

MAY 26 2006

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	AZ-05-1176-MoSC
)		
FREDDIE H. SEWELL; DONNA)	Bk. No.	04-20591
D. SEWELL,)		
)		
Debtors.)		
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FREDDIE H. SEWELL; DONNA)		
D. SEWELL,)		
)		
Appellants,)		
)		
v.)	<u>MEMORANDUM</u> ¹	
)		
MGF FUNDING, INC.; MARKEN)		
VENTURES, LLC; 42 DEVELOPMENT)		
GROUP; RUSSELL A. BROWN,)		
Trustee,)		
)		
Appellees.)		
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Argued and Submitted on January 20, 2006
at Phoenix, Arizona

Filed - May 26, 2006

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

Honorable Redfield T. Baum, Sr., Chief Bankruptcy Judge, Presiding

Before: MONTALI, SMITH and CARROLL,² Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, claim preclusion, or issue preclusion. See 9th Cir. BAP Rule 8013-1.

² Hon. Peter H. Carroll, Bankruptcy Judge for the Central District of California, sitting by designation.

1 An order reinstating this previously-dismissed Chapter 13³
2 case was signed before but entered after completion of a
3 foreclosure sale. The bankruptcy court held that the
4 reinstatement was not effective until the order was entered. We
5 AFFIRM.

6 **I. FACTS**

7 Debtors filed their voluntary Chapter 13 petition on November
8 29, 2004, the day before a scheduled foreclosure sale of their
9 home by secured creditor Mountainview Lending, LLC ("Lender").
10 They did not file the required documents and their case was
11 dismissed on January 5, 2005. On January 11, 2005, they filed the
12 missing documents -- bankruptcy schedules and a Chapter 13 plan --
13 together with a motion to reinstate their case. Debtors did not
14 serve a copy of the reinstatement motion on Lender by mail,
15 although Lender may have received a notice of electronic court
16 filing ("ECF") from the court.

17 On January 13, 2005, a trustee's sale was conducted but not
18 completed because under Arizona law a foreclosure sale is not
19 complete until, at the earliest, the time the consideration is
20 paid.⁴ Next, as stated in a minute order of the bankruptcy court:

21 On January 14, 2005, several critical events
22 occurred, namely: (1) the court noticed a hearing on
the motion to reinstate for January 18th [and Lender

23 _____
24 ³ Unless otherwise indicated, all chapter, section and
25 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,
26 as enacted and promulgated prior to the effective date of The
27 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, 119 Stat. 23, because the case from which this
28 appeal arises was filed before that effective date (generally
October 17, 2005).

⁴ A.R.S. § 33-810(A); In re Benson, 293 B.R. 234 (Bankr.
D. Ariz. 2003).

1 received electronic notice of that hearing at 9:47
2 a.m.], (2) at about 1 P.M. the court signed⁵ an
3 order reinstating the case notwithstanding the
4 January 18th hearing because the debtors orally
5 notified the court that a trustee's sale was pending
6 on their residence [the "Reinstatement Order"],
7 (3) at about 3 P.M. [the purchaser] paid the trustee
8 the bid price and shortly thereafter the trustee
9 recorded the trustee's deed, and (4) at about 4 P.M.
10 the [Reinstatement Order] was docketed by the clerk.

11 The Reinstatement Order states, "IT IS HEREBY ORDERED
12 reinstating [sic] case number 04-20591-PHX-RTB and setting aside
13 the dismissal in this matter." The order contains no other
14 language indicating whether the case is reinstated as of the time
15 the order was signed or when it was entered on the docket.

16 Debtors filed a motion to set aside the sale of real property
17 (the "Set Aside Motion"). The purchasers of the home filed a
18 Motion for Relief from the Automatic Stay and Validating Trustee's
19 Sale (the "Stay Relief Motion"). The purchasers are MGF Funding,
20 Inc. ("MGF") and Marken Ventures LLC ("Marken"), and the entity to
21 which they later conveyed the home, 42 Development Group, LLC
22 (collectively "Purchasers").

23 Debtors' Set Aside Motion argues that just as the automatic
24 stay is effective immediately upon submission of a bankruptcy
25 petition to the clerk, not at the later time the petition is
26 docketed or that creditors receive notice of the bankruptcy case,
27 similarly an order reinstating a bankruptcy case should restore
28 the automatic stay as of the time the order is signed, not at the

26 ⁵ The order was signed electronically. Debtors' counsel
27 and the bankruptcy court apparently were able to verify the time
28 of signing from the court's computer personnel. Apart from
verifying the time of signing, it makes no difference for purposes
of this appeal that the order was signed and docketed
electronically rather than manually.

1 later time it is entered on the docket. Alternatively, the Set
2 Aside Motion argues that by its terms the Reinstatement Order set
3 aside the dismissal and that must mean that the effects of the
4 dismissal were also set aside, as if the automatic stay had never
5 terminated. Debtors propose to sell the home to a related party
6 and they allege that such a sale would generate substantial
7 proceeds for general unsecured creditors, as well as for Debtors'
8 homestead exemption.

9 After hearings and supplemental briefing, the bankruptcy
10 court issued a minute order concluding as an initial matter that
11 the effective date and time of an order reinstating a dismissed
12 bankruptcy case is a matter for its discretion:

13 Surprisingly the rules are not absolutely clear as to
14 when an order reinstating a dismissed case becomes
15 effective. The rules are clear that a judgment is
16 effective when it is docketed by the clerk. See:
17 Fed.R.Civ.P. 58, Bankr. Rules 5003 and 9021.^[6] Both
18 the Federal Rules of Civil Procedure and the
19 Bankruptcy Rules make multiple references to
20 "judgments" and "orders" strongly implying that
21 judgments and orders are treated differently under
22 both rules. These rules do not say that all orders
23 are not effective until they are docketed by the
24 clerk. Noli [v. C.I.R., 860 F.2d 1521, 1525 (9th
25 Cir. 1988)] provides that some orders are effective
26 without being signed or docketed.

21 The bankruptcy court then reviewed the equities in favor and
22 against imposing the automatic stay as of the time the
23 Reinstatement Order was signed and concluded that it was not
24 effective until it was entered on the docket, based primarily on
25 lack of notice to the affected parties:

27 ⁶ Rule 9021 provides in part that a "judgment is effective
28 when entered as provided in Rule 5003." Fed. R. Bankr. P. 9021.
Rule 9021 also incorporates Fed. R. Civ. P. 58 (procedures
governing entry of judgment). The Rules define a "judgment" as
any appealable order. See Fed. R. Bankr. P. 9001(7), 9002(5).

1 . . . the court finds that no one could find the ECF
2 [R]einstatement [O]rder of January 14th until that
3 order was entered on the court's docket. It would be
4 poor public policy to hold that parties are bound by
5 orders where they have no notice or knowledge of such
6 orders, and particularly where they have no ability
7 to ascertain the existence of orders from the public
8 record. There was no way for the [a]ffected
9 creditors, trustee and high bidder to know that the
10 [R]einstatement [O]rder had been signed until it was
11 entered in the court's docket. Although not raised
12 by the parties, the court also doubts the
13 constitutional validity of a finding that the order
14 was effective when signed where the [a]ffected
15 parties lacked any notice or knowledge thereof and
16 lacked any way to find such order in the public
17 record: such result seems to lack fundamental due
18 process of law.

11 Consistent with this ruling, the bankruptcy court entered an
12 order (a) granting Purchasers' Stay Relief Motion and (b) denying
13 Debtors' Set Aside Motion (the "Foreclosure Validation Order").
14 Debtors filed a timely notice of appeal.⁷ Debtors did not name
15 Lender as an appellee, nor was Lender served with the notice of
16 appeal.⁸

18 ⁷ Debtors did not obtain a stay of the Foreclosure
19 Validation Order and their home has been sold and resold to
20 Purchasers. Ordinarily such facts might render this appeal moot.
21 See In re Onouli-Kona Land Co., 846 F.2d 1170, 1171 (9th Cir.
22 1988) ("Bankruptcy's mootness rule applies when an appellant has
23 failed to obtain a stay from an order that permits a sale of a
24 debtor's assets. Whether an order directly approves the sale or
25 simply lifts the automatic stay, the mootness rule dictates that
26 the appellant's failure to obtain a stay moots the appeal.")
27 (citation omitted). In this case, however, the issue is not so
28 much whether there was cause to grant relief from the automatic
stay but whether the stay applied at all, and if it did then the
sale was not simply voidable but was void. Presumably no amount
of selling or reselling would cure such voidness. See generally
In re Schwartz, 954 F.2d 569 (9th Cir. 1992) (actions taken in
violation of automatic stay are void, not merely voidable).
Therefore, particularly in the absence of any briefing on this
issue by the parties, we are not prepared to dismiss this appeal
as moot.

⁸ Lender might be prejudiced if we were to reverse.
Therefore, if we were inclined to reverse we might require Debtors
to take steps to join Lender in this appeal so that it could

(continued...)

1 **II. ISSUES**

2 A. Was it within the bankruptcy court's discretion to
3 determine when Debtors' case was reinstated and the automatic stay
4 was reimposed?

5 B. If so, did the bankruptcy court abuse its discretion?

6 **III. STANDARD OF REVIEW**

7 The briefs on this appeal do not address the standard of
8 review. The proper standard of review is a legal question, and we
9 review legal questions de novo. In re Baldwin Builders,
10 232 B.R. 406, 410 (9th Cir. BAP 1999).

11 Debtors appear to argue that the issues on this appeal are
12 purely matters of law, as to which the bankruptcy court had no
13 discretion. Their primary theory seems to be that all
14 reinstatement orders must be immediately effective when signed, in
15 order to be consistent with the immediate effects of presenting a
16 bankruptcy petition for filing. Alternatively they argue that
17 regardless of when a case is reinstated the very act of setting
18 aside a dismissal necessarily eviscerates all effects of the
19 dismissal as a matter of law, as if the automatic stay never
20 terminated. We reject these arguments in the Discussion section
21 below and we hold that the bankruptcy court had discretion when to
22 reinstate the case and when to reimpose the automatic stay.
23 Therefore, the Foreclosure Validation Order must be reviewed under
24 the abuse of discretion standard.

25 ⁸(...continued)
26 defend the Foreclosure Validation Order. Because we affirm we do
27 not take that approach. See Interstate Oil Co. v. Gormley, 105
28 F.2d 431, 432 (9th Cir. 1939) (after notice of appeal is filed,
permission to join necessary appellee is discretionary and "should
not be granted unless there is merit in the contentions of the
appellants").

1 The Foreclosure Validation Order appears to be a
2 clarification of an ambiguity in the Reinstatement Order, but to
3 the extent it was a reconsideration we also review the decision to
4 reconsider for an abuse of discretion. Fidelity Fed. Bank, FSB v.
5 Durga Ma Corp., 387 F.3d 1021, 1023 (9th Cir. 2004) (grant or
6 denial of motion under Fed. R. Civ. P. 60(b) reviewed for abuse of
7 discretion); In re Kaypro, 218 F.3d 1070, 1073 and 1077 (9th Cir.
8 2000) (grant of new trial reviewed for abuse of discretion).

9 To the extent, if any, that the bankruptcy court annulled the
10 automatic stay that decision also would be reviewed for an abuse
11 of discretion. In re Fjeldsted, 293 B.R. 12, 18 (9th Cir. BAP
12 2003). The bankruptcy court might not have intended to annul the
13 automatic stay because it reasoned that the stay did not exist
14 when the foreclosure sale was completed. Nevertheless, the relief
15 requested in the Stay Relief Motion was to annul the automatic
16 stay and the Foreclosure Validation Order granted that motion so
17 this might have been an alternative basis for the Foreclosure
18 Validation Order.

19 For all of these reasons, we review the Foreclosure
20 Validation Order for an abuse of discretion. We find an abuse of
21 discretion if we have a "definite and firm conviction" that the
22 bankruptcy court committed a clear error of judgment in the
23 conclusion it reached. A bankruptcy court also necessarily abuses
24 its discretion if it bases its ruling on an erroneous view of the
25 law. In re Beatty, 162 B.R. 853, 855 (9th Cir. BAP 1994)
26 (quotation marks and citation omitted).

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1 **IV. DISCUSSION**

2 A. The bankruptcy court had discretion to determine when
3 Debtors' case was reinstated and the automatic stay was
4 reimposed

5 Debtors argue that the bankruptcy court erred in determining
6 that the Reinstatement Order was effective when entered, instead
7 of when signed. Debtors analogize to a bankruptcy petition. They
8 point out that creditors typically receive no advance notice of
9 the petition and yet the automatic stay arises under Section
10 362(a) at the moment when it is given to the court clerk for
11 filing, not at the later time when it is entered on the docket.
12 In re Godfrey, 102 B.R. 769 (9th Cir. BAP 1989). Despite this
13 lack of notice to creditors, actions taken in violation of the
14 automatic stay are void. Schwartz, 954 F.2d 569. Debtors are
15 also correct that Ninth Circuit has held for policy reasons that
16 certain orders are effective when signed, not when entered. In re
17 San Joaquin Roast Beef, 7 F.3d 1413, 1416-17 (9th Cir. 1993).
18 These arguments persuade us that in general a bankruptcy court can
19 reinstate a case and reimpose the automatic stay as of the time it
20 signs a reinstatement order, subject to review for abuse of
21 discretion. That does not mean that a bankruptcy court is
22 required to do so.

23 There are differences between filing a new bankruptcy
24 petition and reinstating a prior bankruptcy case and there are
25 valid reasons for choosing between them. There may be
26 disadvantages to filing a petition, or a debtor may be ineligible.
27 See, e.g., 11 U.S.C. § 109(g). For whatever reason, Debtors chose
28 to file a motion to reinstate their dismissed case instead of a

1 new petition. The bankruptcy court then had to determine whether
2 and when to reinstate the case. We see no reason why the
3 bankruptcy court could not defer reimposing the automatic stay in
4 fairness to other parties in interest, just as the bankruptcy
5 court has broad discretion whether to grant relief from the
6 automatic stay retroactively, prospectively, or as of a future
7 date and time. See generally Fjeldsted, 293 B.R. at 21 (noting
8 bankruptcy courts' broad discretion in crafting relief from
9 automatic stay). To hold otherwise would promote form over
10 substance in cases such as this. Purchasers' Stay Relief Motion
11 asked the bankruptcy court to annul the automatic stay and there
12 is no question that such relief is a matter for the bankruptcy
13 court's discretion. Id.

14 Debtors argue in the alternative that the Reinstatement Order
15 by its terms "set[] aside" the dismissal, that this means the
16 dismissal order was vacated, and the bankruptcy court erred by
17 ruling otherwise. Debtors cite authority that "when an order of
18 dismissal is vacated, all of its effects are vacated, including
19 the termination of the automatic stay" and this "restores the stay
20 as if had not been terminated at all" In re Hakim, 244
21 B.R. 820, 821-22 (Bankr. N.D. Cal. 1999). Contra In re Nagel, 245
22 B.R. 657, 662 (D.C. Ariz. 1999) (retroactive reinstatement of
23 Chapter 11 case was "a kind of judicial time travel that cannot be
24 reconciled with the law").

25 We are not convinced. The Reinstatement Order did "set
26 aside" the dismissal but this may imply only prospective relief.
27 To vacate all of the effects of a dismissal order retroactively
28 could have far ranging, unintended consequences. See In re

1 Aheong, 276 B.R. 233, 238, 243 n.10 (9th Cir. BAP 2002). The
2 Reinstatement Order says nothing about retroactively imposing the
3 automatic stay and doing so would void not only the foreclosure
4 sale but possibly other events that we and the bankruptcy court
5 know nothing about. We decline to read the Reinstatement Order so
6 broadly and, like the court in In re Brown, 290 B.R. 415, 422
7 (Bankr. M.D. Fla. 2003), we do not "find any reason to deviate
8 from the well-accepted rule that orders are effective when written
9 and docketed." See also Beatty, 162 B.R. at 857-58 (oral ruling
10 was not effective to convert case, partly because "the rules
11 consistently rely upon the entry of the judgment or order as the
12 effective date for the consequences of the judgment or order").

13 We also question whether retroactive imposition of the
14 automatic stay as if it had never terminated would be appropriate
15 in these circumstances. A title company or purchaser at a
16 foreclosure sale can verify within a short time after the sale is
17 completed whether a bankruptcy petition was filed before that
18 time, but if reinstatement orders were to retroactively impose the
19 automatic stay there would be no way to protect against the sale
20 being rendered retroactively void at some future date. See In re
21 Hill, 305 B.R. 100, 106 (Bankr. M.D. Fla. 2003) ("While the
22 Bankruptcy Code grants the bankruptcy court the power to
23 retroactively grant relief from a stay, . . . this court is
24 unaware of any authority that grants the bankruptcy court power to
25 retroactively impose a stay.") (discussing cases). But see In re
26 Diviney, 225 B.R. 762, 771 (10th Cir. BAP 1998) (stating in dicta
27 that the "expected result" of vacating order should be to vacate
28 all its effects and reinstatement was effective as of date when

1 order was signed); Hakim, 244 B.R. at 822 (citing “orderly
2 administration of the case” and control over creditor conduct as
3 reasons for vacating order of dismissal and restoring stay as if
4 it had never been terminated).

5 Alternatively, if we assume for the sake of argument that the
6 Reinstatement Order purported to reimpose the automatic stay
7 retroactively, and that the bankruptcy court had the power to do
8 so, the bankruptcy court still had discretion to reconsider that
9 order. The Foreclosure Validation Order leaves no doubt as to the
10 bankruptcy court’s ultimate conclusion. The case was reinstated
11 and the stay was reimposed when the Reinstatement Order was
12 entered, not when it was signed. An act that violates the
13 automatic stay is void but that is cured by retroactive annulment
14 of the stay. Aheong, 276 B.R. 233.

15 Just as we reject Debtors’ arguments that the bankruptcy
16 court lacked discretion to choose a time other than when it signed
17 the Reinstatement Order to reimpose the automatic stay, we also
18 reject Purchasers’ arguments that the only acceptable time was
19 when that order was entered. Purchasers cite our opinion in
20 Beatty, in which we reversed the bankruptcy court and held that
21 its oral ruling on a motion to convert was not effective until it
22 was reduced to writing and docketed, at least “for purposes of
23 determining whether a debtor retains his or her right to dismiss a
24 Chapter 13 case” under Section 1307(b). Beatty, 162 B.R. at 857-
25 58. That case is distinguishable, not only because of the
26 important policies behind Section 1307(b), but also because it
27 involved an oral order and we specifically noted, “We need not
28 address whether under San Joaquin Roast Beef [7 F.3d 1413] the

1 signing date and/or the filing date of the order would control
2 over the subsequent date of entry on the docket as the effective
3 date of conversion” Beatty, 162 B.R. at 857 n. 10.

4 For these reasons we hold that the bankruptcy court was not
5 required to reinstate the case and reimpose the automatic stay at
6 either of the times argued by the parties. It had discretion at
7 least to choose between those times: when it signed the
8 Reinstatement Order or when that order was docketed.

9 B. The bankruptcy court did not abuse its discretion

10 The bankruptcy court was concerned that Purchasers and Lender
11 had “no notice or knowledge” of the Reinstatement Order and had
12 “no ability to ascertain the existence” of that order when the
13 foreclosure sale was completed because the order had not yet been
14 entered on the docket. This is a valid concern. So far as Lender
15 knew, it was free to proceed with foreclosure pending the hearing
16 that had been set on Debtors’ motion to reinstate their case.
17 Neither Lender nor Purchasers had notice that Debtors sought
18 retroactive application of the automatic stay to render any
19 completed foreclosure sale void.

20 Debtors argue that other parties could have discovered when
21 the order was signed, as their own counsel did. It would have
22 been far easier for Debtors’ counsel to have notified Lender. See
23 Brown, 290 B.R. at 422 (“A telephone call would have put the
24 [creditor] on actual notice of the reinstated case.”). Debtors’
25 proposal would also burden the court with inquiries about when an
26 order is signed and could even put the judge in the awkward
27 position of being a percipient witness, perhaps the only witness,
28 as to the time of signing.

1 These are ample reasons for the bankruptcy court to rule as
2 it did. Debtors' arguments to the contrary are not convincing.

3 Debtors argue that the bankruptcy court placed too much
4 reliance on Rule 9021 and Fed. R. Civ. P. 58, commonly known as
5 the separate judgment rule. It is true that "Rule 58 was intended
6 primarily to clear up uncertainties" as to the time for appeal,
7 and this was one reason why the oral order in Noli was not invalid
8 despite the absence of a separate written order (Noli, 860 F.2d at
9 1525), but there was more. The Ninth Circuit observed that the
10 debtors in Noli "were present when the oral order was issued and
11 clearly had notice of its existence and content," they "understood
12 and accepted the order as final for purposes of appeal," and
13 immediate relief from the automatic stay was appropriate because
14 they had used bankruptcy as the latest in a series of tactics to
15 evade liability on the eve of trial. Id. at 1525-26. It is
16 hardly surprising that an oral order granting immediate relief
17 from the automatic stay was valid in these circumstances, but the
18 issues in this case are entirely different and in general orders
19 are effective when reduced to writing and docketed. See Brown,
20 290 B.R. at 419 and 422 (noting "well-accepted rule that orders
21 are effective when written and docketed" even though oral rulings
22 can be "immediately effective" in emergency situations).

23 Nor are we persuaded by Debtors' analogy to San Joaquin Roast
24 Beef, 7 F.3d 1413. In that case the Ninth Circuit established a
25 uniform rule that the two year statute of limitations in Section
26 546(a)(1) runs from when the order appointing a trustee is signed,
27 not when it is entered. The Ninth Circuit was concerned that
28 "bankruptcy trustees should act to protect the estate immediately

1 upon appointment and should not wait for entry of an order." Id.
2 at 1417. Debtors advance no similarly compelling policy that the
3 automatic stay must be effective when a reinstatement order is
4 signed, rather than when it is entered. The Ninth Circuit also
5 relied on the "ample notice" provided by the order in that case
6 (id. at 1416), which was entered two days after it was signed and
7 started a two year limitations period. The Ninth Circuit
8 contrasted the "relatively short time that a party has to appeal a
9 final order" (id. at 1417) and even that short time is more notice
10 than Lender and Purchasers had in this case.

11 For the above reasons, the bankruptcy court did not abuse its
12 discretion. Debtors' case was reinstated and the automatic stay
13 was reimposed as of the time the Reinstatement Order was docketed,
14 not when it was signed.

15 **V. CONCLUSION**

16 The bankruptcy court had discretion to determine when
17 Debtors' case was reinstated and the automatic stay was reimposed.
18 It did not abuse that discretion. The Foreclosure Validation
19 Order is AFFIRMED.

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