

MAY 10 2013

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	CC-12-1515-MkTaMo
6	ELKE MAGDALENA LESSO,)	Bk. No.	11-32945
7	Debtor.)		
8	_____)		
9	FUCHS & ASSOCIATES, INC.)		
10	Appellant,)		
11	v.)	MEMORANDUM*	
12	ELKE MAGDALENA LESSO,)		
13	Appellee.**)		
	_____)		

Argued on February 21, 2013
at Pasadena, California

Submitted on March 25, 2013

Filed - May 10, 2013

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

Honorable Sandra R. Klein, Bankruptcy Judge, Presiding

*This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

**In its Notice of Appeal, Fuchs & Associates, Inc. named three additional parties as appellees in this appeal: (1) Lone Oak Fund, LLC, (2) the Los Angeles County Treasurer & Tax Collector, (3) and the Perfect Bite Company. But Fuchs & Associates, Inc. later stipulated with these three parties for their removal as appellees herein. Based on that Stipulation, the Panel entered an order on January 13, 2013 effectively removing these three parties as appellees.

1 Appearances: John R. Fuchs of Fuchs & Associates, Inc. argued
2 for Appellant Fuchs & Associates, Inc.; Thomas H.
3 Edwards argued for Appellee Elke M. Lesso.

4 Before: MARKELL, TAYLOR and MONTALI,** Bankruptcy Judges.

5 INTRODUCTION

6 Chapter 11¹ debtor Elke Lesso ("Lesso") moved for authority
7 under § 363(f) to sell two parcels of real property located in
8 Glendale, California ("Properties") free and clear of liens.
9 Appellant Fuchs & Associates, Inc. ("FAAI") opposed the sale
10 motion, claiming among other things that it held valid liens
11 against the Properties. In the process of granting the sale
12 motion, the bankruptcy court declared that one of FAAI's liens
13 was invalid and that the other was subject to bona fide dispute
14 and, hence, the Properties could and would be sold free and clear
15 of the alleged liens in accordance with § 363(f)(4). The
16 bankruptcy court entered an order granting Lesso's sale motion,
17 and FAAI appealed. Because it is impossible for us to provide
18 FAAI with any meaningful relief on the state of this record, we
19 DISMISS this appeal as moot.

20 FACTS

21 In September 2007, Lesso commenced a dissolution proceeding
22 against her ex-husband, Piotr Andrzejewski ("Andrzejewski"), in
23

24 ***Hon. Dennis Montali, United States Bankruptcy Judge for
25 the Northern District of California, sitting by designation.

26 ¹Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. All "Civil Rule" references are to
the Federal Rules of Civil Procedure.

1 the Family Law Division of the Los Angeles Superior Court
2 ("Family Court") (LASC Case No. GD041694), and the Family Court
3 entered an interlocutory judgment of dissolution on January 21,
4 2011. FAAI represented Lesso in the dissolution proceeding
5 between October 2008 and June 2010. This representation
6 ultimately led to a dispute between Lesso and FAAI over fees. It
7 is undisputed that Lesso paid FAAI over \$400,000 in attorney's
8 fees, but FAAI claims that Lesso owes it hundreds of thousands of
9 dollars more.

10 In the course of the dissolution proceeding, the Family
11 Court made several rulings significant to the parties' fee
12 dispute. First, on October 8, 2009, the Family Court issued an
13 order ("§375,000 Judgment") against Andrzejewski that in relevant
14 part awarded Lesso \$375,000 under Cal. Fam. Code § 2030(a)(1),²
15 as pendente lite attorney's fees, on account of fees she then
16 owed FAAI and fees she expected to owe FAAI in the future. While
17 the §375,000 Judgment stated that the fees were awarded to Lesso,

18
19 ²The statute provides in relevant part:

20 (a)(1) In a proceeding for dissolution of marriage,
21 nullity of marriage, or legal separation of the
22 parties, and in any proceeding subsequent to entry of a
23 related judgment, the court shall ensure that each
24 party has access to legal representation, including
25 access early in the proceedings, to preserve each
26 party's rights by ordering, if necessary based on the
27 income and needs assessments, one party, except a
28 governmental entity, to pay to the other party, or to
the other party's attorney, whatever amount is
reasonably necessary for attorney's fees and for the
cost of maintaining or defending the proceeding during
the pendency of the proceeding.

28 Cal. Fam. Code § 2030(a)(1).

1 it also directed Andrzejewski to wire the fees to FAAI's trust
2 account. To date, Andrzejewski has not satisfied the \$375,000
3 Judgment.

4 Much of the current dispute between Lesso and FAAI arises
5 from the \$375,000 Judgment because of its language directing
6 Andrzejewski to wire the fees to FAAI's trust account and because
7 of the language of Cal. Fam. Code § 2030(a)(1), which among other
8 things directs the Family Court to order payment of such fees
9 either to a party or that party's attorney. FAAI claims that it
10 - not Lesso - is the judgment creditor entitled to enforce the
11 \$375,000 Judgment. Lesso contends that she - not FAAI - is the
12 judgment creditor entitled to enforce the \$375,000 Judgment.

13 After FAAI ceased representing Lesso in the dissolution
14 proceeding in June 2010, it focused its efforts on recovering the
15 additional attorney's fees it claimed Lesso owed it ("Additional
16 Fees"). While some of its collection efforts were aimed directly
17 at Lesso, others were aimed at Andrzejewski based on its supposed
18 rights under the \$375,000 Judgment. For example, in June 2010,
19 within days of Lesso terminating FAAI as her counsel, FAAI
20 recorded an abstract of judgment ("Abstract") in which it
21 identified itself as the judgment creditor of the \$375,000
22 Judgment.³

23 FAAI also sought to enforce its purported judgment creditor
24 rights by filing a motion in the Family Court seeking an

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26 ³Even before Lesso terminated FAAI as her counsel, FAAI
27 sought and obtained a writ of execution on the \$375,000 Judgment
28 ("Writ Of Execution"), which identified FAAI as the judgment
creditor. FAAI claims that Lesso consented to FAAI obtaining the
Writ Of Execution in its own name as judgment creditor.

1 assignment of rents from the Properties. Lesso opposed that
2 motion. The Family Court held a hearing on the assignment of
3 rents motion on August 30, 2010. At the hearing, the Family
4 Court recited the respective positions taken by Lesso and FAAI.
5 According to the Family Court, Lesso argued that FAAI was not a
6 bona fide judgment creditor and that she was the person entitled
7 to enforce the \$375,000 Judgment. As for FAAI, the Family Court
8 stated that FAAI pointed to the Writ Of Execution and the
9 Abstract as supporting its claim to be the judgment creditor
10 under the \$375,000 Judgment. The Family Court agreed with Lesso.
11 It in essence held that, in granting the \$375,000 Judgment, it
12 never had intended for FAAI to be able to attach that amount of
13 money.⁴

14
15 ⁴FAAI claims that at the August 30, 2010 hearing the Family
16 Court never addressed whether FAAI was a bona fide creditor
17 entitled to enforce the \$375,000 Judgment. According to FAAI,
18 the form of order the Family Court signed therefore should not
19 have purported to resolve that issue. But page 6 of the
20 August 30, 2010 hearing transcript tends to contradict FAAI's
21 claim. We acknowledge that page 6 and many other pages of that
22 transcript are subject to legibility problems, but we are
23 comfortable that a sufficient amount of the transcript is
24 legible, such that we have accurately reflected in this decision
the gist of the Family Court's relevant statements. In any
event, the content of the written order controls over any alleged
inconsistency with the Family Court's oral ruling. See Kong v.
City of Hawaiian Gardens Redevelopment Agency, 134 Cal.Rptr.2d
260, 265 n.9 (Cal. App. 2002). We apply the same rule to
bankruptcy court orders. See Cashco Fin. Servs., Inc. v. McGee
(In re McGee), 359 B.R. 764, 774 n.9 (9th Cir. BAP 2006).

25 FAAI claims to have obtained a full and legible copy of the
26 August 30, 2010 Family Court hearing transcript. We will not
27 consider the more legible version of the transcript at all,
28 because it was not made available to the bankruptcy court before
it ruled. But FAAI only saw fit to attach to its opening appeal
(continued...)

1 The Family Court thereafter entered its order denying FAAI's
2 assignment of rents motion ("Rents Assignment Denial Order"). In
3 that order the Family Court explicitly held that FAAI was not
4 entitled to an assignment of rents because it was not a bona fide
5 judgment creditor and was not entitled to the Writ Of Execution
6 for \$375,000.

7 In addition to the judgment lien ("Judgment Lien") arising
8 from FAAI's recordation of its Abstract, FAAI claimed to hold a
9 valid attorney fee and cost lien ("Charging Lien") against all of
10 Lesso's property. The Charging Lien allegedly arose from FAAI's
11 hourly attorney fee agreements ("Fee Agreements") with Lesso. On
12 June 25, 2010, in furtherance of its purported Charging Lien,
13 FAAI filed in the Family Court a notice of attorney fee and cost
14 lien for \$625,000.

15 FAAI also initiated a collection action against Lesso. On
16 July 14, 2010, FAAI sued Lesso in the Civil Division of the Los
17 Angeles County Superior Court ("State Court") seeking to recover
18 all of the Additional Fees Lesso allegedly owed it. In September
19 2011, that matter was heard pursuant to mandatory binding
20 arbitration in accordance with the terms of the Fee Agreements.
21 In October 2011, the arbitrator issued an award ("Arbitration
22 Award") finding, among other things, that the Abstract was
23 "invalidated by the [Family Court], and the [Judgment Lien]

24 ⁴(...continued)
25 brief (Ex. A thereto) a single page - page 7 - from its more-
26 legible version of the transcript. Apparently, FAAI believes
27 that page 7 supports its version of what transpired at the
28 hearing. We presume that FAAI did not make available to the
Panel the more legible version of page 6 from the same transcript
because it does not support its version of events.

1 should be expunged and title cleared." Arbitration Award
2 (Oct. 12, 2011) at p. 12; see also id. at 7. The arbitrator
3 further found that FAAI had no right under the Fee Agreements to
4 a Charging Lien against the Properties. Id. at 12. Ultimately,
5 the arbitrator concluded: "[1] [FAAI] shall recover no additional
6 attorney fees, costs or damages; [2] The lien recorded by [FAAI]
7 is invalid and should be expunged; [and 3] [FAAI] need not refund
8 any of the \$480,998.68 previously paid [by Lesso]." Id. at 13.

9 On January 19, 2012, the State Court confirmed the
10 Arbitration Award in its entirety. In addition, the California
11 Court of Appeal recently affirmed the State Court's judgment
12 confirming the Arbitration Award. See Fuchs & Associates, Inc.
13 v. Lesso, No. B239246, 2013 WL 74441 (Cal. Ct. App. Jan. 8, 2013,
14 modified on denial of reh'g, January 28, 2013). A discretionary
15 appeal was lodged with the California Supreme Court. See Fuchs &
16 Associates v. Lesso, No. S208621 (Cal. S. Ct. Feb. 14. 2013).
17 However, on May 1, 2013, the California Supreme Court denied
18 review.

19 Meanwhile, Lesso filed her chapter 11 bankruptcy case on
20 May 26, 2011, and she moved to sell the Properties under § 363(f)
21 on August 6, 2012 ("Sale Motion"). Several parties, including
22 FAAI, responded to the Sale Motion, and Lesso filed replies
23 addressing each response. On August 30, 2012, the bankruptcy
24 court held its first hearing on the Sale Motion. Shortly before
25 that hearing, the bankruptcy court issued a lengthy and detailed
26 tentative ruling setting forth a history of key events from the
27 dissolution proceeding and addressing the parties' issues.

28 For purposes of this appeal, however, only two issues are

1 important. First, as to the Judgment Lien, the bankruptcy court
2 relied on the Family Court's Rents Assignment Denial Order to
3 hold that the Judgment Lien was invalid. In light of that
4 holding, the bankruptcy court rejected FAAI's objection to the
5 sale to the extent that objection was based on its Judgment Lien.

6 Second, as to the Charging Lien and the Additional Fees, the
7 bankruptcy court referenced the Arbitration Award, which had
8 determined that Lesso owed no Additional Fees to FAAI. The
9 bankruptcy court further noted that the State Court had confirmed
10 the Arbitration Award and that the confirmed Arbitration Award
11 was the subject of an appeal then pending in the California Court
12 of Appeal. Based thereon, the bankruptcy court held that FAAI's
13 Charging Lien claim could be dealt with under § 363(f)(2). FAAI
14 has not challenged this holding on appeal.

15 The bankruptcy court did not fully dispose of the Sale
16 Motion immediately at or after the August 30, 2012 hearing.
17 Instead, the bankruptcy court continued the hearing until
18 September 27, 2012. The continuance gave Lesso the opportunity
19 to serve additional notice of the sale and gave interested
20 parties the opportunity to file supplemental briefs on the issues
21 they raised in response to the proposed sale.

22 At the September 27, 2012 continued sale hearing, the
23 bankruptcy court adopted as its final ruling a slightly amended
24 version of its August 2012 tentative ruling. For our purposes,
25 the final ruling did not materially differ from the August 2012
26 tentative ruling regarding the bankruptcy court's disposition of
27 the Judgment Lien (held invalid), the Charging Lien (held subject
28 to bona fide dispute), and the Additional Fees Lesso allegedly

1 owed FAAI (also held subject to bona fide dispute).

2 Based on the final ruling, the bankruptcy court entered on
3 October 5, 2012, its order approving the sale of the Properties
4 free and clear of all liens under § 363(f) ("Sale Order"), and
5 FAAI timely filed a notice of appeal from the Sale Order on
6 October 10, 2012.

7 JURISDICTION

8 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
9 §§ 1334 and 157(b)(2)(N). Subject to the mootness discussion set
10 forth below, we have jurisdiction under 28 U.S.C. § 158.

11 ISSUE

12 Is this appeal moot?

13 STANDARD OF REVIEW

14 Constitutional mootness is a jurisdictional issue that we
15 review de novo. See Hunt v. Imperial Merchant Servs., Inc.,
16 560 F.3d 1137, 1141 (9th Cir. 2009).

17 DISCUSSION

18 This Panel lacks jurisdiction over appeals when they do not
19 present an actual "case or controversy" within the meaning of
20 Article III of the Constitution. See Motor Vehicle Cas. Co. v.
21 Thorpe Insulation Co. (In re Thorpe Insulation Co.), 677 F.3d
22 869, 880 (9th Cir. 2012) (citing Felster Publ'g v. Burrell
23 (In re Burrell), 415 F.3d 994, 998 (9th Cir. 2005)). In turn, an
24 appeal is considered moot, and does not present a live case or
25 controversy, when it would be impossible for us to grant any
26 effective or meaningful relief to the appellant even if it were
27 to prevail on the merits of its appeal. See id. Sometimes, the
28 existence of a final, non-appealable order may render an appeal

1 from another order moot because it would be impossible to grant
2 relief from the appealed order without unwinding the effect of
3 the final, non-appealable order. See Parks v. Drummond
4 (In re Parks), 475 B.R. 703, 706 (9th Cir. BAP 2012); Omoto v.
5 Ruggera (In re Omoto), 85 B.R. 98, 99-100 (9th Cir. BAP 1988).

6 In this appeal, FAAI has not sought to unwind the sale.
7 Instead, FAAI has sought to establish its entitlement to a share
8 of the sale proceeds based on the Judgment Lien, the Charging
9 Lien and the Additional Fees. But the California Court of Appeal
10 has affirmed the State Court's judgment confirming the
11 Arbitration Award, which in relevant part held: (1) that the
12 Judgment Lien was invalid, (2) that FAAI had no right to a
13 Charging Lien under the Fee Agreements, and (3) that in any event
14 Lesso did not owe any Additional Fees to FAAI. Those holdings
15 are now final, and they are not subject to further appeal. As a
16 result, even if we were to conclude that the bankruptcy court
17 committed some form of reversible error, our vacatur or reversal
18 of the bankruptcy court's sale order would not provide FAAI with
19 any meaningful relief. In light of the Arbitration Award, FAAI
20 still would not be entitled to any share of the proceeds from the
21 sale of the Properties.

22 While Lesso's sale motion was a core bankruptcy matter, see
23 28 U.S.C. 157(b)(2)(N), the respective rights and interests of
24 the parties in the Properties and the sale proceeds were
25 determined by reference to state law. See Butner v. United
26 States, 440 U.S. 48, 55 (stating that property interests in
27 bankruptcy proceedings generally are defined by state law);
28 Ahcom, Ltd. v. Smeding, 623 F.3d 1248, 1250 (9th Cir. 2010)

1 (same). Here, the State Court's order confirming the Arbitration
2 Award effectively established that, under California law, FAAI
3 had no valid claim against Lesso and no valid interest in the
4 sale proceeds. As a matter of comity and federalism, we
5 generally must give deference to state court judgments and
6 proceedings. See, e.g., Marciano v. Chapnick (In re Marciano),
7 708 F.3d 1123, 1128 (9th Cir. 2013); G.C. and K.B. Investments,
8 Inc. v. Wilson, 326 F.3d 1096, 1107 (9th Cir. 2003).

9 Under these circumstances, we cannot grant FAAI any relief
10 that would improve its position vis-a-vis Lesso or the proceeds
11 from sale of the Properties. Accordingly, this appeal is moot.

12 We acknowledge that FAAI also lacks standing. More
13 specifically, in light of the Arbitration Award, FAAI no longer
14 has a stake in the sale or the proceeds. In this instance,
15 mootness is manifesting itself as "the doctrine of standing set
16 in a time frame: [t]he requisite personal interest that must
17 exist at the commencement of the litigation (standing) must
18 continue throughout its existence (mootness)." Arizonans for
19 Official English v. Ariz., 520 U.S. 43, 68 n.22 (1997) (quoting
20 United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397
21 (1980)). Accord, Foster v. Carson, 347 F.3d 742, 745 (9th Cir.
22 2003) (quoting Cook Inlet Treaty Tribes v. Shalala, 166 F.3d 986,
23 989 (9th Cir. 1999)). While in some contexts, this statement
24 might oversimplify the two doctrines, see Friends of the Earth,
25 Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 189-93
26 (2000), the statement is quite apt here. Simply put, because the
27 Arbitration Award effectively has stripped FAAI of its standing,
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1 this appeal has become moot.⁵

2 **CONCLUSION**

3 For the reasons set forth above, we DISMISS this appeal as
4 moot.

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25 ⁵While we can and do hold in the alternative that FAAI lacks
26 standing, we need not alter our disposition of this appeal based
27 on mootness. Indeed, it would be permissible for us to dismiss
28 based on mootness without addressing the standing issue at all.
See, e.g., Cook Inlet Treaty Tribes, 166 F.3d at 989 (citing
Arizonans for Official English, 520 U.S. at 66-67).