

MAY 16 2007

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

6	In re:	)	BAP No.	AZ-05-1410-SPaD
		)		AZ-06-1038-SPaD
7	RICHARD C. BRUMGARD and KAY E.	)		
	BRUMGARD,	)	Bk. No.	02-04327
8		)		
	Debtors.	)	Adv. No.	02-00117
9	_____	)		
		)		
10	YOUNG BUILDERS, INC., PROFIT	)		
	SHARING & RETIREMENT TRUST	)		
11	FUND; YOUNG BUILDERS, INC.;	)		
	JOHN R. YOUNG; MARGARET ANN	)		
12	YOUNG,	)		
		)		
13	Appellants and Cross-Appellees,	)		
		)		
14	v.	)	<b>MEMORANDUM</b> <sup>1</sup>	
		)		
15	RICHARD C. BRUMGARD; KAY E.	)		
	BRUMGARD; GAYLE ESKAY MILLS,	)		
16	Chapter 7 Trustee,	)		
		)		
17	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.

<sup>1</sup> 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 For over 19 years, Richard and Kay Brumgard ("Debtors");  
2 John and Ann Young ("Youngs"); Young Builders, Inc., Profit  
3 Sharing and Retirement Trust ("Trust"); Young Builders, Inc.  
4 ("YBI");<sup>2</sup> and their respective lawyers have been battling over a  
5 self-storage facility located in Casa Grande, Arizona. As a  
6 result of the litigation, Debtors filed for chapter 13<sup>3</sup> relief.  
7 In response, the Young Entities filed a multitude of motions,  
8 claims, and objections.

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

## 19 I. FACTS<sup>4</sup>

### 20 A. The Creation of the Storage Facility

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

23 <sup>2</sup> The Youngs, the Trust, and YBI are collectively referred  
24 to as the "Young Entities."

25 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
28 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.

<sup>4</sup> The facts are largely taken from the bankruptcy court's  
memorandum decision entered on September 1, 2005.

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

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

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

---

27 <sup>5</sup> The Trust is a pension plan for YBI's employees, a  
28 corporation owned by the Youngs. It has approximately 21  
beneficiaries, including the Youngs, who also act as trustees of  
the Trust.

1 agreed to advance \$100,000. In early September, the Partnership<sup>6</sup>  
2 executed the documents for the \$100,000 loan; however, by mid-  
3 September Young informed Brumgard that neither the Young Entities  
4 nor the Pension Plan would fund the balance of the Second Loan.

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

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

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

17 As a result of this litigation, the Youngs and the Trust  
18 hold judgments against Debtors, as well as an attorneys' fee  
19 award (the Brumgard Judgment and the Youngs' Attorneys' Fee  
20 Award).<sup>7</sup> In addition, during the course of the litigation, the  
21

---

22 <sup>6</sup> Wendel and Matthews executed assignments of their interest  
23 in the Partnership to Brumgard in early September 1986.

24 <sup>7</sup> The Brumgard Judgment was entered on January 25, 1989,  
25 pursuant to an uncontested summary judgment in Case No. CV 89-  
26 36326. It awarded Young \$10,000 plus attorneys' fees of \$4,470  
based upon a personal note Brumgard had given Young in September  
1986.

27 The Youngs' Attorneys' Fee Award relates to Debtors'  
28 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.

1 Trust and YBI acquired third-party judgments against Debtors (the  
2 Tanner Judgment, the Foxworth Judgment, and the Pearce Judgment),  
3 which were intended to be used as offsets against the judgments  
4 in favor of Debtors in the event those judgments became final.<sup>8</sup>

5 C. The Debtors' Bankruptcy Case<sup>9</sup>

6 On September 4, 2002, one day prior to the hearing on the  
7 enforcement of the accounting provisions of the Final Mandate  
8

9 <sup>8</sup> In September 1990, the Trust acquired a 50% interest in  
10 the following third-party judgments:

- 11 1. Tanner Companies v. Brumgard, Case No. CIV 36356,  
12 which awarded Tanner, a subcontractor involved in  
13 the Mini's construction, a \$12,033.38 judgment  
against Debtors ("Tanner Judgment"); and
- 14 2. Foxworth-Galbraith v. Brumgard, Case No. 89-38069,  
15 which awarded Foxworth \$19,749.75 in damages and  
16 \$240.47 in costs pursuant to a default judgment  
("Foxworth Judgment").

17 That same month, YBI acquired a 50% interest in the  
18 \$48,052.82 judgment the Brumgards had stipulated to in Pearce v.  
19 Brumgard, Case No. CV 89-37526 ("Pearce Judgment"). YBI also  
20 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.

21 <sup>9</sup> Bankruptcies abound in this saga. Since 1990, there have  
22 been four bankruptcy cases filed in relation to the Young  
23 Entities and Debtors: a chapter 11 filed by the Trust, which was  
24 dismissed almost ten years after the case was filed; a chapter 11  
25 filed by the Youngs that also was dismissed; a chapter 13 case  
26 filed by the Youngs in which they received a discharge; and  
27 Debtors' current chapter 13 case that was converted to a chapter  
28 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.

1 Judgment,<sup>10</sup> Debtors filed for chapter 13 relief. Listed on their  
2 schedules was \$813,581.34 in secured debt, of which approximately  
3 \$360,000 was due to the Young Entities and their lawyer, Fred  
4 Gamble. The \$360,000 was listed as contingent, unliquidated, and  
5 disputed and broken down as: 1) the Trust: \$255,721.08, 2) YBI:  
6 \$50,694.00, 3) the Youngs: \$59,599.99, and 4) Gamble: \$3,565.71.  
7 Debtors' unsecured priority debt was scheduled at \$43,928 and  
8 general unsecured debt was listed as unknown.

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

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

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

---

21 <sup>10</sup> On July 15, 2002, the Arizona trial court entered a  
22 judgment on the mandate of the Arizona Appeals Court's reversal  
23 of its contract claim judgment ("Final Mandate Judgment"). The  
24 Final Mandate Judgment, entered in favor of the Young Entities,  
25 included an award of taxable costs and set aside Debtors'  
26 execution on the Trust's co-tenancy interest in the property. It  
27 also required Debtors to produce, within ten days, an accounting  
28 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."

1 amounts, filed on September 20, 2002;<sup>11</sup>

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

4 3. An objection to Debtors' plan, filed on November 29,  
5 2002; and

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

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

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

11 2. The Trust filed a secured claim valued at  
12 \$910,655.73 based upon: \$392,260.58 awarded during the  
13 state court litigation, an unliquidated claim for an  
14 accounting and payment of 45.666% of the gross income  
15 of the Mini between August 2001 and July 2002 estimated  
16 to be \$50,000, the Tanner Judgment listed as \$14,570.28  
17 on the petition date, the Foxworth Judgment listed as  
18 \$25,784 on the petition date, and an unliquidated claim  
19 for conversion of 45.666% of the Mini's income  
20 estimated to be between \$95,000 and \$245,000;

21 3. The Youngs filed a secured claim in the amount of  
22 \$152,147.25 which consisted of: the Youngs' Attorney's  
23 Fee Award, the Brumgard Judgment listed at \$33,067.02  
24 on the petition date, and the Pearce Judgment which was  
25 listed as \$70,005.90 on the petition date; and

26 4. Gamble filed a secured proof of claim for \$5,726.63  
27 based on an award of attorneys' fees granted to him in  
28 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

---

<sup>11</sup> This motion was only filed by the Trust.

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

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

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

---

22  
23 <sup>12</sup> On October 3, 1997, bankruptcy judge Redfield Baum issued  
24 a sanctions order against the Trust and the Youngs based upon  
25 three events: 1) the post-petition granting and acceptance of a  
26 \$2 million deed of trust to secure fees granted to the Trust's  
27 bankruptcy lawyers and Gamble without court approval or prior  
28 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").



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

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

8 1. The Debtors could, under Arizona law, claim a  
9 homestead exemption in the manager's quarters  
10 ("Managers' Quarters") located on the Property up to  
11 the extent of their co-tenancy interest in the  
12 Property.

11 . . . .

12 3. The Gamble Judgments . . . , which were the subject  
13 of the Sanctions Order, were unenforceable against the  
14 Debtors under principles of judicial estoppel. [The  
15 court] left open the possibility that the Pearce  
16 Judgment . . . might not be subject to the estoppel  
17 ruling, if the evidence demonstrated that it was not an  
18 asset of the Young's [sic] Chapter 13 bankruptcy  
19 estate.

16 4. The Pearce Judgment was not timely renewed and is,  
17 therefore, unenforceable. . . .

18 . . . .

19 6. The co-tenancy interest in the Property between the  
20 Debtors and the Trust arose in 1987 when the Mini DOT  
21 was foreclosed. The amount of the Trust's co-tenancy  
22 interest (45.666%) was established by the First Mandate  
23 Judgment<sup>13</sup>. . . .

22 7. The Trust was barred from requesting accountings and  
23 payments of income from the operation of the Mini until  
24 the period of time after the Trust's bankruptcy case  
25 was dismissed on April 27, 2000. . . .

---

25 <sup>13</sup> In February 1995, the Arizona state court entered a  
26 judgment reinstating the trustee's sale as to the Trust. (This  
27 judgment is referred to by the bankruptcy court as the "First  
28 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.

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

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

7 1. Do the Debtors have the right to claim a homestead  
8 in the Managers' Quarters?

9 If so:

10 (a) What is the extent of those quarters?

11 (b) What is the value of the homestead claim?

12 2. What is the extent of the Trust's co-tenancy  
13 interest in the Property?

14 3. From what date does the Trust have a right to an  
15 accounting and distributions of income from the Mini?  
16 Is the Trust entitled to proportionate distribution of  
17 gross or net income?

18 4. Are any of the Young Entities' claims unenforceable?

19 5. Are the Debtors eligible to be Chapter 13 debtors?

20 6. Have John Young and Gamble misrepresented the  
21 ownership of the Pearce Judgment?

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

23 1. The Homestead Claim

24 The bankruptcy court determined that Debtors were entitled  
25 to claim a homestead exemption under Arizona Revised Statute  
26 ("A.R.S.") § 33-1101(A) (1) based on their co-tenancy interest in  
27 the Managers' Quarters located on the property. While the court  
28 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

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

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

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

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

1 1998). Because Debtors had relied on the orders entered in the  
2 Trust's bankruptcy, the bankruptcy court adopted its tentative  
3 ruling that § 349 did not undo those orders and allow for either  
4 accountings or distributions of income from the property prior to  
5 May 2000.

6 3. Validity of the Young Entities' Claims

7 In addressing Debtors' objections to the portion of the  
8 Trust's claim based on the Foxworth Judgment and the Tanner  
9 Judgment, and to the portion of the Youngs' claim based on the  
10 Youngs' Attorneys' Fee Award, the Brungard Judgment, and the  
11 Pearce Judgment, the bankruptcy court found that all of the  
12 judgments, except the Pearce Judgment, had been timely renewed  
13 and therefore were enforceable against the estate. Under A.R.S.  
14 § 12-1612(E), a successive affidavit of renewal must be filed  
15 "within 90 days of expiration of five years from the date of the  
16 filing of the prior renewal."

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

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

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

8 4. Liability for Accrued Property Taxes

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

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

1 elected to convert their case to a chapter 7.

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

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

## 14 II. JURISDICTION

15 The bankruptcy court had jurisdiction under 28 U.S.C.  
16 §§ 1334, 157(b)(1), and 157(b)(2)(B). We have jurisdiction under  
17 28 U.S.C. § 158.

18 Our jurisdiction over judgments, orders, or decrees is  
19 limited by Bankruptcy Rule 8002. Saunders v. Band Plus Mortgage  
20 Corp. (In re Saunders), 31 F.3d 767, 767 (9th Cir. 1994). Rule  
21 8002(a) requires a notice of appeal to be filed "within 10 days  
22 of the date of the entry of the judgment, order, or decree  
23 appealed from." If a timely motion for reconsideration is filed,  
24 then "the time for appeal for all parties shall run from the  
25 entry of the order [disposing of that motion]." Fed. R. Bankr.  
26 P. 8002(b). Because the provisions of Rule 8002 are  
27 jurisdictional, "the untimely filing of a notice of appeal  
28 deprives the appellate court of jurisdiction to review the

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

4 We note at the outset that the Young Entities have only  
5 appealed the Distribution Order and the Reconsideration Order.<sup>14</sup>  
6 No appeal of the Homestead Order has been taken. Moreover, the  
7 motion for reconsideration, which tolled the time to appeal the  
8 Distribution Order, did not mention the Homestead Order. That  
9 being the case, the time to appeal the Homestead Order expired on  
10 September 12, 2005.

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

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

---

21  
22 <sup>14</sup> The Young Entities' notice of appeal ambiguously  
23 referenced the Order Denying the Motion for Reconsideration and  
24 Motion to Alter or Amend Findings, the Order on Motion to Convert  
25 filed September 1, 2005, the Order Regarding Distributions to Co-  
26 Tenants filed September 1, 2005, and "the preliminary rulings  
27 made in open court on July 8, 2004." Notice of Appeal at 1, Oct.  
28 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.

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

### 7 **III. ISSUES**<sup>15</sup>

8 A. Whether the bankruptcy court erred in ruling that the Pearce  
9 Judgment had to be timely renewed in accordance with A.R.S.  
10 §§ 12-1551 and 12-1611.<sup>16</sup>

11 <sup>15</sup> The Young Entities state as an issue in this appeal  
12 whether "Judge Hollwell [sic] err in her determination that the  
13 Pearce judgment, John Young's judgment in Pinal County No. CIV  
14 36326 [the Brumgard Judgment] and the Youngs' attorney's fees  
15 award in Pinal County No. CIV 36224 were enforceable because they  
16 were not included in the Youngs' schedules filed in their Chapter  
17 13 bankruptcy?" This issue is only relevant to the unadopted  
18 tentative ruling which indicated that the Gamble Judgments were  
19 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").

20 <sup>16</sup> In addressing this issue, the Trust Entities include an  
21 analysis of the Tanner Judgment, the Foxworth Judgment, and the  
22 Gamble Judgments. However, the memorandum decision only  
23 addressed the timeliness of the Pearce Judgment. The bankruptcy  
24 court's findings as to the timeliness of the other judgments did  
25 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.

26 Pursuant to our limited remand order, if a party wished to  
27 appeal the bankruptcy court's decision as to the reconsideration  
28 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...)



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

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

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

#### 10 IV. STANDARD OF REVIEW

11 A bankruptcy court's legal conclusions, including its  
12 interpretation of the Bankruptcy Code and state law, are reviewed  
13 de novo. Roberts v. Erhard (In re Roberts), 331 B.R. 876, 880  
14 (9th Cir. BAP 2005). Discretionary rulings made in accordance  
15 with the Code and a motion for reconsideration are reviewed for  
16 abuse of discretion. First Ave. W. Bldg., LLC v. James (In re  
17 OneCast Media, Inc.), 439 F.3d 558, 561 (9th Cir. 2006); Tran,  
18 309 B.R. at 334. An abuse of discretion will be found if the  
19 bankruptcy court bases its decision on an erroneous view of the  
20 law or clearly erroneous factual findings. Cooter & Gell v.  
21 Hartmarx Corp., 496 U.S. 384, 405 (1990). A bankruptcy court's  
22 findings of fact are reviewed under the clearly erroneous  
23 standard. Hassen Imports P'ship v. KWP Fin. IV (In re Hassen),  
24 256 B.R. 916, 920 (9th Cir. BAP 2000).

25 <sup>16</sup>(...continued)  
26 on May 12, 2006, requiring any amended notice of appeal to have  
27 been filed by May 22, 2006. Fed. R. Bankr. P. 8002. No amended  
28 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.



1 affidavit to renew the judgment.” Lachter v. Smith (In re  
2 Smith), 101 P.3d 637, 639 (Ariz. 2004) (“Smith I”). Pursuant to  
3 A.R.S. § 12-1551(A), a judgment creditor must execute on a  
4 judgment within five years after entry of judgment. If execution  
5 cannot occur within that time period, then a creditor can obtain  
6 an extension of time by either filing within ninety days before  
7 the end of the five-year period an affidavit of renewal pursuant  
8 to A.R.S. § 12-1612, Mobile Discount Corp. v. Hargus, 753 P.2d  
9 1215, 1216 (Ariz. Ct. App. 1988), or by initiating an action as  
10 to the judgment at any time within five years after the date of  
11 the judgment. A.R.S. § 12-1611.

12 “Under Arizona law, enforcement [of a judgment] is stayed  
13 and the time in which to enforce the judgment is tolled during  
14 the pendency of bankruptcy actions” and “any stay of the  
15 enforcement of the judgment, such as might be imposed by the  
16 filing of a supersedeas bond.” Smith I, 101 P.3d at 639  
17 (emphasis added). However, a judgment creditor’s inability to  
18 enforce a judgment during the initial or a subsequent statutory  
19 five-year period, whether because of a bankruptcy stay or other  
20 reasons, does not toll the deadlines imposed by A.R.S. § 12-1612  
21 to file a renewal affidavit. Id.; see also Smith v. Lachter (In  
22 re Smith), 352 B.R. 702, 706 (9th Cir. BAP 2006) (“Smith II”). A  
23 renewal affidavit’s purpose is to notify interested parties of  
24 the existence and continued viability of a judgment. Smith I,  
25 101 P.3d at 639. Ergo, it serves no enforcement function. Id.

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

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

7 While there is no dispute that the time for enforcing the  
8 Pearce Judgment was tolled, the Young Entities’ assertion that  
9 the time to file the renewal affidavit was also tolled is  
10 incorrect. The Arizona Supreme Court in Smith I clearly found  
11 that the filing of a renewal affidavit is a ministerial function  
12 which is not tolled by an enforcement stay.<sup>17</sup> Smith I, 101 P.3d  
13 at 639. Accordingly, the state court and bankruptcy court status  
14 quo orders did not suspend the time for filing the renewal.

15 The Pearce Judgment was initially entered on November 27,  
16 1989. Under A.R.S. § 12-1612(B), it had to be renewed between  
17 August 27, 1994 and November 27, 1994. The first renewal  
18 occurred on September 9, 1994. For a successive renewal to be  
19 timely, the renewal affidavit was required to be filed between  
20 June 9, 1999 and September 9, 1999. A.R.S. § 12-1612(E) (requires  
21 successive renewal affidavits to be filed within ninety days of  
22 expiration of five years from the date of the filing of a prior  
23 renewal affidavit). The second renewal affidavit was not filed  
24 until October 12, 1999.

25 \_\_\_\_\_  
26 <sup>17</sup> Although the filing of a renewal affidavit has been  
27 considered by the Arizona Supreme Court to be a ministerial act  
28 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.

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

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

---

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

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

2 B. Doctrine of Estoppel as a Defense to Abatement

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

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

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

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

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

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

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

---

21  
22 <sup>19</sup> The Trust Entities frame the issue as: "Did Judge  
23 Hollowell err in her ruling that barred issues relating to the  
24 manner in which debtors managed the Casa Grande Mini-Storage  
25 which could have been but were not resolved by Judge Redfield T.  
26 Baum in the . . . Trust's Chapter 11 proceeding from being raised  
27 in debtors' bankruptcy proceedings.?"

28 <sup>20</sup> 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.

1 (2000). Accordingly, the appeal as to the bankruptcy court's  
2 denial of the Trust's right to an accounting must be dismissed  
3 for lack of jurisdiction.

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

6 The obligation to pay taxes assessed against property held  
7 by entities and/or individuals as tenants in common is the  
8 responsibility of all of the tenants in common. See Beatty v.  
9 Benton, 135 U.S. 244, 250 (1890) (tenants in common are equally  
10 entitled to the benefits of the property and equally liable for  
11 its burdens); 20 Am. Jur. 2d Cotenancy and Joint Ownership § 63  
12 (2d ed. 2006). As such, one tenant in common is under no legal  
13 obligation to the other cotenants to pay the taxes. See Stoltz  
14 v. Maloney, 630 P.2d 560, 563-64 (Ariz. Ct. App. 1981); 86 C.J.S.  
15 Tenancy in Common § 63 (2006). Nonetheless, because a fiduciary  
16 relationship exists between tenants in common, if a cotenant is  
17 in possession of the property and receiving all the profits and  
18 rents from it, it is the duty of that cotenant to pay the taxes  
19 owing up to the extent of the rents and profits received. See  
20 Stoltz, 630 P.2d at 563; Crossman v. Meek, 556 P.2d 325, 326  
21 (Ariz. Ct. App. 1976); Wallach v. Korniczky (In re Korniczky),  
22 308 B.R. 153, 157 (Bankr. W.D.N.Y. 2004); 86 C.J.S. Tenancy in  
23 Common § 89 (2006).

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



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

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

18 Based on the record, there is insufficient evidence to  
19 establish Debtors' liability for the accrued interest on the  
20 property taxes from and after 2000. The one piece of evidence  
21 that offers any insight into the Mini's income is a statement of  
22 revenues and expenses created for tax purposes for an eight-month  
23 period ending August 31, 2002, which lists total income of  
24 \$53,259, expenses of \$54,025.03, and net income of a negative  
25 \$766.03. This evidence fails to provide sufficient information  
26 for us to determine whether Debtors had the ability to pay the  
27 property taxes for all years beginning in 2000. Therefore,  
28 further factual findings regarding the Mini's income from 2000 to

1 the present are needed.

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

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

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

23 From these two sentences there is no clear indication that  
24 Debtors were seeking enforcement of the prior order awarding them  
25 \$20,000. Moreover, none of the other pleadings filed by Debtors  
26 (i.e., the "Memorandum For Evidentiary Hearing" filed on April  
27 27, 2005, and the "Post-Hearing Memorandum" filed on May 16,  
28 2005) address the \$20,000, nor seek to have the order awarding

1 the payment enforced. Because the demand for payment of the  
2 \$21,030.41 is not clearly stated in the Disbursement Opposition,  
3 we view this issue as arising for the first time on appeal.

4 As a general rule, where an issue not called to the  
5 attention of the trial court is raised for the first time on  
6 appeal, the appellate court will not consider such issue. United  
7 States v. Whitten, 706 F.2d 1000, 1012 (9th Cir. 1983). This  
8 rule is applicable even if the record may contain facts relating  
9 to the issue. Duarte v. Bank of Haw., 287 F.2d 51, 55 (9th Cir.  
10 1961). Thus, we decline to consider whether the bankruptcy  
11 court's omission of an order restoring Debtors' claimed  
12 \$21,030.41 was committed in error.

#### 13 **VI. CONCLUSION**

14 Based upon the foregoing, we conclude as follows:

- 15 A. The appeal as to any issues surrounding the granting of  
16 the homestead exemption to Debtors is DISMISSED on  
17 jurisdictional grounds.
- 18 B. The bankruptcy court's determination that the Pearce  
19 Judgment was untimely renewed and unenforceable is  
20 AFFIRMED.
- 21 C. The appeal as to the Trust's right to an accounting is  
22 DISMISSED.
- 23 D. The bankruptcy court's determination that Debtors are  
24 liable for the accrued interest on the outstanding  
25 property taxes is VACATED and REMANDED to the  
26 bankruptcy court for further findings consistent with  
27 this memorandum.
- 28 E. We decline to consider whether the bankruptcy court's

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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