NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. AZ-03-1047-PaDK
	AZ-03-1093-PaDK
MILIVOJ MARINKOVIC,	(consolidated)
Debtor.	Bk. No. 02-00378
	Adv. No. 02-00029
MILIVOJ MARINKOVIC,	
Appellant,	
v.	**M E M O R A N D U M**[1]
MIDLAND LOAN SERVICES, INC.,	
Appellee.	

Submitted on Briefs Without Oral Argument
on October 19, 2006

Filed - November 8, 2006

Appeal from the United States Bankruptcy Court
for the District of Arizona[2]

Honorable James M. Marlar, Bankruptcy Judge, Presiding.

Before: PAPPAS, DUNN and KLEIN, 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 or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

[2] These appeals were reopened by order of the Panel on March 23, 2006, as instructed in the order of remand from the United States Court of Appeals for the Ninth Circuit on March 7, 2006.

FACTS

The facts in this chapter 11[3] case are complex. We only highlight those directly relevant to this appeal.[4]

Milivoj Marinkovic ("Marinkovic") and his wife, Eva ("Mrs. Marinkovic"), owned a 20-unit apartment complex (the "Property") in Tucson, Arizona. On March 6, 1997, they executed a promissory note and obtained a loan from Southern Pacific Thrift & Loan Association ("Southern Pacific") for $189,000, secured by a deed of trust on the Property. On September 9, 1999, Southern Pacific assigned its interest in the note and deed of trust to La Salle National Bank ("La Salle"), as Trustee for J.P. Morgan Commercial Finance Corporation. La Salle appointed Midland Loan Services,

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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 in force 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 ("BAPCPA").

[4] As a pro se litigant, we granted Appellant Marinkovic permission to file informal briefs. Even so, his Opening Brief and Reply Brief are largely incomprehensible and raise numerous issues not relevant in this appeal. His Excerpts of Record are also flawed, incomplete, contain mere snippets of information, and appear to present portions of documents that favor his position without explanation why full documents have not been provided.

Marinkovic is not alone in failing to comply with the standards for appellate submissions. Appellee, represented by counsel, cites to numerous documents in its Brief that are not included in either the Appellant's or Appellee's Excerpts of Record. Appellee did not include copies of some of its own pleadings filed in the bankruptcy court or transcripts or records from the numerous apparently relevant proceedings in which both parties have engaged in litigation concerning the Property. Appellee also failed to comply with BAP Rule 8009-(b)1(b)2 which requires all pages in submitted Excerpts of Record to be consecutively numbered.

Largely as a matter of necessity, we have consulted the records of our previous decisions concerning the disputes between these parties, and where required, we have examined documents in the bankruptcy court's record (Arizona Bankruptcy Case no. 02-0378-TUC-JMM).

Inc. ("Midland") as its agent and attorney-in-fact with respect to the Note and Deed of Trust.

The Default on the Note and Early Court Action in Arizona

Following the assignment to La Salle, some time in 1999, Midland alleges that Marinkovic fell delinquent in his note payments. In November 1999, Marinkovic informed Midland that his son, Mel Marin ("Marin"), was his agent for purposes of the loan, and Marinkovic purported to transfer the Property to Marin as Trustee of Happy Trust Three (the "Family Trust"), a revocable living trust. There is no evidence in the record that any deed or other document was executed in 1999 formally transferring title to Marin or the Family Trust.

In July 2000, in a divorce action between Marinkovic and Mrs. Marinkovic, a California superior court ordered that the Property be sold as part of the community property settlement. However, the Property was not sold as required by the California superior court.

On February 12, 2001, Midland declared the loan in default, gave notice of its intent to conduct a trustee's sale of the Property, and filed a receivership action against Marinkovic in Pima County (Arizona) Superior Court. On March 6, 2001, Marinkovic executed a quitclaim deed that transferred ownership of the Property to the Family Trust. Marin attempted to prevent the trustee's sale by filing suit in the U.S. District Court for the District of Arizona. Marin v. La Salle Nat'l Bank et al., (D. Az. Case no. 01-00050). But on August 8, 2001, the district court dismissed Marin's lawsuit with prejudice because Marin was not a

party to the loan transaction. The Ninth Circuit later affirmed. Marin v. La Salle Nat'l Bank, (9th Cir. Case No. 01-17232, June 13, 2002.).

The trustee's foreclosure sale was stayed when Marinkovic filed a chapter 13 bankruptcy case on August 22, 2001, in the Arizona bankruptcy court. His bankruptcy schedules indicated that he owned the Property. At a hearing on October 22, 2001, the bankruptcy court, sua sponte, dismissed the chapter 13 case because Marinkovic failed to file a plan. An order dismissing the case was entered on October 26, 2001. Marinkovic appealed, but requested no stay pending appeal. We affirmed the dismissal order of the bankruptcy court, Marinkovic v. Midland Loan Service,(9th Cir. BAP no. AZ-01-1544-KRyB, August 15, 2002).

The Family Trust Bankruptcy Case in New York

One day after the hearing at which the bankruptcy court dismissed Marinkovic's chapter 13 case, and three days before entry of the dismissal order, on October 23, 2001, Marin filed a chapter 11 case on behalf of the Family Trust in the bankruptcy court for the Northern District of New York. Case no. 01-66282 (SDG)(the "Trust Bankruptcy Case"). The Family Trust's schedules filed in the Trust Bankruptcy Case assert that the Family Trust owned the Property in fee simple.

Midland filed a motion in the Trust Bankruptcy Case for relief from the automatic stay with respect to the Property so it could continue with the foreclosure proceedings. In the alternative, Midland asked that the Trust Bankruptcy Case be dismissed because it was a bad faith filing, or because the Family

Trust was not a business trust eligible for relief under chapter 11. The U. S. Trustee joined Midland's motion to dismiss.

The bankruptcy court in the Trust Bankruptcy Case dismissed the case because the Family Trust was not eligible for relief under chapter 11. Although the court did not expressly rule on Midland's allegations of bad faith, the New York bankruptcy court noted that the Family Trust

> was not created to make a profit [one of the legal requirements in New York for a business trust]. It was created for tax purposes and to keep . . . [Marin's] parents' property out of the hands apparently of his sister and to . . . divest his mother of property that was previously titled to her by the use of some ancient power of attorney, when that property was at the . . . very heart of a pending matrimonial action in the State of California.

Tr. Hr'g 234:17-24 (Trust Bankruptcy Case)(January 22, 2002).

Although Midland's motion for stay relief was mooted by the court's decision to dismiss the case, the New York bankruptcy court granted a limited version of Midland's request that the dismissal be with prejudice as to the re-imposition of the automatic stay on foreclosure of the Property. The bankruptcy court acknowledged Midland's concern that the Family Trust would immediately file another bankruptcy case

> . . . in some other forum, in an effort to, once again, frustrate Midland's efforts to complete its foreclosure action of the Arizona property. This Court believes it has heard sufficient testimony today that it may invoke its general power pursuant to section 105 and provide that the dismissal of this case be with prejudice to the imposition of the automatic stay, vis-a-vis the [Property], in any subsequent bankruptcy case filed in any jurisdiction by Happy Trust Three.

Tr. Hr'g 236:1-9 (Trust Bankruptcy Case). However, the court

clarified that its order would only be effective for 180 days, and would only restrict filings by the Family Trust. Tr. Hr'g 236:10-17 (Trust Bankruptcy Case). The New York bankruptcy court implicitly recognized it lacked jurisdiction over other parties who might file bankruptcy petitions (i.e., Marinkovic), but the bankruptcy judge indicated he "would strongly suggest" that others not file for the purpose of imposing the stay on Midland's foreclosure proceedings. Tr. Hr'g 236:12 (Trust Bankruptcy Case).

The bankruptcy court directed Midland's counsel to prepare an order dismissing the case, which it entered on January 31, 2002. The order included, inter alia, the following findings of fact:

> 1. . . . [the Family Trust] is not a business trust, and was not intended to be established as a business trust within the meaning of Section 2 of the General Associations Law of New York.
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> 2. The Property . . . was not owned by [the Family Trust} at the time of its inception in 1999, and was not deeded [to the Family Trust] until March 2001, a time subsequent to the commencement by Midland of foreclosure proceedings against the Property.
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> . . . .
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> 4. The Arizona chapter 13 filing of [Marinkovic] included the Property as an asset of that estate, despite the fact that title to the Property had passed by deed nearly six months before said individual bankruptcy proceeding was filed.
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> 5. This chapter 11 case is the fifth judicial proceeding since February 2001 by [Marin and/or Marinkovic] to attempt to delay and prevent Midland's completion of its foreclosure and trustee's sale of the Property.
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> 6. . . . [T]here is, as evidenced by the prior conduct of [Marin and Marinkovic] a substantial likelihood that [Family Trust] will file or cause to be filed further bankruptcy proceedings . . . for the purpose of further hindering and delaying Midland's efforts to complete its foreclosure and Trustee's sale of the Property.

The order dismissed the case with prejudice as discussed above.

Two other features of this order are noteworthy. The first decretal paragraph provides, "[it is] ORDERED, that this chapter 11 case is dismissed as of this 25th day of January 2002." Second, the bankruptcy judge made changes to the terms of counsel's proposed order in his own handwriting, accompanied by his initials.[5]

Marin appealed the dismissal order to the United States District Court for the Northern District of New York. N.D.N.Y. Case no. 02-01518. The district court affirmed the bankruptcy court's order on December 19, 2002, and later, so did the Second Circuit. The Second Circuit's Summary Order provided that, "The [bankruptcy court's findings] were not clearly erroneous and they amply justify the bankruptcy court's conclusion that bankruptcy protection was not available." Mel M. Marin v. Midland Loan Services (In re Happy Trust Three), No. 03-5004 (2nd Cir., December 7, 2004).

No stay was entered pending these appeals. On January 25, 2002, the same day that the New York bankruptcy court's dismissal order was effective, the trustee under Midland's deed of trust conducted a foreclosure sale of the Property. A Trustee's Deed, recorded on January 29, 2002, conveyed the Property to the successful bidder at the sale, La Salle.

Also on January 25, 2002, Marin attempted to transfer an 86 percent interest in the Property to Marinkovic and Mrs.

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[5] The corrected and initialed entry appears on page 4 of the Order. The original text read: "ORDERED, that this Order is intended as an in rem order of relief, effective against the Property." The corrected entry reads: "ORDERED, that this Order is intended as an in rem order of dismissal, effective against the Property.

Marinkovic, and a nine percent interest to himself, leaving the Family Trust with a five percent interest in the Property.

Marinkovic's Chapter 11 Case in Arizona

The day before the New York bankruptcy court entered its order of dismissal, on January 30, 2002, Marinkovic filed a chapter 11 petition in the Arizona bankruptcy court.

On February 25, 2002, now four weeks after the foreclosure sale, there was a hearing in Pima County Superior Court on Midland's motion to dismiss the receivership action, which action included a counterclaim by Marinkovic. The state court's minute order concerning that hearing states:

> Mr. Marinkovic is present. . . . The Court notes that, on February 5, 2002, after having reviewed the file and received Defendant's Notice of Filing Bankruptcy, this Court called the Honorable James M. Marlar, U.S. [Bankruptcy] Judge for the District of Arizona, and advised him of this hearing. Judge Marlar orally lifted the Stay with respect to this Motion to Dismiss. . . . The Court notes that Mr. Mel M. Marin is not a party to this case; the Court will not consider the pleadings he has submitted. IT IS ORDERED that the Motion to Dismiss is granted.

The dismissal order in the receivership action did not specify whether it was with prejudice. Marinkovic did not timely appeal the state court dismissal order, and did not challenge the bankruptcy court's oral ruling for relief from the automatic stay in the chapter 11 case until 18 months later. On April 22, 2002, Marinkovic filed a motion in Pima County Superior Court to reopen the time to appeal the dismissal order in the receivership action, which was denied on June 7, 2002.

On February 26, 2002, Marinkovic commenced an adversary proceeding in the chapter 11 case to require Midland to turn over the Property. Marinkovic v. Midland Loan Servs., Inc., Bankr. D.Az. Adv. Pro. No. 02-0029. In his complaint, Marinkovic claimed to hold fee simple ownership of the Property. He also alleged that the Property was property of the chapter 11 bankruptcy estate. On March 22, 2002, Midland filed a motion for summary judgment (the "Summary Judgment Motion"). Marinkovic filed no opposition to this motion, but Marin filed various documents in opposition.

On April 18, 2002, the bankruptcy court appointed a chapter 11 trustee, Randall Sanders. On May 20, 2002, the trustee filed a "Notice by Trustee of Substitution of Trustee as Plaintiff" in the adversary proceeding. There is no indication in the record that any party objected to the Trustee's Notice. A review of the dockets of both the chapter 11 case and the adversary proceeding reveals that the trustee did not oppose Midland's Summary Judgment Motion.

The bankruptcy court conducted a hearing on the Summary Judgment Motion on July 1, 2002. Marinkovic, the trustee, Midland and the U.S. Trustee were present and represented by counsel. Marin appeared as representative of the Family Trust.

The bankruptcy court granted the Summary Judgment Motion in a Memorandum Decision signed on August 2, 2002. The court made several rulings, including that:

> (1) . . . the January 25, 2002, Order of the United States bankruptcy Court for the Northern District of New York was, is and shall be deemed effective as of January 25, 2002; (2) . . . the automatic stay applicable to the instant case shall be annulled as to

> the property in favor of Midland; [and] (3) . . . that the trustee's sale, held on January 25, 2002, effectively and completely eliminated all legal and equitable interests of the debtor and those claiming interests by, through or under him.

A Judgment embodying these rulings was entered on August 29, 2002.[6]

The Sale of the Property and Eviction of Marinkovic

Although La Salle purchased the Property at the foreclosure sale on January 25, 2002, Marinkovic did not vacate the premises. On September 18, 2002, Midland served a "Notice of Termination of Rental Agreement" on Marinkovic, which demanded that he vacate the Property no later than October 31, 2002. Marinkovic did not do so. On November 18, 2002, Midland filed a motion to annul the automatic stay in the chapter 11 case in order to terminate Marinkovic's asserted right to possession of the Property. A hearing was held on Midland's motion on December 16, 2002, where Midland and the chapter 11 trustee were represented by counsel; Marinkovic and Marin were also present. The bankruptcy court granted Midland's motion to terminate the stay to allow Midland to recover possession of the Property, but the court declined to annul the stay to make it retroactive. The court entered an order consistent with this decision on December 16, 2002.

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[6] The provisions of the Judgment as proposed by counsel were altered and initialed by the bankruptcy judge. The original text contained the phrase "and Randall Sanders, as Chapter 11 operating trustee, having appeared in opposition to the motion." The judge changed the wording to: "and Randall Sanders, as Chapter 11 operating trustee, having appeared and made comments."

Marinkovic filed a timely appeal of the order terminating the stay on December 24, 2002.[7] That appeal, BAP AZ-03-1047, is one of those before us for decision here. On January 29, 2003, Marin filed an Emergency Motion with this Panel for stay pending appeal, attempting to prevent the sale of the Property to Magnolia Bearcat, LLC, an unrelated third party. This Panel denied the Emergency Motion on January 30, 2003, on the grounds that Marin had not demonstrated a probability of success on the merits and that he had no standing because he was not a party in the adversary proceeding.[8] On January 31, 2003, La Salle completed the sale of the Property to Magnolia Bearcat, LLC.

On March 13, 2003, the bankruptcy court terminated the stay to allow Magnolia Bearcat to pursue eviction proceedings in state court against Marinkovic. Marin filed a complaint against Magnolia Bearcat, Midland, La Salle, and related parties in Pima County Superior Court, no. C-20031459 (the "Magnolia Bearcat Litigation"). Marin's complaint alleged that the defendants were

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[7] This notice of appeal also addresses other judgments, orders and rulings. The Panel determined in a December 9, 2003, Order Denying Motion for Rehearing and Clarification; Order Consolidating Appeals; Order Setting Final Deadline for Completion of Record, BAP AZ-03-1047 & AZ-03-1093 (Consolidated), that Marinkovic's Notice of Appeal was untimely or fatally premature as to those other judgments, orders and rulings. It ordered that only the bankruptcy court's December 16, 2002 order terminating stay would be reviewed in this appeal, 03-1047. The Panel noted, however, that should Marinkovic prevail in his other pending appeal before us, 03-1093 (discussed infra), he may then have a right to reinstate his appeal of the other orders, judgments and rulings referenced in his notice of appeal.

[8] Order Denying Motion for Stay Pending Appeal (9th Cir. BAP, January 30, 2003). In addition to the reasons noted in the Panel's order of January 30, 2003, we note that Marin failed to first seek a stay from the bankruptcy court, as required by Fed. R. Bankr. P. 8005.

guilty of conversion and conspiracy to commit fraud arising from La Salle's purchase of the property at the foreclosure. The defendants filed a motion to dismiss the Magnolia Bearcat Litigation, which was granted on June 6, 2003. The superior court dismissed on the grounds of res judicata (claim and issue preclusion), explaining that Marin had filed and litigated related claims in two cases in the federal district court, two cases in Pima County Superior Court, and three actions in the bankruptcy court. Marin appealed the state court order of dismissal to the Arizona Court of Appeals, which affirmed the superior court on July 2, 2004.

Midland alleges that Marinkovic was thereafter evicted.[9] We find nothing in the record that casts any doubt on this assertion.

Attempts to Amend August 29, 2002, Orders

On September 6, 2002, Marinkovic filed a "Notice and Motion to Amend Orders of Aug 29th [granting Summary Judgment] and Joinder in Motions of Family Trustee." On November 26, 2002, the bankruptcy court issued a Memorandum Decision regarding pending motions, that included disposition of Marinkovic's September 6 motion to amend the August 29 order. The court deemed the September 6 motion to be a motion for reconsideration under Fed. R. Civ. P. 59 and Fed. R. Bankr. P. 9023. The court determined that there was no legal basis to grant the motion. The court denied the motion in an order entered November 26, 2002.

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[9] Appellee's Answering Br. at 15, citing Marinkovic's Opening Br. to the Ninth Circuit, No. 05-15176, dated April 22, 2005 at 6.

On December 16, 2002, Marin filed a "Notice of and Motion to Extend Time Within Which to File Notice of Appeal and Motion to Stay Judgments of November 26, 2002" ("Motion to Extend Time"). The court conducted a hearing on Marin's Motion to Extend Time on January 7, 2003, and took the matter under advisement.

On February 3, 2003, the bankruptcy court issued its Memorandum Decision regarding Marin's Motion to Extend Time. The court observed that Rule 8002(c)(1) allows the court to extend the time for filing a notice of appeal by any party, unless the order or decree to be appealed falls into one of the six categories specified in the Rule. Subsection (A) of Rule 8002(c)(1) prohibits the bankruptcy court from extending the time to appeal an order granting relief from the automatic stay. The bankruptcy court explained:

> Marin requested that the court extend the time to appeal the denial of his motion to reconsider the August 29, 2002 Judgment annulling the automatic stay under § 362. The Order denying the motion to reconsider was entered on November 26, 2002. Marin filed his motion to extend twenty days later on December 16, 2002. Clearly, Marin is barred from appealing the original Judgment annulling the automatic stay, because the time to file such an appeal expired ten days after the motion to reconsider was denied, and the court cannot grant an extension even on the showing of "excusable neglect" under Rule 8002(c)(1)(A).[10]
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> However, Marin is appealing the Order denying the motion to reconsider the Judgment granting relief from stay. The court is not aware of any case law, nor has Marin cited any, that stands for the proposition that a motion to reconsider a Judgment granting relief from the

[10] The court noted elsewhere in its decision that Marin's motion conceded that "there is no appeal against the order of 8/29."

> automatic stay should be treated differently than the original Judgment for purposes of granting an extension to the time to appeal under Rule 8002(c)(1)(A). To interpret the 1997 amendment to subsection (c) as Marin would have it would clearly go against the underlying purpose for its enactment. Subsection (c)(1)(A) was promulgated so that the party which was granted a Judgment for relief from stay could rely on the finality of that Judgment and exercise its rights after the 10-day appeal period had run. Therefore, the court does not have the authority to extend the time to appeal the November 26, 2002 Order.

The bankruptcy court also observed that even were it not prohibited by the Rules from entertaining Marin's request for an extension of time to appeal the Order denying reconsideration, Marin did not show "excusable neglect" as required by Rule 8002(c)(2). Instead, the bankruptcy court found that Marin could and should have monitored the status of the adversary proceeding by referring to the docket, and the court rejected Marin's argument that he could not do so because he was in the military during the relevant time because Marin was a reservist, not on active duty, and therefore he was not entitled to the protection of the Soldiers and Sailors Civil Relief Act of 1940.

For all these reasons, on February 3, 2003, the bankruptcy court entered an order denying Marin's motion to extend time to appeal. Marin and Marinkovic jointly filed a Notice of Appeal on February 12, 2002. This appeal, BAP AZ-03-1093, is also before us.

The Court of Appeals' Decision and Remand to the BAP

Marin and Marinkovic filed numerous motions with this Panel between 2003 and the present. Among the more critical rulings of

the Panel concerning these motions were:

> (1) An order entered January 30, 2003, denying Marin's motion for a stay pending appeal, filed by Mel Marin, because he did not demonstrate a probability of success on the merits. This order also determined that Marin had no standing to appeal, or to prosecute, 03-1047 because he was not a party to the adversary proceeding below.
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> (2) Our Order Denying Motion for Rehearing and Clarification; Order Consolidating Appeals; Order Setting Final Deadline for Completion of Record entered on December 9, 2003. This order again concluded that Marin had no standing to appeal in 03-1047 or in 03-1093. It also consolidated these two appeals, and warned that they would be dismissed if Marinkovic did not comply with certain directions.
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> (3) The Order Dismissing Appeal for Failure to Prosecute, entered on November 2, 2004.
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> (4) The Order of January 4, 2005, which denied Marin's motion for reconsideration of the Order Dismissing Appeal. However, as discussed below, the Panel indicated its willingness to vacate the dismissal and hear the appeals if the Ninth Circuit remanded.
>
> (5) And, after action by the Ninth Circuit, our Order After Remand: Vacating Dismissal and Reopening Appeals of March 23, 2006.

On December 15, 2005, the United States Court of Appeals for the Ninth Circuit considered Marinkovic's appeal of our decision dismissing the appeals for failure to prosecute, and Marin's appeal of our decisions finding that he lacked standing to appeal. The court affirmed "the BAP's determination as to Marin's standing[11] and remanded to allow Marinkovic, as the sole appellant, to pursue his appeal." Marin v. Midland Loan Service,

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[11] The Ninth Circuit agreed with our decision denying standing to Marin because, even if Marin were a creditor, such creditors have no independent standing to appeal automatic stay decisions. As the Court of Appeals reaffirmed, "Section 362 is intended solely to benefit the debtor's estate," citing its earlier decision in Tilley v. Vucurevich (In re Pecan Groves of Az.), 951 F.2d 242, 245 (9th Cir. 1991). The court concluded that Marin failed to demonstrate that he had a legal interest that would require him to be joined as a necessary party. In re Marinkovic, 158 Fed. Appx. at 886.

Inc., Marinkovic v. Midland Loan Services. Inc., (In re Marinkovic), 158 Fed. Appx. 885 (9th Cir. 2005).[12]

The Court of Appeals remanded the appeals to us to vacate our dismissal for failure to prosecute and, in the court's words, "allow Marinkovic, as the sole appellant, to pursue his appeal." Id. at 885 (emphasis added).

These Appeals

Thus, after this protracted course of proceedings, our task is to review two orders of the Arizona bankruptcy court. One order, entered December 16, 2002, terminated the automatic stay in the chapter 11 case and allowed Midland to evict Marinkovic from the Property after the foreclosure sale. The other denied a request to extend the time to appeal the order declining to reconsider the August 29, 2002, stay relief order.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (G). We have jurisdiction pursuant to § 158(b)(1).

ISSUES

1. Whether the appeal of the order terminating the automatic stay to allow Midland to evict Marinkovic is moot.

2. Whether the bankruptcy court erred in denying Marinkovic's motion to extend the time to appeal

[12] Our citation to this unpublished decision, to reflect the status of this case, is authorized by Ninth Circuit Rule 36-3.

the order declining to reconsider the August 29, 2002, stay relief order.[13]

STANDARDS OF REVIEW

The bankruptcy court's decision to grant relief from the automatic stay is reviewed for abuse of discretion. In re Umali, 345 F.3d 818, 822 (9th Cir. 2003); First Fed. Bank v. Robbins (In re Robbins), 310 B.R. 626 (9th Cir. BAP 2004).

We review a bankruptcy court's denial of a motion for an extension of time to file a notice of appeal for abuse of discretion. Warrick v. Birdsell (In re Warrick), 278 B.R. 182, 184 (9th Cir. BAP 2002); Nugent v. Betacom of Phoenix, Inc. (In re Betacom of Phoenix, Inc.), 250 B.R. 376, 379 (9th Cir. BAP 2000).

DISCUSSION

I.

This appeal (AZ-03-1047) is moot.

Marinkovic's December 24, 2002, notice of appeal, that initiated AZ-03-1047, referenced and sought review of several

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[13] Marinkovic's Opening Brief failed to designate the issues on appeal. Ordinarily, failure to designate and argue the issues on appeal in the appellant's opening brief results in a waiver of those issues. Law Offices of Neil Vincent Wake v. Sedona Inst. (In re Sedona Inst.), 220 B.R. 74, 76 (9th Cir. BAP 1998). However, our Order of December 9, 2003, clarified that in these appeals we have jurisdiction to review (1) in AZ-03-1047, the December 16, 2002, order terminating the automatic stay to allow eviction of Marinkovic and (2) in AZ-03-1093, Marinkovic's challenge to the memorandum and order of February 3, 2003, denying an extension of time to file a notice of appeal from one of the court's orders entered November 26, 2002. Order Denying Motion for Rehearing and Clarification; Order Consolidating Appeals; Order Setting Final Deadline for Completion of Record, BAP Nos. AZ-03-1047 & 1093 (December 9, 2003). Appellee acknowledges these are the matters before the Panel. We thus have formulated the issues on appeal as presented above.

different judgments, orders and rulings of the Arizona bankruptcy court. However, as we determined in our December 9, 2003 order, we have jurisdiction only to consider the bankruptcy court's order of December 16, 2002, terminating the automatic stay to allow Midland to evict Marinkovic.

A short recap of the events that followed the bankruptcy court's entry of the order terminating the stay to allow Midland to evict Marinkovic is helpful:

(1) Marinkovic filed a timely appeal of the order terminating the stay.

(2) On January 29, 2003, Marin filed an Emergency Motion for stay pending appeal to prevent Midland from selling the Property.

(3) This Panel thereafter denied Marin's Emergency Motion.

(4) Neither Marin nor Marinkovic appealed this Panel's decision denying Marin's Emergency Motion.

(5) The Property was sold on January 31, 2003, by La Salle (the purchaser at the trustee's sale) to Magnolia Bearcat, LLC, an unrelated third party.

(6) The bankruptcy court then terminated the stay again on March 13, 2003, this time to allow Magnolia Bearcat to pursue a state court action to evict Marinkovic.

(7) Marin and Marinkovic sued Magnolia Bearcat in Arizona Superior Court, alleging that Magnolia Bearcat purchased the Property with knowledge of, and subject to, Marin's and Marinkovic's claims to the Property.

(8) The Arizona court dismissed all claims in that action, including those against Magnolia Bearcat.

(9) The Court of Appeals of Arizona affirmed the superior

court's dismissal.

(10) Marinkovic was evicted.

"This Panel can only address actual cases and controversies." Tennant v. Rojas (In re Tennant), 318 B.R. 860, 867 (9th Cir. BAP 2004) (quoting Omoto v. Ruggera (In re Omoto), 85 B.R. 98, 99-100 (9th Cir. BAP 1988)). "Bankruptcy's mootness rule 'developed from the general rule that the occurrence of events which prevent an appellate court from granting effective relief renders an appeal moot, and the particular need for finality in orders regarding stays in bankruptcy.'" Onouli-Kona Land Co. v. Estate of Richards (In re Onouli-Kona Land Co.), 846 F.2d 1170, 1172 (9th Cir. 1988) (quoting Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1423 (9th Cir. 1985)).

From the events chronicled above, it is clear that Marinkovic's appeal (AZ-03-1047) of the order allowing Midland to evict him from the Property is moot because, even were there merit to Marinkovic's position, the Panel can not grant any effective relief to Marinkovic.

No stay pending appeal was entered, and the Property has been transferred by Midland to an unrelated third party who is not a party to this appeal. It is therefore of no moment that, at the time the bankruptcy court made its decision and that Marinkovic filed this appeal, there was a live controversy; that controversy no longer exists.

> It is an inexorable command of the United States Constitution that the federal courts confine themselves to deciding actual cases and controversies. See U.S. CONST. art. III, § 2, cl. 1. For a case to fall within the parameters of our limited judicial power, "it is not enough that there may have been a live case or controversy when the case was decided

> by the court whose judgment we are reviewing." Burke v. Barnes, 479 U.S. 361, 363, 93 L. Ed. 2d 732, 107 S. Ct. 734 (1987). Rather, Article III requires that a live controversy persist throughout all stages of the litigation. See Steffel v. Thompson, 415 U.S. 452, 459 n.10, 39 L. Ed. 2d 505, 94 S. Ct. 1209 (1974) ("an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed"). Where this condition is not met, the case has become moot, and its resolution is no longer within our constitutional purview.

Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125, 1128-29 (9th Cir. 2005). The most common reason that a bankruptcy appeal becomes moot is when "events may occur that make it impossible for the appellate court to fashion effective relief." Focus Media, Inc. v. Nat'l Broadcasting Co. Inc. (In re Focus Media Inc.), 378 F.3d 916, 922 (9th Cir. 2004) (citing Bennett v. Gemmill (In re Combined Metals Reduction Co.), 557 F.2d 179, 187 (9th Cir. 1977)).

Marinkovic persists in asserting his ownership rights to the Property.[14] After the sale of the Property at the trustee's sale

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[14] Marinkovic and Marin have not, however, asserted ownership in consistent terms in this case. In 1999, Marinkovic alleged that he transferred the Property to Family Trust, although he did not issue a deed until March 2001. In 2000, the California Superior Court determined that the Property was community property to be sold in the divorce settlement of Marinkovic and Mrs. Marinkovic, although that court order was not obeyed. Although he clearly had transferred title in March, several months later in his chapter 13 case, Marinkovic asserted ownership of the Property. Immediately after the chapter 13 case was dismissed, Marin filed a chapter 11 case for the Family Trust, in which he claimed ownership of the Property for the Family Trust. Once the Family Trust case was dismissed, Marin attempted to transfer 85 percent of the Property to Marinkovic and Mrs. Marinkovic, five percent to himself, with six percent remaining in the Family Trust. Despite this attempted transfer, in his opposition to the instant appeal, Marin claimed full ownership of the Property in his personal capacity and that Marinkovic was his employee as manager of the Property. Then, in the litigation in the summer of 2003 against Magnolia Bearcat, Marin and Marinkovic asserted joint ownership of the Property.

to La Salle, he refused to vacate the premises. The bankruptcy court then terminated the stay so that Midland could evict him. Before a state court eviction order was obtained, La Salle sold the Property to a third party, Magnolia Bearcat. The bankruptcy court then granted stay relief so that Magnolia Bearcat could pursue Marinkovic's eviction.

Simply put, even if the bankruptcy court had abused its discretion in granting Midland stay relief to evict Marinkovic from the Property, our reversal of that order would be of no significance given later events. As the Ninth Circuit has instructed, "Where an automatic stay is lifted, the debtor's failure to obtain a stay pending appeal renders an appeal moot after assets in which the creditor had an interest are sold." Sun Valley Ranches, Inc., v. Equitable Life Ass. Society of the U.S. (In re Sun Valley Ranches, Inc.), 823 F.2d 1373, 1374 (9th Cir. 1987)(citations omitted).

Admittedly, in Sun Valley, the court acknowledged a potential exception to mootness where real property is sold to a creditor who is a party to the bankruptcy case. Id. at 1375, citing Matter of Springpart Assocs., 623 F.2d 1377 (9th Cir. 1981). As the court explained, where the court has jurisdiction over the third party, "it would not be impossible for the Court to fashion some sort of relief." Id.

However, this narrow exception to the mootness rule will not help Marinkovic. The Property was sold to Magnolia Bearcat, which is not a creditor or otherwise a party to the bankruptcy case and Magnolia Bearcat has evicted Marinkovic. Under these facts, we conclude that this appeal (AZ-03-1047) is moot because we can not

fashion any effective relief for Marinkovic.[15]

II.

The bankruptcy court did not err by denying Marinkovic's motion to extend time to appeal.

A.

Two preliminary matters must be considered before addressing the merits of this appeal.

First, this appeal (AZ-03-1093) was filed by Marin, then joined by Marinkovic. In an Order accompanying this Memorandum, we deny reconsideration of our previous decision rejecting Marin's standing to appeal the bankruptcy court's order, or otherwise granting Marin some role in this appeal. Our approach is consistent with the Ninth Circuit's instructions in its remand that this appeal proceed with Marinkovic as "the sole appellant."

Second, like the first appeal, there is a serious question whether the issues in this appeal are also moot. To the extent that the real purpose of this appeal is to review Marinkovic's claim that he owns the Property, that effort is futile because, as discussed above, the Panel cannot grant that relief. However, in our December 9, 2003, Order, we indicated that if Marinkovic prevailed in this limited appeal, he might have the right to reinstate his appeal as to one or more of the other orders referenced in his December 24, 2002, notice of appeal. We are unable to determine from the record all the issues that were raised in connection with those other orders, or if they may

[15] To the extent that there could be a lingering concern that Magnolia Bearcat purchased the Property as part of a conspiracy with Midland/La Salle, this challenge to the buyer's good faith has been fully litigated in the Arizona superior court, which dismissed any claims based on such theories.

implicate aspects of Marinkovic's bankruptcy case other than ownership of the Property. For that reason, we proceed to an examination of the merits of the second appeal.

B.

The authority allowing the bankruptcy courts to extend the time for filing a notice of appeal is found in Fed. R. Bankr. P. 8002(c).[16] Under this Rule, the bankruptcy court may grant extensions of time to file a notice of appeal, unless the order to be appealed falls into one of six categories.

In this case, the bankruptcy court first determined that the motion to extend time amounted to a de facto attempt to extend the time to appeal its August 29, 2002, order terminating the automatic stay in favor of Midland. The bankruptcy court observed that, under Rule 8002(c)(1)(A), it lacks authority to grant any extension of time to appeal a stay relief order.

We have not previously examined, nor are we aware of any decisions considering, whether a motion to reconsider a judgment granting relief from the automatic stay should be treated any

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[16] The Rule provides that:

> (1) The bankruptcy judge may extend the time for filing the notice of appeal by any party, unless the judgment, order or decree appealed from: (A) grants relief from the automatic stay under § 362, § 922, §1201, or § 1301. . . .
>
> (2) A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect. An extension of time for filing a notice of appeal may not exceed 20 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 10 days from the date of entry of the order granting the motion.

differently than the original order for stay relief for purposes of granting an extension of time to appeal that order. Though there are no other cases to consult, the Panel finds no error in the bankruptcy court's conclusion that granting the motion for extension of time under these circumstances would frustrate the purposes of disallowing extensions of time to appeal certain types of orders in bankruptcy cases. This prohibition was added to Rule 8002(c) by a 1997 amendment. According to the Advisory Committee Note for that amendment, there was an important purpose for this change to the Rule:

> The sub-division is amended . . . to prohibit any extension of time to file a notice of appeal – even if the motion for an extension is filed before the expiration of the original time to appeal – if the order appealed from grants relief from the automatic stay, authorizes the sale or lease of property, use of cash collateral, obtaining of credit, or assumption or assignment of an executory contract or unexpired lease under § 365, or approves a disclosure statement or confirms a plan. <u>These types of orders are often relied upon immediately after they are entered and should not be reviewable on appeal after the expiration of the original period under Rule 8002(a) and (b).</u>

10 COLLIER ON BANKRUPTCY, App. 8002[4] (15th ed. rev. 2005)(Emphasis added).

Stay relief, in this and most cases, is granted by the bankruptcy court for "cause." <u>See</u> § 362(d)(1)(providing that the bankruptcy court "shall grant relief from the stay . . . for cause . . . ."). In other words, to obtain stay relief, a party must demonstrate that the continuation of the automatic stay impairs some rights or interests of the moving party. Extensions of time beyond the normal ten-day period to appeal an order denying

reconsideration of a stay relief order operate to, effectively, continue the very stay the court has ordered annulled or terminated. Under such circumstances, there is a real potential for prejudice to the party for whom stay relief has been granted. As a result, the policy promoted by the prohibition in the Rule on extension of time for appeal of stay relief orders, i.e., prompt finality, could be easily frustrated if, as Marinkovic contends, the prohibition were inapplicable to appeals from orders denying reconsideration of orders dealing with the automatic stay.

Under these odd circumstances, we conclude the bankruptcy court did not abuse its discretion in denying the motion for extension of time to appeal because it feared to do so would frustrate the purpose of the limitations imposed on extensions by Rule 8002(c)(1)(A).

C.

We visit more familiar territory in evaluating whether the bankruptcy court abused its discretion in determining, under these facts, that Marinkovic had not demonstrated "excusable neglect" in failing to file a timely appeal. As we discussed in In re Warrick, in our review, we consider the factors established in Pioneer Inv. Servs. Co. v. Brunswick Assocs., Ltd., 113 S.Ct. 1489, 1498 (1993). 278 B.R. at 184. These include: the danger of prejudice to the non-movant if an extension is granted; the length of the delay in seeking the extension, and the potential impact on the judicial proceedings; and the reason for the delay in appealing and whether the movant acted in good faith. Id. Pioneer requires us to look at all of these factors and balance the equities. Id. at 395.

Regarding prejudice to the non-movant, it would be clearly prejudicial to Midland and La Salle[17] if an extension of time to appeal was granted because it would now call into question the effect of the annulment of the automatic stay entered some four years ago on August 29, 2002. The length of Marinkovic's delay in seeking an extension is also significant in this case in that the real target of this motion, the stay annulment order, was entered over three months before the motion to extend time was filed. Finally, regarding the effect of allowing an extension on judicial proceedings, granting the motion would undoubtedly require additional proceedings.

It is difficult to judge the movant's good faith in these circumstances. In Pioneer, the Supreme Court has instructed us to judge good faith based on all the circumstances of a case. Id. at 395. We have noted above Marin's inconsistency in representations in several courts regarding ownership of the Property. We also note that two bankruptcy courts have questioned the purpose of Marin's/Marinkovic's procedural maneuvering in these cases. The New York bankruptcy judge dismissed the Family Trust bankruptcy, observing that the Family Trust was a sham, "created for tax purposes and to keep . . . [Marin's] parents' property out of the hands apparently of his sister and to . . . divest his mother of property that was previously titled to her." The Arizona bankruptcy court in this case described Marin's and Marinkovic's

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[17] Although the court may or may not have been aware of the re-sale of the Property to Magnolia Bearcat on January 31, 2003, granting the motion would also be prejudicial to Magnolia Bearcat which also has the right to rely on the validity of its purchase of property known to be under supervision of the courts.

actions as "an ongoing shell game played through the court system . . . to avoid paying the primary obligation owed to Midland and perhaps other creditors. . . . This type of behavior of 'playing fast and loose with the courts' will not be condoned." Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001). We therefore can understand the serious doubts of the bankruptcy court concerning the good faith of Marin and Marinkovic in bringing this motion.

The bankruptcy court noted that Marin (and Marinkovic, too, for that matter) was fully capable of monitoring the court's docket to determine the status of entry of orders regardless of whether, as Marin suggested, the orders were not logged, or the adversary proceeding file not available to the public.[18] We agree with this conclusion. Thus, Marin and Marinkovic must provide an adequate excuse for their failure to timely appeal. They have not done so.

The bankruptcy court also did not abuse its discretion in declining to find that Marin's alleged military service entitled him to the protection of the Soldiers and Sailors Civil Relief Act of 1940.[19] The Panel has examined the cases cited by the

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[18] Although the bankruptcy court did not charge Marin with the special knowledge of an attorney, the court was presumably aware from information in the record that Marin is an inactive member of the New York bar. Additionally, even pro se litigants are required to monitor the case dockets. In re Sweet Transfer & Storage, Inc., 896 F.2d 1189, 1193 (9th Cir. 1990).

[19] We note that on at least one occasion, Marin's military service duties did not prevent him from attending court. Marin alleged in his November 26, 2002, Opposition of Creditor to Motion of Bank for Eviction of Debtor, "Bank counsel already caused the present mess and one year delay by insisting on a hearing and then selling the property on January 25 [2002] when this soldier was on active military duty." The Transcript of Motion Hearing Before (continued...)

bankruptcy court and notes that there are conflicts in those cases as to whether an individual on "active duty in the reserves" is entitled to protection under the act. Bowen v. United States, 292 F.3d 1383, 1386 (Fed. Cir. 2002)(deals with National Guardsmen rather than active reserves). However, we cannot reverse unless we have a definite and firm conviction that the bankruptcy court below committed a clear error of judgment in the conclusions it reached upon a weighing of the relevant factors. The bankruptcy court was simply not persuaded that Marin's military activities prevented him from acting sooner, and we do not believe this conclusion represents an abuse of discretion.

The bankruptcy court adequately considered the Pioneer factors in this case, and in the exercise of its discretion, decided the motion for an extension of time should be denied. We agree.

CONCLUSION

The orders of the bankruptcy court are AFFIRMED.

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[19](...continued)
Honorable Stephen D. Gerling, United States Bankruptcy Judge, for January 25, 2002, shows that Marin was present in court on January 25, 2002, and spoke on the record. Tr. Hr'g 3 (Appearance) & 4:25 – 5:1 (verbally entering his appearance) (January 25, 2002).