

UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

ASOCIACIÓN DE TITULARES DE CONDOMINIO CASTILLO,

Debtor-Appellant

v.

JOANNA DIMARCO, MONA DIMARCO, AND
UNITED STATES OF AMERICA

Creditor-Appellees

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

BRIEF FOR THE UNITED STATES AS APPELLEE

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BAP No. PR 17-0009

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BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

This appeal concerns a bankruptcy court's dismissal of a voluntary chapter 7 bankruptcy petition filed by the Asociación de Titulares de Condominio Castillo (Asociación), a condominium association in San Juan, Puerto Rico. A former resident of the Asociación, Carlos Gimenez-Bianco, filed a complaint with the United States Department of Housing and Urban Development (HUD) alleging that the Asociación discriminated on the basis of disability in violation of the Fair Housing Act, 42 U.S.C. 3601-3619. HUD subsequently filed a charge of

discrimination on behalf of Mr. Gimenez, which resulted in an order by the Secretary of HUD finding that the Asociación violated the Fair Housing Act and awarding \$20,000 in damages to Mr. Gimenez, and \$16,000 in civil penalties to HUD. Doc. 17, at 4.¹ The Asociación appealed and, on May 2, 2016, the United States Court of Appeals for the First Circuit affirmed the Secretary's order. *Castillo Condo. Ass'n v. HUD*, 821 F.3d 92, 96, 100 n.7 (1st Cir. 2016).

Rather than pay those sums, on June 21, 2016, the Asociación filed for chapter 7 bankruptcy in the United States Bankruptcy Court for the District of Puerto Rico. App. at 13-45. Both HUD and Mr. Gimenez are listed as unsecured creditors in the schedules attached to the bankruptcy petition. App. at 26-27. The bankruptcy court dismissed the petition, and denied a motion to reconsider its dismissal. App. at 76, 215. On April 5, 2017, the Asociación filed a timely notice of appeal. App. at 216. This bankruptcy appellate panel has jurisdiction over the appeal pursuant to 28 U.S.C. 158(b)(1).

¹ Citations to "Doc. __, at __" refer to the documents in the bankruptcy court record, as numbered on the docket sheet, and page numbers within those documents. Citations to "App. at __" refer to documents included in the Appellant's Appendix filed before the Bankruptcy Appellate Panel. Citations to "Br. __" refer to page numbers within the Appellant's opening brief.

STATEMENT OF THE ISSUES

1. Whether the bankruptcy court correctly dismissed the chapter 7 bankruptcy petition filed by the Asociación after concluding that it had been filed to avoid payment to creditors for judgments that could not be discharged in bankruptcy.

2. Whether the bankruptcy court acted within its discretion in denying the Asociación's motion for reconsideration of the dismissal.

STATEMENT OF THE CASE

1. Legal Framework

Chapter 7 of the United States Bankruptcy Code (Bankruptcy Code or Code) provides for liquidation of a debtor's assets in exchange for a discharge of debts. 11 U.S.C. 701-727. Commencement of a chapter 7 case creates an "estate" that includes all of the debtor's interests in property as of the filing of the bankruptcy petition. 11 U.S.C. 541(a). Subject to certain exceptions, a chapter 7 debtor is entitled to an automatic stay of actions to enforce, collect, assess, or recover claims against the debtor or the property of the estate. 11 U.S.C. 362(a). The debtor must surrender all non-exempt estate property to the chapter 7 trustee, who takes custody of the estate property, liquidates it, and disburses the proceeds to creditors in accordance with their rights and priorities under the Bankruptcy Code. 11 U.S.C. 507, 521(3) and (4), 704(1), 726.

A chapter 7 debtor is entitled to a discharge of his pre-petition debts unless the debtor is ineligible or the debts are of a type excepted from discharge under the Code. 11 U.S.C. 523, 727(a) and (b). Non-individual chapter 7 debtors (*e.g.*, corporations, partnerships, and other artificial entities) are not entitled to a discharge of their pre-petition debts. 11 U.S.C. 727(a)(1). In addition, the Bankruptcy Code exempts from discharge debts “for willful and malicious injury by the debtor,” as well as certain fines and penalties to governmental units. 11 U.S.C. 523(a)(6) and (7).

A requirement of good faith on the part of the bankruptcy filer “is inherent in the purposes of bankruptcy relief.” *In re Zick*, 931 F.2d 1124, 1129 (6th Cir. 1991) (citations omitted). Moreover, the Bankruptcy Code expressly recognizes the power of bankruptcy courts to prevent the abuse of the bankruptcy process.

Section 105 of the Code authorizes bankruptcy courts to:

issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. 105(a).

2. *Procedural History*

a. *HUD's Underlying Disability Discrimination Claims Against The Asociación*

In 2012, HUD filed a charge of discrimination on behalf of Carlos Gimenez-Bianco alleging that the Asociación had violated the Fair Housing Act by refusing to allow Mr. Gimenez to keep a dog as an emotional support animal in violation of 42 U.S.C. 3604(f)(1) and (2). In October 2014, the Secretary of HUD found for Mr. Gimenez, concluding that the Asociación's conduct "exhibited willful disregard of its fair housing obligations" and that its actions were "egregious and intentional." Doc. 17-2, at 4. The Secretary of HUD awarded \$20,000 in damages to Mr. Gimenez and imposed the maximum civil penalty against the Asociación in the amount of \$16,000, payable to HUD. Doc. 17-2, at 7. Those awards were affirmed on appeal and are final. See *Castillo Condo. Ass'n v. HUD*, 821 F.3d 92, 96, 100 n.7 (1st Cir. 2016); see also Doc. 17-3 (opinion of the First Circuit).

b. *The Asociación Files A Voluntary Petition For Chapter 7 Bankruptcy*

On June 21, 2016, the Asociación filed a voluntary chapter 7 petition for bankruptcy in the United States Bankruptcy Court for the District of Puerto Rico. App. at 13-45. In its initial summary of assets and liabilities, the Asociación reported \$14,048 in assets (App. at 23), and a total of \$104,515 in liabilities (App. at 28). Although there were 17 unsecured creditors listed, three judgment creditors accounted for the majority of the liabilities. App. at 25-27. Specifically, the

Asociación listed a \$60,000 judgment owed to Charles Fitzwilliams, along with the \$20,000 judgment owed to Mr. Gimenez and the \$16,000 fine-judgment owed to HUD (*i.e.*, the civil penalty). App. at 26-27. Creditor-appellees Joanna Dimarco and Mona Dimarco were also listed as having alleged damages claims. App. at 27.

c. United States' Motion Requesting An Order Of Non-Dischargeability Of The Asociación's Debts To HUD And Mr. Gimenez

On October 25, 2016, the United States, on behalf of HUD, filed a motion requesting an order as to the non-dischargeability of debt related to the Fair Housing Act judgment. Doc. 17. The United States sought an order declaring that the \$20,000 award of damages to Mr. Gimenez is non-dischargeable pursuant to 11 U.S.C. 523(a)(6), and that the \$16,000 in civil monetary penalties is non-dischargeable pursuant to 11 U.S.C. 523(a)(7). The United States' motion asserted that the Asociación was fraudulently attempting to avoid payment of these debts. Specifically, the motion explained that after filing for bankruptcy, the Castillo Condominium had formed a "new" homeowners association which had paid off all liabilities listed in the bankruptcy petition except for those owed to the judgment creditors. Doc. 17, at 9.

On November 18, 2016, the bankruptcy court granted the United States' motion as unopposed after the Asociación failed to timely file a response. Doc. 28. One week later, the Asociación filed a motion to reconsider, asserting that the motion had not been properly served. The Asociación's motion for reconsideration

made no substantive arguments against non-dischargeability, nor addressed the United States' contention that the bankruptcy filing, in conjunction with the formation of the "new" homeowners association, was tantamount to fraud. See Doc. 35. On December 2, 2016, without addressing the merits of the motion for reconsideration, the bankruptcy court issued an order requiring the Asociación to file a memorandum addressing whether it was prohibited from receiving any discharge of debt in accordance with 11 U.S.C. 727(a)(1) given that it is not an individual debtor. Doc. 40.

The Asociación did not file a memorandum in response to the bankruptcy court's order. As a result, on January 13, 2017, the bankruptcy court denied the Asociación's motion to reconsider. See Doc. 45. The Asociación is not appealing the court's non-dischargeability orders (Doc. 28, 45), and therefore even if the bankruptcy petition was reinstated, there is no question that the debts at issue are non-dischargeable. The Asociación has nonetheless sought to avoid payment to HUD and Mr. Gimenez by forming a "new" homeowners association, which receives homeowners' ongoing dues and is responsible for the day-to-day operation of the condominium, while leaving the "old" homeowners saddled with debt, and deprived of funds (such as homeowner dues) to pay that debt. Doc. 17, at 9.²

² Although this panel need not decide the question, it has been and remains the position of the United States that the "new" homeowners association is liable (...continued)

d. Motion To Dismiss, Which Was Joined By The United States

On October 22, 2016, two unsecured creditors, Mona Dimarco and Joanna Dimarco, filed a motion to dismiss the bankruptcy petition (App. at 64-71), which they claimed had been filed “as abuse of process” (App. at 70). Their motion asserted that at a creditors meeting on August 31, 2016, representatives of the homeowners association “stated that after the filing of the bankruptcy[,] the unsecured creditors listed, except for judgment[] creditors, had been paid in full.” App. at 65. On October 24, 2016, the United States filed a motion to join the Dimarcos’ motion to dismiss. Doc. 15.

On February 7, 2017, the bankruptcy court heard arguments on the Dimarcos’ motion to dismiss. App. at 77-97. During the hearing, counsel for the Asociación admitted that “once the Asociación filed for Chapter 7, it stopped performing its duties in maintaining the common areas of the condominium * * * [a]nd a new entity was formed by the owners of the condominium to perform those duties.” App. at 93. The bankruptcy court asked counsel for the Asociación if there was “any other reason” why the Asociación filed for bankruptcy other than an inability or unwillingness to make payments on the judgments at issue. App. at

for the debts to HUD and Mr. Gimenez under a theory of successor liability. See Doc. 17, at 10-11.

84. Counsel for the Asociación responded that there was no other reason for its bankruptcy filing. App. at 84.

At the conclusion of the February 7 hearing, the bankruptcy judge ruled from the bench that “the Asociación may not be a debtor under Section 109 of the Bankruptcy Code, and has filed a petition to avoid payment to creditors holding judgment against it, claims that it would not be discharged in bankruptcy.” App. 96. The bankruptcy court issued a minute order setting out the same conclusion and dismissing the petition. App. 76.

e. The Asociación’s Motion To Reconsider Dismissal

On May 31, 2017, the Asociación filed a motion for reconsideration of the dismissal, asserting that “[t]he reason for the [initial bankruptcy] filing was that Debtor had become insolvent due to several judgments against it, which together with other debts, could not be paid from the assets available to the Debtor.” App. 98-99. The Asociación conceded that it was not eligible for a discharge of debts, because “[o]nly individuals are eligible for a discharge, not artificial entities.” App. 100. The Asociación nonetheless argued that it was eligible to file for bankruptcy and the “fact that Debtor filed due to the judgments against it is not a reason to dismiss.” App. at 100.

Both the United States and the Dimarcos filed oppositions to the motion for reconsideration. The United States asserted that the “sole reason” the Asociación

filed the bankruptcy petition and formed a new home-owners association “was to purposely deprive the former Asociación de Titulares de Condominio Castillo of its revolving income from ownership dues, so as to fabricate an insolvency and file for bankruptcy, [in an] attempt to free itself of the judgment issued by HUD’s Secretary.” App. at 111-112. The United States further asserted that such “conduct is tantamount to fraud and cannot be tolerated by this court.” App. at 112. The United States attached to its opposition memorandum a transcript of the August 31, 2016, creditors meeting before the bankruptcy trustee, at which the President of the Asociación testified about the purpose for filing for bankruptcy and creating a new homeowners association. She testified that because there were “no funds to pay all of those debts that were being claimed” (App. at 195), a new homeowners association had been formed after the prior one had filed for bankruptcy, and that the new association would pay all debts other than those to the judgment creditors, Mr. Gimenez and Mr. Fitzwilliams, as well as to HUD for its civil penalty, or to the Dimarcos for their contested damages claim. App. at 193-199.

In their opposition to the reconsideration motion, the Dimarcos urged that the Asociación was only repeating arguments that the bankruptcy court had already rejected, and that such arguments only “emphasize[] that the present petition was filed as an abuse of process.” App. at 214.

On March 23, 2017, the bankruptcy court denied the motion for reconsideration “for the reasons stated in response by the United States of America * * * and creditors Dimarco’s opposition.” App. at 215.

f. Notice Of Appeal

On March 31, 2017, the Asociación filed a Notice of Appeal, challenging the February 7, 2017, order dismissing the bankruptcy petition, and the March 23, 2017, order denying reconsideration. App. at 216-217.

ARGUMENT

I

THE BANKRUPTCY COURT CORRECTLY DISMISSED THE ASOCIACIÓN’S BANKRUPTCY PETITION

A. Standard Of Review

A bankruptcy court’s factual findings are reviewed for clear error and its conclusions of law de novo. *Jeffrey v. Desmond*, 70 F.3d 183, 185 (1st Cir. 1995). A factual 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.” *In re the Bible Speaks*, 869 F.2d 628, 630 (1st Cir. 1989) (citations omitted). If the bankruptcy court’s “account of the evidence is plausible in light of the record viewed in its entirety, [this panel] may not reverse.” *Ibid*. In addition, this panel may affirm the decision

of the bankruptcy court “on any ground supported by the record.” *In re IDC Clambakes, Inc.*, 727 F.3d 58, 64 (1st Cir. 2014) (citations omitted).

B. Bankruptcy Courts Have Broad Authority To Act To Prevent Abuse Of The Bankruptcy Process

As the Supreme Court has stated, “[t]he principal purpose of the Bankruptcy Code is to grant a ‘fresh start’ to the ‘honest but unfortunate debtor.’” *Marrama v. Citizens Bank*, 549 U.S. 365, 367 (2007) (citation omitted). The purpose of a chapter 7 filing is “to fairly distribute the debtor’s asset among its creditors, and to give the debtor a fresh start through discharge in bankruptcy.” *In re W.R. Grace & Co.*, 475 B.R. 34, 147 (D. Del. 2012); see also *Wachovia Mortg. v. Smoot*, 478 B.R. 555, 569 (E.D.N.Y. 2012) (“[I]n a chapter 7 case, the purpose and intent is liquidation with the aim of the debtor to receive a discharge.”).

Moreover, the Bankruptcy Code, “both in general structure and in specific provisions, authorizes bankruptcy courts to prevent the use of the bankruptcy process to achieve illicit objectives.” *In re Kestell*, 99 F.3d 146, 149 (4th Cir. 1999). In particular, section 105 of the Bankruptcy Code recognizes the broad power that Bankruptcy Courts have to prevent abusive filings and litigation practices. That section authorizes bankruptcy courts to “tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.” 11 U.S.C. 105(a). By its own terms, section 105 empowers bankruptcy courts “to take any action, even at its own

initiative ‘to prevent an abuse of process.’” *In re Kestell*, 99 F.3d at 149 (citations omitted); see also 132 Cong. Rec. 28,610 (1986) (statement of Sen. Hatch) (Section 105(a) “allows a bankruptcy court to take any action on its own, or to make any necessary determination to prevent an abuse of process and to help expedite a case in a proper and justified manner”).

In addition to this statutory grant of authority, bankruptcy courts possess broad inherent equitable powers “to dismiss a petition for judicial reasons, such as bad faith, frivolity, or lack of jurisdiction.” *In re Moog*, 46 B.R. 466, 468 (N.D. Ga.) rev’d on other grounds, 774 F.2d 1073 (11th Cir. 1985). The judicial power vested in the bankruptcy courts “is analogous to the broad, inherent power of district court judges to dismiss collusive, sham and frivolous suits, and needs no statutory basis.” *Ibid.* (citing *Jefferson Fourteenth Ass’n v. Wometco de P.R., Inc.*, 695 F.2d 524, 526 (11th Cir.1983)). Indeed, the First Circuit has recognized that bankruptcy courts possess the inherent power to act to remedy and deter litigation tactics that amount to a fraud on the court. *Pearson v. First NH Mortg. Corp.*, 200 F.3d 30, 42 n.7 (1st Cir. 1999).

C. Because The Asociación’s Bankruptcy Filing Abused The Chapter 7 Bankruptcy Process, Dismissal Was Appropriate

When the Asociación filed its chapter 7 bankruptcy petition, its aim was not to liquidate its assets among its creditors, nor to achieve a fresh start. Instead, it sought simply to avoid payment of debts to certain creditors, including to HUD

and Mr. Gimenez, that could not be discharged through bankruptcy. The Asociación's debts to HUD and to Mr. Gimenez for violation of the Fair Housing Act cannot be discharged because they are subject to the non-dischargeability exceptions provided in 11 U.S.C. 523(a)(6) and (7). Doc. 28, 45. Moreover, the Asociación concedes that it was never going to be eligible for a discharge through filing for chapter 7 bankruptcy because it is not an individual debtor, and is thus barred from receiving a discharge pursuant to 11 U.S.C. 727(a)(1). See Br. 11-12 & n.14 (citing cases holding that non-individual debtors are not entitled to discharge pursuant to 11 U.S.C. 727(a)(1)).

The Asociación has admitted that once it filed its chapter 7 bankruptcy petition, a "new" homeowners association was formed to take over the duties of the previous one. App. at 90. The "old" homeowners association would continue to exist on paper but would receive no new income from homeowners' dues. Therefore, it would be left with judgments and fines that it had purposefully deprived itself of any means of paying. During the hearing on the motion to dismiss, the Asociación conceded that there was no other reason that it filed for chapter 7 bankruptcy other than because it was unable or unwilling to make payments on the judgments against it. App. at 84. It further admitted that it filed for bankruptcy and formed the "new" condominium association in order to stop creditors from attaching the Asociación's assets. App. at 90. Given these admitted

facts, the bankruptcy court committed no error—much less clear error—in concluding that the Asociación had “filed a petition to avoid payment to creditors holding judgment against it, claims that it would not be discharged in bankruptcy.” App. at 96. Based upon this finding, the bankruptcy court had ample grounds and authority to dismiss the Asociación’s petition. See *In re Van Owen Car Wash, Inc.*, 82 B.R. 671, 674 (C.D. Cal. 1988) (relying on the court’s inherent equitable powers in dismissing the bankruptcy filing for abuse of process); see also *In re Dami*, 172 B.R. 6, 11 (E.D. Pa. 1994) (“Where a debtor files a petition in bankruptcy with no intention of obtaining the benefits or the goals for which the proceeding was designed * * * the bankruptcy code is being abused.”) (citations omitted).³

D. The Asociación Fails To Show That Dismissal Was Improper

In arguing that the dismissal was improper, the Asociación makes three main arguments. First, it argues (Br. 6-10) that the bankruptcy court erred in concluding that the Asociación “may not be a debtor under Section 109 of the Bankruptcy Code.” App. at 76. Second, it argues that the court erred in taking account of the fact that the debts at issue are non-dischargeable. Br. 11-12. And third, it argues that there was no evidence before the bankruptcy court showing that the petition

³ The United States notes that the Asociación’s abuse of the bankruptcy process continues to prejudice Mr. Gimenez, who is in his 80s and is concerned that he may pass away before he can collect the judgment that he is owed.

had been filed in order not to pay HUD and its judgment creditors. Br. 12-13.

None of these arguments shows that dismissal was improper.

1. Section 109 defines who may be a “debtor” eligible for federal bankruptcy relief. Section 109(a) defines “debtor” broadly to include any “person that resides or has a domicile, a place of business, or property in the United States, or a municipality.” 11 U.S.C. 109(a). Section 109(b) provides an enumerated list of exemptions as to certain entities that may not be debtors. The term “person” is further defined in 11 U.S.C. 101(41) in a non-exhaustive manner to “include individual[s], partnership[s], and corporation[s].” *Ibid.* The Asociación’s argument is that, to the extent that the bankruptcy court’s ruling is understood as holding that the Asociación was per se ineligible to file for chapter 7 bankruptcy, the bankruptcy court erred.

Regardless of whether the Asociación was per se eligible file for chapter 7 bankruptcy, this dismissal was proper because the bankruptcy court found that the bankruptcy petition was filed in an attempt to avoid payment of non-dischargeable debts. This is an abuse of process. In addition, there is no reason why the bankruptcy court’s statement that the “Asociación may not be a debtor under Section 109 of the Bankruptcy Code” must be viewed as a standalone legal holding. The minute order states that the “Asociación may not be a debtor under section 109 of the Bankruptcy Code, and has filed the petition to avoid payment to

creditors holding judgments against it, claims that could not be discharged in bankruptcy.” App. at 76. Read in its entirety, the sentence sets out the findings that show why the Asociación’s filing for chapter 7 bankruptcy was an abuse of process.

2. It was not improper for the bankruptcy court to consider the fact that the debts at issue are non-dischargeable in ruling on the motion to dismiss. A bankruptcy court should consider any and all “facts and circumstances surrounding the debtor’s filing for bankruptcy.” *Perlin v. Hitachi Capital Am. Corp.*, 497 F.3d 364, 373-374 (3d Cir. 2007). Again, the debts to HUD and Mr. Gimenez are non-dischargeable not just because the Asociación is not an individual debtor, see 11 U.S.C. 727(a)(1), but also because those debts are subject to the explicit dischargeability exemptions set out in 11 U.S.C. 523 for willful and malicious injury (section 523(a)(6)) and governmental fines (section 523(a)(7)). These and the other dischargeability exemptions in section 523 “reflect a decision by Congress to allow certain competing public interests to override the ‘fresh start’ purpose of bankruptcy.” *In re Nam*, 273 F.3d 281, 289 (3d Cir. 2001) (citations omitted). As the Supreme Court has stated, “Congress evidently concluded that the creditors’ interest in recovering full payment of debts in these categories outweighed the debtors’ interest in a complete fresh start.” *Grogan v. Garner*, 498 U.S. 279, 287 (1991). Thus, “it [is] unlikely that Congress * * * would have

avored the interest in giving perpetrators of [willful and malicious injury, 11 U.S.C. 523(a)(6),] a fresh start over the interest in protecting victims of [such injury].” *Ibid.* Accordingly, it is entirely relevant that the Asociación’s conduct was intended to frustrate payment of the type of debts to HUD and Mr. Gimenez that Congress categorically exempts from discharge.

Moreover, the fact that these debts could not be discharged is relevant in understanding the Asociación’s intent in filing for chapter 7 bankruptcy. At the hearing on the motion to dismiss, the bankruptcy judge pointedly asked “why did the Asociación file for bankruptcy if bankruptcy cannot be a tool to handle the debts that it has?” App. at 89. Counsel for the Asociación responded that it was to stop the assets of the Asociación from being attached in enforcement actions by the judgment creditors. App. at 89-90. The Asociación again admits this in its brief, stating that the purpose of the bankruptcy filing, given the formation of “a new HOA, with new funds collected from the owners after the filing of the petition,” was “to be able to operate and provide the necessary services without fear of attachment of its assets.” Br. 17. In essence, the Asociación admits that it intended to file for bankruptcy and take advantage of the automatic stay of collection proceedings, but then create a new homeowners association that could go about business as usual, except for paying HUD and the judgment creditors.

The abusiveness of this course of action is not lessened by the Asociación's contention (Br. 13-14) that HUD and the judgment creditors could file collection proceedings against each homeowner individually. The purpose of the automatic stay provision is "to prevent some private creditors from gaining priority on other creditors." *In re Spookyworld, Inc.*, 346 F.3d 1, 10 (1st Cir. 2003). Its purpose is not to give a debtor time to create a new successor entity in an attempt to permanently avoid payment, or to needlessly multiply the proceedings that creditors must undertake to recover entirely valid debts.

3. Finally, the Asociación's assertion (Br. 18) that the bankruptcy court erred in granting the motion to dismiss because "there was no evidence admitted in the record to support the conclusion that the Debtor * * * had filed for bankruptcy to avoid payment of judgment creditors" is not correct. The bankruptcy court did not need to conduct a formal evidentiary proceeding to conclude that the petition was filed to avoid payment of judgment creditors. Counsel for the Asociación directly admitted this in open court. Asked if there was "[a]ny other reason why the * * * Asociacion filed f[or] bankruptcy, other than because it was unable to make payments or [un]willing to make payments" to the judgment creditors, counsel replied "No, Your Honor." App. at 83-84. That concession, both by itself, and viewed in context of the entire record here, more

than amply supports the bankruptcy court's conclusion that the purpose of the bankruptcy filing was to avoid payment to judgment creditors.

II

THE BANKRUPTCY COURT ACTED WITHIN ITS DISCRETION IN DENYING THE MOTION FOR RECONSIDERATION

A. Standard Of Review

Denial of a motion for reconsideration under Federal Rule of Civil Procedure 59(e) is reviewed for abuse of discretion. *Palmer v. Champion Mortg.*, 465 F.3d 24, 30 (1st Cir. 2006).

B. The Bankruptcy Court Did Not Abuse Its Discretion

The Asociación argues that, in denying the motion for reconsideration, the bankruptcy court improperly considered “new arguments [by the United States] brought for the first time after the Order Dismissing the case.” Br. 16. There is no error here. First, the reconsideration motion filed by the Asociación failed to meet the requirements of Federal Rule of Civil Procedure 59(e). “Rule 59(e) motions are granted only where the movant shows a manifest error of law or newly discovered evidence.” *Kansky v. Coca-Cola Bottling Co.*, 492 F.3d 54, 60 (1st Cir. 2007). Neither occurred below. Instead, the Asociación repeated the same arguments it had previously pressed and which had already been rejected by the court. Because “[t]he repetition of previous arguments is not sufficient to prevail on a Rule 59(e) motion,” *United States v. 23,000 in U.S. Currency*, 356 F.3d 157,

165 n.9 (1st Cir. 2004) (citations omitted), the bankruptcy court did not abuse its discretion in denying reconsideration.

In any event, in opposing the Asociación's motion, the United States continued to assert the same arguments that it had previously raised, which showed that the Asociación's conduct throughout the bankruptcy process constituted an abuse of process. The United States offered further support for the conclusions that the bankruptcy court had already reached by attaching a transcript of the August 31, 2016 creditors meeting. The substance of that meeting was uncontested and had previously been addressed in the Dimarco's motion to dismiss (App. 64), the United States' motion for non-dischargeability (Doc. 17), and in open court (App. at 82). Moreover, the issue under review here is whether the Asociación offered new evidence or argument in support of reconsideration. As it did not, the bankruptcy court did not abuse its discretion in denying the reconsideration motion. *Prescott v. Higgins*, 538 F.3d 32, 45 (1st Cir. 2008).

CONCLUSION

The United States respectfully requests that this court affirm the orders of the bankruptcy court dismissing the bankruptcy petition and denying the motion for reconsideration

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Bankruptcy Appellate Panel for the First Circuit by using the appellate CM/ECF system.

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UNITED STATES BANKRUPTCY APPELLATE PANEL
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BAP No. PR 17-0009

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Debtor-Appellant

v.

JOANNA DIMARCO, MONA DIMARCO, AND
UNITED STATES OF AMERICA

Creditor-Appellees

STATEMENT REGARDING RELATED CASES

Counsel for the United States is not aware of any related cases in any other court.

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STATEMENT REGARDING INTERESTED PARTIES

In addition to the parties and counsel listed in Appellant's Notice of Appeal, counsel for the United States believes that Mr. Carlos Gimenez-Bianco and Mr. Charles Fitzwilliams have financial interests in the outcome of this appeal.

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