

AUG 14 2007

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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NOT FOR PUBLICATION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

6	In re:)	BAP No.	NC-06-1302-SDK
7	CARLO ANTONIO DELCONTE,)	Bk. No.	06-30638
8	Debtor.)		
9	_____)		
10	CARLO ANTONIO DELCONTE,)		
11	Appellant,)		
12	v.)	MEMORANDUM ¹	
13	TONY TORREZ,)		
14	Appellee.)		
	_____)		

Argued and Submitted on June 22, 2007
at San Francisco, California

Filed - August 14, 2007

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

Honorable Thomas E. Carlson, Bankruptcy Judge, Presiding.

Before: SMITH, DUNN and KLEIN, 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 premises and forfeiture of the lease agreement.

2 When Debtor did not vacate the premises by the agreed date,
3 Appellee filed the stipulation for entry of judgment in state
4 court. However, before the judgment could be entered, Debtor
5 moved to rescind the settlement agreement. The motion to rescind
6 came on for hearing on July 24, 2006. At the hearing's
7 conclusion, the state court took the matter under submission.

8 On July 27, 2006, Debtor filed for chapter 13² bankruptcy
9 relief. According to Debtor, he telephoned Appellee's attorney,
10 Sally Morin ("Morin"), and faxed a copy of the petition to her on
11 the day he filed. Nevertheless, on July 28, 2006, the state
12 court denied the rescission motion and entered judgment in favor
13 of Appellee. On the same day, the court clerk issued a writ of
14 possession. Sometime thereafter, Morin contacted the sheriff's
15 office and scheduled the eviction for August 16, 2006.

16 Upon receiving notice of the bankruptcy filing on August 4,
17 2006, the sheriff's office cancelled the eviction and advised
18 Morin that the writ would not be executed until the automatic
19 stay was lifted. Morin responded that neither Appellee nor she
20 had been provided copies of the petition and thus would inquire
21 about it.³

22 ² Unless otherwise indicated, all chapter, section and rule
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
24 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
25 enacted and promulgated by The Bankruptcy Abuse Prevention and
Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005,
119 Stat. 23.

26 ³ Morin concedes that Debtor advised her of the filing prior
27 to the judgment being entered, but she disputes that a copy of
28 the petition was faxed to her. Declining to "go on his word,"
(continued...)

1 Upon confirming the filing from the court's website, Morin
2 immediately filed an "Ex Parte Motion to Shorten Time on Motion
3 to Terminate or Modify the Stay" on August 9, 2006. The court
4 granted the ex parte motion and set August 14, 2006, as the
5 hearing date for the stay motion.

6 At the August 14 hearing, the bankruptcy court determined
7 that retroactive relief from the stay was warranted to allow the
8 judgment and writ of possession to be effective. Unpersuaded by
9 Debtor's argument that the settlement agreement was an executory
10 contract because no judgment had been entered pre-petition, the
11 bankruptcy court determined that the settlement fell outside "the
12 realm of executory contracts." Hr'g Tr. 14, Aug. 14, 2006. As
13 of the petition date, the motion to rescind had been heard by the
14 state court, leaving only the decision whether to enter the
15 judgment to be determined. Thus, the court reasoned that the
16 circumstances justified conclusion of the matter by the state
17 court and annulment of the stay as of the petition date. The
18 bankruptcy court stressed that any state law remedies available
19 to Debtor, such as the right to seek relief from the forfeiture
20 under California Civil Code § 1179, needed to be presented in
21 state court.

22 The court also found that Appellee was entitled to continue
23 with the eviction because the judgment caused Debtor not to have
24 any right to remain on the premises. Although the court
25 recognized that neither Appellee nor Morin had been provided a

26 ³(...continued)

27 she confirmed the filing from the court's website, but only after
28 the sheriff's office notified her that the eviction would not
proceed due to the bankruptcy.

1 copy of the petition prior to the judgment's entry and writ's
2 issuance,⁴ it noted that once Morin learned of the stay from the
3 sheriff's office, Appellee had a duty to investigate whether
4 there was a stay in effect. Because Appellee had time to seek
5 relief from the stay prior to the eviction, the court held that
6 retroactive relief was not justified for the eviction
7 proceedings. For this reason, Appellee was granted relief to
8 move forward with the eviction proceedings, but was restrained
9 from enforcing the writ of possession for nine days⁵ following
10 entry of the relief order so as to prevent Appellee from
11 obtaining any advantage from his actions taken after the stay's
12 effective date.

13 Debtor thereafter sought reconsideration of the court's
14 relief order, arguing that the court should reinstate the
15 automatic stay, or at least extend out the eviction date, because
16 1) he had just learned that he had a medical condition that he
17 believed brought him under the Americans with Disabilities Act
18 and entitled him to additional time before any eviction could
19 occur and 2) § 362 protected his substantial claim and equity in
20 the premises.

21 The matter came on for hearing on August 22, 2006. During

22 ⁴ The court does not address the fact that Debtor telephoned
23 Morin about the bankruptcy without providing any evidence of it
24 prior to the judgment's entry.

25 ⁵ Initially, the court planned to apply the normal ten-day
26 stay period to the relief order as required by Rule 4001(a)(3).
27 The ten-day period would have caused the stay not to lift until
28 the following Thursday. Morin informed the court that the
sheriff only scheduled evictions on Wednesdays. Thus, the court
waived the ten-day stay and applied only a nine-day stay in order
to conform to the sheriff's schedule.

1 the hearing, the court explained to Debtor in detail how state
2 law governed his rights in the premises and why it was
3 appropriate to defer to the state court to make a decision in the
4 unlawful detainer action because it was filed pre-petition, arose
5 under state law, and fell within a particular area of law where
6 the state court had much greater expertise. Due to these
7 circumstances and Debtor's failure to raise any argument to
8 persuade the bankruptcy court otherwise, it refused to find that
9 the automatic stay should stop the entry of judgment and issuance
10 of the writ. The court also found that circumstances surrounding
11 the entry of the judgment did not support Appellee being held in
12 contempt for violating the stay.

13 In addition, the bankruptcy court held that the Code did not
14 provide Debtor with the right to reject the settlement agreement
15 as an executory contract. The state court determined that the
16 settlement agreement was enforceable and that Debtor's lease had
17 been forfeited. Thus, the bankruptcy court opined that the Code
18 did not allow Debtor to stay the eviction when he had no right to
19 remain in the premises. The court believed that it would be a
20 "gross interference" with the state court process if Debtor were
21 able to use the bankruptcy stay to prevent a state court from
22 entering a judgment in a matter already heard and taken under
23 submission.

24 The court noted that while the Americans with Disabilities
25 Act might have entitled Debtor to a 30-day notice period prior to
26 eviction, Debtor had failed to pinpoint how any relief afforded
27 under the Act applied to his particular situation. Without so
28 much as a citation, the court concluded that it could not, simply

1 on Debtor's word alone, find that Debtor was entitled to an
2 extension of the eviction date past August 23, 2006.

3 Based on the foregoing, the court denied Debtor's
4 reconsideration motion and entered an order evidencing such on
5 August 22, 2006. Debtor timely appealed.

6 II. JURISDICTION

7 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
8 and § 157(b)(1) and (b)(2)(G). We have jurisdiction under 28
9 U.S.C. § 158.

10 One of the issues Debtor submits for our review is whether
11 the bankruptcy court erred in not finding Appellee and Morin in
12 contempt under § 362(h) for willfully violating the automatic
13 stay as prayed in his "Motion to Hold Landlord/Creditor And
14 Attorney For Landlord/Creditor In Contempt For A Violation Of The
15 Automatic Stay And Seeking Compensatory And Punitive Damages"
16 ("Contempt Motion"). This issue was briefly touched upon by the
17 bankruptcy court during the reconsideration hearing,⁶ but was not
18 resolved nor addressed in either the relief from stay order or
19

20 ⁶ The discussion went as follows:

21 DEBTOR: What about my motion for contempt that was
22 supposed to be heard in September, I mean, that is
destroyed by the order retroactive?

23 THE COURT: That happens when you lift the stay
24 retroactively. Again, the Court has discretion to lift
25 the stay. I don't think that a landlord who has a
26 hearing before the State Court in which the State Court
says I'm going to rule for you, and then the Court
enters that judgment, should be subject to contempt. .

27 . .

28 Hr'g Tr. 12-13, Aug. 22, 2006.

1 the reconsideration order.

2 Notwithstanding the court's granting of annulment of the
3 stay, we note that annulment does not necessarily moot Debtor's
4 § 362(h) motion. "[C]ase law has not yet definitively addressed
5 whether an action taken in violation of the stay, validated by
6 annulment after the fact, may nonetheless serve as a basis for an
7 award of money damages if the debtor has suffered an injury."
8 Williams v. Levi (In re Williams), 323 B.R. 691, 702 (9th Cir.
9 BAP 2005). Compare In re Edisto Res. Corp., 158 B.R. 954, 958-59
10 (Bankr. D. Del. 1993) (holding that once the creditor paid the
11 debtor's legal fees associated with defending against litigation
12 that violated the automatic stay, cause would exist to annul the
13 stay), and In re Thompson, 182 B.R. 140, 155 (Bankr. E.D. Va.
14 1995), aff'd, 92 F.3d 1182 (4th Cir. 1996) (annulling the
15 automatic stay precludes an award of damages for a stay
16 violation). Thus, Debtor may still have a valid § 362(h) claim.
17 The determination of the validity of such a claim, at this point,
18 remains a task for the bankruptcy court.

19 In sum, as the bankruptcy court has not yet entered a final
20 order disposing of the Contempt Motion, we do not have
21 jurisdiction to review issues arising from it on this appeal.⁷
22 See Special Invs., Inc. v. Aero Air, Inc., 360 F.3d 989, 992 (9th
23 Cir. 2004).

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25
26 ⁷ According to the bankruptcy court's docket, the Contempt
27 Motion was filed on August 9, 2006, and given a hearing date of
28 September 5, 2006. However, there is no indication on the docket
that it was heard on that or any other date, or that it was
resolved by order of the court.

1 **III. ISSUES⁸**

- 2 A. Whether the bankruptcy court abused its discretion by
3 annulling the automatic stay as to the entry of judgment and
4 issuance of the writ and granting relief from stay for the
5 eviction.
- 6 B. Whether the bankruptcy court erred in finding that Debtor
7 could not assume the lease.
- 8 C. Whether the settlement agreement was an executory contract
9 which Debtor had the right to reject under § 365(d).

10 **IV. STANDARD OF REVIEW**

11 A bankruptcy court's conclusions of law are reviewed de
12 novo. Miller v. United States, 363 F.3d 999, 1003 (9th Cir.
13 2004).

14 We review a decision retroactively lifting the automatic
15 stay for an abuse of discretion. Nat'l Env'tl. Waste Corp. v.
16 City of Riverside (In re Nat'l Env'tl. Waste Corp.), 129 F.3d
17 1052, 1054 (9th Cir. 1997). An abuse of discretion will be found
18 "if the underlying decision 'involved a clear error of law.'" First Ave. W. Bldg., LLC v. James (In re OneCast Media, Inc.),
19 439 F.3d 558, 561 (9th Cir. 2006) (citing McDowell v. Calderon,

21 _____
22 ⁸ The notice of appeal states that Debtor is appealing the
23 order denying his motion for reconsideration. However, he has
24 not included any argument in his opening brief which addresses
25 how the bankruptcy court abused its discretion in denying the
26 motion. Any argument related to the reconsideration order is
27 therefore deemed waived. Alaska Ctr. for the Env't v. U.S.
28 Forest Serv., 189 F.3d 851, 858 n.4 (9th Cir. 1999); Martinez-
Serrano v. INS, 94 F.3d 1256, 1259 (9th Cir. 1996); Int'l Union
of Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401, 1404 (9th
Cir. 1985) ("we will not ordinarily consider matters on appeal
that are not specifically and distinctly raised and argued in
appellant's opening brief").

1 197 F.3d 1253, 1255 (9th Cir. 1999) (en banc)).

2
3 **V. DISCUSSION**

4 A. Retroactive Relief from the Automatic Stay

5 A petition in bankruptcy operates as a stay against actions
6 that may affect property of the bankruptcy estate or a judicial
7 proceeding initiated against the debtor prior to commencement of
8 the bankruptcy case. 11 U.S.C. § 362(a). Acts committed in
9 violation of the automatic stay are void. Schwartz v. United
10 States (In re Schwartz), 954 F.2d 569, 571-72 (9th Cir. 1992);
11 Sewell v. MGF Funding, Inc. (In re Sewell), 345 B.R. 174, 178 n.6
12 (9th Cir. BAP 2006). "However, section 362(d)⁹ 'gives the
13 bankruptcy court wide latitude in crafting relief from the
14 automatic stay, including the power to grant retroactive relief
15 from the stay.'" Nat'l Env'tl. Waste Corp., 129 F.3d at 1054
16 (citing Schwartz, 954 F.2d at 572). The Code therefore accounts
17 for the fact that it may be inappropriate in certain
18 circumstances to permit a debtor to take advantage of the
19 automatic stay. Sherman v. SEC (In re Sherman), 441 F.3d 794,
20 815 (9th Cir. 2006).

21 Section 362(d) requires a court to grant relief from the
22 automatic stay "for cause." 11 U.S.C. § 362(d)(1). In
23 determining whether there is cause to grant retroactive relief,
24 courts consider the following factors:

25 _____
26 ⁹ Section 362(d) states, "On request of a party in interest
27 and after notice and a hearing, the court shall grant relief from
28 the stay provided under subsection (a) of this section, such as
by terminating, annulling, modifying, or conditioning such stay.
. . . ."

- 1 1. Whether the creditor was aware of the bankruptcy
petition;
- 2
- 3 2. Whether the debtor engaged in unreasonable or
inequitable conduct, or prejudice would result to the
creditor;
- 4
- 5 3. Number of filings;
- 6
- 7 4. The debtor's overall good faith;
- 8
- 9 5. Whether creditors knew of [the] stay but nonetheless
took action, thus compounding the problem, or whether
they moved expeditiously to gain relief from the stay;
- 10
- 11 6. Whether the debtor has complied with the Bankruptcy
Code and Rules;
- 12
- 13 7. The relative ease of restoring parties to the status
quo ante;
- 14
- 15 8. How quickly creditors moved for annulment;
- 16
- 17 9. Whether annulment of the stay will cause irreparable
injury to the debtor; and
- 18
- 19 10. Whether stay relief will promote judicial economy
or other efficiencies.
- 20

21 Fjeldsted, 293 B.R. at 25. A court should not mechanically apply
22 these factors, but should use them as an aid in weighing the
23 equities. Nat'l Env'tl. Waste Corp., 129 F.3d at 1055; Williams,
24 323 B.R. at 700. "In any given case, one factor may so outweigh
25 the others as to be dispositive." Fjeldsted, 293 B.R. at 25.

26 In this case, the bankruptcy court appears to have afforded
27 significant weight to the judicial economy factor. Specifically,
28 the court found that the unlawful detainer matter had been fully
litigated, i.e., a hearing had been held and the matter taken
under submission, and the only step remaining as of the date of
the filing was for the state court to render its ruling.

The court also determined that Appellee had acted promptly
in seeking relief from the stay. Though Debtor maintains that he

1 faxed Appellee and Morin a copy of his petition the night of the
2 filing and also telephoned Morin about the bankruptcy, he did not
3 provide a fax transmission receipt, or any other evidence of the
4 communication, to the court. Morin acknowledged receiving verbal
5 notice of the filing from Debtor but did not indicate the date
6 she received it. Even if we accept Debtor's representation that
7 notice was given on the petition date, i.e., July 27, Appellee's
8 stay relief motion was filed less than two weeks later. Based on
9 this evidence, we cannot disagree with the court's finding that
10 Appellee sought relief in a timely fashion.

11 Continuing with the process of analyzing the equities
12 between the parties, the bankruptcy court further observed that
13 this is not a circumstance where [Debtor] should be
14 able to use the bankruptcy to avoid enforcement of this
15 particular kind of judgment where the effect would be
16 to allow [him] to stay in a premises after the [state
court] has determined it's been forfeited, and
especially without paying rent going forward.

17 Hr'g Tr. 10, Aug. 22, 2006. In our view, the court did not abuse
18 its discretion in determining that the equities weighed in favor
19 of granting retroactive relief to Appellee with respect to the
20 entry of the judgment and issuance of the writ.

21 Similarly, the court did not err in finding cause for
22 granting stay relief as to the eviction proceeding. "In an
23 ensuing unlawful detainer action, the court does not decide
24 whether the lessor terminated the lease." Vanderpark Props.,
25 Inc. v. Buchbinder (In re Windmill Farms, Inc.), 841 F.2d 1467,
26 1471 (9th Cir. 1988). Rather, the court's role is to determine
27 whether the landlord's termination of the lease was proper and if
28 it was, as the state court decided here, grant the landlord a

1 judgment for possession of the property. Id.

2 The settlement agreement clearly states that the lease
3 terminated on July 12, 2006, at 5 p.m. Consequently, as of that
4 time and date, Debtor's tenancy terminated. The fact that the
5 state court had yet to enter a final judgment upholding the
6 validity of the termination under California law does not alter
7 the existence of the termination itself. See id. at 1470-71 ("It
8 is possible to define termination in such a way that events
9 sufficient to constitute termination of a lease occur long before
10 a court determines that the termination is valid under state
11 law."). Cause therefore existed to grant relief from the stay to
12 allow Appellee to proceed with the eviction proceedings because
13 Debtor's tenancy had terminated prior to the bankruptcy filing.

14 B. Assumption of the Lease

15 The Bankruptcy Code permits a debtor to "assume or reject
16 any . . . unexpired lease of residential real property . . . at
17 any time before the confirmation of a plan. . . ." 11 U.S.C.
18 § 365(d)(2). Debtor maintains that at the time of the petition's
19 filing, the lease "had been illegally and fraudulently terminated
20 by [Appellee] for retaliatory reasons, but the calendar term of
21 the lease was unexpired." Appellant's Opening Br. 9, Mar. 28,
22 2007. Accordingly, he argues that he should be allowed to assume
23 or reject the lease under § 365.

24 The settlement agreement executed by the parties modified
25 the terms of the original lease, effectively creating a new
26 tenancy agreement with a term that expired on July 12, 2006, a
27 date prior to the date of the bankruptcy filing. Under the terms
28 of the settlement agreement, in the event of Debtor's failure to

1 vacate the premises by July 12, 2006, Appellee had the right to
2 seek the entry of a judgment for restitution and possession.

3 Because Debtor did not comply with the terms of the
4 settlement, i.e., vacate the premises on the agreed date,
5 Appellee filed the stipulated judgment, which was entered on July
6 28, 2007, after the state court rejected Debtor's argument that
7 the settlement agreement was improperly procured by duress and
8 fraud.

9 Based on the foregoing circumstances, that is, the execution
10 of the settlement agreement, the July 12 vacate date, and the
11 filing of the stipulated judgment, all of which occurred
12 prepetition, there was no remaining unexpired lease for Debtor to
13 assume as of the date of the bankruptcy filing.

14 Even assuming, purely for the sake of argument, that the
15 lease somehow survived the execution of the settlement agreement
16 (an argument which we reject), by its own term the lease expired
17 on July 31, 2006, and included no provisions for the renewal or
18 extension of the term past that date.¹⁰ By the time the
19 bankruptcy court heard Appellee's stay relief motion on August
20 14, 2006, the lease term would have already expired, leaving
21 nothing for Debtor to assume. While § 365(d) provides a debtor
22 time to assume or reject an unexpired lease of residential
23 property, it does not give a debtor the right to extend a lease
24 past its natural expiration. See In re G-N Partners, 48 B.R.
25 462, 466 (Bankr. D. Minn. 1985).

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28 ¹⁰ The lease provided for a one-year term commencing August
1, 2005, and ending July 31, 2006.

1 The bankruptcy court did not err in finding that Debtor did
2 not have a right to assume the lease.

3
4 C. Rejection of the Settlement Agreement

5 A debtor has the right to assume or reject an executory
6 contract at any time prior to plan confirmation. 11 U.S.C.
7 § 365(d)(2). Whether a contract is executory for purposes of the
8 Code is a question of federal law. Marcus & Millichap Inc. of
9 S.F. v. Munple, Ltd. (In re Munple, Ltd.), 868 F.2d 1129, 1130
10 (9th Cir. 1989).

11 Although the Code does not define "executory contract," it
12 has been generally defined as a contract in which performance is
13 due to some extent on both sides. Unsecured Creditors Comm. v.
14 Southmark Corp. (In re Robert L. Helms Constr. & Dev. Co., Inc.),
15 139 F.3d 702, 705 (9th Cir. 1998). "More precisely, a contract
16 is executory if 'the obligations of both parties are so far
17 unperformed that the failure of either party to complete
18 performance would constitute a material breach and thus excuse
19 the performance of the other.'" Id. (quoting Griffel v. Murphy
20 (In re Wegner), 839 F.2d 533, 536 (9th Cir. 1988)).

21 Here, Debtor argues that the settlement agreement
22 constituted an executory contract because both Appellee and he
23 had outstanding obligations to perform at the time he filed his
24 bankruptcy petition. However, prior to the bankruptcy filing,
25 Appellee had performed his obligations according to the
26 settlement agreement. Once Debtor failed to perform by timely
27 vacating the apartment, nothing remained to be done by Appellee,
28 other than file the stipulated judgment, which was done prior to

1 the bankruptcy filing. As of the date the petition was filed,
2 there were no remaining acts to be performed by either party and
3 the settlement agreement was, therefore, not executory. See
4 Southmark Corp., 139 F.3d at 706. We agree with the bankruptcy
5 court that Debtor did not have the right to assume or reject the
6 settlement agreement as an executory contract.

7 **VI. CONCLUSION**

8 Based on the foregoing, we AFFIRM the relief from stay and
9 reconsideration orders.

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