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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NOT FOR PUBLICATION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

In re:	BAP No. CC-10-1070-DNoPa
ENEDEL ANGULO and MARIA L. VILLANUEVA,	Bk. No. 09-23463-KT
Debtors.	
ENEDEL ANGULO; MARIA L. VILLANUEVA,	
Appellants,	
v.	**M E M O R A N D U M**[1]
SOUTHSTAR III, LLC,	
Appellee.	

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

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[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.

Before: DUNN, NOVACK[2] and PAPPAS, Bankruptcy Judges

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

I. FACTS

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

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

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

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 However, that Trustee's deed was rescinded on April 9, 2009, because the foreclosure sale was "conducted in error due to a failure to communicate timely, notice of conditions which would have warranted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

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

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

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

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

Appellants filed their chapter 7[4] bankruptcy petition on October 13, 2009. On December 24, 2009, Southstar filed a motion for relief from the automatic stay ("RFS Motion"), asserting as cause under § 362(d)(1) that Southstar had acquired title to the Property by a prepetition foreclosure sale and that a prepetition unlawful detainer judgment had been entered in its favor. In the Unlawful Detainer Declaration filed with the RFS Motion, Southstar alleged that it had served the Steel Mountain Notice, that it had filed the Steel Mountain Complaint, and that an unlawful detainer judgment had been entered against Appellants for which a Writ of Possession had issued. In the Unlawful Detainer Declaration, Southstar's attorney, Richard S. Sontag, declared under penalty of perjury that the Property "is not an asset of the Estate, as title to the [P]roperty was vested and perfected prepetition. At the time the . . . petition was filed [Appellants] had no ownership interest in the [Property]." In addition to signing the Unlawful Detainer Declaration under penalty of perjury, Mr. Sontag specially averred: "I am 'of

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[4] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. 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.

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

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

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

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

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

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

II. JURISDICTION

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

III. ISSUES

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

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

3. Whether Appellants had notice of the RFS Hearing.

4. In light of the events occurring, both pre- and postpetition, is this appeal moot?

IV. STANDARDS OF REVIEW

The decision of a bankruptcy court whether or not to grant relief from the automatic stay under § 362(d) is reviewed for abuse of discretion. Mataya v. Kissinger (In re Kissinger), 72 F.3d 107, 108 (9th Cir. 1995); In re Kronemyer, 405 B.R. 915, 919 (9th Cir. BAP 2009).

We follow a two-part test to determine objectively whether the bankruptcy court abused its discretion. United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009). First, we "determine de novo whether the bankruptcy court identified the correct legal rule to apply to the relief requested." Id. Second, we examine the bankruptcy court's factual findings under the clearly erroneous standard. Id. at 1262 & n.20. We must affirm the court's factual findings unless those findings are "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" Id. If we determine that the court erred under either part of the test, we must reverse for an abuse of discretion. Id.

Standing is a legal issue that we review de novo. Loyd v. Paine Webber, Inc., 208 F.3d 755, 758 (9th Cir. 2000); In re Kronemyer, 405 B.R. at 919. De novo review requires that we consider a matter anew, as if it had not been heard before, and as if no decision had been rendered previously. United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988); B-Real, LLC v. Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008).

V. DISCUSSION

We are disturbed that the record Southstar provided on appeal[6] suggests that at the time Southstar was declaring to the bankruptcy court that it held a valid unlawful detainer judgment and a valid writ of possession to the property, Southstar knew these declarations were untrue. Specifically, Southstar had "corrected," postpetition but prior to filing the RFS Motion, the Trustee's Deed Upon Sale, and days after entry of the RFS Order, Southstar initiated an action to obtain a right to possess the Property through a new unlawful detainer action in its own name.

A judgment that is based on a claim that the party obtaining the judgment knew to be fraudulent may be avoided. See Restatement of the Law, Judgments 2d § 70(1)(b).

> [I]t is assumed that modern systems of procedure generally yield results that are as just as may be expected, given the uncertainties of proof in contested cases and elements of individual judgment inherent in application of legal rules and principles to specific instances. Indeed, if this confidence did not exist, the concept of finality itself would be rationally insupportable.
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> It is for this reason that attacks are not permitted on a judgment simply on the ground that the losing party neglected to take best advantage of his day in court . . . On the other hand, it is equally inappropriate that all judgments be treated as absolutely inviolable. Particularly is this true when a judgment has been procured by the fraud of the successful party. . . .

Restatement of the Law, Judgments 2d § 70, Comment a.

To avoid a judgment procured by fraud, the party seeking relief from the judgment must state a claim for relief with "such

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[6] Southstar's excerpts of record include numerous documents not presented to or considered by the bankruptcy court, including documentation of events occurring after the RFS Order was entered.

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

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

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

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

Appellants assert that the bankruptcy court erred when it failed to disregard the evidence Southstar submitted in support of the RFS Motion because they "are documents seemingly belonging to an unknown third party Steel Mountain." Appellant's Open. Br. at 7:14-17. Specifically, Appellants contend that the evidence relied upon by Southstar to support the RFS Motion was not admissible under Fed. R. Evid. 901.[7] For the following reasons, we do not agree that the bankruptcy court abused its discretion when it granted the RFS Motion even though it was supported by questionable evidence.

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

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

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

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

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

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

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

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

> (h) Failure to File Required Papers. Papers not timely filed and served may be deemed by the court to be consent to the granting or denial of the motion, as the case may be.
>
> (I) Evidence on Motions, Responses to Motions, or Reply 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

> allow oral examination of any declarant or any other witness in accordance with FRBP 9017. When the court intends to take such testimony, it will give the parties 2 days notice of its intention, if possible, or may grant such a continuance as it may deem appropriate.
>
> (2) An evidentiary objection may be deemed waived unless it is (A) set forth in a separate document; (B) cites the specific Federal Rule of Evidence upon which the objection is based; and (C) is filed with the responsive or reply papers.
>
> (3) In lieu of oral testimony, a declaration under penalty of perjury will be received into evidence.

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

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

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 –

> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization.

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

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

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

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

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

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

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

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[8] Mail service on Appellants was initiated 22 days prior to the RFS Hearing. It is unlikely that mail delivery was accomplished as soon as the following day. Of the eight days 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.

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

D. This Appeal is Moot.

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

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

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

VI. CONCLUSION

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