

OCT 31 2012

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-11-1664-KiNoPa
)
 MICHAEL S. ZUCKERMAN,) Bk. No. 09-22943-DJS
)
 Debtor.)
 _____)
 DENISE HEALY ZUCKERMAN)
)
 Appellant,)
)
 v.) **MEMORANDUM**¹
)
 JASON M. RUND, Chapter 7)
 Trustee,)
 Appellee.)
 _____)

Argued and Submitted on September 20, 2012
at Pasadena, California

Filed - October 31, 2012

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Deborah J. Saltzman, Bankruptcy Judge, Presiding

APPEARANCES: Appellant, Denise Healy Zuckerman, appeared pro
se.

Before: KIRSCHER, NOVACK,² and PAPPAS, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. Charles D. Novack, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

1 Appellant, Denise Healy Zuckerman ("Denise"), former wife of
2 debtor Michael Steven Zuckerman ("Michael"), appeals an order
3 from the bankruptcy court disallowing her proof of claim. We
4 DISMISS the appeal as MOOT.

5 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

6 **A. The dissolution action and adversary proceeding.**

7 Denise and Michael were married in 1984. Denise filed for
8 divorce in June 2007. On or about March 27, 2009, the parties
9 executed a Marital Termination Agreement ("MTA"), which was
10 incorporated into the final Amended Judgment of Dissolution of
11 Marriage (the "Judgment") entered by the state court in April
12 2009.³ In Paragraph 18 of the MTA, both Denise and Michael
13 expressly waived their right to past due or future spousal
14 support. No minor children existed from the marriage for whom
15 child support would be due. Paragraph 3 stated that the MTA was
16 to serve as a "release, relinquishment, quitclaim and surrender
17 by each of the parties of any rights that he or she may have or
18 assert or claim to have in or to any such property, earnings, and
19 income" and that "[a]ll property . . . which the parties
20 severally now hold, or may acquire by virtue or pursuant to this
21 agreement . . . and all property which either of the parties
22 hereto may hereafter acquire, shall be and shall remain the

23
24 ³ Only a few pages of the MTA were offered in the excerpts
25 of record. However, we found a complete copy of the MTA in the
26 adversary proceeding Trustee filed against Denise in April 2010.
27 See Adv. Pro. 10-1276, dkt. no. 1, Exh. B. The Panel may take
28 judicial notice of documents appearing on the docket in the
underlying bankruptcy case and related adversary proceedings.
See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert), 887 F.2d
955, 957-58 (9th Cir. 1988); Atwood v. Chase Manhattan Mortg. Co.
(In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 separate property and estate of the party so holding or
2 acquiring, free from any claims of the other." Paragraph 9
3 provided that Denise and Michael waived and released the other
4 from all liability, debt, or obligation of every kind and nature,
5 and that the MTA was intended to settle all rights of the
6 parties. Finally, Paragraph 8 provided that if any community
7 property were to be discovered at a later date, the non-owner
8 party was entitled to an amount equal to: (a) the non-owning
9 party's interest in the property; (b) the full market value of
10 the non-owner party's interest in the property as of the date of
11 the MTA; or (c) the full market value of the non-owner's interest
12 as of the date the non-owner discovered the undisclosed property.

13 Michael filed a chapter 7⁴ bankruptcy case on June 12, 2009.
14 Appellee, chapter 7 trustee Jason M. Rund ("Trustee"), was
15 appointed to administer Michael's case shortly thereafter.
16 On January 29, 2010, Trustee filed an application to employ
17 counsel. Trustee had learned that, as part of the Judgment,
18 Michael had been awarded a vacant lot in Big Bear Lake,
19 California (the "Big Bear Property") and that Denise had failed
20 to transfer her interest in it to Michael per the terms of the
21 Judgment. Because equity existed in the Big Bear Property,
22 Trustee wished to employ counsel to initiate an adversary
23 proceeding against Denise to recover it for the benefit of the
24 estate, as well as to address other administrative matters as
25 needed.

26
27 ⁴ Unless otherwise indicated, all chapter, section, and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 On February 1, 2010, Trustee filed a Notice of Assets and
2 Possible Dividend, giving creditors until May 7, 2010, to file a
3 proof of claim. An order approving counsel's employment was
4 entered by the bankruptcy court on March 5, 2010, and Trustee
5 filed an adversary proceeding against Denise to recover the Big
6 Bear Property on April 15, 2010.

7 Meanwhile, on February 11, 2010, Denise, represented by
8 counsel, moved to set aside the Judgment in state court for
9 Michael's alleged breach of the MTA. Specifically, Denise
10 contended that Michael had intentionally concealed the existence
11 of a multitude of personal and real property during the course of
12 their dissolution proceeding and execution of the MTA. Denise
13 further contended that Michael had forged her name to numerous
14 grant deeds. Denise estimated that, in light of the undisclosed
15 property, she was entitled to at least \$1,649,750 more than she
16 received in the Judgment, plus \$31,411 in attorney's fees.
17 Denise also requested monthly spousal support of \$2,073.

18 In response to Denise's motion to set aside the Judgment,
19 Trustee's counsel sent a letter to Denise's divorce counsel,
20 informing him that the motion was in violation of the automatic
21 stay under § 362(a)(3) because it sought to determine a division
22 of property that was part of the bankruptcy estate. The letter
23 requested that Denise withdraw the motion by March 16, 2010, or
24 Trustee would seek sanctions. Denise's counsel complied and
25 withdrew the motion. Denise never sought relief from the
26 automatic stay to pursue her claim in state court.

27 In August 2010, Trustee filed a motion for summary judgment
28 in the adversary proceeding against Denise seeking turnover of

1 the Big Bear Property per the terms of the Judgment. On
2 October 14, 2010, the bankruptcy court entered a memorandum
3 decision and order granting Trustee's motion. The court found
4 that the Big Bear Property was property of the estate and Denise
5 was required to turn it over pursuant to the Judgment, which was
6 final and preclusive. Denise's "cross-motion" for summary
7 judgment was denied for failing to comply with Rule 7056. The
8 court's turnover order was not appealed.

9 **B. The claim objection.**

10 Denise, appearing pro se, filed a proof of claim in
11 Michael's case ("Claim No. 15") on May 3, 2010. In the Official
12 Form 10 ("Form 10"), Denise alleged that she held a claim against
13 Michael for \$5,067,682.00, plus damages. Item 2 stated that the
14 basis for Claim No. 15 was "see adversary proceedings coversheet
15 and submission, entire, for basis." In Item 4, Denise asserted
16 that \$376,000 of her claim was secured by "real estate," "a motor
17 vehicle," and "other," and that the remaining \$4,691,682 portion
18 of the claim was unsecured. In Item 5, Denise asserted that her
19 claim was entitled to priority as a "domestic support obligation"
20 under § 507(a)(1)(A).

21 Attached to Claim No. 15 were 228 pages of documents, which
22 appear to consist of a complaint against Michael, a request to
23 dismiss Trustee's adversary proceeding against Denise, a copy of
24 the MTA, a copy of Denise's state court motion to set aside the
25 Judgment, various deeds and deeds of trust, various loan
26 applications and promissory notes, bank deposit slips, E-trade
27 receipts, and numerous other documents.

28 On October 4, 2011, Trustee objected to Claim No. 15 and

1 moved to disallow it. He contended that Claim No. 15 should be
2 disallowed because it lacked prima facie evidence of validity or
3 amount as per Rule 3001(f). Specifically, Trustee contended:
4 (1) Claim No. 15 was not filed in accordance with Rule 3001(a),
5 (c), or (d) because it provided no basis for the alleged secured
6 claim (such as copies of lien documentation in Denise's favor or
7 proof of perfection), and because it failed to provide the basis
8 for priority under § 507(a)(1)(A) or (a)(1)(B); and (2) Denise
9 offered no facts or evidence to support what appeared to be
10 claims for fraudulent transfers and, in any event, she was barred
11 from raising such claims by the MTA, which forever settled all
12 claims between the parties. Trustee contended that to the extent
13 Denise was seeking relief under Paragraph 8 of the MTA (after-
14 discovered property), she failed to explain what property was not
15 listed in the MTA and how that property constituted community
16 property, and she failed to provide a calculation of the amounts
17 owed. A hearing on the claim objection was set for November 3,
18 2011.

19 In her untimely response,⁵ Denise contended that Trustee had
20 accepted Claim No. 15 "as-is" at a status hearing, and that any
21 data entry mistakes in the Form 10 never presented an issue. In
22 any event, contended Denise, the documents attached to Claim
23 No. 15 provided the proper lien documentation. Denise further
24

25 ⁵ Under Local Bankruptcy Rule ("LBR") 3007-1(b)(3)(A), a
26 response to Trustee's claim objection was due no later than 14
27 days prior to the November 3, 2011 hearing. This means Denise's
28 response was due by October 20; she filed it October 25. Due to
its untimeliness, the bankruptcy court was free to grant Trustee
relief without further notice or hearing. See LBR 3007-
1(b)(3)(B).

1 contended that because the MTA was signed and filed within
2 90 days of Michael's bankruptcy filing, Trustee had a fiduciary
3 obligation to investigate and litigate any claim arising from the
4 MTA, particularly from Paragraph 8 (claims for after-discovered
5 property). According to Denise, no less than twenty-nine
6 documents filed in support of Claim No. 15 showed evidence of
7 fraud and forgery by Michael, thereby establishing prima facie
8 evidence of its validity.

9 Trustee filed his reply on October 27, 2011. Denise is not
10 listed on Trustee's proof of service. Trustee contended that the
11 problems with Claim No. 15 were not mere "data entry" errors, but
12 rather the information provided in Form 10 directly contradicted
13 the documents Denise claimed supported Claim No. 15. Further,
14 contended Trustee, any claims for fraudulent transfer were barred
15 by the MTA and, in any event, Denise had failed to explain how
16 the elements of fraudulent transfer were met or to provide
17 supporting evidence in a coherent manner. Finally, Trustee
18 asserted that Denise's calculation of damages from the alleged
19 after-discovered property was incorrect per Paragraph 8 of the
20 MTA, as it was not based on the value of the properties during
21 any of the three given points in time. Alternatively, Trustee
22 contended that based on Denise's allegation that Michael had
23 refinanced and pulled the equity out of these properties prior to
24 entering the MTA, her interest in the various properties was
25 likely \$0 or close to \$0.

26 On October 31, 2011, Denise filed what she called "Addendum
27 I" and "Addendum II" in response to Trustee's claim objection.
28 Both addenda contain multiple "cross-motions" for various relief,

1 including breach of the MTA, quiet title, declaratory relief, and
2 a request that the bankruptcy court "overturn" an apparent state
3 court judgment for judicial foreclosure and deficiency on an
4 unnamed property in favor of First American Title Company.

5 Although the caption on each addendum said that the cross-motions
6 were being heard in three days at the November 3 hearing with
7 Trustee's claim objection, no notice of hearing was filed or
8 hearing set in accordance with LBR 9013-1 for the cross-motions,
9 nor was an application filed requesting an order shortening time
10 under LBR 9075-1.

11 **C. The claim objection hearing.**

12 The hearing on the objections to Claim No. 15 went forward
13 on November 3, 2011. In addition to his previous objections,
14 Trustee noted that the Avenida Alavaras property Denise named in
15 her papers was investigated approximately one year ago when
16 Denise notified him of it, and its value at that time was only
17 \$119,000. According to Denise's allegation, over \$300,000 of
18 loans existed on that property. Therefore, it had no value.
19 Trustee contended that most of the allegations raised in Claim
20 No. 15 were for fraudulent transfers that occurred prior to the
21 MTA, so any potential claims were waived per the MTA and would
22 not fall under the after-discovered property provision in
23 Paragraph 8. Finally, Trustee noted that Denise may have other
24 avenues for relief, but Claim No. 15 was not the proper method
25 for seeking it.

26 Denise contended that because she provided evidence of liens
27 existing on the real properties she named in Claim No. 15, she
28 satisfied Rule 3001(c) and (d). The bankruptcy court informed

1 Denise that no document she provided showed that she held a lien
2 against the property listed. Denise responded that evidence of
3 her lien had been filed with the state court but not with Claim
4 No. 15. On the evidence presented, the bankruptcy court
5 determined that Denise had failed to prove she held any security
6 interest in property owned by Michael.

7 The bankruptcy court then asked Denise to explain why her
8 claim was entitled to priority under § 507(a)(1)(A), noting that
9 under the MTA Denise had forever waived her right to spousal
10 support. Denise proceeded to discuss irrelevant matters and
11 failed to articulate any basis for a priority claim. After
12 hearing further argument from Denise on matters either irrelevant
13 to the claim objections or not before the court, the bankruptcy
14 court informed Denise that § 547 governing the recovery of
15 preferences and the 90-day look back period was inapplicable, and
16 it proceeded to enter its oral ruling in favor of Trustee:

17 You -- you have filed a proof of claim and it is your
18 obligation when you file a proof of claim to properly
19 document that claim, the basis for that claim, any
20 security that you're asserting that secures that claim,
any basis to priority. And again, based on the entire
record, you haven't done that.

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21 Ms. Zuckerman, we've had a number of conversations when
22 I've tried to explain to you the deficiencies in your
23 legal arguments and the deficiencies in your claims.
24 Rather than listen to me and rather than read my rulings
25 you've chosen to continue to talk, you've chosen to try
and re-litigate the same issues that have already been
decided. So, I'm going to give you my ruling now and
we'll be finished for the day.

26 You have not established that you have a valid claim in
27 the amount of \$5,067,682 for the reasons that are set
28 forth in the Trustee's objection and for the reasons that
I've explained to you here today. So, I'm going to
sustain the objection to your claim.

1 Hr'g Tr. (Nov. 3, 2011) 11:22-12:2; 13:15-14:2.

2 The bankruptcy court entered an order sustaining Trustee's
3 objections and disallowing Claim No. 15 in its entirety on
4 November 9, 2011 ("Claim Objection Order"). Denise timely
5 appealed.

6 **II. JURISDICTION**

7 The bankruptcy court had jurisdiction under 28 U.S.C.
8 §§ 1334 and 157(b)(2)(B). We discuss our jurisdiction under
9 28 U.S.C. § 158 below.

10 **III. ISSUES**

11 1. Is this appeal moot?

12 2. If not, did the bankruptcy court err in determining
13 that Claim No. 15 failed to comply with Rule 3001?

14 3. Did the bankruptcy court err in not considering
15 Denise's cross-motions?

16 **IV. STANDARDS OF REVIEW**

17 Mootness is a question of law reviewed de novo. S. Ore.
18 Barter Fair v. Jackson Cnty. Ore., 372 F.3d 1128, 1133 (9th Cir.
19 2004)(citing Ore. Advocacy Ctr. v. Mink, 322 F.3d 1101, 1116 (9th
20 Cir. 2003)). "The basic question in determining mootness is
21 whether there is a present controversy as to which effective
22 relief can be granted." Feldman v. Bomar, 518 F.3d 637, 642 (9th
23 Cir. 2008)(citation omitted).

24 Whether a proof of claim is executed and filed in accordance
25 with the Federal Rules of Bankruptcy Procedure is a question of
26 fact we review for clear error. Garner v. Shier (In re Garner),
27 246 B.R. 617, 619 (9th Cir. BAP 2000)(citing Ashford v. Consol.
28 Pioneer Mortg. (In re Consol. Pioneer Mortg.), 178 B.R. 222, 225

1 (9th Cir. BAP 1995)).

2 **V. DISCUSSION**

3 Trustee filed a letter with this Panel on August 22, 2012,
4 indicating that Denise's appeal of the Claim Objection Order was
5 "essentially moot" because Michael's bankruptcy estate was
6 administratively insolvent, and there were no funds to pay
7 anything on Claim No. 15. As explained by Trustee, a hearing on
8 the Notice of Trustee's Final Report and Applications for
9 Compensation and Deadline to Object ("NFR") was scheduled for
10 August 30, 2012. In the NFR, the balance of cash on hand in the
11 estate of \$49,438.49 was to go entirely to administrative and
12 professional fees of the Trustee, his accountant, and his
13 counsel, leaving nothing for unsecured creditors. Objections to
14 the NFR were due by August 16, 2012, but none were timely filed.⁶

15 On August 23, 2012, we entered an order requiring Denise to
16 file and serve by no later than August 31, 2012, a written
17 response explaining why this appeal should not be dismissed as
18 moot. Denise timely filed her response, along with a motion to
19 continue oral argument. Because Denise's response did not
20 properly address the issue of mootness, and because she failed to
21 show "exceptional circumstances" for continuing oral argument
22 under 9th Cir. BAP Rule 8012-1, on August 29, 2012, we entered an
23 order denying all relief requested in Denise's response and
24 denying her motion to continue. Oral argument would be optional

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27 ⁶ We take judicial notice of the NFR and the fact that no
28 objections were filed. See In re E.R. Fegert, 887 F.2d at
957-58; In re Atwood, 293 B.R. at 233 n.9.

1 should Denise wish to appear.⁷ Denise timely filed a response on
2 September 5, 2012, indicating that she would be appearing.

3 Meanwhile, the hearing on the NFR went forward on August 30,
4 2012. According to the order entered on August 31, 2012, the NFR
5 was approved in its entirety. Our review of the bankruptcy
6 court's docket shows that no party timely appealed the order
7 approving the NFR.⁸

8 We lack jurisdiction over moot appeals. I.R.S. v. Pattullo
9 (In re Pattullo), 271 F.3d 898, 901 (9th Cir. 2001). If the
10 appeal is moot, we must dismiss it. Id. "The party asserting
11 mootness has the heavy burden of establishing that there is no
12 effective relief remaining for a court to provide." Oregon
13 Advocacy Ctr., 322 F.3d at 1116 (citation and internal quotations
14 omitted). A case is moot "[i]f an event occurs while a case is
15 pending on appeal that makes it impossible for the court to grant
16 any effectual relief whatever to a prevailing party"
17 In re Pattullo, 271 F.3d at 901.

18 Trustee cited no authority to support his position of
19 mootness in his August 22 letter. We, also, were unable to
20 locate a similar case. Nonetheless, we conclude that Denise's
21 appeal is moot because subsequent events have occurred making it

22 ⁷ Trustee waived his right to appear at oral argument by not
23 filing a responsive brief as per our order entered on February
24 13, 2012. We noted this fact in the order entered on August 29,
2012.

25 ⁸ We take judicial notice of the order granting the NFR and
26 the fact that no appeal was taken. See In re E.R. Fegert,
27 887 F.2d at 957-58; In re Atwood, 293 B.R. at 233 n.9. That
28 order is now final. See Hollingsworth v. Kaler (In re
Hollingsworth), 331 B.R. 399 (8th Cir. BAP 2005)(a bankruptcy
court's order approving a trustee's final report and proposed
distribution of the bankruptcy estate's assets is a final order).

1 impossible for us to fashion any effective form of relief for
2 her. The bankruptcy estate is insolvent, and even if we were to
3 reverse the Claim Objection Order, no money exists in the estate
4 to pay any portion of it. Accordingly, this appeal is MOOT and
5 we DISMISS it for lack of jurisdiction.⁹

6 Even if the appeal were not moot, we conclude the bankruptcy
7 court did not clearly err in determining that Denise failed to
8 meet her burden to prove the validity of Claim No. 15 in
9 accordance with Rule 3001. She did not provide any evidence
10 whatsoever of a security interest in her favor in either real
11 property or a motor vehicle (or anything else) owned by Michael.
12 She also failed to prove that Claim No. 15 qualified for priority
13 status, as none of the documents she attached established a basis
14 for why it was a domestic support obligation entitled to
15 priority. Simply because Denise may have a claim against Michael
16 for breach of the MTA (or other related claims), any potential
17 award she would receive is not automatically "transformed" into a
18 domestic support obligation entitled to priority. Further,
19 Denise forever waived her right to any spousal support. Finally,
20 as the bankruptcy court informed Denise, the preference provision
21 of § 547 has no relevance here, and, even if it did, Denise's

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23 ⁹ Because we lack jurisdiction over this appeal, we do not
24 reach the issue of whether the bankruptcy court erred by not
25 considering Denise's "cross-motions" filed in response to the
26 claim objection. We do note, however, that the motions were
27 never properly before the bankruptcy court. First, they were not
28 noticed or properly set for hearing under local rule. Second,
they suffer from other procedural defects, as some of the claims
asserted require the filing of an adversary proceeding in
accordance with Rule 7001. Finally, the bankruptcy court had no
jurisdiction to "overturn" a state court order for judicial
foreclosure and deficiency.

1 supporting documents failed to establish the necessary elements
2 for a preference. United States v. Daniel (In re R & T Roofing
3 Structures & Commercial Framing, Inc.), 887 F.2d 981, 984 (9th
4 Cir. 1989)(setting forth the seven elements required to establish
5 a preference).

6 Whatever claims Denise may have against Michael, state court
7 would appear to be the proper forum for her to exercise whatever
8 rights she may have under the MTA.¹⁰

9 VI. CONCLUSION

10 Based on the foregoing reasons, we DISMISS as MOOT.
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25 ¹⁰ Because we do not reach the merits of the parties'
26 arguments about the validity of Claim No. 15, our decision here
27 is not intended to have preclusive effect on Denise's ability to
28 litigate her claims against Michael in state court, whatever they
may be. See In re Pattullo, 271 F.3d at 901 (since a dismissal
for mootness is a dismissal for lack of jurisdiction, a court
that has no jurisdiction cannot enter a judgment with preclusive
effect).