

DEC 06 2012

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. CC-12-1276-HKiD  
 )  
 MICHAEL RENE RODARTE, ) Bk. No. 09-10411-TA  
 )  
 Debtor. )  
 )  
 )  
 MICHAEL RENE RODARTE, )  
 )  
 Appellant, )  
 )  
 v. ) **M E M O R A N D U M**<sup>1</sup>  
 )  
 ESTATES AT MONARCH COVE )  
 COMMUNITY ASSOCIATION, )  
 )  
 Appellee. )  
 )

Argued and Submitted on November 15, 2012  
at Pasadena, California

Filed - December 6, 2012

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

Honorable Theodor C. Albert, Bankruptcy Judge, Presiding

Appearances: Douglas Crowder, Esq. argued for Appellant;  
Bernard John Frimond, Esq. argued for Appellee.

Before: HOLLOWELL, KIRSCHER, 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 Michael Rene Rodarte (the Debtor) appeals an order of the  
2 bankruptcy court that granted annulment of the automatic stay.  
3 We AFFIRM.

4 **I. FACTS**

5 The Debtor owns property as a tenant-in-common with his  
6 father, Manuel Rodarte (Rodarte) in Dana Point, California (the  
7 Property). The Property is part of a homeowners' association,  
8 the Estates at Monarch Cove Community Association (Monarch). A  
9 dispute arose between the Debtor, Rodarte, and Monarch with  
10 respect to maintenance of the Property. In 2003, Monarch filed a  
11 complaint in California state court against the Debtor and  
12 Rodarte to determine that a slope area on the Property was their  
13 responsibility to maintain under the terms of Monarch's  
14 Covenants, Conditions and Restrictions (CC&Rs). Monarch  
15 prevailed after a jury trial. On November 17, 2006, the state  
16 court entered a judgment against the Debtor and Rodarte (the CC&R  
17 Judgment).

18 The CC&R Judgment ordered the Debtor and Rodarte to repair  
19 and restore landscaping on the Property and to provide ongoing  
20 maintenance on it to comply with the CC&Rs. It provided that if  
21 the Debtor and Rodarte failed to repair or maintain the Property,  
22 Monarch was authorized to landscape and irrigate the Property to  
23 CC&R standards and to charge the cost to the Debtor and Rodarte  
24 by way of special assessment. Thereafter, in March 2007, the  
25 CC&R Judgment was amended to include an award of attorneys' fees  
26 and costs in favor of Monarch. The CC&R Judgment was recorded in  
27 the amount of \$147,474.39, with 10% interest from August 22,  
28 2006.

1 In 2008, pursuant to the CC&R Judgment, Monarch entered the  
2 Property to restore the landscaping. Litigation continued. In  
3 late 2008, the state court issued an order for the Debtor to  
4 appear on January 22, 2009, and show cause why the state court  
5 should not grant a motion filed by Monarch to have the Property  
6 sold.

7 On January 21, 2009, the Debtor filed a chapter 13<sup>2</sup>  
8 bankruptcy petition. On February 5, 2009, the Debtor filed his  
9 bankruptcy schedules along with a chapter 13 plan. According to  
10 the Debtor's schedules, Monarch was the Debtor's only creditor,  
11 holding the CC&R Judgment as a secured claim. The Debtor  
12 proposed to pay the CC&R Judgment in full over the term of the  
13 plan.

14 Monarch moved to dismiss the Debtor's bankruptcy case,  
15 asserting that the Debtor filed it in bad faith to avoid  
16 continued litigation in the state court regarding the Property.  
17 Monarch also objected to the Debtor's plan on the basis that it  
18 failed to fully provide for payment of Monarch's claims. Monarch  
19 asserted that in addition to the CC&R Judgment, it held two  
20 unsecured judgments: (1) an award of costs incurred in planting  
21 and restoring the Property in the amount of \$18,544.50; and  
22 (2) an award of \$6,092.50 in attorneys' fees and costs from  
23 prevailing on an appeal of the CC&R Judgment. Over Monarch's  
24 objections, an amended plan (Plan) was confirmed on February 22,  
25

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26 <sup>2</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
28 "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037.

1 2010. The Plan proposed to pay Monarch's secured claim with 6%  
2 interest.

3 On April 9, 2010, Monarch filed a motion for relief from the  
4 automatic stay (MRS). On April 13, 2010, Monarch filed a similar  
5 motion for relief as to Rodarte as a co-debtor. Monarch  
6 requested relief from the stay in order to enforce the CC&R  
7 Judgment, including the ability to re-landscape the Property and  
8 assess "the Debtor and his father for all postpetition costs,  
9 including attorney fees incurred in connection with the  
10 landscaping" if the Debtor and Rodarte failed to perform  
11 necessary postpetition maintenance on the Property. Memorandum  
12 of Law in Support of MRS at 2. Monarch stated that it  
13 "anticipat[ed] filing a new legal action against [the Debtor and  
14 Rodarte] to restrain their ongoing postpetition violations of the  
15 [CC&Rs]," which it asserted were impacting the value of  
16 neighboring properties. Id.

17 The Debtor filed an opposition to the MRS on April 16, 2010.  
18 He asserted that relief should not be granted because (1) Monarch  
19 had hired three law firms and "is well-financed" and (2) Monarch  
20 "will be in a position to make the State Court litigation so  
21 expensive that the Debtor will be unable to make his plan  
22 payments." Debtor's Response to MRS at 5-6.

23 On May 4, 2010, the bankruptcy court held a hearing on the  
24 MRS (MRS Hearing) at which Monarch, the Debtor and his counsel  
25 attended. The bankruptcy court issued a tentative ruling prior  
26 to the MRS Hearing (MRS Tentative) stating that it intended to  
27 grant the stay relief as to any ongoing postpetition violations:  
28

1 [t]o the extent that movant needs to initiate process  
2 to enforce the ongoing covenants (as opposed to the  
3 monetary sums already embodied in the earlier judgment)  
4 there is either no stay, or if there is, the movant  
would be irreparably harmed . . . if this lot were  
allowed to remain in a non-conforming state for the  
balance of the term of the plan.

5 Tentative Ruling (May 4, 2010).

6 Consistent with the MRS Tentative, the bankruptcy court  
7 orally ruled at the MRS Hearing that it would deny Monarch the  
8 ability to enforce the monetary portions of the CC&R Judgment,  
9 dealt with in the Plan, but would grant stay relief to allow  
10 Monarch to liquidate prepetition attorney fees not dealt with in  
11 the Plan, and to allow Monarch to reduce the fees to judgment.<sup>3</sup>  
12 Additionally, the bankruptcy court granted stay relief so that  
13 Monarch could pursue its remedies under state law to enforce its  
14 CC&Rs with regard to the ongoing duties of the Debtor and  
15 Rodarte. An entry on the bankruptcy case docket dated May 4,  
16 2010, states:

17 Hearing Held . . . Motion for Relief from Stay . . .  
18 MOTION GRANTED IN PART AND DENIED IN PART; Relief is  
19 denied as to sums already dealt with in the plan.  
20 Modify co-debtor stay as to prepetition amounts not  
dealt with in the plan. Granted as to ongoing duties  
under the CC&Rs.

21 Although the bankruptcy court orally granted relief at the  
22 MRS Hearing on May 4, 2010, the written order denying the MRS in  
23 part and granting it in part was not actually entered until  
24 \_\_\_\_\_

25 <sup>3</sup> A transcript of the MRS Hearing was not provided in the  
26 record and is unavailable on the bankruptcy court's docket.  
27 However, we have gleaned information about the hearing from the  
28 parties' briefs, the docket, and from the bankruptcy court itself  
when it later recounted what took place at the MRS Hearing. See  
Hr'g Tr. (Apr. 18, 2012) at 12-18.

1 sometime later, on June 29, 2010 (the MRS Order).<sup>4</sup> The MRS Order  
2 was consistent with the MRS Tentative and the bankruptcy court's  
3 oral ruling.

4 In the meantime, acting on the oral ruling by the bankruptcy  
5 court at the MRS Hearing, Monarch filed, on June 1, 2010, a  
6 complaint in state court to enforce the CC&R Judgment (the State  
7 Court Action). The State Court Action alleged causes of action  
8 arising from the Debtor's and Rodarte's continuing violations of  
9 the CC&Rs with respect to maintenance of the Property.<sup>5</sup>

10 The Debtor and Rodarte filed an answer in the State Court  
11 Action, along with a cross complaint against Monarch. The State  
12 Court Action was thereafter fully litigated. A jury trial was  
13 held June 9-22, 2011. The jury subsequently found in favor of  
14 Monarch, finding that the Debtor and Rodarte were liable for  
15 damages in the amount of \$18,520.59.<sup>6</sup> The verdict was reduced to  
16 a judgment entered on August 2, 2011 (the State Court Judgment).  
17 The State Court Judgment was amended on August 4, 2011, to  
18 include over \$300,000 in Monarch's attorney's fees and costs  
19 incurred in the State Court Action. The final State Court

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20  
21 <sup>4</sup> The order granting relief from the co-debtor stay was  
22 entered June 21, 2010. Its terms are identical to the MRS Order.

23 <sup>5</sup> The record on appeal contains only the face page of the  
24 state court complaint. Our understanding of the State Court  
25 Action comes from the parties' briefs.

26 <sup>6</sup> The Debtor's declaration submitted with the Motion to  
27 Establish Violation states that the amount of damages awarded was  
28 \$18,520.59. However, he has at other times stated the amount of  
damages awarded was only \$2,700. We cannot resolve the  
discrepancy because neither the actual verdict nor the State  
Court Judgment is included in the record on appeal.

1 Judgment against the Debtor and Rodarte was entered in the amount  
2 of \$342,702.92. The Debtor lost an appeal of the State Court  
3 Judgment.<sup>7</sup>

4 Notwithstanding the State Court Action, the dispute between  
5 the parties regarding maintenance of the Property was still not  
6 resolved. Monarch informed the Debtor that it intended to enter  
7 the Property on January 21, 2012, in order to repair the  
8 landscaping.

9 On January 17, 2012, the Debtor filed a Motion for Contempt  
10 for Violation of the Automatic Stay. Monarch filed an opposition  
11 and requested that the bankruptcy court retroactively annul the  
12 automatic stay under § 362(d) to June 1, 2010. The Debtor later  
13 withdrew the motion. Thereafter, on February 26, 2012,<sup>8</sup> the  
14 Debtor filed a Motion to Establish Violation of Automatic Stay  
15 (Motion to Establish Violation), alleging that Monarch violated  
16 the automatic stay by filing the State Court Action before the  
17 MRS Order was entered. Because the State Court Action was  
18 commenced before the MRS Order was entered, the Debtor argued  
19 that the State Court Judgment was void.

20 In the Motion to Establish Violation, the Debtor also  
21 asserted that Monarch was only granted relief to liquidate  
22 prepetition attorneys' fees that were not part of the Plan and to  
23

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24 <sup>7</sup> According to Monarch, the Debtor did not assert that the  
25 stay violation was a basis for appeal. (The Debtor answered "no"  
26 to a question on the appeal form asking "Is there a related  
27 bankruptcy case or a court-ordered stay that affects this  
28 appeal?").

<sup>8</sup> An identical motion was filed on February 20, 2012, but  
that motion appears to be an incomplete filing.

1 pursue postpetition remedies to enforce the CC&Rs, but not to  
2 initiate an action to recover attorneys' fees for any  
3 postpetition litigation.

4 Also in the Motion to Establish Violation, the Debtor  
5 addressed various factors that courts consider when deciding  
6 whether to annul the automatic stay and asserted that those  
7 factors weighed against annulment. The Debtor requested the  
8 bankruptcy court to void the State Court Judgment.

9 Monarch filed an opposition on April 4, 2012, and the Debtor  
10 thereafter filed a reply. Monarch asserted that retroactive  
11 annulment of the stay was appropriate under the circumstances of  
12 the case, particularly because of the Debtor's long silence  
13 before asserting the alleged violation. In his reply, the Debtor  
14 explained that, because he was without bankruptcy counsel after  
15 the hearing on the MRS, he did not discover until sometime in  
16 October 2011, that the State Court Action was filed before the  
17 MRS Order was entered on the docket.

18 The bankruptcy court held a hearing on the Motion to  
19 Establish Violation on April 18, 2012. Prior to the hearing, the  
20 bankruptcy court issued a tentative ruling indicating that it  
21 would deny the Motion to Establish Violation and instead would  
22 grant annulment of the automatic stay. The bankruptcy court  
23 determined that "if there were ever a case for annulment it would  
24 be this one." Tentative Ruling (Apr. 18, 2012) at 2. It found  
25 that, in applying a balancing of the equities standard,

26 the [D]ebtor's long silence is a strong additional  
27 factor weighing in favor of annulment. Other obvious  
28 factors would include that [Monarch] took the proper  
precaution of first seeking relief of stay, so this is  
not like those cases where the creditor blunders ahead



1 without concern or cognizance of the stay. Further,  
2 while the court cannot condone actions taken before the  
3 relief of stay order is actually entered, the lapse is  
4 certainly more understandable here since it apparently  
5 took the court several weeks to process the order.  
6 Lastly, it is simply an affront to equity (not to  
7 mention a tremendous waste of resources) that the  
8 debtor should remain silent awaiting the results of the  
9 jury verdict, judgment and then even filing an appeal  
10 there from [sic], and then attempt to circumvent all by  
11 seeking a late declaration that the entire Superior  
12 Court action was void ab initio. This serves no  
13 legitimate bankruptcy purposes and is game playing  
14 (like heads I win, tails you lose) at its worse [sic].

9 Id.

10 At the hearing, the Debtor accused Monarch of lying to  
11 the bankruptcy court about the reasons it filed the MRS,  
12 asserting that the Debtor had no indication that Monarch  
13 intended to immediately bring a cause of action against the  
14 Debtor. The bankruptcy court addressed the Debtor's concern  
15 by reviewing the MRS Order and stating that it was clear  
16 that the reason Monarch filed the MRS was to be able to  
17 return to state court to enforce the CC&R Judgment if  
18 necessary during the term of the Plan.

19 On May 11, 2012, the bankruptcy court entered its order  
20 denying the Motion to Establish Violation and granting  
21 annulment of the automatic stay retroactive to June 1, 2010.  
22 The Debtor timely appealed.

## 23 **II. JURISDICTION**

24 The bankruptcy court had jurisdiction pursuant to  
25 28 U.S.C. §§ 1334 and 157(b)(2)(G). We have jurisdiction  
26 under 28 U.S.C. § 158.

1                                   **III. ISSUE**

2           Whether the bankruptcy court abused its discretion in  
3 annulling the automatic stay.

4                                   **IV. STANDARDS OF REVIEW**

5           A bankruptcy court’s decision to grant retroactive  
6 relief from the automatic stay is reviewed for an abuse of  
7 discretion. Nat’l Env’tl. Waste Corp. v. City of Riverside  
8 (In re Nat’l Env’tl. Waste Corp.), 129 F.3d 1052, 1054 (9th  
9 Cir. 1997); Williams v. Levi (In re Williams), 323 B.R. 691,  
10 696 (9th Cir. BAP 2005).

11           A bankruptcy court abuses its discretion if it bases a  
12 decision on an incorrect legal rule, or if its application  
13 of the law was illogical, implausible, or without support in  
14 inferences that may be drawn from the facts in the record.  
15 United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir.  
16 2009) (en banc); Ellsworth v. Lifescape Med. Assocs., P.C.  
17 (In re Ellsworth), 455 B.R. 904, 914 (9th Cir. BAP 2011).

18                                   **V. DISCUSSION**

19           Monarch contends that it did not violate the automatic  
20 stay because the stay was dissolved after the bankruptcy  
21 court’s oral ruling at the MRS Hearing.

22           Ordinarily, a judgment or order is effective when  
23 entered. Rule 9021; see also Beatty v. Traub  
24 (In re Beatty), 162 B.R. 853, 857 (9th Cir. BAP 1994),  
25 overruled on other grounds by Marrama v. Citizens Bank of  
26 Mass., 549 U.S. 365 (2007). Courts have, however,  
27 determined that entry of an order is not always necessary to  
28 effectuate it, particularly when the parties had notice of

1 the oral order. Noli v. Comm'r of Internal Revenue, 860  
2 F.2d 1521, 1525 (9th Cir. 1988); Am.'s Servicing Co. v.  
3 Schwartz-Tallard, 438 B.R. 313, 318 (D. Nev. 2010). Here,  
4 the Debtor clearly had notice that the bankruptcy court  
5 granted Monarch stay relief to return to state court and  
6 enforce the terms of the CC&R Judgment because he had  
7 attended, with counsel, the MRS Hearing. The Debtor and  
8 Rodarte also had constructive notice of the stay relief  
9 because the oral ruling was entered on the bankruptcy case  
10 docket the same day. Therefore, it is unclear how the  
11 Debtor was prejudiced by Monarch's action taken before the  
12 MRS Order was entered as he was aware of the existence and  
13 extent of the stay relief. See Noli, 860 F.2d at 1525.

14 A bankruptcy court has discretion to determine whether  
15 its order is immediately effective when given orally. Am.'s  
16 Servicing Co., 438 B.R. at 318; see also Sewell v. MGF  
17 Funding, Inc. (In re Sewell), 345 B.R. 174, 179 (9th Cir.  
18 BAP 2006). In this case, the bankruptcy court acted under  
19 the well-accepted rule that orders are effective when  
20 written and docketed. See In re Brown, 290 B.R. 415, 421  
21 (Bankr. M.D. Fla. 2003). Consequently, the bankruptcy court  
22 determined there was a violation of the automatic stay, but  
23 that annulment was appropriate under the circumstances. We  
24 address below the merits of that decision.

25 The bankruptcy court determined that Monarch violated  
26 the automatic stay because the MRS Order had not been  
27 entered before the State Court Action was initiated. In the  
28 Ninth Circuit, actions taken in violation of the stay are

1 void. Schwartz v. United States (In re Schwartz), 954 F.2d  
2 569, 571-72 (9th Cir. 1992); see also Algeran, Inc. v.  
3 Advance Ross Corp., 759 F.2d 1421, 1425 (9th Cir. 1985).

4 However, an action taken in violation of the automatic  
5 stay may be declared valid if cause exists for retroactive  
6 annulment of the stay. Id. at 573. Section 362(d) empowers  
7 the bankruptcy court to annul the stay. It provides:

8 On request of a party in interest and after notice  
9 and a hearing, the court shall grant relief from  
10 the stay provided under subsection (a) of this  
11 section, such as by terminating, annulling,  
12 modifying, or conditioning such stay-

(1) for cause, including the lack of adequate  
protection of an interest in property of such  
party in interest.

13 11 U.S.C. § 362(d); In re Schwartz, 954 F.2d at 572  
14 (“[S]ection 362(d) gives the bankruptcy court wide latitude  
15 in crafting relief from the automatic stay, including the  
16 power to grant retroactive relief from the stay.”).

17 In analyzing whether “cause” exists to annul the stay  
18 under § 362(d)(1), the bankruptcy court is required to  
19 balance the equities of the creditor’s position in  
20 comparison to that of the debtor. In re Nat’l Envtl. Waste  
21 Corp., 129 F.3d at 1055. Under this approach, the  
22 bankruptcy court considers (1) whether the creditor was  
23 aware of the bankruptcy petition and automatic stay, and  
24 (2) whether the debtor engaged in unreasonable or  
25 inequitable conduct. Id. The Bankruptcy Appellate Panel  
26 approved additional factors for consideration in Fjeldsted  
27 v. Lien (In re Fjeldsted), 293 B.R. 12, 24 (9th Cir. BAP  
28 2003). The Fjeldsted factors are employed to “further

1 examine the debtor's and creditor's good faith, the  
2 prejudice to the parties, and the judicial or practical  
3 efficacy of annulling the stay." Id. at 24-25. The factors  
4 include:

- 5 1. Number of filings;
- 6 2. Whether, in a repeat filing case, the  
7 circumstances indicate an intention to delay  
and hinder creditors;
- 8 3. A weighing of the extent of prejudice to  
9 creditors or third parties if the stay relief  
10 is not made retroactive, including whether  
harm exists to a bona fide purchaser;
- 11 4. The debtor's overall good faith (totality of  
the circumstances test)
- 12 5. Whether creditors knew of stay but  
13 nonetheless took action, thus compounding the  
problem;
- 14 6. Whether the debtor has complied, and is  
15 otherwise complying with the Bankruptcy Code  
and Rules;
- 16 7. The relative ease of restoring parties to the  
17 status quo ante;
- 18 8. The costs of annulment to debtors and  
creditors;
- 19 9. How quickly creditors moved for annulment, or  
20 how quickly debtors moved to set aside the  
sale or violative conduct;
- 21 10. Whether, after learning of the bankruptcy,  
22 creditors proceeded to take steps in  
continued violation of the stay, or whether  
23 they moved expeditiously to gain relief;
- 24 11. Whether annulment of the stay will cause  
irreparable injury to the debtor;
- 25 12. Whether stay relief will promote judicial  
26 economy or efficiencies.

27 Id. at 25.

1           The factors merely present a framework for analysis and  
2 “[i]n any given case, one factor may so outweigh the others  
3 as to be dispositive.” Id.; In re Williams, 323 B.R. at  
4 700.

5           The record demonstrates that the bankruptcy court  
6 properly balanced the equities. The bankruptcy court found  
7 that the Debtor’s “long silence” was a strong factor  
8 weighing in favor of annulment and that it was “simply an  
9 affront to equity” that the Debtor should remain silent  
10 throughout the State Court Action and after losing an appeal  
11 of the State Court Judgment before raising the issue of a  
12 technical stay violation. The bankruptcy court found this  
13 conduct amounted to “game playing.” Indeed, the bankruptcy  
14 court found that the Debtor “doubled down and lost” in his  
15 dispute against Monarch. Hr’g Tr. (Apr. 18, 2012) at  
16 14:4-5. It found that the Debtor was essentially seeking a  
17 “pass on the last year and a half” through its Motion to  
18 Establish Violation. Id. at 14:6-7.

19           The bankruptcy court weighed the Debtor’s conduct  
20 against the fact that Monarch had taken the proper  
21 precaution to seek relief from the stay in the first  
22 instance. Although it acknowledged that it took several  
23 weeks for the bankruptcy court to process the MRS Order, it  
24 “could not condone” Monarch’s filing of the State Court  
25 Action. Nevertheless, it found that there was no equitable  
26 reason for, or bankruptcy purpose served by, declaring the  
27 State Court Judgment void. It stated:

1 [A] strict mechanical view of the law would  
2 suggest that there's some substance to [declaring  
3 the State Court Judgment void as a violation of  
4 the stay]. But, anybody who stops for a minute  
5 and thinks where's the equity, where's the  
6 judicial resources, what's the bankruptcy purpose,  
7 if any, to be served, would know that it is a  
8 ridiculous argument. And it is, in fact, a  
9 ridiculous argument.

10 Id. at 14:9-14.

11 After reviewing the record, we cannot say that the  
12 bankruptcy court abused its discretion in its analysis  
13 supporting annulment of the stay. Furthermore, we find the  
14 Debtor's arguments on appeal, that the bankruptcy court made  
15 several errors in applying the balancing test, unavailing.  
16 We briefly address those arguments below.

17 First, the Debtor argues that the bankruptcy court made  
18 a clearly erroneous finding that the Debtor deliberately  
19 waited until after the jury trial to move to establish a  
20 violation of the automatic stay as a legal tactic. He  
21 insists that, because he did not have bankruptcy counsel to  
22 assist him, he did not know there was a violation of the  
23 stay. He argues that the bankruptcy court erred in finding  
24 his explanation for the delay was not credible.

25 We give findings of fact based on credibility  
26 particular deference. Rule 8013; Anderson v. City of  
27 Bessemer City, N.C., 470 U.S. 564, 575 (1985). This  
28 deference is given to inferences drawn by the bankruptcy  
29 court. Arab Monetary Fund v. Hashim (In re Hashim),  
30 379 B.R. 912, 925 (9th Cir. BAP 2007). Additionally, where  
31 there are two permissible views of the evidence, the fact  
32 finder's choice between them is not clearly erroneous. Id.

1 (citing Anderson, 470 U.S. at 574 ("This applies to  
2 credibility-based findings and to findings based on  
3 inferences from other facts.")). Accordingly, the  
4 bankruptcy court's finding that the Debtor's silence was a  
5 legal tactic cannot be clearly erroneous.

6 The Debtor also argues that the bankruptcy court failed  
7 to give proper weight to the "extreme prejudice suffered by  
8 the Debtor." Appellant's Opening Br. at 14. He asserts  
9 that he was highly prejudiced by the stay violation because  
10 he could have avoided a costly jury trial in lieu of  
11 arbitration.<sup>9</sup>

12 As we noted above, the Debtor had actual knowledge of  
13 the bankruptcy court's decision, delivered at the MRS  
14 Hearing, to grant stay relief so that Monarch could enforce  
15 the CC&R Judgment. Indeed, he has not articulated in what  
16 way the violation of the stay actually prejudiced him.  
17 Rather, he argues only that he was prejudiced due to the  
18 outcome of the State Court Action since he lost on the  
19 merits, and more specifically, because the state court  
20 awarded over \$300,000 in attorneys' fees.<sup>10</sup> Thus, if  
21 Monarch had waited to file the State Court Action after  
22

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23 <sup>9</sup> The parties have not provided us with the controlling  
24 state statutes that provide for arbitration under these  
25 circumstances or suggested that there is a time requirement  
within which a party must request arbitration.

26 <sup>10</sup> At oral argument, the Debtor acknowledged that he  
27 determined the stay violation was significant only after the  
28 state court awarded over \$300,000 in attorneys' fees since the  
actual damages award was "nominal."



1 entry of the MRS Order, and the Debtor again had  
2 participated fully in the litigation resulting in the same  
3 outcome, what prejudice could the Debtor demonstrate?  
4 Similarly, what prejudice could the Debtor demonstrate if he  
5 had prevailed in the State Court Action?

6 Furthermore, it is entirely unclear how Monarch's  
7 filing of the State Court Action before the MRS Order was  
8 docketed affected in any way the Debtor's ability to have  
9 asserted his right to arbitrate in defending against the  
10 State Court Action. The Debtor's counsel apparently  
11 conceded this point: "now that we've lost the lawsuit,  
12 we're going to do it again. And this time, we're not going  
13 to make the mistakes that caused us to lose. We get a  
14 second bite at the apple too because what was done before  
15 was void." Hr'g Tr. (Apr. 18, 2012) at 8:2-5.

16 The policy behind § 362 is to protect the bankruptcy  
17 estate from being depleted by creditors. It is intended to  
18 give debtors "breathing room" after filing the petition by  
19 stopping collection efforts, harassment, and foreclosure  
20 actions. It also prevents "piecemeal dismemberment" of the  
21 estate and allows the debtor time to reorganize. Lehman  
22 Commercial Paper, Inc. v. Palmdale Hills Prop., LLC  
23 (In re Palmdale Hills Prop., LLC), 423 B.R. 655, 663  
24 (9th Cir. 2009). Here, the Debtor had the breathing room  
25 afforded by the stay to reorganize and confirm a chapter 13  
26 plan. But as the bankruptcy court noted, simply because the  
27 Debtor is in bankruptcy, it does not give him license to  
28 disregard his ongoing duties with respect to the Property.

1 Hr'g Tr. (Apr. 18, 2012) at 15-18; Tentative Ruling (May 4,  
2 2010) at 2.

3 The Debtor also argues that the bankruptcy court erred  
4 in annulling the stay because it allowed Monarch to have  
5 exceeded the scope of the MRS Order. The Debtor asserts  
6 that Monarch brought new causes of action against the Debtor  
7 in its State Court Action that were not contemplated by the  
8 parties. However, the record demonstrates that the MRS was  
9 filed, and the MRS was granted, so that Monarch could pursue  
10 enforcement of the CC&R Judgment as to postpetition  
11 violations. The MRS stated that Monarch anticipated filing  
12 a new state court action to enforce the CC&R Judgment, which  
13 would include recovery for monetary damages and attorneys'  
14 fees.<sup>11</sup>

15 The Debtor's final argument on appeal is that the  
16 bankruptcy court erred in annulling the automatic stay  
17 because Monarch "did not make a separately noticed motion  
18 asking for retroactive annulment, depriving Debtor of due  
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20  
21 <sup>11</sup> At oral argument, the Debtor argued that the causes of  
22 action "may have included" prepetition damages. However, because  
23 the state court complaint is not included in the record, we have  
24 no way of evaluating that argument. Moreover, this argument was  
25 not made to the bankruptcy court, and therefore, it is waived on  
26 appeal. Campbell v. Verizon Wireless S-CA (In re Campbell),  
27 336 B.R. 430, 434 n.6 (9th Cir. BAP 2005) (citing O'Rourke v.  
28 Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957  
(9th Cir. 1989) ("The rule in this circuit is that appellate  
courts will not consider arguments that are not 'properly  
raise[d] in the trial courts.'"). The Debtor's argument to the  
bankruptcy court was that a request for attorneys' fees was  
outside the scope of the MRS Order.

1 process and the ability to oppose the request." Appellant's  
2 Opening Br. at 18. This argument is a non-starter. The  
3 Debtor opposed annulment in his Motion to Establish  
4 Violation. He set out the Fjeldsted factors and contended  
5 that they weighed against annulment. The Debtor also filed  
6 a reply brief reiterating his argument that there was no  
7 "cause" or factors that supported annulment. Additionally,  
8 the Debtor, through counsel, argued his motion to the  
9 bankruptcy court at the April 18, 2012 hearing.  
10 Consequently, there is no basis for the Debtor to assert  
11 that he was deprived of due process here.

12 According to the bankruptcy court, retroactive  
13 annulment of the stay was appropriate in light of the  
14 Debtor's conduct - waiting until after the State Court  
15 Action resulted in an adverse judgment before asserting that  
16 there was a stay violation, and in light of its finding that  
17 voiding the State Court Judgment would not support any  
18 bankruptcy purpose, but would instead be a waste of judicial  
19 resources. That decision was not illogical, implausible, or  
20 unsupported by the evidence in the record, and therefore,  
21 was not an abuse of discretion.

## 22 VI. CONCLUSION

23 For the foregoing reasons, we AFFIRM.  
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