

APR 07 2011

NOT FOR PUBLICATION

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	AZ-10-1209-JuMkPa
)		
ANDRADA FINANCING, LLC,)	Bk. No.	08-13469-JMM
)		
Debtor.)	Adv. No.	10-00289-JMM
)		
ANDRADA FINANCING, LLC,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
HUMARA GROUP, INC., d/b/a)		
Humara, Inc.; CHU WENG FAMILY)		
HOLDINGS, LLC; CHARLES H.)		
WHITEHILL,)		
)		
Appellees.)		

Argued and Submitted on February 17, 2011
at Phoenix, Arizona

Filed - April 7, 2011

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

Hon. James M. Marlar, Chief Bankruptcy Judge, Presiding.

Appearances: H. Lee Horner, Jr., Esq., Goldstein, Horner
& Horner argued for Appellant
Mark L. Collins, Esq., Gust Rosenfeld, PLC argued
for Appellees Humara Group, Inc. and Chu Weng
Family Holdings, LLC

* 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.

1 Michael R. Perry, Esq., argued for Appellee
2 Charles H. Whitehall

3 Before: JURY, MARKELL, and PAPPAS, Bankruptcy Judges.
4

5 Appellant Andrada Financing, LLC ("Financing") filed an
6 adversary complaint against appellees Humara Group, Inc. and Chu
7 Weng Family Holdings, LLC (collectively "Lenders") and Charles
8 H. Whitehill ("Whitehill") almost a year after Financing
9 voluntarily dismissed its chapter 11¹ case. The complaint
10 alleged that appellees presented fraudulent documents to, and
11 suppressed material facts from, the bankruptcy court in
12 obtaining an order granting them relief from stay. Due to the
13 fraud, Financing alleged that the order granting appellees'
14 motion for relief from stay was ineffective. Therefore,
15 Financing alleged that appellees violated the automatic stay by
16 foreclosing on two of its properties.

17 Lenders moved to dismiss the complaint under Civil Rule
18 12(b)(1) and (6) (made applicable by Rule 7012). The bankruptcy
19 court granted Lenders' motion on jurisdictional grounds. The
20 court supplemented its oral findings of fact and conclusions of
21 law in a memorandum decision denying Financing's motion for
22 reconsideration.

23 Financing timely appealed both of the bankruptcy court's
24 orders. Finding no reversible error, we AFFIRM.

25 ¹ Unless otherwise indicated, all chapter, section and
26 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
27 1532. "Rule" references are to the Federal Rules of Bankruptcy
28 Procedure and "Civil Rule" references are to the Federal Rules
of Civil Procedure.

1 **I. FACTS**

2 In early 2007, Lenders lent Financing \$815,000. The loan
3 was evidenced by a promissory note that was cross collateralized
4 by separate deeds of trust encumbering two properties. One deed
5 of trust encumbered six lots in Tucson, Arizona (the "Bowman
6 Lots") and the other deed of trust encumbered eleven lots
7 located in Vail, Arizona (the "Vail Lots"). Both trust deeds
8 bore the signature of Mr. Daratony ("Daratony"), Financing's
9 managing member.

10 Whitehill, the successor trustee and a licensed attorney,
11 commenced foreclosure proceedings on the two properties after
12 Financing failed to pay. On the eve of foreclosure, October 1,
13 2008, Financing filed its chapter 11 petition.² Financing
14 listed only the Bowman Lots in Schedule A. In Schedule C,
15 Financing claimed as exempt "possibly all 11 lots used as cross
16 collateral."³ Financing listed Lenders as secured creditors in
17 Schedule D and listed no unsecured creditors in Schedule F.

18 Lenders moved for relief from stay. Lenders attached three
19 pages of the Vail Lots trust deed, page one of which contained
20 the legal description of the eleven Vail Lots. Also attached
21

22 ² The original petition and schedules were hand-written
23 and were filed pro se. Because LLC's are prohibited from
24 appearing in court without an attorney, see Rowland v. Cal.
25 Men's Colony, 506 U.S. 194, 201 (1993), the bankruptcy court
issued an order instructing Financing to retain counsel, which
it promptly did. However, the schedules were never amended.

26 ³ It is unclear what Financing meant by this notation on
27 its Schedule C since exemptions are only available for
28 individual debtors and not limited liability corporations. See
§ 522(b)(1).

1 were the legal descriptions of the six Bowman Lots, but the
2 Bowman Lots trust deed was not included.

3 At the stay relief hearing, the bankruptcy court determined
4 that Financing could not confirm a plan because Lenders, the
5 sole creditors, were unlikely to approve a plan. The court
6 further decided that Financing filed its petition in bad faith
7 because the filing was on the eve of foreclosure that involved
8 Financing's only asset. The court granted appellees relief from
9 stay by order entered December 8, 2008. Attached to the order
10 were legal descriptions for the Bowman Lots but not the Vail
11 Lots.

12 On January 7, 2009, Whitehill foreclosed on the Bowman Lots
13 and the Vail Lots.

14 On January 22, 2009, Financing along with Daratony's other
15 companies, RS Songbird, LLC and Andrada Marketing, LLC ("Andrada
16 Marketing"), filed four lawsuits in the Arizona Superior Court,
17 Pima County, Arizona against Lenders and Fidelity National Title
18 Agency, Inc. The complaints sought damages resulting from the
19 wrongful encumbrance of the Vail Lots based on the purported
20 forgery of Daratony's signature on the Vail Lots trust deed.⁴

22 ⁴ On February 11, 2011, Lenders filed a Notice of Errata
23 in this appeal which attached the state court's ruling dated
24 February 4, 2011. We take judicial notice of the ruling. See
25 Biggs v. Terhune, 334 F.3d 910, 916 n.3 (9th Cir. 2003)
26 (judicial notice is properly taken of proceedings in other
27 courts, both within and without the federal judicial system, if
28 those proceedings have a direct relation to matters at issue),
overruled on other grounds by Hayward v. Marshall, 603 F.3d 546,
555 (9th Cir. 2010).

The state court's ruling, among other things, found that
(continued...)

1 On January 30, 2009, Financing filed a motion to dismiss
2 its bankruptcy case. Financing's motion stated that the
3 bankruptcy proceeding was no longer needed due to the court's
4 order granting appellees relief from stay. The bankruptcy court
5 dismissed Financing's chapter 11 bankruptcy case by order
6 entered on February 27, 2009.

7 Almost a year later, on February 18, 2010, Financing filed
8 the adversary complaint against appellees in the bankruptcy
9 court, alleging fraud and violation of the stay. Financing's
10 fraud claim was based on the alleged forgery of Daratony's
11 signature on the Vail Lots trust deed. Financing also asserted
12 that the attachments to Lenders' relief from stay motion were
13 incomplete because they did not attach the Bowman Lots trust
14 deed or contain any description of the Vail Lots other than what
15 was in the Vail Lots trust deed. As a result, Financing
16 maintained that the stay relief was not for the Vail Lots and,
17 therefore, Lenders' foreclosure sale of those lots was void ab
18 initio.

19 Lenders filed a motion to dismiss the complaint or abstain
20

21 _____
22 ⁴(...continued)

23 the Vail Lots were held by Daratony's trust when the bankruptcy
24 petition was filed. As a consequence, these lots were not
25 property of the estate and not protected by the stay. The court
26 also found that Daratony's signature was not forged. The Panel
27 raised the issue of whether this appeal was moot due to these
28 findings. The parties informed the Panel that the state court
ruling was not a final judgment at the time of oral argument.
Therefore, the Panel concluded that the doctrine of issue
preclusion did not prevent it from hearing the merits of the
appeal from the bankruptcy court's dismissal order.

1 in March 2010.⁵ Lenders sought dismissal under Civil Rule
2 12(b)(1) on the ground that the bankruptcy court did not have
3 related-to jurisdiction due to Financing's dismissal of its
4 underlying chapter 11 case. Lenders also sought dismissal under
5 Civil Rule 12(b)(6), arguing that the adversary complaint was a
6 collateral attack on the order granting them relief from stay
7 which was final. In that regard, Lenders maintained that
8 Financing had never appealed the order granting them relief from
9 stay nor did it timely move for relief from the order under
10 Civil Rule 60(b)(3)⁶ (made applicable by Rule 9024). Lenders
11 argued that even if the bankruptcy court were to entertain a
12 Civil Rule 60(b) motion, there was no fraud on the court because
13 the motion for relief from stay sought permission from the court
14 to foreclose on both the Vail Lots and Bowman Lots.

15 In addition, Lenders asserted that it was unlikely that
16 Financing had just discovered the fraud. They maintained that
17 Daratony "of all people" would have known about the alleged
18 forgery by the time he filed Financing's bankruptcy in 2008.
19 However, Financing did not raise this allegation during the lift
20 stay proceeding. Moreover, Lenders pointed out that Financing
21 knew of the alleged forgery by at least January 22, 2009, when
22 it and Daratony's related entities filed the state court

23
24 ⁵ Whitehill answered the complaint and later joined in
25 the Lenders' dismissal motion. Whitehill also filed a joinder
with Lenders' brief in this appeal.

26 ⁶ Civil Rule 60(b)(3) provides that the court may
27 relieve a party from a final order for "fraud (whether
28 previously called intrinsic or extrinsic), misrepresentation, or
misconduct by an opposing party[.]"

1 lawsuits against Lenders. Yet, eight days later Financing moved
2 to dismiss its bankruptcy case without mentioning the alleged
3 fraud.

4 Finally, Lenders requested the bankruptcy court to abstain
5 from hearing the matter because Financing was prosecuting the
6 state court actions against Lenders to recover damages for the
7 alleged forgery.

8 At the April 19, 2010, hearing, the bankruptcy court
9 concluded that it did not have jurisdiction over the claims
10 alleged in Financing's complaint because Financing had
11 voluntarily dismissed its chapter 11 case. The court dismissed
12 the complaint by order entered April 23, 2010.

13 Financing moved for reconsideration, which the court denied
14 without a hearing by order entered June 8, 2010. In conjunction
15 with the order, the bankruptcy court supplemented its previous
16 oral findings of fact and conclusions of law in a memorandum
17 decision. The court found that dismissal of Financing's
18 complaint was appropriate on various equitable grounds. The
19 court further determined that the complaint was in substance a
20 collateral attack on the order granting Lenders relief from stay
21 which was final.

22 **II. JURISDICTION**

23 As discussed below, the bankruptcy court had jurisdiction
24 over this adversary proceeding under 28 U.S.C. §§ 1334 and
25 157(a) and (b). We have jurisdiction under 28 U.S.C. § 158.

26 **III. ISSUE**

27 Whether the bankruptcy court properly dismissed Financing's
28 adversary complaint.

1 **IV. STANDARDS OF REVIEW**

2 We review de novo dismissal of a complaint for lack of
3 subject matter jurisdiction. Davis v. Courington (In re Davis),
4 177 B.R. 907, 910 (9th Cir. BAP 1995). We also review de novo
5 dismissal of a complaint for failure to state a claim under
6 Civil Rule 12(b)(6). Ta Chong Bank Ltd. v. Hitachi High Techs.
7 Am., Inc., 610 F.3d 1063, 1066 (9th Cir. 2010).

8 We review for abuse of discretion (1) the exercise of the
9 bankruptcy court's equitable powers, Baker v. Delta Air Lines,
10 Inc., 6 F.3d 632, 637 (9th Cir. 1993); (2) the bankruptcy
11 court's application of judicial estoppel, Broussard v. Univ. of
12 Cal. at Berkeley, 192 F.3d 1252, 1255 (9th Cir. 1999); and (3)
13 the bankruptcy court's denial of a motion under Civil Rule 59(e)
14 (made applicable by Rule 9023) to alter or amend the judgment,
15 Ta Chong Bank, 610 F.3d at 1066.

16 We follow a two-part test to determine objectively whether
17 the bankruptcy court abused its discretion. United States v.
18 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).
19 First, we "determine de novo whether the bankruptcy court
20 identified the correct legal rule to apply to the relief
21 requested." Id. Second, we examine the bankruptcy court's
22 factual findings under the clearly erroneous standard. Id. at
23 1262 n.20. We affirm the court's factual findings unless those
24 findings are "(1) 'illogical,' (2) 'implausible,' or (3) without
25 'support in inferences that may be drawn from the facts in the
26 record.'" Id. If the bankruptcy court did not identify the
27 correct legal rule, or its application of the correct legal
28 standard to the facts was illogical, implausible, or without

1 support in the record, then the bankruptcy court abused its
2 discretion. Id.

3 V. DISCUSSION

4 A contempt action for a willful violation of the stay is
5 within the bankruptcy court's ancillary or "arising under"
6 jurisdiction despite dismissal of the underlying bankruptcy
7 case. Couter & Gell v. Hartmarx Corp., 496 U.S. 384, 395-99
8 (1990); Aheong v. Mellon Mortg. Co. (In re Aheong), 276 B.R.
9 233, 244 (9th Cir. BAP 2002).⁷ However, the rule regarding
10 post-dismissal jurisdiction over stay violations is tempered by
11 equitable considerations. See Matthews v. Rosene, 739 F.2d 249,
12 251 (7th Cir. 1984) (suspension of § 362 provisions may be
13 appropriate when equitable considerations weigh heavily in favor
14 of creditor and the debtor bears some responsibility for
15 creating the problems); Wolkowitz v. Shearson Lehman Bros.,
16 Inc. (In re Weisberg), 193 B.R. 916, 925 (9th Cir. BAP 1996)
17 ("The injunction aspect of § 362 calls into play equitable
18 principles."), rev'd in part on other grounds, 136 F.3d 655 (9th
19 Cir. 1998); see also, Lonestar Sec. & Video, Inc. v. Gurrola (In
20 re Gurrola), 328 B.R. 158, 172 (9th Cir. BAP 2005) (noting that
21 balance of equities test applied under § 362(d) for annulment of
22 stay). Therefore, although the order granting Lenders' relief
23 from the stay was deficient as to the Vail Lots, the bankruptcy
24

25 ⁷ In its memorandum decision, the bankruptcy court cited
26 the above referenced case law which indicates it obviously
27 recognized that it had post-dismissal jurisdiction to reach the
28 merits of Financing's alleged stay violation. To the extent the
court's initial oral ruling suggests otherwise, the court cured
this error in its memorandum decision.

1 court could decline to exercise its jurisdiction over
2 Financing's post-dismissal stay violation damage claim based on
3 equitable considerations.

4 Here, the bankruptcy court identified several independent
5 bases for the dismissal of Financing's complaint in its
6 memorandum decision: (1) the stay relief order was final and
7 could not be collaterally attacked; (2) Financing knew or could
8 have known that the stay relief was granted as to both
9 properties; (3) Financing's arguments were precluded by res
10 judicata;⁸ (4) Financing filed its complaint based on the
11 alleged stay violation unconscionably late and, therefore, its
12 claims were forfeited; (5) Financing had unclean hands; (6) the
13 doctrine of judicial estoppel barred Financing's claims because
14 of its inconsistent positions; (7) Financing's fraud claim was
15 too late for reconsideration under Civil Rule 60(b)(3); and (8)
16 Financing's allegation of fraud did not amount to fraud on the
17 court under Civil Rule 60(d)(3).⁹

18 Financing ignores the majority of the court's ruling in its
19 opening brief. Although the bankruptcy court declined to
20 exercise post-dismissal jurisdiction over Financing's complaint
21 partially based on equitable doctrines, Financing does not
22 discuss these doctrines nor does it contend that the bankruptcy
23 court made any factual errors. Accordingly, those arguments are

24
25 ⁸ The bankruptcy court used the term "res judicata"
rather than the preferred term "claim preclusion."

26
27 ⁹ Civil Rule 60(d)(3) provides that the grounds listed
in Civil Rule 60(b) for relief from a final judgment do not
28 limit a court's power to set aside a judgment for "fraud on the
court."

1 deemed waived for purposes of this appeal.¹⁰ Smith v. Marsh, 194
2 F.3d 1045, 1052 (9th Cir. 1999).

3 We need not discuss or decide if every basis for the
4 court's decision was correct. Rather, we may affirm the
5 bankruptcy court's decision on any ground fairly supported by
6 the record. Wirum v. Warren (In re Warren), 568 F.3d 1113, 1116
7 (9th Cir. 2009).

8
9 **A. Equitable Considerations Justified Dismissal Of Financing's
10 Complaint**

11 Based on our review of the record, we conclude the
12 bankruptcy court properly identified numerous equitable
13 considerations that justified dismissal of Financing's
14 complaint.

15 We agree with the bankruptcy court's assessment that
16 Financing's complaint for the stay violation was filed
17 unconscionably late and, therefore, Financing had forfeited its
18 claim against Lenders due to the passage of time. See Lowery v.
19 Channel Commc'ns, Inc. (In re Cellular 101, Inc.), 539 F.3d
20 1150, 1155 n.2 (9th Cir. 2008). There is nothing in the record
21 that shows Financing's delay was excusable. Rather, the record
22 supports the bankruptcy court's finding that Financing knew or
23 could have known that the bankruptcy court intended to grant
24 stay relief as to both properties in 2008.

25 ¹⁰ Neither the parties nor the bankruptcy court mentioned
26 Civil Rule 12(b)(1) and (6) or the standards that govern them
27 despite Lenders' reliance on those rules in its motion to
28 dismiss. Financing has not raised any issue on appeal regarding
whether the rules were properly applied. Therefore, those
arguments are deemed waived as well.

1 The exhibits to the stay relief motion showed the legal
2 description of the Vail Lots on page one of the Vail Lots trust
3 deed and also separately showed the legal descriptions for the
4 six Bowman Lots. Therefore, although not the model of clarity,
5 the motion sought relief as to both properties. Moreover, in
6 Financing's response to the motion, it stated that "the
7 Promissory Note between Debtor and Movants indicates that only
8 six (6) lots are encumbered by the obligations to the Movants,
9 and the Deed of Trust references eleven (11) lots."

10 These pleadings show that the alleged "incomplete"
11 information giving rise to the purported fraud was available to
12 Financing when the motion for relief from stay was filed. Thus,
13 Financing could have investigated the accuracy (or inaccuracy)
14 of the documents omitted from the motion. Instead, it
15 acquiesced and did nothing to supplement the record at that
16 time.

17 Moreover, the record shows that by at least by January 22,
18 2009, Daratony was aware of the alleged forgery on the Vail Lots
19 trust deed because he filed a state court lawsuit on behalf of
20 Financing and against Lenders based on that operative fact.
21 However, nowhere did Daratony or Financing ever mention the
22 possibility of fraud or address the alleged stay violation prior
23 to seeking the dismissal of Financing's bankruptcy case only
24 eight days later.

25 In addition, Financing had the opportunity to pursue any
26 issues regarding the propriety of the trustee's sale on the Vail
27 Lots in the state court after the dismissal of its bankruptcy
28 case. However, as the bankruptcy court observed, Financing sat

1 back and allowed Lenders to exercise and vest their substantive
2 rights under state law without ever objecting to the sale. See
3 Ariz. Rev. Stat. §§ 33-808(e) and 33-811 (B), (C), (E).

4 We also agree with the bankruptcy court's conclusion that
5 Financing was guilty of unclean hands. See Cal. State U.,
6 Fresno v. Gustafson (In re Gustafson), 111 B.R. 282, 288 (9th
7 Cir. BAP 1990), rev'd on other grounds, 934 F.2d 216 (9th Cir.
8 1991). The record supports the bankruptcy court's conclusion
9 that Financing used the bankruptcy laws in bad faith to avoid
10 its obligations to Lenders. The bankruptcy court's order
11 granting Lenders' relief from stay on this ground was never
12 appealed. Under these circumstances, it was reasonable for the
13 court to conclude that Financing's complaint filed almost a year
14 after it voluntarily dismissed its bankruptcy case simply caused
15 further delay.

16 The record also supports the bankruptcy court's application
17 of judicial estoppel. Judicial estoppel is an equitable
18 doctrine, invoked by a court at its discretion, that precludes a
19 party from gaining an advantage by asserting one position and
20 subsequently taking a clearly inconsistent position. Hamilton
21 v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir.
22 2001). In determining whether to apply the doctrine of judicial
23 estoppel, courts consider: (1) whether a party's position is
24 clearly inconsistent with its earlier position; (2) whether the
25 first court accepted the party's earlier position; and (3)
26 whether the party seeking to assert an inconsistent position
27 would derive an unfair advantage if not estopped. Id. (citing
28 New Hampshire v. Maine, 532 U.S. 742, 750 (2001)). Although the

1 bankruptcy court did not specifically articulate these factors,
2 the record supports their application.

3 Financing's bankruptcy Schedule A listed only the Bowman
4 Lots as an asset and at no time did Financing amend the
5 schedule. Further, Financing moved for dismissal after both the
6 Bowman Lots and Vail Lots had been lost to foreclosure.
7 However, Financing never disclosed in its request for dismissal
8 that two properties were part of its estate or that one of those
9 properties was still subject to the stay. Moreover, it is
10 obvious from the record that the bankruptcy court believed
11 throughout Financing's bankruptcy case that it was a single
12 asset real estate case based on Financing's Schedule A. In
13 granting relief from stay, the bankruptcy court specifically
14 found bad faith because Financing was a single asset, single
15 creditor case that was filed on the eve of foreclosure. As
16 previously mentioned, at no time did Financing ever correct the
17 court's perception. Under these circumstances, it would have
18 been reasonable for the bankruptcy judge to sign a stay relief
19 order with one property description rather than two.

20 These facts demonstrate that Financing's challenge to the
21 order granting Lenders relief from stay with respect to the Vail
22 Lots was inconsistent with its earlier position during the
23 pendency of its chapter 11; i.e., that its only asset was the
24 Bowman Lots.¹¹ Further, Financing's Schedule A and silence
25

26 ¹¹ Ironically, the state court's ruling, although not
27 final, established that the Vail Lots were held in Daratony's
28 trust at the time Financing filed its petition. Therefore, it
appears that the Bowman Lots were indeed Financing's only asset.

1 regarding its ownership in the Vail Lots clearly misled the
2 bankruptcy court. Finally, any award of damages for violation
3 of the stay, assuming they could even be proved,¹² would reward
4 Financing for failing to disclose an asset of its estate.
5 Accordingly, we conclude the bankruptcy court did not abuse its
6 discretion in applying judicial estoppel to protect the
7 integrity of the bankruptcy process under these circumstances.

8 In sum, we conclude the bankruptcy court's decision to
9 dismiss the complaint on the equitable grounds discussed above
10 was a proper exercise of its discretion.

11 **B. Financing's Fraud Claim Was An Impermissible Collateral**
12 **Attack On The Order Granting Relief From Stay**

13 We also agree with the bankruptcy court's conclusion that
14 Financing's complaint in substance was an impermissible
15 collateral attack on the order granting Lenders' motion for
16 relief from stay, which was final.

17 This is especially true with respect to the Bowman Lots.
18 Nowhere does Financing dispute the validity of the Bowman Lots
19 trust deed nor does it feign ignorance as to whether the order
20 granting Lenders' motion for relief from stay applied to the
21 Bowman Lots. However, in its complaint, Financing requested

22
23 ¹² Financing, as a corporation, could not seek damages
24 for a stay violation under § 362(k) in any circumstance.
25 Johnston Env'tl. Corp. v. Knight (In re Goodman), 991 F.2d 613,
26 616 (9th Cir. 1993). Rather, it was required to file a motion
27 for contempt under § 105(a) and Rule 9020. Rule 9020 provides
28 that motions for contempt in bankruptcy cases are contested
matters governed by Rule 9014. Therefore, Financing was not
required to file a complaint or initiate an adversary
proceeding. See Barrientos v. Wells Fargo Bank, N.A.,
__F.3d__, 2011 WL 451955, *3 (9th Cir. 2011).

1 relief pertaining to the Bowman Lots, namely, to nullify the
2 "entire stay relief order," to "declare void the trustee's sale
3 of Bowman based on the [alleged] fraud" and that "the deeds to
4 the Bowman Lots be voided."

5 In addition, Financing requested an order declaring Lenders
6 to be unsecured creditors despite the fact that (1) the order
7 granting Lenders' motion for relief from stay was valid as to
8 the Bowman Lots (2) its bankruptcy case was dismissed and (3) it
9 had a pending state court action against Lenders based on the
10 same operative facts. In short, Financing does not assert any
11 basis for the bankruptcy court to properly exercise jurisdiction
12 over any of its requests for relief pertaining to the Bowman
13 Lots.

14 Further, the alleged "fraud" did not provide a basis for
15 the bankruptcy court to exercise jurisdiction over the purported
16 stay violation. Financing was not entitled to relief from the
17 stay order under Civil Rule 60(b)(3) which specifically provides
18 that a court may set aside a judgment for fraud if the motion is
19 made within one year. The record shows that Financing's fraud
20 claim under Civil Rule 60(b)(3) was untimely. Moreover, the
21 savings clause under Civil Rule 60(d)(3) which provides that
22 subsection (b) does not limit the power of a court to set aside
23 a judgment for "fraud upon the court" does not "save" Financing
24 under these circumstances. The fraud upon the court exception
25 to Civil Rule 60(b) is narrow and addresses a species of fraud

26 which does or attempts to, defile the court itself, or
27 is a fraud perpetrated by officers of the court so
28 that the judicial machinery can not perform in the
usual manner its impartial task of adjudging cases
that are presented for adjudication.

1 Levander v. Prober (In re Levander), 180 F.3d 1114, 1119 (9th
2 Cir. 1999). Here, as the bankruptcy court appropriately
3 observed, the fraud Financing complains of amounts to
4 nondisclosure which is not "fraud on the court" because it could
5 have been challenged in the bankruptcy court for the reasons we
6 discussed above. Id. Thus, we agree with the bankruptcy
7 court's decision to reject the independent action exception to
8 Civil Rule 60(b).

9 In sum, upon our de novo review of the bankruptcy court's
10 decision that Financing's complaint was an improper collateral
11 attack upon a final order, we conclude that the court's
12 dismissal of Financing's complaint was properly based upon the
13 applicable law and the entire record.

14 **C. The Bankruptcy Court Properly Denied Financing's Motion for**
15 **Reconsideration**

16 Finally, we conclude that the bankruptcy court did not
17 abuse its discretion in denying Financing's motion for
18 reconsideration. Financing did not show a manifest error of
19 fact or law or present newly discovered evidence. Hansen v.
20 Moore (In re Hansen), 368 B.R. 868, 878 (9th Cir. BAP 2007).
21 Therefore, there was nothing for the court to reconsider.

22 **VI. CONCLUSION**

23 For the reasons set forth above, we AFFIRM.
24
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26
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28