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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE:)
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Shelly Ann Battle)
DEBTOR,)
_____)
Shelly Ann Battle,)
Appellant,)
v.)
Rod Danielson, Chapter)
13 Trustee,)
Appellee.)
_____.)

Case No. 5:14-cv-02063-JGB
USBC Case No. 6:14-19874-WJ

**ORDER VACATING THE
BANKRUPTCY COURT'S ORDER
DISMISSING THE CASE AND
REMANDING FOR FURTHER
PROCEEDINGS**

Before the Court is an appeal of the bankruptcy court's order dismissing Appellant's Chapter 13 bankruptcy case. For the reasons set forth below, the Court VACATES the bankruptcy court's dismissal order and REMANDS the matter to the bankruptcy court for further proceedings consistent herewith. The April 6, 2015 Hearing on the matter is VACATED.

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3 **I. BACKGROUND**

4 Appellant, Shelly Ann Battle ("Debtor" or
5 "Appellant"), filed her voluntary Chapter 13 bankruptcy
6 petition on August 1, 2014. (Doc. No. 10, (Excerpts of
7 Record ("E.R.")) at 13.) Debtor is a registered nurse,
8 who has never before filed for bankruptcy. (Id. at 18.)

9 On August 15, 2014, Debtor filed her Chapter 13 Plan
10 ("Plan"). (Id. at 148.) The Plan provided that Debtor
11 would pay her creditors 100 percent of the amounts due to
12 them over a five-year payment period. (Id. at 142.) The
13 Plan estimated the total amount owed to unsecured
14 creditors as \$76,383.00. (Id.)

15
16 Both the meeting of creditors and the confirmation
17 hearing were set for September 9, 2014, with the meeting
18 of creditors to take place in the morning and the
19 confirmation hearing to take place in the afternoon.
20 (Id. at 31.)

21
22 At the meeting of creditors, Debtor's counsel
23 informed counsel for the Trustee that a creditor, to whom
24 Plaintiff owed \$12,000, had not been included on the
25 filed schedules. (Id. at 31.) Additionally, the IRS
26 filed a proof of claim that set forth a higher debt than
27 that originally scheduled by the debtor. (Id. at 142.)
28

1 That afternoon, at the confirmation hearing, the
2 Trustee moved for dismissal of Debtor's petition, based
3 primarily on the newly disclosed \$12,000 debt. (Id. at
4 171) The Trustee contended that Debtor's Plan was
5 infeasible, based on his calculation of the monthly
6 payments that would be necessary, which were more than
7 the disposable income Debtor listed in her schedules.
8 (Id.) Debtor's counsel responded that Debtor could likely
9 make a tighter budget, thus increasing her disposable
10 income; her expenses had been "a little excessive" the
11 first time around, but Debtor had assumed this would not
12 matter, as she was paying 100 percent of the debt owed.
13 (Id.) Debtor's counsel suggested a continuance, but the
14 bankruptcy court instead denied confirmation and
15 dismissed the case without prejudice. (Id. at 174.) The
16 court did not provide a reason for the dismissal. (Id.)

17
18 On September 24, 2014, Debtor/Appellant filed a
19 timely notice of appeal of the bankruptcy court's order
20 and notice of dismissal with the Bankruptcy Appellate
21 Panel ("BAP"). (Id. at 1.) Appellee Rod Danielson, the
22 Chapter 13 Trustee in the underlying bankruptcy
23 case("Appellee"), filed a statement of election to have
24 the appeal transferred to the district court.

25
26 Appellant filed her Opening Brief on November 3,
27 2014. (Doc. No. 11.) Appellee filed his Opening Brief on

28

1 November 17, 2014. (Doc. No. 12.) Appellant filed his
2 Reply Brief on December 1, 2014. (Doc. No. 13.)

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4 **II. JURISDICTION AND STANDARD OF REVIEW**

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6 Title 28 U.S.C. § 158(a) gives the district court
7 jurisdiction to hear appeals from the bankruptcy court
8 regarding "final judgments, orders, and decrees." 28
9 U.S.C. § 158(a).

10
11 The bankruptcy court's decision to dismiss a Chapter
12 13 case is reviewed for abused of discretion. In re
13 Nelson, 343 B.R. 671, 674 (B.A.P. 9th Cir. 2006.) Under
14 the abuse of discretion standard, the court first
15 determines de novo "whether the [bankruptcy] court
16 identified the correct legal rule to apply to the relief
17 requested." In re Taylor, 599 F.3d 880, 887 (9th Cir.
18 2010) (citing United States v. Hinkson, 585 F.3d 1247,
19 1262 (9th Cir. 2009)).

20
21 If the bankruptcy court identified the correct rule,
22 the court then must determine whether its application of
23 that standard was "(1) illogical, (2) implausible, or (3)
24 without support in inferences that may be drawn from the
25 facts in the record." In re Taylor, 599 F.3d at 887
26 (citing Hinkson, 585 F.3d at 1262). "If the bankruptcy
27 court did not identify the correct legal rule, or its
28

1 application of the correct legal standard to the facts
2 was illogical, implausible, or without support in
3 inferences that may be drawn from the facts in the
4 record, then the bankruptcy court has abused its
5 discretion." In re Taylor, 599 F.3d at 887-88 (citing
6 Hinkson, 585 F.3d at 1262).

7
8 **III. DISCUSSION**
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10 The bankruptcy code provides that: "on request of a
11 party in interest or the United States trustee and after
12 notice and a hearing, the court may [convert a case to
13 Chapter 7] or may dismiss a case under this chapter,
14 whichever is in the best interests of the creditors and
15 the estate, for cause . . ." 11 U.S.C. § 1307(c). The
16 bankruptcy code designates items of "cause" in a
17 nonexclusive list at § 1307(c)(1)-(10). Although the
18 bankruptcy court in this case did not specifically state
19 its reasons for dismissal, it appears that the court
20 relied on subsection 5, which states that cause includes
21 "denial of a confirmation of a plan under section 1325 of
22 this title and denial of a request made for additional
23 time for filing another plan or a modification of a
24 plan." 18 U.S.C. § 1307(c)(5)

25
26 Appellant argues the bankruptcy court erred by not
27 granting the continuance she requested. Appellant
28

1 contends the continuance would have allowed her to
2 "sharpen her pencil" - i.e. modify her Plan - and
3 thereafter present the bankruptcy court with a feasible
4 amended Plan that took into account the (1) additional
5 \$12,000 debt and the (2) increased IRS proof of claim.
6 Appellee contends the denial of Appellant's request for a
7 continuance was not an error as Appellant could not have
8 created a feasible plan, given her economic
9 circumstances. The Court finds, based on clear precedent
10 from the BAP, that Appellant should have been granted a
11 continuance so as to file a modified plan.

12

13 **A. The Bankruptcy Court's Denial of Appellants' Request**
14 **for a Continuance**

15

16 The BAP has directly spoken to the central issue in
17 this case. In Nelson v. Meyer (In re Nelson), 343 B.R.
18 671 (B.A.P. 9th Cir. 2006), the bankruptcy court, at the
19 confirmation hearing, found that the debtor's proposed
20 monthly payments were so low that they could only be
21 confirmed in "very extenuating circumstances" and that
22 the presence of certain nondischargeable debt was
23 problematic. 343 B.R. at 673. The bankruptcy court
24 therefore denied confirmation of the debtor's proposed
25 plan and dismissed the case under Section 1307(c)(5).

26 Id. at 674.

27

28

1 The BAP took up the case to address "whether the
2 court correctly applied 11 U.S.C. § 1307(c)(5) when it
3 dismissed the case without affording the debtor an
4 opportunity to revise her plan after it denied
5 confirmation." Id. The BAP explained that the use of
6 the conjunction "and" in Section 1307 (c)(5)¹ means that
7 two elements must exist to constitute "cause" to dismiss
8 a bankruptcy case: (1) denial of confirmation; and (2)
9 denial of a request for time to file a new or a modified
10 plan. (Id. at 675-76.) It is the second element that
11 applies to the instant case, as it is undisputed that the
12 bankruptcy court denied confirmation of Appellant's Plan.

13
14 The BAP concluded in Nelson that: "We are persuaded
15 that the second element of § 1307(c)(5) requires, at a
16 minimum, that the court must afford a debtor an
17 opportunity to propose a new or modified plan following
18 the denial of plan confirmation. Because the court did
19 not offer the debtor such an opportunity, the second
20 element of § 1307(c)(5) was not satisfied. It follows
21 that there was no 'cause' to dismiss or convert the
22 chapter 13 case under that authority." (Id. at 676)
23 (internal citations omitted).²

24 _____
25 ¹ " . . . denial of confirmation of a plan under
26 section 1325 of this title and denial of a request made
27 for additional time for filing another plan or a
28 modification of the plan." 11 U.S.C. § 1307(c)(5).

² The BAP based its decision on its reasoning that
(continued...)

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Appellee presses several arguments in opposition to the clear holding of Nelson. First, Appellee argues that since there was no possible way for Appellant to propose a feasible amended Plan, the bankruptcy court need not have granted a continuance; in other words, a continuance would have been futile. Next, Appellee contends that Nelson is not necessarily binding, as it was a BAP decision. Finally, Appellee argues that Nelson is distinguishable on its facts. The Court does not find any of these arguments persuasive.

First, as to futility of the continuance, there is nothing in the record to suggest that the bankruptcy court made such a finding. In fact, after Debtor's counsel explained a proposed amendment of the Plan and requested a continuance, the bankruptcy court dismissed the case and explained, "if it's without prejudice, you can refile, and you'll know exactly what to do in the next one." (E.R. at 174.) If an amended plan were futile, a re-filing - containing the same amended plan -

²(...continued)
"[t]he policy underlying the second element of § 1307(c)(5) relating to a request for time to try again is that chapter 13 plan confirmation is an iterative process. A debtor who wishes to submit to the rigors of living for a number of years in the straightjacket of a plan that represents one's "best efforts" to pay creditors should, in principle, be permitted the latitude to correct perceived deficiencies in proposed plans."
343 B.R. at 676

1 would be equally as futile. The Court need not address
2 the specific, detailed arguments offered by both sides as
3 to why an amended plan will or will not be feasible, as
4 these questions should be decided by the bankruptcy court
5 on remand; as the bankruptcy court clearly did not make a
6 finding of futility, the underlying substantive issue is
7 not appropriately before this Court on appeal.

8
9 Appellee also contends that Appellant should not be
10 allowed to amend her plan, as she should be bound to her
11 initial proposal - as expressed in her schedules of
12 expenses and income - since these schedules were filed
13 under penalty of perjury. However, this argument is
14 foreclosed by Nelson, where the BAP stated that, if given
15 a chance to offer an amended plan, "it is [] possible
16 that [debtor] will sharpen her pencil and either project
17 increases in disposable income or propose a mechanism for
18 capturing increases in such income during the life of
19 plan. In other words, [debtor] might propose a plan that
20 would be worthy of being confirmed." 343 B.R. at 676.
21 Implicit in this statement is the understanding that an
22 initial plan does not forever bind a debtor; to the
23 contrary, chapter 13 plan confirmation is an "iterative
24 process." Id.

25
26 Appellee's stare decisis argument is likewise
27 unpersuasive. Appellee argues that the Court should not
28

1 follow Nelson, as it was decided by the BAP, an Article I
2 court.³ However, Appellee presents no authority contrary
3 to Nelson, either from the Supreme Court, the Ninth
4 Circuit, or the BAP. The Court finds Nelson persuasive
5 and well-reasoned, and sees no reason to stray from its
6 holding.

7
8 Appellee next contends that Nelson should stand for
9 the proposition that a debtor must only be afforded an
10 opportunity to request a continuance. Appellee contends
11 that since Appellant had the opportunity to request a
12 continuance - and, in fact, did so - this case should be
13 distinguished. The Court can find no support for such a
14 reading of Nelson; the BAP certainly did not make this
15 strained distinction in the case itself.

16
17 Finally, Appellee argues that the Court's reading of
18 Nelson would mean a case could never be dismissed under
19 Section 1307(c)(5), as the bankruptcy court would be
20 forced "to continue, continue, and continue, as long as a
21 debtor kept requesting a continuance." (Doc. No. 12 at
22 19.) However, this contention has no merit. The
23 Bankruptcy Code contemplates that chapter 13 debtors
24 "be afforded more than one opportunity to confirm a
25 Chapter 13 plan before the case is dismissed or converted

26
27 ³ Additionally, Appellee's argument is undercut by
28 his citation to five other BAP decisions in support of
his arguments. (See Doc. No. 12 at 1, 9-10, 15-16, 20)

1 following denial of plan confirmation." Nelson, 343 B.R.
2 at 678. This does not mean the bankruptcy court must
3 grant infinite second chances to the debtor; but, where
4 as here, there is no finding that amendment would be
5 futile, the bankruptcy court must give the debtor at
6 least one second chance.

7
8 In conclusion, the Nelson court clearly held that
9 "since the [bankruptcy] court did not comply with §
10 1307(c)(5) when it preempted the debtor's chance to try
11 again and dismissed the case after the first denial of
12 plan confirmation, it applied an incorrect legal standard
13 and thereby abused its discretion." 343 B.R. at 676.
14 The Court likewise finds that the bankruptcy court should
15 have granted Appellant a continuance so as to allow her
16 to file an amended plan; by failing to do so the
17 bankruptcy court abused its discretion. The bankruptcy
18 court should have allowed Appellant a chance to file an
19 amended plan before dismissing the case.

20
21 **B. Appellant's Due Process Argument**

22
23 Appellant also argues that the confirmation hearing
24 should not have taken place the same day as the meeting
25 of creditors. She bases this contention on Section
26 1324(b) of the Bankruptcy Code, which states: "[T]he
27 hearing on the confirmation of the plan may be held not
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1 earlier than 20 days and not later than 45 days after the
2 date of the meeting of creditors under section 341(a),
3 unless the court determines that it would be in the best
4 interests of the creditors and the estate to hold such
5 hearing at an earlier date and there is no objection to
6 such earlier date." 11 U.S.C. § 1324(b). However, here
7 Appellant did not file an objection to the date of the
8 confirmation hearing. Thus, any due process issue is not
9 appropriately before the Court on appeal.

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IV. CONCLUSION

For the reasons set forth above, the Court VACATES the Bankruptcy Court's order and REMANDS to the bankruptcy court for further proceedings consistent herewith. The April 6, 2015 hearing on the matter is VACATED.

Dated: March 31, 2015



JESUS G. BERNAL
United States District Judge