NOT FOR PUBLICATION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 M**[1]
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.

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[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.

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

I. FACTS

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

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

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

filed a chapter 11[2] bankruptcy petition.

On its bankruptcy Schedule A, Ripon valued the Business Property at $2,175,000 with secured claims against it in the amount of $2,294,425.[3]

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

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

[3] Ripon's Schedule D lists two claims secured by the Business Property: (1) the Bank's claim in the amount of $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.

[4] We have taken judicial notice of the cash collateral motions filed on the bankruptcy court's electronic docket because they were referred to by Ripon in its brief on appeal but not submitted with the record. See O'Rourke v. Seaboard Sur. Co. (In 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).

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

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

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

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

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

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

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

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

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

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(G). We have jurisdiction to review final orders under 28 U.S.C. § 158. However, we lack jurisdiction to hear moot appeals. I.R.S. v. Pattullo (In re Pattullo), 271 F.3d 898, 900 (9th Cir. 2001). An appeal is moot if we cannot fashion effective relief in the event of reversal. Church of Scientology of Calif. v. United States, 506 U.S. 9, 12 (1992); United States v. Tanoue, 94 F.3d 1342, 1344 (9th Cir. 1996) (Appeal is moot

[6] Ripon first filed a motion for stay pending appeal in the bankruptcy court, but it was denied.

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

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

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

III. ISSUES

(1) Did the bankruptcy court err when it granted the Bank relief from the automatic stay?

(2) Did the bankruptcy court err when it refused to extend the automatic stay to the Madzey Property and to award damages to Ripon under § 362(k)?

IV. STANDARDS OF REVIEW

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

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

V. DISCUSSION

A. Relief From The Automatic Stay

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

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

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

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

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

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

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

Conceding there was no equity in the Business Property, Ripon had the burden to demonstrate that the Business Property was necessary for an effective reorganization. Under the

[7] The bankruptcy court's findings regarding credibility are entitled to particular deference under Rule 8013.

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

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

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

[8] The MRS was filed 10 days before the exclusivity period 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.

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

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

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

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[9] Ripon relies on Timbers to support its position that the Bank (as an undersecured creditor who was receiving adequate protection) was not entitled to stay relief. Timbers held that under § 362(d)(1), undersecured creditors are not entitled to compensation for the delay caused by the automatic stay in 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.

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

B. Enforcement Of The Automatic Stay

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

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

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

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

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

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

The automatic stay may protect nondebtors only under "unusual circumstances" where the interests of the debtor and the nondebtor are inextricably interwoven. See A.H. Robins v. Piccinin, 788 F.2d 994, 999 (4th Cir. 1986), cert. denied, 479 U.S. 876 (1986). However, the Ninth Circuit has held that "although referred to as extensions of the automatic stay," it is

[10] The Madzey Property is not listed on Ripon's bankruptcy schedules.

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

VI. CONCLUSION

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