

NOV 02 2010

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	EC-10-1240-HMoD
7	BALWANT SINGH BAINS and)	Bk. No.	09-42144
8	GURMEET KAUR BAINS)	Adv. No.	10-02010
9	Debtors.)		
10	<hr/>			
11	BULWANT SINGH BAINS;)		
12	GURMEET KAUR BAINS)		
13	Appellants,)		
14	v.)	MEMORANDUM¹	
15	RUSSELL D. GREER, Chapter 13)		
16	Trustee, ONEWEST BANK, F.S.B.,)		
17	Appellees.)		
18	<hr/>			

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, MONTALI² 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.

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

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

10 I.

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

16 II.

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

20 The Bank, and the Chapter 13 Trustee filed oppositions to
21 the Plan asserting that the Plan's provision modifying the loan
22 did not meet the requirements of 11 U.S.C. §§ 1322(b)(2) or
23 1325.

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

28 The Debtors did not appeal the denial of confirmation of

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

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

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

26 On May 4, 2010, the Debtors filed a motion for
27 reconsideration. The bankruptcy court denied the motion on June
28 17, 2010. On June 30, 2010, the Debtors filed this appeal,

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

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

9 III.

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

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

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

1 2008). The doctrine of constitutional mootness is a recognition
2 of Article III's prohibition against federal courts' issuing
3 advisory opinions. Church of Scientology of Calif. v. United
4 States, 506 U.S. 9, 12 (1980) ("It has long been settled that a
5 federal court has no authority to give opinions upon moot
6 questions or abstract propositions, or to declare principles or
7 rules of law which cannot affect the matter in issue in the case
8 before it.").

9 The mootness doctrine applies when events occur during the
10 pendency of the appeal that make it impossible for the appellate
11 court to grant effective relief. Id. If no effective relief is
12 possible, we must dismiss for lack of jurisdiction. Id.; United
13 States v. Arkison (In re Cascade Rds., Inc.), 34 F.3d 756, 759
14 (9th Cir. 1994). The determining issue is "whether there exists
15 a 'present controversy as to which effective relief can be
16 granted.'" People of Village of Gambell v. Babbitt, 999 F.2d
17 403, 406 (9th Cir. 1993) (quoting NW Env'tl. v. Gordon, 849 F.2d
18 1241, 1244 (9th Cir. 1988)).

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

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

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

4 Here, there was no temporal limitation that impeded the
5 ability of the parties to litigate the matter before it became
6 moot. The Debtors dismissed their chapter 13 case.

7 Consequently, the house was foreclosed and their interest in the
8 mortgage loan evaporated. There is no probability that the
9 Debtors would be subject to the same order denying their ability
10 to modify their mortgage loan through bankruptcy in the future
11 because they no longer have the home or mortgage. The exception
12 to mootness does not apply.

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

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