NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-05-1410-SPaD AZ-06-1038-SPaD
RICHARD C. BRUMGARD and KAY E. BRUMGARD,	Bk. No. 02-04327
Debtors.	Adv. No. 02-00117
YOUNG BUILDERS, INC., PROFIT SHARING & RETIREMENT TRUST FUND; YOUNG BUILDERS, INC.; JOHN R. YOUNG; MARGARET ANN YOUNG,	
Appellants and Cross-Appellees,	
v.	**M E M O R A N D U M**[1]
RICHARD C. BRUMGARD; KAY E. BRUMGARD; GAYLE ESKAY MILLS, Chapter 7 Trustee,	
Appellees and Cross-Appellants.	

Argued and Submitted on January 18, 2007
at Phoenix, Arizona

Filed - May 16, 2007

Appeal from the United States Bankruptcy Court
for the District of Arizona

Hon. Eileen W. Hollowell, Bankruptcy Judge, Presiding.

Before: SMITH, PAPPAS 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.

For over 19 years, Richard and Kay Brumgard ("Debtors"); John and Ann Young ("Youngs"); Young Builders, Inc., Profit Sharing and Retirement Trust ("Trust"); Young Builders, Inc. ("YBI");[2] and their respective lawyers have been battling over a self-storage facility located in Casa Grande, Arizona. As a result of the litigation, Debtors filed for chapter 13[3] relief. In response, the Young Entities filed a multitude of motions, claims, and objections.

On September 1, 2005, after unsuccessful attempts by the parties to settle, the bankruptcy court issued a memorandum decision addressing the pending motions and objections filed by the Young Entities and Debtors. The Young Entities sought reconsideration of certain rulings in the memorandum decision. The reconsideration motion was denied. On October 7, 2005, a timely notice of appeal was filed by the Young Entities, and subsequently, on October 14, 2005, Debtors filed notice of their cross-appeal. We AFFIRM in part, VACATE and REMAND in part, and DISMISS in part.

I. FACTS[4]

A. The Creation of the Storage Facility

In 1985, Richard Brumgard, Michael Matthews, and Fred Wendel, III formed a partnership known as Casa Grande Mini

[2] The Youngs, the Trust, and YBI are collectively referred to as the "Young Entities."

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date (October 17, 2005) of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

[4] The facts are largely taken from the bankruptcy court's memorandum decision entered on September 1, 2005.

("Partnership") for the purposes of developing a mini-storage facility ("Mini"). The Mini was to be built on property contributed by Debtors that had been purchased from John and Barbara Pearce in November 1985 for $75,000. The purchase was accomplished by a down payment of $20,000 and the granting of a carry back note to the Pearces for the balance ("Pearce Note"). The Pearce Note was secured by a first position deed of trust on the property recorded on November 26, 1985 ("Pearce DOT"). Payments on the Pearce Note were made by the Partnership.

Late in 1985, the Partnership borrowed $600,000 from Fred Wendel and Company ("FWC") and Dr. P. James Nichols' pension plan ("Nichols") for the construction of the Mini and, in connection therewith, executed a promissory note in like amount in favor of these parties ("Mini Note"). Thereafter, FWC assigned its interest in the Mini Note to a group of 14 investors, including the Trust.[5] In connection with the construction financing, the Pearces consented to the subordination of the Pearce DOT to the deed of trust securing the Mini Note ("Mini DOT").

In the summer of 1986, Brumgard learned that Matthews and Wendel had used part of the Mini Note proceeds for purposes other than for servicing the Pearce Note and the construction of the Mini. Consequently, he entered into a series of discussions with John Young to obtain an additional $300,000 in funding for the Mini (the "Second Loan"). In August 1986, the Partnership entered into an agreement with Young Builders, Inc., Defined Benefit Pension Plan ("Pension Plan") in which the Pension Plan

[5] The Trust is a pension plan for YBI's employees, a corporation owned by the Youngs. It has approximately 21 beneficiaries, including the Youngs, who also act as trustees of the Trust.

agreed to advance $100,000. In early September, the Partnership[6] executed the documents for the $100,000 loan; however, by mid-September Young informed Brumgard that neither the Young Entities nor the Pension Plan would fund the balance of the Second Loan.

By December 1986, the Mini Note was in default. A trustee's sale was set for March 1987.

B. Pre-petition Litigation Between Debtors and the Young Entities

In December 1986, in an effort to stave off foreclosure of the property, Debtors commenced an action in Pinal County Superior Court against Wendel and his entities, Matthews, Nichols, and all of the assignees of the Mini Note. This case spawned two decades of litigation, which included the entries of multi-million dollar judgments in favor of Debtors, the appeal and vacating of those judgments, and various other legal proceedings in state and federal court.

As a result of this litigation, the Youngs and the Trust hold judgments against Debtors, as well as an attorneys' fee award (the Brumgard Judgment and the Youngs' Attorneys' Fee Award).[7] In addition, during the course of the litigation, the

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[6] Wendel and Matthews executed assignments of their interest in the Partnership to Brumgard in early September 1986.

[7] The Brumgard Judgment was entered on January 25, 1989, pursuant to an uncontested summary judgment in Case No. CV 89-36326. It awarded Young $10,000 plus attorneys' fees of $4,470 based upon a personal note Brumgard had given Young in September 1986.

The Youngs' Attorneys' Fee Award relates to Debtors' unsuccessful petition for review of one of the Arizona Court of Appeals decisions in March 1993. Attorneys' fees were awarded to both the Trust and the Youngs. The Youngs' portion of the award was approximately $25,000.

Trust and YBI acquired third-party judgments against Debtors (the Tanner Judgment, the Foxworth Judgment, and the Pearce Judgment), which were intended to be used as offsets against the judgments in favor of Debtors in the event those judgments became final.[8]

C. The Debtors' Bankruptcy Case[9]

On September 4, 2002, one day prior to the hearing on the enforcement of the accounting provisions of the Final Mandate

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[8] In September 1990, the Trust acquired a 50% interest in the following third-party judgments:

1. Tanner Companies v. Brumgard, Case No. CIV 36356, which awarded Tanner, a subcontractor involved in the Mini's construction, a $12,033.38 judgment against Debtors ("Tanner Judgment"); and

2. Foxworth-Galbraith v. Brumgard, Case No. 89-38069, which awarded Foxworth $19,749.75 in damages and $240.47 in costs pursuant to a default judgment ("Foxworth Judgment").

That same month, YBI acquired a 50% interest in the $48,052.82 judgment the Brumgards had stipulated to in Pearce v. Brumgard, Case No. CV 89-37526 ("Pearce Judgment"). YBI also obtained a 50% interest in the Pearce Note and Pearce DOT. In 2000, YBI transferred its ownership interest in the Pearce Judgment to the Youngs.

[9] Bankruptcies abound in this saga. Since 1990, there have been four bankruptcy cases filed in relation to the Young Entities and Debtors: a chapter 11 filed by the Trust, which was dismissed almost ten years after the case was filed; a chapter 11 filed by the Youngs that also was dismissed; a chapter 13 case filed by the Youngs in which they received a discharge; and Debtors' current chapter 13 case that was converted to a chapter 7 on September 30, 2005. The filings of the Trust's and the Youngs' chapter 11 cases were precipitated by the first $3 million judgment. Neither had the funds to post the supersedeas bond required to stay the judgment on appeal. They filed for chapter 11 relief in order to receive protection from the automatic stay under § 362.

Judgment,[10] Debtors filed for chapter 13 relief. Listed on their schedules was $813,581.34 in secured debt, of which approximately $360,000 was due to the Young Entities and their lawyer, Fred Gamble. The $360,000 was listed as contingent, unliquidated, and disputed and broken down as: 1) the Trust: $255,721.08, 2) YBI: $50,694.00, 3)the Youngs: $59,599.99, and 4) Gamble: $3,565.71. Debtors' unsecured priority debt was scheduled at $43,928 and general unsecured debt was listed as unknown.

On November 1, 2002, Debtors filed a 36-month plan that provided for monthly payments of $675 for the first three months and $175 a month for the balance of the plan term. The plan also listed the claims of the Young Entities, Gamble, and the IRS as disputed and provided that the amounts of the disputed claims was to be determined by the court and paid, without interest, when and if allowed.

Debtors' bankruptcy sparked the filing of several motions by the Young Entities and Gamble, including:

> 1. A motion for turnover of 45.666% of the gross receipts from the operation of the Mini from July 1991 or, in the alternative, a priority claim for those

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[10] On July 15, 2002, the Arizona trial court entered a judgment on the mandate of the Arizona Appeals Court's reversal of its contract claim judgment ("Final Mandate Judgment"). The Final Mandate Judgment, entered in favor of the Young Entities, included an award of taxable costs and set aside Debtors' execution on the Trust's co-tenancy interest in the property. It also required Debtors to produce, within ten days, an accounting to the Trust of "all monies received from [the] income producing property" in which the Trust held an interest and that Debtors had obtained by way of "execution, garnishment or other process" from the breach of contract judgment and to pay the Trust the "income so received."

amounts, filed on September 20, 2002;[11]

2. An objection to Debtors' homestead exemption claimed in the property, filed on November 21, 2002;

3. An objection to Debtors' plan, filed on November 29, 2002; and

4. A motion to convert Debtors' chapter 13 case to chapter 7, filed on December 13, 2002.

The Young Entities and Gamble filed the following proofs of claims against Debtor's bankruptcy estate:

1. YBI filed a secured proof of claim for $74,096.57;

2. The Trust filed a secured claim valued at $910,655.73 based upon: $392,260.58 awarded during the state court litigation, an unliquidated claim for an accounting and payment of 45.666% of the gross income of the Mini between August 2001 and July 2002 estimated to be $50,000, the Tanner Judgment listed as $14,570.28 on the petition date, the Foxworth Judgment listed as $25,784 on the petition date, and an unliquidated claim for conversion of 45.666% of the Mini's income estimated to be between $95,000 and $245,000;

3. The Youngs filed a secured claim in the amount of $152,147.25 which consisted of: the Youngs' Attorney's Fee Award, the Brumgard Judgment listed at $33,067.02 on the petition date, and the Pearce Judgment which was listed as $70,005.90 on the petition date; and

4. Gamble filed a secured proof of claim for $5,726.63 based on an award of attorneys' fees granted to him in state court.

By early 2004, after unsuccessfully trying to settle the pending matters for most of 2003, the litigation between Debtors, the Young Entities, and Gamble recommenced. On February 19, 2004, Debtors objected to all of the Young Entities' and Gamble's proofs of claim. Thereafter, on March 29, 2004, the Trust filed a motion seeking payment of a portion of the Mini's income to it as a joint-owner. The Trust argued that because Debtors had used

[11] This motion was only filed by the Trust.

the income to pay their bankruptcy attorneys' fees, plan payments, and the employer's portion of their payroll taxes, it, as a 46.666% co-owner of the property, should receive a proportionate share of the Mini's income.

On April 21, 2004, the Young Entities and Gamble filed a motion for summary judgment on their objection to Debtors' homestead exemption. The next day, the Young Entities filed another summary judgment motion seeking a determination that all of the judgments referred to in the Young Entities' proofs of claim were valid, enforceable, and entitled to first priority against the property. According to the Young Entities, even if some of their judgments had not been timely renewed, any untimely renewals had resulted from the entry of various status quo orders in the Trust bankruptcy and the state court stays, and therefore, the doctrine of equitable tolling should apply to validate the late filed renewals.

Two days later, on April 23, 2004, Debtors filed their own summary judgment motion with respect to their objection to the Young Entities' claim. Relying heavily on an earlier sanctions order entered against the Trust and the Youngs in their respective bankruptcy cases,[12] they argued that the Young

[12] On October 3, 1997, bankruptcy judge Redfield Baum issued a sanctions order against the Trust and the Youngs based upon three events: 1) the post-petition granting and acceptance of a $2 million deed of trust to secure fees granted to the Trust's bankruptcy lawyers and Gamble without court approval or prior disclosure; 2) violations by the Trust and the Youngs and their attorneys of the stay/status quo orders issued by the court; and 3) the assignment by the Youngs of undisclosed judgments to Gamble coupled with the Youngs' conduct in their chapter 13 case. The undisclosed judgments included the Pearce Judgment, the Brumgard Judgment, and the Youngs' Attorneys' Fee Award (collectively referred to as the "Gamble Judgments").

Entities' claims, including the Trust's co-ownership in the property, should be disallowed because of the Young Entities' alleged wrongful conduct in both the state court litigation and in each of the party's bankruptcy cases.

Hearings on the parties motions for summary judgment were held on August 20, 2004, and September 27, 2004. The following tentative rulings were issued at those hearings:

> 1. The Debtors could, under Arizona law, claim a homestead exemption in the manager's quarters ("Managers' Quarters") located on the Property up to the extent of their co-tenancy interest in the Property.
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> . . . .
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> 3. The Gamble Judgments . . . , which were the subject of the Sanctions Order, were unenforceable against the Debtors under principles of judicial estoppel. [The court] left open the possibility that the Pearce Judgment . . . might not be subject to the estoppel ruling, if the evidence demonstrated that it was not an asset of the Young's [sic] Chapter 13 bankruptcy estate.
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> 4. The Pearce Judgment was not timely renewed and is, therefore, unenforceable. . . .
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> . . . .
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> 6. The co-tenancy interest in the Property between the Debtors and the Trust arose in 1987 when the Mini DOT was foreclosed. The amount of the Trust's co-tenancy interest (45.666%) was established by the First Mandate Judgment[13]. . . .
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> 7. The Trust was barred from requesting accountings and payments of income from the operation of the Mini until the period of time after the Trust's bankruptcy case was dismissed on April 27, 2000. . . .

[13] In February 1995, the Arizona state court entered a judgment reinstating the trustee's sale as to the Trust. (This judgment is referred to by the bankruptcy court as the "First Mandate Judgment.") Included in the judgment was a legal description of the property and an allocation of the ownership interests between Debtors and the Trust: 54.334% to Debtors and 45.666% to the Trust. Debtors unsuccessfully appealed the ownership allocation.

Memorandum Decision 13-14, Sept. 1, 2005.

At the conclusion of the September 27 hearing, the court set an evidentiary hearing to resolve the remaining factual issues. The evidentiary hearing took place on May 2, 2005, and thereafter, the court issued its memorandum decision which addressed the following issues:

> 1. Do the Debtors have the right to claim a homestead in the Managers' Quarters?
> If so:
> (a) What is the extent of those quarters?
> (b) What is the value of the homestead claim?
>
> 2. What is the extent of the Trust's co-tenancy interest in the Property?
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> 3. From what date does the Trust have a right to an accounting and distributions of income from the Mini? Is the Trust entitled to proportionate distribution of gross or net income?
>
> 4. Are any of the Young Entities' claims unenforceable?
>
> 5. Are the Debtors eligible to be Chapter 13 debtors?
>
> 6. Have John Young and Gamble misrepresented the ownership of the Pearce Judgment?

Memorandum Decision 16-17, Sept. 1, 2005.

1. The Homestead Claim

The bankruptcy court determined that Debtors were entitled to claim a homestead exemption under Arizona Revised Statute ("A.R.S.") § 33-1101(A)(1) based on their co-tenancy interest in the Managers' Quarters located on the property. While the court recognized that a portion of the Managers' Quarters was being used as an office to manage the Mini, it concluded that this limited commercial use did not bar the Managers' Quarters from being considered a dwelling under the Arizona statute, noting that Arizona courts have consistently interpreted the homestead

laws liberally. The court found that Debtors were entitled to claim a homestead exemption in the 1,069 square foot Managers' Quarters along with the two parking spaces and septic tank found on the property and valued the homestead claim at $37,577.39.

2. The Trust's Right to an Accounting and Distribution of Income from the Mini's Operations

In deciding whether the Trust was entitled to an accounting and distribution of income from the date Debtors began operating the Mini in 1991, the bankruptcy court relied heavily on the orders entered in the Trust's chapter 11 bankruptcy and on the effect of the dismissal order entered in the Trust's bankruptcy in relation to § 349. During the Trust's chapter 11 case, orders had been entered that 1) placed Debtors in possession of the property with the right to retain and use the net operating income derived from the Mini; and 2) appointed an examiner with special powers to review budgets and oversee that the Mini was being operated in a businesslike and reasonable manner. Based on the examiner's recommendations, orders were entered in the Trust's bankruptcy which allowed Debtors to occupy the Managers' Quarters, pay themselves a managing fee, and pay other bills associated with the operation of the Mini.

Though the basic purpose of § 349 is to undo the Trust's bankruptcy case "as far as practicable," Cohen v. Tran (In re Tran), 309 B.R. 330, 334 (9th Cir. BAP 2004), the bankruptcy court opined that the dismissal of the Trust's case did "not necessarily 'undo' the bankruptcy case where the parties . . . acquired rights in reliance on the case." Wytch v. Pacific Reconveyance (In re Wytch), 223 B.R. 190, 192 (9th Cir. BAP

1998). Because Debtors had relied on the orders entered in the Trust's bankruptcy, the bankruptcy court adopted its tentative ruling that § 349 did not undo those orders and allow for either accountings or distributions of income from the property prior to May 2000.

3. Validity of the Young Entities' Claims

In addressing Debtors' objections to the portion of the Trust's claim based on the Foxworth Judgment and the Tanner Judgment, and to the portion of the Youngs' claim based on the Youngs' Attorneys' Fee Award, the Brumgard Judgment, and the Pearce Judgment, the bankruptcy court found that all of the judgments, except the Pearce Judgment, had been timely renewed and therefore were enforceable against the estate. Under A.R.S. § 12-1612(E), a successive affidavit of renewal must be filed "within 90 days of expiration of five years from the date of the filing of the prior renewal."

The first affidavit of renewal for the Pearce Judgment was recorded on September 9, 1994. Thus, the court determined that the second affidavit of renewal needed to be filed 90 days before September 9, 1999. However, the second affidavit of renewal was not recorded until October 12, 1999.

The court was unpersuaded by the Young Entities' argument that equitable tolling should apply to the renewal of the Pearce Judgment because of the status quo orders entered in the Trust and Young bankruptcy cases and the injunctions entered by the state court after the Trust's bankruptcy was dismissed. In reviewing the status quo orders, the court noted that they were focused on preventing the execution of judgments and reasoned

that, under Arizona law, the renewal of an existing judgment does not constitute an execution of a judgment, but rather, is considered a ministerial action. In re Smith, 101 P.3d 637, 639 (Ariz. 2004). Because the orders had not prevented the Young Entities from renewing the Pearce Judgment, the court found that the doctrine of equitable tolling did not apply. Accordingly, it held that the Pearce Judgment was unenforceable.

4. Liability for Accrued Property Taxes

The court further ruled that Debtors were solely responsible for the accrued unpaid real property taxes. As co-tenants in possession, Debtors had a fiduciary duty to operate the property in a manner that would not impair or injure the Trust's property interest. Crossman v. Meek, 556 P.2d 325 (Ariz. Ct. App. 1976). Therefore, the court concluded that the Trust should not bear the cost of accrued interest on property taxes that Debtors had failed to pay while they were in control of the property and the Mini's operations.

On September 1, 2005, an "Order Regarding Distributions to Co-Tenants" was entered (the "Distribution Order"). The Distribution Order, in relevant part, directed Debtors to a) be solely responsible for all interest accrued on past due real property taxes on the property from and after 2000; and b) remain in control of the property and provide monthly accountings of the property's operation to the Trust. In addition, an "Order Overruling Objection To Homestead Claim" (the "Homestead Order") and an "Order On Motion To Convert" (the "Conversion Order") were entered. The Conversion Order required Debtors to either dismiss or convert their chapter 13 case. On September 30, 2005, Debtors

elected to convert their case to a chapter 7.

The Young Entities filed a motion for reconsideration of the court's memorandum decision on September 12, 2005. By the motion, they requested that the court reconsider its rulings on the application of the judgment renewal statutes, the Trust's right to an accounting as to Debtors' financial transactions prior to April 2000, and the enforceability of the Gamble Judgments. The bankruptcy court entered its order denying the reconsideration motion on September 27, 2005 (the "Reconsideration Order").

The Young Entities appealed the Distribution and Reconsideration Orders on October 7, 2005; Debtors cross-appealed on October 14, 2005.

II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334, 157(b)(1), and 157(b)(2)(B). We have jurisdiction under 28 U.S.C. § 158.

Our jurisdiction over judgments, orders, or decrees is limited by Bankruptcy Rule 8002. Saunders v. Band Plus Mortgage Corp. (In re Saunders), 31 F.3d 767, 767 (9th Cir. 1994). Rule 8002(a) requires a notice of appeal to be filed "within 10 days of the date of the entry of the judgment, order, or decree appealed from." If a timely motion for reconsideration is filed, then "the time for appeal for all parties shall run from the entry of the order [disposing of that motion]." Fed. R. Bankr. P. 8002(b). Because the provisions of Rule 8002 are jurisdictional, "the untimely filing of a notice of appeal deprives the appellate court of jurisdiction to review the

bankruptcy court's order." Saunders, 31 F.3d at 767 (quoting Anderson v. Mouradick (In re Mouradick), 13 F.3d 326, 327 (9th Cir. 1994)).

We note at the outset that the Young Entities have only appealed the Distribution Order and the Reconsideration Order.[14] No appeal of the Homestead Order has been taken. Moreover, the motion for reconsideration, which tolled the time to appeal the Distribution Order, did not mention the Homestead Order. That being the case, the time to appeal the Homestead Order expired on September 12, 2005.

Because the Homestead Order has not been appealed, we do not have jurisdiction to review the bankruptcy court's decision overruling the Trust Entities' objection to Debtors' homestead exemption in the Managers' Quarters, as the Young Entities request. Consequently, our review is limited to issues arising from the Distribution Order and the Reconsideration Order.

As to Debtors' argument that the bankruptcy court's ruling on the untimely renewal of the Pearce Judgment was not reduced to a final appealable order, it is true that no order was entered consistent with the court's findings of fact and conclusions of

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[14] The Young Entities' notice of appeal ambiguously referenced the Order Denying the Motion for Reconsideration and Motion to Alter or Amend Findings, the Order on Motion to Convert filed September 1, 2005, the Order Regarding Distributions to Co-Tenants filed September 1, 2005, and "the preliminary rulings made in open court on July 8, 2004." Notice of Appeal at 1, Oct. 7, 2006. Because we could not determine with certainty what decisions of the bankruptcy court were being appealed, and whether the matter should proceed as a single appeal or be split into two or more appeals, we issued an order on December 9, 2005, directing the Young Entities to address our concerns. Based on the response, we determined that the appeal would proceed only as to the Distribution Order and the Reconsideration Order.

law regarding the timeliness of the Pearce Judgment renewal. Nevertheless, because the Young Entities requested that the court review its findings as to this issue in their motion for reconsideration, we conclude that we have jurisdiction to review the issue in the context of the appeal of the Reconsideration Order.

III. ISSUES[15]

A. Whether the bankruptcy court erred in ruling that the Pearce Judgment had to be timely renewed in accordance with A.R.S. §§ 12-1551 and 12-1611.[16]

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[15] The Young Entities state as an issue in this appeal whether "Judge Hollwell [sic] err in her determination that the Pearce judgment, John Young's judgment in Pinal County No. CIV 36326 [the Brumgard Judgment] and the Youngs' attorney's fees award in Pinal County No. CIV 36224 were enforceable because they were not included in the Youngs' schedules filed in their Chapter 13 bankruptcy?" This issue is only relevant to the unadopted tentative ruling which indicated that the Gamble Judgments were unenforceable against Debtors on the basis of judicial estoppel. Because the bankruptcy court did not adopt its tentative ruling concerning the enforceability of the Gamble Judgments, this issue is moot. See Spencer v. Kemna, 523 U.S. 1, 7 (1998)(explaining that an issue is moot when the injury complained of cannot be "redressed by a favorable judicial decision").

[16] In addressing this issue, the Trust Entities include an analysis of the Tanner Judgment, the Foxworth Judgment, and the Gamble Judgments. However, the memorandum decision only addressed the timeliness of the Pearce Judgment. The bankruptcy court's findings as to the timeliness of the other judgments did not occur until after we granted Debtor's motion for a limited remand regarding their pending motion to reconsider whether the Trust Entities' other claims were also untimely renewed and therefore unenforceable.

Pursuant to our limited remand order, if a party wished to appeal the bankruptcy court's decision as to the reconsideration motion, it needed to file an amended notice of appeal. Order Granting Limited Remand at 2, Mar. 17, 2006. The bankruptcy court's order addressing the reconsideration motion was entered

(continued...)

B. Whether we have jurisdiction to review the bankruptcy court's denial of the Trust's accounting request in light of Debtors obtaining a discharge.

C. Whether the bankruptcy court erred in holding Debtors solely responsible for the accrued interest on the delinquent property taxes.

D. Whether the court erred in not requiring the return to Debtors of $21,030.41 in funds distributed to the Young Entities.

IV. STANDARD OF REVIEW

A bankruptcy court's legal conclusions, including its interpretation of the Bankruptcy Code and state law, are reviewed de novo. Roberts v. Erhard (In re Roberts), 331 B.R. 876, 880 (9th Cir. BAP 2005). Discretionary rulings made in accordance with the Code and a motion for reconsideration are reviewed for abuse of discretion. First Ave. W. Bldg., LLC v. James (In re OneCast Media, Inc.), 439 F.3d 558, 561 (9th Cir. 2006); Tran, 309 B.R. at 334. An abuse of discretion will be found if the bankruptcy court bases its decision on an erroneous view of the law or clearly erroneous factual findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990). A bankruptcy court's findings of fact are reviewed under the clearly erroneous standard. Hassen Imports P'ship v. KWP Fin. IV (In re Hassen), 256 B.R. 916, 920 (9th Cir. BAP 2000).

[16](...continued)
on May 12, 2006, requiring any amended notice of appeal to have been filed by May 22, 2006. Fed. R. Bankr. P. 8002. No amended notice of appeal was filed. As such, we have no subject matter jurisdiction over the court's order regarding the timeliness of the Tanner Judgment, Foxworth Judgment, and Brumgard Judgment. Mouradick, 13 F.3d at 327.

Jurisdictional issues are matters of law which we review de novo. Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005).

V. DISCUSSION

A. Application of the Arizona Renewal of Judgment Statutes

The Young Entities complain that the bankruptcy court erred in finding that the Pearce Judgment had abated. Relying primarily on the case of North Star Development Corp. v. Wolfswinkel, 706 P.2d 732 (Ariz. Ct. App. 1985), they argue that as to any judgment originally entered while an injunction prohibiting its collection is in place, the five-year renewal period for the judgment is tolled until the injunction preventing collection is lifted. Accordingly, the renewal period for the Pearce Judgment would not have started to run until July 15, 2002 (the day the last injunction was lifted), requiring no renewal to be filed prior to Debtors filing for chapter 13 relief in September 2002. Even if the law in North Star is not followed, the Young Entities maintain that the court still erred in holding that the Pearce Judgment had been untimely renewed based on its failure to consider the interplay between § 108 and A.R.S. § 12-1612.

In addition, the Young Entities contend that it was Debtors who sought the issuance of the stays and injunctions which prevented them from enforcing the Pearce Judgment. Consequently, Debtors' conduct estops them from asserting that the Pearce Judgment has abated.

"The Arizona statutory scheme discusses two separate events: enforcement of the judgment, and the ministerial filing of an

affidavit to renew the judgment." Lachter v. Smith (In re Smith), 101 P.3d 637, 639 (Ariz. 2004)("Smith I"). Pursuant to A.R.S. § 12-1551(A), a judgment creditor must execute on a judgment within five years after entry of judgment. If execution cannot occur within that time period, then a creditor can obtain an extension of time by either filing within ninety days before the end of the five-year period an affidavit of renewal pursuant to A.R.S. § 12-1612, Mobile Discount Corp. v. Hargus, 753 P.2d 1215, 1216 (Ariz. Ct. App. 1988), or by initiating an action as to the judgment at any time within five years after the date of the judgment. A.R.S. § 12-1611.

"Under Arizona law, enforcement [of a judgment] is stayed and the time in which to enforce the judgment is tolled during the pendency of bankruptcy actions" and "any stay of the enforcement of the judgment, such as might be imposed by the filing of a supersedeas bond." Smith I, 101 P.3d at 639 (emphasis added). However, a judgment creditor's inability to enforce a judgment during the initial or a subsequent statutory five-year period, whether because of a bankruptcy stay or other reasons, does not toll the deadlines imposed by A.R.S. § 12-1612 to file a renewal affidavit. Id.; see also Smith v. Lachter (In re Smith), 352 B.R. 702, 706 (9th Cir. BAP 2006)("Smith II"). A renewal affidavit's purpose is to notify interested parties of the existence and continued viability of a judgment. Smith I, 101 P.3d at 639. Ergo, it serves no enforcement function. Id.

Under applicable bankruptcy law, "[t]he time for renewing a state court judgment does not expire until the later of the applicable state law period or thirty days after the termination

of the automatic stay." Smith II, 352 B.R. at 705-06; see also 11 U.S.C. § 108(c)(1) & (c)(2). If state or federal nonbankruptcy law allows for the tolling of a statute of limitations once a bankruptcy stay goes into effect, then that suspension of time will be added to the end of the limitations period. 11 U.S.C. § 108(c)(1).

While there is no dispute that the time for enforcing the Pearce Judgment was tolled, the Young Entities' assertion that the time to file the renewal affidavit was also tolled is incorrect. The Arizona Supreme Court in Smith I clearly found that the filing of a renewal affidavit is a ministerial function which is not tolled by an enforcement stay.[17] Smith I, 101 P.3d at 639. Accordingly, the state court and bankruptcy court status quo orders did not suspend the time for filing the renewal.

The Pearce Judgment was initially entered on November 27, 1989. Under A.R.S. § 12-1612(B), it had to be renewed between August 27, 1994 and November 27, 1994. The first renewal occurred on September 9, 1994. For a successive renewal to be timely, the renewal affidavit was required to be filed between June 9, 1999 and September 9, 1999. A.R.S. § 12-1612(E)(requires successive renewal affidavits to be filed within ninety days of expiration of five years from the date of the filing of a prior renewal affidavit). The second renewal affidavit was not filed until October 12, 1999.

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[17] Although the filing of a renewal affidavit has been considered by the Arizona Supreme Court to be a ministerial act which does not implicate the automatic stay, there has been no determination by the Ninth Circuit as to whether the filing of a renewal violates the automatic stay. See Smith II, 352 B.R. at 706 n.11.

The Young Entities maintain that the status quo orders entered in the Trust's chapter 11 bankruptcy case prevented them from filing the renewal. However, the status quo orders entered in that case only precluded the parties from executing on the judgments.[18] While it is true that status quo orders prevented the Youngs from renewing the Pearce Judgment by action under A.R.S. § 12-1611, this was not the only available method for renewal. The Arizona Code allows a creditor to also renew a judgment by affidavit (A.R.S. § 12-1612), which, as earlier noted, is not considered a form of execution under Arizona law. Smith I, 101 P.3d at 639. Hence, the status quo orders were not a complete bar to the Youngs' renewal of the Pearce Judgment. In fact, there is evidence that the Youngs knew this in light of the fact that Young filed a second renewal affidavit during the pendency of the Trust's bankruptcy. Unfortunately for the Youngs, the renewal was filed a month too late.

Because the Youngs had the opportunity to renew pursuant to A.R.S. § 12-1612(B), we do not find applicable the tolling provisions of § 108(c)(1). The time to renew arose over a year after the Youngs received a discharge in their chapter 13 bankruptcy. Therefore, the time to file the renewal affidavit was governed by A.R.S. § 12-1612. See 11 U.S.C. § 108(c). Since the second renewal affidavit was untimely filed by approximately a month under the Arizona renewal statute, the bankruptcy court

[18] On April 17, 1996; May 6, 1996; and July 18, 1996, the court in the Trust's chapter 11 bankruptcy ordered all parties to the bankruptcy, including the Trust, its principals, and the Brumgards, to maintain the status quo. The court also precluded them from executing on any judgments pending further order of the court.

did not err in finding that the Pearce Judgment had abated.

B. Doctrine of Estoppel as a Defense to Abatement

The Trust Entities further assert that Debtors should be estopped from asserting abatement of the Pearce Judgment. For the same reasons discussed above, we find this argument unconvincing.

The bankruptcy court ruled that the Pearce Judgment abated because of the failure to file a timely renewal affidavit. There was no finding of abatement due to the lack of enforcement. The injunctions issued by the bankruptcy court and state court only prevented the Trust Entities from collecting on the Pearce Judgment. The Trust Entities were not prevented from filing a renewal affidavit. Because the Pearce Judgment is unenforceable due to the failure of the Trust Entities to complete a ministerial act under Arizona law, and not from the lack of execution, there is no basis for applying the doctrine of estoppel as a defense to the untimely renewal.

Based on the foregoing, the denial of the Trust Entities' motion for reconsideration as to the timely renewal of the Pearce Judgment was warranted.

C. The Trust's Appeal of Its Right to Seek an Accounting of Debtors' Financial Transactions is Moot

The Trust asserts entitlement to a financial accounting of Debtors' management operations for the period commencing mid-1991 through April 2000 for the purpose of determining whether Debtors improperly diverted income to themselves and deprived the Trust

of its 45.666% share of the revenues.[19] Any claim against Debtors that the Trust might have discovered from the accounting, however, would constitute a prepetition debt.[20] Significantly, subsequent to the commencement of this appeal, Debtors were granted a discharge. At oral argument, counsel for the Trust Entities conceded that they had not filed a non-dischargeability complaint nor sought an extension of time to file one.

The entry of the discharge is fatal to the justiciability of the accounting claim. Simply put, there is no "live controversy" for us to review. Am. Civil Liberties Union of Nev. v. Lomax, 471 F.3d 1010, 1016 (9th Cir. 2006)(a "live" controversy no longer exists if relief cannot be granted between the parties and there is no reasonable expectation that the wrong will be repeated). Any claim the Trust may have had against Debtors based on any information that could have been obtained from the accounting would be for a prepetition debt. Because the Trust failed to preserve their right to challenge the dischargeability of any potential debt, Debtors' liability was extinguished with the entry of the discharge. 11 U.S.C. § 727(b). Consequently, the issue is moot. City of Erie v. Pap's A.M., 529 U.S. 277, 287

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[19] The Trust Entities frame the issue as: "Did Judge Hollowell err in her ruling that barred issues relating to the manner in which debtors managed the Casa Grande Mini-Storage which could have been but were not resolved by Judge Redfield T. Baum in the . . . Trust's Chapter 11 proceeding from being raised in debtors' bankruptcy proceedings.?"

[20] Debtors' chapter 13 bankruptcy was filed on September 4, 2002. The Trust is seeking an accounting to determine whether Debtors are liable for actions that occurred between 1991 and 2000. As such, any claim the Trust holds would be for a prepetition debt.

(2000). Accordingly, the appeal as to the bankruptcy court's denial of the Trust's right to an accounting must be dismissed for lack of jurisdiction.

D. Liability for the Accrued Interest on the Delinquent Property Taxes

The obligation to pay taxes assessed against property held by entities and/or individuals as tenants in common is the responsibility of all of the tenants in common. See Beatty v. Benton, 135 U.S. 244, 250 (1890)(tenants in common are equally entitled to the benefits of the property and equally liable for its burdens); 20 Am. Jur. 2d Cotenancy and Joint Ownership § 63 (2d ed. 2006). As such, one tenant in common is under no legal obligation to the other cotenants to pay the taxes. See Stoltz v. Maloney, 630 P.2d 560, 563-64 (Ariz. Ct. App. 1981); 86 C.J.S. Tenancy in Common § 63 (2006). Nonetheless, because a fiduciary relationship exists between tenants in common, if a cotenant is in possession of the property and receiving all the profits and rents from it, it is the duty of that cotenant to pay the taxes owing up to the extent of the rents and profits received. See Stoltz, 630 P.2d at 563; Crossman v. Meek, 556 P.2d 325, 326 (Ariz. Ct. App. 1976); Wallach v. Korniczky (In re Korniczky), 308 B.R. 153, 157 (Bankr. W.D.N.Y. 2004); 86 C.J.S. Tenancy in Common § 89 (2006).

The bankruptcy court found Debtors liable for the accrued interest related to the outstanding property taxes based on the fiduciary duty they owed to the Trust to operate the Mini in a manner that did not injure the Trust's property interest. Debtors' failure to pay the property taxes clearly harmed the

Trust's co-tenancy interest, and therefore, the court held the Debtors responsible for the accrued interest. Debtors argue that this finding is erroneous because at the time the taxes were due there was insufficient income from the Mini to pay them. As Debtors had no way to pay the taxes, they contend it was inequitable for the court to saddle them with the complete liability.

It is clear that as the cotenants in possession of the property and managers of the Mini's operations since 1991, Debtors had a fiduciary duty to the Trust to pay the property taxes. However, this duty only extended as far as the income Debtors obtained and controlled from the Mini's operations. If the Mini's operations from 2000 to the present were not producing income sufficient to pay the property taxes, then a finding that Debtors had breached their fiduciary duty to the Trust would be unwarranted and sole liability for the accrued interest unjustified.

Based on the record, there is insufficient evidence to establish Debtors' liability for the accrued interest on the property taxes from and after 2000. The one piece of evidence that offers any insight into the Mini's income is a statement of revenues and expenses created for tax purposes for an eight-month period ending August 31, 2002, which lists total income of $53,259, expenses of $54,025.03, and net income of a negative $766.03. This evidence fails to provide sufficient information for us to determine whether Debtors had the ability to pay the property taxes for all years beginning in 2000. Therefore, further factual findings regarding the Mini's income from 2000 to

the present are needed.

E. The Enforcement of the Order Restoring Debtors' $21,030.41

Debtors assert that the bankruptcy court erred in failing to enter an order restoring the $21,030.41 held by them, which had been previously awarded by court order in the Trust's bankruptcy. They maintain that a demand for the payment of those funds was made in "Debtors' Opposition To Motion For Order Requiring Disbursement Of Income To Joint Owner" filed on May 26, 2004 (the "Disbursement Opposition"). Based on the principles of justice and equity, Debtors believe that the bankruptcy court was required to follow up with the previously filed order and honor the order for payment.

In reviewing the Disbursement Opposition, the only reference to the $21,030.41 is, "[t]he Trust also retained another $20,000 upon its bankruptcy before Judge Baum, that was specifically identified as the Brumgards' money and was to be used to pay undersigned's legal fees." Following this sentence, Debtors request "that the Young Trust motion for distribution be denied, that the question of what amount is owned [sic] to what party await evidentiary hearing, and that the Brumgards be awarded additional relief which the Court determines is just and appropriate."

From these two sentences there is no clear indication that Debtors were seeking enforcement of the prior order awarding them $20,000. Moreover, none of the other pleadings filed by Debtors (i.e., the "Memorandum For Evidentiary Hearing" filed on April 27, 2005, and the "Post-Hearing Memorandum" filed on May 16, 2005) address the $20,000, nor seek to have the order awarding

the payment enforced. Because the demand for payment of the $21,030.41 is not clearly stated in the Disbursement Opposition, we view this issue as arising for the first time on appeal.

As a general rule, where an issue not called to the attention of the trial court is raised for the first time on appeal, the appellate court will not consider such issue. United States v. Whitten, 706 F.2d 1000, 1012 (9th Cir. 1983). This rule is applicable even if the record may contain facts relating to the issue. Duarte v. Bank of Haw., 287 F.2d 51, 55 (9th Cir. 1961). Thus, we decline to consider whether the bankruptcy court's omission of an order restoring Debtors' claimed $21,030.41 was committed in error.

VI. CONCLUSION

Based upon the foregoing, we conclude as follows:

A. The appeal as to any issues surrounding the granting of the homestead exemption to Debtors is DISMISSED on jurisdictional grounds.

B. The bankruptcy court's determination that the Pearce Judgment was untimely renewed and unenforceable is AFFIRMED.

C. The appeal as to the Trust's right to an accounting is DISMISSED.

D. The bankruptcy court's determination that Debtors are liable for the accrued interest on the outstanding property taxes is VACATED and REMANDED to the bankruptcy court for further findings consistent with this memorandum.

E. We decline to consider whether the bankruptcy court's

omission of an order restoring Debtors' $21,030.41 was error.