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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	NV-12-1378-KiDJu
)		
BRADLEY I. WEINSTEIN and)	Bk. No.	09-25205-MKN
ROCHELLE H. WEINSTEIN,)		
)		
Debtors.)		
_____)		
)		
BRADLEY I. WEINSTEIN;)		
ROCHELLE H. WEINSTEIN,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM¹	
)		
FEDERAL NATIONAL MORTGAGE)		
ASSOCIATION; SETERUS INC.,)		
Servicer for FANNIE MAE;)		
DAVID A. ROSENBERG, Chapter 7)		
Trustee; SHUMWAY VAN &)		
HANSEN,)		
)		
Appellees.)		
_____)		

Argued and Submitted on January 25, 2013
at Las Vegas, Nevada

Filed - September 4, 2013

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

Honorable Mike K. Nakagawa, Bankruptcy Judge, Presiding

Appearances: George Haines, of Haines & Krieger, L.L.C., argued
for appellants.

Before: KIRSCHER, DUNN and JURY, Bankruptcy Judges.

¹ 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 Appellants, chapter 7² debtors Bradley I. Weinstein and
2 Rochelle H. Weinstein ("Debtors"), appeal an order from the
3 bankruptcy court directing the former chapter 13 trustee, Kathleen
4 A. Leavitt ("Trustee Leavitt"), to disburse funds she held to
5 appellee, Federal National Mortgage Association ("Fannie Mae"),³
6 after the conversion of Debtors' bankruptcy case from chapter 13
7 to chapter 7. Debtors also appeal the bankruptcy court's order
8 denying their motion for reconsideration. We AFFIRM both orders.

9 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

10 **A. The chapter 13 bankruptcy case and Fannie Mae's first motion**
11 **for relief from stay**

12 Debtors filed a chapter 13 bankruptcy case on August 18,
13 2009. In 2004, Debtors obtained a purchase money loan from Mylor
14 Financial Group, Inc. for their residence in Las Vegas, Nevada.
15 In exchange for the loan, Debtors executed a promissory note and
16 first deed of trust in favor of the lender. At the time of their
17 bankruptcy filing, Debtors' first mortgage was \$4,369.34 in
18 arrears, as evidenced by a proof of claim filed by Mylor's
19 successor in interest, CitiMortgage, Inc. ("CitiMortgage").

20 Debtors filed an Amended Chapter 13 Plan #2 ("Plan #2") on
21 September 5, 2010, which was confirmed on October 5, 2010.

23 ² Unless specified otherwise, all chapter, code and rule
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
25 the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

26 ³ On October 2, 2012, a Conditional Order of Waiver was
27 entered advising appellees: Fannie Mae; Seterus Inc., servicer
28 for Fannie Mae; David A. Rosenberg, chapter 7 trustee; and Shumway
Van & Hansen that if they failed to file a responsive brief, they
would waive their right to oral argument. Appellees waived their
right to oral argument.

1 Plan #2 proposed plan payments of \$2,091.00 for 60 months to
2 commence on September 14, 2009. Plan #2 also included a "Loan
3 Modification Plan," which set forth details regarding adequate
4 protection payments to be distributed by Trustee Leavitt to
5 CitiMortgage while Debtors continued to negotiate a loan
6 modification agreement on their first mortgage. Section 6.02.B.4.
7 of Plan #2 (found in the Loan Modification Plan) states:

8 The Creditor designated in Paragraph 1 above shall have
9 a lien on all Adequate Protection Payments as set forth
10 in Paragraph 2.c above whether this case is confirmed
11 or unconfirmed. In the event this case is Dismissed or
12 Converted to another Chapter, the Trustee shall
13 distribute the unpaid Adequate Protection Payments to
14 Creditors as soon as practicable and before closing the
15 case.

16 During the parties' negotiation process, Fannie Mae became
17 CitiMortgage's successor in interest of the first deed of trust on
18 Debtors' residence.

19 On August 26, 2011, Fannie Mae filed a motion for relief from
20 stay to proceed with its foreclosure rights on Debtors' residence
21 ("First Stay Relief Motion"). By this point, Debtors'
22 postpetition arrears on their first mortgage were \$38,472.82.
23 Based on Debtors' valuation of the residence of \$222,000 and total
24 encumbrances of \$361,212.64, and because Debtors had failed to
25 make postpetition mortgage payments, Fannie Mae argued that relief
26 from stay was warranted under § 362(d)(1) and (d)(2). In its
27 prayer for relief, Fannie Mae also asked the bankruptcy court to
28 order Trustee Leavitt to set aside and deliver all adequate
protection payments she had received from Debtors for the
residence, or any other payments Debtors had made to satisfy the
note. Fannie Mae's attached proposed order granted relief from

1 stay, but did not order the turnover of the mortgage payment
2 funds.

3 A hearing on the First Stay Relief Motion was held on
4 September 28, 2011, but was continued to October 26, 2011, so the
5 parties could determine whether the arrears as stated in the
6 motion matched the funds received by Trustee Leavitt as provided
7 for in Debtors' confirmed Plan #2.⁴ Before the next hearing, it
8 was determined that Debtors did not qualify for a HAMP loan
9 modification based on their income and, because their loan was
10 more than eighteen months delinquent, they were also ineligible
11 for any in-house modification programs. The parties agreed that
12 if Debtors made a lump sum payment of \$13,072 so the loan would be
13 less than eighteen months delinquent, they would then be
14 considered for in-house options.

15 At the continued hearing on October 26, 2011, counsel
16 informed the bankruptcy court that Trustee Leavitt was holding
17 approximately \$30,000 Debtors could use to reduce the delinquency
18 on their loan, making them eligible for review for an in-house
19 modification. At Debtors' counsel's request, the hearing on the
20 First Stay Relief Motion was continued again to November 9, 2011,
21 so counsel could discuss the options with his clients. Prior to
22 the November 9 hearing, Debtors' counsel emailed counsel for
23

24 ⁴ The following facts are set forth in the declaration of
25 Cindy Lee Stock, counsel for Fannie Mae, filed in support of
26 Fannie Mae's opposition to Debtors' motion for reconsideration.
27 Debtors did not submit the Stock declaration as part of the
28 record, but we were able to locate it on the bankruptcy court's
electronic docket at Docket No. 102. See O'Rourke v. Seaboard
Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir.
1988); Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),
293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 Fannie Mae advising her that Trustee Leavitt had agreed to release
2 the funds in her possession to Fannie Mae. However, a
3 disagreement over the amount of funds to be released arose, so the
4 hearing was continued to November 30, 2011. The November 30
5 hearing was continued again to December 14, 2011, as the parties
6 had not yet agreed on the amount of funds to be released. Prior
7 to that continued hearing, it was determined that Debtors were not
8 eligible for any loan modification because the current interest
9 rate on their loan was already at 3%.

10 At the continued hearing on December 14, 2011, Debtors'
11 counsel asked to continue the hearing on the First Stay Relief
12 Motion again until January 4, 2012, so he could discuss with
13 Debtors whether to bring their mortgage loan current or allow the
14 motion to be granted. The hearing was continued again to
15 January 18, 2012, as Debtors' counsel had not yet conferred with
16 his clients.

17 At the continued hearing on January 18, 2012, Debtors'
18 counsel stated that Debtors wanted to keep their residence, and
19 that he would be putting together a written proposal that would
20 include turnover of the approximate \$33,000 being held by Trustee
21 Leavitt and filing an amended chapter 13 plan to handle the
22 remaining postpetition arrears. The hearing on the First Stay
23 Relief Motion was continued to February 1, 2012. Just before that
24 hearing, Debtors' counsel sent an email to counsel for Fannie Mae
25 requesting a continuance to February 15 to finalize Debtors'
26 proposal. Debtors' counsel confirmed that Trustee Leavitt was
27 holding \$35,140.00 for Fannie Mae.

28 The First Stay Relief Motion was ultimately taken off

1 calendar, as the parties had reached an agreement. On
2 February 27, 2012, the bankruptcy court entered the parties'
3 Agreed Order Conditioning the Automatic Stay and Granting Secured
4 Creditor Adequate Protection ("Agreed Order"). Under the Agreed
5 Order:

- 6 • Debtors agreed to re-commence making regular monthly payments
7 to Fannie Mae under the terms of the note until all
8 outstanding amounts were paid in full;
- 9 • As of February 13, 2012, Trustee Leavitt had paid to Fannie
10 Mae \$13,804.34 in adequate protection during the course of
11 Debtors' chapter 13 bankruptcy, \$4,369.34 of which had been
12 credited towards the prepetition arrearage;
- 13 • Debtors agreed that \$35,140.00, the current amount held by
14 Trustee Leavitt for the benefit of Fannie Mae, would be
15 turned over immediately and credited against their \$48,913.28
16 postpetition arrearage;
- 17 • the remaining \$13,773.28 deficiency would be paid through a
18 modified plan, which Fannie Mae would support upon receiving
19 at least \$32,000 from Trustee Leavitt.

20 **B. Debtors' conversion to chapter 7 and Fannie Mae's second**
21 **motion for relief from stay**

22 On the same day the court entered the Agreed Order, Debtors
23 filed a notice to convert their case to chapter 7.⁵ Fannie Mae
24 filed its second motion for relief from stay ("Second Stay Relief
25 Motion") two days later on February 29, 2012, to proceed with its
26 foreclosure rights. Fannie Mae contended that no equity existed
27 in the residence, and relief from stay was warranted under
28 § 362(d)(2). In its prayer for relief, Fannie Mae asked the court
to terminate the stay and order Trustee Leavitt to set aside and
deliver all adequate protection payments received from Debtors, or
any other payments Debtors had made on the note. Despite Debtors'

⁵ Debtors' notice to convert was filed at 9:17 a.m.; the
Agreed Order was filed at 2:30 p.m.

1 assertion in their appellants' opening brief to the contrary,
2 Fannie Mae's attached proposed order requested this same relief.
3 Fannie Mae's separately filed notice warned, as required by Local
4 Rule 9014(d)(1), that if Debtors failed to file and serve a timely
5 written opposition, they could be denied the opportunity to speak
6 at the hearing, and the court could rule against them. Despite
7 the warning, Debtors did not file an opposition.

8 The hearing on the Second Stay Relief Motion was held on
9 April 4, 2012. Counsel appeared for Debtors, Fannie Mae and
10 Trustee Leavitt. Counsel for Trustee Leavitt, who did not oppose
11 the relief, began by noting that Fannie Mae's disbursement request
12 did not specify how much money she was to disburse, so she was
13 appearing to get an exact figure. Debtor's counsel then
14 apologized to the court for not filing a response and stated that
15 he had no excuse for not doing so. Nonetheless, he proceeded to
16 argue whether it was appropriate for Fannie Mae to be requesting
17 monetary relief in a motion for relief from stay. Fannie Mae's
18 counsel then explained that this was an unusual motion because,
19 just prior to the conversion, the parties had agreed that the
20 approximately \$35,000 in adequate protection funds held by Trustee
21 Leavitt would be turned over to Fannie Mae. However, now that
22 Debtors had converted to chapter 7, the Code directed that the
23 money revert back to Debtors. Nonetheless, argued counsel,
24 Debtors had been promising the funds to Fannie Mae since August
25 2011 to obtain continuances of the motion and a loan modification,
26 and Fannie Mae wanted the funds that had been set aside for its
27 benefit.

28 Upon hearing counsels' arguments, the bankruptcy court ruled

1 that it was not considering Debtors' oral objection because they
2 had not filed a written opposition. The court further ruled that
3 it was terminating the stay with respect to Fannie Mae's
4 foreclosure rights, but the disbursement matter would be continued
5 for thirty days. On April 11, 2012, the bankruptcy court entered
6 an order terminating the automatic stay but requiring that the
7 funds held by Trustee Leavitt not be disbursed until further order
8 of the court.

9 The continued hearing on the disbursement matter was held on
10 May 2, 2012. Debtors again did not file an opposition prior to
11 the hearing. Counsel appeared for Debtors, Fannie Mae and Trustee
12 Leavitt. Fannie Mae's counsel requested that the court order
13 Trustee Leavitt to turn over to Fannie Mae the approximate \$36,000
14 she was holding in adequate protection funds, less Trustee
15 Leavitt's fees. Debtors' counsel acknowledged that he did not
16 file an opposition, but he nonetheless objected to Fannie Mae's
17 request because he argued § 1326 required the funds to be turned
18 over to Debtors. Although noting that Fannie Mae had not filed a
19 separate motion to compel Trustee Leavitt to turn over the funds,
20 the court inquired whether David A. Rosenberg, the chapter 7
21 trustee ("Trustee Rosenberg"), had received notice of the motion
22 and whether any party had filed an opposition. Upon being
23 informed that Trustee Rosenberg was noticed and that no opposition
24 had been filed, the court granted the motion.

25 On May 9, 2012, the bankruptcy court entered an order
26 directing that the funds held by Trustee Leavitt in the
27 approximate sum of \$36,000, less her fees, be disbursed to Fannie
28 Mae ("Disbursement Order").

1 **C. Debtors' motion for reconsideration**

2 Debtors filed a timely motion to reconsider ("Reconsideration
3 Motion") on May 18, 2012, thereby tolling the appeal time of the
4 Disbursement Order. Debtors argued that even though the Second
5 Stay Relief Motion was asking for the additional relief of
6 turnover of the funds, their counsel had inadvertently not filed
7 an opposition to Fannie Mae's Second Stay Relief Motion because
8 Debtors had decided to surrender the residence.⁶ While
9 acknowledging that the local rules authorized the bankruptcy court
10 to not consider their oral argument in the absence of a written
11 opposition, Debtors contended that their failure to file an
12 opposition was excusable under Civil Rule 60(b)(1) due to their
13 counsel's negligence. Debtors also argued that § 1326(a)(2)
14 directs a trustee to immediately return to the debtor all funds in
15 the trustee's possession upon conversion or dismissal of a
16 chapter 13 case, and their admitted failure to file an opposition
17 should not result in the manifestly unjust result of Fannie Mae
18 receiving both the residence and \$35,000 of Debtors' money.⁷

19 Trustee Rosenberg opposed the Reconsideration Motion,
20

21 ⁶ Although Debtors' counsel argued that the residence was
22 being surrendered, their amended statement of intention, a copy of
23 which we obtained from the bankruptcy court's electronic docket,
24 stated that they planned to retain the residence. In re E.R.
Fegert, Inc., 887 F.2d at 957-58; In re Atwood, 293 B.R. at 233
n.9.

25 ⁷ On course, there is another way of looking at this
26 situation. Even if the "under water" residence ultimately is sold
27 at a foreclosure sale (and at oral argument, it was reported that
28 the Debtors still were living in the residence), it is not
necessarily unjust that the Debtors be required to pay
approximately \$35,000 rent for the period that they occupied the
residence when unpaid maintenance payments in excess of \$48,000
accrued.

1 contending that even though he sympathized with Debtors'
2 frustrations and recognized their monetary loss, he did not
3 consider it appropriate or reasonable for Debtors' counsel to make
4 this request for relief now, especially since he had not provided
5 any legitimate reason for reconsideration. Specifically, Trustee
6 Rosenberg argued that Debtors' failure to file an opposition was
7 not excusable, particularly since he told Debtors and their
8 counsel at the § 341(a) meeting of creditors that Fannie Mae's
9 motion was seeking the funds held by Trustee Leavitt, which should
10 rightfully go to Debtors under § 348, and that if Debtors failed
11 to object, they stood to lose out on a substantial sum of money.
12 However, despite his warnings, Debtors' attorney failed to file an
13 opposition even though he had opportunities to do so before each
14 hearing on the Second Stay Relief Motion. Nonetheless, argued
15 Trustee Rosenberg, Debtors had a remedy, as they could sue their
16 attorney's insurance carrier for malpractice given his admission
17 of negligence.

18 Fannie Mae also opposed the Reconsideration Motion,
19 contending that Debtors could not support a claim under Civil
20 Rule 60(b)(1) for mistake, inadvertence, surprise or excusable
21 neglect because they were given proper notice of the Second Stay
22 Relief Motion and two hearings were held to consider it, yet they
23 admittedly chose not to file an opposition because they intended
24 to surrender the residence. Fannie Mae further argued that the
25 funds held by Trustee Leavitt rightfully belonged to Fannie Mae as
26 a result of the parties' negotiations and, in any event, payment
27 of the funds would not cure Debtors' postpetition delinquency of
28 \$48,913.28.

1 After a hearing on June 20, 2012, the bankruptcy court
2 entered an order denying Debtors' Reconsideration Motion on
3 July 18, 2012 ("Reconsideration Order"). In reviewing the four
4 factors under Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.
5 P'ship, 507 U.S. 380, 385 (1993), the court found that Debtors'
6 failure to file a written opposition to the Second Stay Relief
7 Motion did not constitute excusable neglect. Specifically, the
8 court noted that Local Rule 9014 clearly states that a written
9 opposition must be filed at least 14 days before the hearing, or
10 the court can refuse to hear the opposing party's arguments and
11 rule against that party. Considering that this warning was
12 conspicuously stated in Fannie Mae's notice of hearing, the court
13 found that Debtors' counsel's failure to recognize and address the
14 potential consequence of not complying with Local Rule 9014 was
15 not excusable; Debtors should have at least filed a limited
16 opposition, but they consciously chose not to file anything.

17 The court also rejected Debtors' alternative theory for
18 relief under Civil Rule 60(b)(6), reasoning that clause (6) and
19 the preceding clauses under Civil Rule 60(b) are mutually
20 exclusive, and a motion brought under clause (6) must be for some
21 reason other than the five reasons preceding it. Therefore, since
22 Debtors had asserted excusable neglect under Civil Rule 60(b)(1)
23 as a basis for relief, they could not also claim relief under
24 Civil Rule 60(b)(6).

25 Finally, although relegated to a footnote, the court noted
26 that Debtors' reliance on § 1326(a)(2) that funds held by a
27 trustee must be turned over to the debtor upon conversion was
28 misplaced because that provision applies only when a plan has not

1 been confirmed. In the case of a confirmed chapter 13 plan, as in
2 the Debtors's case, § 348(f) rather than § 1326(a)(2) applies.
3 Section 348(f) states that if the funds held by Trustee Leavitt
4 consisted of Debtors' postpetition earnings or other property
5 acquired postpetition (no such evidence had been submitted by
6 Debtors), such proceeds were not property of the estate upon
7 conversion and belonged to Debtors. Further, noted the court,
8 once Debtors' case was converted to chapter 7, § 348(e) and
9 Rule 1019(4) terminated Trustee Leavitt's services and her
10 authority to distribute funds, and any non-estate property she
11 held generally was to be turned over to Trustee Rosenberg.

12 Debtors timely appealed the Disbursement Order and
13 Reconsideration Order on July 23, 2012.

14 **II. JURISDICTION**

15 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
16 and 157(b)(2)(G). We have jurisdiction under 28 U.S.C. § 158.

17 **III. ISSUES**

18 1. Did the bankruptcy court abuse its discretion by relying on
19 Local Rule 9014 to disregard Debtors' oral opposition to the
20 Second Stay Relief Motion on the basis that Debtors failed to file
21 a written opposition?

22 2. Did the bankruptcy court abuse its discretion in entering the
23 Disbursement Order based on Debtors' failure to file an opposition
24 to the Second Stay Relief Order?

25 3. Did the bankruptcy court abuse its discretion in denying the
26 Reconsideration Motion?

27 **IV. STANDARDS OF REVIEW**

28 We review issues of law, including interpretation of the

1 Bankruptcy Code and Rules of Procedure, de novo and findings of
2 fact for clear error. Bunyin v. United States (In re Bunyin),
3 354 F.3d 1149, 1150 (9th Cir. 2004); Schook v. CBIC
4 (In re Schook), 278 B.R. 815, 820 (9th Cir. BAP 2002).

5 A court's interpretation and application of a local rule is
6 reviewed for abuse of discretion. United States v. Heller,
7 551 F.3d 1108, 1111 (9th Cir. 2009). We review orders granting
8 relief from the automatic stay for abuse of discretion. Kronemyer
9 v. Am. Contractors Indem. Co. (In re Kronemyer), 405 B.R. 915, 919
10 (9th Cir. BAP 2009). The bankruptcy court's denial of a motion
11 for reconsideration is reviewed for an abuse of discretion.
12 OneCast Media, Inc. v. James (In re OneCast Media, Inc.), 439 F.3d
13 558, 561 (9th Cir. 2006). A bankruptcy court abuses its
14 discretion if it applied the wrong legal standard or its findings
15 were illogical, implausible or without support in the record.
16 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th
17 Cir. 2011).

18 V. DISCUSSION

19 **A. The bankruptcy court did not abuse its discretion by relying**
20 **on its local rules to not consider Debtors' oral opposition**
to the Second Stay Relief Motion.

21 Debtors do not challenge the April 4, 2012 order granting
22 Fannie Mae relief from stay to proceed with its foreclosure rights
23 against the residence. In fact, they concede that issue is moot
24 since they received a discharge on May 30, 2012. See
25 § 362(c)(2)(C). Debtors challenge only the Disbursement Order
26 entered one month later directing that the funds held by Trustee
27 Leavitt be turned over to Fannie Mae.

28 Motions for relief from the stay are contested matters. See

1 Rules 4001(a) and 9014(a). Debtors contend on appeal that a
2 written opposition to the Second Stay Relief Motion was not
3 necessary under Rule 9014 or Local Rule 9014(d)(3), and that the
4 bankruptcy court failed to properly apply these rules by refusing
5 to consider their oral opposition based on the lack of a written
6 opposition. Debtors did not raise this issue before the
7 bankruptcy court. In fact, their Reconsideration Motion
8 acknowledged that the local rules authorized the bankruptcy court
9 to not consider their oral argument in the absence of a written
10 opposition.

11 Generally, we will not consider arguments raised for the
12 first time on appeal. See Smith v. Marsh, 194 F.3d 1045, 1052
13 (9th Cir. 1999). However, even if we did consider Debtors'
14 argument here, we disagree with Debtors. Rule 9014(a) states:

15 In a contested matter not otherwise governed by these
16 rules, relief shall be requested by motion, and
17 reasonable notice and opportunity for hearing shall be
18 afforded the party against whom relief is sought. No
19 response is required under this rule unless the court
20 directs otherwise.

21 While we agree that no written response is generally required by
22 Rule 9014(a), the bankruptcy court may direct otherwise. The
23 Bankruptcy Court for the District of Nevada has directed otherwise
24 in its local rules.⁸ Pursuant to Local Rules 9014(b) and (d)(1),
25 if a party opposes the relief requested in a contested motion and
26 fails to file a written response, the bankruptcy court may refuse
27 to allow the party to speak at the scheduled hearing and rule

28 ⁸ The Bankruptcy Court for the District of Nevada promulgated
new local rules effective on January 1, 2013. The local rules in
effect prior to the January 1, 2013 govern this appeal.

1 against the party without formally calling the matter at the
2 hearing.⁹ Therefore, while Debtors were not required to file a
3 response to the Second Stay Relief Motion under Rule 9014(a), they
4 were mandatorily required to file one (along with supporting
5 affidavits) under Local Rules 9014(b) and (d)(1)¹⁰ if they wanted

6
7 ⁹ Local Rule 9014(b) states:

8 (b) Notice of hearing and service of motion and notice.

9 (1) The movant must obtain a hearing date, and the
10 notice of hearing must be filed with the motion and
11 must, in addition to the requirements of Fed. R. Bankr.
12 P. 2002(c), include the following:

- 13 (A) The date, time, and place of the hearing;
14 (B) A brief description of the relief sought;
15 (C) A statement of the time for filing and serving
16 objections or oppositions in accordance with LR
17 9014(d); and,

18 This statement:

19 "If you object to the relief requested, you *must*
20 file a **WRITTEN** response to this pleading with the
21 court. You *must* also serve your written response on
22 the person who sent you this notice.

23 If you do not file a written response with the
24 court, or if you do not serve your written response
25 on the person who sent you this notice, then:

26 • The court may *refuse to allow you to speak*
27 at the scheduled hearing; and,

28 • The court may *rule against you* without
formally calling the matter at the hearing."

(Emphasis in original).

20 Further, Local Rule 9014(d)(1) states:

21 (d) Opposition, response, and reply.

22 (1) Except as set out in subsection (3) below, any opposition
23 to a motion must be filed, and service of the opposition must
24 be completed on the movant, no later than fourteen (14) days
25 preceding the hearing date for the motion. The opposition
26 must set forth all relevant facts and any relevant legal
27 authority. An opposition must be supported by affidavits or
28 declarations that conform to the provisions of subsection (c)
of this rule.

26 It is undisputed that Fannie Mae's notice of hearing for the
27 Second Stay Relief Motion complied with these local rules.

28 ¹⁰ In the local rules in effect prior to January 1, 2013, two
(continued...)

1 their opposition considered or face the consequences of the
2 bankruptcy court rejecting their oral opposition and ruling
3 against them.

4 Debtors also attempt to argue that the Second Stay Relief
5 Motion was subject to Local Rule 9014(d)(3), not (d)(1), and
6 therefore no written opposition was required.¹¹ Local Rule
7 9014(d)(3) provides exceptions to the application of Local Rule
8 9014(d)(1). However, Debtors have failed to explain why (d)(3)
9 applies here and not (d)(1). The only exception that could
10 possibly apply here under Local Rule 9014(d)(3) is (C) - motions
11 or contested matters for which the court has set a separate
12 briefing schedule either in open court or by separate order. The
13 initial hearing on the Second Stay Relief Motion was scheduled
14 for, and took place on, April 4, 2012. No "separate briefing
15 schedule" was ever ordered by the court in open court or by
16 separate order. The disbursement matter was then continued to
17 May 2, 2012. Again, no "separate briefing schedule" was ordered
18 by the court. Even if the continuance could somehow be construed

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¹⁰(...continued)
21 subparagraphs were identified as (c). However, Appellant, in his
22 opening brief, correctly refers to the second subparagraph (c) as
23 (d). This designation is consistent with the January 1, 2013
24 local rules.

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¹¹ Local Rule 9014(d)(3) states:

- (3) Subsections (d)(1) and (2) do not apply to:
 - (A) Motions for summary judgment brought in any adversary proceeding;
 - (B) Motions for which an order shortening the time for the hearing date has been obtained; and,
 - (C) Motions or contested matters for which the court has set a separate briefing schedule either in open court or by separate order.

1 as a separate briefing schedule, Local Rule 9014(d)(3) still does
2 not eliminate the consequences of failing to file and serve a
3 written opposition as set forth in Local Rule 9014(b)(1).

4 Both the Ninth Circuit and this Panel have confirmed that
5 "courts have broad discretion to interpret their local rules.
6 Only in rare cases will an appellate court question the exercise
7 of discretion in connection with the application of the local
8 rules." Qualls by and Through Qualls v. Blue Cross, 22 F.3d 839,
9 842 (9th Cir. 1994); Katz v. Pike (In re Pike), 243 B.R. 66, 69
10 (9th Cir. BAP 1999) ("The bankruptcy court has broad discretion to
11 apply its local rules."). This is not a "rare case" in which we
12 question the bankruptcy court's discretion.

13 Accordingly, we conclude that the bankruptcy court,
14 consistent with its local rules, did not abuse its discretion by
15 not considering Debtors' oral opposition to the Second Stay Relief
16 Motion based on their failure to file and serve a written
17 opposition.

18 **B. The bankruptcy court did not abuse its discretion by granting**
19 **Fannie Mae relief on the sole basis that Debtors failed to**
file an opposition to the Second Stay Relief Motion.

20 "Local rules have the 'force of law' and are binding upon the
21 parties and upon the court" Prof'l Programs Grp. v. Dep't
22 of Commerce, 29 F.3d 1349, 1353 (9th Cir. 1994). "[J]udges must
23 adhere to their court's local rules" Alliance of
24 Nonprofits for Ins., Risk Retention Group v. Kipper, 712 F.3d
25 1316, 1327 (9th Cir. 2013), citing In re Corrinet, 645 F.3d 1141,
26 1146 (9th Cir. 2011).

27 The bankruptcy court granted the Disbursement Order because
28 Debtors failed to file any written opposition to the Second Stay

1 Relief Motion after having the opportunity to do so prior to two
2 scheduled hearings held over approximately two months. At the
3 first scheduled hearing on April 4, 2012, Debtors' counsel stated,
4 "I apologize for not filing a response. I don't actually have an
5 excuse, but I'm not sure it's entirely appropriate for a motion
6 for relief to request monetary relief." Hr'g Tr. (April 4, 2012)
7 4:13-16. The bankruptcy court responded, "Well, the cash would be
8 part of their collateral, I suspect" Id. 4:20-21. Later,
9 the bankruptcy court stated, "Well, with respect to the debtors'
10 objection, I'm not going to consider that because they didn't file
11 an opposition." Id. 5:24-6:1. At the conclusion of the April 4
12 hearing, the bankruptcy court stated, "But I'll enter an order
13 . . . terminating the stay as to your ability to foreclose on the
14 property and continue this for a status hearing in 30 days . . .
15 so that [the bankruptcy court] can hear the issue of or the
16 resolution of the money that was held by the Chapter 13 Trustee."
17 Id. 7:2-6. At the second scheduled hearing held on May 2, 2012,
18 the bankruptcy court inquired as to whether any opposition had
19 been filed concerning the amount and who should receive the money.
20 Fannie Mae's counsel informed the bankruptcy court that no
21 opposition had been filed. Debtors' counsel concurred by stating,
22 "Yeah. There was no timely opposition filed." Hr'g Tr. (May 2,
23 2012) 3:24-25. Given the conversion from a chapter 13 to
24 chapter 7 case, the bankruptcy court inquired if the chapter 7
25 trustee had notice and upon confirming adequate notice, the
26 following discussion occurred:

27 THE COURT: Well, there is no opposition on file. Was
28 there one even filed at all?
[FANNIE MAE'S COUNSEL]: No.

1 THE COURT: None at all. All Right. So I'll grant the
2 motion.

3 Id. 5:22-6:1.

4 Debtors contend that as a motion for relief from stay is a
5 summary proceeding such a motion should not incorporate an
6 additional request for a monetary award. In support of their
7 position they refer to Biggs v. Stovin (In re Luz Int'l, Ltd.),
8 219 B.R. 837, 842 (9th Cir. 1998) (given the expedited nature of
9 motion, merits of claims, defenses or counterclaims should not be
10 adjudicated). Debtors' reliance on this case however overlooks
11 the basic fact that in In re Luz Int'l, Ltd., the "trustee filed
12 an opposition to the motion." Id. at 841. For this reason,
13 In re Luz Int'l, Ltd. is distinguishable. Debtors never filed any
14 written opposition to the Second Stay Relief Motion.

15 Consistent with the bankruptcy court's Local Rule 9014(b)(1)
16 and given Debtor's repeated failure to file a written opposition
17 to Fannie Mae's Second Stay Relief Motion and the broad discretion
18 the bankruptcy court has in applying its local rules, the
19 bankruptcy court, in this instance, did not abuse its discretion
20 in granting the Disbursement Order. See Qualls by and Through
21 Qualls, 22 F.3d at 842; In re Pike, 243 B.R. at 69.

22 **C. The bankruptcy court did not abuse its discretion in denying**
23 **the Reconsideration Motion.**

24 Debtors in their Reconsideration Motion relied upon Civil
25 Rule 60(b)(1), incorporated in Fed. R. Bankr. P. 9024, in
26 asserting that their failure to file any written opposition to the
27 Second Stay Relief Motion arose from their counsel's negligence
28 and constituted excusable neglect. Debtors further asserted that

1 if Rule 60(b)(1) did not apply then Rule 60(b)(6)(any other reason
2 justifies relief) applies.¹² Alternatively, Debtors asserted that
3 § 1326(a)(2) required disbursement of the retained payments to
4 Debtors.¹³ The bankruptcy court thoughtfully reviewed and analyzed
5 Debtors' assertions in its Reconsideration Order.

6 The bankruptcy court properly applied the four factors
7 adopted in Pioneer Inv. Servs. Co. in considering excusable
8 neglect under Civil Rule 60(b)(1).¹⁴ As to factors one and two,
9 the bankruptcy court found that they favored the debtors because
10 "requiring a party to litigate the merits of its motion generally
11 does not create a significant risk of prejudice" and Debtors'
12 prompt Reconsideration Motion minimized delay and impact on the
13 judicial process. Reconsideration Order, p. 5-6. As to factors
14 three and four, the bankruptcy court found the Debtors should have
15 promptly filed a written opposition to the Second Stay Relief
16

17 ¹² Civil Rule 60, in part, provides:

18 (b) Grounds for Relief from a Final Judgment,
19 Order, or Proceeding. On motion and just terms,
20 the court may relieve a party . . . from a final
21 . . . order . . . for the following reasons:

22 (1) mistake . . . , or excusable neglect;

* * *

(6) any other reason that justifies relief.

23 ¹³ Section 1326(a)(2) provides, in part: "If a plan is
24 confirmed, the trustee shall distribute any such payment in
25 accordance with the plan as soon as is practicable. If a plan is
not confirmed, the trustee shall return any such payments not
previously paid . . . to debtor"

26 ¹⁴ The four factors are: "the danger of prejudice to the
27 [non-moving party], the length of the delay and its potential
28 impact on judicial proceedings, the reason for the delay,
including whether it was within the reasonable control of the
movant, and whether the movant acted in good faith." Pioneer Inv.
Servs. Co., 507 U.S. at 395.

1 Motion and failed to prove that "their failure to file a written
2 opposition to the [Second Stay Relief Motion] constitutes
3 excusable neglect." Reconsideration Order, p. 7. Local
4 Rule 9014(b)(1) mandates that a written response to a pleading be
5 filed, and if that response is not filed, an adverse ruling may be
6 entered. Debtors' counsel acknowledged at the hearings that he
7 had notice of the Second Stay Relief Motion and apologized to the
8 court for not filing a response and acknowledged that he did not
9 have an excuse. On these facts and given the principles discussed
10 in Pioneer Inv. Servs. Co., 507 U.S. at 395-96, the bankruptcy
11 court did not err in finding that excusable neglect did not apply.

12 In Debtors' opening appellant brief, they no longer raise the
13 excusable neglect factor of Civil Rule 60(b)(1) or that some other
14 reason justifies relief under (b)(6), except to state the
15 bankruptcy court denied the Reconsideration Motion for Debtors'
16 failure to file a response, finding an absence of excusable
17 neglect. As Debtors have not further raised or argued Civil
18 Rule 60(b)(1) or (b)(6), the Panel deems Debtors to have waived
19 any issues associated with Civil Rule 60. See Jodoin v. Samayoa
20 (In re Jodoin), 209 B.R. 132, 143 (9th Cir. BAP 1997).

21 Also, Debtors no longer argue that the wrong Code section,
22 § 1326(a)(2) applies, as they did in the Reconsideration Motion.
23 Now, they argue on appeal that § 348(f) applies, an argument that
24 they did not make to the bankruptcy court. At this point, that
25 argument makes its appearance too late in the game. The Panel
26 will not consider an argument involving § 348(f) that was not
27 raised by Debtor before the bankruptcy court, either orally or in
28 a written opposition. See In re E.R. Fegert, Inc., 887 F.2d at

1 957.

2 Debtors' failure to file a written response to the Second
3 Stay Relief Motion after receiving conspicuous notice to file a
4 response allowed the bankruptcy court, in its discretion, to
5 refuse Debtors the opportunity to speak at any scheduled hearing
6 and to have an adverse ruling entered against them. As the local
7 rules "have the 'force of law' and are binding upon the parties
8 and upon the court, . . . ," Prof'l Programs Grp., 29 F.3d at
9 1353, and as the Debtors failed to raise any viable argument in
10 support of their Reconsideration Motion, the bankruptcy court did
11 not abuse its discretion in denying Debtors' Reconsideration
12 Motion.

13 **VI. CONCLUSION**

14 Based on the foregoing reasons, we AFFIRM the Disbursement
15 Order and the Reconsideration Order.

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