

MAY 28 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NOT FOR PUBLICATION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-12-1373-TaPaMk
6	JERMAINE SINCLAIR,)	Bk. No.	09-23178-BR
7	Debtor.)		
8	_____)		
9	JERMAINE SINCLAIR,)		
10	Appellant,)		
11	v.)	MEMORANDUM*	
12	BANK OF AMERICA, N.A., in its)		
13	own capacity and as successor)		
14	by merger to BAC HOME LOANS)		
15	SERVICING, LP and BANK OF)		
16	NEW YORK MELLON FKA BANK)		
17	OF NEW YORK, AS TRUSTEE FOR)		
18	THE CERTIFICATEHOLDERS CWALT,)		
19	INC., ALTERNATIVE LOAN TRUST)		
20	2006-OC11, MORTGAGE)		
21	PASS-THROUGH CERTIFICATES,)		
22	SERIES 2006-OC11,)		
23	Appellee.)		
24	_____)		

Submitted Without Oral Argument**
on May 16, 2013

Filed - May 28, 2013

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

Honorable Barry Russell, 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.

** Appellant Jermaine Sinclair did not appear at oral argument. While Appellees offered to present argument, the appeal is deemed submitted without oral argument.

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Appearances: Appellant Jermaine Sinclair, pro se, on brief;
Christopher Rivas of Reed Smith LLP, on brief for
Appellees.

Before: TAYLOR, PAPPAS, and MARKELL, Bankruptcy Judges.

INTRODUCTION¹

Appellant and debtor Jermaine Sinclair ("Sinclair") appeals from the bankruptcy court's order granting retroactive annulment of the automatic stay under § 362(d)(1)² to appellees Bank of America, N.A. ("BOA"), in its own capacity and as successor by merger to BAC Home Loans Servicing, LP ("BAC"),³ and The Bank of New York Mellon FKA The Bank of New York ("BONYM"), as Trustee for the Certificateholders CWALT, Inc., Alternative Loan Trust 2006-OC11, Mortgage Pass-Through Certificates, Series 2006-OC11 (collectively, the "Appellees"). We AFFIRM the bankruptcy court's order.

FACTS

In 2006, Sinclair's grandmother, Gloria H. Spence ("Spence"), obtained a loan secured by real property located in Houston, Texas (the "Property"). Spence eventually defaulted on

¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

² The bankruptcy court's order annulling the stay identifies § 362(d)(1) and (d)(2) as the grounds for relief. But it exclusively addressed "cause" under § 362(d)(1) and did not refer to § 362(d)(2). Thus, we solely review the order annulling the stay under § 362(d)(1).

³ BAC was formerly known as Countrywide Home Loans Servicing LP ("Countrywide").

1 the promissory note evidencing the loan.

2 In May 2009, Spence executed and recorded a grant deed
3 purporting to grant a 25% interest in the Property to Sinclair.⁴
4 There was no evidence of consideration for the transfer and no
5 consent by the secured lender. Approximately two weeks later,
6 BAC, through the law firm of Barrett Daffin Frappier Turner &
7 Engel, LLP ("Barrett Daffin"), notified Spence that a foreclosure
8 sale was scheduled for July 7, 2009.

9 On May 29, 2009, Sinclair filed a chapter 13 bankruptcy
10 petition in the Central District of California; his case was
11 converted to chapter 7 shortly thereafter. Sinclair listed ten
12 real properties on his amended Schedule A, including the
13 Property. He also scheduled Countrywide and Barrett Daffin as
14 creditors and listed them on his creditor mailing list.

15 Unaware of Sinclair's purported interest in the Property or
16 of his bankruptcy filing, the Appellees conducted the foreclosure
17 sale on July 7, 2009, and BONYM purchased the Property. After
18 learning of the transfer and bankruptcy, BONYM promptly moved to
19 annul the stay so as to validate the foreclosure. Before that
20 matter could be heard, however, the bankruptcy court
21 administratively dismissed Sinclair's case on October 20, 2009,
22 for Sinclair's failure to attend the § 341(a) meeting of
23 creditors. No party contested the dismissal, and Sinclair's
24 bankruptcy case was closed on January 28, 2010.

25 In March 2011, Sinclair and three other family members,
26

27 ⁴ Apparently, Spence also conveyed partial interests in the
28 Property to other family members.

1 including Spence, commenced an action against the Appellees in
2 the Texas state court. Among other things, they alleged a
3 violation of the automatic stay in Sinclair's bankruptcy case and
4 sought damages and injunctive relief seeking to compel a loan
5 modification. The Appellees removed the action to the federal
6 district court in Texas and moved to dismiss the case.

7 The Appellees waited until April 13, 2012, to address the
8 stay violation by filing an ex-parte application to reopen
9 Sinclair's bankruptcy case and moving for retroactive annulment
10 of the stay. The bankruptcy court promptly granted the
11 Appellees' application to reopen Sinclair's bankruptcy case. But
12 it did not vacate the order dismissing Sinclair's case.

13 In response, Sinclair disputed that he filed his bankruptcy
14 petition in bad faith and asserted that the foreclosure sale was
15 malicious, unethical, and violated state and federal laws. The
16 Appellees replied that Sinclair filed his bankruptcy case in bad
17 faith, which established cause to annul the stay under
18 § 362(d)(1).

19 The hearing came before the bankruptcy court on June 26,
20 2012. The bankruptcy court determined that Sinclair's bankruptcy
21 was a bad faith case and, accordingly, that cause existed to
22 grant stay relief. On July 6, 2012, it entered an order
23 annulling the automatic stay retroactively. Sinclair timely
24 appealed.

25 JURISDICTION

26 As discussed further below, the bankruptcy court had
27 jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(G). We
28 have jurisdiction under 28 U.S.C. § 158.

1 DISCUSSION

2 A. The bankruptcy court possessed "arising under" jurisdiction to annul the automatic stay retroactively.
3

4 Neither Sinclair nor the Appellees expressly raise the issue
5 of the bankruptcy court's jurisdiction to consider and grant the
6 Appellees' requested relief. Nonetheless, we have an independent
7 duty to consider jurisdictional issues. Aheong v. Mellon
8 Mortgage Co. (In re Aheong), 276 B.R. 233, 239 (9th Cir. BAP
9 2002). We conclude that the bankruptcy court had "arising under"
10 jurisdiction to consider the Appellees' motion and to annul the
11 stay retroactively notwithstanding prior dismissal of the case.

12 In relevant part, 28 U.S.C. § 1334(b) provides that
13 bankruptcy jurisdiction includes all civil proceedings "arising
14 under" the Bankruptcy Code, or "arising in" or "related to" a
15 bankruptcy case. "Arising under" jurisdiction includes
16 proceedings based on a right or cause of action created by the
17 Bankruptcy Code. In re Aheong, 276 B.R. at 243.

18 Post-dismissal bankruptcy jurisdiction is generally limited.
19 The bankruptcy court retains jurisdiction to dispose of ancillary
20 matters, including construing and interpreting its orders. Id.
21 at 241. It may not, however, "grant new relief independent of
22 its prior rulings once the underlying action has been dismissed."
23 Tsafaroff v. Taylor (In re Taylor), 884 F.2d 478, 481 (9th Cir.
24 1989) (citing Armel Laminates, Inc. v. Lomas & Nettleton Co.
25 (In re Income Prop. Builders, Inc.), 699 F.2d 963, 964 (9th Cir.
26 1982)); see also Beneficial Trust Deeds v. Franklin
27 (In re Franklin), 802 F.2d 324, 327 (9th Cir. 1986).

28 Notwithstanding, proceedings to annul the stay after the

1 underlying bankruptcy case is dismissed fall within the ambit of
2 "arising under" bankruptcy jurisdiction. In re Aheong, 276 B.R.
3 233 at 248; accord Johnson v. TRE Holdings LLC (In re Johnson),
4 346 B.R. 190, 194 (9th Cir. BAP 2006) (bankruptcy court may annul
5 the stay after the bankruptcy case is dismissed). In Aheong, the
6 panel majority determined that "arising under" jurisdiction did
7 not depend on the existence of an active bankruptcy case. Id. at
8 244-45. It also distinguished In re Taylor and In re Income
9 Prop. Builders as cases involving requests for prospective, not
10 retroactive, relief from stay. Id. at 246-47.

11 Here, the bankruptcy court reopened Sinclair's bankruptcy
12 case, but did not vacate the order dismissing his case.
13 Nonetheless, we determine that the bankruptcy court had "arising
14 under" jurisdiction over the Appellees' motion. See id. at 250.
15 To the extent the bankruptcy court retains jurisdiction to
16 address stay violations and sanctions, it follows that the
17 bankruptcy court also retains jurisdiction to annul the stay
18 retroactively. Id. at 249.

19 **B. Sinclair's appeal is not equitably moot.**

20 The Appellees assert that Sinclair's appeal is equitably
21 moot and, thus, that we lack jurisdiction to entertain the
22 appeal. Sinclair neither submitted a reply brief nor appeared at
23 oral argument and, thus, did not respond to this argument.

24 We will not entertain an appeal that is moot. See Motor
25 Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe
26 Insulation Co.), 677 F.3d 869, 779-880 (9th Cir. 2012).
27 Equitable mootness looks beyond the existence of redressability
28 to the availability and consequences of effective relief. Clear

1 Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 33
2 (9th Cir. BAP 2008) (citation omitted).

3 To determine whether an appeal is equitably moot, we examine
4 whether a stay pending appeal was sought, "for absent that a
5 party has not fully pursued its rights." In re Thorpe Insulation
6 Co., 677 F.3d at 881. But see Suter v. Goedert, 504 F.3d 982,
7 990-91 (9th Cir. 2007) (failure to seek stay pending appeal does
8 not moot appeal where the debtor has state law remedies to set
9 aside or undo the transaction at issue). We further consider:
10 (1) whether there has been substantial consummation of the
11 appealed plan (or order); (2) the effect, if any, on third-
12 parties not before the court; and (3) whether the court may
13 fashion effective and equitable relief without undoing the plan
14 (or order) and creating an uncontrollable situation.
15 In re Thorpe Insulation Co., 677 F.3d at 881.

16 Fundamentally, the central inquiry in an equitable mootness
17 analysis is whether there has been a comprehensive change of
18 circumstances such that it is inequitable or impractical to
19 consider the merits of the appeal. In re PW, LLC, 391 B.R. at 33
20 ("Ultimately, the decision whether to unscramble the eggs turns
21 on what is practical and equitable."). The party asserting
22 mootness bears the heavy burden of establishing a lack of
23 effective relief. Id. at 34.

24 We conclude that Sinclair's appeal is not equitably moot.
25 Sinclair did not apply for a stay pending appeal; but that is
26 irrelevant given that the foreclosure sale occurred almost four
27 years ago, Appellee BONYM acquired the Property, and there is no
28 evidence of further disposition of the Property. The Appellees

1 have neither asserted nor shown that any changes have occurred
2 since the bankruptcy court entered the order annulling the stay
3 retroactively, let alone that the changes were comprehensive.
4 Consequently, they have not met their burden of showing a
5 comprehensive change of circumstances such that it is inequitable
6 or impractical for us to consider the appeal. Therefore, the
7 appeal is not moot.

8 **C. The bankruptcy court did not abuse its discretion in**
9 **annulling the automatic stay.**

10 On appeal, Sinclair argues that the foreclosure sale is void
11 because it violated the automatic stay. Indeed, it is well-
12 established that violations of the automatic stay are void. See
13 Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571
14 (9th Cir. 1992). Neither party seriously challenges that the
15 foreclosure sale occurred after Sinclair filed his bankruptcy
16 petition or that the sale violated the automatic stay, which
17 rendered the sale void. Sinclair, however, does not address the
18 bankruptcy court's ability to annul the stay retroactively or the
19 effect of such relief.

20 Section 362(d) provides authorization to annul the automatic
21 stay, which, in effect, retroactively ratifies or validates acts
22 that otherwise violated the stay. Lone Star Sec. & Video, Inc.
23 v. Gurrola (In re Gurrola), 328 B.R. 158, 172 (9th Cir. BAP
24 2005). Determining whether cause exists to annul the stay
25 retroactively is a case-by-case inquiry based on a balance of the
26 equities. Nat'l Envtl. Waste Corp. v. City of Riverside (In re
27 Nat'l Envtl. Waste Corp.), 129 F.3d 1052, 1055 (9th Cir. 1997).
28 In making this determination, the bankruptcy court considers

1 12 factors, including the debtor's overall good faith under a
2 totality of the circumstances; whether the creditor was aware of
3 the stay but nonetheless took action; how quickly the creditor
4 moved for annulment, or how quickly the debtor moved to set aside
5 the violative sale; whether, after learning of the bankruptcy,
6 the creditor proceeded to take steps in continued violation of
7 the stay, or whether it moved expeditiously to gain relief; and
8 the extent of prejudice to creditors or third parties if the stay
9 relief is not made retroactive. In re Fjeldsted, 293 B.R. at 25
10 (incorporating the two factors discussed in In re Nat'l Envtl.
11 Waste Corp., 129 F.3d at 1055). These factors, however, "are
12 merely a framework for analysis and not a scorecard," and thus,
13 "[i]n any given case, one factor may so outweigh the others as to
14 be dispositive." Id.

15 Here, the bankruptcy court implicitly balanced the
16 circumstances of Sinclair's bankruptcy filing against the
17 Appellees' violative conduct. It found that Sinclair filed his
18 bankruptcy case in bad faith and that this established sufficient
19 cause to annul the stay retroactively under § 362(d)(1). In so
20 finding, the bankruptcy court inherently determined that, under
21 the totality of the circumstances, Sinclair's lack of good faith
22 outweighed the Appellees' stay violation. The record supports
23 its findings.

24 The record shows that Sinclair filed his bankruptcy petition
25 three weeks after Spence purportedly transferred a partial
26 interest in the Property to Sinclair and just one week after the
27 Appellees notified Spence about the scheduled foreclosure sale.
28 There is no evidence that Sinclair provided consideration for the

1 transfer of an interest in the Property or that either Spence or
2 he obtained the lender's consent. Appellee BONYM promptly moved
3 for retroactive stay relief in 2009 after learning of Sinclair's
4 interest in the Property and his subsequent bankruptcy filing,
5 but failed to obtain relief due to the case dismissal. Construed
6 as a whole, these circumstances support the bankruptcy court's
7 determination.

8 Sinclair argues that the Appellees were on notice of his
9 bankruptcy filing as he listed Countrywide and Barrett Daffin on
10 his creditor mailing list. While it is true that he scheduled
11 the Property, Countrywide, and Barrett Daffin, and included the
12 bank and law firm on his creditor mailing list, nothing in the
13 record shows that he contacted or notified the bank or the law
14 firm about his interest in the Property or subsequent bankruptcy
15 filing. It is unclear how the Appellees would have made the
16 connection between the Property and Sinclair when Spence - not
17 Sinclair - was the borrower. This factor, thus, either supports
18 the bankruptcy court's determination or, at best for Sinclair, is
19 neutral.

20 Based on the foregoing, the bankruptcy court's finding was
21 not illogical, implausible, or without support from the record.
22 As such, it did not err in determining that Sinclair's bad faith
23 filing established cause to annul the stay. See In re Fjeldsted,
24 293 B.R. at 25 (any one factor may outweigh the other factors so
25 as to be dispositive). Therefore, the bankruptcy court did not
26 abuse its discretion in annulling the automatic stay
27 retroactively.

28 ///

CONCLUSION

Based on the foregoing, we AFFIRM.

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