**NOT FOR PUBLICATION**

# UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

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**BAP NO. PR 13-055**

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**Bankruptcy Case No. 03-12653-MCF**

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**EPR MARINE WELDING CONSTRUCTION SERVICES, INC.,**
**Debtor.**

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**EPR MARINE WELDING CONSTRUCTION SERVICES, INC.,**
**Appellant,**

**v.**

**NAVAL SERVICES OF PUERTO RICO, INC.,**
**Appellee.**

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**Appeal from the United States Bankruptcy Court**
**for the District of Puerto Rico**
**(Hon. Mildred Cabán, U.S. Bankruptcy Judge)**

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**Before**
**Hillman, Hoffman, and Finkle,**
**United States Bankruptcy Appellate Panel Judges.**

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**Lyssette A. Morales Vidal, Esq., on brief for Appellant.**

**No brief filed by Appellee.**

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**July 31, 2014**

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**Hillman, U.S. Bankruptcy Appellate Panel Judge.**

The debtor, EPR Marine Welding Construction Services, Inc. ("EPR"), appeals from the bankruptcy court's order dismissing its chapter 11 case, and the order denying reconsideration of the dismissal. For the reasons set forth below, we conclude that the bankruptcy court's finding that cause existed to dismiss EPR's case was clearly erroneous, and, therefore, that it erred in dismissing the case. Thus, we **REVERSE** the dismissal order and **REMAND** to the bankruptcy court for proceedings consistent with this opinion.

## BACKGROUND[1]

EPR filed a chapter 11 petition in November 2003. EPR performs repair and welding services on various types of vessels, as well as other welding services for the erection of steel structures. In its schedules, EPR listed an action pending before the superior court in San Juan, Civil Case No. K1CD2001-3200 (the "state court action"), filed by Naval Services of Puerto Rico, Inc. ("Naval Services") against EPR, Aluma Electric Corp. ("Aluma"), and the Autoridad de Los Puertos de Puerto Rico, a/k/a Puerto Rico Port Authority ("PRPA"). In the state court action, Naval Services sought to collect $1,270,148.00 for repair services it claimed to have performed on several naval vessels owned by Aluma and PRPA. EPR filed cross-claims against Aluma and PRPA.[2] On March 6, 2002, prior to EPR's bankruptcy filing, PRPA deposited with the state court $62,000.00, as payment of the balance owed under its contract with EPR (the

[1] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. § 101, et seq. All references to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure, and all references to "Local Bankruptcy Rule" are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the District of Puerto Rico.

[2] The nature of EPR's cross-claims is not apparent from the record.

"PRPA Funds"). In April 2004, special counsel was appointed to litigate the state court action on behalf of EPR.

On August 24, 2004, EPR filed its third amended schedules, in which it listed Naval Services as an unsecured creditor with a disputed claim in the amount of $1.00. Naval Services took no active role in the bankruptcy case, but on July 28, 2005, after the claims bar date (and after plan confirmation), it filed a proof of claim asserting an unsecured claim in the amount of $1,270,148.00.

On June 24, 2005, the bankruptcy court confirmed EPR's plan of reorganization dated December 6, 2004, as supplemented by an addendum dated June 14, 2005. The plan provided for various cash distributions including a pro rata distribution to unsecured creditors (with allowed claims totaling $433,905.00) as follows:

> CLASS 5 All unsecured claimants, shall receive payments equaling, in the aggregate, 10% the allowed amount of the claim upon the sale of real estate of the Debtor which is expected to occur on or before 18 months after the effective date. Contingent upon settlement of the litigation [in the state court action] and after covering all expenses, surviving debtor will cover the remaining 90% of the allowed amount of each claim from proceeds of litigation within a period of two years from the effective date or the settlement, whichever occurs first. The Plan is designed to provide a distribution to all creditors from the sale of assets, and a second distribution contingent upon the results of the litigation.

In the addendum to the plan, EPR: (1) committed to pay the initial pro rata distribution to unsecured creditors (in the aggregate amount of $43,000.00) on the effective date of the plan; (2) committed to pay a second pro rata distribution to unsecured creditors of $23,804.11 (to complete a 15% distribution) "within 10 days of the collection of funds deposited in the local court, estimated at $62,000.00" (referring to the PRPA Funds); and (3) committed to make a "final contingent payment to all unsecured creditors, equivalent up to the remaining 85% of the

allowed amounts of these claims" to be paid "within 20 days of collection of successful settlement or judgment in [EPR]'s favor in the state court [action], estimated within 2 years from the effective date of the plan." With respect to Naval Services' disputed $1.00 claim, EPR indicated (in the payment schedule attached to the addendum) that it would make an initial payment of $.10 to Naval Services on the plan effective date, that the "deferred amount" of Naval Services' claim was $0.90, that it would make an additional payment of $0.05 (in reduction of the deferred amount) upon collection of the PRPA Funds from the state court, and that "the maximum payment under the contingency" was $0.85 (the remaining portion of the deferred amount). Naval Services neither objected to the plan nor appealed the confirmation order.

On December 12, 2005, EPR filed a motion informing the bankruptcy court that it had commenced distribution under the plan and requesting entry of a final decree. It also submitted a Special Report on Plan Payments certifying that, as of November 25, 2005, it had made payments totaling $258,965.97 (including the $43,000.00 initial distribution to unsecured creditors) in accordance with the confirmed plan, that there was a balance of $71,528.26 to be paid under the plan, and that the plan was substantially consummated. The schedule of payments and balances filed by EPR reflected that it made the initial non-contingent distributions to Naval Services and other Class 5 unsecured creditors required under the plan, but had not made any distribution of the contingent amounts (neither the additional 5% distribution which was contingent upon the receipt of the PRPA Funds, nor the final distribution which was contingent upon successful recovery in the state court action). Specifically with respect to Naval Services, EPR's schedule of payments and balances showed it made a payment of $0.10 to

Naval Services, with no "balance to be paid under the Plan" to Naval Services. No parties objected to EPR's motion, and on February 23, 2006, the bankruptcy court issued its Final Decree and Certificate of Consummation, and closed the case. EPR asserts that, by November 7, 2007, it had completed distribution of the $71,528.26 balance, thereby completing its payments under the plan.

On March 4, 2010, EPR filed a motion seeking to reopen the case in order to administer assets, request authorization to settle its counterclaim against Aluma in the state court action for $50,000.00, and request the turnover of the $62,000.00 in PRPA Funds held by the state court. A few days later, EPR filed a motion requesting court approval of its compromise with Aluma. Naval Services objected to the settlement motion, arguing that it was a subcontractor of EPR, and as a subcontractor, it had direct claims against Aluma and PRPA under Puerto Rico law, and was entitled to both the $50,000.00 settlement with Aluma and the $62,000.00 in PRPA Funds held by the state court. After a hearing on July 20, 2010, the bankruptcy court approved the settlement with Aluma, but granted Naval Services until August 20, 2010, to contest the distribution of the settlement proceeds. It also stated that it was unnecessary to reopen the case, "because there is jurisdiction retained."[3]

[3] It is unclear from the record whether the case was actually reopened. It appears that after an April 14, 2010 hearing on the motion to reopen and the motion for authority to settle with Aluma, the bankruptcy court (Judge de Jesús) entered an order providing, *inter alia*: "**Wherefore, we grant the request for reopening ordering the Clerk to state if fees are due within seven days."** On April 22, 2010, the Clerk of the bankruptcy court filed a report stating that EPR needed to pay the reopening fee of $1,000.00 (Doc. 167), and on May 1, 2010, EPR filed a motion requesting a waiver of the reopening fee (Doc. 172). On July 20, 2010, the bankruptcy court (Judge Vaughn) held a hearing on the settlement motion and objection thereto, as well as the Clerk's report and EPR's request for waiver of the reopening fee. In the Minutes of Hearing, Judge Vaughn approved the compromise with Aluma, and stated: "There is no need to reopen the case, because there is jurisdiction retained."

On August 3, 2010, Naval Services filed an opposition to the distribution of the Aluma settlement proceeds, stating it did not dispute the settlement amount, but challenged EPR's right to the settlement proceeds. Naval Services restated its argument that it was a subcontractor of EPR and, as such, it had a superior right under Puerto Rico law to the funds paid by the owners (Aluma and PRPA) to the general contractor (EPR) in the litigation. EPR filed a response arguing, among other things, that Naval Services was making new allegations that were not previously raised in the state court action. Thereafter, both parties filed additional pleadings asserting their positions regarding the distribution of funds.

The bankruptcy court held hearings on February 25, 2011, and June 10, 2011, and took the matter under advisement. On July 1, 2011, the bankruptcy court issued an order in which it "denied" Naval Services' opposition to the distribution of funds. In its decision, the bankruptcy court stated that Naval Services did not effectively become a creditor in the case because it filed its proof of claim post-confirmation, after the deadline for filing claims had passed, and without leave of court. Moreover, the court rejected Naval Services' argument that it was entitled to the

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Thereafter, on August 19, 2010, the bankruptcy court (Judge de Jesús) entered an order stating: "Does the confirmed plan provide for retention of jurisdiction over this matter so that reopen[ing] is unnecessary? Clerk shall respond in 7 days." (Doc. 190). On September 13, 2010, the Clerk filed a report indicating that "the case must be reopened for statistical purposes" and that EPR should be ordered to pay the $1,000.00 reopening fee. On September 16, 2010, the bankruptcy court (Judge de Jesús) entered an order: (1) acknowledging Judge Vaughn's statement in the July 20, 2010 Minutes of Hearing that "[t]here is no need to reopen the case, because there is jurisdiction retained"; (2) indicating that her own August 19, 2010 order was entered "[b]y mistake and believing that the controversy was pending"; (3) vacating her August 19, 2010 order; and (4) stating that she was disregarding the Clerk's September 13, 2010 report.

Thus, there are two conflicting orders regarding the reopening of the case: (1) Judge de Jesús' initial order of April 14, 2010 stating that "we grant the request for reopening"; and (2) Judge Vaughn's July 20, 2010 statement in the Minutes of Hearing that "[t]here is no need to reopen the case, because there is jurisdiction retained."

funds paid by Aluma and PRPA based on a purported contractual relationship with EPR.[4] In a separate order dated July 6, 2011, the bankruptcy court ordered that the $62,000.00 in PRPA Funds held by the state court be released and deposited with the bankruptcy court for the benefit of the bankruptcy estate.

Thereafter, on August 4, 2011, the state court entered a judgment dismissing the complaint against Aluma due to its settlement with EPR in the bankruptcy case, and dismissing the complaint against PRPA, which it found to have no relationship with Naval Services.[5] Thus, the only parties remaining in the state court action were EPR and Naval Services. Moreover, as the state court dismissed the action against PRPA, and there was no pending action between EPR and PRPA, the state court ordered that the $62,000.00 in PRPA Funds remain in the state court and should not be transferred to the bankruptcy court. Thereafter, EPR once again moved the bankruptcy court to order that the $62,000.00 in PRPA Funds held by the state court be turned over to the bankruptcy court.

At a hearing on July 26, 2012, the bankruptcy court ordered the parties to file motions addressing the issue of the PRPA Funds held by the state court, including the bankruptcy court's authority to order the release of the funds by the state court considering that the state court had determined that the money should not be turned over to the bankruptcy estate. The court

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[4] The bankruptcy court stated it was basing its ruling on the fact that the state court had denied Naval Services' motion to amend its complaint to include allegations that it was a subcontractor of EPR, Naval Services' clear admissions that it was not a subcontractor of EPR, and Naval Services' failure to produce any evidence of its claim at the hearings.

[5] Although the state court's August 4, 2011 order was included in the record on appeal, it is in Spanish and the parties have not provided the Panel with a certified translation. Thus, facts pertaining to the order have been gleaned from EPR's pleadings and the bankruptcy court's summary of the order.

scheduled a status conference for March 27, 2013, and then, at EPR's request, continued it to May 8, 2013. EPR did not file its motion in compliance with the bankruptcy court's July 26, 2012 order until nine months later, just a few hours before the scheduled status conference. At the status conference, the bankruptcy court noted that EPR's motion was untimely, but nonetheless continued the hearing to June 26, 2013.

After the continued hearing, the bankruptcy court entered an order (the "Order Denying Turnover") denying EPR's request for turnover of the $62,000.00 in PRPA Funds, stating that the state court order determining that the PRPA Funds should remain in the state court was not appealed and therefore was final. EPR filed a motion to set aside, vacate, and reconsider the Order Denying Turnover, arguing that the bankruptcy court misconstrued the state court judgment of August 4, 2011. According to EPR, the state court's judgment was not a refusal to turn over the funds, but rather a stay pending further determination by the bankruptcy court as to what, if any, "effect, implementation and extent the chapter 11 plan of reorganization has in relation to creditor Naval Services." The bankruptcy court never ruled on EPR's motion for reconsideration of the Order Denying Turnover.

On August 23, 2013, Naval Services filed a motion to dismiss the bankruptcy case pursuant to § 1112(b)(4), alleging EPR had materially defaulted with respect to the confirmed plan. According to Naval Services, EPR was required to pay unsecured creditors from "'collection of funds deposited in the local court' estimated 'within 2 years from the effective date of the Plan,'" yet "eight years have elapsed since the confirmation and/or the effective date of the Plan, and the Debtor has not yet distributed any payment to unsecured creditors as proposed under the Plan." Naval Services claimed, therefore, that EPR had materially defaulted

since it "failed to pay the proposed dividend to unsecured creditors." On August 29, 2013, the bankruptcy court entered an Order and Notice Setting Hearing, stating that objections to the motion to dismiss must be filed "within fourteen (14) days from notice of this order," and warning that "[f]ailure to file a timely objection may result in the entering of an order dismissing or converting the case without further notice or hearing." The order also provided that if an objection was filed, a hearing would be held on September 17, 2013.

On September 13, 2013, Naval Services filed a second motion to dismiss on the grounds that the deadline to oppose the motion to dismiss had expired the previous day and that EPR had failed to respond. That same day, the bankruptcy court entered an Order Dismissing Case, noting that no opposition to the first motion to dismiss had been filed and that the case was dismissed "for the reasons stated in the motion to dismiss."[6]

On September 25, 2013, EPR filed a motion to reconsider and vacate the dismissal, arguing that its response to the motion to dismiss was due on Monday, September 16, 2013, and, therefore, that the bankruptcy court had prematurely issued the Order Dismissing Case on Friday, September 13, 2013. It also filed a request for entry of findings of fact, a motion for an extension of time to file its opposition to the motion to dismiss, and an opposition to the motion

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[6] The Order Dismissing Case provided as follows:

> The motion to dismiss filed by NAVAL SERVICES OF PUERTO RICO INC (docket #264) having been duly notified to all parties in interest, and no replies having been filed, it is now
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> ORDERED, ADJUDGED AND DECREED that the instant case be and is hereby dismissed for the reasons stated in the motion to dismiss; and it is further
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> ORDERED, ADJUDGED AND DECREED that the Clerk closes any contested matter or adversary proceeding pending in the instant case.

to dismiss. Naval Services did not respond to any of the motions. On October 30, 2013, the bankruptcy court, without a hearing, entered an order denying reconsideration of the Order Dismissing Case, without further explanation ("Order Denying Reconsideration"). The bankruptcy court never ruled on EPR's other motions.

EPR timely filed a notice of appeal of the Order Dismissing Case and the Order Denying Reconsideration.

## JURISDICTION

Before addressing the merits of an appeal, we must determine that we have jurisdiction, even if the litigants do not raise the issue. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998). The Panel has jurisdiction to hear appeals from final judgments, orders, and decrees. 28 U.S.C. § 158(a)(1). "An order dismissing a chapter 11 case is a final, appealable order." Soto Carreras v. Palmas Doradas Condo. Homeowners Ass'n (In re Soto Carreras), BAP No. PR 13-001, 2013 WL 7118201, at *3 (B.A.P. 1st Cir. Oct. 24, 2013) (internal quotations omitted) (citing Farnsworth v. Morse (In re Farnsworth), BAP No. MW 08-086, 2009 WL 8466786, at *6 (B.A.P. 1st Cir. Nov. 20, 2009); Gilroy v. Ameriquest Mortg. Co. (In re Gilroy), BAP No. NH 07−054, 2008 WL 4531982, at *4 (B.A.P. 1st Cir. Aug. 4, 2008)). Moreover, an order denying reconsideration is final if the underlying order is final and together the orders end the litigation on the merits. Garcia Matos v. Rivera (In re Garcia Matos), 478 B.R. 506, 511 (B.A.P. 1st Cir. 2012) (citations omitted). As the Order Dismissing Case and the Order Denying Reconsideration meet these criteria, we have jurisdiction to hear this appeal.

## STANDARD OF REVIEW

"[W]hen considering a § 1112(b) dismissal, we review the bankruptcy court's findings of fact for clear error and conclusions of law *de novo*." In re Colón Martinez, 472 B.R. 137, 143 (B.A.P. 1st Cir. 2012) (citing In re Gilroy, 2008 WL 4531982, at *4). A bankruptcy court's factual findings are clearly erroneous "if, after a review of the entire record, [the court is] 'left with the definite and firm conviction that a mistake has been committed.'" Bezanson v. Thomas (In re R & R Assocs. of Hampton), 402 F.3d 257, 264 (1st Cir. 2005) (internal quotations omitted) (citing Groman v. Watman (In re Watman), 301 F.3d 3, 8 (1st Cir. 2002)).

## DISCUSSION

EPR argues that the bankruptcy court erred in entering the Order of Dismissal and in denying its motion for reconsideration because: (1) the bankruptcy court failed to make a determination of cause or consider whether dismissal was in the best interest of creditors as required by § 1112(b)(1); (2) the Motion to Dismiss was procedurally flawed and failed to give adequate notice; (3) the Order of Dismissal was premature; and (4) the bankruptcy court lacked authority to dismiss the case after confirmation, discharge, and entry of a final decree. We begin with a discussion of § 1112(b).

Section 1112(b) governs conversion or dismissal of a chapter 11 case. It provides, in relevant part, that:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under [chapter 11] to a case under chapter 7 or dismiss a [chapter 11 case], whichever is in the best interests of creditors and the estate, for cause . . . .

11 U.S.C. § 1112(b)(1).

As the Panel has 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 interests of creditors and the estate."

In re Colón Martinez, 472 B.R. at 144 (quoting In re Gilroy, 2008 WL 4531982, at *4).

Thus, a determination under § 1112(b)(1) requires a two-step analysis. Id. First, the bankruptcy court must determine whether cause exists to convert or dismiss the chapter 11 proceeding; and second, if cause exists, the court must consider which option is in the best interests of creditors and the estate. Id. (citing Gollaher v. U.S. Trustee (In re Gollaher), No. UT-11-019, 2011 WL 6176074, at *3 (B.A.P. 10th Cir. Dec. 13, 2011); In re Farnsworth, 2009 WL 8466786, at *6).

Subsection 1112(b)(4) provides a lengthy but nonexhaustive list of what constitutes "cause." 11 U.S.C. § 1112(b)(4). This section includes "material default by the debtor with respect to a confirmed plan." 11 U.S.C. § 1112(b)(4)(N). A default with respect to a plan may occur long after confirmation and long after substantial consummation of the plan. 7-1112 Collier on Bankruptcy ¶ 1112.04[n] (16th ed. 2014) (citing cases). Under § 1112(b), "the court may convert or dismiss the case at any time under [sic] the occurrence of a default, provided that the default is also material." Id. Although the Code does not define the term "material," the failure to make payments when due under the plan constitutes a material default. Id.

In its motion to dismiss, Naval Services argued that EPR materially defaulted with respect to the confirmed plan, which provided that "distribution to unsecured creditors would be

effected from 'collection of funds deposited in the local court' estimated 'within 2 years from the effective date of the Plan,'" yet "[e]ight years have elapsed since the confirmation and/or the effective date of the Plan, and the Debtor has not yet distributed any payment to unsecured creditors as proposed under the Plan." Naval Services also argued that "litigation of the state court case has been dormant for more than two years, without a date yet set for trial, due to [EPR]'s failure to prosecute." Thus, Naval Services argued, cause existed to dismiss the case under § 1112(b). In dismissing the case, the bankruptcy court did not recite any specific findings regarding cause, but stated that it was dismissing the case "for the reasons stated in the motion to dismiss"— namely, material default under the confirmed plan.

It is unclear from the Motion to Dismiss whether Naval Services was claiming that EPR failed to make *any* payments to unsecured creditors, or whether Naval Services was really alleging that EPR had failed to pay the proposed deferred payments relating to the state court action.[7] Any claim that EPR failed to make *any* payments to unsecured creditors is clearly incorrect, as evidenced by the schedule of payments attached to EPR's motion for a final decree, and the bankruptcy court's finding of substantial consummation and entry of the final decree. Thus, we consider whether EPR's failure to make the deferred payments relating to the state court action constituted a material default under the plan.

We conclude that the bankruptcy court erred in finding that there was a material default under the plan. As noted above, the original plan provided for essentially two phases of payments to unsecured creditors: an initial 10% distribution to all unsecured creditors to be paid

[7] This ambiguity is further exacerbated by the fact that the bankruptcy court failed to recite any specific findings as to cause or how EPR defaulted under the terms of the confirmed plan.

from the sale of assets; and a second distribution which was "*contingent upon the results of the litigation*." (emphasis added). The addendum to the plan added an intermediate phase, also contingent, of an additional 5% payment to be paid after recovery of the PRPA Funds held by the state court, and clarified that "[a] final *contingent* payment to all unsecured creditors" would be paid after "collection of *successful settlement or judgment in debtor's favor* in the state court complaint . . . ." (emphasis added). In its motion for a final decree, EPR informed the court that it had commenced distribution under the plan and certified that, as of November 25, 2005, it had made payments totaling $258,965.97 (including $43,000.00 to unsecured creditors) in accordance with the confirmed plan, leaving a balance of $71,528.26 to be paid under the plan. Thus, the plan was substantially consummated. Based on this information, the bankruptcy court, on February 23, 2006, entered a Final Decree and Certificate of Consummation and closed the case. No parties objected to the Debtor's motion for a final decree and no party appealed the entry of the final decree. Moreover, EPR asserts that by November 7, 2007, it had completed distribution of the $71,528.26 balance, thereby completing its payments under the plan. There is nothing in the record that contradicts EPR's statement. Thus, the record shows that EPR made all of the *non-contingent* payments required under the first phase of distribution.

Based on the terms of the confirmed plan, the next phase of distribution (5% of the deferred amount) to unsecured creditors was contingent upon recovery of the PRPA Funds from the state court, and the final phase of distribution (up to 85% of the deferred amount) to unsecured creditors was contingent upon recovery in the state court action. Neither of these events has occurred. Although Naval Services alleges that the state court action was dormant due to EPR's failure to prosecute, this argument is disingenuous. After the state court dismissed

the complaint as to Aluma and PRPA, the only parties remaining in the action were Naval Services and EPR. Naval Services is the plaintiff, so any claim of "failure to prosecute" would have to be directed to Naval Services, not EPR. Moreover, the record shows that EPR actively pursued recovery on its cross-claims in the state court action and that its settlement with Aluma brought an additional $50,000.00 into the estate in further implementation of the plan. In addition, EPR diligently sought turnover of the $62,000.00 in PRPA Funds held by the state court for further distribution under the plan. The record shows that the bankruptcy court initially ordered that the $62,000.00 in PRPA Funds be released and deposited with the bankruptcy court for the benefit of the estate. When the state court, however, subsequently ordered that the funds remain in the state court, EPR asked the bankruptcy court a second time to order that the PRPA Funds be turned over for the benefit of the bankruptcy estate. The bankruptcy court ultimately denied EPR's request for turnover of the PRPA Funds in light of the state court's rulings. EPR filed a motion to set aside, vacate, and reconsider that order, arguing that the bankruptcy court had misconstrued the state court's decision, but the bankruptcy court never ruled on the motion. EPR's conduct was anything but passive.

The record shows that EPR paid its creditors in accordance with the plan. The estate was fully administered, and the bankruptcy court entered a final decree, discharged EPR, and closed the case. The proposed deferred payments to unsecured creditors under the plan were contingent upon recovery in the state court action, and no such recovery (beyond the settlement payment by Aluma) has been made despite EPR's efforts. To the extent that EPR has failed to make the deferred *contingent* payments to unsecured creditors, that failure does not constitute a default under the plan, let alone a material one. Consequently, we conclude that the bankruptcy

court's finding that EPR materially defaulted under the terms of the confirmed plan was clearly erroneous, and that the bankruptcy court erred in dismissing EPR's case under § 1112(b). Having so determined, we need not address the other arguments raised by EPR in this appeal.

## CONCLUSION

For the foregoing reasons, we **REVERSE** the bankruptcy court's order dismissing EPR's chapter 11 case and the order denying reconsideration of the dismissal, and **REMAND** for proceedings consistent with this opinion.