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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NOT FOR PUBLICATION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.	CC-12-1558-KiTaKu
)		
ERLINDA KOO,)	Bk. No.	2:11-59180-SK
)		
Debtor.)		
)		
_____)		
)		
ERLINDA KOO,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
VNO SHOPS ON LAKE, LLC,)		
)		
Appellee.)		
_____)		

Argued and Submitted on September 19, 2013,
at Pasadena, California

Filed - October 1, 2013

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

Honorable Sandra R. Klein, Bankruptcy Judge, Presiding.

Appearances: Tony Otha Thompson, Esq., argued for appellant,
Dr. Erlinda Koo; Todd E. Whitman, Esq. of Allen
Matkins argued for appellee, VNO Shops on Lake,
LLC.

Before: KIRSCHER, TAYLOR and KURTZ, 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 Individual chapter 11² debtor, Dr. Erlinda Koo ("Koo"),
2 appeals an order from the bankruptcy court overruling her
3 objection to a proof of claim filed by appellee, VNO Shops on
4 Lake, LLC ("VNO"). We DISMISS the appeal as MOOT.

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

6 **A. Prepetition events**

7 On or about May 14, 2003, VNO's predecessor, as landlord, and
8 Gemini Business Concepts, Inc. ("Gemini"), as tenant, entered into
9 a five-year written lease agreement ("Lease") for certain
10 commercial property located at The Shops on Lake Avenue, Pasadena,
11 California ("Premises"). Gemini was a California corporation
12 owned by Koo, who signed the Lease as Gemini's "chairperson." The
13 Premises was used for the operation of a Japanese restaurant. The
14 Lease contained an option to renew for another five-year term from
15 2008-2013. The parties disagreed about whether Koo ever exercised
16 the option, but the bankruptcy court found that she had.

17 Concurrently with the Lease, Koo executed a written guaranty
18 of lease ("Guaranty"), wherein Koo personally guaranteed, among
19 other things, Gemini's payment of all rents and other sums payable
20 under the Lease.

21 On or about November 17, 2007, Koo as "owner" of Gemini
22 executed an assignment of the Lease ("Assignment") to Royal Jade
23 Investments, Inc. ("Royal Jade"), another corporation owned by
24 Koo. Koo also executed as "owner" of Royal Jade an acceptance of
25 the Assignment, agreeing to be bound by all terms, conditions and
26

27 ² Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 covenants in the Lease, including the payment of rent. VNO, as
2 landlord, consented to the Assignment.

3 On December 14, 2007, Koo executed an affirmation of
4 guarantors ("Affirmation"), wherein Koo reaffirmed her Guaranty of
5 Royal Jade's obligations under the Lease, including the payment of
6 all rents due and payable to VNO.

7 As the result of VNO's unlawful detainer action against Royal
8 Jade, the state court entered a judgment for possession in favor
9 of VNO on November 18, 2011. The parties also agreed to a
10 settlement on the record whereby Royal Jade would pay VNO
11 \$113,063, with \$24,000 to be paid by November 11, 2011, and five
12 monthly payments of \$17,812.70 to be paid by the 15th of each
13 month. The parties further agreed that if all payments were made,
14 Royal Jade and Koo would be released from all past and future
15 liability. If any payments were missed, VNO could pursue all past
16 and future amounts less any payments made.

17 On December 2, 2011, the state court entered a writ of
18 possession directing the sheriff to enforce the judgment against
19 Royal Jade. Koo was not personally named on either the possession
20 judgment or the writ of possession. The parties agree that Koo
21 timely tendered the \$24,000 payment. However, no further payments
22 were made.

23 **B. Koo's objection to VNO's claim**

24 Koo filed a chapter 11 bankruptcy case on December 1, 2011.
25 Royal Jade filed a chapter 7 bankruptcy case two weeks later on
26 December 14, 2011.

27 Based on her Guaranty, VNO filed an amended proof of claim
28 ("Claim") in Koo's bankruptcy case for \$228,902.61: \$152,110.26

1 in pre-surrender rent and \$76,792.35 in damages per § 502(b)(6).

2 Koo objected to VNO's Claim contending, among other things,
3 that the Guaranty failed to impose liability on her because it was
4 an unenforceable "sham guaranty" under CAL. CIV. CODE § 2787.³

5 VNO disputed Koo's sham guaranty argument.

6 On October 10, 2012, the bankruptcy court issued a tentative
7 ruling on the Claim objection. In short, the court found that
8 Koo's Guaranty was not a sham, and that she was liable for breach
9 of the Lease. The court rejected Koo's "sham guaranty" argument
10 on two bases. First, Koo was estopped from arguing that she and
11 Royal Jade were not legally distinct. Royal Jade had filed for
12 bankruptcy, and Koo had signed the petition as Royal Jade's
13 president. Therefore, reasoned the court, Koo had acknowledged
14 that Royal Jade was a separate legal entity. Further, the
15 schedules showed that Royal Jade owned separate property,
16 including a liquor license. Second, Koo could not use the alter
17 ego doctrine defensively to "accomplish an 'inequitable purpose'
18 of avoiding her obligations under the Guaranty."

19 The bankruptcy court distinguished the cases cited by Koo as
20 "inapplicable," because they involved issues regarding whether a
21 general partner is liable for a partnership's debts and
22 liabilities for deficiencies related to real property purchases
23 governed by California's antideficiency statutes. The court
24 further rejected Koo's argument that Royal Jade was a "dummy"
25 corporation. Koo had Royal Jade file its own bankruptcy case. To

26
27 ³ Koo had also argued that VNO's Claim should be offset by
28 the \$24,000 payment she made in November 2011. VNO and the
bankruptcy court agreed. The Claim was reduced accordingly.

1 take Koo's argument to its logical conclusion would mean that Koo
2 was individually liable to all of Royal Jade's creditors, and that
3 Royal Jade's bankruptcy case itself was a sham.

4 The bankruptcy court held a hearing on the Claim objection on
5 October 11, 2012. After hearing oral argument from the parties,
6 the court announced that its tentative ruling would be the final
7 ruling.

8 On October 17, 2012, the bankruptcy court entered its order
9 overruling Koo's objection in part, sustaining it in part, and
10 allowing VNO's Claim for \$204,902.61, which reflected the conceded
11 \$24,000 reduction. The court entered its tentative ruling as its
12 final ruling on November 2, 2012. This timely appeal followed.

13 **II. JURISDICTION**

14 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
15 and 157(b)(2)(B). We discuss our jurisdiction under 28 U.S.C.
16 § 158 below.

17 **III. ISSUES**

18 Is this appeal moot? If not, did the bankruptcy court err by
19 not applying the "sham guaranty" test to determine Koo's liability
20 under the Guaranty?

21 **IV. STANDARDS OF REVIEW**

22 Mootness is a question of law reviewed de novo. S. Ore.
23 Barter Fair v. Jackson County Ore., 372 F.3d 1128, 1133 (9th Cir.
24 2004)(citing Ore. Advocacy Ctr. v. Mink, 322 F.3d 1101, 1116 (9th
25 Cir. 2003)). "The basic question in determining mootness is
26 whether there is a present controversy as to which effective
27 relief can be granted." Feldman v. Bomar, 518 F.3d 637, 642 (9th
28 Cir. 2008)(citation omitted).

1 An order overruling a claim objection can raise legal issues,
2 which we review de novo, as well as factual issues, which we
3 review for clear error. Veal v. Am. Home Mortg. Serv., Inc.
4 (In re Veal), 450 B.R. 897, 918 (9th Cir. BAP 2011). "De novo
5 review is independent, with no deference given to the trial
6 court's conclusion." Allen v. U.S. Bank, N.A. (In re Allen),
7 472 B.R. 559, 564 (9th Cir. BAP 2012). A finding of fact is
8 clearly erroneous if it is illogical, implausible or without
9 support in the record. Retz v. Samson (In re Retz), 606 F.3d
10 1189, 1196 (9th Cir. 2010)(citing United States v. Hinkson,
11 585 F.3d 1247, 1261-62 & n.21 (9th Cir. 2009)(en banc)).

12 V. DISCUSSION

13 Counsel for VNO informed us at oral argument that Koo's
14 bankruptcy case had been dismissed while this appeal was pending,
15 thereby rendering the appeal of her Claim objection moot.⁴ We
16 reviewed the bankruptcy court's electronic docket and have
17 confirmed that Koo's chapter 11 case was dismissed on
18 September 13, 2013. (Dkt. no. 227). See FED. R. EVID. 201(c) &
19 (f); O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.),
20 887 F.2d 955, 957-58 (9th Cir. 1989)(panel may take judicial
21 notice of the bankruptcy court docket or of matters relevant to
22 the appeal).

23 We lack jurisdiction over moot appeals. I.R.S. v. Pattullo
24 (In re Pattullo), 271 F.3d 898, 901 (9th Cir. 2001). If the

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26 ⁴ While we appreciate this information from VNO, it really
27 should have been provided to us by counsel for Koo. See Arizonans
28 for Official English v. Ariz., 520 U.S. 43, 68 n.23 (1997)("It is
the duty of counsel to bring to the federal tribunal's attention,
'without delay,' facts that may raise a question of mootness.").

1 appeal is moot, we must dismiss it. Id. A case is moot "[i]f an
2 event occurs while a case is pending on appeal that makes it
3 impossible for the court to grant any effectual relief whatever to
4 a prevailing party" Id.

5 With the dismissal of a bankruptcy case, property of the
6 bankruptcy estate reverts in the debtor (or other entity that
7 owned the estate property prepetition). See § 349(b)(3). The
8 dismissal order terminates the bankruptcy estate. Lomagno v.
9 Salomon Bros. Realty Corp. (In re Lomagno), 320 B.R. 473, 478 (1st
10 Cir. BAP 2005), aff'd, 429 F.3d 16 (1st Cir. 2005)("dismissal of
11 the bankruptcy petition immediately terminates both the automatic
12 stay and the bankruptcy estate."). If the bankruptcy estate no
13 longer exists, then the court need not resolve an objection to a
14 proof of claim that seeks a distribution against the (now)
15 non-existent bankruptcy estate. Cf. Nash v. Kester (In re Nash),
16 765 F.2d 1410, 1412-13 (9th Cir. 1985)(allowed claim in chapter 13
17 plan had no right to further payment under plan after bankruptcy
18 case was dismissed). See also Robbs v. Hughes, Hubbard & Reed
19 (In re Robbs), 67 F.3d 308 (9th Cir. 1995)(unpublished table case)
20 (appeal of order allowing claim is rendered moot when underlying
21 bankruptcy case is dismissed).

22 We conclude that Koo's appeal is moot, because subsequent
23 events have occurred making it impossible for us to fashion any
24 effective form of relief for her. The bankruptcy estate, from
25 which VNO's Claim seeks payment, no longer exists, and VNO will
26 now have to pursue its remedies for breach of the Lease against
27 Koo in state court. Hence, a reversal of the Claim order would be
28 meaningless.

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VI. CONCLUSION

Accordingly, because the appeal is MOOT, we DISMISS for lack of jurisdiction.