NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. NH 07-054

Bankruptcy Case No. 06-10786-MWV

ROSEMARY ANN GILROY,
Debtor.

ROSEMARY ANN GILROY,
Appellant,

v.

AMERIQUEST MORTGAGE COMPANY, AMC MORTGAGE SERVICES, JAMES KASPER, Trustee of the Ponemah Trust, and the U.S. TRUSTEE,
Appellees.

Appeal from the United States Bankruptcy Court
for the District of New Hampshire
(Hon. Mark W. Vaughn, U.S. Bankruptcy Judge)

Before
Lamoutte, de Jesús, and Hillman,
United States Bankruptcy Appellate Panel Judges.

Rosemary A. Gilroy, *pro se*, on brief for Appellant.

Geraldine Karonis and Ann Marie Dirsa, on brief for Appellee U.S. Trustee.

August 1, 2008

Lamoutte, U.S. Bankruptcy Appellate Panel Judge.

Ms. Rosemary Ann Gilroy (the "Debtor") appeals the bankruptcy court's order dismissing her chapter 11 case for failure to maintain insurance for five condominiums located at 107 Ponemah Road, Amherst, New Hampshire.[1] The record on appeal clearly shows that the Debtor failed to maintain real property insurance over property of the estate. Thus, the bankruptcy court's finding that "cause" existed to dismiss or convert the Debtor's case under 11 U.S.C. § 1112(b)[2] is not clearly erroneous. Further, the bankruptcy court's implied finding that the dismissal is in the best interest of creditors and the estate is not clearly erroneous. The bankruptcy court, therefore, did not err in dismissing the Debtor's case. We **AFFIRM** the dismissal order.

BACKGROUND

The Debtor owns a five-unit condominium development (the "Units") located at 107 Ponemah Road, Amherst, New Hampshire. The Debtor obtained financing from Ameriquest Mortgage Company ("Ameriquest") and from James Kasper, Trustee for the Ponemah Trust, in order to convert the same into residential units. The Debtor ran out of funds before construction was completed. On July 11, 2006, the Debtor filed a petition under chapter 13 of the Bankruptcy

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[1] The notice of appeal was filed prior to actual dismissal of the case on August 16, 2007, and identified the subject of the appeal as the bankruptcy court's August 2, 2007 order, which stated that the Debtor's case would be dismissed if she did not file a certificate of insurance by 12:00 p.m. on August 3, 2007. The Debtor subsequently filed a motion seeking permission to file a new notice of appeal, explaining that she had mistakenly thought that the August 2, 2007 order was a dismissal order. By prior order, the Panel construed her motion as an amended notice of appeal, thus establishing the August 16, 2007, dismissal order as the subject of the appeal.

[2] Unless otherwise indicated, the terms "Bankruptcy Code," "section" and "§" refer to Title 11 of the United States Code, 11 U.S.C. § 101 et seq., as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8.

Code. The case was voluntarily converted to chapter 11 on November 20, 2006 because her secured debt exceeded the eligibility requirements of § 109(e).

The Debtor scheduled the five condominium Units with a fair market value of $2,345,000. She listed in Schedule D secured claims against the property in the amount of $1,240,816, including real estate tax liens of $36,539,[3] and listed in Schedule F unsecured nonpriority debt in the amount of $43,411. No priority claims were listed in Schedule E.

Ameriquest held liens over Units 1, 2 and 4; and James Kasper, Trustee of the Ponemah Trust, held liens over Units 3 and 5. The Debtor resided in Unit 1. Units 2, 3, 4 and 5 did not generate rental income because they were vacant and without occupancy permits. Throughout the travel of the case, the Debtor tried to sell these Units to no avail. On March 26, 2007, the Debtor informed the bankruptcy court that the arrears on the mortgages were in the vicinity of $80,000. The Debtor disclosed in Form B22 that her only income is $756[4] monthly from Social Security benefits.

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[3] Debtor filed a Chapter 11 Plan of Reorganization as part of the chapter 11 Schedules and Statement of Financial Affairs containing a Liquidation Analysis describing the estate's real properties as follows:

> Unit 1 has a fair market value of $650,000, liens in the amount of $308,000, and an exemption of $125,000, leaving $217,000 in equity;
> Unit 2 has a fair market value of $445,000 and liens for $386,000, leaving $59,000 in equity;
> Unit 3 has a fair market value of $425,000 and liens for $75,000, leaving $350,000 in equity;
> Unit 4 has a fair market value of $435,000 and liens for $254,000, leaving $181,000 in equity; and
> Unit 5 has a fair market value of $445,000 and liens for $75,000, leaving $370,000 in equity.

[4] Schedule I provides that the Debtor's monthly income from Social Security is $754. Her brief on appeal states that her sole source of income is $718 per month. The difference in the amounts is irrelevant for purposes of this appeal.

On February 6, 2007, the United States Trustee (the "UST") moved to dismiss or convert the case for the Debtor's failure to make mortgage payments and file monthly operating reports. The motion noted that the Debtor's property insurance had been at risk of cancellation for nonpayment, but that the Debtor avoided cancellation by rendering a partial payment of the premium.

On March 26, 2007, the bankruptcy court held a hearing on the UST's motion to dismiss or convert the case, and the Debtor's request to refinance Units 3 and 5. The Debtor explained at the hearing that she was having great difficulty in selling the Units because they were without occupancy permits, and therefore, she concluded that it would be best to refinance the Units in order to become current on the mortgage payments and secure monies to pay for the construction work required to obtain occupancy permits. The Debtor also informed that she was in discussions with a lender regarding the refinancing of Units 3 and 5. Mr. Thomas Nealand, a mortgage broker, testified that two qualified lenders were contemplating refinancing these Units, but the final decision would be made in two to three weeks. Mr. Nealand explained that there was a budget figure of $115,000 to finish the Units. Once construction was finished the Town of Amherst could issue the occupancy permits and the sale of the Units could take place. The bankruptcy court stated that the refinancing would not be approved until there was a firm commitment from a lender and an agreement to review.

The UST, in support of the motion to dismiss or convert, informed that the Debtor was delinquent in the payment of her quarterly fees, and stated that in light of the Debtor's limited income, heavy debt load, and unsuccessful efforts to sell the Units, there appeared to be a continuing diminution of the estate and an absence of a reasonable likelihood of reorganization.

The UST suggested that the appointment of a chapter 11 trustee would be a better alternative than conversion to chapter 7, as a chapter 11 trustee "might actually attain fair market value," rather than liquidation value, for the Units. The UST also stated that dismissal of the case was not a bad alternative, as the secured creditors would have to go through state law procedures before they could take any direct action with respect to the Units. The bankruptcy court rejected the suggestion of the appointment of a chapter 11 trustee in this case, and noted that the Debtor is an individual "and it's hard to step into her shoes." The bankruptcy court concluded the hearing by stating that dismissal of the case was likely if the refinancing did not materialize in the next four or five weeks because "it could be almost ten months [since the Debtor commenced her chapter 11 case] by the time we have this next hearing, and if she can't do it in ten months or get some movement forward, it's just too long." The motion to dismiss or convert was continued to May 1, 2007.

The Debtor moved to continue the May 1, 2007 hearing. The UST opposed the motion for continuance stating, among other things, that the Debtor's insurance agent had informed her that the Debtor's insurance on the Units lapsed on April 18, 2007. Notwithstanding the opposition, the bankruptcy court continued the hearing to June 19, 2007, which the Debtor failed to attend. At the hearing, the UST stated to the bankruptcy court that the Debtor had failed to file her cash flow reports, and that it appeared the Debtor had not secured insurance for the Units or a commitment for refinancing. The bankruptcy court stated:

> Well, I think under the circumstances, this has been going on for quite a while. I think -- I know the Court has given Ms. Gilroy every opportunity to try to salvage her investment in these condominiums. At this point in time I think I'm going to dismiss the case.

A dismissal order was not entered; instead, the bankruptcy court continued the hearing to June 26, 2007. The Debtor admitted at the hearing that she did not obtain insurance for the Units, but that coverage was provided on a few of the Units by Ameriquest. Counsel for Ameriquest clarified that Ameriquest had procured forced-place insurance over Units 1, 2 and 4, but only covering their interest. After listening to the Debtor's efforts to obtain insurance and refinancing, the bankruptcy court issued the following order: "Debtor will have insurance by July 13, 2007 or case will be dismissed upon receipt of affidavit by UST [stating that Debtor did not provide them with proof of insurance by such date]."

The Debtor did not obtain the insurance; rather, on July 13, 2007, she filed a motion seeking a further extension of two (2) weeks to obtain the insurance coverage. A hearing on that motion was held on July 24, 2007, eleven days after the July 13, 2007, deadline. After finding that the Debtor had failed to secure insurance and refinancing, the bankruptcy court issued the following order: "Debtor must have insurance by July 31, 2007. UST shall file affidavit." On July 31, 2007, the UST filed an affidavit stating that proof of insurance coverage had not been received.

On August 1, 2007, the Debtor filed another motion requesting an unspecified further extension. The bankruptcy court responded on August 2, 2007, without a hearing, with the following order:

> The Debtor shall file with the Court a certificate of insurance by **August 3, 2007, at 12:00 p.m.** or the Debtor's case will be dismissed. This matter having been continued numerous times and the Debtor having been granted numerous extensions, the Court will not entertain any further emergency motions filed by the Debtor with regard to this matter.

The bankruptcy court clerk's office certified that the August 2, 2007 order was mailed on August 2, 2007. The Debtor failed to file the insurance certificate by August 3, 2007. On August 16, 2007, and proof of insurance still not yet on file, the bankruptcy court issued an order dismissing the Debtor's chapter 11 case. The Debtor then appealed the order dismissing the bankruptcy case.[5]

In her brief on appeal, the Debtor argued that the properties were insured by Ameriquest; that the notice of the August 2, 2007 order was sent out on August 3, 2007 and thus she could not have timely complied; that if the dismissal is allowed to stand, she will lose all the equity in these properties; that unbeknownst to her, the properties were insured for one month, from June 13, 2007 through July 12, 2007; that she is in the process of refinancing the properties; and that she has no money to pay for insurance. She further argued that one of the mortgage holders acted in bad faith and that the reason for her default on the mortgage was the increase in the interest rate from 14% to 20%, "which the Lender obligated Debtor to be liable for."

JURISDICTION

A bankruptcy appellate panel may hear appeals from "final judgments, orders and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Id. at 646 (citations omitted). An order dismissing a chapter 11 case is a final, appealable order. See

[5] The Debtor argued in her brief on appeal that the bankruptcy court erred when it determined her homestead exemption. However, the only order on appeal is the bankruptcy court's dismissal of the bankruptcy case.

In re Abijoe Realty Corp., 943 F.2d 121 (1st Cir. 1991) (reviewing bankruptcy court's dismissal of chapter 11 case).

STANDARD OF REVIEW

Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"),[6] § 1112 provided that a bankruptcy court "may" dismiss or convert a chapter 11 case for cause. Appellate courts accordingly reviewed a bankruptcy court's dismissal of a chapter 11 case for abuse of discretion. See De Jounghe v. Lugo Mender (In re De Jounghe), 334 B.R. 760, 765 (B.A.P. 1st Cir. 2005). However, BAPCPA amended § 1112 to provide that a bankruptcy court "shall" dismiss or convert a chapter 11 case for cause.[7] Thus, the bankruptcy court's discretion to dismiss or convert chapter 11 cases has been restricted for cases filed after the effective date of the BAPCPA. See 11 U.S.C. § 1112(b)(1). We thus review the bankruptcy court's findings of fact for clear error and conclusions of law *de novo*. See T.I. Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995); Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.), 43 F.3d 714, 719-20 n.8 (1st Cir. 1994).

DISCUSSION

As previously stated, in general terms, § 1112(b) provides for the dismissal or conversion of a chapter 11 petition, whichever is in the best interests of creditors and the estate, upon the

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[6] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 442(a) (2005), effective in cases commenced on or after October 17, 2005.

[7] Prior to the BAPCPA, the bankruptcy court had more discretion in its determination of whether the case would be dismissed or converted. Section 1112(b) read in pertinent part as follows: "on request of a party in interest or the United States Trustee, and after notice and a hearing, the court **may** convert a case . . . or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause . . ." 11 U.S.C. 1112(b)(2004), amended by 11 U.S.C. § 1112(b)(2005)(emphasis added).

request of a party in interest, after notice and a hearing, for cause. Section 1112(b)(4) provides a nonexclusive list of what constitutes cause.

BAPCPA limited the bankruptcy court's discretion to dismiss or convert a chapter 11 petition for cause by mandating conversion or dismissal if the movant establishes cause, unless the debtor presents unusual circumstances, the debtor meets certain criteria justifying the act or omission and likelihood of confirming a plan, or the bankruptcy court finds that the appointment of a trustee is in the best interest of creditors. 7 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy, ¶ 1112.04[1] (15th ed. rev. 2008). After the BAPCPA amendments, § 1112(b)(1) is "no longer permissive, but instead mandates conversion or dismissal if the movant establishes exclusive cause, and no unusual circumstances establish that conversion or dismissal is not in the best interest of creditors." 5 Hon. William Norton, Jr., Norton Bankruptcy Law and Practice, § 103:66, at 103-14 (3d ed. 2008). However, the bankruptcy court still retains broad discretion to determine whether either conversion or dismissal is in the best interests of creditors and the estate after finding cause.

Section 1112(b)(4)(C) specifically provides that "cause" to dismiss or convert a chapter 11 petition includes "failure to maintain appropriate insurance that poses a risk to the estate or the public." Certainly, failure to provide liability and property insurance to cover loss or damage to the Units owned by the Debtor comes within the purview of § 1112(b)(4)(C). The fact that the Debtor did not have appropriate insurance to cover the real property owned by her is amply supported by the record. Ameriquest procured forced-place insurance only over Units 1, 2 and 4, and only covering their interest. In those Units, the Debtor's equity remained uninsured. The Debtor provided no proof of insurance at all regarding Units 3 and 5. In fact, the Debtor does not

dispute that she did not have insurance on the Units, but instead explains why she was unable to pay the insurance premium.[8] Even assuming that her explanations are credible, they do not bear on our inquiry. Additionally, the fact that the properties were insured for one month is irrelevant, as the properties remained uninsured thereafter. Therefore, there was cause to dismiss or convert the petition.

The record shows that the Debtor failed to present evidence for the bankruptcy court to identify that there were unusual circumstances to establish that dismissal was not in the best interests of creditors and the estate. Also, the Debtor did not establish a reasonable likelihood that a plan could be confirmed or that the failure to obtain insurance over the property was reasonably justified. On the contrary, the evidence before the bankruptcy court was that, in addition to not providing insurance, the Debtor was unable to sell or refinance the Units, and could not make the mortgage payments.

One exception to the mandatory nature of conversion or dismissal, once cause is established, is in § 1104(a)(3). It provides that "if grounds exist to convert or dismiss the case under section 1112, but the bankruptcy court determines that the appointment of a trustee or an examiner is in the best interests of creditors and the estate," the appropriate remedy is the appointment of a chapter 11 trustee, and not the dismissal or conversion of the petition. The record shows that the bankruptcy court considered the UST's suggestion for the appointment of a

[8] At oral argument, the Debtor stated that she has since secured insurance on the Units, and tendered proof of such insurance to the Panel. We decline to consider such evidence as it does not bear on the question of whether cause to dismiss the Debtor's case existed at the time the bankruptcy court dismissed her case. We note, however, that if the Units are indeed presently appropriately insured, in a new chapter 11 case, the failure to have insurance would not be cause to dismiss it.

trustee, but discarded it under the circumstances of this case. The bankruptcy court's conclusion has not been challenged on appeal.

The UST established cause to convert or dismiss the case and the bankruptcy court dismissed the case. The bankruptcy court did not make a specific finding that dismissal was in the best interests of creditors and the estate. However, the bankruptcy court is not required to make a specific finding that its decision to convert or dismiss is in the best interests of creditors and the estate upon granting a motion to convert or dismiss for cause, when the debtor or the moving party have not argued that the alternate solution is in the best interests of creditors and the estate. The burden is on the party making a specific request for either conversion or dismissal to argue and present evidence in support of its position. Upon failure to argue or present evidence for either alternative, conversion or dismissal, the argument is waived on appeal. In any event, neither the Debtor nor the UST has raised the argument on appeal. Moreover, considering the multiple references made by the bankruptcy court to the Debtor's inability to obtain insurance, make payments on the mortgages and to sell or refinance the property, the determination of dismissal being in the best interests of creditors and the estate is implied.

The Debtor argues that the bankruptcy court dismissed her case on insufficient notice. Specifically, she argues that the August 2, 2007 order, which stated that the Debtor's case would be dismissed unless she filed with the bankruptcy court a certificate of insurance by 12:00 p.m. on August 3, 2007, was postmarked August 3, 2007, and could not have been received before August 4, 2007, thus making it impossible for her to comply with the order. This argument is wholly disingenuous given that the bankruptcy court first threatened to dismiss the Debtor's case for failure to maintain appropriate insurance on March 26, 2007, and then continually gave her

more opportunities to obtain appropriate insurance. The bankruptcy court first ordered that the Debtor's case would be dismissed if she did not obtain insurance by July 13, 2007, and then extended the deadline to July 31, 2007, and *then* ordered that the case truly would be dismissed if a certificate of insurance was not filed by 12:00 p.m. on August 3, 2007. Notably, the bankruptcy court did not dismiss the case until August 16, 2007. Moreover, the bankruptcy court clerk's office certified that the August 2, 2007 order was mailed on August 2, 2007.

Additionally, the Debtor should have been monitoring the court docket, particularly in light of the fact that she failed to meet the July 31, 2007 deadline and filed yet another motion to extend the deadline. Therefore, she was well aware that her case could soon be dismissed. See Mirpuri v. ACT Mfg., Inc., 212 F.3d 624, 631 (1st Cir. 2000) (concluding that plaintiff's reliance on a telephonic inquiry in lieu of checking a court docket was not excusable neglect, and citing several cases holding that failure to check court dockets is not excusable neglect). The record is clear that the bankruptcy court afforded the Debtor an abundance of notice as to the impending dismissal of her case for failure to maintain appropriate insurance.

CONCLUSION

We conclude that the bankruptcy court did not err in dismissing the Debtor's case. The bankruptcy court's finding that there was "cause" to dismiss the chapter 11 case pursuant to § 1112(b) is amply supported by the record as the Debtor failed to maintain appropriate insurance on the Units. Accordingly, the dismissal order is **AFFIRMED**.