

JUL 11 2011

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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NOT FOR PUBLICATION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. NC-10-1428-JuHPa
)	
GLORINO F. FULARON,)	Bk. No. 10-58475
)	
Debtor.)	
_____)	
ANDRE SOUANG,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M *
)	
GLORINO F. FULARON,)	
)	
Appellee.)	
_____)	

Argued and Submitted on June 16, 2011
at San Francisco, California

Filed - July 11, 2011

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

Honorable Arthur S. Weissbrodt, Bankruptcy Judge, Presiding

Appearances: Michael B. Stone, Esq. argued for Appellant
Andre Souang

Before: JURY, HOLLOWELL and PAPPAS, Bankruptcy Judges.

Appellant, Andre Souang ("Souang"), appeals the bankruptcy
court's order denying his motion for retroactive relief from the

* 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 automatic stay. For the reasons stated, we VACATE and REMAND.

2 **I. FACTS**

3 Debtor Glorino F. Fularon owned property on Foothill Road
4 in Pismo Beach, California, which was scheduled to be sold at a
5 trustee's sale on August 16, 2010. Faced with imminent
6 foreclosure, debtor filed his bare bones chapter 13¹ petition
7 pro se on August 16, 2010, at 11:56:12 a.m. Approximately five
8 minutes later, at 12:01 p.m., Souang was the successful bidder
9 at the trustee's sale and tendered a cashier's check to
10 ReconTrust Trustee Services ("ReconTrust") for the purchase
11 price of \$618,030.

12 On August 17, 2010, the bankruptcy court issued an order
13 and notice providing for automatic dismissal of debtor's case
14 due to his failure to file required documents. The notice
15 provided that debtor was required to file his schedules,
16 statement of financial affairs and Form B22 (Means Test) by
17 September 30, 2010, or otherwise his petition would be
18 dismissed. On the same day, the court issued an order providing
19 for dismissal unless debtor filed his chapter 13 plan within
20 fourteen days of the notice.

21 On August 26, 2010, Souang filed a declaration in the
22 bankruptcy court entitled "Proof of Equitable Interest in Real
23 Property (11 U.S.C. § 549(c))" in which he stated that he
24 purchased debtor's property at the trustee's sale postpetition

25 _____
26 ¹ Unless otherwise indicated, all chapter, section and
27 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
28 1532. "Rule" references are to the Federal Rules of Bankruptcy
Procedure and "Civil Rule" references are to the Federal Rules of
Civil Procedure.

1 and intended to immediately seek retroactive relief from the
2 automatic stay. Souang further declared that neither he nor
3 ReconTrust knew that debtor had filed bankruptcy prior to the
4 sale.

5 On September 1, 2010, Souang filed a motion for retroactive
6 relief from the automatic stay under § 362(d). Souang argued
7 that he was entitled to retroactive relief from stay "for cause"
8 because (1) debtor's chapter 13 filing was a sham and not filed
9 in good faith; (2) debtor had no equity in the property and it
10 was not required for an effective reorganization inasmuch as
11 debtor had failed to file a chapter 13 plan; and (3) debtor's
12 latest bankruptcy filing was part of a scheme to hinder or delay
13 creditors.² Citing Nat'l Env'tl. Waste Corp. v. City of
14 Riverside (In re Nat'l Env'tl. Waste Corp.), 129 F.3d 1052 (9th
15 Cir. 1997), Schwartz v. United States (In re Schwartz), 954 F.2d
16 569 (9th Cir. 1992) and Fjeldsted v. Lien (In re Fjeldsted),
17 293 B.R. 12 (9th Cir. BAP 2003), Souang maintained that the
18 balance of equities weighed in his favor for retroactive relief.

19 In support of his motion, Souang submitted his declaration,
20 reiterating that he was a good faith purchaser at the trustee's
21 sale and that he was unaware of the bankruptcy. Souang also

22
23 ² Debtor's wife, Marlyn C. Fularon, filed a chapter 7
24 petition pro se on October 1, 2009 (Bankruptcy Case No. 09-
25 58425). This case was dismissed on November 19, 2009, due to her
26 failure to file the required documents. Because she never filed
27 her schedules, it is unclear whether the property at issue in
28 this appeal was part of Mrs. Fularon's bankruptcy. We take
judicial notice of her petition and other documents filed with
the bankruptcy court through the electronic docketing system.
Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R.
227, 233 n.9 (9th Cir. BAP 2003).

1 submitted the declaration of Michael B. Stone, his attorney, who
2 declared that debtor (or his wife) had previously filed a
3 bankruptcy petition in 2009.

4 On September 15, 2010, the bankruptcy court dismissed
5 debtor's case for failure to file his plan.

6 On September 29, 2010, the court heard Souang's motion.
7 Debtor did not file opposing papers,³ but he appeared at the
8 hearing with his wife. According to debtor and his wife, they
9 faxed notice of their bankruptcy filing to ReconTrust after
10 debtor filed his petition, but before the sale. However, they
11 did not produce a fax confirmation.

12 At the end of the hearing, the court gave Souang the option
13 of having an evidentiary hearing or receiving prospective
14 relief. Souang chose to have an evidentiary hearing. In
15 response to debtor's question about the proposed evidentiary
16 hearing, the court stated, "[e]ither ReconTrust or the wife is
17 going to testify. She's going to testify and perhaps you're
18 (referring to debtor) going to testify." Hr'g Tr. (September
19 29, 2010) at 10:14-15. The court informed debtor that the issue
20 was whether debtor had notified ReconTrust of the bankruptcy
21 before the sale occurred. The court scheduled the evidentiary
22 hearing for October 7, 2010.

23 On October 1, 2010, Souang filed the declaration of his
24 agent, Carrie Herzog. Herzog declared that she was present
25 prior to and during the sale, but she was not aware of any

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27 ³ The bankruptcy court's local rules do not require a
28 response to a motion for relief from stay. See Bankr. N.D. Cal.
R. 4001-1(f).

1 bankruptcy filing affecting the sale nor did she perceive that
2 ReconTrust was aware of any bankruptcy filing. She further
3 testified that she texted Souang from her cell phone at 12:01
4 p.m. telling him that she had "got it" (referring to the
5 property). A copy of the AT&T telephone bill showing the 12:01
6 time was attached to her declaration.

7 On October 6, 2010, Souang filed the declaration of
8 Randolyn Logan, the Assistant Vice President of ReconTrust and
9 the manager of the group within ReconTrust that conducted the
10 trustee's sale of debtor's property. Logan declared that he had
11 performed a diligent search and reasonable inquiry for all
12 records pertaining to the sale and, to the best of his
13 knowledge, there were none showing communication received from
14 debtor or any other person on his behalf. He further declared
15 that, at the time of the sale, ReconTrust was unaware that
16 debtor had filed a bankruptcy petition.

17 The court held the evidentiary hearing on October 7, 2010.
18 Souang's attorney offered three exhibits but produced no
19 witnesses to testify. The court rejected the exhibits because
20 they were not authenticated. The court further declined to take
21 judicial notice of a map which showed the route between debtor's
22 residence and the courthouse which Souang offered to show that
23 it would have taken debtor more than five minutes to reach his
24 home after filing his petition. The court summarily denied
25 Souang's motion without further argument and made a notation on
26 the minute entry that the sale was void.

27 Relying on the minute entry, Souang filed his notice of
28 appeal on October 12, 2010, which was timely. Souang later

1 submitted an order denying his motion, which was entered on
2 January 21, 2011. Debtor has not participated in this appeal.

3 II. JURISDICTION

4 The bankruptcy court had jurisdiction over this proceeding
5 under 28 U.S.C. §§ 1334 and 157(b)(2)(G). Aheong v. Mellon
6 Mortg. Co. (In re Aheong), 276 B.R. 233, 239-40 & n.8 (9th Cir.
7 BAP 2002) (bankruptcy court retains jurisdiction after dismissal
8 of a bankruptcy case in some circumstances to "'interpret' and
9 'effectuate' its orders," including retroactive annulment of the
10 automatic stay).⁴ We have jurisdiction under 28 U.S.C. § 158.

11 III. ISSUE

12 Whether the bankruptcy court abused its discretion in
13 denying Souang's motion for retroactive relief from stay.

14 IV. STANDARD OF REVIEW

15 A bankruptcy court's decision to deny retroactive relief
16 from the automatic stay is reviewed for an abuse of discretion.
17 Nat'l Envtl. Waste Corp., 129 F.3d at 1054.

18 We follow a two-part test to determine objectively whether
19 the bankruptcy court abused its discretion. United States v.
20 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).
21 First, we "determine de novo whether the bankruptcy court
22 identified the correct legal rule to apply to the relief
23 requested." Id. Second, we examine the bankruptcy court's
24 factual findings under the clearly erroneous standard. Id. at

26 ⁴ Souang's motion for retroactive relief from stay was
27 filed while debtor's case was active. However, both hearings on
28 the motion took place after the bankruptcy court dismissed
debtor's case for failure to file a plan.

1 1262 n.20. We affirm the court's factual findings unless those
2 findings are "(1) 'illogical,' (2) 'implausible,' or (3) without
3 'support in inferences that may be drawn from the facts in the
4 record.'" Id. If the bankruptcy court did not identify the
5 correct legal rule, or its application of the correct legal
6 standard to the facts was illogical, implausible, or without
7 support in the record, then the bankruptcy court abused its
8 discretion. Id.

9 V. DISCUSSION

10 Under § 362(a), the filing of debtor's bankruptcy petition
11 operated as a stay of "any act to create, perfect, or enforce
12 any lien against property of the estate." § 362(a)(4). Here,
13 the foreclosure sale, conducted after debtor filed his
14 bankruptcy case, constituted an act "to obtain possession of
15 property of the estate" in violation of § 362. In the Ninth
16 Circuit, actions taken in violation of the stay are void. In re
17 Schwartz, 954 F.2d at 572. However, a foreclosure sale may be
18 declared valid if cause exists for retroactive annulment of the
19 stay.

20 Section 362(d), which gives the bankruptcy court authority
21 to enter an order annulling the automatic stay, provides:

22 On request of a party in interest and after notice and
23 a hearing, the court shall grant relief from the stay
24 provided under subsection (a) of this section, such as
by terminating, annulling, modifying, or conditioning
such stay-

25 (1) for cause, including the lack of adequate
26 protection of an interest in property of such party in
interest.

27 See also In re Schwartz, 954 F.2d at 572 (§ 362(d) "gives the
28 bankruptcy court wide latitude in crafting relief from the

1 automatic stay, including the power to grant retroactive relief
2 from the stay.”).

3 In analyzing whether “cause” exists to annul the stay under
4 § 362(d)(1), the bankruptcy court is required to balance the
5 equities of the creditor’s position in comparison to that of the
6 debtor. In re Nat’l Env’tl. Waste Corp., 129 F.3d at 1055.

7 Under this approach, the bankruptcy court considers (1) whether
8 the creditor was aware of the bankruptcy petition and automatic
9 stay; and (2) whether the debtor engaged in unreasonable or
10 inequitable conduct. Id. at 1055-56. In In re Fjeldsted, the
11 Panel approved additional factors for consideration which
12 include the number of bankruptcy filings by the debtor; the
13 extent of any prejudice, including to a bona fide purchaser; the
14 debtor’s overall good faith; the debtor’s compliance with the
15 Code; how quickly the creditor moved for annulment; and how
16 quickly the debtor moved to set aside the sale. 293 B.R. at 25.
17 However, “[i]n any given case, one factor may so outweigh the
18 others as to be dispositive.” Id.; see also, Williams v. Levi
19 (In re Williams), 323 B.R. 691 (9th Cir. BAP 2005).

20 The foregoing authorities demonstrate that, at bottom,
21 balancing the equities required the bankruptcy court to reach an
22 equitable conclusion rather than a factual or legal one. See
23 Graves v. Myrvang (In re Myrvang), 232 F.3d 1116, 1121 (9th Cir.
24 2000) (citing Bank of Honolulu v. Anderson (In re Anderson),
25 833 F.2d 834, 836 (9th Cir. 1987) (per curiam) (appellate courts
26 use the abuse of discretion standard to review bankruptcy
27 court’s equitable actions)). Our review of the bankruptcy
28 court’s equitable conclusion denying Souang’s motion is hampered

1 because it made no detailed findings. See Rule 9014
2 (incorporating Civil Rule 52 (made applicable by Rule 7052)
3 which requires findings and conclusions in any contested
4 matter); In re Williams, 323 B.R. at 700. "Effective review
5 should not depend upon the intuition of the appellate judges or
6 their ability to divine the critical facts or trial court's
7 reasons for its judgment." Id.

8 Here, the record does not show that the bankruptcy court
9 balanced the equities by considering the factors in In re Nat'l
10 Env'tl. Waste Corp. and In re Fjeldsted. Indeed, the record
11 reveals that the court's singular focus at the initial hearing
12 was on whether the trustee, ReconTrust, had notice of debtor's
13 bankruptcy filing.⁵ However, in the Ninth Circuit, a
14 postpetition foreclosure sale taken in violation of the
15 automatic stay – even a sale executed with knowledge of the
16 bankruptcy petition – may be validated by annulment of the stay.
17 Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1425 (9th
18 Cir. 1985). Thus, there is no per se rule that notice of the
19 bankruptcy case precludes retroactive relief from stay. At any
20 rate, there are no facts in the record that would support a
21 finding that debtor gave timely notice of his bankruptcy
22 petition to ReconTrust.

23 Underlying the apparently deficient record of the court's
24 analysis is the confusion about what the court expected at the
25 evidentiary hearing and what it would consider as support for
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28 ⁵ The transcript of the evidentiary hearing does not show
what was the focus of the court at that time.

1 Souang's motion outside live testimony. The bankruptcy court's
2 local rules do not define "evidentiary hearing." A fair reading
3 of the record shows that the court only requested testimony on
4 the single disputed issue of notice to ReconTrust. From
5 comments made by the court, it should not have expected
6 testimony regarding facts previously asserted by Souang in
7 relation to debtor's alleged inequitable conduct, i.e., debtor's
8 wife's prior bankruptcy filing and debtor's failure to submit a
9 chapter 13 plan which resulted in the dismissal of his case.
10 Undoubtedly, this evidence would have come from the court's
11 files, but there is no indication in the record that the court
12 considered it.

13 The bankruptcy court also misapprehended the burden of
14 proof in retroactive relief from stay matters. Section 362(g)
15 provides:

16 In any hearing under subsection (d) . . . of this
17 section concerning relief from the stay of any act
18 under subsection (a) of this section - (1) the party
19 requesting such relief has the burden of proof on the
issue of the debtor's equity in property; and (2) the
party opposing such relief has the burden of proof on
all other issues.

20 Under this section, the debtor bears the ultimate burden of
21 proving that the request for retroactive relief from the stay
22 should be denied. In re Nat'l Envtl. Waste Corp., 191 B.R.
23 832, 836 (Bankr. C.D. Cal. 1996) (debtor has the burden of proof
24 to demonstrate that "cause" does not exist to annul the stay
25 under § 362(d)(1)), aff'd Nat'l Envtl. Waste Corp., 129 F.3d
26 1052.

27 Debtor did not meet his ultimate burden. He neither
28

1 testified at the evidentiary hearing⁶ nor did he produce the fax
2 confirmation which allegedly gave notice to ReconTrust that he
3 had filed for bankruptcy. Simply put, there is no evidence in
4 the record that would support the bankruptcy court's ruling.

5 **VI. CONCLUSION**

6 We conclude that the bankruptcy court abused its discretion
7 in denying Souang's motion for retroactive relief from the
8 automatic stay and finding the trustee's sale void. Therefore,
9 we VACATE the bankruptcy court's order and REMAND this matter to
10 the bankruptcy court to conduct an appropriate evidentiary
11 hearing, and to enter adequate findings of fact, conclusions of
12 law, and a decision on the merits concerning Souang's motion.

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28 ⁶ To be fair, the bankruptcy court terminated the hearing
without giving debtor an opportunity to present any evidence.