Debtor. Asked by the court where the retainer funds came from, Debtor's response was "excess of earnings." Trans. 1/16-1 at 4, *in* AA 686 at 646.

admit voluminous documents after the time to disclose such evidence had expired. In addition, the documents were not adequately organized or marked, and many of them would not be admissible without testimony that Debtor did not intend to submit. Nonetheless, Debtor was allowed to testify at length at trial regarding his defenses to the motion to dismiss, and appears to have been granted significant leeway with respect to his presentation of his case. Significantly, Debtor failed to assert his due process claims in the bankruptcy court, and such failure typically precludes appellate review.[35]

Finally, Debtor contends that the bankruptcy court "refused" to subpoena Kimberly for trial. In fact, Debtor failed to properly obtain a subpoena, did not seek Kimberly's agreement to appear at trial, and only listed her as a "may call" witness on his pre-trial witness list. Failure to subpoena a witness, even when it is not the fault of a party, is not considered to be prejudicial unless the witness's testimony would significantly further that party's position.[36] Yet, when asked why he needed Kimberly's testimony, Debtor responded that she had personal knowledge of the benefits conveyed by Sease's advances to him. It is difficult to see how such testimony could have helped establish Debtor's defense to the motion to dismiss. Moreover, Kimberly would have been extremely unlikely to corroborate Debtor's and Sease's assertion that advances from Sease to Debtor were, in fact, "loans." Thus, Debtor did not establish that Kimberly's testimony would have in any way supported his claim that his petition was filed in good faith, or that he had the ability to effectuate a valid plan of reorganization. Her absence at trial was therefore not prejudicial.

In any event, each of Debtor's due process claims arises from his own

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[35] *See, e.g., Turner v. Pub. Serv. Co.*, 563 F.3d 1136, 1143 (10th Cir. 2009) ("Absent extraordinary circumstances, we will not consider arguments raised for the first time on appeal").

[36] *See Hooks v. Workman*, 689 F.3d 1148, 1200 (10th Cir. 2012).

failure to promote and protect his interests at trial. Such failures cannot be excused by the fact that he was not represented by counsel, as "[p]ro se status does not excuse the obligation of any litigant to comply with the fundamental requirements of the Federal Rules of Civil and Appellate Procedure."[37] Debtor's failure to follow procedures in place for obtaining counsel, submitting exhibits, and subpoenaing witnesses, coupled with his inability to articulate a viable argument regarding his assertions that he was denied due process, compels the conclusion that his due process claims are without merit.

V. CONCLUSION

The bankruptcy court's factual findings, upon which its decision to dismiss Debtor's bankruptcy was based, are not "clearly erroneous." In addition, the decision to dismiss does not amount to an abuse of discretion. Finally, we conclude that Debtor was not denied due process in the bankruptcy court proceedings. The order of dismissal is therefore AFFIRMED.

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[37] *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008) (internal quotation marks omitted).