NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 17-021

Bankruptcy Case No. 12-12438-MSH
Adversary Proceeding No. 15-01222-MSH

DUSAN PITTNER,
Debtor.

DUSAN PITTNER,
Plaintiff-Appellant,

v.

CASTLE PEAK 2011-1 LOAN TRUST and
SELENE FINANCE LP,
Defendants-Appellees.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Melvin S. Hoffman, U.S. Bankruptcy Judge)

Before
Godoy, Finkle, and Cary,
United States Bankruptcy Appellate Panel Judges.

David G. Baker, Esq., on brief for Plaintiff-Appellant.
Richard C. Demerle, Esq., on brief for Defendants-Appellees.

February 1, 2018

Finkle, U.S. Bankruptcy Appellate Panel Judge.

Dusan Pittner ("Debtor") appeals from the bankruptcy court's May 23, 2017 order granting the appellees' motion to dismiss the remaining count of his amended complaint, and the June 20, 2017 order denying reconsideration of that order. In the remaining count of the amended complaint, the Debtor alleged that the appellees had taken certain actions in violation of his confirmed plan of reorganization and sought a finding of contempt of the "confirmation order" pursuant to § 105(a).[1] For the reasons set forth below, the Panel **AFFIRMS**.

BACKGROUND

I. Pre-Bankruptcy Events

The Debtor and his wife, Ludmila Pittnerova ("Pittnerova"), own residential real property located in Boca Raton, Florida (the "Property"). When they purchased the Property in 2007, only Pittnerova executed a promissory note in favor of SMC Mortgage Company. As security for Pittnerova's obligations under the note, both Pittnerova and the Debtor executed a mortgage on the Property. The note and mortgage were assigned to appellee Castle Peak 2011-1 Loan Trust ("Castle Peak"), and, at all times relevant to this appeal, appellee Selene Finance LP ("Selene Finance") serviced the mortgage. (Castle Peak and Selene Finance are referred to collectively as "the Appellees.").

[1] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections are 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 "Rule" are to the Federal Rules of Civil Procedure.

II. Bankruptcy Proceedings

In March 2012, the Debtor filed a chapter 11 petition.[2] In November 2012, the Appellees filed an amended proof of claim, asserting a claim in the amount of $673,044.42, partially secured by the Property, which they valued at $375,000.00.

A. March 2013 Plan

After filing an initial and then amended plan of reorganization, the Debtor filed his second amended plan in March 2013 (the "March 2013 Plan"). The terms of that plan are central to this appeal. In Article III of the March 2013 Plan, entitled "Classification of Claims and Interests–Specific," the Debtor listed three real properties under the heading "Class 1–Allowed Secured Claims." The provision relating to the Property (the "Property Provision") stated, in its entirety:

> This property is a single family dwelling with three bedrooms and two bathrooms, consisting of about 2,000 square feet. It was built in 1970. By agreement with Selene Finance, the servicer of the mortgage, the value of the property is $354,000. Mr. Pittner purchased the property in April, 2007, and lived in it for a time, but began renting it in or about May, 2008, and it has been rented more or less continuously since then. The current tenant pays $2,525 per month in rent.
>
> A note with a principal amount of $354,000 at 4% interest for a term of 23 years requires a monthly payment of $1,963.82. This amount is less than the rent being received from this property, so the payment is feasible. Upon information and belief, Selene Finance has been paying the taxes and insurance for the property; the amounts stated below are believed to be the amounts Selene has been paying.
>
> There are no junior liens, to the best of Mr. Pittner's knowledge and belief.

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[2] The Debtor filed three bankruptcy petitions prior to the current case, including a chapter 7 petition filed jointly with Pittnerova in May 2009, in which both received a discharge.

The debtor projects the following operating budget for this property:

Income:	Rent:	$2,525.00
Expenses:	Mortgage:	- 1,963.82
	Insurance:	- 125.75
	Property taxes:	- 493.00
	Maintenance, etc.:	- 40.00
Net pre-tax income		($97.57)

Mr. Pittner considers this loss to be *de minimus* and can be made up by increasing the rent the next time the lease renews.

The Appellees objected to the March 2013 Plan on the grounds that it failed to provide a reasonable interest rate for their claim, payment of pre-petition arrears, or reimbursement of post-petition advances they made for real estate taxes and hazard insurance.

On July 17, 2013, the bankruptcy court held a hearing on confirmation of the March 2013 Plan and the Appellees' objection. After the confirmation hearing, the bankruptcy court entered an order ("July 17, 2013 Order"),[3] stating that the March 2013 Plan was "[g]ranted" and the Appellees' objection was "[o]verruled." Additionally, the court directed the Debtor to file a formal confirmation order by July 24, 2013. The docket reflects that no such confirmation order was filed, although the Debtor's counsel insists that he submitted a proposed confirmation order "to chambers."[4] It is undisputed that the court never entered a separate more formal

[3] The July 17, 2013 Order was in the form of a "Proceeding Memorandum/Order of Court" issued in conjunction with the hearing, and provided no explanation or discussion of the bankruptcy court's decision. Instead, the court simply checked one box to indicate the March 2013 Plan was "granted" and another to indicate the Appellees' objection was "overruled."

[4] The record is devoid of any evidence that the Debtor complied with the July 17, 2013 Order, and the Debtor's counsel did not offer any documentation (such as a cover letter, email, facsimile, or other document) to corroborate his assertion.

confirmation order, and that the July 17, 2013 Order was the only order entered relating to confirmation of the March 2013 Plan.

B. Post-Confirmation Modification of the March 2013 Plan

Six days after the confirmation hearing, the Debtor filed, with the Appellees' consent, a motion to modify the Property Provision of the March 2013 Plan, indicating that the parties had agreed: (1) to increase the interest rate payable on the Appellees' claim from 4.00% to 4.25%; and (2) that the Appellees could seek allowance of an administrative claim for their post-petition advances. On July 25, 2013, the bankruptcy court granted the motion without explanation. (Hereafter, the March 2013 Plan as modified by these terms will be referred to as the "Operative Plan.").

C. Final Decree

In February 2014, the Debtor moved for entry of a final decree closing the case, stating the Plan of Reorganization ha[d] been substantially consummated" and the Debtor had commenced making payments pursuant to the Operative Plan, including payments to the Appellees. The bankruptcy court granted the request, and the case was closed in April 2014.

D. Adversary Proceeding

A year and a half later, in October 2015, the Debtor successfully moved to reopen his bankruptcy case to seek redress for the Appellees' alleged violations of the Operative Plan.[5] He then commenced an adversary proceeding against the Appellees with a four-count complaint

[5] By this time, the bankruptcy judge who had initially presided over the case had retired, and a different bankruptcy judge was assigned to the reopened case.

("Original Complaint") alleging they had violated the Operative Plan after the bankruptcy case was closed by, among other things, rejecting proffered payments and refusing to speak to him about the loan. In Count I, the Debtor asserted a cause of action for contempt of "the confirmation order." In the remaining counts, the Debtor alleged: breach of contract (Count II); violation of Mass. Gen. Laws ch. 93A, § 11 (Count III); and violation of 12 U.S.C. § 2605(e), the Real Estate Settlement Procedures Act ("RESPA") (Count IV).

E. Motion to Dismiss Original Complaint

The Appellees filed a motion to dismiss the Original Complaint, maintaining that the bankruptcy court lacked subject matter jurisdiction over Counts II through IV, and that the Debtor had failed to allege a prima facie case for contempt in Count I. After a hearing, the bankruptcy court denied the motion to dismiss, but directed the Debtor to file an amended complaint with a more complete explanation of his causes of action within 30 days. The Appellees appealed the order denying the motion to dismiss to the U.S. District Court for the District of Massachusetts (the "District Court"), which granted leave to hear their interlocutory appeal.[6]

F. Amended Complaint

While the District Court appeal was pending, the Debtor filed an amended complaint ("Amended Complaint"), presumably in response to the bankruptcy court's directive issued

[6] In the District Court appeal, the Appellees raised only the issue of whether the bankruptcy court erred as a matter of law when it determined it had subject matter jurisdiction to decide the claims predicated

before the appeal was filed.[7] The Amended Complaint contained the same causes of action as the Original Complaint but added additional factual allegations to support the claims asserted.

Specifically, in Count I of the Amended Complaint, entitled "Contempt of the Confirmation Order," the Debtor alleged that the Appellees had violated the "clear and unambiguous" terms of the Operative Plan by accepting payments for one year following its confirmation, and then refusing to accept additional payments from the Debtor or to communicate with him regarding the debt. As redress, the Debtor requested that the bankruptcy court exercise its equitable powers under § 105 and hold the Appellees in contempt of the "confirmation order."[8]

To support his claim for contempt in the Amended Complaint, the Debtor alleged, in pertinent part that: (1) the Operative Plan modified the mortgage to provide a principal balance of $354,000, to be paid at 4% interest over 23 years; (2) after a hearing on July 17, 2013, the court "entered an order granting the plan," although "no formal confirmation order was entered"; (3) shortly thereafter, at the Appellees' request, the Property Provision was modified to increase the interest rate payable on their claim, and the court approved the modification; (4) for a year after the confirmation hearing, Selene Finance accepted payments "in accordance with the

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upon state and non-bankruptcy federal law. See Castle Peak 2011-1 Loan Trust v. Pittner, No. CV 16-10844-RWZ, 2017 WL 1190369 (D. Mass. Mar. 29, 2017). Therefore, the District Court limited its review to the bankruptcy court's denial of the motion to dismiss Counts II through IV. Id.

[7] In light of the pending appeal in the District Court, the Debtor's filing of the Amended Complaint was premature.

[8] The Debtor did not specify what he meant by "confirmation order." However, as discussed later, we construe the "confirmation order" referenced in the Amended Complaint to be the July 17, 2013 Order.

[Operative P]lan"; (5) on May 19, 2014, Selene Finance sent a "Notice of Default and Intent to Accelerate" to Pittnerova, asserting that the mortgage was in default, and demanding payment of $3,226.21 to cure the default; (6) Selene Finance refused to provide the information he requested under RESPA, responding by letter that it "d[id] not have a record of [the Debtor] as a customer"; (7) on September 16, 2014, Selene Finance sent Pittnerova another "Notice of Default and Intent to Accelerate," and demanded payment of $5,953.91 to cure the default; and (8) Selene Finance repeatedly refused to communicate with the Debtor, send him monthly statements, or accept payments from him "tendered in accordance with the 'granted' chapter 11 plan" and returned the payments he made in March and April 2015.

G. May 2016 Plan

A few weeks after filing the Amended Complaint (and also while the District Court appeal was pending), the Debtor filed another modified plan along with a motion for its approval retroactive to the date of the confirmation hearing held on July 17, 2013 ("May 2016 Plan"). Through this modified plan, the Debtor attempted to address certain deficiencies in the Operative Plan which were noted by the bankruptcy court at the hearing on the motion to dismiss the Original Complaint. Specifically, the May 2016 Plan provided that the Debtor would make the stated payments to secured creditors required under this plan. No objections were filed, and after a hearing, on August 1, 2016, the bankruptcy court granted the motion and entered an order confirming the May 2016 Plan retroactive to July 17, 2013.

H. District Court Judgment

In March 2017, the District Court entered a Judgment, "remanding the case to the Bankruptcy Court to dismiss counts II, III, and IV of Pittner's 11/18/15 complaint." Thus, only

Count I of the Original Complaint—the contempt count—remained unaffected by the District Court's Judgment. But, as noted, by this time, the Debtor had filed his Amended Complaint which amended that count as well as the other counts of the Original Complaint.

I. Dismissal Motion

Before the bankruptcy court acted on the District Court's remand instruction, the Appellees responded to the Amended Complaint by filing a new motion to dismiss pursuant to Rule 12(b)(6) ("Dismissal Motion"). The Dismissal Motion was targeted at Count I of the Amended Complaint, with the Appellees proceeding as if the other counts had been rendered a nullity by the District Court's Judgment even though the bankruptcy court had not yet entered an order dismissing Counts II through IV of the Original Complaint. Because they deemed the contempt count (Count I) as the only surviving count of the Amended Complaint, the Appellees also moved to dismiss the entire adversary proceeding with prejudice. Specifically, they argued that they could not be found in contempt of a "confirmation order" because no confirmation order had been entered. They also maintained that the Debtor had once again failed to allege a prima facie case for contempt in Count I because the Amended Complaint did not allege sufficient facts to establish that the Appellees' actions violated any specific terms of the Operative Plan.

The Debtor filed an opposition to the Dismissal Motion, countering that the Amended Complaint contained sufficient alleged facts concerning the Appellees' violations of the "unambiguous" terms of the Operative Plan to establish a prima facie case for contempt of the "confirmation order." According to the Debtor, there was a "confirmed plan," as evidenced by the July 17, 2013 Order, and it was "immaterial that a 'formal' order was not entered," because

all of the parties "acted in accordance with the plan having been confirmed." He contended the Appellees were in violation of the Operative Plan because they accepted post-confirmation payments from the Debtor for about a year before refusing to accept further payments or to communicate with him regarding the debt.

A few days after the Debtor filed his opposition to the Dismissal Motion, the bankruptcy court entered an order dismissing Counts II, III, and IV of the Original Complaint (the "Post-Remand Dismissal Order") consistent with the District Court's Judgment.

J. Hearing on Dismissal Motion

In May 2017, the bankruptcy court held a hearing on the Dismissal Motion. At the outset of the hearing, the bankruptcy court indicated, without objection by either party, that Count I was the sole surviving count in the Amended Complaint,[9] and the parties limited their arguments to that count.[10]

At the hearing, the Appellees again asserted: (1) they could not be held in contempt of an order that never entered; and (2) even if the court had entered a confirmation order, the Operative Plan did not require them to do anything, and they had no obligation to accept payments from the

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[9] The bankruptcy court asked the parties: "All the other counts have now been addressed by Judge Zobel [of the District Court], correct?" The Appellees responded affirmatively, and the Debtor did not object.

[10] As Counts II through IV of the Original Complaint were dismissed, the Debtor's efforts to amend those counts by virtue of his prematurely filed Amended Complaint amounted to an empty exercise. Moreover, it is clear from the Dismissal Motion that the Appellees treated the Amended Complaint as an amendment to Count I only. Indeed, the Debtor's own filings, including his opposition to the Dismissal Motion, reflect that he too viewed the amendment as applying only to this count. Thus, both parties proceeded in the litigation as if only Count I of the Amended Complaint remained after the District Court's Judgment and remand.

Debtor or to communicate with him because he was not a borrower under the note. The Appellees also explained they had stopped accepting payments from the Debtor because the mortgage obligation had become far in arrears.[11]

The Debtor countered that the lack of a formal confirmation order was not fatal to his case because both the July 17, 2013 Order and the docket entry following the confirmation hearing reflected that the bankruptcy court had confirmed the March 2013 Plan.[12] The Debtor again insisted that the Appellees were in contempt because they had accepted payments under the Operative Plan for a year after its confirmation, and then refused to accept further payments from the Debtor or to communicate with him regarding the loan.

At the conclusion of the hearing, the bankruptcy court granted the Dismissal Motion, reasoning:

> You know, I agree with Mr. Baker [the Debtor's counsel] that even though there is not a confirmation order there's an order granting the approval of a plan. It's a little awkwardly worded, but I think that's enough to create the – to put this in a situation as Mr. Baker describes it that you have[ ] a plan that is a contract between the debtor and his creditors. The problem is [ ] what is that contract. And the plan that was confirmed is just too vague for me to be able to look at Selene and say, you had an agreement with Mr. Pittner to do X, Y and Z and your failure to do so is a violation of the plan and is, therefore, eligible for contempt, assuming other things were to occur.
>
> I just don't see how we get there, Mr. Baker. There's not – there's not a verb in your entire treatment of this particular claim. It doesn't say he'll do anything. It doesn't say he'll pay. It doesn't say he'll execute. Nothing. It just says a note

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[11] The Appellees stated that the Debtor's monthly payments under the Operative Plan covered principal and interest, but were insufficient to pay the escrow component of the loan for insurance and real estate taxes. Thus, the arrearage continued to increase.

[12] This docket entry provided: "Order Dated 7/17/2013 Re: 133 Second Amended Chapter 11 Plan. Hearing Held. Granted. Formal Order to be submitted by Debtor in one week."

> with a principal amount of $354,000 at four percent interest for a term of 23 years requires a monthly payment of $1,962.82.
>
> Okay. And then what? There's no obligation created by any of the language in this plan by Mr. Pittner to Selene or vice versa. It's all passive. It's all statements of something but it's not enough, in my opinion, for me to now say that what Selene Finance has been doing rises to the level of contempt. I just can't do it. And the default is in the way this plan is worded, so I'm going to grant the motion to dismiss.

Thereafter, the bankruptcy court entered an order granting the Dismissal Motion "for the reasons set forth on the record" ("Dismissal Order").

K. Reconsideration Motion

The Debtor filed a motion for "relief" from the Dismissal Order under Bankruptcy Rule 9023 ("Reconsideration Motion"), maintaining that the bankruptcy court had committed manifest errors of law and fact. According to the Debtor, the bankruptcy court had read the Operative Plan too narrowly, had overlooked the parties' post-confirmation modification agreement, and had not given appropriate consideration to the Appellees' post-confirmation conduct. The Debtor maintained that the bankruptcy court erred by looking only at the Property Provision in determining that the Operative Plan imposed no obligation on either the Debtor or the Appellees. Instead, he contended, the bankruptcy court should have considered all of the provisions of the Operative Plan as a whole, as well as the post-confirmation hearing negotiations between the parties leading to the modified treatment of the Appellees' claim under the Operative Plan. He pressed that the court should have "infer[red]" that the Debtor intended to make the stated monthly payment to the Appellees on account of their claim. To bolster his contention, the Debtor noted: the word "payment" appeared twice in the Property Provision; Section 6.4 of the Operative Plan authorized the Debtor and any claimant to execute any other documents

necessary for the implementation of the Operative Plan; and Section 6.6 of the Operative Plan required the Debtor to take any necessary actions to implement the Operative Plan, including executing any amended loan documents or modification agreements required by a secured creditor.

In opposition to the Reconsideration Motion, the Appellees reasserted their position that: (1) the Debtor failed to identify any specific terms of the Operative Plan they allegedly violated; (2) because the Debtor had received a discharge in his prior chapter 7 case, he had no obligations under the mortgage; and (3) his payments under the Operative Plan, as well as the Appellees' acceptance of such payments, were entirely voluntary as there was no mandate in the Operative Plan for the Debtor to make the payments or for the Appellees to accept them.

L. Hearing on Reconsideration Motion

The bankruptcy court held a hearing on the Reconsideration Motion and articulated its findings and conclusions from the bench. The court focused primarily on one issue: whether the Operative Plan was clear and unambiguous as to the parties' obligations with respect to the Appellees' claim.

In this regard, the bankruptcy court reiterated its findings that the Operative Plan was ambiguous and did not specifically obligate the Debtor to do anything with respect to the Appellees' claim or vice versa. The court explained that the relevant provision of the Operative Plan simply "says the principal is this much, the interest rate is this much, and the monthly payment is how much, but it doesn't say who pays it or that [the Appellees] have to accept it or anything like that." The court acknowledged that shortly after the July 2013 confirmation hearing, the parties had agreed to a modest modification regarding the interest rate payable on

the Appellees' claim, but pointed out that all other provisions had remained the same. Thus, even as modified, the Operative Plan simply did not impose any specific obligations on the Debtor or the Appellees. Following these observations, the court denied the Reconsideration Motion, stating:

> [The treatment of the Appellees' claim] wasn't articulated in a fashion that . . . gives [the Debtor] the ability to make a contempt of this confirmation order claim against Selene Finance. I'm just not prepared to countenance such a profound and drastic remedy in a circumstance where the treatment doesn't actually articulate who's to do what, either on [the Debtor's] side or Selene Finance's side, especially in a situation like this where you have a debtor who's not personally signed on the note and who's not legally obligated because of a prior discharge.
>
> This all should have been laid out clearly in the plan. Notwithstanding a discharge the debtor is going to make these payments. Notwithstanding a discharge Selene is entitled to look to the debtor for these [payments]—none of that is in here and on the basis of that I'm not prepared to reconsider what I said before. This is not treatment [ ] from which I can find in any way that there's a contempt in Selene's conduct here, so I'm going to deny the motion.

Thereafter, the court entered an order denying the Reconsideration Motion ("Order Denying Reconsideration"). The Debtor timely appealed the Dismissal Order and the Order Denying Reconsideration.

JURISDICTION

"Pursuant to 28 U.S.C. §§ 158(a) and (b), the Panel may hear appeals from 'final judgments, orders, and decrees,' § 158(a)(1), or 'with leave of the court, from interlocutory orders, and decrees,' § 158(a)(3)." Fleet Data Processing Corp. v. Branch (In re Bank of New Eng. Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998); see also Bullard v. Blue Hills Bank, 135 S. Ct. 1686, 1692, 1695 (2015) (discussing the Panel's jurisdiction to hear bankruptcy appeals under 28 U.S.C. § 158(a)). A decision is considered final if it "ends the li[ti]gation on

the merits and leaves nothing for the court to do but execute the judgment." In re Bank of New Eng. Corp., 218 B.R. at 646 (citations omitted). Generally, an order granting a motion to dismiss an adversary complaint is a final order. Privitera v. Curran (In re Curran), 554 B.R. 272, 278 (B.A.P. 1st Cir. 2016) (citing Gonsalves v. Belice (In re Belice), 480 B.R. 199, 203 (B.A.P. 1st Cir. 2012)), aff'd, 855 F.3d 19 (1st Cir. 2017). Thus, to assess our jurisdiction, we must consider whether there has been a final adjudication of all causes of action presented in the adversary proceeding.

The bankruptcy court, acting on the District Court's remand instructions, dismissed Counts II through IV of the Original Complaint.[13] Thereafter, the bankruptcy court dismissed the sole surviving count of the Amended Complaint—Count I, (the contempt claim). Together, the Post-Remand Dismissal Order and the Dismissal Order, constituted a final adjudication of all of the causes of action in the adversary proceeding.[14] Therefore, the Dismissal Order is a final order.

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[13] As discussed above, the parties and the bankruptcy court deemed the Post-Remand Dismissal Order as essentially nullifying Counts II through IV in the Amended Complaint.

[14] Although the bankruptcy court did not enter an order specifically dismissing Counts II through IV of the Amended Complaint, this does not affect our finality analysis. It is clear from the record that the bankruptcy court and the parties considered Count I of the Amended Complaint—the contempt count—to be the sole surviving cause of action, and that the court's disposition of that count would be its final decision in the adversary proceeding. See Bankers Trust Co. v. Mallis, 435 U.S. 381, 387 (1978) (concluding there was appellate jurisdiction despite absence of a separate order memorializing the final judgment because: (1) the trial court evidenced its intent that its decision would represent its final decision in the case; and (2) no party was misled or prejudiced by considering the order final); see also Diaz-Reyes v. Fuentes-Ortiz, 471 F.3d 299, 301 (1st Cir. 2006) (citing United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 232 (1958); Goodwin v. United States, 67 F.3d 149, 151 (8th Cir. 1995))

Because the Dismissal Order is final, so, too, is the Order Denying Reconsideration. See United States v. Monahan (In re Monahan), 497 B.R. 642, 646 (B.A.P. 1st Cir. 2013) (stating an order denying reconsideration is final if the underlying order is final and together the orders end the litigation on the merits) (citation omitted). Accordingly, we have jurisdiction to consider both of the orders on appeal.

STANDARD OF REVIEW

"We review a bankruptcy court's findings of fact for clear error and its conclusions of law de novo." Jeffrey P. White & Assocs., P.C. v. Fessenden (In re Wheaton), 547 B.R. 490, 496 (B.A.P. 1st Cir. 2016) (citation omitted). An order dismissing a complaint for failure to state a claim is subject to de novo review. In re Curran, 554 B.R. at 279 (citing Juárez v. Select Portfolio Servicing, Inc., 708 F.3d 269, 276 (1st Cir. 2013); Banco Santander de P.R. v. López-Stubbe (In re Colonial Mortg. Bankers Corp.), 324 F.3d 12, 15 (1st Cir. 2003)). The Panel reviews an order denying a motion for reconsideration for abuse of discretion. In re Wheaton, 547 B.R. at 496 (citing Ross v. Garcia (In re Garcia), 532 B.R. 173, 181 (B.A.P. 1st Cir. 2015)). A court abuses its discretion if it "'relies upon an improper factor, neglects a factor entitled to substantial weight, or considers the correct mix of factors but makes a clear error of judgment in weighing them.'" Mercado v. Combined Invs., LLC (In re Mercado), 523 B.R. 755, 761

("For an order to constitute a final judgment, 'there must be some clear and unequivocal manifestation by the [ ] court of its belief that the decision made, so far as the court is concerned, is the end of the case.'").

(B.A.P. 1st Cir. 2015) (quoting Bacardí Int'l Ltd. v. V. Suárez & Co., 719 F.3d 1, 9 (1st Cir. 2013)).

DISCUSSION

I. The Dismissal Order.

A. Applicable Law

1. Rule 12(b)(6) Standard

The Appellees sought dismissal of Count I of the Amended Complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted.[15] This Rule is made applicable to adversary proceedings by Bankruptcy Rule 7012(b). See Fed. R. Bankr. P. 7012(b). To avoid dismissal under Rule 12(b)(6), a plaintiff must aver in the complaint "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory, or on the absence of sufficient facts alleged under a cognizable legal theory. Johnson v. Riverside Healthcare Sys., LP, 534 F.3d 1116, 1121 (9th Cir. 2008).

[15] Rule 12(b)(6) provides that a defendant may move to dismiss a complaint if it fails to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6); see also Diaz-Colon v. Toledo-Davila, 922 F. Supp. 2d 189, 196 (D.P.R. 2013).

When considering a motion brought under Rule 12(b)(6), the court must treat all well-pleaded allegations in the complaint as true, and must view them in the light most favorable to the plaintiff. Pérez-Acevedo v. Rivero-Cubano, 520 F.3d 26, 29 (1st Cir. 2008) (citation omitted). "However, the court need not accept as true conclusory allegations or legal characterizations cast in the form of factual allegations." In re Curran, 554 B.R. at 280 (citing Twombly, 550 U.S. at 555-56). In assessing such a dismissal motion, a court may consider the allegations in the complaint, exhibits attached to the complaint, documents referenced in but not attached to the complaint, and matters of public record. Rodi v. S. New Eng. Sch. of Law, 389 F.3d 5, 12 (1st Cir. 2004).

2. Contempt Powers under § 105(a)

In Count I of the Amended Complaint, the Debtor sought a determination that the Appellees were in contempt of the "confirmation order" and requested redress through the bankruptcy court's exercise of its equitable powers under § 105 to sanction the Appellees.

This provision authorizes bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). It "provides the bankruptcy court broad authority to exercise its equitable powers—where necessary or appropriate—to facilitate the implementation of other Bankruptcy Code provisions." Ameriquest Mortg. Co. v. Nosek (In re Nosek), 544 F.3d 34, 43 (1st Cir. 2008) (citation omitted) (internal quotations omitted). It is well settled that § 105(a) confers "'statutory contempt powers' which 'inherently include the ability to sanction a party.'"

Id. at 43-44 (citation omitted).[16] The First Circuit has warned, however, that the courts should exercise their equitable powers under § 105(a) cautiously, stating:

> [S]ection 105(a) does not provide bankruptcy courts with a roving writ, much less a free hand. The authority bestowed thereunder may be invoked only if, and to the extent that, the equitable remedy dispensed by the court is necessary to preserve an identifiable right conferred elsewhere in the Bankruptcy Code.

Jamo v. Katahdin Fed. Credit Union (In re Jamo), 283 F.3d 392, 403 (1st Cir. 2002) (citations omitted).

(a) Redress Under § 105(a) For Violations of a Confirmation Order

It is well settled that a court may invoke its contempt power under § 105(a) to require compliance with its orders. See In re Nosek, 544 F.3d at 43 (citation omitted); see also Padilla v. GMAC Mortg. Corp. (In re Padilla), 389 B.R. 409, 420 (Bankr. E.D. Pa. 2008) (citing, among others, Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991)). Although the First Circuit has not explicitly ruled on the issue, courts within this circuit, including the Panel, have concluded that a party's violation of a confirmation order can constitute sanctionable contempt under § 105(a). See, e.g., Fatsis v. Braunstein (In re Fatsis), 405 B.R. 1, 11 (B.A.P. 1st Cir. 2009) (affirming bankruptcy court's determination that debtor was in contempt for actions which violated the order confirming his chapter 13 plan and its imposition of monetary contempt sanctions under

[16] The "statutory contempt powers" set forth in § 105 are distinct from the court's "inherent contempt powers" to regulate conduct before it. See Bessette v. Avco Fin. Servs., Inc., 230 F.3d 439, 445 (1st Cir. 2000) ("[Section] 105 provides a bankruptcy court with statutory contempt powers, in addition to whatever inherent contempt powers the court may have.") (citations omitted).

§ 105(a)); In re Franklin, No. 09-13399-JMD, 2017 WL 3701214, at *7 (Bankr. D.N.H. Aug. 24, 2017) (holding that failure to properly account for mortgage payments rendered the mortgagee in contempt of the confirmation order and court could remedy such contempt under § 105(a)) (citing In re Nosek, 544 F.3d at 43-44).[17] Moreover, in In re Nosek, supra, the First Circuit acknowledged the bankruptcy court's authority under § 105(a) to ensure compliance with its own orders and considered, among other things, whether the terms of the debtor's chapter 13 plan were "sufficiently concrete," such that the creditor's conduct violated those provisions and warranted the imposition of remedies under § 105(a). 544 F.3d at 44. Ultimately, the First Circuit declined to impose any such remedies under § 105, but it did so because the terms of the plan did not "provide the specificity required to invoke the enforcement authority of § 105(a)." Id. at 47. It is implicit in the court's ruling that if the plan had provided the required "specificity," the bankruptcy court could have imposed remedies under § 105(a) for violations of the confirmation order. See id. at 49.[18]

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[17] But see Chase v. CitiMortgage, Inc. (In re Chase), No. 12-10772-JNF, 2017 WL 6397713, at *10 (Bankr. D. Mass. Dec. 13, 2017) (quoting in re Padilla, 389 B.R. at 420-21, in which the court ruled that a party cannot be held in contempt of a confirmation order because "the confirmation order is not a coercive court order directing creditors to act in conformity with the terms of the confirmed plan."). The court in In re Chase, however, ultimately concluded that debtors had failed to establish any basis for an award of damages for violation of the confirmation order because the confirmation order was no longer effective due to the dismissal of the bankruptcy case.

[18] A number of courts outside of this circuit have likewise determined that the "statutory contempt powers" under § 105(a) are available to remedy violations of a confirmation order and to impose sanctions or other remedies for those violations. See, e.g., Keller v. New Penn Fin., LLC (In re Keller), 568 B.R. 118, 128-29 (B.A.P. 9th Cir. 2017) ("A violation of the confirmation order . . . is an act of contempt and may be remedied under § 105."); In re Rhodes, 563 B.R. 380, 387-88 (Bankr. M.D. Fla. 2017) (awarding sanctions for contempt of confirmation and sale orders); In re Crawford, 532 B.R. 645, 654 (Bankr. D.S.C. 2015) (stating that it was authorized under § 105(a) to award attorney's fees when

(b) Contempt Standard

The standard for civil contempt is clear. To prove civil contempt of a court order, the moving party "must establish by clear and convincing evidence that a contemnor violated a court order." In re Fatsis, 405 B.R. at 7 (citing AccuSoft Corp. v. Palo, 237 F.3d 31, 47 (1st Cir. 2001)). The moving party must demonstrate that: "(1) the alleged contemnor had notice of the order, (2) the order was clear and unambiguous, (3) the alleged contemnor had the ability to comply with the order, and (4) the alleged contemnor violated the order." Hawkins v. Dep't of Health & Human Servs. for N.H., 665 F.3d 25, 31 (1st Cir. 2012) (citation omitted) (internal quotations omitted). The second and fourth factors are often combined into one inquiry—whether the party charged with contempt violated an order that is clear and unambiguous. See United States v. Saccoccia, 433 F.3d 19, 27 (1st Cir. 2005) (citations omitted).

In its evaluation, a court "'must read any ambiguities or omissions in . . . a court order as redound[ing] to the benefit of the person charged with contempt.'" Id. at 28 (quoting NBA Props., Inc. v. Gold, 895 F.2d 30, 32 (1st Cir. 1990)). "To be held in contempt, a party 'must have violated a clear and unambiguous order that left no reasonable doubt as to what behavior was expected and who was expected to behave in the indicated fashion.'" Baldiga v. C.A. Acquisition Corp. (In re Cyphermint, Inc.), 496 B.R. 49, 57 (Bankr. D. Mass. 2013) (quoting

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holding a party in contempt for failure to comply with a confirmation order); In re Dendy, 396 B.R. 171, 179 (Bankr. D.S.C. 2008) (holding that "violation of the confirmation order is an act of contempt, which . . . may be remedied" under § 105); Sanchez v. Ameriquest Mortg. Co. (In re Sanchez), 372 B.R. 289, 311 (Bankr. S.D. Tex. 2007) (stating that the bankruptcy court "may issue sanctions under § 105(a) for . . . contempt of an order confirming a debtor's plan.").

Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 17 (1st Cir. 1991), and citing In re Fatsis, 405 B.R. at 7); see also In re Padilla, 389 B.R. at 420 ("[C]ivil contempt is an appropriate remedy only where 'a person violates a court order requiring in specific and definite language that a person do or refrain from doing an act or series of acts.'") (citation omitted). "The test is whether the contemnor is 'able to ascertain from the four corners of the order precisely what acts are [required or] forbidden.'" In re Fatsis, 405 B.R. at 7 (quoting Goya Foods, Inc. v. Wallack Mgmt. Co., 290 F.3d 63, 76 (1st Cir. 2002)). "Focusing the test within the four corners of a document limits the inquiry to an examination of that document's text." Goya Foods, Inc., 290 F.3d at 76 (citation omitted). If the terms of an order are ambiguous, the alleged violator cannot be found in contempt. Moreover, "[t]he question is not whether the order is clearly worded as a general matter[.]" Saccoccia, 433 F.3d at 28 (citation omitted). "[I]nstead, the 'clear and unambiguous' prong requires that the words of the court's order have clearly and unambiguously forbidden [or required] *the precise conduct on which the contempt allegation is based*." Id. (citation omitted).

B. Analysis

To establish a plausible claim for contempt of a court order, the Debtor was required to set forth sufficient facts which, if taken as true, established that: (1) the Appellees had notice of the order; (2) the order was "clear and unambiguous," i.e. it required in specific and definite language that the Appellees do, or refrain from doing, specific acts; (3) the Appellees had the ability to comply with those terms; and (4) the Appellees violated those clear and unambiguous provisions. See Hawkins, 665 F.3d at 31 (citation omitted). We concur with the bankruptcy court that the Debtor failed to set forth sufficient facts to establish that the Appellees' actions

violated a "clear and unambiguous" court order. Accordingly, he did not set forth a plausible claim for contempt.[19]

In Count I of the Amended Complaint, the Debtor asserted the Appellees' actions violated the "clear and unambiguous" terms of the Operative Plan, and sought a finding that the Appellees were in contempt of the so-called "confirmation order." It is undisputed that the bankruptcy court did not enter a formal confirmation order, and that the only order entered by the court with respect to confirmation was the July 17, 2013 Order. We discern no error in the bankruptcy court's determination that this order constituted an order confirming the Operative Plan. Indeed, the only "confirmation order" that the Appellees could have conceivably violated is the July 17, 2013 Order.[20] Hence, our "'clear and unambiguous' inquiry is limited to the four corners of" that order. See Goya Foods, Inc., 290 F.3d at 76-77.

The July 17, 2013 Order simply noted that: (1) the court held a hearing on the March 2013 Plan and the Appellees' objection to confirmation of that plan; (2) the March 2013 Plan was "[g]ranted" and the Appellees' objection was "[o]verruled"; and (3) the Debtor was to

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[19] The parties have not raised any issues regarding the first and third elements of the contempt standard (notice and ability to comply). Thus, our focus is on the second and fourth prongs—whether the Appellees violated a clear and unambiguous court order. See Hawkins, 665 F.3d at 31 (noting that parties "d[id] not contest [ ] the first three prongs of the contempt inquiry" and, as result, examining only the remaining prong); Saccoccia, 433 F.3d at 27-28 (articulating four-part contempt standard, but stating it was "focus[ing] on the 'clear and unambiguous' prong together with the violation prong").

[20] Notwithstanding its recitation that the confirmation of the May 2016 Plan was retroactive to the date of the July 17, 2013 confirmation hearing, the August 2016 Order cannot serve as the predicate order upon which the bankruptcy court could make a contempt finding as the Appellees' allegedly contemptuous conduct occurred several years before its entry.

submit a "formal order" within "1 week." It did not explicitly incorporate the March 2013 Plan or refer to any of its terms, and it did not contain "specific and definite language" requiring the Appellees to "do or refrain from doing" any specific acts. See In re Padilla, 389 B.R. at 420 (citation omitted). The Appellees could not "ascertain from the four corners" of the July 17, 2013 Order "precisely what acts [were required or] forbidden." See In re Fatsis, 405 B.R. at 7 (citation omitted) (internal quotation omitted). In short, this order, standing alone, does not meet the "clear and unambiguous" standard required for a contempt finding.[21]

Because the July 17, 2013 Order was silent as to the parties' obligations with respect to the Appellees' claim, the bankruptcy court necessarily focused on the Property Provision in the Operative Plan. This is consistent with the practice of some courts outside of this circuit to look beyond the confirmation order to the actual plan document to evaluate whether a creditor's conduct violated a confirmation order. See, e.g., In re Keller, 568 B.R. at 129 (reviewing the terms of the plan to determine whether the creditor's actions violated the confirmation order, and determining that "[t]he confirmed plan [wa]s silent on the issue"); In re Dendy, 396 B.R. at 180 (stating that "[a]n examination of the relevant provisions in the plan and confirmation order" was "necessary" to determine whether creditor's actions violated the confirmation order); Kerney v. Capital One Fin. Corp. (In re Sims), 278 B.R. 457, 473-74 (Bankr. E.D. Tenn. 2002)

[21] Nor does the Order entered on the Debtor's motion to modify the March 2013 Plan (slightly amending the Property Provision) yield any greater specificity regarding the respective obligations of the parties. Rather, it simply stated that the motion was: "Granted."

(determining that there was "nothing in the plans or the confirmation orders . . . that advised [the creditor] in clear and unambiguous terms what it was required to do or abstain from doing").

Even with such widening of the lens of our inquiry, the Debtor fares no better. As the bankruptcy court correctly found, the Property Provision does not contain any concrete directives that the Appellees accept payments from the Debtor or that they must communicate with him regarding the loan. To compensate for the absence of any such specific directives, the Debtor submits two basic arguments on appeal. First, he urges a "holistic approach" to plan interpretation, asserting that the bankruptcy court erred in its strict reading of the Property Provision and by looking *only* to that provision. Because this provision set forth the amounts he believed "Selene ha[d] been paying" for "taxes and insurance for the property," the Debtor contends, "it would have been entirely appropriate for the bankruptcy court to *infer* that [the Debtor] intended, by this provision, to pay $1,963.82 per month plus escrow." (emphasis added). For additional support, he highlights the Operative Plan's "Article VI–Means for Implementation of the Plan," which repeats the word "payment" several times, as well as the Operative Plan's subsections 6.3, addressing unclaimed distributions; 6.4, authorizing the Debtor and any claimant to execute any other documents necessary for the implementation of the Operative Plan; and 6.6, requiring the Debtor to take any necessary actions, including executing any amended loan documents or modification agreements required by a secured creditor.

Second, the Debtor insists that the bankruptcy court should have looked past the four corners of the Operative Plan and considered the parties' conduct. He argues that "[l]ooking solely to the provision for Selene [Property Provision] takes the provision out of the context of

the plan, and the negotiations leading up to it, and fails to make appropriate inferences in [the Debtor's] favor . . . ."

We are unpersuaded. The "inferences" the Debtor contends the bankruptcy court should have made about the Operative Plan fall far short of the "clear and unambiguous" standard the Debtor had to meet for a finding of contempt. Like the Property Provision, the other provisions of the Operative Plan he highlights are silent regarding the Appellees' obligations to the Debtor. Even when considered as a whole, the Operative Plan still does not contain any "specific and definite language" that requires the Appellees to accept payments from the Debtor or to communicate with him post-confirmation about the debt, or for that matter, to do or refrain from doing anything. Nor does it require any action by the Debtor or legally obligate him for the debt owed to Appellees. Conspicuously absent is any obligation of the Debtor to assume the obligations under the note and mortgage—a significant omission because the Debtor was never a borrower on the note and was discharged of any personal liability under the mortgage in his prior chapter 7 case. In short, the Operative Plan does not contain any "sufficiently concrete" directive that the Debtor must remit monthly payments to the Appellees in the amount stated in the Operative Plan, or that the Appellees must accept those payments. See In re Nosek, 544 F.3d at 44.

The ambiguity concerning the parties' obligations with respect to the Appellees' claim is further underscored when compared to the Operative Plan's provisions for other secured claims. For example, in Article III (describing Class 1 allowed secured claims) for the secured claim against certain property located in Easton, Massachusetts, the Operative Plan expressly states

that "Mr. Pittner *will pay* Deutsche Bank or its designee "$22,500." (emphasis added). The Operative Plan does not state a similar mandate for the Debtor to remit payments to the Appellees on their secured claim against the Property.

As to his contention that the bankruptcy court should have considered the parties' negotiations, the Debtor offers no legal support for the notion that the "clear and unambiguous" inquiry permits consideration of such negotiations. Nor can he, for this argument contradicts the "four corners" contempt test prescribed by the First Circuit. Under this test, courts within this circuit are constrained to consider only the document in issue to determine its clear mandates; they should not look beyond it. See Goya Foods, Inc., 290 F.3d at 76 ("Focusing the test [for contempt] within the four corners of a document limits the inquiry to an examination of that document's text.") (citation omitted).

In short, accepting as true the Debtor's factual allegations regarding the Appellees' post-confirmation conduct, the Debtor failed to set forth sufficient facts to establish that the Appellees violated the July 17, 2013 Order or any specific provisions of the Operative Plan, and, therefore, he failed to set forth a plausible claim for contempt.[22] We conclude that the bankruptcy court did not err in granting the Dismissal Motion.

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[22] The Panel's determination that the Appellees' conduct does not rise to the level of contempt in no way precludes the potential that it may constitute a breach of contract. See New Seabury Co. v. New Seabury Props., LLC (In re New Seabury Co.), 450 F.3d 24, 33 (1st Cir. 2006) (citation omitted) ("A plan of reorganization is a binding contract between the debtor and the creditors and is subject to the general rules of contract construction and interpretation."). But that is not the issue before us. While the Debtor alleges bad faith conduct by the Appellees, not all alleged bad conduct constitutes contempt. See, e.g.,

II. Reconsideration Motion

Through the Reconsideration Motion, the Debtor sought relief from the Dismissal Order under Rule 59(e), made applicable in bankruptcy proceedings by Bankruptcy Rule 9023. Rule 59(e) authorizes the filing of a written motion to alter or amend a judgment after its entry. See Fed. R. Civ. P. 59(e). To meet the threshold requirements of Rule 59(e), the movant "must demonstrate the 'reason why the court should reconsider its prior decision' and 'must set forth facts or law of a strongly convincing nature' to induce the court to reverse its earlier decision." Nieves Guzmán v. Wiscovitch Rentas (In re Nieves Guzmán), 567 B.R. 854, 863 (B.A.P. 1st Cir. 2017) (quoting In re Ortiz Arroyo, 544 B.R. 751, 756-57 (Bankr. D.P.R. 2015)). The movant must either clearly establish a manifest error of law or fact or must present newly discovered evidence that could not have been discovered during the case. Id. (citations omitted). The motion cannot be used as a vehicle to relitigate matters already litigated and decided by the court. "'Rule 59(e) is not intended to give an unhappy litigant one additional chance to sway the judge.'" See Ramirez Rosado v. Banco Popular de P.R. (In re Ramirez Rosado), 561 B.R. 598, 602 (B.A.P. 1st Cir. 2017). "In practice, [Rule] 59(e) motions are typically denied because of the narrow purposes for which they are intended." In re Nieves Guzmán, 567 B.R. at 863 (quoting In re Ortiz Arroyo, 544 B.R. at 757).

Cipes v. Mikasa, Inc., 404 F. Supp. 2d 367, 372 (D. Mass. 2005) (concluding defendant's noncompliance with court order was "not so egregious as to merit an order of contempt"). Not surprisingly, the Appellees denied any bad faith conduct on their part, and explained at the hearing on the Reconsideration Motion that they had provided the Debtor with an opportunity to cure the mortgage arrearage resulting from the escrow payment shortage.

Here, the Debtor did not present any newly discovered evidence which would warrant the extraordinary relief of reconsideration, and for the reasons discussed above, failed to establish a manifest error of law. As we have previously stated:

> A motion for reconsideration is a weapon that should not be deployed reflexively by the losing party in a contested matter or an adversary proceeding. We recognize that lawyers are duty-bound to advocate zealously on behalf of their clients. But not every adverse order or judgment is predicated on a manifest error of law and the instances of newly discovered evidence are few and far between.

In re Ramirez Rosado, 561 B.R. at 608.

We conclude that the bankruptcy court did not abuse its discretion in denying the Reconsideration Motion.

CONCLUSION

Having determined that the bankruptcy court did not err in dismissing Count I of the Amended Complaint for failure to set forth a plausible claim for contempt of the July 17, 2013 Order, or abuse its discretion in denying reconsideration of that determination, we **AFFIRM** both orders.