Record on Appeal
Res Judicata
BAP Rule 8006-1
BAP Rule 8009(b)
11 U.S.C. § 364(d)
11 U.S.C. § 361(3)
11 U.S.C. § 1307(c)
11 U.S.C. § 1329(a)
11 U.S.C. § 1326(a)(6)
Fed.R.Bankr.P. 9014
Fed.R.Bankr.P. 9023
Fed.R.Civ.P. 59

Smith v. Roost et. al — BAP # OR-00-1029-MaBK
OR-00-1192-MaBK

In Re Smith — Bankruptcy # 697-62183-aer13

11/30/00 BAP (affirming Radcliffe)
(underlying decisions in this consolidated appeal are not in opinion index)

Unpublished

Debtor's confirmed plan provided for monthly payments, plus a sale or refinance of her main asset by a date certain in an amount sufficient to pay all claims or the case would be dismissed. Debtor defaulted on her monthly payments. As the sale or refinance date approached, she moved to "encumber property", to allow a refinance with a third party lender. The new loan would pay only the undisputed portions of the claims, leaving a substantial portion of the first lienholder's claim unpaid, plus all of the second lienholder's claim unpaid. The refinancing lender was to be provided a first lien on the property. The new loan would be at a higher interest rate than the existing loans.

At about the same time, one of the major secured creditors moved to dismiss or in the alternative, convert to Chapter 7.

After hearing, the court denied the motion to encumber and granted the motion to convert, the Debtor having advised the court that given the choice between dismissal and conversion she preferred conversion. Debtor then filed motions to reconsider those orders, and sought (by motion) to modify her plan to eliminate direct payments to the major secured creditor. The motions to reconsider were denied. Further, the court did not allow plan modification.

On Appeal: Affirmed.

The BAP first noted that Debtor had not provided an adequate record on appeal, thus providing an alternative ground to affirm.

It analyzed the motion to encumber under § 364(d). The bankruptcy court did not abuse its discretion in failing to allow a priming lien, where no protection, other than a purported equity cushion was offered. Debtor had not shown the ability to service the new loan, which, at a higher interest rate, would eat away more quickly at any equity cushion. Also, accruing attorney fees and interest on the secured creditor's claims, would eat away at the cushion. The BAP agreed that "priming" loans should only be allowed in "extraordinary situations."

The BAP rejected Debtor's argument that the conversion motion wasn't properly served because it wasn't served on all creditors and parties in interest. Service on the Debtor, and notice of the hearing confined to interested parties was sufficient under the rules. Further, dismissal was already contemplated by the plan's terms.

The BAP rejected Debtor's argument that pending claims litigation prejudiced her ability to comply with the plan. Further, the plan's terms could not be relitigated, as confirmation was res judicata. The BAP found no admissible evidence in the record supporting Debtor's contention that the secured creditors had thwarted sales attempts. It agreed there was adequate cause under § 1307(c) to convert given Debtor's prior plan defaults, and likewise, to deny confirmation of any modified plan as infeasible, especially because the proposed modified plan did not extend the original sale or refinance deadline, which had already passed.

Debtor's motions for reconsideration were treated as ones for new trials under Fed.R.Bankr.P. 9023 incorporating Fed.R. Civ.P. 59. The bankruptcy court properly denied them because Debtor made the same arguments in those motions as she made originally at hearing.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re	BAP No. OR-00-1029-MaBK BAP No. OR-00-1192-MaBK (consolidated)
GERALDINE KAY SMITH, Debtor.	Bk. No. 697-62183-aer-13
GERALDINE KAY SMITH, Appellant,	
v.	**M E M O R A N D U M[1]**
ERIC R.T. ROOST, Chapter 7 Trustee, WESTERN BANK; GOLD COUNTRY LENDERS, Appellees.	

Argued and Submitted on October 12, 2000
at Eugene, Oregon

Filed - November 30, 2000

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

Honorable Albert E. Radcliffe, Chief Bankruptcy Judge, Presiding

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Before: MARLAR, BRANDT, and KLEIN, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

E00-16(31)

INTRODUCTION

The chapter 13[2] debtor attempted to incur post-confirmation refinancing of her real property by obtaining a loan which would be secured by a superpriority lien. Her motion for approval of the borrowing was denied. At the same time, the bankruptcy court granted the secured creditor's motion to convert the chapter 13 case to chapter 7. The debtor appealed both orders, as well as the orders which denied her post-judgment motions, including a motion to modify the plan. The appeals have been consolidated, and we AFFIRM.

FACTS AND PROCEDURAL HISTORY

The debtor filed a chapter 13 petition on April 17, 1997. She owned a bed and breakfast (the "property"), in Gold Beach, Oregon. The property, valued in the confirmed chapter 13 plan at $499,000, was encumbered by three liens: (1) the first-position lien of Western Bank ("Western Bank"); (2) the second-position lien of the county taxing authority; and (3) the third-position lien of Gold Country Lenders ("GCL"). Western Bank and GCL (together "appellees") are oversecured creditors.

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[2] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, while rule references are to the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), Rules 1001-9036.

A. The Appellees' Secured Claims

Western Bank filed its first proof of claim in 1997, to which the debtor objected. Following litigation, a failed settlement attempt, and further litigation on a second amended proof of claim, Western Bank then filed its third amended proof of claim, in 1998, in the amount of $106,130.26. In July 1999 (post-confirmation), the bankruptcy court allowed Western Bank's secured claim in the amount of $102,669.89 plus interest, pursuant to § 506(b)[3].

The debtor appealed the order allowing the secured claim. That appeal was consolidated with the her appeal of the bankruptcy court's order denying her motion for reconsideration of the order confirming her chapter 13 plan. The consolidated appeal was pending during these proceedings in bankruptcy court. The BAP subsequently affirmed the bankruptcy court's orders. See In re Smith, No. OR-98-1499 and No. OR-99-1563 (consolidated) (9th Cir. BAP Oct. 11, 2000) (amended mem.).

GCL also filed proofs of claim. Its third amended claim

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[3] The interest was awarded pursuant to § 506(b) based on Western Bank's oversecured status. This section provides:

> (b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

was in the amount of $61,182.59. The debtor objected to each proof of claim. Following trial, in July 1999, the bankruptcy court allowed GCL's secured claim in the amount of $68,980.91. This amount included $43,000 in principal, based on a cross-collateralized installment note, plus interest, attorneys' fees and costs.

The debtor appealed that order. The panel affirmed the order allowing GCL's claim, but remanded to the bankruptcy court so that it could recalculate the amount of the claim. The panel directed that the claim should not include any sums based on two underlying notes, including a $15,000 note that had been paid off by investors, or a new $15,000 note that had been executed in favor of the investors, which were not referred to in the GCL trust deed. See In re Smith, No. OR-99-1542 and No. OR-99-1543 (consolidated) (9th Cir. BAP Aug. 4, 2000) (mem.).[4] In any event, following any deduction to be made upon remand, GCL will likely have an allowed secured claim for a substantial amount, subject to further appeal, if any.

B. The Plan

The debtor's first chapter 13 plan relied on funding from her income. However, the court denied confirmation of that

[4] We take judicial notice of our prior decisions. In re Ditter, 205 B.R. 213, 214 n.3 (9th Cir. BAP 1996); Fed.R.Evid. 201.

plan, in part based on lack of feasibility. See Transcript of November 9, 1999 hearing, p. 4.

On November 20, 1997, the debtor filed a Third Amended Plan ("Plan"), which contemplated full payment of all allowed claims from the proceeds of either a sale or a refinancing of her property. The confirmation order was entered on May 19, 1998. That confirmation order was not timely appealed and is final.[5]

Paragraph 2 of the Plan provided that the secured creditors would be paid their undisputed claims according to their pre-petition contract terms, unless otherwise provided in the Plan, and that the following pre- and post-petition arrearages would be cured and paid through the Plan:

Western Bank	$10,771, plus $9,693.90 post-petition arrearage
Curry County Tax Collector	$12,114, plus $2,900 post-petition arrearage
GCL	$46,520

All creditors under the Plan would receive a minimum of 100%, plus a six percent discount factor, on their allowed claims. The interest rate on Western Bank's secured claim was modified to 9.375% by the confirmation order.

Paragraph 4 of the Plan further provided that Western Bank would be paid its regular post-petition payments outside the

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[5] The debtor filed an untimely motion for reconsideration of the confirmation order. The panel determined that there were no grounds to vacate the underlying confirmation order, and it was affirmed. See In re Smith, No. OR-98-1499 and No. OR-99-1563 (consolidated) (9th Cir. BAP Oct. 11, 2000) (amended mem.).

Plan, a sum of about $1,050 per month. Paragraph 4, as modified by the confirmation order, also provided that other secured creditors, the Oregon Department of Veterans Affairs (ODVA), and Frank and Marie Webre, whose claims were secured by other collateral, would also have their regular post-petition loan payments paid directly by the debtor. The post-petition real property taxes were also to be paid pursuant to Paragraph 4.

The confirmation order further provided that "all allowed claims" would be paid "in full as of the date of the sale" from "a lump sum payment of all net proceeds from the sale or refinancing of [the subject] real property."

Paragraph 2(e) of the Plan described the prospective sale of the property and stated, in relevant part:

> The selling season in the Gold Beach area is from April 1st to October 1st. There are currently two separate parties who have inspected the property and want to buy the property. One party is a client of Century 21 Realty . . . . The other is a party with whom the seller is dealing . . . directly, who is having his attorney draft an offer based on a sales price which would pay all debt of the estate. Century 21 also has another client to whom they want to show the property. Coldwell Banker Realty in Gold Beach also has a client to whom they are planning to show the property, when this client comes to town. Debtor has in the area of at least $250,000 equity, after paying her debt.

The confirmation order added a deadline for the sale or refinancing of the property, or for dismissal of the case:

> If the Debtor has not closed a sale or refinancing of the real property . . . in an amount sufficient to pay the allowed amounts of all claims before November 1, 1999, this case shall be and hereby is, dismissed effective as of that date.

The confirmation order further required the trustee's

consent or notice and hearing, in order for the debtor, out of the ordinary course, to incur debt or to sell or encumber her interest in the real property during the five-year plan. By late 1999, the debtor had neither sold nor refinanced the property, as required under the Plan.

C. Debtor's Motion to Encumber Real Property

In October 1999, the debtor filed a "Motion To Encumber Property And Motion For Stay, Pending Appeal, Of Only Disputed Claims and Declaration."[6] The debtor sought to borrow $140,000, and proposed to give the new lender a first priority deed of trust on the property to secure the loan, thereby "priming," or taking precedence over, the other liens on the property. The loan was to be amortized over 30 years at 12% interest per annum, with a balloon payment in five years. The monthly payment would be $1,568.

The debtor stated that she would use the loan proceeds to pay all allowed claims against the estate, including the undisputed portion of Western Bank's secured claim (approximately $86,000). The debtor did not propose, however, to pay GCL any of its claim from the loan funds, because she

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[6] The debtor sought to stay the payments under the bankruptcy court's orders confirming the chapter 13 plan and allowing Western Bank's claim, pending her appeal of those orders. The panel subsequently rendered its decision and affirmed the bankruptcy court's orders.

maintained that that claim was still disputed and unresolved. She conceded, however, that the Western Bank claim had grown to over $100,000, and the GCL claim had grown to about $68,000.

The debtor stated that she had not been able to obtain an unsecured loan, and that this refinancing was the best way in which to pay off the existing creditors, while she continued to market her property for sale. She calculated that there would be an equity cushion of about $250,000 which would secure the disputed claims of the appellees.[7]

By the time of the debtor's motion, her Plan payments had been delinquent on several occasions, and the debtor had not been paying Western Bank its regular post-confirmation payments outside the Plan. Both Western Bank and GCL objected to the debtor's motion.

D. Motion to Dismiss or Convert

On October 19, 1999, GCL filed a "Motion To Dismiss Or Convert" the debtor's chapter 13 case. GCL argued that the November 1, 1999 deadline for selling or refinancing would have passed by the time of the November 9, 1999 hearing on the debtor's motion to encumber. GCL also argued that the debtor's

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[7] The debtor figured that the disputed claims would total about $103,000 plus attorneys' fees ($35,000 for Western Bank plus $68,804 for GCL). She then subtracted $243,000 (the $140,000 new first lien plus $103,000) from the $499,000 value, leaving an equity cushion of $256,000.

refinancing proposal did not provide any payment of GCL's approximate $68,000 claim. GCL maintained that the debtor had missed several regular payments to Western Bank since confirmation, totaling more than $13,000 in arrearages, and that such default jeopardized its lien position. In addition, GCL maintained that the debtor was not paying her real property taxes and owed over $19,000 in back taxes.[8]

The debtor opposed the motion. She maintained that it had not been properly noticed to all creditors and interested parties. The debtor also continued to dispute the appellees' claims. Although the debtor did not dispute that payments were overdue to Western Bank, she argued, nonetheless, that she did not have to pay Western Bank anything until that claim and its related contract issues were resolved. She contended that the appellees were adequately protected by an equity cushion in the property. She maintained that no taxes were overdue, because certain of her payments had not been credited; she also stated that any tax delinquencies would be cured, in any event, through the refinancing proposal.

The debtor further argued that she was capable of meeting the Plan payments. She maintained that ODVA and the Webres had agreed to be paid directly by the debtor, and she blamed Western

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[8] The record does not contain all of the evidence and/or exhibits concerning the outstanding debt. The transcript of the pertinent hearing is only a partial transcript consisting of the bankruptcy court's ruling. We note that the debtor has the burden of providing an adequate record for the panel's review. In re Burkhart, 84 B.R. 658, 660 (9th Cir. BAP 1988).

Bank for the language in the Plan and confirmation order which required those creditors also to be paid by November 1, 1999. Finally, the debtor contended that her case should not be converted or dismissed where the Plan provided for 100% payment of allowed claims.

E. Combined Hearing and the Bankruptcy Court Ruling

The hearing on both the debtor's motion to encumber and GCL's motion to dismiss or convert was held on November 9, 1999, following notice to interested parties. The bankruptcy court made oral findings.

On the debtor's motion to encumber the real property, the bankruptcy court found that the debtor's refinancing plan was infeasible because she had not been making all of the regular payments to the secured creditors, including Western Bank, and had periodically fallen behind on her scheduled Plan payments.

The court observed that the debtor was proposing to postpone payment to the appellees indefinitely. She proposed to pay only about $86,000 of the Western Bank claim, which had climbed to over $100,000. The court found that the new $140,000 loan thus exceeded the amount by which the Western Bank loan would be reduced, and that it would require payment of a higher interest rate.

Since the debtor had not been able to make all of her regular payments to date, the bankruptcy court found that

incurring this new loan debt and new lien would be "a substantial impairment that does not exist at this time to the remaining $40,000 or so of the Western Bank claim" as well as create "a substantial diminution in the position of Gold Country Lenders who comes behind the current Western Bank loan."

The bankruptcy court noted that, while there was equity in the property, it was being eroded by the nonpayment of the secured debt and the continuing accrual of interest. In addition, the bankruptcy court found that the substantial litigation in the case would entitle the oversecured appellees to seek reimbursement from the debtor for their attorneys' fees.

The bankruptcy court further found that the debtor had not sold the property, as provided for in the Plan, even though two peak selling seasons had passed. The court noted that the debtor's previous operating plan had been denied for lack of feasibility, and the reason the present Plan had been confirmed was because it provided for the sale or refinance, and because of the amount of the debtor's then-equity.

Therefore, the bankruptcy court denied the debtor's motion to encumber and converted the case to chapter 7.[9] Its order converting the case was entered on November 12, 1999, and its order denying the debtor's motion was entered on November 22,

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[9] The bankruptcy court noted that the debtor, at an earlier hearing on Western Bank's motion to dismiss, had stated her preference for conversion rather than dismissal, if it came to that. The debtor also raised this point in her opposition to GCL's motion to dismiss.

1999. The debtor filed timely post-judgment motions.

F. The Post-Judgment Motions

The debtor's motions sought to: (1) alter or amend the conversion order and the order denying her motion to encumber; (2) modify the plan; and (3) stay the conversion order.[10]

The debtor contested the bankruptcy court's findings that she was in material default under the Plan and that the refinancing plan was infeasible or did not adequately protect the appellees.

The debtor stated that she was justified in not paying Western Bank's contract payments because the Bank would somehow improperly be paid twice. She explained that her Plan contained inconsistent provisions in that it provided for payment of Western Bank's allowed secured claim from the lump sum sale or refinancing proceeds, while at the same time providing for regular payments in accordance with the terms of the existing agreements. Therefore, she contended that Paragraph 4 of the Plan should be modified to delete Western Bank, such that its secured claim would only be paid from the sale or refinancing proceeds, and the bank would no longer be entitled to receive

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[10] The debtor has not presented an issue or argument on appeal concerning the bankruptcy court's denial of her motion for a stay of the conversion order pending appeal. See In re Wymer, 5 B.R. 802, 806 (9th Cir. BAP 1980). Thus, this issue is deemed abandoned. In re Branam, 226 B.R. 45, 55 (9th Cir. BAP 1998), aff'd mem., 205 F.3d 1350 (9th Cir. 1999).

regular monthly payments pursuant to the underlying note.

The debtor maintained that Western Bank's form of confirmation order caused this confusion. She also stated that unexpected maintenance and repair costs caused her to fall behind in her Plan payments. She asserted that she could cure all post-petition defaults within a few months, as she had done on other occasions. The debtor contended that she was not in arrears in any tax payments. Nor, according to the debtor, were there any payments owing to Smuggler's Cove HOA, the other secured creditor on the property.

On December 1, 1999, the bankruptcy court denied the debtor's motion for reconsideration of the conversion order and all other relief set forth in that motion. On December 8, 1999, the bankruptcy court denied the debtor's motion to alter or amend the order denying her motion to encumber.

On December 13, 1999, the debtor timely appealed the order of conversion, the order denying her motion to encumber, and the two orders denying her motions for reconsideration. These appeals were consolidated.[11]

ISSUES

The debtor has listed 10 issues in appeal No. 00-1029 and

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[11] Subsequently, on May 26, 2000, the bankruptcy court approved the trustee's motion to sell the subject real property. However, as of the time of oral argument, a sale had not been consummated.

11 issues in appeal No. 00-1192. Eight of the issues are the same in both appeals. Some of the stated issues will not be addressed because they are outside our jurisdiction, irrelevant to this appeal, or moot, in light of the debtor's previous appeal of the claim allowance and Plan confirmation orders, and the panel's affirmance thereof. Distilled, the remaining issues can be restated as follows:

1. Whether the bankruptcy court erred when it determined that the debtor's refinancing proposal did not adequately protect the appellees' secured claims.

2. Whether the bankruptcy court correctly found "cause" to convert the debtor's chapter 13 case under § 1307(c).

3. Whether the bankruptcy court abused its discretion by denying the debtor's motion to modify the Plan.

4. Whether the bankruptcy court abused its discretion by denying the debtor's motions for reconsideration.

STANDARD OF REVIEW

We review the bankruptcy court's findings of fact under the clearly erroneous standard, and its conclusions of law are

reviewed de novo. In re Powers, 202 B.R. 618, 620 (9th Cir. BAP 1996). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

The bankruptcy court's decision whether to allow the debtor to incur debt secured by a senior lien under § 364 is reviewed for an abuse of discretion. See § 364(d)(1) (providing that the bankruptcy court "may authorize" such credit or lien). The determination of whether a secured creditor is "adequately protected" is a finding of fact, which can only be reversed on appeal if it is clearly erroneous. In re Mellor, 734 F.2d 1396, 1399 (9th Cir. 1984); Fed.R.Bankr.P. 8013.

The bankruptcy court's decision to dismiss or convert a chapter 13 case is reviewed for an abuse of discretion. See In re Leavitt, 171 F.3d 1219, 1221 (9th Cir. 1999); In re Green, 64 B.R. 530, 531 (9th Cir. BAP 1986) (word "may" under § 1307(c) is a "permissive word"). We also review the bankruptcy court's refusal to confirm a modified plan for an abuse of discretion. In re Than, 215 B.R. 430, 433 (9th Cir. BAP 1997); Powers, 202 B.R. at 620. The bankruptcy court's ruling on a motion for reconsideration is reviewed under the abuse of discretion standard. In re Agric. Research & Tech. Group, Inc., 916 F.2d 528, 533 (9th Cir. 1990).

A bankruptcy court abuses its discretion only when we have a definite conviction that it made a clear error of judgment in its conclusion, upon weighing all relevant factors. Corder v. Howard Johnson & Co., 53 F.3d 225, 229 (9th Cir. 1994).

DISCUSSION

A. Inadequate Record on Appeal

The debtor has assigned error to the bankruptcy court's factual findings. A finding of fact is "clearly erroneous" when, although there is evidence to support it, the panel on the entire evidence "is left with the definite and firm conviction that a mistake has been committed." United States Gypsum Co., 333 U.S. at 395. Thus, in order to review a factual finding for clear error, the debtor must provide a record on appeal containing the entire transcript, and all other relevant evidence considered by the bankruptcy court. In re McCarthy, 230 B.R. 414, 417 (9th Cir. BAP 1999); Burkhart, 84 B.R. at 660-61; 9th Cir. BAP Rules 8006-1 and 8009(b).

The debtor has only provided that portion of the November 9, 1999 hearing which contains the court's ruling. We can presume that the debtor did not regard the missing portions of the transcript as helpful to her appeal. McCarthy, 230 B.R. at 417; In re Gionis, 170 B.R. 675, 680-81 (9th Cir. BAP 1994), aff'd mem., 92 F.3d 1192 (9th Cir. 1996). Moreover, we can

affirm where the record is inadequate to show clear error. In re Friedman, 126 B.R. 63, 68 (9th Cir. BAP 1991); see also In re Massoud, 248 B.R. 160, 163 (9th Cir. BAP 2000). Here the record is inadequate; that inadequacy is an alternate basis for our affirmance of the bankruptcy court's orders.

B. The Debtor's Motion to Encumber - § 364(d)

The debtor sought to refinance her property, pursuant to the terms of the confirmed Plan, by borrowing $140,000 and giving the new lender a senior priming lien on the property. The terms provided for an interest rate of 12% per annum and a balloon payment after five years. The monthly payment would have been slightly more than the payment to Western Bank.

The debtor contends that the bankruptcy court failed to determine the amount of any delinquency in Plan payments, and that its conclusion that the proposed refinance would mean a higher monthly payment was a mistake of fact. However, the debtor has failed to provide the complete transcript of the evidentiary hearing. Therefore, the panel is limited to a review of the record provided, in light of the court's ruling and conclusions.

Section 364(d) provides that the bankruptcy court, after notice and hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior lien on property of the estate that is already subject to a lien, if "there is adequate

protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted." § 364(d)(1)(B).[12] The debtor has the burden of proof on the issue of adequate protection. § 364(d)(2). She maintained that the equity cushion provided adequate protection.

Section 361 provides that adequate protection under § 364 may be provided by "granting such other relief . . . as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property." § 361(3). A classic method for finding adequate protection is the existence of an equity cushion, which if large enough may be the sole basis for adequate protection. Mellor, 734 F.2d at 1400. An equity cushion is defined as "the value in the property, above the amount owed to the creditor with a secured claim, that will shield that interest from loss due to any decrease in the value of the property" during the pertinent time period. Id.

The purpose of adequate protection under § 361 is to "insure that the secured creditor receives in value essentially

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[12] GCL maintains that § 364(d)(1) does not apply to post-confirmation debt, since the property was no longer "property of the estate." See § 1327(b) (vesting property in the debtor upon confirmation, unless the plan provides otherwise.) The record does not contain any legal conclusions by the bankruptcy court as to this argument. We need not reach this interesting issue, but note that all parties are bound by the confirmed Plan, which provided for refinancing by the deadline of November 1, 1999 -- clearly post-confirmation.

what he bargained for . . . ." Id. at 1401. The determination of adequate protection is ultimately an equitable one, decided on a case-by-case basis. See In re Am. Mariner Indus., Inc., 734 F.2d 426, 431 (9th Cir. 1984) (citing H.R. Rep. No. 595 at 339, 1978 U.S.C.C.A.N. at 6295; 3 COLLIER ON BANKRUPTCY § 361.03[1] (15th ed. 2000). Thus, facts may exist which show that the equity cushion by itself will not adequately protect the creditor by giving him the benefit of his bargain. See In re Colrud, 45 B.R. 169, 178 (Bankr. D.Alaska 1984) (holding, under Mellor, that an equity cushion "will suffice as adequate protection under § 362(d)(1) and § 361 provided there are no other factors which weigh more heavily in the creditor's favor"). When a priming lien pursuant to § 364(d)(1) is involved, courts may also look to the speculative nature of the financing, In re Mosello, 195 B.R. 277, 292 (Bankr. S.D.N.Y. 1996), or question whether the secured interest to be primed is being "unjustifiably jeopardized." In re Aqua Assocs., 123 B.R. 192, 196 (Bankr. E.D.Pa. 1991).

In this case, the oversecured appellees were entitled to protection of their interest in the property, which interest included their allowed secured claims -- including § 506(b) post-petition interest and attorneys' fees -- up to the value of the property. See In re McCombs Props. VI, Ltd., 88 B.R. 261, 266 (Bankr. C.D.Cal. 1988) (§ 506(b) requires payment of interest on a secured creditor's claim during the bankruptcy to be taken from the cushion).

The bankruptcy court found that the appellees' secured interests were not adequately protected because the debtor had proven that she was unable to service the existing debt. Thus, a new debt, with higher accruing interest, would likely erode the existing equity cushion. In addition, the appellees' secured debt continued to accrue post-petition interest, attorneys' fees, and costs. This scenario was especially troublesome because the Plan was intended, in large part, to cure arrearages and to pay post-petition priority tax debt.

The debtor contended that she could cure any default in Plan payments, as she had done on other occasions. She contended that the new loan would also be used to cure the existing defaults. However, her proposal was only to pay $86,000 of Western Bank's claim and none of GCL's claim. That meant that the appellees, whose allowed claims were still to be determined, would assume greater risks while a new lender would prime their liens.

The court's ability, under § 364(d), to prime an existing lien is "reserved for 'extraordinary' situations." 3 COLLIER, supra, § 364.05. "When the effect of new borrowing with a senior lien is merely to pass the risk of loss to the holder of the existing lien, the request for authorization should be denied." Id. The bankruptcy court recognized that the secured lenders were assuming the risk of not being paid the full amount of their allowed claims, while at the same time, their equity cushions were being substantially depleted. A bankruptcy court

is rightly reluctant to force a secured party to take on new risks. See In re Chevy Devco, 78 B.R. 585, 590 (Bankr. C.D. Cal. 1987).

The bankruptcy court's finding that the appellees were not adequately protected by the proposed financial arrangement was not clearly erroneous. Therefore, the bankruptcy court's denial of the debtor's motion to obtain a new priming lien was based upon sound reasoning and must be affirmed.

C. Conversion - § 1307(c)

Code § 1307(c) provides for dismissal or conversion of chapter 13 cases for "cause." The section provides a nonexhaustive list of such causes, including: "(1) unreasonable delay by the debtor that is prejudicial to creditors; . . . [and] (6) material default by the debtor with respect to a term of a confirmed plan . . . ." See 8 COLLIER supra, § 1307.04. The bankruptcy court has discretion, based upon the "best interests of creditors and the estate," to convert or dismiss a chapter 13 case. § 1307(c). Courts ordinarily prefer to defer finding cause to exercise this power until after the debtor has had a reasonable opportunity to cure a default and when it appears that the plan cannot be modified in a manner that would make completion feasible. 8 COLLIER, supra, § 1307.04[7].

The debtor contends that the motion to dismiss was not properly noticed. She further challenges the bankruptcy court's

determinations that she was in material default under the Plan or that her default had caused prejudicial delay. She maintains that the default concerning the November 1, 1999 deadline was caused by the appellees' alleged interference, and that any default could be remedied by either the proposed refinancing or by Plan modification. We address her major arguments, based on the record before us, with the exception of the refinancing matter that was previously discussed.

1. The Motion to Dismiss or Convert Was Properly Noticed

The debtor contends that the appellees failed to serve the motion to dismiss or convert pursuant to § 1307(c) upon all creditors and interested parties, including other secured parties, but she has not cited a particular rule or authority.

Motions to dismiss or convert pursuant to § 1307(c) are contested matters under Fed.R.Bankr.P. 9014. See Fed.R.Bankr.P. 1017(f)(1). The service of a motion in a contested matter is intended to give reasonable notice and opportunity for hearing to the "party against whom relief is sought." Fed.R.Bankr.P. 9014. In this case, that party was the debtor, who clearly had notice and who opposed the motion.

The only requirement for noticing all creditors and interested parties in connection with dismissal or conversion of a chapter 13 case is found in Fed.R.Bankr.P. 2002(f), which provides that "the clerk, or some other person as the court may

direct, shall give the debtor, all creditors, and indenture trustees notice by mail of: . . . (2) the dismissal or the conversion of the case to another chapter." This rule relates to service of the ultimate order or event, not the initiating motion.

GCL served its motion to dismiss or convert by first class mail upon the debtor, the trustee, Western Bank, and the U.S. Trustee. The Clerk's Office then sent, on October 22, 1999, a notice of the hearing. The bankruptcy court docket indicates that there was a certificate of service of this notice, but the parties' excerpts of record do not include a copy of that certificate. GCL has alleged that the notice was sent to the "interested parties," which could mean the same limited parties. Finally, when the case was converted, the court presumably sent notice of that event to all creditors and interested parties, as required by Rule 2002(f); that notice is not disputed. See Bankruptcy Court Docket, Case No. 697-62183, item no. 338, dated December 5, 1999.

We cannot conclude on the record provided that there was any deficiency in notice. Moreover, a general notice of the filing of the motion to dismiss was unnecessary, because the confirmed Plan provided for automatic dismissal if the property were not sold or refinanced by November 1, 1999.

2. The Secured Creditors Did Not Interfere with Plan Performance

The debtor alleged that: (1) the appellees blocked her attempts to sell the property; (2) their claims were unfounded and required extensive litigation; and (3) Western Bank's involvement in negotiating the terms of the Plan and/or the confirmation order resulted in a Plan which duplicated the payments to Western Bank and other secured creditors who were being paid outside the Plan.

The arguments concerning thwarted sales are not supported by any admissible evidence of abuse by the appellees. The record does not reveal that the debtor presented any evidence about these allegations at the November 9, 1999 hearing. To the contrary, the appellees approved the debtor's Plan, which provided for the sale of the property and the payoff of their debts by a date certain. Therefore, it would be improbable that they would try to block any sale which would accomplish that end. In any event, lacking the entire record, we are not convinced that the bankruptcy court's failure to find interference by the creditors was clearly erroneous.

Additionally, the claims allowance litigation has proceeded in piecemeal fashion over several years. The debtor contends that the prolonged claims allowance process has prejudiced her ability to satisfy the Plan's requirements. This complaint is unfounded because it is common practice to resolve claims post-

confirmation. See In re Grogan, 158 B.R. 197, 199-200 (Bankr. E.D.Cal. 1993). Claims litigation does not excuse the debtor from commencing Plan payments, as required by § 1326(a)(1).

The debtor next contends that Western Bank's influence over the Plan and confirmation order language resulted in double payment of Western Bank's allowed secured claim, and therefore she did not need to make such improper payments. This argument is barred by the doctrine of res judicata. The debtor had an opportunity to litigate the terms of the Plan and the confirmation order, but did not do so in a timely manner. Therefore, that order is final and binding. In re Ivory, 70 F.3d 73, 75 (9th Cir. 1995). All creditors and the debtor are bound by the terms of the confirmed Plan.

3. The Debtor's Direct Payment Default Was Relevant

The debtor contends that the bankruptcy court improperly considered delinquent direct payments when it analyzed the debtor's payment defaults.

A chapter 13 plan provides a flexible means for repaying creditors, and may include direct-payment provisions. Matter of Aberegg, 961 F.2d 1307, 1308-09 (7th Cir. 1992). Here the debtor apparently had insufficient income to make the Plan payments as well as the payments to Western Bank and the other secured creditors outside the Plan. Otherwise, there would not have been monetary defaults under the Plan, or she would have

had the funds available to cure those defaults.

The record reveals that the bankruptcy court properly balanced the equities by looking at the fact that the debtor had not made thousands of dollars in payments to Western Bank, either on its arrearages under the Plan or by direct payment. This situation was prejudicial to both Western Bank and GCL, whose outstanding claims continued to accrue interest and attorneys' fees.

The debtor asserts that she was justified in not making many of those payments because her Plan stated that only "allowed" claims would be paid. She further asserts that the appellees' claims were not finally resolved, and that double payments would have resulted under the allegedly inconsistent Plan provisions. However, she can point to no agreement for delayed payments.

Either the bankruptcy court or state court can resolve disputes concerning the balances owed when the time comes for payoff; the issue is not ripe for our consideration. It is unlikely that any court would authorize double payment of a secured claim.

4. The Bankruptcy Court Did Not Abuse Its Discretion by Denying Plan Modification

The debtor's failure to make even the monthly payments called for under the Plan was a significant factor in the

bankruptcy court's decisions. Therefore, the debtor moved to modify the Plan by eliminating the provision calling for direct payments to Western Bank. She asserted that the monthly payments to Western Bank were inconsistent with the Plan, because another of its provisions provided for payment in full of the allowed secured claim upon the sale or refinance of the property.

A party may request plan modification after the confirmation date but before completion of the plan, subject to the requirements for plan confirmation, specified in 1329(a),[13] and the bankruptcy court's discretion. Powers, 202 B.R. at 622. A modified plan is essentially a new plan. Than, 215 B.R. at 434. As such, it must also meet the feasibility requirements of § 1325(a)(6), which provides that "the debtor will be able to

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[13] Section 1329(a) provides:

> (a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to -
>
> (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
>
> (2) extend or reduce the time for such payments; or
>
> (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan, to the extent necessary to take account of any payment of such claim other than under the plan.

11 U.S.C. § 1329.

make all payments under the plan and to comply with the plan."

The debtor's proposed modification did not include an extension of the deadline for the sale or refinancing of the property, which date had already passed. There was no prospective sale pending at the time of the hearing. The court had denied the request for priming financing. Thus, feasibility was the most significant issue, which the bankruptcy court properly resolved against the debtor. This factual determination was not clearly erroneous. In re Gavia, 24 B.R. 573, 574 (9th Cir. BAP 1982).

The policy behind chapter 13 is to give individuals with regular income the option of adjusting their debts pursuant to a plan, in place of the liquidation of their nonexempt assets, in order to pay creditors more than they would realize upon liquidation. The bankruptcy court has already denied confirmation of the debtor's proposed operating plan and only confirmed the amended Plan in order to allow the debtor to salvage her equity through refinancing or sale, because a chapter 13 debtor can volunteer to pay creditors from capital assets. See In re Burgie, 239 B.R. 406, 410-11 (9th Cir. BAP 1999). In this case, however, the debtor did not perform her part of the bargain. The bankruptcy court had sufficient and ample reasons to deny Plan modification and to convert the case to chapter 7.

Based on the foregoing analysis, we hold that the bankruptcy court correctly determined that the debtor's failure

to sell or refinance the property by the Plan deadline, so that all claims would be paid in full, was cause for conversion. The bankruptcy court's findings clearly reflect that there was both a material default, and a delay that was prejudicial to creditors. We perceive no error.

Additionally, the bankruptcy court found that conversion of the case to chapter 7 would effectuate the sale of the property and payment of all the claims, and was in the best interests of the estate and the creditors within the meaning of § 1307(c). This finding was not clearly erroneous in light of the Plan provisions, the status of the case, and the debtor's agreement at the hearing that she would prefer conversion to dismissal. The bankruptcy court did not abuse its discretion by converting the case to chapter 7.

D. Motions for Reconsideration

The debtors' timely motions for reconsideration are considered to be motions for new trial under Fed.R.Bankr.P. 9023/Fed.R.Civ.P. 59. The bankruptcy court's orders can be vacated if they resulted from manifest error of fact or law, or if there was newly discovered evidence that would affect the judgments. In re Nunez, 196 B.R. 150, 157 (9th Cir. BAP 1996).

A thorough review of the pleadings results in the conclusion that the debtor's motions consisted of the same arguments previously presented to the bankruptcy court. "A

motion for reconsideration should not be used to ask the court 'to rethink what the court had already thought through--rightly or wrongly.'" In re Am. W. Airlines, Inc., 240 B.R. 34, 38 (Bankr. D.Ariz. 1999) (quoting Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983)).

Again, because the evidence and argument portion of the transcript of the November 9, 1999 hearing has not been included in the record, we have no basis on which to find the court's oral findings clearly erroneous.

CONCLUSION

After more than two years, the chapter 13 debtor, in spite of a firm and imminent deadline set forth in her confirmed Plan, had not obtained a refinancing or sale of the real property which would result in promised full payment of the secured debt. The debtor's attempts to obtain a new loan, with a priming lien, did not adequately protect the appellees' secured interests, based on the facts of this case. The Plan clearly provided for dismissal if the debtor failed to pay the allowed secured claims by November 1, 1999. The debtor agreed that the court could convert, rather than dismiss, her case. The bankruptcy court's findings that the debtor had not shown that continuation of the chapter 13 case was feasible, because she had defaulted on Plan payments as well as on payments outside the Plan and had no firm prospects for sale, were not clearly erroneous, and the court

properly denied her refinancing request.

The orders of the bankruptcy court, which denied her motion to encumber the real property, converted her case to chapter 7, and denied her post-judgment motions, are therefore AFFIRMED.