

MAY 29 2013

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

1 In re:) BAP No. AZ-12-1368-MkJu
2)
3 PETER F. BRONSON AND SHERRI L.) Bk. No. 08-00777
4 BRONSON,)
5)
6 Debtors.)
7)
8 _____)
9)
10 PETER F. BRONSON; SHERRI L.)
11 BRONSON,)
12 Appellants,)
13)
14 v.) **MEMORANDUM***
15)
16 THOMAS M. THOMPSON,)
17)
18 Appellee.)
19 _____)

Submitted Without Oral Argument
on May 16, 2013

Filed - May 29, 2013

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

Honorable George B. Nielsen, Jr., Bankruptcy Judge, Presiding

Appearances: Appellants Peter Bronson and Sherri Bronson on
brief pro se; Jimmie D. Smith on brief for
appellee Thomas M. Thompson.

Before: MARKELL, DUNN and JURY, Bankruptcy Judges.

*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.

1 The second appeal, filed on June 15, 2012 ("BAP No. AZ-12-
2 1320"), sought review of two orders: (1) an order converting the
3 Bronsons' chapter 11 case to chapter 7, and (2) an order denying
4 reconsideration of the conversion order. We are disposing of BAP
5 No. AZ-12-1320 by a separate written decision issued
6 contemporaneously with this decision. The decision disposing of
7 BAP No. AZ-12-1320 contains a lengthy recitation of facts
8 concerning the Bronsons' disputes with TMT. Accordingly, we only
9 recite here those facts that are directly relevant to our
10 disposition of this third appeal.

11 TMT was a secured creditor of the Bronsons. The Bronsons
12 defaulted on the loan they owed to TMT, so TMT commenced
13 foreclosure proceedings against the Office Building, which
14 secured the loan. In furtherance thereof, TMT recorded in
15 October 2007 a notice of trustee's sale.

16 On January 28, 2008, the day before the scheduled trustee's
17 sale, the Bronsons filed their chapter 11 bankruptcy petition.²
18 As a result of the automatic stay, the trustee's sale could not
19 be held as scheduled. On July 2, 2008, TMT filed a motion for
20 relief from stay, seeking to proceed with foreclosure against the
21 Office Building. TMT noticed the "final hearing" on the relief
22 from stay motion for August 19, 2008. The Bronsons, who were
23 represented by counsel at the time, filed an opposition to the
24 relief from stay motion, but never requested an evidentiary
25

26 ²In April 2012, the court converted the Bronsons' chapter 11
27 case to chapter 7. The conversion order, and the denial of
28 reconsideration of the conversion order, are the subject of BAP
No. AZ-12-1320.

1 hearing in accordance with the bankruptcy court's local rules.³
2 At the final hearing, the bankruptcy court orally announced its
3 finding that cause existed for modifying the stay. According to
4 the court, it was not persuaded that TMT's interest in the Office
5 Building was adequately protected. With respect to the value of

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7 ³Those local rules provide in relevant part:

8 **(a) Initial Hearing without Live Testimony.** Pursuant
9 to Bankruptcy Rule 9014(e), all hearings scheduled on
10 contested matters will be conducted without live
11 testimony except as otherwise ordered by the court.
12 If, at such hearing, the court determines that there is
13 a material factual dispute, the court will schedule a
14 continued hearing at which live testimony will be
15 admitted.

13 **(b) Request for Live Testimony.**

14 (1) Any party filing a motion, application, or
15 objection who reasonably anticipates that its
16 resolution will require live testimony may file an
17 accompanying motion for an evidentiary hearing,
18 stating:

18 (A) The estimated time required for receipt of all
19 evidence, including live testimony;

20 (B) When the parties will be ready to present such
21 evidence;

22 (C) The estimated time required to complete all
23 formal and informal discovery;

24 (D) Whether a Bankruptcy Rule 7016 Scheduling
25 Conference should be held; and,

26 (E) Whether any party who may participate at the
27 evidentiary hearing is appearing pro se.

28 (2) The party requesting an evidentiary hearing shall
29 accompany the motion with a form of order.

Bankr. D. Ariz. R. 9014-2.

1 the Office Building, the court acknowledged that the Bronsons had
2 listed the value of the Office Building in their schedules as
3 exceeding \$1 million, but the court expressed doubt regarding the
4 scheduled value and opined that the scheduled value by itself was
5 not sufficient under the circumstances to satisfy the adequate
6 protection requirement. The court expressed particular concern
7 over rents from the property and the fact that nothing was being
8 paid either to secured creditors or for property taxes:

9 I'm concerned about a piece of property sitting there
10 with no money to secured creditors, no money to pay for
11 taxes, and yet it throws off income [of \$1,000 per
12 month].

12 Hr'g Tr. (Aug. 19, 2008) at 24:15-17.

13 Nonetheless, the court further ruled that it did not want to
14 immediately terminate the stay. Instead, it wanted to give the
15 Bronsons a further opportunity to confirm a chapter 11 plan
16 and/or to sell or refinance the Office Building. Thus, the court
17 ruled that the stay would remain in effect, unless by November
18 19, 2008, the Bronsons had not confirmed a chapter 11 plan, at
19 which point the stay would be modified to permit TMT to foreclose
20 on the Office Building.

21 On August 22, 2008, the bankruptcy court entered the Relief
22 From Stay Order, which was consistent with the court's oral
23 ruling. The Bronsons never appealed the Relief From Stay Order.
24 Nor did they ever confirm a chapter 11 plan. TMT ultimately
25 proceeded with the foreclosure sale on July 13, 2009, at which
26 TMT was the successful bidder based on a credit bid of \$200,000.

1 A trustee's deed was recorded on July 17, 2009.⁴

2 The Bronsons did not file their Reconsideration Motion of
3 the Relief From Stay Order until May 24, 2012. By the time of
4 the filing of their Reconsideration Motion, the Bronsons were
5 representing themselves in their bankruptcy case. The
6 Reconsideration Motion sought relief based on Civil
7 Rule 60(b)(2), (3) and (6). While the Bronsons' allegations were
8 wide ranging, the Reconsideration Motion hinged on the Bronsons'
9 contention that TMT wrongfully failed to disclose certain facts
10 concerning TMT's foreclosure and subsequent resale of a parcel of
11 commercial real property located on Broad Street in Globe,
12 Arizona ("Broad Property"). According to the Bronsons, TMT
13 purchased the Broad Property in June 2008 at a foreclosure sale
14 for a credit bid of \$384,000 and resold the Broad Property to a
15 third party in 2009 for \$420,000 ("Broad Sale"). The Bronsons
16 contend that the the Broad Sale established the value of the
17 Broad Property, which in turn established the value of the Office
18 Building, by "extrapolation." Therefore, the Bronsons concluded,
19 TMT and his counsel should have disclosed the Broad Property and
20 its sale during the course of the relief from stay proceedings.⁵

21 _____
22 ⁴While the Bronsons have represented themselves in this
23 appeal, they were represented by counsel during the entire period
24 of the events described above, from the time they filed
25 bankruptcy through the time TMT foreclosed on the Office
26 Building.

27 ⁵The Bronsons twice claim in their opening brief that they
28 first learned about the Broad Property on or after May 24, 2011.
Aplt. Opn. Br. at pp. 3, 22. This claim is patently false. The
Bronsons asserted in November 2009, in their motion to dismiss
TMT's adversary complaint seeking a deficiency, that the Broad

(continued...)

1 On July 10, 2012, the bankruptcy court entered an order
2 denying the Reconsideration Motion, in essence holding that the
3 Bronsons were not entitled to relief because their motion was
4 untimely and because they had not established adequate grounds
5 for relief under Civil Rule 60(b)(2), (3) or (6). The Bronsons
6 timely filed a notice of appeal from the Order denying their
7 Reconsideration Motion on July 16, 2012.⁶

8 JURISDICTION

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

12 ISSUE

13 Is this appeal moot?

14 STANDARD OF REVIEW

15 We have an independent duty to determine whether an appeal
16 is moot within the meaning of Article III's case or controversy
17 requirement, and the mootness issue is considered de novo. See
18 U.S. v. Golden Valley Elec. Ass'n, 689 F.3d 1108, 1112 (9th Cir.

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20 ⁵(...continued)
21 Sale for \$420,000 established that TMT was not entitled to any
22 deficiency.

23 ⁶Prior to entering the July 10, 2012 order, the bankruptcy
24 court entered on June 27, 2012 what it referred to as an "interim
25 order" denying the Reconsideration Motion ("Interim Order"). If
26 the Interim Order qualified as a final and appealable order, then
27 the Bronsons' appeal of the denial of the reconsideration motion
28 would be untimely. See Slimick v. Silva (In re Slimick),
928 F.2d 304, 306-07 (9th Cir. 1990). However, we do not
consider the Interim Order to be a final and appealable order,
because it is clear from the language of the Interim Order that
the court did not intend that order to be its "final act in the
matter." Id.

1 2012); Hunt v. Imperial Merchant Servs., Inc., 560 F.3d 1137,
2 1141 (9th Cir. 2009).

3 **DISCUSSION**

4 As a threshold matter, we note that the only ruling properly
5 before this Panel is the denial of the Bronsons' Reconsideration
6 Motion. All other matters the Bronsons have raised are beyond
7 the scope of this appeal, including but not limited to TMT's
8 adversary proceeding seeking a deficiency judgment, the Bronsons'
9 plan confirmation proceedings, and TMT's motion to convert the
10 case from chapter 11 to chapter 7. The Relief From Stay Order,
11 entered on August 22, 2008, also is beyond the scope of this
12 appeal. If the Bronsons desired to appeal that order, they
13 should have timely filed an appeal from it no later than
14 September 2008. See Rule 8002; see also United Student Aid
15 Funds, Inc. v. Espinosa, 130 S.Ct. 1367, 1380 (2010) (holding
16 that bankruptcy court's erroneous order nonetheless was binding
17 and enforceable against appellant because appellant had notice of
18 the proceedings but did not appeal that order).

19 We also should note the scope of relief that we may grant to
20 an appellant who prevails on appeal. Under Rule 8013, if the
21 Bronsons were to prevail, we could reverse or modify the order on
22 appeal, and we could remand for further proceedings consistent
23 with our determination as to whether the bankruptcy court erred
24 in entering the order appealed.

25 Here, however, the Bronsons ask us to do much more than
26 merely determine whether the court erred in denying the
27 Reconsideration Motion. The Bronsons also request the following
28 additional relief: (1) unwinding of the trustee's sale of the

1 Office Building that took place in July 2009; (2) return of
2 ownership of the Office Building to the Bronsons;
3 (3) reconversion of their bankruptcy case to chapter 11;
4 (4) reversal of all other rulings of the bankruptcy court since
5 June 2008; (5) a determination that TMT and his counsel are
6 guilty of misconduct; (6) direction to the bankruptcy court to
7 hold evidentiary hearings to determine whether sanctions against
8 TMT and his counsel are appropriate under Civil Rules 11 and 37;
9 (7) compulsion of TMT and his counsel to respond to the Bronsons'
10 subpoenas and other discovery requests; (8) award of all of the
11 Bronsons' attorney's fees and costs; and (9) direction to the
12 Ninth Circuit Court of Appeals to conduct a judicial misconduct
13 investigation of the bankruptcy judge presiding over their
14 bankruptcy case.

15 The Bronsons have not pointed us to any authority that would
16 permit us, by virtue of this appeal, to grant such relief. Nor
17 are we aware of any such authority. Simply put, our role in this
18 appeal necessarily is limited to review of the order denying the
19 Bronsons' Reconsideration Motion. But we may not fulfill even
20 that limited role unless this appeal presents a live case or
21 controversy, as discussed immediately below.

22 Even if we were to reverse the order on appeal and direct
23 full reinstatement of the automatic stay, the reinstatement of
24 the automatic stay would not prevent TMT from foreclosing. That
25 foreclosure occurred some years ago, in July 2009. In other
26 words, the action the Bronsons wanted to enjoin - the foreclosure
27 of the Office Building - already has occurred. This calls into
28 question whether this appeal presents a live case or controversy.

1 See Murphy v. Hunt, 455 U.S. 478, 481 (1982). This type of
2 mootness is jurisdictional and arises from Article III of the
3 Constitution, which provides that a dispute is not justiciable in
4 federal court unless it presents a live case or controversy. See
5 Arizonans for Official English v. Ariz., 520 U.S. 43, 66-67
6 (1997). As the Supreme Court stated in Arizonans for Official
7 English: "To qualify as a case fit for federal-court
8 adjudication, 'an actual controversy must be extant at all stages
9 of review, not merely at the time the complaint is filed.'" Id.
10 at 67 (quoting Preiser v. Newkirk, 422 U.S. 395, 401 (1975)).

11 When the action sought to be enjoined already has occurred,
12 an appeal from the denial or the discontinuance of injunctive
13 relief becomes constitutionally moot. See, e.g., Vegas Diamond
14 Props., LLC v. FDIC, 669 F.3d 933, 936 (9th Cir. 2012);
15 In Defense of Animals v. Dep't of Interior, 648 F.3d 1012, 1013
16 (9th Cir. 2011); Ctr. for Biological Diversity v. Lohn, 511 F.3d
17 960, 963-64 (9th Cir. 2007); Seven Words LLC v. Network
18 Solutions, 260 F.3d 1089, 1095 (9th Cir. 2001); Friends of the
19 Earth, Inc. v. Bergland, 576 F.2d 1377, 1379 (9th Cir. 1978).

20 We acknowledge that, when the order on appeal authorizes a
21 sale of real property, we have invoked a different mootness
22 doctrine - bankruptcy sale mootness - in declaring an appeal from
23 the sale order moot. See Vista Del Mar Assocs., Inc. v. W. Coast
24 Land Fund (In re Vista Del Mar Assocs., Inc.), 181 B.R. 422, 425
25 (9th Cir. BAP 1995). This mootness doctrine focuses on the
26 "particular need" for the finality of bankruptcy sale orders, and
27 it applies whenever the appellant fails to obtain a stay pending
28 appeal and the sale is consummated. See id. at 424. Vista Del

1 Mar Assocs. recognized two exceptions to bankruptcy sale
2 mootness: "(1) where the debtor has a statutory right of
3 redemption, and (2) where other state law would permit the sale
4 to be set aside." Id. at 425 (citing Ewell v. Diebert
5 (In re Ewell), 958 F.2d 276, 280 (9th Cir. 1992)). We tend to
6 doubt that the exceptions to bankruptcy sale mootness apply in
7 the context of an appeal from an order denying or discontinuing
8 an injunction, when the act sought to be enjoined already has
9 occurred. See Vegas Diamond, 669 F.3d at 936 (fact that sale
10 might be subject to unwinding did not prevent appeal of order
11 denying preliminary injunction from becoming moot when the sale
12 sought to be enjoined already had occurred).

13 However, even if we were to consider the bankruptcy sale
14 mootness exceptions, these exceptions would not help the Bronsons
15 here. Under the facts of this case, Arizona law does not give
16 the Bronsons either a right of redemption or the right to unwind
17 the sale. Indeed, Arizona law explicitly provides that the
18 foreclosure sale itself cut off any such rights that the Bronsons
19 otherwise might have asserted. See A.R.S. § 33-811(C) and (E);
20 see also T Capital, LLC v. TD Serv. Co. of Ariz., 275 P.3d 598,
21 600 (Ariz. 2012); Madison v. Groseth, 279 P.3d 633, 637-38 (Ariz.
22 Ct. App. 2012).

23 In sum, we cannot grant any effective relief to the
24 Bronsons. Even if they were to prevail on appeal, and even if we
25 were to remand for reconsideration of the Relief From Stay Order,
26 the act the Bronsons sought to prevent by invocation of the stay,
27 the foreclosure of the Office Building, already has occurred.
28 And we know of no authority that would enable the Bronsons to

1 unwind that sale.

2 **CONCLUSION**

3 For the reasons set forth above, we DISMISS this appeal as
4 moot.⁷

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22 ⁷Even if we were to reach the merits of this appeal, we
23 would be inclined to affirm. The Bronsons' requests for relief
24 under Civil Rule 60(b)(2), (3) and (6) were untimely and hinged
25 upon their contention that TMT had some sort of duty to disclose
26 the particulars concerning the Broad Property. We know of no
27 such duty. Any reliance of the Bronsons on Civil Rule 26(a) is
28 misplaced. It does not apply in contested matters, which include
relief from stay motions. See Rule 9014(c). Moreover, just
because the Bronsons believed that the Broad Property was
comparable to the Office Building does not necessarily make it so
for valuation and disclosure purposes. Thus, we are not
persuaded that the bankruptcy court erred in denying the
Bronsons' Reconsideration Motion.