NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MW 03-023

Bankruptcy Case No. 03-40276-JBR

VITO LOMAGNO and MARIE MIDOLO,
Debtors.

VITO LOMAGNO and MARIE MIDOLO,
Defendants/Appellants,

v.

RAYMOND FITZGERALD, Receiver, and
THE CITY OF LAWRENCE, MASSACHUSETTS,
Plaintiffs/Appellees.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Joel B. Rosenthal, U.S. Bankruptcy Judge)

Before
LAMOUTTE, de JESÚS AND HAINES, U.S. Bankruptcy Appellate Panel Judges.

David G. Baker, Esq. and Peter C. Lacy, Esq., on brief for Appellants.

Michael B. Feinman, Esq. and Stephen P. Shannon, Esq.,
on brief for Appellee, Raymond Fitzgerald.

March 11, 2004

LAMOUTTE, U.S. Bankruptcy Appellate Panel Judges.

The issue before the Bankruptcy Appellate Panel (the "Panel") is whether the bankruptcy court erred in dismissing the appellants' Chapter 13 case after *sua sponte* raising issues as to the Debtors' good faith and the feasibility of their plan of reorganization.[1]

Background

Vito Lomagno and Marie Midolo (the "Debtors") are married and live in Lawrence, Massachusetts. They began having financial difficulties several years ago after Midolo became disabled as a result of a medical condition and Lomagno was injured on the job.

The Debtors purchased a house on Tower Hill Street in Lawrence, MA, in 1990. In 1999, they moved out of the house and rented it to a tenant. Problems arose, and when they attempted to evict the tenant(s), the tenants complained to the local housing authority about housing code violations. The city began proceedings against the Debtors, and eventually the appellee, Raymond Fitzgerald, was appointed as receiver (the "Receiver").

The Debtors fell into arrears on their mortgage, and the mortgagee began foreclosure proceedings. The Debtors filed a homestead exemption and filed a Chapter 7 proceeding on July 31, 2001, eventually receiving a discharge on November 6, 2001. The mortgagee resumed foreclosure proceedings, and the Debtors filed a Chapter 13 proceeding *pro se* on July 31, 2002. When the Debtors were unable to provide proof of insurance on the property, the trustee filed a motion to dismiss the case, which was granted by the bankruptcy court on October 24, 2002. The

[1] The appellants style the issue on appeal as "whether the debtors' plan is feasible as filed and if not, whether there is no reasonable likelihood that a feasible plan could be proposed if given an opportunity to amend."

Debtors obtained proof of insurance from the Receiver and mortgagee and requested reconsideration, which was denied by the bankruptcy court.

A few months later, foreclosure proceedings were recommenced and the Debtors filed the instant bankruptcy proceeding on January 16, 2003. The Receiver filed a motion to dismiss, which was joined by the City of Lawrence on January 23, 2003. The court held a hearing on the motion to dismiss on January 29, 2003, and denied the Receiver's request.

The Receiver then filed an objection to the plan on January 28, 2003, alleging that it did not comply with the Bankruptcy Code,[2] was not feasible,[3] and impermissibly modified the Receiver's claim. On that same date the Receiver filed an objection to the Debtors' claim of exemption, arguing that the Debtors did not reside at the property over which they claimed a homestead exemption. The City of Lawrence filed a motion to join the Receiver's objections.

On January 31, 2003, the bankruptcy court issued notices of a hearing to be held on March 5, 2003, to consider the Receiver's objection to the Debtors' claim of exemption, the Receiver's objection to confirmation of plan, and the Debtors' motion to avoid the Receiver's judicial lien, as well as the Debtors' motion to strike the City of Lawrence's objection thereto.

The bankruptcy court held the hearing on March 5, 2003, and took the matter under advisement. The bankruptcy court entered an opinion on March 10, 2003, wherein it dismissed the Debtors' Chapter 13 case, based upon its findings that the Debtors' plan (1) misrepresented

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[2] The Receiver alleged that the plan did not comply with the Bankruptcy Code because it did not provide sufficiently for the curing of defaults as required by 11 U.S.C. § 1322(b)(2)(3) and did not establish the basis for making the balloon payment provided for in the plan.

[3] According to the Receiver, the Debtors' monthly cash flow, determined from their schedules, was insufficient to satisfy their secured claims, and they did not demonstrate the feasibility of the balloon payment proposed in the plan.

the amount of mortgage arrears; (2) incorrectly averred that certain student loans were discharged in their first bankruptcy case; (3) did not provide for the Receiver's expenses; (4) was not feasible; and (5) proposed a $30,000 balloon payment despite no reasonable likelihood of refinancing to make such a payment. The Debtors appealed.

Jurisdiction and Standard of Review

The bankruptcy court's order dismissing the Debtors' Chapter 13 petition is a final, appealable order. In re Saco Local Dev. Corp., 711 F.2d 441 (1st Cir. 1983). The Panel has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a)(1) and (b).

The bankruptcy court's conclusions of law are reviewed *de novo*. Prebor v. Collins (In re I Don't Trust), 143 F.3d 1, 3 (1st Cir. 1998); Brandt v. Repco Printers & Lithographics, Inc. (In re Healthco Int'l, Inc.), 132 F.3d 104, 107 (1st Cir. 1997).

Discussion

The Debtors argue that the bankruptcy court erred in dismissing their case. According to the Debtors, the bankruptcy court should not have found that the proposed plan was not feasible because it disapproved of the treatment of various claims; rather, it should have considered whether the plan met the guidelines of § 1325. Further, the Debtors argue that the bankruptcy court erred in deciding *sua sponte* that the treatment of claims was improper without affording them notice or opportunity to be heard, and without objection from the affected claimants. The Debtors argue that their due process rights were violated by the bankruptcy court's actions.

The Receiver argues that the bankruptcy court was not clearly erroneous in dismissing the Debtors' Chapter 13 petition because there was no reasonable likelihood that the Debtors could

propose a feasible plan of reorganization. Further, the Receiver argues that because the property has now been sold at foreclosure, the appeal is moot and should be dismissed.[4]

The hearing which was noticed for March 5, 2003, was to address the Receiver's objection to the plan, the Receiver's objection to the Debtors' claim of exemption, and the Debtors' objection to the Receiver's lien. However, at the hearing the bankruptcy court raised several issues *sua sponte,* including the Debtors' good faith in filing this petition. For example, the Debtors' counsel indicated at the conclusion of the hearing that he "wasn't aware that there was any allegation of bad faith pending,"[5] to which the bankruptcy judge replied that he was raising the issue *sua sponte.*

The bankruptcy court's memorandum of decision, issued after taking the matter under advisement at the hearing, focused on the mortgage arrears, the student loans, the payment of the Receiver's costs, the feasibility of the plan and the balloon payment proposed in the plan. While all of these considerations may have been relevant to a determination of the Receiver's objection to confirmation of the Debtors' plan, the bankruptcy court went beyond such a determination to dismiss the case entirely. The hearing of March 5, 2003, was not notified as one to consider the dismissal of the case; indeed, a hearing on said issue had been held a short time previously and the request had been denied.

This Panel has previously held that a bankruptcy court cannot *sua sponte* dismiss a Chapter 13 case without the notice and opportunity to be heard required by the Bankruptcy Code

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[4] The appellees' claims of mootness of the appeal were addressed by the Panel's order of August 6, 2003, denying the same.

[5] Transcript of March 5, 2003 hearing at 23.

and Bankruptcy Rules. See Muessel v. Pappalardo (In re Muessel), 292 B.R. 712 (B.A.P. 1st Cir. 2003). In Muessel, the Panel first addressed whether a bankruptcy court has authority to dismiss a Chapter 13 case *sua sponte* and concluded that it does. Id. at 717 (citing 4 Keith M. Lundin, Chapter 13 Bankruptcy § 337.1 (2002). The Panel in Muessel then found that "both the Bankruptcy Code and Bankruptcy Rules require prior notice to the debtor of any hearing, accompanied by a motion or order to show cause specifying the reasons for dismissal, before dismissal may be considered." Id. The Panel went on to note that even if there were no statutory requirements for such notice, "fundamental concepts of procedural due process would require notice to the debtor and an opportunity to be heard on the bankruptcy court's reasons for dismissal." Id. (citing Melendez Colon v. Rivera (In re Melendez Colon), 265 B.R. 639, 644 (B.A.P. 1st Cir. 2001)).

We find that the parties, particularly the Debtors, did not have sufficient notice of the bankruptcy court's contemplation of dismissal of the case. Further, the basis for the bankruptcy court's decision to dismiss the case was a series of matters, such as the Debtors' budget, which had not even been discussed at the hearing; accordingly, even if the Debtors had asked for additional time at the conclusion of the hearing, they would have had no way of knowing what the bankruptcy judge was contemplating as a possible basis for dismissing their case.

Conclusion

The Panel concludes that the bankruptcy erred in raising the issues *sua sponte* and dismissing the Debtors' bankruptcy petition without notice and a hearing. Accordingly, the decision of the bankruptcy court is **REVERSED** and the case is **REMANDED** for further proceedings consistent with this opinion.