

OCT 21 2010

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No. CC-10-1070-DNoPa
)	
6	ENEDEL ANGULO and)	Bk. No. 09-23463-KT
	MARIA L. VILLANUEVA,)	
7)	
	Debtors.)	
8	_____)	
)	
9	ENEDEL ANGULO;)	
	MARIA L. VILLANUEVA,)	
10)	
	Appellants,)	
11)	
	v.)	M E M O R A N D U M¹
12)	
	SOUTHSTAR III, LLC,)	
13)	
	Appellee.)	
14	_____)	

Argued and Submitted on September 23, 2010
at Pasadena, California

Filed - October 21, 2010

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

Hon. Kathleen H. Thompson, Bankruptcy Judge, Presiding

Appearances: _____
Claudia C. Bohorquez for Appellants Enedel Angulo
and Maria L. Villanueva
Nicole Glowin, Wright, Finlay & Zak LLP for
Appellee Southstar III, LLC

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 Before: DUNN, NOVACK² and PAPPAS, Bankruptcy Judges

2 After Appellants failed to respond to a motion for relief
3 from the automatic stay and failed to appear at the hearing
4 scheduled on the motion, the bankruptcy court granted the motion.
5 Appellants made no effort in the bankruptcy court to obtain
6 relief from the default order, but instead filed this appeal.
7 Because the issues raised on appeal were not presented to the
8 bankruptcy court in the first instance, and because an eviction
9 has been completed following the entry of the default order, with
10 the result that we can afford no effective relief to Appellants,
11 we DISMISS this appeal as moot. Nevertheless, we have very
12 serious concerns about Appellee's actions in obtaining the order
13 on appeal.

14 **I. FACTS**

15 On December 27, 2006, Appellants, Enedel Angulo and Maria
16 Villanueva, executed a trust deed ("Trust Deed") granting Fremont
17 Investment & Loan ("Fremont") a lien on their residence (the
18 "Property") to secure payment of a promissory note they executed
19 the same date in the amount of \$491,400. The Trust Deed was
20 recorded in the Los Angeles County, California Recorder's Office
21 on January 11, 2007.

22 The Trust Deed named Mortgage Electronic Registration
23 Systems, Inc. ("MERS") as Fremont's nominee. On February 12,
24 2008, MERS assigned Fremont's beneficial interest in the Trust
25 Deed to Merrill Lynch Mortgage Lending, Inc. ("Merrill Lynch").
26

27 ² Hon. Charles D. Novack, U.S. Bankruptcy Judge for the
28 Northern District of California, sitting by designation.

1 A Trustee's Deed Upon Sale was recorded February 5, 2009,
2 evidencing a foreclosure sale that took place on January 22,
3 2009. However, that Trustee's deed was rescinded on April 9,
4 2009, because the foreclosure sale was "conducted in error due to
5 a failure to communicate timely, notice of conditions which would
6 have warranted a cancellation of the foreclosure. . . ."

7 On June 8, 2009, a second foreclosure sale was conducted,
8 and Merrill Lynch became the owner of the Property. On June 15,
9 2009, Merrill Lynch conveyed its interest in the Property to
10 Southstar III, LLC ("Southstar"). The Trustee's Deed Upon Sale
11 was not recorded until October 7, 2009, and it was amended on
12 November 17, 2009, postpetition, to change the name of the
13 grantee from Merrill Lynch to Southstar.

14 On August 4, 2009, Steel Mountain Capital I, LLC ("Steel
15 Mountain") served Appellants with a Notice to Vacate Property
16 ("Steel Mountain Notice") on the basis that Steel Mountain "or
17 its predecessor in interest" had purchased the Property at the
18 foreclosure sale.³ When Appellants failed to vacate the
19 Property as directed in the Steel Mountain Notice, Steel Mountain
20 filed a complaint ("Steel Mountain Complaint") in unlawful
21 detainer in the Los Angeles County Superior Court seeking post-
22 foreclosure eviction, alleging that it had obtained title to the
23 Property and right to its possession by purchasing the Property

24
25 ³ In its brief filed in this appeal, Southstar explains
26 the involvement of Steel Mountain: "Due to an internal error, the
27 Notice to Vacate and the [Steel Mountain Complaint] were
28 mistakenly instituted or served in the name of Steel Mountain
. . . instead of . . . [Southstar]." Appellee's Brief at
3:18-21.

1 at a foreclosure sale conducted on February 5, 2009. A judgment
2 of restitution and possession was entered in favor of Steel
3 Mountain on September 4, 2009, and a Writ of Execution was issued
4 September 30, 2009, directing the Sheriff of Los Angeles County
5 to enforce Steel Mountain's right to possession of the Property.

6 Appellants filed their chapter 7⁴ bankruptcy petition on
7 October 13, 2009. On December 24, 2009, Southstar filed a motion
8 for relief from the automatic stay ("RFS Motion"), asserting as
9 cause under § 362(d)(1) that Southstar had acquired title to the
10 Property by a prepetition foreclosure sale and that a prepetition
11 unlawful detainer judgment had been entered in its favor. In the
12 Unlawful Detainer Declaration filed with the RFS Motion,
13 Southstar alleged that it had served the Steel Mountain Notice,
14 that it had filed the Steel Mountain Complaint, and that an
15 unlawful detainer judgment had been entered against Appellants
16 for which a Writ of Possession had issued. In the Unlawful
17 Detainer Declaration, Southstar's attorney, Richard S. Sontag,
18 declared under penalty of perjury that the Property "is not an
19 asset of the Estate, as title to the [P]roperty was vested and
20 perfected prepetition. At the time the . . . petition was filed
21 [Appellants] had no ownership interest in the [Property]." In
22 addition to signing the Unlawful Detainer Declaration under
23 penalty of perjury, Mr. Sontag specially averred: "I am 'of
24

25
26 ⁴ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 All "Rule" or "FRBP" references are to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of
Civil Procedure are referred to as Civil Rules.

1 Counsel' to Ruzicka & Wallace, LLP, [Southstar's] Attorneys
2 herein. At all relevant times, the matters stated herein are
3 true of my own personal knowledge or, on information and belief,
4 I believe those matters to be true." To the Unlawful Detainer
5 Declaration, Southstar attached supporting exhibits, including
6 the Steel Mountain Notice and the Steel Mountain Complaint.

7 The RFS Motion included notice that a hearing ("RFS
8 Hearing") on the RFS Motion was set for January 14, 2010, and it
9 directed Appellants to file a response to the RFS Motion no less
10 than 14 days prior to the RFS Hearing. Appellants filed no
11 written response to the RFS Motion and did not appear at the RFS
12 Hearing.⁵ On February 2, 2010, the bankruptcy court entered an
13 order ("RFS Order") granting Southstar relief from the automatic
14 stay.

15 Thereafter Southstar, on February 9, 2010, served Appellants
16 with its own Notice to Vacate Property ("Southstar Notice").
17 When Appellants failed to vacate the Property as directed in the
18 Southstar Notice, Southstar, on February 18, 2010, filed a
19 complaint ("Southstar Complaint") in unlawful detainer in the Los
20 Angeles County Superior Court seeking post-foreclosure eviction,
21 alleging that it had obtained title to the Property and right to
22 its possession as evidenced by the Trustee's Deed Upon Sale which
23 had been recorded on November 17, 2009. In the Southstar
24 Complaint, Southstar alleged that title was perfected in
25 Southstar on or around November 17, 2009.

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27 ⁵ Appearances at the RFS Hearing were waived based on the
28 bankruptcy court's tentative ruling dated January 13, 2010, that
the RFS Motion should be granted.

1 Further, on March 19, 2010, Steel Mountain filed an
2 application in its unlawful detainer action to vacate both the
3 default entered against Appellants and the unlawful detainer
4 judgment, and to dismiss the Steel Mountain Complaint. The Steel
5 Mountain Complaint was dismissed March 30, 2010.

6 In the meantime, Appellants filed their Notice of Appeal
7 from the RFS Order on February 16, 2010. In the appeal before
8 us, Appellants assert that the evidence presented in support of
9 the RFS Motion was not properly authenticated by a true custodian
10 of records; that Southstar had no standing to bring the RFS
11 Motion; and that they had no notice of the RFS Hearing. We
12 learned at oral argument that Appellants were evicted from the
13 Property while this appeal was pending.

14 II. JURISDICTION

15 The bankruptcy court had jurisdiction under 28 U.S.C.
16 §§ 1334 and 157(b)(2)(g). While it is well established that we
17 lack jurisdiction to hear moot cases, United States v. Pattullo
18 (In re Pattullo), 271 F.3d 898, 900 (9th Cir. 2001), we have
19 jurisdiction to determine our jurisdiction. Hupp v. Educ. Credit
20 Mgmt. Corp. (In re Hupp), 383 B.R. 476, 478 (9th Cir. BAP 2008).

21 III. ISSUES

22 1. Whether the bankruptcy court abused its discretion when
23 it granted Southstar relief from the automatic stay based on the
24 declaration and supporting documents.

25 2. Whether Southstar had standing to prosecute the RFS
26 Motion.

27 3. Whether Appellants had notice of the RFS Hearing.
28

1 particularity as to indicate it is well founded and prove the
2 allegations by clear and convincing evidence. . . ." Id. at
3 § 70(2)(b). In addition to establishing that a judgment was
4 procured based on fraudulent evidence, Appellants are required to
5 show both that the fraud prevented them from fully and fairly
6 presenting their case to the bankruptcy court, and that they had
7 a meritorious defense to the RFS Motion. See 11 Wright, Miller &
8 Kane, Fed. Practice and Proc. 2d § 2860 (2010).

9 Civil Rule 60(b)(3) provides that a motion for relief from a
10 judgment obtained by fraud must be made within a reasonable time
11 and in any event not more than a year after the judgment is
12 entered. Because Civil Rule 60(b)(3) provides specific
13 procedures for raising a question of fraud in the trial court,
14 the question cannot be asserted for the first time on appeal from
15 the judgment allegedly obtained by fraud. See Rohauer v.
16 Friedman, 306 F.2d 933, 937 (9th Cir. 1962) ("An appeal to this
17 court cannot be used as a substitute for the timely procedure set
18 forth by [Civil] Rule 60(b)[3]."). No Civil Rule 60(b)(3) motion
19 has been filed by Appellants or decided by the bankruptcy court
20 alleging that Southstar obtained the RFS Order by fraud.

21 We make these comments to reflect our concerns regarding
22 Southstar's actions in obtaining the RFS Order and after, as
23 reflected in Southstar's excerpts of record, mindful that these
24 actions are not among the issues before us on appeal. We turn
25 now to the issues as presented by the parties.

26 ///

27 ///

28 ///

1 A. The Bankruptcy Court Was Not Required to "Disregard" the
2 Evidence Submitted in Support of the RFS Motion.

3 Appellants assert that the bankruptcy court erred when it
4 failed to disregard the evidence Southstar submitted in support
5 of the RFS Motion because they "are documents seemingly belonging
6 to an unknown third party Steel Mountain." Appellant's Open. Br.
7 at 7:14-17. Specifically, Appellants contend that the evidence
8 relied upon by Southstar to support the RFS Motion was not
9 admissible under Fed. R. Evid. 901.⁷ For the following reasons,
10 we do not agree that the bankruptcy court abused its discretion
11 when it granted the RFS Motion even though it was supported by
12 questionable evidence.

13 Section 362(a) provides that the filing of a petition under
14 title 11 creates an automatic stay of, inter alia, "any act to
15 obtain possession of property of the estate or of property from
16 the estate. . . ." § 362(a)(3). A motion for relief from the
17 automatic stay is a contested matter to be presented in
18 accordance with Rule 9014. Rule 4001(a).

19 Rule 7055, which incorporates Civil Rule 55(b), is made
20 applicable in contested matters by Rule 9014(c). Civil Rule
21 55(b) does not contemplate the need for a hearing prior to the
22 entry of a default judgment, unless such hearing is necessary,
23 inter alia, to "(C) establish the truth of any allegation by
24 evidence." In the absence of any challenge to the RFS Motion,

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26 ⁷ Fed. R. Evid. 901(a) provides: "The requirement of
27 authentication or identification as a condition precedent to
28 admissibility is satisfied by evidence sufficient to support a
finding that the matter in question is what its proponent
claims."

1 the bankruptcy court was entitled to take as true the well-
2 pleaded allegations in the RFS Motion.

3 Upon entry of a default judgment, facts alleged to
4 establish liability are binding upon the defaulting
5 party, and those matters may not be relitigated on
6 appeal. Thomson v. Wooster, 114 U.S. 104 (1885);
7 see Geddes v. United Financial Group, 559 F.2d 557
8 (9th Cir. 1977).

9 Danning v. Lavine, 572 F.2d 1386, 1388 (9th Cir. 1978). On
10 appeal, Appellants are entitled to challenge the sufficiency of
11 the RFS Motion and its allegations to support the RFS Order, but
12 not the sufficiency of the evidence supporting the RFS Motion.
13 See id., citing Nishimatsu Constr. Co. v. Houston Nat'l Bank,
14 515 F.2d 1200, 1206 (5th Cir. 1975).

15 There is a difference between well-pleaded allegations and
16 allegations that are untrue. This distinction also is reflected
17 in the Local Rules ("LBR") for the Bankruptcy Court for the
18 Central District of California, which also govern the RFS Motion
19 in this case.

20 LBR 4001-1 provides that LBR 9013-1 applies to motions for
21 relief from the automatic stay. As relevant to this appeal, LBR
22 9013-1 Motion Practice and Contested Matters provides:

23 (h) Failure to File Required Papers. Papers not timely
24 filed and served may be deemed by the court to be
25 consent to the granting or denial of the motion, as the
26 case may be.

27 (I) Evidence on Motions, Responses to Motions, or Reply
28 Papers. Factual contentions involved in any motion,
opposition or other response to a motion, or reply
papers, must be presented, heard, and determined upon
declarations and other written evidence. The
verification of a motion is not sufficient to
constitute evidence on a motion, unless otherwise
ordered by the court.

(1) The court may, at its discretion, in addition
to or in lieu of declaratory evidence, require or

1 allow oral examination of any declarant or any
2 other witness in accordance with FRBP 9017. When
3 the court intends to take such testimony, it will
4 give the parties 2 days notice of its intention,
5 if possible, or may grant such a continuance
6 as it may deem appropriate.

7 (2) An evidentiary objection may be deemed waived
8 unless it is (A) set forth in a separate document;
9 (B) cites the specific Federal Rule of Evidence
10 upon which the objection is based; and (C) is
11 filed with the responsive or reply papers.

12 (3) In lieu of oral testimony, a declaration under
13 penalty of perjury will be received into evidence.

14 Under LBR 9013-1, by failing to respond to the RFS Motion,
15 Appellants are deemed to have (1) consented to the granting of
16 the RFS Motion, and (2) waived their evidentiary objections to
17 the RFS Motion.

18 Civil Rule 55(c) authorizes the bankruptcy court to set
19 aside the RFS Order under Civil Rule 60(b). LBR 9013-4(b)(2)
20 requires that any motion for a new hearing in a contested matter
21 for an insufficiency of the evidence to justify the decision must
22 "specify with particularity wherein the evidence is claimed to be
23 insufficient." Appellants made no such motion for the bankruptcy
24 court to consider. We generally do not decide issues on appeal
25 that were not first presented to the bankruptcy court. O'Rourke
26 v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957
27 (9th Cir. 1989).

28 B. Southstar Alleged Sufficient Facts to Support Its Standing
to File the RFS Motion.

As relevant to this appeal, § 362(d) requires the
bankruptcy court to grant relief from the automatic stay to a
"party in interest," in the following circumstances:

(2) with respect to a stay of an act against property
under subsection (a) of this section, if -

1 (A) the debtor does not have an equity in such
2 property; and

3 (B) such property is not necessary to an effective
4 reorganization.

5 In the RFS Motion, Southstar asserted that the Property was not
6 property of the estate, with the effect that the Appellants had
7 no interest (and therefore no equity) in the Property and that
8 the Property was not necessary to Appellants' effective
9 reorganization. Appellants ask that we determine that Southstar
10 is not a "party in interest" for purposes of § 362(d) and
11 therefore was without standing to bring the RFS Motion.

12 The term "party in interest" is not defined in the
13 Bankruptcy Code. Therefore, whether a moving party has status as
14 "a party in interest" under § 362(d), is a factual matter to be
15 determined on a case-by-case basis, taking into account the
16 claimed interest and the impact of the automatic stay on that
17 interest. In re Kronemyer, 405 B.R. at 919. A party in interest
18 can include any party that has a pecuniary interest in the case,
19 has a practical stake in the resolution of the case, or is
20 impacted by the automatic stay. Brown v. Sobczak (In re
21 Sobczak), 369 B.R. 512, 517-18 (9th Cir. BAP 2007) (internal
22 citations omitted).

23 Because the RFS Motion was granted by default, the
24 bankruptcy court could take as true the allegations in the RFS
25 Motion, including those relating to Southstar's standing.
26 Appellants did not raise in the bankruptcy court a challenge to
27 Southstar's standing to bring the RFS Motion. As we stated
28 above, as a general rule we do not decide on appeal an issue not

1 raised before the bankruptcy court. In re E.R. Fegert, Inc.,
2 887 F.2d at 957.

3 C. Appellants Have Not Established That They Did Not Receive
4 Notice of the RFS Motion.

5 Appellants assert that the only reason they did not respond
6 to the RFS Motion and appear at the RFS Hearing was because they
7 did not receive notice of the RFS Hearing. LBR 9013-1(d)(1)
8 provides that a notice of a motion and a motion must be filed and
9 served not later than 21 days before the hearing date set forth
10 in the notice. LBR 9013-1(e) requires that every paper filed be
11 accompanied by a proof of service. LBR 9013-3 provides that the
12 proof of service is to be in the form of a declaration of the
13 person accomplishing service. In this case, the declaration was
14 completed by Francis Herrera, an employee in Mr. Sontag's office,
15 and reflects that the notice and the RFS Motion were served by
16 U.S. Mail on December 23, 2009, the minimal notice required under
17 the local rules.⁸

18 Southstar correctly points out the long recognized rule that
19 service is complete upon mailing, based upon a presumption that
20 documents mailed are received in due course. Hagner v. United
21 States, 285 U.S. 427 (1932); Morris Motors v. Peralta (In re
22 Peralta), 317 B.R. 381, 388 (9th Cir. BAP 2004). We previously
23 have held that compliance with rules regarding service by mail
24

25 ⁸ Mail service on Appellants was initiated 22 days prior
26 to the RFS Hearing. It is unlikely that mail delivery was
27 accomplished as soon as the following day. Of the eight days
28 between "service" and the deadline for filing a written response
(14 days before the January 14, 2010 Hearing), there were only
four business days for Appellants to act even had they received
notice.

1 constitutes prima facie evidence of valid service. Cossio v.
2 Cate (In re Cossio), 163 B.R. 150, 154 (9th Cir. BAP
3 1994)(service of summons and complaint pursuant to Rule 7004). A
4 declaration, or as here, Appellants' assertion on appeal, that
5 they did not receive the RFS Motion and the notice does not
6 controvert the fact of mailing. Id. at 155. Whether Appellants
7 might have the necessary "strong and convincing evidence" to
8 controvert the prima facie validity of service is a factual
9 determination that was never presented to the bankruptcy court
10 for decision in the first instance. As such, we do not consider
11 it here. In re E.R. Fegert, Inc., 887 F.2d at 957.

12 D. This Appeal is Moot.

13 Finally, as a matter of jurisdiction, we consider whether
14 this appeal is moot. Appellants have been evicted from the
15 Property. As discussed above, they did not preserve any issue
16 for us to review on appeal. When asked at oral argument what
17 relief Appellants thought we could provide on appeal post-
18 eviction, Appellant's counsel stated that her clients wanted
19 "justice," although they did not articulate what exactly might
20 constitute justice in these circumstances.

21 Even if we had an issue properly before us for review, there
22 is no effective relief we can grant the Appellants in light of
23 the eviction. As a consequence, this appeal is constitutionally
24 moot. See United States v. Gould (In re Gould), 401 B.R. 415,
25 421-23 (9th Cir. BAP 2009), aff'd, 603 F.3d 1100 (9th Cir. 2010).
26 Federal courts may decide only actual cases or live
27 controversies. Clear Channel Outdoor, Inc. v. Knupfer (In re PW,
28

1 LLC), 391 B.R. 25, 33 (9th Cir BAP 2008). Accordingly, we must
2 dismiss this appeal as moot.

3 **VI. CONCLUSION**

4 While we have grave concerns about the actions Southstar
5 took in the bankruptcy court, because the Appellants 1) did not
6 file a response to the RFS Motion, 2) did not appear at the RFS
7 Hearing, 3) did not seek relief from the default order in the
8 first instance from the bankruptcy court, 4) instead chose to
9 raise the issues of standing, insufficient evidence and improper
10 service for the first time on appeal, and 5) have been evicted
11 from the Property, we can grant them no effective relief through
12 this appeal. We therefore DISMISS this appeal as moot.

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