

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9

In the Matter of:

No. 08-2329-PHX-MHM

10

James Henderson Sanders,

Bankruptcy Case No. 2:07-bk-01734-RTB

11

Debtor.

ORDER

12

James Henderson Sanders, Debtor,

13

Appellant,

14

v.

15

Progressive Casualty Insurance Company,
an Ohio corporation, et al.,

16

Appellee.

18

19

20

21

22

23

24

25

26

27

28

Currently pending before the Court is Debtor’s Appeal from the Arizona Bankruptcy Court’s “Order Denying Debtor’s Motion to Dismiss Chapter 7 Bankruptcy Case and Continue Rule 2004 Examination” (Dkt.#13), Debtor’s Motion to Add Further Supplemental Exhibit to Appellants Informal Reply (Dkt.#21), Debtor’s Motion to Withdraw the Motion to Add Further Supplemental Exhibit (Dkt.#24), and Debtor’s Motion for Oral Argument (Dkt.#23). After reviewing the pleadings and record excerpts submitted for purposes of this appeal, and having determined that oral argument is unnecessary, the Court issues the following Order.

1 **I. Background**

2 The facts leading up to this bankruptcy appeal demonstrate that James Henderson Sanders
3 (“Sanders”) is no stranger to bankruptcy proceedings.¹

4 **A. Sanders’ Prior Proceedings**

5 On January 27, 1997, Sanders was convicted of mail fraud in violation of 18 U.S.C. §
6 1341 and aiding and abetting under 18 U.S.C. § 2. (Dkt.#16 at 4) He was sentenced to
7 prison for 51 months and was ordered to pay restitution of \$4,106,657 to Progressive
8 Casualty Insurance Company (“Progressive”). (Dkt.#16 at 4) He subsequently filed for
9 Chapter 7 Bankruptcy relief on May 12, 1997 in an Oregon Bankruptcy Court (Case No. 97-
10 33882-TMB7). (Dkt.#16 at 4) After he was granted a discharge, he sought a declaration that
11 the restitution that he owed to Progressive was or should have been discharged in the Oregon
12 Bankruptcy case. (Dkt.#16 at 4) The Bankruptcy Court specifically found that the restitution
13 owed to Progressive was not dischargeable in bankruptcy. (Dkt.#16 at 4) Sanders appealed
14 to the Ninth Circuit Bankruptcy Panel, which dismissed his appeal. (Dkt.#16 at 5)

15 On October 14, 2005, Sanders again filed for bankruptcy relief under Chapter 7 in an
16 Arizona Bankruptcy Court. (Dkt.#16 at 5) Progressive filed a motion for summary judgment
17 that the restitution obligation owed to it by Sanders was not dischargeable under principles
18 of res judicata. (Dkt.#16 at 5) The Arizona Bankruptcy Court agreed and granted this
19 motion for summary judgment. (Dkt.#16 at 6) The Ninth Circuit Bankruptcy Appellate
20 Panel affirmed this decision on March 30, 2007. (Dkt.#16 at 6)

21
22
23
24
25 ¹ The following facts are taken from Progressive’s Opening Brief, which in turn, cites
26 to documents collected in either Sanders’ or Progressive’s Excerpts of Record. Debtor
27 Sanders fails to challenge the facts presented or present any alternative versions of the facts;
28 thus, this Court has no choice but to rely on the facts presented by Progressive (and in any
case, the Court’s review of the documents of record presented by Sanders appears to support
the version of the facts developed by Progressive).

1 **B. The Present Bankruptcy Action**

2 On April 18, 2007, Sanders filed another Arizona bankruptcy case (the present case), this
3 time under Chapter 11 of the United States Bankruptcy Code, on the eve of a scheduled
4 debtor's examination in the Maricopa County Superior Court. (Dkt.#16 at 6)

5 **(1) The Missed Rule 2004 Examinations that Led to Sanders Being Held in
6 Contempt by the Bankruptcy Court**

7 Progressive applied for a Rule 2004 Examination of Sanders, and the Bankruptcy Court
8 approved. (Dkt.#16 at 6) The Rule 2004 Examination was scheduled for May 29, 2007, but
9 Sanders failed to appear, despite having received notice of examination. (Dkt.#16 at 7) The
10 Rule 2004 was rescheduled, this time for June 5, 2007, but Sanders failed to appear again,
11 despite having received notice of this examination as well.

12 Progressive moved for an order to show cause why Sanders should not be held in
13 contempt for his failure to appear at the Rule 2004 examination. (Dkt.#17, Exh. B at 1) In
14 response, the Bankruptcy Court ordered Sanders to deliver to Progressive a number of
15 documents to Progressive no later than March 6, 2008 and to appear for the Rule 2004
16 Examination on March 13, 2008. (Dkt.#16 at 7) Sanders did neither, and the Bankruptcy
17 Court held him in contempt for failing to comply with its order. (Dkt.#16 at 8) The
18 Bankruptcy Court's order provided that Sanders could purge the contempt order if he
19 delivered the requested documents and appeared at the Rule 2004 Examination. (Dkt.#16
20 at 8) At the time scheduled for the August 8, 2008 Rule 2004 Examination, Sanders
21 confirmed that he would deliver the requested documents to Progressive on or before August
22 19, 2008. However, he did not. (Dkt.#16 at 4)

23 **(2) The Conversion to a Chapter 7 Case**

24 While the dispute regarding the Rule 2004 Examination was unfolding, the Trustee filed
25 a Motion to Convert Case to Chapter 7 Proceedings on May 9, 2008. The U.S. Attorneys'
26 Office and Progressive joined the Trustee in this request. Sanders' Chapter 11 case was
27 converted to a Chapter 7 one on August 11, 2008. Jill Ford was appointed Chapter 7 Trustee
28 of Sanders' bankruptcy estate. (Dkt.#16 at 9)

1 On August 18, 2008, Sanders filed a Motion to Dismiss, which sought the dismissal of his
2 bankruptcy case, as well as an order that would continue or defer the Rule 2004 examination.
3 (Dkt.#16 at 4) The Bankruptcy Court conducted a hearing on the Motion to Dismiss on
4 October 8, 2008, and denied the motion on December 2, 2008. (Dkt.#16 at 9) Sanders
5 subsequently filed this appeal. (Dkt.#16 at 9)

6 **II. Discussion**

7 **A. Jurisdiction & Standard of Review**

8 A district court may hear appeals from “final judgments, orders, and decrees, and, with
9 leave of the court, from interlocutory orders and decrees, of bankruptcy judges.” 28 U.S.C.
10 § 158(a). A Bankruptcy Court’s findings of fact are reviewed under the “clearly erroneous”
11 standard, and its conclusions of law are reviewed *de novo*. In re Compton Impressions, Ltd.,
12 217 F.3d 1256, 1260 (9th Cir. 2000); Fed. R. Bankr. P. 8013 (“Findings of fact, whether
13 based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and
14 due regard shall be given to the opportunity of the bankruptcy court to judge the credibility
15 of the witnesses.”). A third standard of review attaches when a Bankruptcy Court makes a
16 decision that is within its discretion under the Bankruptcy Code; such decisions will not be
17 set aside unless there is plain error or abuse of discretion. See In re Rosson, 545 F.3d 764
18 (9th Cir. 2008) (explaining that a bankruptcy court’s decision to deny debtor’s request for
19 dismissal of his Chapter 13 case and to convert the case from Chapter 13 to Chapter 7 was
20 reviewed for an abuse of discretion); In Re Sherman, 491 F.3d 948, 969 (9th Cir. 2007)
21 (“[W]e review a bankruptcy court’s decision to grant or deny a motion to dismiss for
22 misconduct that constitutes ‘cause’ for abuse of discretion.”).

23 **B. Analysis**

24 Sanders appeals from the Bankruptcy Court’s denial of his motion to dismiss his Chapter
25 7 bankruptcy case and continue his Rule 2004 examination. (Dkt.#13)

26 ///

27

28

1 **(1) Conversion from Chapter 11 (Reorganization) to Chapter 7 (Liquidation)**

2 Sanders argues that the Bankruptcy Court inappropriately granted the U.S. Trustee’s
3 request for a Chapter 7 conversion instead of dismissing his Chapter 11 proceeding as he
4 requested. (Dkt.#13 at 4-5)

5 Under 11 U.S.C. § 1112(b)(1), “on request of a party in interest, and after notice and a
6 hearing,” unless unusual circumstances are present and identified by the court, a bankruptcy
7 court “shall convert a case under [chapter 11] to a case under chapter 7 or dismiss a case
8 under this chapter, whichever is in the best interest of the creditors and the estate, if the
9 movant establishes cause.” This section allows a bankruptcy court to convert a bankruptcy
10 case from Chapter 11 to Chapter 7, or to dismiss a case, as long as the party asking for the
11 conversion establishes cause. It also permits a bankruptcy court to dismiss a bankruptcy
12 case; however, the decision of whether to convert or dismiss must be guided by “whatever
13 is in the best interest of the creditors and the estate.” The legislative comments to this section
14 summarize that a “bankruptcy court is permitted to convert a reorganization case to a
15 liquidation case or to dismiss the case, whichever is in the best interest of creditors and the
16 estate, only for cause.” H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess.
17 (1977) pp. 405, 406.

18 Thus, to be affirmed, the bankruptcy must have had cause for its decision to convert the
19 case from Chapter 11 (Reorganization) to Chapter 7 (Liquidation). The term “cause” is
20 defined by 11 U.S.C. § 1112 to include, among other things, “failure to comply with an order
21 of the court,” “unexcused failure to satisfy timely any filing or reporting requirement
22 established by this title or by any rule applicable to a case under this title,” “failure to attend
23 the meeting of creditors convened under section 341(a) or an examination ordered under rule
24 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by debtor,”
25 and “failure to provide information or attend meetings reasonably requested by the United
26 States trustee (or the bankruptcy administrator, if any). 11 U.S.C. § 1112(b)(4)(E),(F),(G)
27 and (H).
28

1 Here, it is clear that “cause” existed; Sanders had failed to attend no less than three
2 scheduled Rule 2004 Examinations, clearly falling within the subsection (b)(4)(G)
3 definition of “cause” (“failure to attend . . . an examination ordered under Rule 2004 of the
4 Federal Rules of Bankruptcy Procedure without good cause shown by the debtor.”). There
5 is no indication in the record that Sanders had good cause for failing to attend any of the
6 scheduled Rule 2004 examinations. Therefore, the Bankruptcy Court clearly had “cause”
7 either to convert Sanders’ bankruptcy case from Chapter 11 (reorganization) to Chapter 7
8 (liquidation) or to dismiss the case.

9 **(2) Dismissal Prior to Conversion**

10 Sanders does not appear to dispute any of the above, but argues that the Bankruptcy Court
11 erred in converting the case from Chapter 11 to Chapter 7 without giving him the chance to
12 argue for the alternative sanction of having his case dismissed. (Dkt.#13 at 3) However, it
13 appears that Sanders *was* given the opportunity to argue for dismissal. The Motion to
14 Convert or Dismiss was filed on April 9, 2008 (Dkt.#14 at 11). Sanders does not assert that
15 he failed to receive notice of this motion. The Court did not grant the motion until August
16 11, 2008. Sanders could have filed a response to the motion that argued in favor of dismissal
17 over conversion at any point during the intervening four months; however, he apparently did
18 not. As such, he cannot now complain that the Bankruptcy Court failed to allow him to
19 respond prior to the decision to convert. In addition, Sanders was given several post-Chapter
20 7 conversion chances to argue his case for dismissal. He was allowed to present these
21 arguments at the hearing on October 8, 2008. (Dkt.#17, Exh. D at 5-7) He was also
22 permitted to file a brief regarding this issue after the hearing (Dkt.#14 at ER 63 [“Debtor’s
23 Amended Reply to Progressive’s ‘Objection to Debtor’s Motion to Dismiss and Continue
24 Rule 2004 Examination’ Occasioned by Post Reply Joinders”]). The Bankruptcy Court
25 clearly permitted Sanders to present his arguments in favor of dismissal before rejecting these
26 arguments on December 9, 2008.

27 ///

28

1 **(3) Denial of Sanders’ Motion to Dismiss After Conversion**

2 The crux of Sanders’ argument is that the Bankruptcy Court erred by failing to allow him
3 to dismiss his case when he realized that it was going to be converted from Chapter 11 to
4 Chapter 7. However, Sanders points to no case law or statute that confers an absolute right
5 for debtors to dismiss their bankruptcy petitions at whim. On the contrary, 11 U.S.C. §
6 1112(b)(1) compels a bankruptcy court to consider which action is in the best interest of the
7 estate and the creditors. A Ninth Circuit case explicitly denies that a debtor has any such
8 absolute right to dismissal. In re Bartee, 317 B.R. 362, 366 (9th Cir. 2004) (“Debtors argue
9 they have an absolute right to dismissal of their chapter 7 case. This is plainly wrong.”). The
10 fact that the Bankruptcy Court chose to convert the case from Chapter 11 to Chapter 7 rather
11 than to dismiss the case as Sanders desired is error only if the Bankruptcy Court abused its
12 discretion in refusing to dismiss the case. In re Leach, 130 B.R. 855, 856 (9th Cir. 1991)
13 (explaining that the “denial of a voluntary motion to dismiss rests within the sound discretion
14 of the judge and is reversible only for an abuse of discretion”).

15 “While a debtor may voluntarily choose to place himself in bankruptcy, he does not enjoy
16 the same discretion to withdraw his case once it has been commenced.” Id. at 857 n.5
17 (quoting In re Klein, 39 B.R. 530, 532 (Bankr. E.D.N.Y. 1984)). If dismissal will prejudice
18 interested parties, a court may refuse to allow a debtor to dismiss the petition. Leach., 130
19 B.R. at 858 (affirming the bankruptcy court’s refusal to allow debtor to dismiss case where
20 prejudice would have resulted to debtor’s creditors). See also In re Simmons, 200 F.3d 738,
21 743 (11th Cir. 2000) (“When dismissal will only allow the Debtor to hinder creditors, secret
22 assets, and further the Debtor’s abuse of the system, dismissal of her voluntary petition is not
23 warranted.”); In re Atlas Supply Corp., 857 F.2d 1061, 1063 (5th Cir. 1988) (no abuse of
24 discretion in denial of dismissal where dismissal would have prejudiced creditors).

25 The Ninth Circuit has explained that debtors who seek the protection of the bankruptcy
26 court “must also assume the responsibilities attendant to this protection, including accounting
27 for the assets and completing schedules in good faith, and . . . the debtor may not engage in
28 questionable or fraudulent conduct and then dismiss the case once such conduct is

1 discovered.” Bartee, 317 B.R. at 366-67 (quoting 9A Am.Jur.2d. Bankruptcy § 1020)
2 (explaining that debtor’s failure to comply with trustee’s request for additional information
3 about its assets, income, prepetition transfers and alleged gambling losses would have
4 constituted an independent basis for affirming the refusal to dismiss).

5 Here, Sanders failed to attend properly noticed Rule 2004 Examinations at least three
6 times, causing the Bankruptcy Court to hold him in contempt. He also failed to cooperate
7 with the Trustee by timely providing financial information such as a list of his personal
8 property, real property, federal and state income tax returns, and other information. Because
9 of these failures, his creditors were understandably concerned that the dismissal of his
10 bankruptcy case would result in greater delay and difficulty in collecting on their debts.
11 Thus, the Bankruptcy Court’s decision to deny his motion to dismiss was not an abuse of
12 discretion; Sanders simply did not meet his burden of establishing that there would be no
13 legal prejudice to his creditors resulting from the dismissal of his bankruptcy case.

14 **(4) Refusal to Defer Debtor’s Exam under Rule 2004**

15 Finally, Sanders had already failed to show up to at least three properly noticed Rule 2004
16 examinations. It was not an abuse of discretion for the Bankruptcy Court to refuse to allow
17 Sanders to continue the Rule 2004 examination yet again, particularly since Sanders provided
18 no reason that would constitute “good cause” for rescheduling it.

19 **(5) Miscellaneous Other Arguments**

20 Sanders also alleges that Progressive Casualty Insurance comes before the Court with
21 unclean hands based on “their introduction and continued reliance on false statements and
22 documentary evidence” (Dkt.#13 at 5). However, he does not identify the statements he
23 alleges are false. He further argues that Progressive “blatant[ly] and persistent[ly] violat[ed]
24 the automatic stay” in a previous case, although he never cites to or provides copies to the
25 court of the prior automatic stay or explains how Progressive allegedly violated it. (Dkt.#13
26 at 6) As such, the Court rejects these arguments as they are unsupported by any legal or
27 factual authority.

28

1 Sanders also argues that the motion schedule imposed by the Bankruptcy Court was
2 procedurally deficient because it violated Local Bankruptcy Rule (Amended March 1, 2007)
3 9013-1(C), which reads as follows:

4 (C) Response and Reply Times for Motions in Adversary
5 Proceedings. Unless otherwise set forth in the Rules, the Local
6 Rules, the notice prescribed in paragraph (j) or an order of the
7 court, in an adversary proceeding the party responding to a
8 motion shall have 15 days after service within which to serve
9 and file a responsive memorandum, and the moving party shall
10 have 10 days after service of the responsive
11 memorandum to serve and file a reply.

12 He also argues that the motion schedule violated his “fundamental right to a surreply in light
13 of the Chapter 7 Trustee raising in the first instance both imputed facts and case law
14 Appellant never had a chance to respond to prior to the matter being taken under
15 advisement.” (Dkt.#13 at 6) However, Sanders never identifies *which* motion schedule he
16 is talking about, cites to the motion schedule, or even identifies the specific topic of the
17 motion concerned. While the Court has made every effort to construe Sanders’ arguments
18 liberally, it cannot search the record and craft his arguments for him. See Aguasin v.
19 Mukasey, 297 Fed. Appx. 706 (9th Cir. Oct. 30, 2008).

20 Sanders also argues that “the Bankruptcy Judge misunderstood Appellant [sic] request
21 merely to respond to the untimely ‘Joinders’ to Progressive Casualty Insurance Company’s
22 ‘Objection’ asserted in writing by the Chapter 7 Trustee and orally by the U.S. Government,
23 through assuming erroneously that Appellant had wished to assert facts or case law beyond
24 that already cited.” (Dkt.#13 at 5) However, he never explains why the Bankruptcy Court’s
25 misunderstanding of his request would be reversible error or provides any citations to
26 document the so-called erroneous assumption. Even assuming, for the sake of argument, that
27 the Bankruptcy Court had misunderstood Sanders’ request, Sanders would still have to
28 explain why this misunderstanding was reversible error. However, he has not even explained
what it is that he actually intended to communicate to the bankruptcy judge, when this
misunderstanding occurred, or how it affected the ultimate outcome of the case. As such,
this Court rejects this argument.

1 Finally, Sanders argues that “none of the case law cited in support of any aspect of the
2 ‘objections and/or joinders’ involved corresponded to Appellant’s unique factual situation.”
3 While this Court appreciates that factual situations are rarely identical in every detail,
4 Sanders does not explain this assertion in any manner. He does not cite to any case that is
5 purportedly inapplicable. Nor does he explain the differences between the cases that
6 allegedly make the case law inapplicable to him. As explained above, while this Court
7 construes the arguments of pro se litigants liberally, it cannot search the record and make
8 their arguments for them. Aguasin v. Mukasey, 297 Fed. Appx. 706 (9th Cir. Oct. 30, 2008)
9 (“Although we liberally construe the briefs of pro se appellants, we also require that
10 arguments must be briefed to be preserved.”) (quoting Yohey v. Collins, 985 F.2d 222, 225
11 (5th Cir. 1993)).

12 **C. Conclusion**

13 For the reasons explained above, the bankruptcy court’s decision below is affirmed.

14 **Accordingly,**

15 **IT IS HEREBY ORDERED** that the December 9, 2008 Order of the Bankruptcy
16 Court denying Debtor’s Emergency Motion to Dismiss Chapter 7 Bankruptcy Case and
17 Continue Rule 2004 Examination is AFFIRMED.

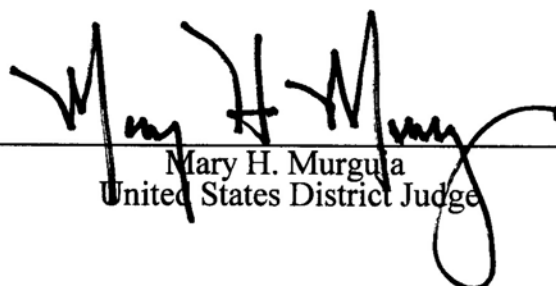
18 **IT IS HEREBY ORDERED** granting Debtor’s Motion to Withdraw his Motion to
19 Add Further Supplemental Exhibit (Dkt.#24).

20 **IT IS HEREBY ORDERED** denying as moot Debtor’s Motion to Add Further
21 Supplemental Exhibit (Dkt.#21).

22 **IT IS HEREBY ORDERED** denying as moot Debtor’s Motion for Oral Argument
23 (Dkt.#23).

24 DATED this 25th day of September, 2009.

25
26
27
28



Mary H. Murgula
United States District Judge