NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. PR 13-001

Bankruptcy Case No. 09-10782-BKT

ROBERTO SOTO CARRERAS,
Debtor.

ROBERTO SOTO CARRERAS,
Appellant,

v.

PALMAS DORADAS CONDOMINIUM HOMEOWNERS ASSOCIATION, LSREF2 ISLAND HOLDINGS, LTD., INC., and AUTORIDAD PARA EL FINANCIAMIENTO DE LA VIVIENDA DE PUERTO RICO,
Appellees.

Appeal from the United States Bankruptcy Court
for the District of Puerto Rico
(Hon. Brian K. Tester, U.S. Bankruptcy Judge)

Before
Deasy, Kornreich, and Bailey,
United States Bankruptcy Appellate Panel Judges.

Carmenelisa Perez-Kudzma, Esq., on brief for Appellant.
Carlos A. Piovanetti Rivera, Esq., on brief for Appellee, Palmas Doradas Condominium Homeowners Association; Nilda M. González Cordero, Esq. on brief for Appellee, Autoridad Para El Financiamiento de la Vivienda de Puerto Rico; Javier Vilariño Santiago, Esq., on brief for Appellee, LSREF2 Island Holdings, Ltd., Inc.

October 24, 2013

Deasy, U.S. Bankruptcy Appellate Panel Judge.

The debtor, Roberto Soto Carreras, appeals from the bankruptcy court order granting the motions to dismiss of Palmas Doradas Condominium Homeowners Association ("Palmas"), Autoridad Para El Financiamiento de la Vivienda de Puerto Rico ("Autoridad"), and LSREF2 Island Holdings, Ltd., Inc. ("LIHL").[1] For the reasons set forth below, we **AFFIRM**.

BACKGROUND

The debtor is a licensed engineer and surveyor who was involved in the purchase and sale of real estate and development of real estate projects. He was also the sole stockholder in five corporations and both he and his non-debtor wife guaranteed the debts of the corporations and the corporations cross-guaranteed many of those loans. The debtor filed an individual petition for relief under chapter 11 on December 17, 2009. Shortly thereafter, the court dismissed the case due to the debtor's failure to file necessary documents. After three motions for reconsideration, the court reopened the case but then vacated the order due to the debtor's noticing failures. In March 2010, the court reopened the case with specific instructions to the debtor for proceeding with the case.

One month later, the court issued an order to show cause for the debtor's failure to comply with the court's March order of conditions. While the court did not dismiss the case as a result, it again reminded the debtor of his obligations at a hearing in June 2010. Later that month, the bankruptcy court granted a motion for an order requiring the debtor to sign his petition. The debtor finally signed it in August 2010.

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[1] In May 2013, the Panel granted LIHL's Amended Motion for Substitution of Party. In the Motion, LIHL explained it was the successor to FirstBank Puerto Rico (?FirstBank").

In September 2010, FirstBank filed a motion to dismiss the case on the grounds that, inter alia, the debtor had failed to file his monthly operating reports.[2] Other creditors supported the motion and, shortly thereafter, Banco Popular de Puerto Rico also filed a motion to dismiss partially based on the debtor's failure to file a disclosure statement and plan. At the hearing on FirstBank's motion, the court ordered the debtor to: (1) file a disclosure statement by November 30, 2010, in which all outstanding litigation and the possible dispositions would be disclosed; and (2) file monthly operating reports. The court also explained that if the debtor failed to comply with the order, it would dismiss the case without a hearing. The court held Banco Popular's motion to dismiss in abeyance.

On November 30, 2010, the debtor filed a motion to extend the disclosure statement deadline, which the court denied. The court dismissed the case on December 2, 2010.[3] The debtor filed a motion to reconsider the dismissal, as well as his disclosure statement and plan. The court granted the motion on March 7, 2011. After creditors objected to the disclosure statement, the debtor filed an amended disclosure statement and plan in June 2011. Again, several creditors objected.

In August 2011, FirstBank filed a motion to dismiss the case on the grounds that the amended disclosure statement would likely not be approved, the debtor was not timely filing his monthly operating reports, and, given that the case was close to its two-year anniversary with no

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[2] In an order responsive to the debtor's counsel previously filed motion to withdraw, the court wrote, "[g]iven the case history of non-compliance with this Court's orders, the hearing on 10/7/2010 at 9:00am to consider the Motion to Dismiss filed by Firstbank PR . . . will go forward with or without new counsel for the debtor."

[3] At this point, the debtor had hired his third counsel of record.

progress, dismissal was warranted. Shortly thereafter, in September 2011, the court ordered the debtor to file an amended disclosure statement and plan by the end of the month. The debtor complied and again objections followed.[4]

In December 2011 and April 2012, the bankruptcy court held hearings on the disclosure statement and objections thereto. At the latter, the debtor was ordered to inform the court by June 29, 2012, when he would file an amended statement. The court explained that the statement should be the "document with all the issues and information required to put all the creditors in a position to vote."

On July 18, 2012, the court held a hearing on several matters. Among other things, the court granted the motion to resign as debtor's counsel and offered the debtor thirty days to hire new counsel. In a subsequent order granting the debtor's request for a brief extension, the court cautioned that it would proceed with various scheduled hearings notwithstanding the debtor's lack of counsel.

In August 2012, RNPM, LLC, by and through Operating Partners Co., LLC ("Operating Partners"), filed a motion to dismiss or convert the debtor's case in which it described the history of the debtor's multiple attorneys and multiple lawsuits. As a result, it contended, the case had become a "complete snarl." It further explained that the debtor had failed to comply with the court's order of April 2012. The complicated facts and the debtor's failure to comply with court orders, it argued, provided ample grounds for dismissal under 11 U.S.C. §§ 1112(b)(1) and (4).

On September 13, 2012, Palmas filed a motion to dismiss in which it explained that the debtor owed approximately $25,000.00 in pre-petition maintenance fees and additional amounts

[4] The court denied FirstBank's motion to dismiss because the debtor complied with the order.

for unpaid post-petition maintenance fees and annual insurance. Given the unusual delay in the case, Palmas asked for dismissal and also joined the motion of Operating Partners.

On September 26, 2012, the court held a continued hearing on the various outstanding matters. Replacement counsel, who the debtor had retained the prior evening, began his presentation by withdrawing the outstanding request for recusal. With respect to the additional outstanding matters, the court continued them for thirty days in order to allow new counsel to apprise himself of the various issues in the case. Counsel assured the court that he would and could file a disclosure statement and a feasible, confirmable plan by October 31, 2012. After a request from a creditor, the court repeatedly and emphatically explained to the debtor's counsel that it would not entertain further extensions absent some emergency and that a failure to comply would result in dismissal. During the hearing and without correction from the debtor, the court consistently referred to the motions of Operating Partners and Palmas as requests to dismiss. The court held those motions in abeyance.

On October 31, 2012, the debtor filed an anemic amended disclosure statement, and on November 15, 2012, the debtor filed the more comprehensive Fifth Amended Disclosure Statement and a plan of reorganization. The disclosure statement was 100 pages and offered nine alternatives for implementation—all of which rested upon the outcome of the pending litigation.

Several creditors responded. For example, FirstBank filed a motion joining the August motion of Operating Partners and requested dismissal. It also filed an objection to the disclosure statement in which it outlined the debtor's failure to comply with court orders and detailed how the statement lacked adequate information about, inter alia, his affiliated corporations and their assets and liabilities.

Banco Popular and MAPFRE PRAICO Insurance Co. both filed objections to the disclosure statement on the grounds that it lacked adequate information. MAPFRE joined the other objections and also joined Operating Partners' request for dismissal. Autoridad filed an objection to the Fifth Amended Disclosure Statement. Among the issues it raised, Autoridad explained that one of the properties the debtor had identified as a source of funding after its sale was now worth a fraction of its former value. It also filed a motion to dismiss detailing all of the reasons set forth in earlier motions and specifically adopting the motion of Operating Partners.

The court held a hearing on November 28, 2012, which several creditors attended. The transcript reflects that the court carefully polled the creditors to ascertain which creditors had filed objections to the Fifth Amended Disclosure Statement and plan and which had filed motions to dismiss or convert or were joining the filed motions.[5] Only one creditor, Banco Popular, argued that conversion was appropriate, and it did so on the grounds that conversion would safeguard a certain income stream.[6] The court noted at that hearing, inter alia, that the debtor continued to have difficulties timely filing his operating reports.

Counsel for the debtor was given several opportunities to address the dismissal motions. He essentially explained that he was newly involved in the case and wanted an opportunity to sit with his client to discuss the plan objections. He did not explicate his objections to the dismissal

[5] The record reflects that Operating Partners and Palmas had filed motions to dismiss. At the hearing, FirstBank, MAPFRE, Autoridad and Palmas all explained that they had joined Operating Partners' request for dismissal.

[6] Banco Popular made no further representations with respect to this alternative and the debtor responded that the income stream was not estate property. Neither party requested an opportunity to provide evidence as to the merits of conversion.

motions and did not raise any issues related to the best interests of creditors under 11 U.S.C. §§ 1112(b)(1) and (2). The court took the dismissal motions under advisement.

On December 21, 2012, the court issued its Order Dismissing Case. In it, the court explained that Operating Partners had moved to dismiss under 11 U.S.C. §§ 1112(b)(1), (b)(4)(E), and (b)(4)(J). In reviewing the case, the court found significant that the debtor had mismanaged it by way of missed deadlines, disregard for court orders, and multiple unconfirmable plans during the three years of the case.[7] The court cited to the debtor's failure to comply with its very specific order of September 2012. Based on these facts, the court concluded that dismissal was warranted and further enjoined the debtor from filing another case for 180 days. The debtor appealed.

JURISDICTION

A bankruptcy appellate panel is "duty-bound" to determine its jurisdiction before proceeding to the merits, even if the litigants have not raised the issue. Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724, 725–26 (B.A.P. 1st Cir. 1998) (citation omitted). The bankruptcy appellate panel has jurisdiction to consider appeals from final orders. See 28 U.S.C. § 158(a)(1). "An order dismissing a chapter 11 case is a final, appealable order." Farnsworth v. Morse (In re Farnsworth), No. BAP MW 08–086, 2009 WL 8466786, at *6 (B.A.P. 1st Cir. Nov. 20, 2009) (citation omitted); see also

[7] Specifically, the court wrote:

> Among the most important arguments presented are the fact that multiple efforts to approve a disclosure statement have failed and that the case has been open since December 17, 2009, without providing adequate protection payments to secured creditors. . . . Throughout the last three years, the court has provided multiple opportunities for Debtor to successfully reorganize. The record of this case is lengthy and filled with unmet deadlines and the Debtor's continued disregard for the orders of this court.

Gilroy v. Ameriquest Mortgage Co. (In re Gilroy), No. BAP NH 07–054, 2008 WL 4531982, at *4 (B.A.P. 1st Cir. Aug. 4, 2008) (citation omitted). Accordingly, the Panel has jurisdiction to hear this appeal.

STANDARD OF REVIEW

When considering an 11 U.S.C. § 1112(b) dismissal, we review the bankruptcy court's findings of fact for clear error and conclusions of law *de novo*. See In re Colón Martinez, 472 B.R. 137, 143 (B.A.P. 1st Cir. 2012) (citing In re Gilroy, 2008 WL 4531982, at *4) (citations omitted). In Gilroy, however, we explained that 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." 2008 WL 4531982, at *4. Accordingly, the decision as to which relief to elect is reviewed for an abuse of discretion. "A court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." Cabral v. Shamban (In re Cabral), 285 B.R. 563, 570 (B.A.P. 1st Cir. 2002) (citation omitted).

DISCUSSION

1. 11 U.S.C. § 1112(b)

Section 1112(b) governs conversion or dismissal of a chapter 11 case. In pertinent part, it provides:

> (1) Except as provided in paragraph (2) and subsection (c), 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 interests of creditors and the estate.

> (2) The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes that—
>
> (A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and
>
> (B) the grounds for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A) . . . .

11 U.S.C. § 1112(b).

As we recently explained:

> "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." In re Gilroy, 2008 WL 4531982, at *4 (citation omitted). In essence, § 1112(b)(1) "requires the bankruptcy court to make two determinations: (1) cause exists to convert or dismiss, and (2) which option is in the best interests of creditors and the estate." In re Gollaher, 2011 WL 6176074, at *3 (citations omitted); see also In re Farnsworth, 2009 WL 8466786, at *6.

In re Colón Martinez, 472 B.R. at 144.

a. Cause

Included in the non-exclusive statutory list of what constitutes cause is "failure to comply with an order of the court" and the "unexcused failure to satisfy timely any filing or reporting requirement . . . ." 11 U.S.C. §§ 1112(b)(4)(E) and (F). Also included is the "failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;" 11 U.S.C. § 1112(b)(4)(J). We have noted that cause may include "unreasonable

delay by the debtor that is prejudicial to creditors." In re Colón Martinez, 472 B.R. at 144.[8] A movant need only establish one ground to satisfy the statute. Id.

In its Order Dismissing Case, the bankruptcy court found that "the record of this case is lengthy and filled with unmet deadlines and the Debtor's continued disregard for the orders of this court." The court further found that the debtor had filed multiple unsuccessful disclosure statements during the three years of the case and had not complied with the court's September order regarding the filing of a feasible confirmable disclosure statement within a fixed time. Given the ample examples in the record to support these findings, there is no basis upon which we could conclude that the court was clearly erroneous in finding cause under 11 U.S.C. §§ 1112 (b)(4)(E) (failure to comply with an order of the court), and (b)(4)(J) (failure to file a disclosure statement, or to confirm a plan, within the time fixed by this title or by order of the court).

Indeed, at oral argument the debtor conceded that cause existed given that the debtor had missed several court imposed deadlines to file a disclosure statement and plan. Accordingly, we conclude that the finding of cause was not clearly erroneous.

b. Unusual Circumstances

Despite the debtor's concession, however, he argues that we should consider mitigating factors such as the failure of the many parties in the case to play a more active role in the debtor's

[8] In Colón Martinez, the debtor received several extensions before filing an inadequate and untimely plan. Id. The Panel agreed that the debtor had delayed the proceedings and neglected the extensions he had been granted. As such, the record supported the finding of cause. As for the best interests of creditors test, the Panel explained that despite the fact that the court did not employ the phrase, it could reasonably conclude that the court considered the issue. Id. at 146.

attempted reorganization,[9] and the failure of the bankruptcy court to rule on the disclosure statement and plan before ruling on the dismissal motions. Generously viewed, these additional arguments address whether facts existed to support an "unusual circumstances" defense to the motions pursuant to 11 U.S.C. § 1112(b)(2). As set forth above, that subsection prohibits conversion or dismissal if: (1) the court finds and identifies unusual circumstances demonstrating the outcome is not in the creditors' best interests; (2) the debtor or other party in interest establishes that there is a reasonable likelihood the plan will be timely confirmed; and (3) the debtor or other party in interest can demonstrate that the cause for conversion or dismissal, with exception, was an act or omission that was reasonably justified and can be cured within a reasonable time.

Although the statute first refers to the court making a finding, it is only after the debtor or interested party files an objection addressing the second two prongs that the first prong is triggered. See, e.g., Douglas Asphalt Co. v. Walton (In re Douglas Asphalt Co.), Case No. CV 510-055, 2010 WL 4777534, at *2 (S.D. Ga. Nov. 16, 2010) (explaining court need not address "unusual circumstances" unless and until debtor objects and meets burden). As a result, the initial burden for establishing a defense under this subsection rests with the debtor or interested party. See In re Dr. R.C. Samanta Roy Inst. of Sci. Tech. Inc., 465 Fed. Appx. 93, 97 (3d Cir. 2011) ("Thus, once cause is found, the burden shifts to the opposing party to show why dismissal or conversion would not be in the best interests of the estate and the creditors."); Sanders v. U.S.

[9] For example, the debtor argued that the United States Trustee should have filed more pleadings including a request to convert or appoint a trustee, the creditors should have filed a plan after the exclusivity period expired, and the court should have considered sua sponte converting the case or appointing a trustee.

Trustee (In re Sanders), No. CC-12-1398-KiPaTa, 2013 WL 1490971 (B.A.P. 9th Cir. April 11, 2013) (explaining debtor carries burden of proof under 11 U.S.C. § 1112(b)(2)); In re Triumph Christian Ctr., Inc., 493 B.R. 479, 495-96 (Bankr. S.D. Tex. 2013) (ruling same).

The record reflects that the debtor neither raised the defense below nor squarely developed it in his brief. As such, the debtor has waived the defense. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (explaining failure to brief issue in more than perfunctory manner results in waiver); Municipality of Carolina v. Baker Gonzalez (In re Baker Gonzalez), 490 B.R. 642, 650 (B.A.P. 1st Cir. 2013) (ruling issue not raised below cannot be broached for first time on appeal).[10]

c. Best Interests of Creditors

As we explained in In re Colón Martinez, if the bankruptcy court finds cause and the debtor fails to establish a valid defense, the bankruptcy court must then decide between conversion or dismissal. In re Colón Martinez, 472 B.R. at 144. As the appellees noted at oral argument, the debtor, despite having ample time and opportunity to do so, similarly never addressed this issue before the bankruptcy court. Thus, he is precluded from proceeding with that argument in this appeal. See In re Baker Gonzalez, 490 B.R. at 650.

Even if we were to consider the issue of whether the court abused its discretion in dismissing instead of converting, we would not conclude the court abused its discretion. While the bankruptcy court did not explicate its decision to dismiss instead of convert, the Panel has previously held that if the record contains enough information, the Panel may reasonably

[10] Given this waiver, we cannot conclude that the court erred in failing to consider whether unusual circumstances existed.

conclude that the bankruptcy court considered the issue. In re Colón Martinez, 472 B.R. at 146. At both the September and November 2012 hearings, the bankruptcy court referred to the motions as motions to dismiss and questioned the creditors as to who were the movants and who supported the motions. The pleadings and the transcripts from these hearings reflect that all but one of the active creditors either sought or supported dismissal instead of conversion. The only creditor who requested conversion is not an appellee. These facts reflect that the court considered the issue and made a decision based upon the record and the majority's request.

CONCLUSION

As the debtor cannot address on appeal the ?unusual circumstances" defense or the issue of dismissal versus conversion, the only issue before the Panel is whether the bankruptcy court's findings as to cause were clearly erroneous. Given that those findings were amply supported by the record and the debtor conceded cause existed, we conclude that the bankruptcy court's findings as to the existence of cause pursuant to 11 U.S.C. §§ 1112(b)(1) and (4) were not clearly erroneous. Accordingly, we **AFFIRM.**