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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	WW-05-1416-KDMc
	)		
FRANKLIN IVAN MIXON,	)	Bk. No.	05-40784
	)		
Debtor.	)		
_____	)		
	)		
FRANKLIN IVAN MIXON,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
TWIN ASSETS, LLC; DAVID M.	)		
HOWE, Chapter 13 trustee;	)		
UNITED STATES TRUSTEE,	)		
	)		
Appellees.	)		
_____	)		

Argued and Submitted on September 13, 2006  
at Seattle, Washington

Filed - September 26, 2006

Appeal from the United States Bankruptcy Court  
for the Western District of Washington

Honorable Paul B. Snyder, Bankruptcy Judge, Presiding

Before: KLEIN, DUNN and McMANUS,\*\* Bankruptcy Judges.

\*This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

\*\*Hon. Michael S. McManus, Chief Bankruptcy Judge for the Eastern District of California, sitting by designation.



1 In the interval between the foreclosure sale and the filing  
2 of Twin Assets' unlawful detainer action, the debtor filed, on  
3 June 7, a motion to vacate the dismissal and to reinstate his  
4 chapter 13 case. On June 30, the court entered an order vacating  
5 the dismissal and reinstating the debtor's case.<sup>4</sup>

6 Unaware that the debtor's bankruptcy case had been  
7 reinstated on June 30, Twin Assets obtained a Writ of Restitution  
8 on July 12, and was set to have the Pierce County Sheriff evict  
9 the debtor from the property. The eviction was forestalled when  
10 the debtor informed Twin Assets that his chapter 13 case had been  
11 reinstated and that the automatic stay was in effect.

12 On July 28, Twin Assets filed a motion for relief from the  
13 automatic stay to enable it to evict the debtor from the property  
14 it purchased at the foreclosure sale.

15 The debtor opposed Twin Assets' motion and a hearing was  
16 held. At the hearing, the debtor argued that the foreclosure  
17 sale was void because he did not receive notice of the chapter 13  
18 trustee's motion to dismiss (and was unaware his case had been  
19 dismissed), and because he had been making his plan payments to  
20 protect the subject property. The court informed the debtor that  
21 the sale that took place after his case had been dismissed, but  
22 before his case was reinstated, was valid and that any challenge  
23 to the foreclosure sale should be brought in state court. The  
24 court then took the motion for relief from stay under submission.

25 On August 29, the court entered an order denying the motion  
26 for relief from stay. The court found that the debtor and his

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27  
28 <sup>4</sup>After the dismissal was vacated, the debtor brought his  
plan payments current.

1 attorney were properly served with notice of the trustee's motion  
2 to dismiss and the dismissal order and that no evidence in the  
3 record was sufficient to rebut the presumption of proper service.  
4 Without addressing the question of the applicability of the  
5 automatic stay to protect the debtor's possessory interest, the  
6 court denied Twin Assets' motion for relief from stay, ruling  
7 that the vacation of the dismissal on June 30, did not  
8 retroactively reinstate the stay so as to invalidate the  
9 foreclosure sale.

10 On September 14, the debtor filed a motion for  
11 reconsideration.

12 On September 30, the court denied the motion for  
13 reconsideration on the basis that the debtor did not file it  
14 within the ten-day time limit for filing reconsideration motions  
15 under the local rules of the district court.

16 The debtor appealed from the order denying the motion for  
17 reconsideration.

#### 18 JURISDICTION

19 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.  
20 We have jurisdiction under 28 U.S.C. § 158(a)(1).  
21

#### 22 ISSUE

23 Whether the court abused its discretion when it denied the  
24 debtor's motion to reconsider an order denying a motion for  
25 relief from stay.  
26

1 STANDARD OF REVIEW

2 The court's denial of a motion for reconsideration is  
3 reviewed for an abuse of discretion. Smith v. Pac. Props. & Dev.  
4 Corp., 358 F.3d 1097, 1100 (9th Cir. 2004).

5  
6 DISCUSSION

7 This appeal focuses on a denial of a motion for  
8 reconsideration in which the debtor contended that the  
9 reinstatement of the bankruptcy case retroactively invalidated  
10 the foreclosure sale. The court's stated procedural reason for  
11 denying the motion as untimely was error. Nevertheless, since  
12 the court was correct in its original ruling that the foreclosure  
13 sale was not invalidated by the revival of the bankruptcy, the  
14 procedural error was harmless.

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16 I

17 The bankruptcy court denied the debtor's motion because he  
18 did not file it within the ten-day rule prescribed by a local  
19 rule of the district court regarding a "motion for  
20 reconsideration."<sup>5</sup> This local rule presents a problem of  
21 construction.

22 Despite the common generic usage of "reconsideration" to  
23 connote a request to have a court revisit a ruling, the term

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<sup>5</sup>United States District Court, Western District of  
Washington, Civil Rule 7(h)(2) provides:

26 A motion for reconsideration shall be plainly labeled  
27 as such. The motion shall be filed within ten judicial  
28 days following the order to which it relates. . . .  
Failure to comply with this subsection may be grounds  
for denial of the motion.

1 "motion for reconsideration" is not mentioned in the Federal  
2 Rules of Civil Procedure. It is used in the Federal Rules of  
3 Bankruptcy Procedure only in reference to the statutory provision  
4 of 11 U.S.C. § 502(j) that permits a ruling on a claim to be  
5 "reconsidered" at any time.

6 The jurisprudence of "reconsideration" motions, however, is  
7 straightforward. When a "motion for reconsideration" of a  
8 judgment that does not invoke a specific rule of procedure is  
9 presented, its construction depends upon whether it is made  
10 within or after ten days of the entry of the order to be  
11 reconsidered. If filed within ten days, it is deemed to be a  
12 motion under either Civil Rule 52(b) or 59(e). If filed after  
13 ten days of such entry, then it is deemed to be a motion for  
14 relief from judgment under Rule 60. Am. Ironworks & Erectors,  
15 Inc. v. N. Am. Constr. Corp., 248 F. 3d 892, 898-99 (9th Cir.  
16 2001); Captain Blythers, Inc. v. Thompson (In re Captain  
17 Blythers, Inc.), 311 B.R. 530, 539 (9th Cir. BAP 2004), aff'd  
18 mem., 2006 WL 1478849 (9th Cir. 2006). It is in this context  
19 that one must assess the district court's local rule requiring  
20 "motions for reconsideration" to be made within ten days.

21 It is apodictic that a local rule must be consistent with  
22 the Federal Rules of Civil Procedure. Fed. R. Civ. P. 83(a).  
23 Because Rule 60(b) motions must be brought within a "reasonable  
24 time" and, in the case of three of the six subcategories for  
25 relief permitted by Rule 60(b), within one year, it follows that  
26 the district court's local rule, with its ten-day limitation,  
27 cannot be applicable to Rule 60(b) motions.

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1 A

2 The debtor's motion for reconsideration was filed within  
3 sixteen days of entry of the August 29 order denying the motion  
4 for relief from stay. As a general rule, a motion brought within  
5 ten days of entry of an order is treated as a motion for  
6 reconsideration governed by Federal Rule of Civil Procedure 52  
7 and/or 59. Am. Ironworks & Erectors, Inc., 248 F. 3d at 898-99;  
8 Captain Blythers, 311 B.R. at 539. A motion filed after the ten-  
9 day period of entry of an order is construed as a motion for  
10 relief from judgment governed by Federal Rule of Civil Procedure  
11 60(b). Id.

12 Even though a court has wide discretion in deciding whether  
13 to reconsider its own orders, the court in this instance should  
14 have entertained the debtor's motion at least as one brought  
15 timely under Rule 60(b).

16 B

17 The preceding analysis assumes that the order in question  
18 would have triggered the running of the ten-day timer of Rules  
19 52(b) and 59(e) in the first instance. Here, however, a review  
20 of the record indicates that the ten-day timer did not start  
21 because the court's order on the motion for relief from stay  
22 violated the separate order doctrine of Federal Rule of  
23 Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure  
24 58(a)(1). Garland v. Maloney (In re Garland), 295 B.R. 347, 350  
25 (9th Cir. BAP 2003).

26 "Every judgment entered in an adversary proceeding or  
27 contested matter shall be set forth in a separate document."  
28 Fed. R. Bankr. P. 9021. A motion for relief from stay is a

1 contested matter. Fed. R. Bankr. P. 4001(a). Thus, the order  
2 resolving the motion for relief from stay in this case should  
3 have been a separate document that included no findings of fact  
4 and conclusions of law. Garland, 295 B.R. at 350.

5 The court's August 29 order did not comply with the separate  
6 document requirement of Rules 58 and 9021. The two-page order  
7 states the procedural history of the case, and includes findings  
8 of fact and conclusions of law. It ends with a statement that  
9 the motion for relief from stay is denied because "the stay was  
10 not reinstated retroactive upon vacation of the dismissal."

11 Because the order is not in the form of a "separate  
12 judgment", nor was a separate document later filed, it did not  
13 become final until 150 days after it was entered on the docket.  
14 Fed. R. Bankr. P. 58(b); Garland, 295 B.R. at 351.

15 Therefore, the debtor's motion for reconsideration was  
16 timely filed even within a ten-day regime, and should have been  
17 considered by the court.

18 The procedural error inherent in denying the motion as  
19 untimely, however, turns out to have been harmless.

## 20 21 II

22 We may affirm the order denying the motion for  
23 reconsideration for any reason supported by the record. 28  
24 U.S.C. § 2111; Fed. R. Bankr. P. 9005, incorporating Fed. R. Civ.  
25 P. 61; Dittman v. California, 191 F.3d 1020, 1027 n. 3 (9th Cir.  
26 1999); Donald v. Curry (In re Donald), 328 B.R. 192, 204 (9th  
27 Cir. BAP 2005). The premise of the motion for reconsideration  
28 was that the foreclosure sale was voided by the subsequent



1 revival of the bankruptcy case.

2 The court's underlying order held that the automatic stay  
3 did not reinstate retroactively upon vacation of the dismissal.  
4 The court found that the foreclosure sale was not void *ab initio*  
5 as a violation of the stay, and any challenge to the sale itself  
6 is a matter of state law to be brought in state court. We agree.

7 While the bankruptcy court arguably had jurisdiction to rule  
8 on the validity of the foreclosure, it also had discretion to  
9 abstain from hearing such matter under 28 U.S.C. § 1334(c)(1).  
10 Directing the parties to resolve any dispute regarding  
11 foreclosure validity in state court is tantamount to  
12 discretionary abstention. The court did not abuse its discretion  
13 in that respect.

14 The debtor perceives a denial of due process inherent in the  
15 conduct of a foreclosure sale within three days after the court  
16 ordered that the bankruptcy case be dismissed. He believes that  
17 the order was not effective for a period of ten days. The  
18 debtor's understanding, however, is mistaken. It is settled that  
19 an order dismissing a case is immediately enforceable. Weston v.  
20 Cibula (In re Weston), 101 B.R. 202, 204-05 (Bankr. E.D. Cal.  
21 1989), aff'd mem., 123 B.R. 466 (9th Cir. BAP 1991), aff'd mem.,  
22 967 F.2d 596 (9th Cir. 1992), cert. denied, 506 U.S. 1051 (1993).  
23 Specifically, the 10-day stay prescribed by Federal Rule of Civil  
24 Procedure 62(a) and incorporated for use in adversary proceedings  
25 by Federal Rule of Bankruptcy Procedure 7062 does not apply to  
26 "contested matters," which include motions to dismiss a case,  
27 that are governed by Federal Rule of Bankruptcy Procedure 9014.  
28 Id. Hence, the dismissal order was immediately effective, and

1 there was no reason based on bankruptcy law why a foreclosure (so  
2 long as it complied with governing state law) could not be  
3 conducted the next day.

4 The record also supports the court's finding that the debtor  
5 and his attorney were properly served with notice of the  
6 trustee's motion to dismiss the debtor's chapter 13 case and the  
7 subsequent dismissal order. Thus, appellant's due process  
8 challenge is factually unsupported.

#### 10 CONCLUSION

11 The bankruptcy court did not err when it held that the stay  
12 did not reinstate retroactively to invalidate the foreclosure  
13 sale that took place between the dismissal and subsequent  
14 reinstatement of the debtor's chapter 13 case.<sup>6</sup>

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16 <sup>6</sup>At the hearing, the court informed Twin Assets' counsel  
17 that a relief from stay motion to evict the debtor from the  
18 property was not necessary because the debtor was no longer the  
19 legal owner of the property. In other words, because the  
foreclosure sale was valid, the debtor's interest in the property  
was terminated and he had no interest to be protected by the  
stay. This is not an accurate statement of law.

20 To the contrary, because the debtor was still in possession  
21 of the property when his chapter 13 case was reinstated and when  
22 the Writ of Restitution was issued, the debtor had a possessory  
23 interest in the property. Such possessory interest is an  
24 equitable interest in property that is protected by the automatic  
25 stay. Williams v. Levi (In re Williams), 323 B.R. 691, 699 (9th  
26 Cir. BAP 2005); In re Butler, 867 B.R. 876-77 (Bankr. C.D. Cal.  
27 2002). Thus, the motion by Twin Assets seeking relief from the  
28 stay to evict the debtor was, in fact, necessary. The issue has  
not been raised by the parties in this appeal and, accordingly  
has been waived. Sallie Mae Servicing Corp. v. Ransom (In re  
Ransom), 336 B.R. 790, 793 n. 2 (9th Cir. BAP 2005). Any  
dysfunction that may have ensued as a result of the denial of  
stay relief on the incorrect theory that it was not necessary may  
yet be remedied because the court has power to annul the  
automatic stay retroactively. 40235 Wash. St. Corp. v. Lusardi,  
329 F.3d 1076, 1080 n. 2 (9th Cir.), cert. denied, 540 U.S. 983  
(2003).

1           Thus, the court did not abuse its discretion when it denied  
2 the debtor's motion for reconsideration.  AFFIRMED.

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