NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP No. AZ-03-1431-KMoS
	)	
MILIVOJ MARINKOVIC,	)	Bk. No. 02-00378
	)	
Debtor.	)	
	)	
_____	)	
	)	
MILIVOJ MARINKOVIC; MEL M. MARIN,	)	
	)	
Appellants,	)	
	)	
v.	)	**MEMORANDUM**[*]
	)	
MIDLAND LOAN SERVICES, INC.,	)	
	)	
Appellee.	)	
	)	
_____	)	

Argued and Submitted on September 22, 2005
at Phoenix, Arizona

Filed - September 29, 2005

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable James M. Marlar, Bankruptcy Judge, Presiding

_____

Before: KLEIN, MONTALI, SMITH, 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.

This is an appeal from a bankruptcy court order denying a motion that it construed to be a motion under Federal Rule of Civil Procedure 60(b) for relief from a ruling made 18-months earlier regarding the automatic stay. The court's previous ruling purportedly granting relief from stay cleared the way for the dismissal of a state court receivership action that included a counterclaim made by one of the appellants.

The instant dispute swirls around the foreclosure of an apartment complex in Tucson, Arizona, that spawned four related state court actions and three bankruptcies, including the chapter 11 case in which this appeal arises. The automatic stay regarding the apartment complex has also been annulled in an order that is not involved in this appeal.

We AFFIRM.

FACTS

Debtor and co-appellant Milivoj Marinkovic owned and operated a 20-unit apartment complex ("property") located at 240 West Sahuaro Street, Tucson, Arizona. Co-appellant Mel M. Marin (aka Mel Marinkovic) is the son of Milivoj Marinkovic.

On March 6, 1997, Marinkovic borrowed $189,000 from Southern Pacific Thrift & Loan Association ("Southern Pacific") and secured the loan with the apartment complex.

On September 9, 1999, Southern Pacific assigned its interest in the Note and Deed of Trust to La Salle National Bank, as Trustee for J.P. Morgan Commercial Mortgage Finance Corporation. La Salle National Bank appointed Midland Loan Services, Inc. (appellee and hereinafter referred to as "Midland") as its agent

and attorney-in-fact with respect to the Note and Deed of Trust, pursuant to a Limited Power of Attorney.

Subsequently, Marinkovic defaulted on the Note. Midland commenced foreclosure proceedings, gave notice of a trustee's sale, and filed a receivership action in the Pima County (Arizona) Superior Court on February 12, 2001. Midland Loan Servs., Inc. vs. Marinkovic, No. C20010710. Marinkovic filed counterclaims against Midland, La Salle National Bank, and Southern Pacific Bank for breach of contract, false claims and fraud, and declaratory judgment and injunction.

Marin sought to prevent the trustee's sale by filing a lawsuit in the United States District Court for the District of Arizona on February 5, 2001, claiming protections under the Soldiers and Sailors Civil Relief Act. Marin v. LaSalle Nat'l Bank, So. Pac. Bank, & Midland Loan Servs., Inc., U.S.D. Ct., D. Ariz., No. 01-00050. On August 8, 2001, the district court entered a judgment granting defendants' motions to dismiss with prejudice. The court construed Southern Pacific's joinder in the motion to dismiss as a motion for summary judgment which it also granted.[1]

On March 6, 2001, less than one month after the receivership action was filed in state court, Marinkovic transferred his interest in the property into a revocable trust named Happy Trust Three and appointed his son, Marin, as trustee.

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[1]On appeal, the Ninth Circuit affirmed the district court's judgment of dismissal because Marin was not a party to the contract under which he sought redress. Marin v. LaSalle Nat'l Bank, No. 01-17232.

On March 12, 2001, Marin removed the receivership action to the United States District Court for the District of Arizona, which was ultimately remanded to the state court on May 30, 2001. Midland Loan Servs., Inc. v. Marinkovic, U.S.D. Ct., D. Ariz., No. 01-00102.

On the eve of the trustee's foreclosure sale, Marinkovic filed a chapter 13 case on August 22, 2001, case No. 01-03665, in the United States Bankruptcy Court for the District of Arizona, which case was dismissed on October 26, 2001.

On October 23, 2001, three days prior to the dismissal of the chapter 13 case, Marin filed a voluntary chapter 11 case on behalf of Happy Trust Three in the United States Bankruptcy Court for the Northern District of New York. Thereafter, Midland filed a motion in the New York bankruptcy court seeking: (1) to lift the stay with respect to the property; (2) to dismiss the chapter 11 case with prejudice; (3) to issue an in rem injunction; and (4) for other just and proper relief. At the conclusion of an evidentiary hearing on Midland's motion on January 25, 2002, the New York bankruptcy court announced its ruling dismissing the case. Later, on the same day, Midland conducted a trustee's sale in Arizona and recorded a deed of trust on January 29, 2002.

Also on January 25, 2002, Marin transferred an 86-percent interest in the property to Marinkovic and Marinkovic's ex-wife Eva and a nine-percent interest to himself, leaving Happy Trust Three with a five-percent interest in the property.

The order dismissing the New York chapter 11 case of the Happy Trust Three was entered on docket on January 31, 2002, dismissing the case "as of" January 25, 2002. The order

explained that Happy Trust Three was ineligible to be a debtor under chapter 11 of the Code, because it was not a business trust and not intended to be a business trust, never engaged in business activities, never experienced a profit, and was unlikely to engage in business activities in the future. The order also noted that the chapter 11 case was the fifth judicial proceeding since February 2001 filed by Marin and/or Marinkovic in an attempt to block Midland's completion of the "foreclosure and trustee's sale" of the property. The order dismissing the chapter 11 case was ultimately affirmed by the Second Circuit. Marin v. Midland Loan Servs., Inc. (In re Happy Trust Three), No. 03-5004, (2d Cir. 12/7/04).

Also during the interval between the January 25, 2002 dismissal hearing in the New York bankruptcy case, and entry of the dismissal order on docket on January 31, 2002, Marinkovic filed the chapter 11 case in the United States Bankruptcy Court for the District of Arizona on January 30, 2002, in which this appeal arises.

On February 25, 2002, four weeks after the foreclosure sale, there was a hearing in Pima County (Arizona) Superior Court on Midland's motion to dismiss the receivership action, No. C20010710, which included a counterclaim by Marinkovic. The state court's minute entry states in pertinent part:

> 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] Court 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 did not specify whether it was with or without prejudice. Marinkovic did not timely appeal the state court dismissal order and did not question the bankruptcy court's ruling regarding the automatic stay for 18 months. On April 22, 2002, Marinkovic filed a motion in state court to reopen time to appeal, which was denied on June 7, 2002.

On February 26, 2002, the day after the state court dismissed the receivership action, Marinkovic commenced an adversary proceeding in the bankruptcy court to require Midland to turn over the property. Marinkovic v. Midland Loan Servs., Inc., Adv. Pro. No. 02-0029, U.S. Bankr. Ct., D. of Ariz., filed Feb. 26, 2002. On March 22, 2002, Midland filed a motion for summary judgment. Marinkovic filed no opposition, but Marin (who was not a party) filed various documents in opposition. On August 2, 2002, the bankruptcy court granted the summary judgment motion, ruling:

> (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, 200[2]; (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, 200[2], effectively and completely eliminated all legal and equitable interests of the debtor and those claiming interests by, through or under him (emphasis supplied).

Id. at 45. The judgment was entered on August 29, 2002.[2]

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[2]This judgment was not directly appealed. However, on September 6, 2002, Marin, who was not a party, filed a motion for reconsideration of the August 29, 2002 judgment, which the

(continued...)

In yet another attempt to unwind the foreclosure, Marin filed a complaint in the Pima County (Arizona) Superior Court against the purchasers of the property. Marin v. Dean Bell; Magnolia Bearcat, LLC; Centaurus, LLC, No. C-20031459. Marin's complaint alleged conversion and conspiracy to commit fraud arising from defendant's purchase of the property at the foreclosure. Defendants filed a motion to dismiss on the basis that the claims were barred by the rules of res judicata ("claim and issue preclusion"), which motion was granted on June 6, 2003. The order explained that Marin filed and litigated related claims in two cases in the federal district court, two cases in Pima County Superior Court, and three cases in the bankruptcy court.[3]

Two months later, on August 5, 2003, the unsigned motion that is the subject of this appeal was filed in Marinkovic's Arizona chapter 11 case. The motion was entitled:

> NOTICE AND MOTION OF CREDITOR/FAMILY TRUSTEE/SON TO CLARIFY ORDER GRANTING LEAVE TO SUPERIOR COURT TO DISMISS ACTION MIDLAND V. MARINKOVIC c-2001-0710 (Ariz. Sup. 2/25/02) AND TO LIFT-STAY TO ALLOW APPEAL AGAINST STATE ORDER

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[2](...continued)
bankruptcy court denied on November 26, 2002. Adv. Pro. No. 02-00029. Marin later filed a motion to extend the time allowed to file an appeal of the November 26, 2002 order denying reconsideration of the August 29, 2002 judgment. The bankruptcy court denied the motion to extend time on February 3, 2003. Subsequently, Marin filed an appeal to the BAP in which Marinkovic joined. BAP. No. 03-1093. The appeal was consolidated with BAP No. 03-1047. The consolidated appeals were DISMISSED for failure to prosecute on November 2, 2004 [Brandt, Klein, Montali]. Marin and Marinkovic appealed the dismissal order to the Ninth Circuit [9th Cir. No. 05-15176, consolidated with 9th Cir. No. 05-15178]. The Ninth Circuit docket indicates that the appeals are still pending.

[3]Marin appealed the state court order and the Arizona Court of Appeals affirmed the state court on July 2, 2004.

The name Mel M. Marin appeared on the upper left-hand corner of the page. This motion requested two things. First, that the bankruptcy court clarify its 18-month old "unpublished order of February 2002" supposedly granting relief from the automatic stay with respect to the motion to dismiss in the receivership action. Midland Loan Servs., Inc. v. Marinkovic, No. C20010710. Second, the motion further requested relief from the automatic stay to allow Marinkovic and Marin to appeal the February 25, 2002 dismissal order as to which the state court had refused on June 7, 2002 to reopen the time to appeal.

On August 7, 2003, the bankruptcy court deemed the motion to be a request for relief from an order pursuant to Federal Rule of Civil Procedure 60(b) as incorporated by Federal Rule of Bankruptcy Procedure 9024. The court entered an order denying the motion, ruling in pertinent part:

> Grounds for relief from the alleged offending order, made over 19 months ago, do not satisfy any of the grounds enumerated in F.R.Civ.P. 60(b)(4), (5) or (6), made applicable to bankruptcy proceedings by Bank. R. 9024 [Fed. R. Bankr. P. 9024]. If the grounds raised are F.R.Civ.P. 60(b)(1),(2), and (3), then the motion is untimely, as those matters must be made within a one-year period after entry of an Order.

This is the order that is the subject of the instant appeal.

As to the automatic stay of 11 U.S.C. § 362, the court explained: (1) the automatic stay need not be "lifted" to allow the parties to the state court action to take appeals; and (2) to the extent § 362 might have been applicable, it has already been lifted or is inapplicable because it applies to actions taken against the debtor, not by the debtor.

Marin timely appealed and Marinkovic joined in the appeal.[4]

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334 and 157(b). We have jurisdiction under 28 U.S.C. § 158(a)(1).

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[4]Marin filed the subject motion. Although Marinkovic was not a party to the motion and did not formally intervene, he is joined as a party for purposes of this appeal (Marin and Marinkovic are hereinafter collectively referred to as "appellants").

Appellants are no strangers to the Ninth Circuit. They have filed at least 31 appeals to the Circuit. The Ninth Circuit docket lists the following appeals: Midland Loan Service v. Marinkovic, No. 01-17174; Marin v. Midland Loan, No. 03-17080; Marinkovic v. Midland Loan, No. 03-17243; Marin v. Sanders, No. 04-15738; Marin v. Sanders, No. 04-15739; Marin v. Midland Loan Service, No. 04-15741; Marin v. Midland Loan Service, No. 04-15742; Marinkovic v. City of Utica, No. 04-16199; Marin v. Midloan Loan Service, No. 05-15176; Marinkovic v. Midland Loan Service, No. 05-15178; Marinkovic v. Lautsch Law Corp., No. 01-56357; Marinkovic v. City of Utica, No. 04-16199; Marinkovic v. Casey, Gerry, Casey, No. 88-6401; Marinkovic v. Casey, Gerry, Casey, No. 92-55584; Marinkovic v. Casey, Gerry, Casey, No. 94-56042; Marinkovic v. USDC-CAS, No. 95-70364; Marinkovic v. Casey, Gerry, Casey, No. 96-56657; Marin v. LaSalle National, No. 01-17237; Marin v. Tarr, No. 02-15507; Marin v. Gary's Towing, No. 04-15174; Marin v. Sanders, No. 04-15738; Marrin v. Tarr, No. 05-15440; Marin v. Pederson, No. 94-55841; Marin v. Denney, et al., No. 94-55841; Marin v. Denney, No. 94-56452, Marin v. California State Bar, No. 98-56777; Marin v. State of Arizona, No. 99-17000; Marin v. Hazelton, No. 89-35747; Marin v. Hazelton et al; Marinkovic v. Lautsch Law Corp., No. 01-56357; Marinkovic v. USDC-CAS, No. 95-70364.

Nor is this list exhaustive. It does not include appeals to the BAP, other Circuits, or state courts. See, e.g., Mel M. Marin v. LDDS of Missouri, Inc., dba LDDS of Alabama, Inc., No. 97-2430 (8th Cir. 1998); Marin v. City of Utica, et al., No. 04-6683 (2d Cir. 8/8/05); See also, In re Petition by Mel M. Marin, U.S. Postal Serv. Admin. Dkt. No. POB 02-231 (Aug. 5, 2002) (Appeal of Termination of P.O. Box 4312, Ithaca, N.Y. 14852-4312 for "using P.O. Box 4312 for the primary purpose of having mail forwarded to other addresses ... contrary to the rule in DMM § D910.3.6.").

ISSUE

(1) Whether Marin has standing to appeal;

(2) Whether the appeal is moot; and

(3) Whether the bankruptcy court erred when it denied Marin's motion for relief under Federal Rule of Civil Procedure 60(b).

STANDARD OF REVIEW

Standing and mootness are reviewed de novo. Gilliam v. Speier (In re KRSM Properties, LLC), 318 B.R. 712, 715 (9th Cir. BAP 2004); Menk v. LaPaglia (In re Menk), 241 B.R. 896, 903 (9th Cir. BAP 1999). Bankruptcy court decisions regarding relief pursuant to Federal Rule of Civil Procedure 60 are reviewed for abuse of discretion. Morris v. Peralta (In re Peralta), 317 B.R. 381, 384 (9th Cir. BAP 2004).

DISCUSSION

I

The first issue designated by Marin is standing. We assume, without deciding, that appellants do have standing.

II

Marin designates mootness as the second issue. Mootness, however, is a red herring.

Marin argues that if the appeal is moot, then the status quo regarding the rights of parties should be changed. While we doubt that Marin's theory ultimately has merit, an appeal that

could lead to a change in the status quo is not, for that very reason, moot.

III

The court construed Marin's motion to "clarify" the order made 18 months earlier purportedly granting, to the extent necessary, stay-relief to enable the Pima County Superior Court to dismiss the receivership action as a motion seeking relief pursuant to Federal Rule of Civil Procedure 60(b). Such a construction of an unfocused motion that does not state its procedural basis is an appropriate exercise of the court's obligation to construe the rules of procedure to "secure the just, speedy, and inexpensive determination of the matter." Fed. R. Bankr. P. 1001. Peralta, 317 B.R. at 385-86.

The question of whether Rule 60(b) relief should be afforded entails an exercise of discretion by the bankruptcy court that we can set aside only if the court did not apply a correct legal standard or if it rested its decision on a clearly erroneous finding of material fact and we are persuaded that there was a clear error of judgment. Peralta, 317 B.R. at 387-88. Here, the question is whether the court abused its discretion by refusing to act under Rule 60(b).

A.

Because Marin's motion was made 18 months after the order, the bankruptcy court did not err in concluding that the motion was untimely under Rule 60(b)(1), (2) or (3), which motions must be brought within one year. Fed. R. Civ. P. 60(b); Lake v.

Capps (In re Lake), 202 B.R. 751, 758 (9th Cir. BAP 1996).

The bankruptcy court also correctly ruled that the grounds for relief from the order did not satisfy any of the grounds enumerated in Rule 60(b)(4), (5) or (6). Relief under Rule 60(b)(4) is available only if a judgment is void. A final judgment "is void for purposes of Rule 60(b)(4) only if the court that considered it lacked jurisdiction, either as to the subject matter of the dispute or over the parties to be bound, or acted in a manner inconsistent with due process of law." Sasson v. Sokoloff (In re Sasson), __ F.3d __, 2005 WL 2210195, *9 (9th Cir. 2005). Here, it is undisputed that the bankruptcy court acted within its jurisdiction. There is, accordingly, no void judgment. Likewise, Rule 60(b)(5) is not applicable because no prior judgment has been reversed or otherwise vacated. Finally, there are no extraordinary circumstances within the province of 60(b)(6). Community Dental Servs., dba Smile Care Dental Group v. Tani, 282 F. 3d 1164, 1168 (9th Cir. 2002). The bankruptcy court did not abuse its discretion by refusing to act under Rule 60(b).

B.

Marin's "request" for relief from stay in order to prosecute an appeal from the February 25, 2002 dismissal of the Pima County Superior Court's receivership action represents an attempt to erect a "strawman" for the purpose of attempting to bootstrap himself into a position to appeal the dismissal of Marinkovic's counterclaim in the receivership action that was dismissed as part of the dismissal of the receivership action. The dismissal

order was not timely appealed in the first instance, and the Pima County Superior Court refused to grant an extension of time in which to appeal.

Marin's theory regarding the automatic stay has three independently fatal flaws. First, the automatic stay does not apply to an appeal when the debtor was in the position of plaintiff in the trial court. Ingersoll-Rand Fin. Corp. v. Miller Mining Co., 817 F. 2d 1424, 1426 (9th Cir. 1987). Marinkovic's counterclaim was an action in which he was in the position of plaintiff in the trial court for the purposes of the Ninth Circuit Ingersoll-Rand doctrine. Thus, the automatic stay was never an impediment to an appeal of the dismissal of Marinkovic's counterclaim.

Second, the automatic stay, to the extent that it might have applied, was vacated by the bankruptcy court. The procedurally unusual manner in which that ruling purportedly was made (orally on the inquiry of the state court) might once have been able to be challenged. It is now, however, too late. Marinkovic was in court on February 25, 2002, when the Pima County Superior Court described the vacation of the stay, and thus, had actual notice of the circumstances. No attempt was made to call that ruling into question for 18 months. The bankruptcy court did not abuse its discretion by declining to revisit it after such a long period.

Finally, the bankruptcy court definitively annulled the automatic stay in its August 29, 2002 judgment in Marinkovic v. Midland Loan Servs., Inc., Adv. Pro. No. 02-0029. Thus, regardless of the effect of the oral grant of relief from stay in

February 2002, the annulment of August 2002 operated as retroactive relief from stay that cured any defect in the prior ruling.

These are all adequate, independent reasons for concluding that appellants' position regarding the effect of the automatic stay on their ability to appeal the state court's dismissal of Makinkovic's counterclaim is a strawman without substance. Their position lacks merit.

The dismissal by an Arizona state court of general jurisdiction of a counterclaim based on applicable nonbankruptcy law has whatever preclusive effect it has under Arizona law and is unaffected by the bankruptcy automatic stay for the reasons we have explained.[5]

CONCLUSION

For the foregoing reasons, we AFFIRM.

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[5]Midland, at oral argument, withdrew its request for sanctions. We do not elect to award sanctions on our own initiative under Federal Rule of Bankruptcy Procedure 8020, notwithstanding that this appeal lacked substantial merit. Fed. R. Bankr. P. 8020.