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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NOT FOR PUBLICATION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.) **MEMORANDUM***
)
 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.⁴

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

27
28 ⁴After 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.

15
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."⁵ 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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25

⁵United 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.

28

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.

9
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.⁶

15
16 ⁶At 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
the Writ of Restitution was issued, the debtor had a possessory
22 interest in the property. Such possessory interest is an
equitable interest in property that is protected by the automatic
23 stay. Williams v. Levi (In re Williams), 323 B.R. 691, 699 (9th
Cir. BAP 2005); In re Butler, 867 B.R. 876-77 (Bankr. C.D. Cal.
2002). Thus, the motion by Twin Assets seeking relief from the
24 stay to evict the debtor was, in fact, necessary. The issue has
not been raised by the parties in this appeal and, accordingly
25 has been waived. Sallie Mae Servicing Corp. v. Ransom (In re
Ransom), 336 B.R. 790, 793 n. 2 (9th Cir. BAP 2005). Any
26 dysfunction that may have ensued as a result of the denial of
stay relief on the incorrect theory that it was not necessary may
27 yet be remedied because the court has power to annul the
automatic stay retroactively. 40235 Wash. St. Corp. v. Lusardi,
28 329 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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