NOT FOR PUBLICATION

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.	**M E M O R A N D U M**[*]
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.

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

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

Appellant Andrada Financing, LLC ("Financing") filed an adversary complaint against appellees Humara Group, Inc. and Chu Weng Family Holdings, LLC (collectively "Lenders") and Charles H. Whitehill ("Whitehill") almost a year after Financing voluntarily dismissed its chapter 11[1] case. The complaint alleged that appellees presented fraudulent documents to, and suppressed material facts from, the bankruptcy court in obtaining an order granting them relief from stay. Due to the fraud, Financing alleged that the order granting appellees' motion for relief from stay was ineffective. Therefore, Financing alleged that appellees violated the automatic stay by foreclosing on two of its properties.

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

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

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

I. FACTS

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

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

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

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[2] The original petition and schedules were hand-written and were filed pro se. Because LLC's are prohibited from appearing in court without an attorney, see Rowland v. Cal. 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.

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

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

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

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

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

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[4] On February 11, 2011, Lenders filed a Notice of Errata in this appeal which attached the state court's ruling dated February 4, 2011. We take judicial notice of the ruling. See Biggs v. Terhune, 334 F.3d 910, 916 n.3 (9th Cir. 2003) (judicial notice is properly taken of proceedings in other courts, both within and without the federal judicial system, if 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...)

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

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

Lenders filed a motion to dismiss the complaint or abstain

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[4](...continued)
the Vail Lots were held by Daratony's trust when the bankruptcy petition was filed. As a consequence, these lots were not property of the estate and not protected by the stay. The court also found that Daratony's signature was not forged. The Panel raised the issue of whether this appeal was moot due to these 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.

in March 2010.[5] Lenders sought dismissal under Civil Rule 12(b)(1) on the ground that the bankruptcy court did not have related-to jurisdiction due to Financing's dismissal of its underlying chapter 11 case. Lenders also sought dismissal under Civil Rule 12(b)(6), arguing that the adversary complaint was a collateral attack on the order granting them relief from stay which was final. In that regard, Lenders maintained that Financing had never appealed the order granting them relief from stay nor did it timely move for relief from the order under Civil Rule 60(b)(3)[6] (made applicable by Rule 9024). Lenders argued that even if the bankruptcy court were to entertain a Civil Rule 60(b) motion, there was no fraud on the court because the motion for relief from stay sought permission from the court to foreclose on both the Vail Lots and Bowman Lots.

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

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

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

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

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

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

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

II. JURISDICTION

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

III. ISSUE

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

IV. STANDARDS OF REVIEW

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

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

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

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

V. DISCUSSION

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

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[7] In its memorandum decision, the bankruptcy court cited the above referenced case law which indicates it obviously recognized that it had post-dismissal jurisdiction to reach the 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.

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

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

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

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[8] The bankruptcy court used the term "res judicata" rather then the preferred term "claim preclusion."

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

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

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

A. Equitable Considerations Justified Dismissal Of Financing's Complaint

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[12] Financing, as a corporation, could not seek damages for a stay violation under § 362(k) in any circumstance. Johnston Envtl. Corp. v. Knight (In re Goodman), 991 F.2d 613, 616 (9th Cir. 1993). Rather, it was required to file a motion for contempt under § 105(a) and Rule 9020. Rule 9020 provides 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).

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

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

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

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

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

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

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

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

VI. CONCLUSION

For the reasons set forth above, we AFFIRM.