

NOT FOR PUBLICATION

JAN 28 2011

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. CC-10-1180-DKiPa
)	
ANDY ATIGHI,)	Bk. No. 99-18593
)	
Debtor.)	
_____)	
)	
ANDY ATIGHI,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M¹
)	
DLJ MORTGAGE CAPITAL, INC.,)	
et al.,)	
)	
Appellee.)	
_____)	

Argued and Submitted on January 21, 2011
at Pasadena, California

Filed - January 28, 2011

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

Honorable Victoria S. Kaufman, Bankruptcy Judge, Presiding

Appearances: _____
Andrew E. Smyth argued for the Appellant.
Nichole L. Glowin argued for the Appellee.

Before: DUNN, KIRSCHER and PAPPAS, 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 The debtor, Andy Atighi, appeals two of the bankruptcy
2 court's orders: (1) the order annulling and terminating the
3 automatic stay in favor of DLJ Mortgage Capital, Inc. ("DLJ"),
4 and (2) the order denying his motion to invalidate the
5 foreclosure sale of his residence located in San Diego,
6 California ("San Diego property"). On appeal, the debtor
7 contends that the bankruptcy court abused its discretion in
8 annulling and terminating the automatic stay because DLJ's
9 predecessor in interest purchased the San Diego property at the
10 foreclosure sale in willful violation of the automatic stay.
11 Because the foreclosure sale violated the automatic stay, the
12 debtor argues, it was void. The bankruptcy court therefore
13 erred, the debtor concludes, in denying his motion to invalidate
14 the foreclosure sale.

15 For the reasons set forth below, we AFFIRM.
16

17 **FACTS**

18 The debtor filed his chapter 13 petition on March 8, 1999.²
19 Four months later, the debtor's third amended chapter 13 plan was
20 confirmed. The chapter 13 plan provided monthly payments over a
21
22
23

24 ² Unless otherwise indicated, all chapter, section and rule
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
27 enacted and promulgated prior to October 17, 2005, the effective
28 date of most of the provisions of the Bankruptcy Abuse Prevention
and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

1 36-month period.³ The chapter 13 plan also provided:

2 Any property of the estate shall not revert in the
3 debtor until such time as a discharge is granted or the
4 case is dismissed, subject to all liens and
5 encumbrances not avoided herein. In the event the case
6 is converted to a case under Chapter 7, 11 or 12 of the
7 Bankruptcy Code, the property of the estate shall vest
8 in accordance with applicable law.

9 At the time of plan confirmation, the debtor did not own the
10 San Diego property. The debtor accordingly did not provide for
11 the San Diego property in his chapter 13 plan.

12 On August 26, 2003, the chapter 13 trustee filed a notice of
13 intent to submit a final report and to close the case ("closure
14 notice")(docket no. 161). The debtor objected to the chapter 13
15 trustee's closure notice. A hearing on the debtor's objection
16 was scheduled for February 2, 2004; however, according to a
17 notation on the docket (docket no. 166), the matter was taken off
18 calendar as there was "nothing for the [bankruptcy] court to
19 decide." No substantial activity occurred in the bankruptcy case
20 between November 2004 and October 2009; no discharge was entered,
21 and the bankruptcy case did not close.

22 Meanwhile, on June 21, 2006, the debtor purchased the
23 San Diego property, granting first and second trust deeds to

24 ³ The debtor listed in the chapter 13 plan a total of \$5,638
25 in general unsecured claims, which he proposed to pay in full.
26 At the time of the filing of the petition, the debtor scheduled
27 real property located in Oxnard, California ("Oxnard property").
28 The confirmed plan provided for monthly mortgage payments to the
senior lienholder on the Oxnard property. The debtor stated in
the plan that he was current on his mortgage payments for the
Oxnard property.

1 WMC Mortgage Corporation ("WMC").⁴ WMC later assigned the second
2 trust deed to GRP Loan, LLC/GRP Financial Services Corporation
3 ("GRP").

4 The debtor eventually defaulted under the first trust deed.
5 After recording a notice of default and a notice of trustee's
6 sale, WMC conducted a foreclosure sale on November 6, 2008. GRP
7 purchased the San Diego property at the foreclosure sale.

8 On October 5, 2009, the debtor amended his schedules (docket
9 no. 170) to include the San Diego property for the first time.
10 He listed the current market value of the San Diego property at
11 \$795,000.

12 The debtor also moved to invalidate the foreclosure sale
13 ("first motion to invalidate the foreclosure sale"), contending
14 that GRP willfully violated the automatic stay. Specifically,
15 the debtor claimed that he notified GRP of his bankruptcy case;
16 in support, the debtor provided copies of fax transmission
17 reports and certificates of mailing. Despite being made aware of
18 the bankruptcy case, the debtor contended, GRP proceeded with the
19 foreclosure sale without obtaining relief from the automatic
20 stay. The debtor also contested the arrears, asserting that he
21 made payments to GRP and providing in support copies of various
22 checks and money orders made out to GRP.

23 Although the debtor's first motion to invalidate the
24 foreclosure sale was set for hearing on December 9, 2009, the
25 hearing was continued to December 22, 2009 (docket nos. 179 and
26

27 ⁴ WMC held both the first trust deed in the amount of
28 \$636,000, and the second trust deed in the amount of \$79,500.

1 180).⁵ After the hearing, the bankruptcy court issued an order
2 denying the debtor's first motion to invalidate the foreclosure
3 sale for failure to prosecute, as the debtor did not appear at
4 the hearing.⁶

5 Shortly thereafter, GRP assigned to DLJ the first trust deed
6

7
8 ⁵ There is nothing in the record and the bankruptcy main
9 case docket explaining why the hearing on the debtor's first
10 motion to invalidate the foreclosure sale was continued.

11 ⁶ Judge Kaufman issued a tentative ruling for the December
12 9, 2009 hearing on the debtor's first motion to invalidate the
13 foreclosure sale. In her tentative ruling, Judge Kaufman stated
14 that the debtor had submitted evidence indicating that he
15 provided notice of his bankruptcy case to GRP. She further
16 stated that GRP did not obtain relief from the automatic stay
17 before proceeding with the foreclosure sale. Judge Kaufman thus
18 tentatively concluded that the foreclosure sale was void as a
19 violation of the automatic stay.

20 Judge Kaufman's tentative ruling was not entered on the
21 bankruptcy main case docket; it was marked "VACATED," as the
22 hearing was continued to December 22, 2009.

23 Judge Zurzolo presided at the December 22, 2009 hearing; he
24 issued the order denying the debtor's first motion to invalidate
25 the foreclosure sale.

26 Two months after Judge Zurzolo issued the order denying the
27 first motion to invalidate the foreclosure sale, the debtor filed
28 a motion for reconsideration under Fed. R. Civ. P. 60(a) ("motion
for reconsideration") (docket nos. 183, 185 and 188). In his
motion for reconsideration, the debtor argued that Judge Zurzolo
had no authority to deny the first motion to invalidate the
foreclosure sale because Judge Kaufman already had ruled in the
debtor's favor. The debtor contended that it did not matter that
Judge Kaufman's ruling was tentative; it "naturally became the
[bankruptcy court's] Order" because Judge Kaufman considered the
debtor's arguments in the first motion to invalidate the
foreclosure sale and based her ruling thereon.

 Judge Zurzolo denied the debtor's motion for reconsideration
(docket no. 187), as Judge Kaufman's tentative ruling never
became effective and was not entered.

1 on the San Diego property. DLJ then moved for relief from the
2 automatic stay ("relief from stay motion"), seeking to annul and
3 terminate the automatic stay under § 362(d)(1) and (2), in order
4 to validate the foreclosure sale.⁷ Specifically, DLJ contended
5 that the San Diego property had no equity and accordingly had no
6 equity cushion to protect DLJ's interest; DLJ's unpaid first
7 trust deed obligation totaled \$872,198.53, and GRP's second trust
8 deed totaled \$79,500, but the San Diego property only had a fair
9 market value of \$595,000. Moreover, DLJ alleged that the debtor
10 had defaulted on 38 postpetition payments totaling \$194,287.54.
11 DLJ also asserted that the San Diego property was unnecessary to
12 the debtor's reorganization as it was purchased postconfirmation
13 and was not provided for in the debtor's chapter 13 plan. DLJ
14 further argued that the debtor acted in bad faith.

15 The debtor again moved to invalidate the foreclosure sale
16 ("second motion to invalidate the foreclosure sale"), arguing
17 that he provided notice of the bankruptcy case to GRP, and
18 contested the arrears, claiming he made \$40,534.43 in mortgage
19 payments to GRP. The debtor also opposed DLJ's relief from stay
20 motion.

21 The bankruptcy court held separate hearings on the relief
22 from stay motion and the second motion to invalidate the
23

24 ⁷ DLJ asserted that there was cause to annul and terminate
25 the automatic stay under § 362(d)(1) because its interest in the
26 San Diego property was not adequately protected and the debtor
27 acted in bad faith. DLJ further asserted that there was cause to
28 annul and terminate the automatic stay under § 362(d)(2) because
there was no equity in the San Diego property and it was not
necessary for an effective reorganization.

1 foreclosure sale. At the hearing on the relief from stay motion,
2 the bankruptcy court issued a tentative ruling in favor of DLJ.
3 In its tentative ruling, the bankruptcy court determined that GRP
4 was unaware of the debtor's bankruptcy case because (1) he
5 purchased the San Diego property after his plan was confirmed and
6 (2) he did not amend his schedules to include the San Diego
7 property until after DLJ purchased it at the foreclosure sale.
8 The bankruptcy court further determined that the debtor defaulted
9 on 38 postpetition payments, totaling \$194,287.54.

10 The bankruptcy court also determined that there was cause to
11 annul and terminate the automatic stay on the ground that the
12 debtor engaged in unreasonable and inequitable conduct.
13 Specifically, the bankruptcy court found that the bankruptcy case
14 should have been closed long ago, given that it had been pending
15 since March 8, 1999, and the 36-month plan was confirmed on July
16 29, 1999. The bankruptcy court also found that the debtor
17 purchased the San Diego property without its approval. The
18 bankruptcy court further found that the debtor did not amend his
19 schedules to include the San Diego property as an asset of the
20 bankruptcy estate or to identify WMC as a creditor until nearly
21 one year after the foreclosure sale.

22 On June 2, 2010, the bankruptcy court entered an order
23 annulling and terminating the automatic stay under § 362(d)(1)
24 and (d)(2). On the same day, the bankruptcy court entered an
25 order denying the debtor's second motion to invalidate the
26 foreclosure sale on the ground that the foreclosure sale was
27 valid, as the automatic stay had been annulled retroactively with
28 respect to the San Diego property.

1 The debtor timely appealed both orders.

2
3 **JURISDICTION**

4 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
5 and 157(b)(2)(G). We have jurisdiction under 28 U.S.C. § 158.
6

7 **ISSUE**

8 (1) Did the bankruptcy court err in denying the debtor's
9 second motion to invalidate the foreclosure sale?

10 (2) Did the bankruptcy court abuse its discretion in
11 granting DLJ's relief from stay motion?
12

13 **STANDARDS OF REVIEW**

14 We review the bankruptcy court's decision to annul the
15 automatic stay, see Nat'l Envtl. Waste Corp. v. City of Riverside
16 (In re Nat'l Envtl. Waste Corp.), 129 F.3d 1052, 1054 (9th Cir.
17 1997), and to terminate the automatic stay, Gruntz v. County of
18 Los Angeles (In re Gruntz), 202 F.3d 1074, 1084 n.9 (9th Cir.
19 2000)(en banc), for an abuse of discretion. We follow a two-part
20 test to determine objectively whether the bankruptcy court abused
21 its discretion. United States v. Hinkson, 585 F.3d 1247, 1261-62
22 (9th Cir. 2009). First, we "determine de novo whether the
23 bankruptcy court identified the correct legal rule to apply to
24 the relief requested." Id. Second, we examine the bankruptcy
25 court's factual findings under the clearly erroneous standard.
26 Id. at 1262 & n.20. We must affirm the court's factual findings
27 unless those findings are "(1) 'illogical,' (2) 'implausible,' or
28 (3) without 'support in inferences that may be drawn from the

1 facts in the record.'" Id. If we determine that the court erred
2 under either part of the test, we must reverse for an abuse of
3 discretion. Id.

4 We review a finding of bad faith, which is a factual
5 determination, under the clearly erroneous standard. Can-Alta
6 Props., Ltd. v. States Sav. Mortg. Co. (In re Can-Alta Props.,
7 Ltd.), 87 B.R. 89, 90 (9th Cir. BAP 1988).

8 We may affirm on any ground supported by the record. Shanks
9 v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008).

11 DISCUSSION

12 **A. The automatic stay and after-acquired property in chapter 13**

13 The crux of the debtor's argument in challenging the
14 bankruptcy court's orders on appeal is the alleged violation of
15 the automatic stay. The debtor asserts that the bankruptcy court
16 should not have granted relief from stay nor denied his second
17 motion to invalidate the foreclosure sale because GRP⁸ purchased
18 the San Diego property while the automatic stay still was in
19 effect.

20 DLJ contends that it did not violate the automatic stay
21 because the automatic stay did not apply to the San Diego
22 property. Specifically, DLJ argues that the San Diego property
23 was not protected by the automatic stay because the debtor
24

25
26 ⁸ Even though GRP purchased the San Diego property and DLJ
27 was its assignee, we hereafter refer to GRP and DLJ
28 interchangeably as "DLJ," as DLJ stands in the shoes of GRP. See
New Falls Corp. v. Boyajian (In re Boyajian), 367 B.R. 138, 145
(9th Cir. BAP 2007), aff'd, 540 F.3d 1082 (9th Cir. 2008).

1 acquired the San Diego property after confirmation of his chapter
2 13 plan.

3 The automatic stay protects property that is part of the
4 bankruptcy estate from attachment or execution by creditors. See
5 § 362(a). According to DLJ, under § 1327(b), property acquired
6 by a debtor postconfirmation does not become estate property but
7 immediately vests in the debtor. Because the San Diego property
8 was not a part of the bankruptcy estate, DLJ claims, it was not
9 protected by the automatic stay. DLJ therefore did not violate
10 the stay in purchasing the San Diego property at the foreclosure
11 sale.

12 Although our holding in Cal. Franchise Tax Board v. Jones
13 (In re Jones), 420 B.R. 506, 515 (9th Cir. BAP 2009), provides
14 some support for DLJ's argument, given the rather unique facts of
15 this case, we conclude that the automatic stay was in effect as
16 to the San Diego property at the time of the foreclosure sale.

17 Upon the filing of a bankruptcy petition, the automatic stay
18 protects property of the bankruptcy estate from attachment or
19 execution by creditors. See § 362(a). This protection does not
20 extend, however, to property that is not part of the bankruptcy
21 estate. § 362(c)(1).

22 Generally, property of the estate includes all of the
23 debtor's legal or equitable interests in property as of the
24 petition date. § 541(a)(1). Within the context of a chapter 13
25 case, property of the estate includes, in addition to the
26 property specified in § 541, all property acquired by the debtor
27 postpetition but before the chapter 13 case is closed, dismissed
28 or converted. § 1306(a)(1). Confirmation of the chapter 13 plan

1 vests all property of the estate in the debtor, unless otherwise
2 provided for in the chapter 13 plan or confirmation order.

3 § 1327(b). See also § 1306(b) (“Except as provided in a confirmed
4 plan or order confirming a plan, the debtor shall remain in
5 possession of all property of the estate.”).

6 In Jones,⁹ we determined that the automatic stay does not
7 necessarily protect property acquired by the debtor
8 postconfirmation.¹⁰ We read §§ 1306(b) and 1327(b) together to
9 mean that all property of the estate vests in the debtor at
10 confirmation, unless otherwise provided in the plan or
11 confirmation order. Id. Once the property vests in the debtor,
12 we concluded, it is no longer part of the bankruptcy estate and
13 thus loses the protection of the automatic stay. Id.

14 However, the rationale of Jones does not apply here. In
15 Jones, the debtors’ plan explicitly provided that property of the
16 estate revested in the debtor upon confirmation. Id. at 516.
17 Here, the debtor’s plan provided that estate property did not
18 revest in the debtor unless and until he received a discharge or
19 the case was dismissed. Neither of these events have occurred.

21 ⁹ In Jones, we addressed the issue of whether the debtors’
22 confirmed plan in their prior chapter 13 case tolled the three-
23 year lookback period of § 507(a)(8) for postpetition taxes when
24 the state taxing authority attempted to except its income tax
25 claim from discharge in the debtors’ pending chapter 7 case. As
26 part of our determination, we discussed whether the state taxing
27 authority could have collected the income tax during the debtors’
prior chapter 13 case; specifically, whether the automatic stay
protected the debtors’ property from the state taxing authority’s
collection efforts postconfirmation.

28 ¹⁰ The Ninth Circuit has yet to address this issue.

1 Because the property of the estate never vested in the debtor, it
2 still was protected by the automatic stay.

3 We nonetheless agree with DLJ that it did not willfully
4 violate the automatic stay. As stated earlier, we may affirm on
5 any basis supported by the record. Shanks, 540 F.3d at 1086.
6 Based on the record before us, we conclude that the bankruptcy
7 court did not clearly err in determining that DLJ did not have
8 prior notice of the debtor's bankruptcy case.

9 DLJ was unaware of the debtor's bankruptcy case before the
10 foreclosure sale because the debtor did not purchase the San
11 Diego property until after his chapter 13 plan was confirmed.
12 The debtor moreover did not amend his schedules to include the
13 San Diego property as an asset or to identify DLJ as a creditor
14 until almost a year after the foreclosure sale took place.

15 The debtor claims that he provided notice of his bankruptcy
16 case to GRP and submits various fax transmission reports and
17 certificates of mailing as evidence.¹¹ But neither the fax
18 transmission reports nor the mailing certificates show what the
19 debtor actually sent to DLJ. The debtor never provided the
20 documents allegedly providing notice of his bankruptcy case. The
21 debtor also never explained or described what he sent to DLJ to
22

23 ¹¹ As an additional argument in his second motion to
24 invalidate the foreclosure sale, the debtor relied on Judge
25 Kaufman's tentative ruling, contending that Judge Kaufman
26 determined that DLJ conducted the foreclosure sale in violation
27 of the automatic stay. The debtor repeats this argument before
28 us on appeal. As noted above, Judge Kaufman's tentative ruling
is not dispositive.

1 provide notice of his bankruptcy case. Thus, the bankruptcy
2 court had no way to determine what was sent and whether it
3 constituted adequate notice of the debtor's bankruptcy case, and
4 the bankruptcy court did not clearly err in determining that DLJ
5 was not aware of the debtor's bankruptcy case prior to the
6 foreclosure sale.¹²

7
8 **B. Cause existed to annul and terminate the automatic stay**

9 Even if DLJ violated the automatic stay, the foreclosure
10 sale would be valid if the bankruptcy court properly annulled the
11 automatic stay. See Schwartz v. United States (In re Schwartz),
12 954 F.2d 569, 573 (9th Cir. 1992) ("If a creditor obtains
13 retroactive relief under § 362(d), there is no violation of the
14 automatic stay"). See also Algeran v. Advance Ross
15 Corp., 759 F.2d 1421, 1425 (9th Cir. 1985); Fjeldsted v. Lien (In
16 re Fjeldsted), 293 B.R. 12, 21 (9th Cir. BAP 2003)(citations
17 omitted). The question then is whether the bankruptcy court
18 erred in annulling and terminating the automatic stay. We
19 conclude that it did not.

20 A bankruptcy court has "wide latitude in crafting relief
21 from the automatic stay, including the power to grant retroactive
22 relief from the stay," under § 362(d). Nat'l Envtl. Waste Corp.,
23 129 F.3d at 1054. The standards for relief from stay under

24
25 ¹² We believe that an additional procedural ground existed
26 for denying the debtor's second motion to invalidate the
27 foreclosure sale. Given the debtor's arguments in his second
28 motion to invalidate the foreclosure sale, the debtor should have
initiated an adversary proceeding under Rule 7001(7)(adversary
proceeding to obtain an injunction or other equitable relief).

1 § 362(d)(1) and (d)(2) are independent and alternative. Can-Alta
2 Props., Ltd., 87 B.R. at 90.

3 The bankruptcy court may annul and/or terminate the
4 automatic stay for cause. § 362(d)(1). See also Christensen v.
5 Tucson Estates, Inc. (In re Tucson Estates, Inc.), 912 F.2d 1162,
6 1166 (9th Cir. 1990). "Cause" has no clear definition, so it is
7 determined on a case-by-case basis. Id.

8 Here, the bankruptcy court annulled and terminated the
9 automatic stay on three grounds: (1) the balance of the equities
10 tilted in favor of DLJ; (2) lack of adequate protection; and
11 (3) the debtor did not have equity in the property and the
12 property was not necessary to an effective reorganization. We
13 consider each of these three grounds in turn, mindful that we may
14 affirm on any basis supported by the record. See Shanks, 540
15 F.3d at 1086. After reviewing the record, we conclude that the
16 bankruptcy court did not abuse its discretion in annulling and
17 terminating the automatic stay for the following reasons.

18
19 **1. Balance of equities tilts in favor of DLJ**

20 The bankruptcy court must balance the equities in
21 determining whether cause exists to annul the automatic stay.
22 Nat'l Envtl. Waste Corp., 129 F.3d at 1055. In doing so, the
23 bankruptcy court focuses on two factors: (1) whether the creditor
24 was aware of the bankruptcy petition; and (2) whether the debtor
25 engaged in unreasonable or inequitable conduct, or unfair
26 prejudice would result to the creditor. See id. These factors
27 are not dispositive, however. Fjeldsted, 293 B.R. at 24.
28 Bankruptcy courts consider other factors, such as the debtor's

1 and creditor's good faith, the relative prejudice to the parties,
2 and the judicial or practical efficacy of annulling the stay.¹³
3 Id. at 24-25.

4 We conclude upon review that there are sufficient facts in
5 the record supporting the bankruptcy court's decision to annul
6 and terminate the automatic stay for cause. With respect to the
7 first factor, we determine that the bankruptcy court did not
8 clearly err in concluding that DLJ was unaware of the debtor's
9 bankruptcy case. The debtor did not purchase the San Diego
10 property until after his chapter 13 plan was confirmed. He did
11 not amend his schedules to include the San Diego property as an
12 asset and to identify DLJ as a creditor until October 5, 2009,
13 almost a year after the foreclosure sale occurred.

14 The debtor moreover did not supply competent evidence
15 demonstrating that he gave notice of his bankruptcy case to DLJ.
16 He merely submitted copies of fax transmission reports and
17 mailing certificates, none of which show what he actually sent to
18 DLJ as notice. He failed to provide the documents comprising
19 notice of his bankruptcy case and to explain what he sent to DLJ
20 as notice.

21 As to the second factor, the record supports the bankruptcy
22 court's determination that the debtor indeed engaged in
23 unreasonable or inequitable conduct. Although the debtor
24

25
26 ¹³ In Fjeldsted, we listed twelve factors to consider when
27 determining whether to annul the automatic stay. We took care to
28 mention, however, that these factors only were "a framework for
analysis and not a scorecard [as in] any given case, one factor
may so outweigh the others as to be dispositive." Id. at 25.

1 completed his 36-month plan, the chapter 13 case remained open
2 thereafter for years - the debtor even objected to the chapter 13
3 trustee's closure notice. The debtor purchased the San Diego
4 property without leave of the bankruptcy court. He further did
5 not amend his schedules to include the San Diego property as an
6 asset and to list DLJ as a creditor until long after the
7 foreclosure sale took place. The debtor also substantially
8 defaulted on postpetition payments to DLJ.

9 All of these facts tilt the equities in favor of DLJ. There
10 was ample evidence for the bankruptcy court to find cause to
11 annul and terminate the automatic stay.

12

13 **2. Lack of adequate protection**

14 The bankruptcy court here granted relief from the automatic
15 stay, in part, on the ground that DLJ's interest in the San Diego
16 property was not adequately protected under § 362(d)(1). Under
17 § 362(d)(1), the bankruptcy court may annul the automatic stay
18 for lack of adequate protection of an interest in property.
19 Although adequate protection is not defined in the Bankruptcy
20 Code, § 361 sets forth the following examples of what may
21 constitute adequate protection: (1) periodic cash payments
22 equivalent to the decrease in the value of the creditor's
23 interest in the property; (2) an additional or replacement lien
24 on other property; or (3) other relief that provides the
25 indubitable equivalent. Pistole v. Mellor (In re Mellor),
26 734 F.2d 1396, 1400 (9th Cir. 1984).

27 We conclude from the record before us that the facts support
28 the bankruptcy court's decision to grant DLJ relief from stay

1 under § 362(d)(1). The record shows that the debtor
2 substantially defaulted on payments to DLJ postpetition. On
3 appeal, the debtor claims that he made payments to DLJ totaling
4 \$40,534.43. He provides copies of various checks and money
5 orders¹⁴ as evidence of his payments.¹⁵ Reviewing the checks and
6 money orders, it appears that the debtor made a total of
7 \$45,647.52 in postpetition payments. Subtracting this amount
8 from the \$194,287.54 in postpetition default claimed by DLJ, the
9 debtor apparently still was \$148,640.02 in default.

10 Moreover, there was no equity cushion in the San Diego
11 property to protect DLJ's interest therein. DLJ submitted a
12 declaration and broker's price opinion stating that the San Diego
13 property had a fair market value of \$595,000. (Notably, the
14 debtor did not contest DLJ's valuation of the San Diego property,
15 other than to assert a value of \$795,000 in his amended schedules
16 filed in October 2009.) The declaration also indicated that the
17 amount owed to DLJ on the first trust deed alone totaled
18

19 ¹⁴ DLJ claimed in its relief from stay motion that debtor
20 defaulted on November 13, 2007, and that another payment was due
21 on April 1, 2010. Many of the dates on the debtor's checks are
22 illegible, but it appears that the debtor issued them sometime in
23 2009.

24 The money orders are dated between mid to late 2008 and
25 early 2009. The debtor apparently often submitted partial
26 payments; according to DLJ, the payment due was \$5,112.83, but
27 the debtor only twice submitted the full amount due. Moreover,
28 some of these payment amounts were nominal (i.e., less than
\$1,000), so it is unclear whether the debtor made these payments
to make up for earlier partial payments or to cover late charges.

¹⁵ The bankruptcy court did not make a determination as to
whether the debtor indeed made these payments.

1 \$872,198.53. Based on these figures, the San Diego property
2 apparently was way under water.

3
4 **3. No equity in the San Diego property and the San Diego
5 property was unnecessary to the debtor's reorganization**

6 The bankruptcy court also annulled the automatic stay under
7 § 362(d)(2). Under § 362(d)(2), the bankruptcy court may annul
8 the automatic stay when the debtor lacks equity in the collateral
9 and if the collateral is unnecessary to an effective
10 reorganization. See also People's Capital & Leasing Corp. v. In
11 re Big3D, Inc. (In re Big3D, Inc.), 438 B.R. 214, 220 (9th Cir.
12 BAP 2010)(en banc). The burden of proof as to whether a debtor
13 lacks equity in property lies with the creditor. § 362(g)(1).
14 See also Harsh Inv. Corp. v. Bialac (In re Bialac), 712 F.2d 426,
15 432 (9th Cir. 1983).

16 Again, we conclude there is sufficient evidence in the
17 record before us to support the bankruptcy court's determination.
18 With respect to the lack of equity in the San Diego property, DLJ
19 submitted a declaration stating that there was -\$356,698.53 in
20 equity, based on the total amount of claims against the property
21 (first and second trust deeds totaling \$951,698.53) and the fair
22 market value of the San Diego property. DLJ also attached, as
23 evidence, a broker's price opinion as to the San Diego property's
24 fair market value. The debtor never contested DLJ's valuation of
25 the San Diego property (though in his October 5, 2009 amended
26 schedules, the value of the San Diego property was listed as
27 \$795,000).

28 The San Diego property obviously was unnecessary for an

1 effective reorganization. The debtor purchased the San Diego
2 property after plan confirmation, but never modified his chapter
3 13 plan to provide for its acquisition. The debtor moreover
4 completed his chapter 13 plan within the 36-month deadline, long
5 before the San Diego property was acquired.

6 Because the bankruptcy court did not err in annulling and
7 terminating the automatic stay in DLJ's favor, the foreclosure
8 sale still was valid. We therefore conclude that the bankruptcy
9 court did not err in denying the debtor's second motion to
10 invalidate the foreclosure sale.

11 12 **CONCLUSION**

13 Based on our review of the record, we conclude that the
14 bankruptcy court did not err in finding cause for annulling and
15 terminating the automatic stay. The bankruptcy court applied the
16 appropriate legal standards, and sufficient evidence was
17 submitted supporting the bankruptcy court's findings of cause for
18 annulling and terminating the automatic stay. We therefore
19 conclude that the bankruptcy court did not abuse its discretion
20 in granting DLJ's relief from stay motion.

21 Moreover, because the bankruptcy court annulled the
22 automatic stay in favor of DLJ, the foreclosure sale was not
23 void. The bankruptcy court thus did not err in denying the
24 debtor's second motion to invalidate the foreclosure sale.

25 For these reasons, we AFFIRM the decisions of the bankruptcy
26 court granting the motion to retroactively annul the automatic
27 stay and denying the motion to invalidate the foreclosure sale.