UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. EC-10-1240-HMoD
BALWANT SINGH BAINS and GURMEET KAUR BAINS	Bk. No. 09-42144
Debtors.	Adv. No. 10-02010
BULWANT SINGH BAINS; GURMEET KAUR BAINS	
Appellants,	
v.	**MEMORANDUM**[1]
RUSSELL D. GREER, Chapter 13 Trustee, ONEWEST BANK, F.S.B.,	
Appellees.	

Filed - November 2, 2010

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

Robert S. Bardwil, Bankruptcy Judge, Presiding

Before: HOLLOWELL, MONTALI[2] 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.

[2] Hon. Dennis Montali, Bankruptcy Judge for the Northern District of California, sitting by designation.

On October 12, 2010, the Panel entered an order requesting that the parties address whether we lack jurisdiction to decide this appeal, which is set for the November 18, 2010, calendar in Sacramento, California.

On October 12, 2010, the Appellants, Balwant and Gurmeet Bains (the Debtors), filed their response. The Appellee, OneWest Bank (the Bank), filed a response on October 25, 2010. We have reviewed the responses and DISMISS the appeal for lack of jurisdiction.

I.

The central issue in the appeal is whether the bankruptcy court erred in determining that 11 U.S.C. §§ 1322 and 1325 prohibited the debtors from modifying their home mortgage. The debtors argued that the modification was permissible pursuant to the Making Homes Affordable Program, 15 U.S.C. § 1639(a)(HAMP).

II.

The Debtors filed a chapter 13 petition on October 13, 2009, as well as a plan (Plan) that proposed to modify the loan secured by a first deed of trust against their home.

The Bank, and the Chapter 13 Trustee filed oppositions to the Plan asserting that the Plan's provision modifying the loan did not meet the requirements of 11 U.S.C. §§ 1322(b)(2) or 1325.

On December 28, 2009, the bankruptcy court sustained the Bank's objection because the Plan improperly proposed to reduce the monthly installments and failed to cure the prepetition arrearages of $37,490.

The Debtors did not appeal the denial of confirmation of

their Plan. They also did not make the Plan confirmable so that they could then pursue an appeal. See, e.g., Giesbrecht v. Fitzgerald (In re Giesbrecht), 429 B.R. 682 (9th Cir. BAP 2010).

Instead, on January 11, 2010, the Debtors commenced an adversary proceeding by filing a complaint (Complaint) against the Bank to "enforce the loan modification" they proposed in the Plan. The Debtors alleged the Bank violated the Truth in Lending Act under 15 U.S.C. § 1639a ("TILA"), breached its fiduciary duty, and breached the covenant of good faith and fair dealing. The Debtors sought declaratory relief "to establish they enjoy the right to impose the modification of their residential first mortgage upon [the Bank] through a plan and pursuant to HAMP and [TILA]."

On March 23, 2010, the Bank filed a motion to dismiss the Complaint for failure to state a claim. After a hearing on the matter, the bankruptcy court found that all four of the Debtors' causes of action were based on an alleged duty owed them by the Bank under the TILA but that TILA did not create or impose a duty in favor of borrowers, only in favor of investors. The bankruptcy court found that the allegations contained in the Complaint were not sufficient to plausibly suggest the existence of an enforceable contract to modify the Debtors' loan and TILA could not be used to bootstrap a loan modification otherwise impermissible under § 1322. Accordingly, on May 1, 2010, the bankruptcy court dismissed the Complaint.

On May 4, 2010, the Debtors filed a motion for reconsideration. The bankruptcy court denied the motion on June 17, 2010. On June 30, 2010, the Debtors filed this appeal,

contesting the dismissal of the Complaint and the denial of the motion for reconsideration.

On June 28, 2010, the Debtors filed a motion to voluntarily dismiss their chapter 13 case. On July 8, 2010, the bankruptcy court granted the Debtor's motion to dismiss their case. After the case was dismissed, the automatic stay dissolved and the home was subsequently sold at foreclosure to Freddie Mac, which is not a party to the appeal.

III.

As a result of the foreclosure, there is now no mortgage loan to modify and the Debtors no longer own the home. Out of concern that the appeal was moot, we issued the order directing parties to address the jurisdictional issue.

The Debtors assert that their argument that HAMP and TILA create a private right of action within bankruptcy is "of such critical national importance" that the question should be "chartered through the appellate courts due to its extreme public importance as recognized by Congress." Additionally, the Debtors argue that the appeal is not moot according to the repetition/evasion exception to mootness. Finally, the Debtors assert that if we were to reverse the bankruptcy court's dismissal of their Complaint, they could amend the Complaint to include breach of contract claims and assert a claim for damages.

Constitutional mootness is derived from Article III of the U.S. Constitution, which provides that the exercise of judicial power depends on the existence of a case or controversy. DeFunis v. Odegaard, 416 U.S. 312, 316 (1974); Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 33 (9th Cir. BAP

2008). The doctrine of constitutional mootness is a recognition of Article III's prohibition against federal courts' issuing advisory opinions. Church of Scientology of Calif. v. United States, 506 U.S. 9, 12 (1980) ("It has long been settled that a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.").

The mootness doctrine applies when events occur during the pendency of the appeal that make it impossible for the appellate court to grant effective relief. Id. If no effective relief is possible, we must dismiss for lack of jurisdiction. Id.; United States v. Arkison (In re Cascade Rds., Inc.), 34 F.3d 756, 759 (9th Cir. 1994). The determining issue is "whether there exists a 'present controversy as to which effective relief can be granted.'" People of Village of Gambell v. Babbitt, 999 F.2d 403, 406 (9th Cir. 1993) (quoting NW Envtl. v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988).

The subject matter of this litigation – whether the Debtors may modify their mortgage through a bankruptcy plan of reorganization-- has ceased to exist. As a result, there is no case or controversy as to which we can provide effective relief. Id.

An exception to mootness has been established when "the challenged conduct is capable of repetition but evades review." See Weinstein v. Bradford, 423 U.S. 147, 148-49 (1975). The exception is limited "to situations where the challenged action is in its duration too short to be fully litigated prior to its

cessation or expiration and there is a reasonable expectation that the same complaining party would be subjected to the same action again." Id.

Here, there was no temporal limitation that impeded the ability of the parties to litigate the matter before it became moot. The Debtors dismissed their chapter 13 case. Consequently, the house was foreclosed and their interest in the mortgage loan evaporated. There is no probability that the Debtors would be subject to the same order denying their ability to modify their mortgage loan through bankruptcy in the future because they no longer have the home or mortgage. The exception to mootness does not apply.

Finally, if the Debtors believe they have a claim for damages, they are free to pursue that claim in another forum since the Debtors have no pending bankruptcy case.

Given the dismissal of the Debtor's bankruptcy case and the foreclosure sale of the home, the Debtors no longer have an interest in modifying their mortgage loan or an interest in the case or controversy and we cannot fashion effective relief. Therefore, we DISMISS the appeal as moot.