NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL**

**OF THE NINTH CIRCUIT**

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| In re: | BAP No. EC-05-1368-SJB |
| ROY L. OLSON, | Bk. No. 05-24201 |
| Debtor. | |
| ROY L. OLSON, | |
| Appellant, | |
| v. | **MEMORANDUM**[1] |
| BAY AREA FORECLOSURE INVESTMENTS, LLC, et al., | |
| Appellees. | |

Argued and Submitted on
September 13, 2006, at Sacramento, California

Filed - November 21, 2006

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

Honorable David E. Russell, Bankruptcy Judge, presiding

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Before: SMITH, JURY[2] and BRANDT, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Meredith A. Jury, United States Bankruptcy Judge for the Central District of California, sitting by designation.

On August 29, 2005, the bankruptcy court granted a motion filed by Appellees Bay Area Foreclosure Investments, LLC and Rockridge F.I., LLC for retroactive relief from stay to validate a stipulated judgment for possession of Appellant Roy L. Olson's residence (the "property"). A timely notice of appeal was filed on September 2, 2005. Four days later, on September 6, 2005, Appellant executed an agreement with Appellees wherein, among other things, he agreed to vacate the residence by September 27, 2005, acknowledged having no interest in the residence, and waived the right to pursue the present appeal. We AFFIRM.

## I. FACTS

Between Appellant and his spouse (sometimes referred to collectively as the "Olsons"), they have filed seven individual and joint bankruptcy petitions since 1999. The couple filed their third joint petition under chapter 11[3] on May 19, 2004.[4] One day later, on May 20, Citimortgage conducted a nonjudicial foreclosure sale and sold the property to Appellees for $955,000.

Soon after acquiring the property, Appellees hired attorney Gregory Lyons ("Lyons") to help with the eviction process and filing of an unlawful detainer action against the Olsons. However, Appellees subsequently entered into a stipulation with the Olsons that permitted them to buy back the property for

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

[4] At the time of this filing, they were ineligible to be debtors under § 109(g)(2).

$1,150,000 by or before April 12, 2005. Under the stipulation, filed in state court on October 12, 2004, Appellees were entitled to a judgment for possession if the Olsons failed to pay the purchase price or vacate by the deadline. More specifically, the stipulation provided in part:

> 1. Purchase and Sale of the Property: [The Olsons] may purchase the property from [Appellees] on the following terms and conditions:
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> a) The purchase price shall be $1,150,000.
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> b) [The Olsons] shall pay $50,000 Initial Consideration which shall be non-refundable upon said payment and mutual execution hereof, and which shall immediately be passed through and released to Appellees . . . . Upon and in consideration for said payment to Appellees, Appellees agree[] to the terms hereof, including forbearance of eviction. Said Initial Consideration is non-refundable should [the Olsons] fail to timely close escrow as provided herein, time being of the essence, it is fully earned by Appellees upon its payment, and it is not to be considered damages with respect to [the Olsons'] non-performance of the purchase terms. Upon timely close of escrow, time being of the essence, the Initial Consideration shall be applied on account of the purchase price. Should escrow fail to close within sixty days or within such extended time as provided herein, time being of the essence, the Initial Consideration shall not be refundable, the purchase provisions of this agreement shall terminate, [Appellees] and [the Olsons] shall have no purchase and sale obligations hereunder, and [the Olsons] shall immediately deliver full possession of the Property to Appellees.
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> . . . .
>
> d) [The Olsons] acknowledge[] that [they have] no tenancy or leasehold rights with respect to the Property. [The Olsons'] possession of the Property is subject to the terms of this stipulation, and pending judgment as provided herein if escrow doesn't timely close.

Stipulation for Jmt. or Dismissal at 1-3. In addition, the stipulation allowed the Olsons to extend the time to close escrow up to four months by payment of extension fees of $5,000 for the first month, $10,000 for the second month, $15,000 for the third month, and $20,000 for the fourth month, which fees were not to be credited against the purchase price.

On November 30, 2004, the parties executed a purchase agreement which incorporated the terms of the stipulation. Appellant opted to extend the escrow closing date through all four months. All in all, Appellant paid a total of $100,000: the initial $50,000 down-payment plus $50,000 in extension fees. Pursuant to the purchase agreement, escrow was set to close on April 13, 2005.[5]

On April 12, 2005, Appellant filed for chapter 13 relief. According to Lyons, on the very next day, he contacted Appellant to inquire into whether he was prepared to close escrow. Appellant indicated that he was not (without telling Lyons of his pending bankruptcy), and thus, Lyons informed him that Appellees would proceed with obtaining a judgment pursuant to the stipulation.

On the morning of April 18, 2005, allegedly without knowledge of the bankruptcy case, Lyons, on behalf of Appellees,

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[5] Appellant testified that he believed that the escrow closing date was April 14, 2005. The stipulation and the purchase agreement do not make clear the exact date escrow was to close if extensions were taken. The court assumed that since the stipulation and purchase agreement used the term "month" as the calculation period for extensions, that each month extension would end on the same day that the extension initially was sought. The purchase agreement stated that escrow was to close on December 13, 2004, thus the court found that each month extension would end on the 13th of the month.

filed a request for judgment on the stipulation in the Solano Superior Court ("state court"). That same morning, Appellant also filed a "stop notice" in state court, which notified the court that a bankruptcy had been filed by him, and mailed notice of the bankruptcy filing to Lyons' office. The judgment and a writ of possession for the property were filed and issued by the state court that day.

Lyons claims to have received notice of the bankruptcy on April 19, 2005. Shortly thereafter, on April 26, 2005, Appellees filed a motion seeking retroactive relief from the automatic stay (the "motion") in order to validate the stipulated judgment and writ. The motion was brought under sections 362(d)(1) and (d)(2). Appellees argued 1) that there was cause to grant relief based on Appellant's successive bankruptcy filings, which had prejudiced creditors due to the unreasonable delay the filings had caused, and 2) that Appellant did not have any interest in the property, so it was unnecessary for an effective reorganization. Appellees asserted that according to the stipulation, Appellant acknowledged that he had no tenancy or leasehold rights in the property. As a result, he had no equity or ownership interest in the property that could be used to effectuate a plan of reorganization.

Appellant opposed the motion on the grounds that the foreclosure sale, through which Appellees purchased the property, was in violation of the stay imposed by the Olsons' prior May 19, 2004 bankruptcy filing. Because the foreclosure sale occurred in violation of the stay, Appellant maintained that the transfer of title from CitiMortgage to Appellees was void. Thus, the true

creditors secured by the property were CitiMortgage (the holder of the first deed of trust prior to the foreclosure sale) and Bank of America (the holder of the second deed of trust prior to the foreclosure sale).

Appellees' replied that the foreclosure sale was not conducted in violation of the automatic stay as the Olsons had filed their May 19 petition at a time when they were barred from doing so.[6]

The matter came on for hearing on June 21, 2005, at which time the court continued it over for an evidentiary hearing. Thereafter, Appellees provided further briefing in which they argued that retroactive annulment of the stay was appropriate pursuant to the factors discussed by the Ninth Circuit in In re National Environmental Waste Corp., 129 F.3d 1052 (9th Cir. 1997).

The court held the evidentiary hearing on August 19, 2005. After hearing testimony from Wilson Young (Appellees' managing member), Appellant, and Lyons, the court concluded that in accordance with the Ninth Circuit case In re Goeb, 675 F.2d 1386 (9th Cir. 1982), which established the test for bad faith to be a

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[6] As previously noted, the Olsons have filed numerous bankruptcies in the past which have affected the property. The case related to this appeal, filed one day prior to the May 20, 2004 foreclosure sale, is the fourth case filed by Appellant since 2002 and the seventh filed by him or his spouse since 1999. CitiMortgage did not obtain relief from the automatic stay prior to foreclosing on the property, but instead relied on an order entered by the court on May 3, 2004, in Appellant's fifth bankruptcy, which granted CitiMortgage relief from the automatic stay as to the property for 180 days in any case filed subsequently. At the August 19, 2005 hearing, the court stated that the order providing CitiMortgage with relief from the automatic stay was sufficient to provide CitiMortgage with the legal authority to foreclose on the property.

totality of the circumstances, the circumstances surrounding Appellant's bankruptcy warranted a finding that the petition was filed in bad faith. In reaching this determination, the court considered the following factors: (1) whether Appellant misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed his chapter 13 petition or plan in an inequitable manner; (2) Appellant's history of bankruptcy filings and dismissals; (3) Appellant's purpose in filing for bankruptcy; and (4) whether Appellant's behavior was egregious. Applying these factors to Appellant's case, the court found that Appellant had filed six bankruptcy petitions in the past five years which, except for two, were filed to protect the property. Moreover, the court found that Appellant had filed his current bankruptcy for the sole improper purpose of defeating the state court litigation and to stop enforcement of the stipulation. Although the court did not believe that his behavior was egregious, in the end it "conclude[d] that the [Appellant's] actions [were taken] in bad faith in the context of the totality of the circumstances of [the] case", and thus, the stay should be annulled. Hr'g Tr. at 103-04, Aug. 19, 2005.

The court also stated that if Appellees had "proceeded with knowledge of the bankruptcy, then [the court] could not grant retroactive relief." Id. at 103. However, in relying on Lyons' declaration filed on April 18, 2005[7], and the testimony provided

[7] This declaration was apparently filed in state court in support of the entry of the judgment. Lyon's testimony that he first learned about the bankruptcy upon receipt of a notice received on April 19, 2005, is consistent with Appellant's

(continued...)

at the hearing, the court was convinced that neither Lyons nor Appellees knew of Appellant's bankruptcy at the time the stipulation for judgment was filed. Consequently, the court concluded that Appellees were acting in good faith at the time they filed the stipulation with the state court. On September 2, 2005, Appellant filed his notice of appeal.

Thereafter, on September 6, 2005, after the filing of this appeal, the Olsons and Lyons (acting on behalf of Appellees), executed an "Eviction Agreement, Release, Waiver, and Stipulation" (the "Eviction Agreement"). Under the Eviction Agreement, Appellant agreed to 1) an eviction date of September 27, 2005, 2) a general release of all claims against Appellees, 3) waiver of his right to pursue any appeals related to the property, 4) acknowledgment of having no interest in the property, and 5) the termination of any bankruptcy stay affecting the property.

## II. ISSUES

A. Whether the execution of the Eviction Agreement divested the panel of jurisdiction over the appeal.

B. Whether the bankruptcy filing extended Appellant's right to complete the sale past the April 13, 2005 deadline.

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[7](...continued)
testimony that he mailed a copy of the notice to Lyons on April 18, 2005. Though Appellant testified that he left a voicemail message advising of the filing prior to April 18, 2005, his testimony is equivocal: he stated that he left the telephone message "somewhere between the 13th, 14th," but also indicated that "I think I notified [Lyons] on a Saturday afternoon." We take judicial notice of the fact that April 13 and 14, 2005 fell on a Wednesday and Thursday, respectively; Saturday would have been April 16, 2005.

C. Whether the bankruptcy court abused its discretion in granting annulment of the stay.

## III. JURISDICTION

Federal subject matter jurisdiction is founded under 28 U.S.C. §§ 1334(b) and 157(b)(1). We have appellate jurisdiction over final orders pursuant to 28 U.S.C. § 158(b)(1), (b)(2)(G), and (c)(1). As a general rule, we lack jurisdiction to entertain appeals where there is a valid and enforceable waiver of the right to appeal. United States v. Jeronimo, 398 F.3d 1149, 1152-53 (9th Cir. 2005).

## IV. STANDARD OF REVIEW

We review de novo the validity and enforceability of a waiver of the right to appeal. Id. at 1153. Legal conclusions of a bankruptcy court are also subject to a de novo standard of review. Taylor v. Tasafaroff (In re Taylor), 884 F.2d 478, 480 (9th Cir. 1989). Consequently, determinations regarding the effects of assumption or rejection pursuant to § 365 are reviewed de novo. See Aslan v. Sycamore Inv. Co. (In re Aslan), 909 F.2d 367, 370 (9th Cir. 1990).

Findings of fact are reviewed under the clearly erroneous standard. Fed. R. Bankr. P. 8013. A factual finding is clearly erroneous if the appellate court, after reviewing the record, has a firm and definite conviction that a mistake has been committed. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985). If two views of the evidence are possible, the trial judge's choice between them cannot be clearly erroneous. Id. at 574.

A bankruptcy court's decision to grant retroactive relief from the automatic stay is reviewed for an abuse of discretion.

Nat'l Envtl. Waste Corp. v. City of Riverside (In re Nat'l Envtl. Waste Corp.), 129 F.3d 1052, 1054 (9th Cir. 1997). Under an abuse of discretion standard, we will not reverse a bankruptcy court's ruling unless it based its ruling upon an erroneous view of law or we are definitely and firmly convinced that the bankruptcy court committed a clear error of judgment. Fjeldsted v. Lien (In re Fjeldsted), 293 B.R. 12, 18 (9th Cir. BAP 2003); Cady v. Klapperman (In re Cady), 266 B.R. 172, 178 (9th Cir. BAP 2001). Moreover, we "must give due regard to the opportunity of the bankruptcy court to judge the credibility of the witnesses." In re Fjeldsted, 293 B.R. at 18; Fed. R. Bankr. P. 8013.

## V. DISCUSSION

### A. The Legal Impact of the Eviction Agreement on the Panel's Jurisdiction Over the Appeal

"The panel has an independent duty to ensure it has jurisdiction over this appeal." Travers v. Dragul (In re Travers), 202 B.R. 624, 625 (9th Cir. BAP 1996). Appellant filed notice of the appeal following the entry of the court's order granting retroactive relief from the automatic stay on September 2, 2005. However, four days later, the Olsons entered into the Eviction Agreement with Appellees through Lyons. Appellees argue that the Eviction Agreement caused Appellant to waive his rights to this appeal, and thus, the appeal should be dismissed as moot.

"A [party's] waiver of his appellate rights is enforceable if (1) the language of the waiver encompasses his right to appeal on the grounds raised, and (2) the waiver is knowingly and voluntarily made." Jeronimo, 398 F.3d at 1153. Typically, enforcement of a waiver will occur if the plain language of the

agreement is clear and unambiguous on its face. See id.

Pursuant to the Eviction Agreement, in consideration of Appellees not beginning eviction proceedings prior to September 27, 2005, Appellant "knowingly and voluntarily waive[s]" any and all appeal rights as to In re Roy L. Oslon, case no. 05-24201-A-13L (the present case on appeal). The Eviction Agreement states that Appellant has had "adequate opportunity to obtain the advice of counsel regarding the rights waived", and that he acknowledges that he does not have any "interest related to the [p]roperty, including any possessory, legal, or contractual interest related to the [p]roperty, and including any interest related to the [p]roperty as may be afforded protection by the Bankruptcy Code." Based upon the plain language of the Eviction Agreement, it would appear that Appellant has waived his right to continue with this appeal and that the appeal should be dismissed as urged by Appellees.

However, Appellant indicated in his opening brief, and at oral argument, that Lyons "forced" him into signing away his right to appeal by threatening him with physical eviction by local law enforcement. At oral argument before this panel, counsel for Appellees did not vigorously, or even half-heartedly, object to Appellant's allegation.[8] Consequently, it is unclear to the panel whether Appellant voluntarily entered into the Eviction Agreement. In addition, it is also questionable whether Appellant obtained legal advice from independent counsel prior to

[8] During oral argument, Appellees' counsel also stated that Appellees had chosen not to bring a motion to dismiss at an earlier time based on the waiver because they wanted to afford Appellant the opportunity for oral argument.

entering into the Eviction Agreement in light of the fact that he is unrepresented. These issues respecting the validity and enforceability of the purported waiver are, like good faith, fact-intensive, which we are not well-equipped to decide in an appellate setting, and if it were necessary to decide this appeal on this ground, remand to the bankruptcy court for the necessary factual determinations would be appropriate. See In re Thomas, 287 B.R. 782, 785 (9th Cir. BAP 2002). Absent such a factual determination, we decline to give effect to the purported waiver, and will decide the matter on the merits.

B. The Code Provides Appellees with the Right to Seek Relief from the Purchase Agreement Prior to the Expiration of Appellant's Time to Assume It

Appellees acknowledge that after Appellant filed for chapter 13 relief, he was afforded 60 days from the petition date to assume the purchase agreement pursuant to § 108(b).[9] Thus, Appellant would have had until June 13, 2005, to assume the purchase agreement. However, as of August 19, 2005, the date of Appellant's plan confirmation hearing, Appellees assert that Appellant had done nothing to assume the purchase agreement nor provided for assumption of such in his second amended plan. Therefore, the time to assume the purchase agreement expired.

[9] The parties and the bankruptcy court rely on § 108(b) in determining whether Appellant is entitled to an extension of time to assume the sale. However, "[t]he curing of defaults in an executory contract . . . is governed by section 365, not by the more restrictive extension-of-time provisions of section 108(b)." Coleman Oil Co., Inc. v. Circle K Corp. (In re Circle K Corp.), 127 F.3d 904, 909 n.4 (9th Cir. 1997).

The assumption of an executory contract in a chapter 13 case is governed by § 365. See In re Circle K Corp., 127 F.3d at 909; In re Ford, 159 B.R. 930, 931 (Bankr. W.D. Wash. 1993). Pursuant to § 365(d)(2),

> the trustee may assume or reject an executory contract . . . of residential property . . . of the debtor at any time before the confirmation of a plan but the court, on request of any party to such contract . . . may order the trustee to determine within a specified period of time whether to assume or reject such contract. . . .

11 U.S.C. § 365(d)(2). "'[T]he purpose behind § 365 is to balance the state law contract right of the creditor to receive the benefit of his bargain with the federal law equitable right of the debtor to have an opportunity to reorganize.'" In re Circle K Corp., 127 F.3d at 909 (citing Coleman Oil Co., Inc. v. Circle K Corp., 190 B.R. 370, 376 (9th Cir. BAP 1996)).

A debtor's interest in an executory contract falls within the definition of "property of the estate." Computer Commc'ns, Inc. v. Codex Corp. (In re Computer Commc'ns Inc.), 824 F.2d 725, 730 (9th Cir. 1987); 11 U.S.C. § 541(a)(1)(property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case"). As such, the automatic stay, which prevents "any act to obtain possession of property of the estate," enjoins a non-debtor party to an executory contract from unilaterally terminating it. Id. at 729-30; 11 U.S.C. § 362(a)(3). Consequently, "an executory contract that is property of the estate can only be terminated after a grant of relief from the stay." Carroll v. Tri-Growth Centre City, Ltd. (In re Carroll), 903 F.2d 1266, 1271 (9th Cir. 1990).

It is clear that as of the petition date (April 12, 2005) § 365(d) provided Appellant with the right to assume the executory purchase agreement and consummate the sale up to the time of his chapter 13 plan confirmation. However, Appellees also had the right to seek relief from the automatic stay as to the purchase agreement which, if granted, would allow them to terminate the sale and proceed with eviction. Thus, Appellant's entitlement to additional time to consummate the sale is dependent on whether the bankruptcy court abused its discretion in allowing retroactive relief from the stay.

C. The Bankruptcy Court Did Not Abuse Its Discretion in Granting Retroactive Relief from the Automatic Stay

Appellant asserts that the stipulated judgment was entered in violation of the automatic stay, and thus, void. Therefore, retroactive relief from the stay was required for the stipulated judgment to be valid. In granting retroactive relief, Appellant argues that the bankruptcy court abused its discretion because it relied on an incomplete set of facts. Specifically, he contends the court erred in finding that he had filed his petition in bad faith and further erred in relying on Lyons' testimony that Appellees and Lyons were not aware of the bankruptcy.

Clearly, the act of filing the stipulation in state court was in violation of the automatic stay. See In re Computer Commc'ns Inc., 824 F.2d at 728-31 (holding that a debtor's interest in an executory contract is estate property, and thus, protected by the stay). Absent annulment of the stay, the state court's approval of the stipulation and subsequent issuing of the writ for possession are void as a matter of law. See Schwartz v.

United States (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992).

Section 362(d) empowers the bankruptcy court to annul the stay so as to retroactively ratify any action taken in violation of the stay that would otherwise be void. Id. at 573. It states

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay-
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> (1) for cause, including lack of adequate protection of an interest in property of such party in interest;
>
> (2) with respect to stay of an act against property under subsection (a) of this section, if-
> (A) the debtor does not have equity in such property; and
> (B) such property is not necessary to effective reorganization.

11 U.S.C. § 362(d)(1)-(2).

In determining whether there is cause to annul the automatic stay and thereby grant retroactive relief, a court must balance the equities. In re Nat'l Envtl. Waste Corp., 129 F.3d at 1055. The two factors which courts typically focus on in deciding whether or not to annul the stay are: "(1) whether the creditor was aware of the bankruptcy petition; and (2) whether the debtor engaged in unreasonable or inequitable conduct, or prejudice would result to the creditor." In re Fjeldsted, 293 B.R. at 24. These two factors, however, are not exhaustive and many other factors can be employed "which further examine the debtor's and creditor's good faith, the prejudice to the parties, and the judicial or practical efficacy of annulling the stay." Id. at

24-25. Such other factors include:

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

Id. at 25.

In deciding whether the factors support annulment of the stay, a court should keep in mind that the factors present merely a framework for analysis and a case could arise where one factor

so outweighs the others as to be dispositive. Id.

1. The bankruptcy court's factual findings support a determination that Appellant engaged in inequitable conduct

Appellant complains that the court erred in finding that his current bankruptcy was filed in bad faith. He acknowledges that he has filed multiple bankruptcies in the past five years; nevertheless, he maintains that these bankruptcies were all filed in good faith and each benefitted the first and second trust deed holders on the property. Appellant contends that his first four filings (related to failed business ventures) were individually filed in error by his original attorney and subsequently consolidated into one; his fifth and sixth bankruptcies were initiated in order to clear title to the property by eliminating tax liens; and his seventh bankruptcy was filed to preserve his rights under the stipulation. Based on the reasons for his seven filings, Appellant believes that his current case was filed in good faith. We disagree.

In determining whether a chapter 13 debtor is acting in bad faith, a court must apply a totality of the circumstances test and consider the following factors:

> (1) whether the debtor "misrepresented facts in his [petition or] plan, unfairly manipulated the Bankruptcy Code, or otherwise [filed] his Chapter 13 [petition or] plan in an inequitable manner,"
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> (2) "the debtor's history of filings and dismissals,"
>
> (3) whether "the debtor only intended to defeat state court litigation," and
>
> (4) whether egregious behavior is present.

Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999)(citations omitted). Fraudulent intent by the debtor is not required for a finding of bad faith. Id.

Here, the bankruptcy court found that 1) Appellant had "filed six bankruptcy petitions over the years," which "except for the two Chapter 7 petitions," were "geared basically at protecting his house"; 2) "[Appellant's] only purpose in filing for Chapter 13 protection [was] to defeat state court litigation"; and 3) Appellant knew that time was of the essence and if he did not close escrow it would result in the loss of the property. Hr'g Tr. at 101-03, Aug. 19, 2005. Although the court did not determine Appellant's conduct to be egregious, its other findings are more than ample to support its conclusion that the case was filed in bad faith. As there is evidence in the record to support those findings, they are not clearly erroneous. Anderson, 470 U.S. at 574.

2. The record supports the bankruptcy court's finding that Appellees lacked knowledge of the bankruptcy filing at the time of the entry of the stipulated judgment

Appellant contends that at the time of the August 19, 2005 evidentiary hearing, the bankruptcy court was not aware of information which he believes would have discredited Lyons' testimony. It is true that, as of the time of the hearing, Lyons was under federal indictment for five counts of bankruptcy fraud, which indictment had been pending since July 2004. Since the hearing, Lyons has been convicted of bankruptcy fraud

(concealment of assets and aiding and abetting) and disbarred.[10] Based on the indictment, and ultimate conviction, Appellant complains that the court incorrectly assumed that Lyons was being truthful when he testified that he did not have notice of the bankruptcy prior to filing the stipulated judgment.

Certainly, a bankruptcy fraud conviction would have had some bearing on the credibility afforded Lyons' testimony by the bankruptcy court.[11] However, as Lyons did not enter a guilty plea until after the August 19, 2005 hearing, there was no conviction that could have been used as evidence to impeach his credibility at the hearing. See Fed. R. of Evid. 609. Lyons could not have been impeached based solely on an outstanding indictment. See Michaelson v. U.S., 335 U.S. 469, 482 (1958)("Only a conviction . . . may be inquired about to undermine the trustworthiness of a witness."); U.S. v. Maynard, 476 F.2d 1170, 1174 (D.C. Cir. 1973)("As a general rule, it is improper to impeach a witness by showing an outstanding indictment without a conviction.").

There is no indication that the bankruptcy court committed a clear error of judgment in finding that Appellees and Lyons lacked knowledge of the bankruptcy. At the evidentiary hearing,

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[10] Lyons entered a guilty plea on September 2, 2005, and was subsequently suspended from practicing law in California. beginning on November 7, 2005, on the basis of the conviction.

[11] The bankruptcy court made the following comments regarding Lyons' testimony: "I believe Mr. Lyons. I have no reason to think that he was lying and no way he was [sic] going to get on the stand and risk not only this license, but his reputation with that type conduct." Hr'g Tr. at 104, Aug. 19, 2005.

Lyons testified under oath that he had not received any e-mail, voicemail, or notice of Appellant's bankruptcy as of April 18, 2005 (the date the stipulation was filed in state court). The court clearly provided in its ruling that it had evaluated Lyons' veracity and found his testimony to be truthful based upon a declaration filed by him four months earlier which supported his testimony concerning the conversation he had with Appellant regarding escrow closing. And even more importantly, the court found that there was no indication that Appellees knew about Appellant's bankruptcy.

In determining whether the court abused its discretion, we must give respect to its opportunity to judge the credibility of the witnesses. In re Fjeldsted, 293 B.R. at 18. At no time during the hearing did Appellant (who was represented by counsel) object to Lyons' testimony nor provide any evidence to discredit it. Moreover, as previously noted, even if Appellant had attempted to present evidence of Lyons' indictment to the court, such evidence would have been impermissible for the purpose of impeaching his testimony. See Fed. R. of Evid. 609 ("For the purpose of attacking the credibility of a witness, evidence that a witness other than an accused has been convicted of a crime shall be admitted. . . ."). The only testimony presented by Appellant to rebut Lyons' testimony was his own statement that he may have left a voicemail at Lyons' office sometime between April 13 and 14, 2005. In weighing this statement with Lyons' and Wilson Young's testimony and the undisputed evidence that the written notice of the bankruptcy was not mailed to Lyons until April 18, 2005, we do not find that the court abused its

discretion in determining that Lyons and Appellees lacked knowledge of the bankruptcy when the stipulation was filed.

3. A balancing of the equities supports granting retroactive relief from the automatic stay

As discussed above, the test for whether retroactive relief from the automatic stay should be awarded is a balance of the equities. In re Nat'l Envtl. Waste Corp., 129 F.3d at 1055. Prior to granting retroactive relief, the bankruptcy court balanced the equities in favor of both Appellant and Appellees. The bankruptcy court acknowledged that if the relief sought was granted, Appellant would lose 1) the substantial sum of money paid in relation to the purchase agreement, and 2) the increase in equity in the property. However, when these inequities were balanced against the court's additional finding that Appellant had filed his current petition in bad faith based upon 1) the number of past filings related to protecting the property; 2) the purpose for filing his current bankruptcy; 3) Appellant's knowledge that time was of the essence in closing escrow; and 4) Appellees lack of knowledge as to the bankruptcy when the stipulation was filed, the court determined that annulment of the stay was warranted.

We do not find that the court committed a clear error of judgment in balancing the equities. It addressed many of the factors suggested in Fjeldsted and viewed the equities of both Appellant and Appellees prior to granting retroactive relief of the automatic stay. Thus, the bankruptcy court did not abuse its discretion in annulling the stay.

## VI. CONCLUSION

For the foregoing reasons, we AFFIRM the bankruptcy court's order.