

AUG 06 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NOT FOR PUBLICATION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

In re:) BAP No. NV-12-1547-CoDKi
)
 6 NORMA CERALDE, AKA Michael A.) Bk. No. NV-11-24631-BTB
 Henry, AKA Nolan A. Smith,)
 7)
 Debtor.)
 8 _____)
)
 9 NOLAN A. SMITH,)
)
 10 Appellant,)
)
 11 v.) **MEMORANDUM DECISION¹**
)
 12 THE BANK OF NEW YORK MELLON,)
 FKA The Bank of New York, as)
 13 Trustee for the)
 Certificateholders of CWALT,)
 14 Inc., Alternative Loan Trust)
 2007-22, Mortgage)
 15 Pass-Through Certificates,)
 Series 2007-22,)
 16)
 Appellee.)
 17 _____)

Argued and Submitted on July 19, 2013
at Las Vegas, Nevada

Filed - August 6, 2013

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

Honorable Bruce T. Beesley, Bankruptcy Judge, Presiding

Appearances: Jeffrey S. Yong, Esq. of Alexander & Yong argued
 24 for Appellant, Nolan A. Smith; and Chelsea A.
 Crowton, Esq. of Wright, Finlay & Zak, LLP argued
 25 for Appellee, The Bank of New York Mellon.

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

1 Before: COLLINS,² DUNN and KIRSCHER, Bankruptcy Judges.

2
3 **INTRODUCTION³**

4 This involuntary individual chapter 7 bankruptcy involves a
5 dispute between the debtor and the secured lender holding a
6 promissory note and deed of trust secured by real property. The
7 secured lender commenced and completed a trustee's sale of the
8 property postpetition and then filed a motion to retroactively
9 annul the automatic stay and validate the postpetition
10 foreclosure of its collateral.

11 The bankruptcy court entered an order granting the secured
12 lender's motion to annul the stay and then promptly dismissed the
13 chapter 7 proceedings. Debtor Smith appealed the bankruptcy
14 court's order annulling the stay. We AFFIRM the bankruptcy
15 court's order.

16 **STATEMENT OF FACTS**

17 The debtor in this case is apparently known by many
18 different names, including: Nolan A. Smith, Nolan A. Smith, Jr.,
19 Nolan Shaheed (Smith), Norma Ceralde and Michael Henry
20 ("Debtor"). Using the name Nolan A. Smith, Jr., the Debtor
21 executed a Promissory Note secured by a Real Property Deed of
22 Trust upon property located in Pasadena, CA ("Property"). The

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24

² Hon. Daniel P. Collins, Bankruptcy Judge for the District of
25 Arizona, sitting by designation.

26 ³ Unless otherwise indicated, all chapter, section and
27 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
28 1532, and to the Federal Rules of Bankruptcy Procedure, Rules
1001-9037. The Federal Rules of Civil Procedure are referred to
as "Civil Rules."

1 Bank of New York Mellon, FKA The Bank of New York, as Trustee for
2 the Certificateholders of CWALT, Inc., Alternative Loan Trust
3 2007-22, Mortgage Pass-Through Certificates, Series 2007-22
4 ("BNYM"), is the holder of the Promissory Note and Deed of Trust.

5 Alleged creditors Dex Enterprise, Advant Co, and On-The-Go
6 ("Petitioning Creditors") filed the instant chapter 7 involuntary
7 petition on September 16, 2011, listing "Norma Ceralde aka
8 Michael Henry aka Nolan A. Smith" as the Debtor. The Property
9 and associated loan owed to BNYM were not listed in bankruptcy
10 schedules, nor was BNYM listed on a master mailing list.⁴

11 Prior to the filing of the involuntary bankruptcy case, the
12 Debtor defaulted on the loan and BNYM commenced foreclosure
13 proceedings on the Property. BNYM conducted a private
14 foreclosure sale of the Property on September 16, 2011, the same
15 day the Debtor was placed into involuntary bankruptcy. After
16 learning of this involuntary bankruptcy case, on November 21,
17 2011, BNYM recorded a notice of rescission, rescinding the
18 foreclosure of the Property.

19 Less than two months later, BNYM commenced a second private
20 foreclosure, without seeking relief from the automatic bankruptcy
21 stay. A notice of sale was recorded on January 6, 2012, and a
22 trustee's sale of the Property was conducted on January 30, 2012.
23 BNYM then filed an unlawful detainer action against the Debtor in
24 Los Angeles County Superior Court to gain possession of the

25
26 ⁴ No bankruptcy schedules or statements were ever filed nor was
27 an order for relief ever entered by the court in this
28 involuntary case. Further, no master mailing list was ever
filed with the bankruptcy court.

1 Property. BNYM obtained a default judgment in that action.

2 On May 8, 2012, the Debtor filed a voluntary chapter 13
3 bankruptcy in California under the name "Nolan Shaheed (Smith)."
4 Less than a month later, that case was dismissed for failure to
5 timely file all required documents under Rules 1007 and 3015(b).⁵
6 The Debtor retained counsel, Jeffrey Yong ("Yong"), to combat
7 BNYM's state court eviction action. Yong notified BNYM of the
8 instant involuntary bankruptcy proceeding and requested that
9 BNYM's state court action be dismissed.

10 The Debtor filed an action in Los Angeles County Superior
11 Court on May 29, 2012 seeking injunctive relief, declaratory
12 relief and to quiet title on the Property.

13 On June 20, 2012, BNYM filed a motion in the involuntary
14 bankruptcy case requesting annulment of the automatic stay and
15 validation of its postpetition sale of the Property ("Motion to
16 Annul"). The Motion to Annul alleged the stay should be annulled
17 because BNYM had not received notice of the Debtor's bankruptcy
18 until just before its motion to annul. BNYM also alleged the
19 Debtor committed fraud. The Debtor responded with an objection
20 alleging that BNYM had notice of the bankruptcy when it commenced
21 the postpetition foreclosure of the Property. The bankruptcy
22 court held a hearing on the Motion to Annul on July 24, 2012
23 ("July Hearing").

24 **1. July Hearing on the Motion to Annul**

25 At the July Hearing, the bankruptcy court expressed its

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27 ⁵ Bankruptcy Case No. 2:12-bk-26176, United States Bankruptcy
28 Court for the Central District of California (dismissed on
June 1, 2012). See also Debtor's Declaration dated July 5,
2012.

1 suspicion that the involuntary bankruptcy case was a fraudulent
2 bankruptcy filing. The bankruptcy court reasoned that the
3 Petitioning Creditors failed to appear at any hearing or take any
4 action in this case. Moreover, it appeared to the court that the
5 case may have been filed under aliases of the Debtor, "Norma
6 Ceralde aka Michael Henry aka Nolan A. Smith."

7 The bankruptcy court issued an order requiring the
8 Petitioning Creditors to appear and show cause why the
9 involuntary bankruptcy case should not be dismissed. The hearing
10 on BNYM's Motion to Annul was continued until October 2, 2012
11 ("October Hearing").

12 **2. Debtor's Supplemental Opposition**

13 Prior to the October Hearing, the Debtor filed his
14 Supplemental Opposition to the Motion to Annul ("Supplemental
15 Opposition"). The Supplemental Opposition references the
16 deposition of Christina Balandran ("Balandran"), the Person Most
17 Knowledgeable at ReconTrust Company, the foreclosure trustee and
18 agent of BNYM that conducted the foreclosure sale of the
19 Property. The deposition transcript reveals that, on
20 September 16, 2011 (the date the involuntary petition was filed),
21 a ReconTrust technician received notification of a bankruptcy
22 filing, including the Nevada involuntary bankruptcy case number,
23 by a "Nolan Shaheed," but ReconTrust proceeded with the
24 foreclosure because the alleged debtor was named "Nolan Shaheed,"
25 not "Nolan Smith." Ms. Balandran also testified that another
26 ReconTrust technician received notification of the instant
27 bankruptcy on October 14, 2011 and, in turn, notified the loan
28 servicer, Bank of America, of the bankruptcy. On November 10,

1 2011, Bank of America ordered ReconTrust to rescind the
2 foreclosure sale conducted on September 16, 2011 because of the
3 instant bankruptcy filing.

4 **3. October Hearing on the Motion to Annul**

5 The Petitioning Creditors did not appear at the order to
6 show cause October Hearing. The bankruptcy court acknowledged
7 after reading the Supplemental Opposition that BNYM "may well
8 have had notice of the filing, at least constructive notice."
9 October 2, 2012 Hr'g Tr., at 4:2-3. Regardless, the bankruptcy
10 court found that the case should be dismissed, noting the
11 Petitioning Creditors failed to respond to the Order to Show
12 Cause or appear at the hearing. Counsel for the Debtor consented
13 to dismissal of the case and suggested that dismissal "makes the
14 motion to annul moot." October 2, 2012 Hr'g Tr., at 4:25, 5:1.
15 However, counsel for BNYM urged the court to also grant its
16 Motion to Annul to aid it in connection with defending against
17 the Debtor's California state court action seeking to set aside
18 the sale of the Property based on BNYM's alleged violation of the
19 bankruptcy stay. The bankruptcy court granted the Motion to
20 Annul and ordered that the involuntary bankruptcy case be
21 dismissed. The order granting the Motion to Annul was entered on
22 October 17, 2012. The order dismissing the bankruptcy was
23 entered on October 29, 2012. The Debtor timely appealed the
24 order annulling the automatic stay.⁶

25 **4. Motion for Stay Pending Appeal and Hearing**

26 The Debtor filed a motion for stay pending appeal to
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28 ⁶ The Debtor did not appeal the bankruptcy court's
order dismissing the involuntary chapter 7 bankruptcy case.

1 prevent an eviction from the Property. BNYM objected to the
2 motion and the Debtor filed a reply to BNYM's opposition.

3 On December 18, 2012, the bankruptcy court held a hearing
4 on the motion for stay pending appeal and again noted this
5 appeared to be a fraudulent bankruptcy because none of the
6 Petitioning Creditors appeared at the October Hearing pursuant to
7 the Order to Show Cause. The Debtor, in turn, re-asserted his
8 argument that there was no basis to annul the stay because BNYM
9 had notice of the bankruptcy case. The bankruptcy court stated
10 that the Debtor was not harmed because the bankruptcy court would
11 have very likely granted relief from the stay if BNYM moved for
12 relief prior to initiating foreclosure. Judge Beesley further
13 explained why he was suspicious of the Debtor in this case:

14 Your client has lived in this house for over two
15 years without paying any fees. It appears to me
16 that there was a fraudulent bankruptcy filing.
17 Now, there's no connection to your client as you
18 say in the fraudulent bankruptcy filing, but the
19 only person who benefitted from the fraudulent
20 involuntary is your client. Nobody else.

21 December 18, 2012 Hr'g Tr., at 9:10-16.

22 Because the balance of harm favored BNYM, the bankruptcy
23 court denied Debtor's motion for stay pending appeal.⁷

24 JURISDICTION

25 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
26 §§ 1334 and 157(b)(2)(A), (G), (I) and (J). "Orders granting or
27 denying relief from the automatic stay are deemed to be final
28 orders." Nat'l Env't Waste Corp. v. City of Riverside
(In re Nat'l Env't Waste Corp.), 129 F.3d 1052, 1054 (9th Cir.

⁷ BNYM noted at oral argument on appeal that the Debtor has not yet been evicted from the Property.

1 1997) (citing Benedor Corp. v. Conejo Enters., Inc. (In re Conejo
2 Enters., Inc.), 96 F.3d 346, 351 (9th Cir. 1996)). The Panel has
3 jurisdiction under 28 U.S.C. § 158.

4 **ISSUE**

5 Was it an abuse of the bankruptcy court's discretion to annul
6 the stay in this case?

7 **STANDARD OF REVIEW**

8 The standard of review of a motion to annul the automatic
9 stay is abuse of discretion. Mataya v. Kissinger
10 (In re Kissinger), 72 F.3d 107, 108 (9th Cir. 1995). "An abuse
11 of discretion occurs (a) if the [trial] court makes legal error
12 by identifying the incorrect legal rule or (b) if the [trial]
13 court's application of the correct legal standard was
14 '(1) illogical, (2) implausible, or (3) without support in
15 inferences that may be drawn from the facts in the record.'" United States v. Anekqu, 695 F.3d 967, 978 (9th Cir. 2012)
16 (quoting United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir.
17 2009) (en banc)).

19 **DISCUSSION**

20 Pursuant to § 362, when an involuntary bankruptcy petition
21 is filed under § 303, an automatic stay is imposed which
22 prohibits all acts that may affect property of the bankruptcy
23 estate. The automatic stay is designed to protect debtors from
24 their creditors while bankruptcy proceedings are under way.
25 Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571
26 (9th Cir. 1992). The stay also "protect[s] creditors from the
27 'race of diligence,' in which those who acted first would receive
28 payment 'in preference to and to the detriment of other

1 creditors.'" In re Nat'l Env't Waste Corp., 129 F.3d at 1054
2 (quoting H.R.Rep. No. 95-595, at 340 (1978)). A debtor is
3 equally protected by the automatic stay regardless of whether the
4 bankruptcy is voluntary or involuntary.

5 Actions taken in violation of the automatic stay are void.
6 However, "§ 362(d) gives [a bankruptcy] court the power to ratify
7 retroactively any violation of the automatic stay which would
8 otherwise be void." In re Schwartz, 954 F.2d at 573. "Whether
9 to grant retroactive relief from the automatic stay under
10 § 362(d) is a decision committed to the discretion of the
11 bankruptcy court." In re Williams, 323 B.R. 691, 700 (9th Cir.
12 BAP 2005) (citing In re Nat'l Env't Waste Corp., 129 F.3d at
13 1054).

14 **1. Applicable Standard for Stay Annulment**

15 The standard for annulling the stay has been stated
16 differently by different courts in the Ninth Circuit. Some cases
17 such as Phoenix Bond & Indemnity Co. v. Shamblin
18 (In re Shamblin), 890 F.2d 123 (9th Cir. 1989); and
19 In re Kissinger, 72 F.3d 107 (9th Cir. 1995) appear to suggest
20 that retroactive annulment should be exercised only in "extreme
21 circumstances." In re Shamblin, 890 F.2d at 126 (referring to
22 equitable exceptions to the automatic stay). On the other hand,
23 In re Schwartz, 954 F.2d 569 (9th Cir. 1992); and In re Nat'l
24 Env't Waste Corp., 129 F.3d 1052 (9th Cir. 1997) do not mention
25 any "extreme circumstances" requirement to annul the stay and
26 instead simply balance the equities of the case.

27 No Ninth Circuit case has actually applied the restrictive
28 "extreme circumstances" standard to annul the stay. This is true

1 even in cases that have suggested this narrow standard. In
2 Kissinger, for example, the Ninth Circuit simply balanced the
3 equities of the case and relied on non-extraordinary
4 circumstances in its decision confirming the bankruptcy court's
5 decision to annul the stay, including: that there would have been
6 cause to lift the stay, the failure to obey the stay was caused
7 by a state court judge rather than the creditor, and not
8 annulling the stay would impose an undue hardship on creditors.
9 In re Kissinger, 72 F.3d at 109.

10 In the end, the Ninth Circuit has simply balanced the
11 equities of the case when deciding whether stay annulment was
12 appropriate, even in cases where it articulated an extraordinary
13 circumstances standard. We agree with the Panel in Fjeldsted v.
14 Lien (In re Fjeldsted), 293 B.R. 12 (9th Cir. BAP 2003) that
15 "extreme or extraordinary circumstances" should not be required
16 to annul the stay and, instead, a court should apply a
17 case-by-case approach. See In re Eastlick, 349 B.R. 216, 226-27
18 (Bankr. D. Idaho 2004); see also In re Sullivan, 2006 WL 1686732
19 (E.D. Cal. 2006) (agreeing with Fjelsted that extraordinary
20 circumstances are not needed to annul the stay).

21 The case-by-case approach requires a bankruptcy court to
22 balance the equities of the case to determine whether there is
23 cause to annul the stay. When analyzing a request to annul the
24 stay, the two main factors considered by courts are: "(1) whether
25 the creditor was aware of the bankruptcy petition; and
26 (2) whether the debtor engaged in unreasonable or inequitable
27 conduct, or prejudice would result to the creditor." In re Nat'l
28 Env't Waste Corp., 129 F.3d at 1055.

1 The Panel has set forth a more expanded list of factors that
2 may bear on a motion for retroactive annulment of the stay,
3 including: the number of bankruptcy filings; whether, in a
4 repeat filing case, there is an intent to hinder and delay
5 creditors; the extent of prejudice to creditors; a debtor's
6 overall good faith; whether creditors took action with knowledge
7 of the stay; whether a debtor complied with the Bankruptcy Code
8 and Rules; the ease of restoring parties to the *status quo ante*;
9 the costs of annulment to debtors and creditors; how quickly
10 creditors moved for annulment or how quickly debtors moved to set
11 aside a foreclosure sale; whether creditors moved for stay relief
12 after learning of the bankruptcy; whether annulment of the stay
13 will cause irreparable injury to the debtor; and whether stay
14 relief will promote judicial economy. In re Fjeldsted, 293 B.R.
15 at 25. No one factor is dispositive and the list of factors
16 should, instead, serve as "a framework for analysis and not a
17 scorecard." Id.

18 **2. Findings of Fact and Conclusions of Law**

19 The filing of an objection to the Motion to Annul initiated
20 a contested matter, subject to Rule 9014. See Rule 4001(a). In
21 a contested matter, the bankruptcy court must make findings of
22 fact and state its conclusions of law, either orally on the
23 record or in a written decision. Rule 9014(c)(incorporating Rule
24 7052, which in turn incorporates Civil Rule 52). "These findings
25 must be sufficient to enable a reviewing court to determine the
26 factual basis for the court's ruling." Veal v. Am. Home Mortg.
27 Servicing, Inc. (In re Veal), 450 B.R. 897, 919 (9th Cir. BAP
28 2011) (citing Vance v. Am. Haw. Cruises, Inc., 789 F.2d 790, 792

1 (9th Cir. 1986)).

2 We may conduct appellate review, even when a bankruptcy
3 court does not make formal findings, "if a complete understanding
4 of the issues may be obtained from the record as a whole or if
5 there can be no genuine dispute about omitted findings."

6 In re Veal, 450 B.R. at 919-20. Moreover, we may affirm on any
7 basis supported by the record. Shanks v. Dressel, 540 F.3d 1082,
8 1086 (9th Cir. 2008).

9 The bankruptcy court in this case did not make detailed
10 findings of fact and conclusions of law at the July Hearing,
11 October Hearing or at the hearing on the motion for stay pending
12 appeal. Although the bankruptcy court's findings of fact and
13 conclusions of law are sparse, a review of the record supports
14 the bankruptcy court's reasons for retroactively annulling the
15 stay.

16 3. Balancing the Equities of the Case

17 The bankruptcy court properly applied the case-by-case
18 approach in its decision to annul the stay. The record before
19 the Panel reveals that the bankruptcy court did not clearly err
20 in finding the equities of the case favored annulling the stay.
21 On the one hand, BNYM apparently had notice of the involuntary
22 bankruptcy prior to initiating its postpetition foreclosure of
23 the Property. BNYM conceded at oral argument that it rescinded
24 the first trustee's sale based on knowledge of the instant
25 bankruptcy.⁸

26 _____
27 ⁸ The Debtor argues that, because BNYM maintained at all times
28 leading up to oral argument that BNYM did not have notice of the
bankruptcy before it filed its Motion to Annul, BNYM's position
(continued...)

1 On the other hand, the nature of this case and the Debtor's
2 conduct weighs in favor of annulling the stay. The involuntary
3 petition was filed in an improper venue⁹ and under three aliases
4 of the Debtor, "Norma Ceralde aka Michael Henry aka Nolan A.
5 Smith." Also, the Petitioning Creditors did not appear or take
6 any action in this bankruptcy, beyond filing the petition. This
7 involuntary bankruptcy had all the hallmarks of a fraudulent
8 filing.

9 Although the bankruptcy court did not impute fraud to the
10 Debtor, the Debtor's lack of diligence or engagement in the
11 involuntary bankruptcy serves as additional grounds to annul the
12 stay. Debtor's counsel noted at oral argument that the Debtor
13 received notice of the involuntary bankruptcy petition
14 immediately upon its filing. However, the Debtor utterly failed
15 to pursue any aspect of the bankruptcy until he was faced with an
16 eviction proceeding in Los Angeles County nearly 7 months
17 postpetition. The Debtor did not file schedules. Nor did he
18 either object or consent to the involuntary bankruptcy petition.
19 The Debtor, in effect, never availed himself of the stay in this
20 case (and even gained a stay in his chapter 13 bankruptcy filed
21 in May 2012) until he hired counsel in May 2012 and began raising

23 ⁸(...continued)
24 should constitute a lack of candor to the Court that precludes
25 stay annulment. See In re Gonzalez, 456 B.R. 429, 443 (C.D.
26 Cal. 2011) ("a party who seeks annulment has a duty of candor to
the court"). However, we do not view the circumstances of this
appeal as fitting that model.

27 ⁹ Venue was improper because the bankruptcy petition was filed
28 in Nevada even though the Debtor resides in California and the
Property is in California.

1 stay violation arguments.¹⁰

2 Despite his lack of participation in the involuntary
3 bankruptcy case, the Debtor now seeks the benefits of the
4 bankruptcy. The Debtor was the only one who benefitted from the
5 involuntary bankruptcy as he has been living in the Property
6 without making any payments to BNYM for almost two years.¹¹ The
7 Debtor also filed a lawsuit in California state court seeking
8 damages from BNYM for violating the stay imposed in this
9 bankruptcy. The complete lack of diligence on the Debtor's part
10 should preclude him from using the stay as a weapon in his
11 California state action against BNYM.

12 The record is sufficient to conclude that the bankruptcy
13 court was not clearly erroneous in finding that the equities of
14 the case favored BNYM. The bankruptcy court had wide discretion
15 to decide whether to retroactively annul the stay based on the
16 equities of the case. The bankruptcy court's analysis and ruling
17 were not "illogical, implausible, or without support in
18 inferences that may be drawn from the facts in the record."
19 Anekou, 695 F.3d at 978. The bankruptcy court did not abuse its
20 discretion when it annulled the stay.

21

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23 ¹⁰ It is particularly telling that Debtor's counsel consented to
24 dismissal of the involuntary bankruptcy against the Debtor. In
25 fact, Debtor's counsel stated at the October Hearing on the
26 Motion to Annul that dismissal of this involuntary chapter 7
27 would render the Motion to Annul "moot."

28 ¹¹ The Debtor's July 5, 2012 Declaration fails to indicate he
tendered payments to BNYM at any relevant time nor did he supply
an explanation as to why he had not made payments for nearly two
years.

CONCLUSION

For all of the reasons set forth above, we AFFIRM the bankruptcy court's order granting BNYM's Motion to Annul.

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