

MAY 26 2006

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)
)
FREDDIE H. SEWELL; DONNA)
D. SEWELL,)
)
Debtors.)
_____)
FREDDIE H. SEWELL; DONNA)
D. SEWELL,)
)
Appellants,)
)
v.)
)
MGF FUNDING, INC.; MARKEN)
VENTURES, LLC; 42 DEVELOPMENT)
GROUP; RUSSELL A. BROWN,)
Trustee,)
)
Appellees.)
_____)

BAP No. AZ-05-1176-MoSC
Bk. No. 04-20591-RTB

O P I N I O N

Argued and Submitted on January 20, 2006
at Phoenix, Arizona

Filed - May 26, 2006
Amended and Ordered Published - June 21, 2006

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

Honorable Redfield T. Baum, Sr., Chief Bankruptcy Judge, Presiding

Before: MONTALI, SMITH and CARROLL,¹ Bankruptcy Judges.

¹ Hon. Peter H. Carroll, Bankruptcy Judge for the Central
District of California, sitting by designation.

1 MONTALI, Bankruptcy Judge.

2

3 An order reinstating this previously-dismissed Chapter 13²
4 case was signed before but entered after completion of a
5 foreclosure sale. The bankruptcy court held that the
6 reinstatement was not effective until the order was entered. We
7 AFFIRM.

8

I. FACTS

9 Debtors filed their voluntary Chapter 13 petition on November
10 29, 2004, the day before a scheduled foreclosure sale of their
11 home by secured creditor Mountainview Lending, LLC ("Lender").
12 They did not file the required documents and their case was
13 dismissed on January 5, 2005. On January 11, 2005, they filed the
14 missing documents -- bankruptcy schedules and a Chapter 13 plan --
15 together with a motion to reinstate their case. Debtors did not
16 serve a copy of the reinstatement motion on Lender by mail,
17 although Lender may have received a notice of electronic court
18 filing ("ECF") from the court.

19 On January 13, 2005, a trustee's sale was conducted but not
20 completed because under Arizona law a foreclosure sale is not
21 complete until, at the earliest, the time the consideration is
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23

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26 ² Unless otherwise indicated, all chapter, section and
27 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,
28 as enacted and promulgated prior to the effective date of The
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, 119 Stat. 23, because the case from which this
appeal arises was filed before that effective date (generally
October 17, 2005).

1 paid.³ Next, as stated in a minute order of the bankruptcy court:

2 On January 14, 2005, several critical events
3 occurred, namely: (1) the court noticed a hearing on the
4 motion to reinstate for January 18th [and Lender
5 received electronic notice of that hearing at 9:47
6 a.m.], (2) at about 1 P.M. the court signed^[4] an order
7 reinstating the case notwithstanding the January 18th
8 hearing because the debtors orally notified the court
9 that a trustee's sale was pending on their residence
10 [the "Reinstatement Order"], (3) at about 3 P.M. [the
11 purchaser] paid the trustee the bid price and shortly
12 thereafter the trustee recorded the trustee's deed, and
13 (4) at about 4 P.M. the [Reinstatement Order] was
14 docketed by the clerk.

9 Minute Order, March 30, 2005.

10 The Reinstatement Order states, "IT IS HEREBY ORDERED
11 reinstating [sic] case number 04-20591-PHX-RTB and setting aside
12 the dismissal in this matter." The order contains no other
13 language indicating whether the case is reinstated as of the time
14 the order was signed or when it was entered on the docket.

15 Debtors filed a motion to set aside the sale of real property
16 (the "Set Aside Motion"). The purchasers of the home filed a
17 Motion for Relief from the Automatic Stay and Validating Trustee's
18 Sale (the "Stay Relief Motion"). The purchasers are MGF Funding,
19 Inc. ("MGF") and Marken Ventures LLC ("Marken"), and the entity to
20 which they later conveyed the home, 42 Development Group, LLC
21 (collectively "Purchasers").

22 Debtors' Set Aside Motion argues that just as the automatic
23

24 ³ A.R.S. § 33-810(A); In re Benson, 293 B.R. 234, 237
25 (Bankr. D. Ariz. 2003).

26 ⁴ The order was signed electronically. Debtors' counsel
27 and the bankruptcy court apparently were able to verify the time
28 of signing from the court's computer personnel. Apart from
verifying the time of signing, it makes no difference for purposes
of this appeal that the order was signed and docketed
electronically rather than manually.

1 stay is effective immediately upon submission of a bankruptcy
2 petition to the clerk, not at the later time the petition is
3 docketed or that creditors receive notice of the bankruptcy case,
4 similarly an order reinstating a bankruptcy case should restore
5 the automatic stay as of the time the order is signed, not at the
6 later time it is entered on the docket. Alternatively, the Set
7 Aside Motion argues that by its terms the Reinstatement Order set
8 aside the dismissal and that must mean that the effects of the
9 dismissal were also set aside, as if the automatic stay had never
10 terminated. Debtors propose to sell the home to a related party
11 and they allege that such a sale would generate substantial
12 proceeds for general unsecured creditors, as well as for Debtors'
13 homestead exemption.

14 After hearings and supplemental briefing, the bankruptcy
15 court issued a minute order concluding as an initial matter that
16 the effective date and time of an order reinstating a dismissed
17 bankruptcy case is a matter for its discretion:

18 Surprisingly the rules are not absolutely clear as to
19 when an order reinstating a dismissed case becomes
20 effective. The rules are clear that a judgment is
21 effective when it is docketed by the clerk. See:
22 Fed.R.Civ.P. 58, Bankr. Rules 5003 and 9021.⁵ Both
23 the Federal Rules of Civil Procedure and the Bankruptcy
24 Rules make multiple references to "judgments" and
25 "orders" strongly implying that judgments and orders are
26 treated differently under both rules. These rules do
27 not say that all orders are not effective until they are
28 docketed by the clerk. Noli [v. C.I.R., 860 F.2d 1521,
1525 (9th Cir. 1988)] provides that some orders are
effective without being signed or docketed.

26 ⁵ Rule 9021 provides in part that a "judgment is effective
27 when entered as provided in Rule 5003." Fed. R. Bankr. P. 9021.
28 Rule 9021 also incorporates Fed. R. Civ. P. 58 (procedures
governing entry of judgment). The Rules define a "judgment" as
any appealable order. See Fed. R. Bankr. P. 9001(7), 9002(5).

1 Minute Order, March 30, 2005.

2 The bankruptcy court then reviewed the equities in favor and
3 against imposing the automatic stay as of the time the
4 Reinstatement Order was signed and concluded that it was not
5 effective until it was entered on the docket, based primarily on
6 lack of notice to the affected parties:

7 . . . the court finds that no one could find the ECF
8 [R]einstatement [O]rder of January 14th until that order
9 was entered on the court's docket. It would be poor
10 public policy to hold that parties are bound by orders
11 where they have no notice or knowledge of such orders,
12 and particularly where they have no ability to ascertain
13 the existence of orders from the public record. There
14 was no way for the [a]ffected creditors, trustee and
15 high bidder to know that the [R]einstatement [O]rder had
16 been signed until it was entered in the court's docket.
17 Although not raised by the parties, the court also
18 doubts the constitutional validity of a finding that the
19 order was effective when signed where the [a]ffected
20 parties lacked any notice or knowledge thereof and
21 lacked any way to find such order in the public record:
22 such result seems to lack fundamental due process of
23 law.

24 Minute Order, March 30, 2005.

25 Consistent with this ruling, the bankruptcy court entered an
26 order (a) granting Purchasers' Stay Relief Motion and (b) denying
27 Debtors' Set Aside Motion (the "Foreclosure Validation Order").
28 Debtors filed a timely notice of appeal.⁶ Debtors did not name

29 ⁶ Debtors did not obtain a stay of the Foreclosure
30 Validation Order and their home has been sold and resold to
31 Purchasers. Ordinarily such facts might render this appeal moot.
32 See In re Onouli-Kona Land Co., 846 F.2d 1170, 1171 (9th Cir.
33 1988) ("Bankruptcy's mootness rule applies when an appellant has
34 failed to obtain a stay from an order that permits a sale of a
35 debtor's assets. Whether an order directly approves the sale or
36 simply lifts the automatic stay, the mootness rule dictates that
37 the appellant's failure to obtain a stay moots the appeal."
38 (citation omitted)). In this case, however, the issue is not so
39 much whether there was cause to grant relief from the automatic
40 stay but whether the stay applied at all, and if it did then the
41 sale was not simply voidable but was void. Presumably no amount
42 of selling or reselling would cure such voidness. See generally
43 In re Schwartz, 954 F.2d 569 (9th Cir. 1992) (actions taken in

(continued...)

1 Lender as an appellee, nor was Lender served with the notice of
2 appeal.⁷

3 **II. ISSUES**

4 A. Was it within the bankruptcy court's discretion to
5 determine when Debtors' case was reinstated and the automatic stay
6 was reimposed?

7 B. If so, did the bankruptcy court abuse its discretion?

8 **III. STANDARD OF REVIEW**

9 The briefs on this appeal do not address the standard of
10 review. "We review the bankruptcy court's conclusions of law and
11 questions of statutory interpretation de novo, and factual
12 findings for clear error." In re Baldwin Builders, 232 B.R. 406,
13 410 (9th Cir. BAP 1999) (citation omitted).

14 Debtors appear to argue that the issues on this appeal are
15 purely matters of law, as to which the bankruptcy court had no
16 discretion. Their primary theory seems to be that all
17 reinstatement orders must be immediately effective when signed, in
18 order to be consistent with the immediate effects of presenting a
19 bankruptcy petition for filing. Alternatively they argue that
20 regardless of when a case is reinstated the very act of setting

21 ⁶(...continued)
22 violation of automatic stay are void, not merely voidable).
23 Therefore, particularly in the absence of any briefing on this
24 issue by the parties, we are not prepared to dismiss this appeal
as moot.

25 ⁷Lender might be prejudiced if we were to reverse.
26 Therefore, if we were inclined to reverse we might require Debtors
to take steps to join Lender in this appeal so that it could
27 defend the Foreclosure Validation Order. Because we affirm we do
not take that approach. See Interstate Oil Co. v. Gormley, 105
28 F.2d 431, 432 (9th Cir. 1939) (after notice of appeal is filed,
permission to join necessary appellee is discretionary and "should
not be granted unless there is merit in the contentions of the
appellants").

1 aside a dismissal necessarily eviscerates all effects of the
2 dismissal as a matter of law, as if the automatic stay never
3 terminated. We reject these arguments in the Discussion section
4 below and we hold that the bankruptcy court had discretion when to
5 reinstate the case and when to reimpose the automatic stay.
6 Therefore, the Foreclosure Validation Order must be reviewed under
7 the abuse of discretion standard.

8 The Foreclosure Validation Order appears to be a
9 clarification of an ambiguity in the Reinstatement Order, but to
10 the extent it was a reconsideration we also review the decision to
11 reconsider for an abuse of discretion. Fidelity Fed. Bank, FSB v.
12 Durga Ma Corp., 387 F.3d 1021, 1023 (9th Cir. 2004) (grant or
13 denial of motion under Fed. R. Civ. P. 60(b) reviewed for abuse of
14 discretion); In re Kaypro, 218 F.3d 1070, 1073 and 1077 (9th Cir.
15 2000) (grant of new trial reviewed for abuse of discretion).

16 To the extent, if any, that the bankruptcy court annulled the
17 automatic stay that decision also would be reviewed for an abuse
18 of discretion. In re Fjeldsted, 293 B.R. 12, 18 (9th Cir. BAP
19 2003). The bankruptcy court might not have intended to annul the
20 automatic stay because it reasoned that the stay did not exist
21 when the foreclosure sale was completed. Nevertheless, the relief
22 requested in the Stay Relief Motion was to annul the automatic
23 stay and the Foreclosure Validation Order granted that motion so
24 this might have been an alternative basis for the Foreclosure
25 Validation Order.

26 For all of these reasons, we review the Foreclosure
27 Validation Order for an abuse of discretion. We find an abuse of
28 discretion if we have a "definite and firm conviction" that the

1 bankruptcy court committed a clear error of judgment in the
2 conclusion it reached. A bankruptcy court also necessarily abuses
3 its discretion if it bases its ruling on an erroneous view of the
4 law. In re Beatty, 162 B.R. 853, 855 (9th Cir. BAP 1994).

5 IV. DISCUSSION

6 A. The Bankruptcy Court had Discretion to Determine Whether
7 the Reinstatement Order Was Effective When Signed or
8 When Entered

9 Dismissal of a bankruptcy case generally terminates the
10 automatic stay. 11 U.S.C. §§ 349(b)(3), 362(c). But see In re
11 Krueger, 88 B.R. 238, 240-42 (9th Cir. BAP 1988) (order dismissing
12 case was void for lack of due process, so automatic stay was
13 continuously in effect and foreclosure sale was void).

14 Reinstatement of a case restores the automatic stay. Most
15 reported decisions reimpose the automatic stay only prospectively.
16 See, e.g., In re Lomagno, 320 B.R. 473, 479-82 (1st Cir. BAP)
17 (reversal of dismissal order did not retroactively reimpose
18 automatic stay), aff'd, 429 F.3d 16 (1st Cir. 2005). We are not
19 aware of any previous case in which it made a difference whether
20 the automatic stay was reimposed when the reinstatement order was
21 signed or when it was entered.

22 Debtors argue that the bankruptcy court erred in determining
23 that the Reinstatement Order was effective when entered, instead
24 of when signed. Debtors analogize to a bankruptcy petition. They
25 point out that creditors typically receive no advance notice of
26 the petition and yet the automatic stay arises under Section
27 362(a) at the moment when it is given to the court clerk for
28 filing, not at the later time when it is entered on the docket.
In re Godfrey, 102 B.R. 769, 771 (9th Cir. BAP 1989). Despite

1 this lack of notice to creditors, actions taken in violation of
2 the automatic stay are void. Schwartz, 954 F.2d 569. Debtors are
3 also correct that the Ninth Circuit has held for policy reasons
4 that certain orders are effective when signed, not when entered.
5 In re San Joaquin Roast Beef, 7 F.3d 1413, 1416-17 (9th Cir.
6 1993). These arguments persuade us that in general a bankruptcy
7 court can reinstate a case and reimpose the automatic stay as of
8 the time it signs a reinstatement order, subject to review for
9 abuse of discretion. That does not mean that a bankruptcy court
10 is required to do so.

11 There are differences between filing a new bankruptcy
12 petition and reinstating a prior bankruptcy case and there are
13 valid reasons for choosing between them. There may be
14 disadvantages to filing a petition, or a debtor may be ineligible.
15 See, e.g., 11 U.S.C. § 109(g). For whatever reason, Debtors chose
16 to file a motion to reinstate their dismissed case instead of a
17 new petition. The bankruptcy court then had to determine whether
18 and when to reinstate the case. We see no reason why the
19 bankruptcy court could not defer reimposing the automatic stay in
20 fairness to other parties in interest, just as the bankruptcy
21 court has broad discretion whether to grant relief from the
22 automatic stay retroactively, prospectively, or as of a future
23 date and time. See generally Fjeldsted, 293 B.R. at 21 (noting
24 bankruptcy courts' broad discretion in crafting relief from
25 automatic stay). To hold otherwise would promote form over
26 substance in cases such as this. Purchasers' Stay Relief Motion
27 asked the bankruptcy court to annul the automatic stay and there
28 is no question that such relief is a matter for the bankruptcy

1 court's discretion. Id.

2 Debtors argue in the alternative that the Reinstatement Order
3 by its terms "set[] aside" the dismissal, that this means the
4 dismissal order was vacated, and the bankruptcy court erred by
5 ruling otherwise. Debtors cite authority that "when an order of
6 dismissal is vacated, all of its effects are vacated, including
7 the termination of the automatic stay" and this "restores the stay
8 as if had not been terminated at all" In re Hakim, 244
9 B.R. 820, 821-22 (Bankr. N.D. Cal. 1999). Contra In re Nagel, 245
10 B.R. 657, 662 (D. Ariz. 1999) (retroactive reinstatement of
11 Chapter 11 case was "a kind of judicial time travel that cannot be
12 reconciled with the law").

13 We are not convinced. The Reinstatement Order did "set
14 aside" the dismissal but this may imply only prospective relief.
15 To vacate all of the effects of a dismissal order retroactively
16 could have far ranging, unintended consequences. See In re
17 Aheong, 276 B.R. 233, 243 n.10 (9th Cir. BAP 2002). The
18 Reinstatement Order says nothing about retroactively imposing the
19 automatic stay and doing so would void not only the foreclosure
20 sale but possibly other events that we and the bankruptcy court
21 know nothing about. We decline to read the Reinstatement Order so
22 broadly and, like the court in In re Brown, 290 B.R. 415, 422
23 (Bankr. M.D. Fla. 2003), we do not "find any reason to deviate
24 from the well-accepted rule that orders are effective when written
25 and docketed." See also Beatty, 162 B.R. at 857-58 (oral ruling
26 was not effective to convert case, partly because "the rules
27 consistently rely upon the entry of the judgment or order as the
28 effective date for the consequences of the judgment or order").

1 We also question whether retroactive imposition of the
2 automatic stay as if it had never terminated would be appropriate
3 in these circumstances. A title company or purchaser at a
4 foreclosure sale can verify within a short time after the sale is
5 completed whether a bankruptcy petition was filed before that
6 time, but if reinstatement orders were to retroactively impose the
7 automatic stay there would be no way to protect against the sale
8 being rendered retroactively void at some future date. See In re
9 Lashley, 825 F.2d 362, 364 (11th Cir. 1987) ("While the Bankruptcy
10 Code grants the bankruptcy court the power to retroactively grant
11 relief from a stay, . . . this court is unaware of any authority
12 that grants the bankruptcy court power to retroactively impose a
13 stay." (citations omitted, emphasis in original)); In re Hill, 305
14 B.R. 100, 106 (Bankr. M.D. Fla. 2003) (discussing cases). But see
15 In re Diviney, 225 B.R. 762, 770-71 (10th Cir. BAP 1998) (stating
16 in dicta that the "expected result" of vacating order should be to
17 vacate all its effects and reinstatement was effective as of date
18 when order was signed); Hakim, 244 B.R. at 822 (citing "orderly
19 administration of the case" and control over creditor conduct as
20 reasons for vacating order of dismissal and restoring stay as if
21 it had never been terminated).

22 Alternatively, if we assume for the sake of argument that the
23 Reinstatement Order purported to reimpose the automatic stay
24 retroactively, and that the bankruptcy court had the power to do
25 so, the bankruptcy court still had discretion to reconsider that
26 order. The Foreclosure Validation Order leaves no doubt as to the
27 bankruptcy court's ultimate conclusion. The case was reinstated
28 and the stay was reimposed when the Reinstatement Order was

1 entered, not when it was signed. An act that violates the
2 automatic stay is void but that is cured by retroactive annulment
3 of the stay. Aheong, 276 B.R. 233.

4 Just as we reject Debtors' arguments that the bankruptcy
5 court lacked discretion to choose a time other than when it signed
6 the Reinstatement Order to reimpose the automatic stay, we also
7 reject Purchasers' arguments that the only acceptable time was
8 when that order was entered. Purchasers cite our opinion in
9 Beatty, in which we reversed the bankruptcy court and held that
10 its oral ruling on a motion to convert was not effective until it
11 was reduced to writing and docketed, at least "for purposes of
12 determining whether a debtor retains his or her right to dismiss a
13 Chapter 13 case" under Section 1307(b). Beatty, 162 B.R. at 857-
14 58. That case is distinguishable, not only because of the
15 important policies behind Section 1307(b), but also because it
16 involved an oral order and we specifically noted, "We need not
17 address whether, under San Joaquin Roast Beef [7 F.3d 1413], the
18 signing date and/or the filing date of the order would control
19 over the subsequent date of entry on the docket as the effective
20 date of conversion" Beatty, 162 B.R. at 857 n.10.

21 For these reasons we hold that the bankruptcy court was not
22 required to reinstate the case and reimpose the automatic stay at
23 either of the times argued by the parties. It had discretion at
24 least to choose between those times: when it signed the
25 Reinstatement Order or when that order was docketed.

26 B. The Bankruptcy Court Did Not Abuse its Discretion

27 The bankruptcy court was concerned that Purchasers and Lender
28 had "no notice or knowledge" of the Reinstatement Order and had

1 "no ability to ascertain the existence" of that order when the
2 foreclosure sale was completed because the order had not yet been
3 entered on the docket. This is a valid concern. So far as Lender
4 knew, it was free to proceed with foreclosure pending the hearing
5 that had been set on Debtors' motion to reinstate their case.
6 Neither Lender nor Purchasers had notice that Debtors sought
7 retroactive application of the automatic stay to render any
8 completed foreclosure sale void.

9 Debtors argue that other parties could have discovered when
10 the order was signed, as their own counsel did. It would have
11 been far easier for Debtors' counsel to have notified Lender. See
12 Brown, 290 B.R. at 422 ("A telephone call would have put the
13 [creditor] on actual notice of the reinstated case."). Debtors'
14 proposal would also burden the court with inquiries about when an
15 order is signed and could even put the judge in the awkward
16 position of being a percipient witness, perhaps the only witness,
17 as to the time of signing.

18 These are ample reasons for the bankruptcy court to rule as
19 it did. Debtors' arguments to the contrary are not convincing.

20 Debtors argue that the bankruptcy court placed too much
21 reliance on Rule 9021 and Fed. R. Civ. P. 58, commonly known as
22 the separate judgment rule. It is true that "Rule 58 was intended
23 primarily to clear up uncertainties" as to the time for appeal,
24 and this was one reason why the oral order in Noli was not invalid
25 despite the absence of a separate written order (Noli, 860 F.2d at
26 1525), but there was more. The Ninth Circuit observed that the
27 debtors in Noli "were present when the oral order was issued and
28 clearly had notice of its existence and content," they "understood

1 and accepted the order as final for purposes of appeal,” and
2 immediate relief from the automatic stay was appropriate because
3 they had used bankruptcy as the latest in a series of tactics to
4 evade liability on the eve of trial. Id. at 1525-26. It is
5 hardly surprising that an oral order granting immediate relief
6 from the automatic stay was valid in these circumstances, but the
7 issues in this case are entirely different and in general orders
8 are effective when reduced to writing and docketed. See Brown,
9 290 B.R. at 419 and 422 (noting “well-accepted rule that orders
10 are effective when written and docketed” even though oral rulings
11 can be “immediately effective” in emergency situations).

12 Nor are we persuaded by Debtors’ analogy to San Joaquin Roast
13 Beef, 7 F.3d 1413. In that case the Ninth Circuit established a
14 uniform rule that the two year statute of limitations in Section
15 546(a) (1) runs from when the order appointing a trustee is signed,
16 not when it is entered. The Ninth Circuit was concerned that
17 “bankruptcy trustees should act to protect the estate immediately
18 upon appointment and should not wait for entry of an order.” Id.
19 at 1417. Debtors advance no similarly compelling policy that the
20 automatic stay must be effective when a reinstatement order is
21 signed, rather than when it is entered. The Ninth Circuit also
22 relied on the “ample notice” provided by the order in that case
23 (id. at 1416), which was entered two days after it was signed and
24 started a two year limitations period. The Ninth Circuit
25 contrasted the “relatively short time that a party has to appeal a
26 final order” (id. at 1417) and even that short time is more notice
27 than Lender and Purchasers had in this case.

28 For the above reasons, the bankruptcy court did not abuse its

1 discretion. Debtors' case was reinstated and the automatic stay
2 was reimposed as of the time the Reinstatement Order was docketed,
3 not when it was signed.

4 **V. CONCLUSION**

5 The bankruptcy court had discretion to determine when
6 Debtors' case was reinstated and the automatic stay was reimposed.
7 It did not abuse that discretion. The Foreclosure Validation
8 Order is AFFIRMED.

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