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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NOT FOR PUBLICATION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 Nos. EC-10-1325-HKiD
)	EC-10-1326-HKiD
RIPON SELF STORAGE, LLC,)	(Related Appeals)
)	
Debtor.)	Bk. No. 10-27215
)	
RIPON SELF STORAGE, LLC,)	
Appellant,)	M E M O R A N D U M¹
v.)	
EXCHANGE BANK; UNITED STATES)	
TRUSTEE,)	
Appellees.)	

Argued and Submitted on February 17, 2011
at Sacramento, California

Filed - April 1, 2011

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

Honorable Robert S. Bardwil, Bankruptcy Judge, Presiding.

Appearances: Arthur L. Barnes, Attorney at Law, argued for
the Appellant; Rachel K. Stevenson of Abbey, Weitzenberg,
Warren & Emery argued for the Appellee.

Before: HOLLOWELL, KIRSCHER and DUNN, 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.

1 Ripon Self Storage, LLC (Ripon) appeals two orders entered
2 by the bankruptcy court: (1) granting a motion for relief from
3 stay filed by Exchange Bank (Bank); and (2) denying Ripon's
4 motion to enforce the automatic stay against property of Ripon's
5 principal and for damages as a result of the Bank's foreclosure
6 on that property. We AFFIRM.

7 **I. FACTS**

8 In July 2005, Ripon obtained a construction loan from the
9 Bank to develop 3.1 acres of land in Ripon, California (the
10 Business Property) into a 352-unit storage facility. Ripon
11 executed a promissory note in favor of the Bank in the principal
12 amount of \$3,470,000 (the Note). The Note is secured by a deed
13 of trust on the Business Property and an assignment of rents
14 derived from that property (Rent Assignment).

15 Ripon failed to pay the balance due when the Note matured on
16 August 1, 2008. On June 18, 2009, the Bank and Ripon entered
17 into a modification of the Note and a forbearance agreement (the
18 Modification Agreement). The Modification Agreement reduced the
19 Note's principal to \$2,175,000 and extended its maturity date to
20 June 30, 2010. Additionally, the Modification Agreement provided
21 for the execution by Ripon of a second note in the amount of
22 \$1,142,719 (the Second Note). The Second Note is secured by
23 deeds of trust on real property personally owned by Ripon's
24 principal, Ted Madzey (Mazzey) (the Madzey Property).

25 Ripon breached the Modification Agreement by not forwarding
26 rents to the Bank as required by the Rent Assignment. As a
27 result of Ripon's default, the Bank noticed a trustee's sale on
28 the Business Property for March 2010. On March 23, 2010, Ripon

1 filed a chapter 11² bankruptcy petition.

2 On its bankruptcy Schedule A, Ripon valued the Business
3 Property at \$2,175,000 with secured claims against it in the
4 amount of \$2,294,425.³

5 On April 1, 2010, Ripon sought the use of cash collateral
6 from the Bank.⁴ It predicated its request on its contention that
7 the Bank would be adequately protected by an equity cushion in
8 the Business Property, alleging the Business Property had a value
9 of \$2,900,000, and later amended its Schedule A to reflect the
10 higher valuation. The Bank opposed Ripon's use of cash
11 collateral, in part, because according to the Bank's appraisal
12 and the Schedule A on file, there was no equity in the Business
13 Property. The Bank sought adequate protection payments. On June
14 6, 2010, the bankruptcy court granted Ripon the limited right to
15 use cash collateral but conditioned its use on a \$9,000 monthly
16 payment, an amount equal to the Note's monthly interest payment.

17
18 ² Unless otherwise indicated, all chapter and section
19 references are to the Bankruptcy Code, 11 U.S.C. § 101-1532. All
20 Rule references are to the Federal Rules of Bankruptcy Procedure,
Rules 1001-9037.

21 ³ Ripon's Schedule D lists two claims secured by the
22 Business Property: (1) the Bank's claim in the amount of
23 \$2,175,000 and (2) a mechanic's lien in the amount of \$119,425.
The Bank filed a proof of claim asserting a secured claim in the
amount of \$2,276,605.

24 ⁴ We have taken judicial notice of the cash collateral
25 motions filed on the bankruptcy court's electronic docket because
26 they were referred to by Ripon in its brief on appeal but not
27 submitted with the record. See O'Rourke v. Seaboard Sur. Co. (In
28 re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989)
(noting that the appellate court may take judicial notice of
items of record).

1 On July 9, 2010, the Bank filed a motion for stay relief
2 (MRS). The Bank sought relief under § 362(d)(1) for "cause."
3 The Bank alleged it was not adequately protected because Ripon
4 had failed to make the adequate protection payments and was also
5 delinquent in paying property taxes on the Business Property.
6 Alternatively, the Bank sought relief under § 362(d)(2),
7 contending that Ripon lacked equity in the Business Property and
8 that the Business Property was not necessary for an effective
9 reorganization. In the MRS, the Bank contended that Ripon owed
10 \$2,341,822 on the Note. It submitted an appraisal with its MRS,
11 which set the "as is" value of the Business Property at
12 \$1,600,000.

13 On July 13, 2010, the Bank foreclosed on the Madzey
14 Property, which was pledged to secure the Second Note.

15 On July 27, 2010, Ripon filed a response to the MRS. It
16 asserted that the Bank was adequately protected by Ripon's cash
17 collateral payments.⁵ Ripon contended it had met its burden in
18 opposing the MRS because it "demonstrated [the] Bank's
19 unwarranted basis for seeking relief." As far as the
20 "unwarranted basis" for the MRS, Ripon stated that the Bank was
21 "disguis[ing] its request for relief from the stay as a pretext
22 to gain forgiveness from violating the automatic stay" when it
23 foreclosed on the Madzey Property before Ripon was allowed to
24 cure any defaults on its obligation to the Bank under the Note
25 and the Second Note.

26
27 ⁵ The Bank, in its Reply to the MRS, acknowledged that
28 while it had not received a cash collateral payment at the time
it filed the MRS, it had thereafter received payments.

1 On August 3, 2010, Ripon filed a separate motion to enforce
2 the automatic stay, seeking damages under § 362(k) and an order
3 enjoining the Bank from taking any further action to obtain
4 ownership of the Madzey Property (the Motion to Enforce).

5 On August 18, 2010, the bankruptcy court held a hearing on
6 the MRS and the Motion to Enforce. During the hearing, the
7 bankruptcy court explained that separate and apart from whether
8 the Bank was adequately protected for purposes of § 362(d)(1), it
9 was required to grant stay relief if there was no equity in the
10 Business Property and the Business Property was not necessary for
11 an effective reorganization. Ripon argued that it had filed a
12 motion to extend the exclusivity period for 90 days and would be
13 able to "cure whatever problems that [the bankruptcy court had]
14 with the affective [sic] reorganization of the matter." Hr'g Tr.
15 (August 18, 2010) at 6:1-6. As to the Motion to Enforce, the
16 bankruptcy court determined there was no violation of the
17 automatic stay because the automatic stay only applied to
18 property of the estate, a debtor, or a debtor's property, and
19 absent special circumstances, did not extend to the property of
20 the debtor's principals.

21 The bankruptcy court entered Civil Minutes, which
22 memorialized its oral ruling and comprised its findings of fact
23 and conclusions of law. It entered a Civil Minute Order granting
24 the MRS, and a Civil Minute Order denying the Motion to Enforce
25 on August 23, 2010. Ripon timely appealed both orders.

1 On September 3, 2010, Ripon filed a motion for stay pending
2 appeal with the Bankruptcy Appellate Panel (BAP).⁶ The BAP
3 denied the request on September 7, 2010, because Ripon did not
4 demonstrate its entitlement to a stay under the factors
5 enunciated in Wymer v. Wymer (In re Wymer), 5 B.R. 802 (9th Cir.
6 BAP 1980). The Bank subsequently foreclosed on the Business
7 Property. As with the Madzey Property, the Bank was the
8 successful bidder at the trustee's sale.

9 On November 1, 2010, the Bank filed a supplemental brief
10 requesting dismissal of the appeals. The Bank asserted that the
11 appeals became moot when the Business Property and the Madzey
12 Property were sold at trustee's sales. Ripon responded on
13 November 9, 2010. The BAP entered an order on December 1, 2010,
14 denying the motion to dismiss and taking the matter of our
15 jurisdiction under advisement with the merits of the appeals.

16 II. JURISDICTION

17 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
18 §§ 1334 and 157(b)(2)(G). We have jurisdiction to review final
19 orders under 28 U.S.C. § 158. However, we lack jurisdiction to
20 hear moot appeals. I.R.S. v. Pattullo (In re Pattullo), 271 F.3d
21 898, 900 (9th Cir. 2001). An appeal is moot if we cannot fashion
22 effective relief in the event of reversal. Church of Scientology
23 of Calif. v. United States, 506 U.S. 9, 12 (1992); United States
24 v. Tanoue, 94 F.3d 1342, 1344 (9th Cir. 1996) (Appeal is moot
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27 ⁶ Ripon first filed a motion for stay pending appeal in the
28 bankruptcy court, but it was denied.

1 when events occur that make it impossible for the appellate court
2 to grant "any effectual relief whatever.").

3 The Bank argues that because both the Business Property and
4 the Madzey Property have been sold, reversing the orders on
5 appeal would provide no relief for Ripon. See In re Onouli-Kona
6 Land Co., 846 F.2d 1170, 1171 (9th Cir. 1988) ("Whether an order
7 directly approves the sale or simply lifts the automatic stay,
8 the mootness rule dictates that the appellant's failure to obtain
9 a stay moots the appeal."). However, "where real property is
10 sold to a creditor who is a party to the appeal," there exists an
11 exception to the mootness rule. Id. at 1172 (quoting Sun Valley
12 Ranches, Inc. v. Equitable Life Assurance Soc'y of the U.S. (In
13 re Sun Valley Ranches), 823 F.2d 1373, 1375 (9th Cir. 1987)).
14 Because the parties have indicated that the Bank continues to
15 hold title to the Madzey Property and the Business Property, and
16 neither property has been sold to a third party, the exception to
17 mootness applies.

18 Furthermore, the BAP could provide Ripon effective relief if
19 it reversed the bankruptcy court's denial of the Motion to
20 Enforce, since the Motion to Enforce sought damages under
21 § 362(k) for violation of the automatic stay. As a result, the
22 appeals are not moot and we have jurisdiction to address the
23 merits.

24 **III. ISSUES**

25 (1) Did the bankruptcy court err when it granted the Bank
26 relief from the automatic stay?
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1 (2) Did the bankruptcy court err when it refused to extend
2 the automatic stay to the Madzey Property and to award damages to
3 Ripon under § 362(k)?

4 IV. STANDARDS OF REVIEW

5 We review a bankruptcy court's order granting relief from
6 the automatic stay for an abuse of discretion. Arneson v.
7 Farmers Ins. Exch. (In re Arneson), 282 B.R. 883, 887 (9th Cir.
8 BAP 2002). In determining whether the bankruptcy court abused
9 its discretion, we first "determine de novo whether the
10 [bankruptcy] court identified the correct legal rule to apply to
11 the relief requested." United States v. Hinkson, 585 F.3d 1247,
12 1262 (9th Cir. 2009). If the bankruptcy court identified the
13 correct legal rule, we then determine under the clearly erroneous
14 standard whether its factual findings and its application of the
15 facts to the relevant law were "(1) illogical, (2) implausible,
16 or (3) without support in inferences that may be drawn from the
17 facts in the record." Id. (internal quotation marks omitted).

18 We review de novo whether the automatic stay provision of
19 § 362(a) has been violated. Mwangi v. Wells Fargo Bank (In re
20 Mwangi), 432 B.R. 812, 818 (9th Cir. BAP 2010); Chugach Timber
21 Corp. v. N. Stevedoring & Handling Corp. (In re Chugach Timber
22 Corp.), 23 F.3d 241, 244 (9th Cir. 1994). De novo means that our
23 review is independent, with no deference given to the trial
24 court's conclusion. In re Mwangi, 432 B.R. at 818.

25 V. DISCUSSION

26 A. Relief From The Automatic Stay

27 Section 362(d) requires the bankruptcy court, on request of
28 a party in interest, to grant relief from the automatic stay when

1 there is cause, including a lack of adequate protection
2 (§ 362(d)(1)); or, when there is no equity in a property and the
3 property is not necessary for an effective reorganization
4 (§ 362(d)(2)). What constitutes "cause" to terminate the stay is
5 determined on a case-by-case basis. Delaney-Morin v. Day (In re
6 Delaney-Morin), 304 B.R. 365, 369 (9th Cir. BAP 2003) (citing
7 MacDonald v. MacDonald (In re MacDonald), 755 F.2d 715, 717 (9th
8 Cir. 1985)).

9 The bankruptcy court's stay relief order focused on granting
10 relief under § 362(d)(2) and Ripon concedes that the bankruptcy
11 court granted relief under § 362(d)(2). Nevertheless, Ripon
12 argues that because the Bank was receiving payments pursuant to
13 the cash collateral order, the Bank was adequately protected and
14 stay relief was unwarranted. Ripon's argument ignores the
15 language of § 362(d)(2). Section 362(d)(2) provides that "the
16 court shall grant relief from the stay . . . if - (A) the debtor
17 does not have any equity in such property; and (B) such property
18 is not necessary to an effective reorganization." 11 U.S.C.
19 § 362(d)(2) (emphasis added).

20 Section 362(g) provides that the party opposing relief from
21 the stay has the burden of proof on all issues other than the
22 debtor's equity in a property. Thus, once a movant establishes
23 that a debtor has no equity in a property, "it is the burden of
24 the debtor to establish that the collateral at issue is necessary
25 to an effective reorganization." United Sav. Ass'n of Tex. v.
26 Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 375 (1988).

27 Equity, for purposes of § 362(d)(2)(A), is the difference
28 between the value of the property and all the encumbrances on it.

1 Sun Valley Newspapers, Inc. v. Sun World Corp. (In re Sun Valley
2 Newspapers, Inc.), 171 B.R. 71, 75 (9th Cir. BAP 1994) (citing
3 Stewart v. Gurley, 745 F.2d 1194, 1196 (9th Cir. 1984)). On its
4 Schedule A, Ripon listed the Business Property as having a value
5 of \$2,175,000 with secured claims against it in the amount of
6 \$2,294,425. Ripon amended Schedule A to increase its valuation
7 of the Business Property to \$2,950,000, but did not submit an
8 appraisal or other documentation to support the increased value.

9 With its MRS, the Bank submitted an appraisal report that
10 determined the Business Property had an "as is" value of
11 \$1,600,000. Ripon did not contest the Bank's appraisal or argue
12 that there was equity in the Business Property. The bankruptcy
13 court acknowledged Ripon's amended Schedule A, but gave the
14 higher valuation little weight, as it was "convinced that the
15 debtor simply . . . [increased] the value of the real property to
16 accommodate its best interest, without regard as to accuracy of
17 the value given."⁷ The bankruptcy court therefore, used the
18 \$2,175,000 figure listed by Ripon on its initial Schedule A to
19 establish the value of the Business Property. Because the Bank's
20 MRS asserted a claim in the amount of \$2,341,822, the bankruptcy
21 court found there was no equity. Ripon does not challenge this
22 finding on appeal.

23 Conceding there was no equity in the Business Property,
24 Ripon had the burden to demonstrate that the Business Property
25 was necessary for an effective reorganization. Under the
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28 ⁷ The bankruptcy court's findings regarding credibility are entitled to particular deference under Rule 8013.

1 standard set by the Supreme Court in Timbers, to establish that
2 property is necessary for an effective reorganization under
3 § 362(d)(2)(B), a debtor is required to show that “the property
4 is essential for an effective reorganization that is in
5 prospect This means a reasonable possibility of a
6 successful reorganization within a reasonable time.” 484 U.S. at
7 376 (internal quotations omitted); In re Dev., Inc., 36 B.R. 998,
8 1005 (Bankr. D. Haw. 1984) (cited with approval by Timbers).

9 Ripon never contended that it had a reorganization plan in
10 prospect and does not do so on appeal. As the bankruptcy court
11 noted, Ripon submitted virtually no evidence that the Business
12 Property was necessary for an effective reorganization. The only
13 evidence relating to the issue of reorganization was contained in
14 Madzey’s declaration, which stated in a conclusory fashion that
15 Ripon had increased its tenants from 175 to 205 and that “given
16 this positive result, [Madzey] intend[ed] to continue to fund and
17 support marketing for Ripon in anticipation of a successful
18 business reorganization.” There is no other information,
19 documentation, or even argument that addresses how Ripon intended
20 to restructure its debts or otherwise formulate a feasible plan
21 of reorganization. Furthermore, at the time of the MRS hearing,
22 the exclusivity period had run.⁸

23 A debtor must do more than merely assert that it can
24 reorganize if only given the opportunity to do so. See, e.g.,

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27 ⁸ The MRS was filed 10 days before the exclusivity period
28 expired, and the exclusivity period had run at the time the MRS
hearing was held. Ripon did file a motion to extend the
exclusivity period on July 23, 2010; however the bankruptcy court
denied the motion on August 18, 2010.

1 Am. State Bank v. Grand Sports, Inc. (In re Grand Sports, Inc.),
2 86 B.R. 971, 975 (Bankr. N.D. Ill. 1988). After reviewing the
3 record, we agree that Ripon did not provide evidence
4 demonstrating its ability to effectively reorganize within a
5 reasonable time and therefore, did not satisfy its burden under
6 § 362(d)(2). Ripon fails, on appeal, to articulate any error
7 that the bankruptcy court made with respect to that finding.

8 Instead, Ripon argues that it did not have to demonstrate
9 the Business Property was necessary for reorganization "if the
10 [Bank] did not have grounds to seek relief from the Automatic
11 Stay in the first place." Ripon takes the position that since
12 the Bank was receiving cash collateral payments, it was
13 adequately protected and, therefore, had no basis to seek stay
14 relief.⁹

15 The standards for stay relief under § 362(d)(1) and (d)(2)
16 are independent and alternative. Can-Alta Props., Ltd. v. States
17 Sav. Mortg. Co. (In re Can-Alta Props., Ltd.), 87 B.R. 89, 90
18 (9th Cir. BAP 1988). Therefore, the cash collateral payments
19 that Ripon asserted adequately protected the Bank are irrelevant
20 to whether stay relief should have been granted under
21 § 362(d)(2).

23 ⁹ Ripon relies on Timbers to support its position that the
24 Bank (as an undersecured creditor who was receiving adequate
25 protection) was not entitled to stay relief. Timbers held that
26 under § 362(d)(1), undersecured creditors are not entitled to
27 compensation for the delay caused by the automatic stay in
28 foreclosing on their collateral. The passage in Timbers that
Ripon asserts settles the issue is actually a recitation by the
Court of the appellant's arguments, which it found illogical and
dismissed. Thus, Ripon's reliance on Timbers is misplaced and
unpersuasive.

1 When the Bank moved for stay relief under § 362(d)(2), Ripon
2 was obligated to demonstrate that there was equity in the
3 Business Property or that the Business Property was necessary for
4 an effective reorganization. Failing to demonstrate either, the
5 bankruptcy court was required to lift the automatic stay. The
6 bankruptcy court did not abuse its discretion when it granted
7 stay relief under § 362(d)(2).

8 **B. Enforcement Of The Automatic Stay**

9 Ripon asserted that the Bank was inappropriately seeking
10 stay relief as a "pretext to gain forgiveness for its violation
11 of the stay." Ripon argued that the Bank's foreclosure of the
12 Madzey Property violated § 362(a)(6). It sought actual and
13 punitive damages for the willful violation of the automatic stay
14 pursuant to § 362(k) in the amount of \$15,000, and an injunction
15 against the Bank from recording the trustee's deed or taking any
16 other action to sell the Madzey Property.

17 In its Motion to Enforce, Ripon alleged that the Bank
18 violated the stay by foreclosing on the Madzey Property before
19 Ripon had an opportunity to determine whether its plan could cure
20 Ripon's defaults under the Second Note. But it offered no
21 reasoned legal argument as to why Madzey (who is not a debtor) or
22 the Madzey Property (which Ripon concedes is not Ripon's
23 property) would be protected by the automatic stay of § 362(a).

24 Ripon referred to Madzey as a "co-debtor" in its
25 communications with the Bank regarding the foreclosure of the
26 Madzey Property. However, the bankruptcy court correctly
27 determined that no automatic co-debtor stay exists in chapter 11.
28 Under § 362(a)(6), the automatic stay enjoins "any act to

1 collect, assess, or recover a claim against the debtor that arose
2 before the commencement of the case.”

3 Section 362(a) protects only the debtor, property of the
4 debtor, or property of the estate. Boucher v. Shaw, 572 F.3d
5 1087, 1092 (9th Cir. 2009). It does not protect non-debtor
6 parties or their property. Id. Furthermore, it “does not stay
7 actions against guarantors, sureties, corporate affiliates, or
8 other non-debtor parties liable on the debts of the debtor.” Id.
9 (citations omitted); Advanced Ribbons & Office Prods. v. U.S.,
10 125 B.R. 259, 263 (9th Cir. BAP 1991). Madzey is not a debtor
11 but an officer of Ripon. The Madzey Property was pledged as
12 additional security for Ripon’s liability on the Second Note, but
13 that does not bring the Madzey Property into the Ripon estate.¹⁰

14 The bankruptcy court found that only if Ripon had sought a
15 § 105 injunction based on the bankruptcy court’s equitable powers
16 could it have extended the stay to Madzey and the Madzey Property
17 under appropriate circumstances. No § 105 injunction was sought
18 and no stay existed. Therefore, the bankruptcy court concluded
19 that the Bank did not violate the automatic stay and no damages
20 could be awarded. There is no error in that conclusion.

21 The automatic stay may protect nondebtors only under
22 “unusual circumstances” where the interests of the debtor and the
23 nondebtor are inextricably interwoven. See A.H. Robins v.
24 Piccinin, 788 F.2d 994, 999 (4th Cir. 1986), cert. denied, 479
25 U.S. 876 (1986). However, the Ninth Circuit has held that
26 “although referred to as extensions of the automatic stay,” it is
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28 ¹⁰ The Madzey Property is not listed on Ripon’s bankruptcy
schedules.

1 in fact an injunction issued by the bankruptcy court after a
2 hearing where it is established that unusual circumstances are
3 needed to protect the administration of the bankruptcy estate.
4 Boucher v. Shaw, 572 F.3d at 1093 n.3 (citing In re Chugach
5 Forest Prods., Inc., 23 F.3d at 247); In re Spaulding Composites
6 Co., Inc., 207 B.R. 899 (9th Cir. BAP 1997). Thus, any extension
7 of the automatic stay to nondebtors does not occur automatically
8 but requires the filing of an adversary proceeding requesting the
9 bankruptcy court to act under § 105(a). Ripon failed to seek an
10 injunction. Ripon was not entitled to damages as a result of the
11 Bank's foreclosure on the Madzey Property since the Madzey
12 Property was not protected by the automatic stay. Accordingly,
13 the bankruptcy court did not err in denying the Motion to
14 Enforce.

15 **VI. CONCLUSION**

16 For the foregoing reasons, we AFFIRM the bankruptcy court's
17 orders granting the Bank's MRS and denying Ripon's Motion to
18 Enforce.
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