

JUL 07 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NOT FOR PUBLICATION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. AZ-10-1393-MkMaD  
 )  
 JAMES McKINNEY, ) Bk. No. 10-20519  
 )  
 Debtor. )  
 \_\_\_\_\_ )  
 )  
 JAMES McKINNEY, )  
 )  
 Appellant, )  
 )  
 v. ) **MEMORANDUM\***  
 )  
 KONDAUR CAPITAL CORPORATION; )  
 )  
 KONDAUR VENTURE X, LLC; )  
 )  
 KONDAUR CAPITAL TRUST SERIES )  
 )  
 2009-3; PAULA CHASTAIN; PETER )  
 )  
 BAI, )  
 )  
 Appellees. )  
 \_\_\_\_\_ )

Argued and Submitted on May 13, 2011  
at Phoenix, Arizona

Filed - July 7, 2011

Appeal From The United States Bankruptcy Court  
for the District of Arizona

Honorable James M. Marlar, Chief Bankruptcy Judge, Presiding

Appearances: Appellant James McKinney, in propria persona,  
 argued on his own behalf; and Robert Savage of  
 Gust Rosenfeld, PLC argued for appellees Kondaur  
 Capital Corporation, Kondaur Venture X, LLC,  
 Kondaur Capital Trust Series 2009-3, et al.

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\*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: MARKELL, MANN\*\* and DUNN, Bankruptcy Judges.

2  
3 **INTRODUCTION**

4 In this appeal, debtor James McKinney ("McKinney") appeals  
5 two orders: (1) an order granting relief from stay under  
6 § 362(d)(1)<sup>1</sup> to allow appellee Kondaur Capital Corporation  
7 ("Kondaur Capital") to initiate a state court eviction action  
8 (the "Eviction Stay Relief Order"); and (2) an order granting  
9 relief from stay to allow Kondaur Capital and its affiliates (the  
10 "Kondaur Parties") to pursue fees and costs in state court  
11 litigation that Mckinney commenced (the "Fees Stay Relief  
12 Order").

13 The Kondaur Parties have filed a motion to dismiss this  
14 appeal. We grant their motion and order this appeal DISMISSED as  
15 moot.

16 **FACTS<sup>2</sup>**

17 McKinney was the borrower under a note and deed of trust  
18 both dated February 7, 2007 (the "Home Loan").<sup>3</sup> Claiming to be

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19  
20 \*\*Hon. Margaret M. Mann, U.S. Bankruptcy Judge for the  
21 Southern District of California, sitting by designation.

22 <sup>1</sup>Unless specified otherwise, all chapter and section  
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
24 all "Rule" references are to the Federal Rules of Bankruptcy  
25 Procedure, Rules 1001-9037. All "Civil Rule" references are to  
26 the Federal Rules of Civil Procedure.

27 <sup>2</sup>Unless otherwise indicated, the facts set forth below have  
28 not been disputed.

<sup>3</sup>In his excerpts of record McKinney submitted few of the  
relevant filings from the bankruptcy court record, and the  
Kondaur Parties did not submit any excerpts of record at all.

(continued...)

1 the successor in interest to the lender M & I Marshall & Ilsley  
2 Bank, Kondaur Capital conducted a nonjudicial foreclosure sale of  
3 McKinney's residence (the "Property"). A Trustee's Deed Upon  
4 Sale (the "TDUS") was executed on January 5, 2010, and  
5 subsequently recorded on July 7, 2010.<sup>4</sup>

6 The day before the foreclosure sale occurred, on January 4,  
7 2010, McKinney and his son filed a lawsuit in the Arizona  
8 Superior Court for Maricopa County (Maricopa County Superior

9  
10 <sup>3</sup>(...continued)

11 However, we have exercised our discretion to independently review  
12 the bankruptcy court's electronic docket in bankruptcy case no.  
13 10-20519 and in adversary proceeding no. 10-01440, and the imaged  
14 documents attached to both dockets. See O'Rourke v. Seaboard  
Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th  
15 Cir. 1989); Atwood v. Chase Manhattan Mrtg. Co. (In re Atwood),  
16 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

17 <sup>4</sup>The recording "stamp" on the face of the TDUS indicates  
18 that the TDUS was not recorded until July 7, 2010, seven days  
19 after McKinney filed bankruptcy, and Kondaur Capital apparently  
20 did not seek or obtain relief from stay before recording the  
21 TDUS. Under recent Arizona bankruptcy cases, this action did not  
22 violate the automatic stay. Those cases hold that under Arizona  
23 law, the completion of a foreclosure sale (by payment of the  
24 highest cash bid or the submission of the winning credit bid)  
25 fully extinguishes the borrower's former interest in the  
26 property, and the subsequent recording of a trustee's deed is  
27 regarded as a "ministerial act." A.R.S. §§ 33-810(A), 33-811(B)  
28 and (E); see also Capital Realty Servs., LLC v. Benson (In re  
Benson), 293 B.R. 234, 239 (Bankr. D. Ariz. 2003); LR Partners,  
L.L.C. v. Steiner (In re Steiner), 251 B.R. 137, 141-43 (Bankr.  
D. Ariz. 2000). Accord In re Campbell, 2007 WL 215661 (Mem.  
Dec., Bankr. D. Ariz. Jan. 25, 2007).

24 Even if we were to conclude that the recordation violated  
25 the stay and hence is void, it would not alter or affect our  
26 mootness analysis set forth below. Furthermore, neither party  
27 raised the issue before the bankruptcy court or in its appellate  
28 brief, so we decline to discuss it further here. See Burnett v.  
Resurgent Capital Servs. (In re Burnett), 435 F.3d 971, 975-76  
(9th Cir. 2006); Golden v. Chicago Title Ins. Co. (In re Choo),  
273 B.R. 608, 613 (9th Cir. BAP 2002).

1 Court Case No. CV2010-090122) (the "State Court Lawsuit").  
2 Neither party has provided us with a copy of the complaint, but  
3 both parties have described in their papers the gravamen  
4 underlying Mckinney's complaint. McKinney asserted that the  
5 origination and transfer of his Home Loan were rife with  
6 irregularities and improprieties, as were Kondaur Capital's  
7 foreclosure proceedings. According to McKinney, these alleged  
8 irregularities and improprieties rendered invalid both the  
9 alleged transfer of his Home Loan to Kondaur Capital and the  
10 foreclosure proceedings.

11 On January 5, 2010, the day after McKinney filed his  
12 complaint, and the same day the TDUS was executed, McKinney  
13 sought and obtained a temporary restraining order ("TRO")  
14 enjoining the Kondaur Parties from completing the foreclosure  
15 sale. However, the Kondaur Parties subsequently obtained an  
16 order transferring venue to the Arizona Superior Court for Pinal  
17 County (Pinal County Superior Court Case No. CV2010-00970). On  
18 May 26, 2010, the Kondaur Parties obtained a ruling from that  
19 court quashing the TRO and declaring it ineffective as against  
20 Kondaur Capital's foreclosure sale.

21 The Kondaur Parties and McKinney filed cross-motions for  
22 summary judgment in the State Court Lawsuit which the state court  
23 heard on July 1, 2010. The state court ruled in favor of the  
24 Kondaur Parties, and ruled that a judgment of dismissal would be  
25 entered in their favor.

26 On June 30, 2010, the day before the state court summary  
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1 judgment hearing, McKinney filed his chapter 7 bankruptcy.<sup>5</sup>  
2 On July 19, 2010, the Kondaur Parties filed a motion for relief  
3 from stay to pursue an award of attorneys' fees in the State  
4 Court Lawsuit (the "Fees Stay Relief Motion"). In addition, on  
5 August 6, 2010, Kondaur Capital filed a separate motion in  
6 bankruptcy court for relief from stay to allow it to commence and  
7 prosecute a state court eviction action to obtain possession of  
8 the Property (the "Eviction Stay Relief Motion").

9 In both relief from stay motions, the movants asserted that  
10 "cause" existed to grant relief from stay under § 362(d)(1).  
11 According to the movants, the circumstances surrounding the State  
12 Court Litigation and the completion of the foreclosure sale  
13 justified the relief sought.

14 McKinney filed objections to both motions. McKinney  
15 essentially objected on four grounds: (1) the Kondaur Parties  
16 lacked standing to seek relief from stay and were not the real  
17 parties in interest; (2) in light of the (alleged) improprieties  
18 and irregularities in connection with the origination and  
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21 <sup>5</sup>Citing Eisinger v. Way (In re Way ), 229 B.R. 11, 13 (9th  
22 Cir. BAP 1998), the Kondaur Parties assert that the stay was not  
23 applicable to the State Court Lawsuit because McKinney initiated  
24 that lawsuit. See also Lehman Commercial Paper, Inc. v. Palmdale  
25 Hills Property, LLC (In re Palmdale Hills Property, LLC), 423  
26 B.R. 655, 663 (9th Cir. BAP 2009). Given that the Kondaur  
27 Parties were the defendants and given that the foreclosure sale  
28 of the Property already had taken place, we agree that the  
holding of the summary judgment hearing in the State Court  
Lawsuit was neither an act nor a continuation of proceedings  
against the debtor, against his property or against property of  
the estate. In any event, our resolution of this appeal does not  
hinge upon whether the July 1 summary judgment hearing was  
subject to the automatic stay.

1 transfer of the Home Loan, and in connection with the foreclosure  
2 proceedings, stay relief should be denied; (3) the Kondaur  
3 Parties offered insufficient evidence in support of their  
4 motions; and (4) the Kondaur Parties' failure to follow various  
5 local rules of the Arizona bankruptcy court, including Arizona  
6 Local Bankruptcy Rule 4001-1(b), justified denial of both  
7 motions.

8 The court held a hearing on October 4, 2010, at which it  
9 considered and granted both relief from stay motions. The court  
10 entered both the Eviction Stay Relief Order and the Fees Stay  
11 Relief Order on October 7, 2010.<sup>6</sup> The Fees Stay Relief Order  
12 made clear that the granting of stay relief did not impair or  
13 affect the dischargeability of any fee award (to the extent it  
14 was dischargeable).

15 McKinney filed his notice of appeal on October 13, 2010, but  
16 Mckinney did not request or obtain a stay pending appeal of  
17 either order appealed. The Kondaur Parties filed a motion to  
18 dismiss this appeal on April 19, 2011, claiming that the appeal  
19 of both relief from stay orders is moot. In support of their  
20 mootness argument, the Kondaur Parties asserted the following:

21 (1) In state court eviction proceedings commenced after the  
22 bankruptcy court granted relief from stay, Kondaur Capital  
23 obtained a judgment for possession and a writ of  
24

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25 <sup>6</sup>On October 12, 2010, five days after the court entered both  
26 orders granting relief from stay, the bankruptcy court entered  
27 its order granting McKinney his chapter 7 discharge. Pursuant to  
28 § 362(c), the part of the automatic stay protecting McKinney from  
acts and proceedings against the debtor and property of the  
debtor terminated on that date in any event.

1 restitution.

2 (2) Even though McKinney appealed the eviction judgment, he  
3 did not obtain a stay of that judgment pending appeal, and  
4 he voluntarily surrendered possession of the property.

5 (3) As evidenced by a recorded deed, Kondaur Capital has  
6 sold the Property to third parties.

7 (4) After the bankruptcy court granted relief from stay, the  
8 Kondaur Parties filed an application for an award of their  
9 attorneys fees and costs in the State Court Lawsuit, and the  
10 application was granted and reduced to judgment.

11 Most of the assertions in the Kondaur Parties' motion to dismiss  
12 are supported by court filings; we hereby take judicial notice of  
13 their filing and contents. See Estate of Blue v. County of Los  
14 Angeles, 120 F.3d 982, 984 (9th Cir. 1997); Mullis v. Bankruptcy  
15 Ct., 828 F2d 1385, 1388 (9th Cir. 1987).

16 On May 16, 2011, McKinney filed a belated response to the  
17 motion to dismiss and a motion to strike the motion to dismiss.  
18 In addition, McKinney filed on May 17, 2011, a document entitled  
19 "Appellant's Clarification As To Appeal And Appeal Hearing." We  
20 will hereinafter collectively refer to McKinney's May 16 and  
21 May 17 filings as his "Response Papers." McKinney's Response  
22 Papers in essence recapitulate the arguments that he made in his  
23 opening brief. Significantly, he has not disputed any of the key  
24 factual assertions that the Kondaur Parties made in their motion  
25 to dismiss.

26 **JURISDICTION**

27 The bankruptcy court had jurisdiction under 28 U.S.C.  
28 §§ 1334 and 157(b)(2)(A) and (G). We discuss our jurisdiction

1 under 28 U.S.C. § 158 below.

2 **ISSUE<sup>7</sup>**

3 Is this appeal moot?

4 **STANDARD OF REVIEW**

5 We review questions regarding our jurisdiction de novo. See  
6 Belli v. Temkin (In re Belli), 268 B.R. 851, 853 (9th Cir. BAP  
7 2001); Menk v. Lapaglia (In re Menk), 241 B.R. 896, 903 (9th Cir.  
8 BAP 1999).

9 **DISCUSSION**

10 We lack jurisdiction to hear moot appeals. I.R.S. v.  
11 Pattullo (In re Pattullo), 271 F.3d 898, 901 (9th Cir. 2001). In  
12 addition, if an appeal becomes moot while it is pending before  
13 us, we must dismiss it. Id.

14 The circumstances surrounding this appeal implicate two  
15 different types of mootness: constitutional mootness and  
16 equitable mootness. Constitutional mootness arises from

17 \_\_\_\_\_  
18 <sup>7</sup>McKinney's notice of appeal and opening brief arguably  
19 indicated that, in addition to the relief from stay orders,  
20 McKinney also sought appellate review of the bankruptcy court's  
21 August 11, 2010 order declaring void McKinney's attempted removal  
22 of the State Court Lawsuit (the "Removal Order"). However, in  
23 his Response Papers and in papers filed after oral argument,  
24 McKinney stated that he never intended to appeal the Removal  
Order and that he wanted to withdraw his appeal of that order to  
the extent his prior papers indicated a contrary intent. We will  
take McKinney at his word, and we will limit the scope of our  
consideration in this memorandum to the two relief from stay  
orders.

25 In any event, McKinney's notice of appeal was not timely  
26 with respect to the Removal Order, and thus we lack jurisdiction  
27 to review it. See Browder v. Director, Dep't of Corrections,  
434 U.S. 257, 264 (1978); Slimick v. Silva (In re Slimick),  
928 F.2d 304, 306 (9th Cir. 1990); see also Quackenbush v.  
28 Allstate Ins. Co., 517 U.S. 706, 713-14 (1996); Cal. Dept. of  
Water Res. v. Powerex Corp., 533 F.3d 1087, 1096 (9th Cir. 2008).



1 Article III of the U.S. Constitution, which requires a live case  
2 or controversy before judicial power can be exercised. Clear  
3 Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 33  
4 (9th Cir. BAP 2008) (citing DeFunis v. Odegaard, 416 U.S. 312,  
5 316 (1974)). When it is impossible for us to grant effective  
6 relief, no live case or controversy exists. See id.

7 Equitable mootness focuses on the availability of effective  
8 relief. Even if it is in theory still possible to fashion  
9 effective relief, we will not do so when granting such relief  
10 would be impractical or inequitable. Id.; Darby v. Zimmerman  
11 (In re Popp), 323 B.R. 260, 271 (9th Cir. BAP 2005). One  
12 variation of equitable mootness occurs when the appellant has  
13 neither sought nor obtained a stay of the order on appeal, and  
14 comprehensive changes in circumstance have occurred in reliance  
15 on the order. Focus Media, Inc. v. Nat'l Broad. Co., Inc.  
16 (In re Focus Media, Inc.), 378 F.3d 916, 923 (9th Cir. 2004);  
17 In re PW, LLC, 391 B.R. at 33 & n.7.

18 We will separately examine the mootness of the appeal from  
19 each relief from stay order.

20 **A. Eviction Stay Relief Order**

21 As concerns the Eviction Stay Relief Order, the state court  
22 entered a judgment for possession of the Property, and issued a  
23 writ of restitution. Further, McKinney apparently has  
24 surrendered possession of the Property, and the Warranty Deed  
25 attached to the Kondaur Parties' motion to dismiss indicates that  
26 Kondaur Capital has sold the Property to third parties.

27 Even if we were to reverse the Eviction Stay Relief Order,  
28 reversal would not undo the actions taken in prior reliance on

1 the order and would not affect the rulings made or relief granted  
2 in the state court eviction proceedings.<sup>8</sup> More importantly, it  
3 would not restore McKinney's possession of the property. Simply  
4 put, reversal of the Eviction Stay Relief Order would not in any  
5 meaningful way change McKinney's status, position or rights vis-  
6 a-vis the Property or the eviction proceedings.

7 Our conclusion is supported by the undisputed facts set  
8 forth above. In addition, the aspect of the automatic stay that  
9 (absent relief from stay) arguably might have protected McKinney  
10 from the eviction proceedings terminated by operation of  
11 § 362(c)(2),<sup>9</sup> when the bankruptcy court granted McKinney his  
12 discharge on October 12, 2010. In other words, the operation of  
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14 <sup>8</sup>McKinney has referenced his "due process" rights on several  
15 occasions, both before the bankruptcy court and on appeal, but  
16 his due process arguments are incomprehensible. While a  
17 violation of a party's constitutional right to due process can  
18 void bankruptcy court judgments and orders, United Student Aid  
Funds, Inc. v. Espinosa, 130 S.Ct. 1367, 1378 (2010), McKinney  
has not pointed us to any such violation, nor is one evident in  
the record. See id.

19 <sup>9</sup>Aside from exceptions not relevant here, § 362(c) provides:

20 (1) the stay of an act against property of the estate  
21 under subsection (a) of this section continues until  
22 such property is no longer property of the estate;

23 (2) the stay of any other act under subsection (a) of  
this section continues until the earliest of--

24 (A) the time the case is closed;

25 (B) the time the case is dismissed; or

26 (C) if the case is a case under chapter 7 of this title  
27 concerning an individual . . . , the time a discharge  
28 is granted or denied . . . .

1 § 362(c)(2) provides a separate and independent basis for our  
2 conclusion that the appeal from the Eviction Stay Relief Order is  
3 moot.

4 **B. Fees Stay Relief Order**

5 With respect to the Fees Stay Relief Order, the state court  
6 granted the Kondaur Parties' application for fees and costs, and  
7 already has reduced that award to judgment. Even if we were to  
8 reverse the Fees Stay Relief Order, reversal would not undo the  
9 state court rulings made and relief granted concerning the  
10 Kondaur Parties' fee application. Nor would it otherwise change  
11 in any meaningful way McKinney's status, position or rights vis-  
12 a-vis the award of fees and costs.

13 Furthermore, unless the bankruptcy court subsequently orders  
14 otherwise, the discharge injunction under § 727(b) presumably  
15 prevents the Kondaur Parties from taking any steps to enforce the  
16 fees and costs judgment against McKinney. In short, the Kondaur  
17 Parties likely already have reached the end of the road to the  
18 extent they seek to collect their fees and costs award from  
19 McKinney; to the extent they have not reached the end of the  
20 road, reversal of the Fees Stay Relief Order would not protect  
21 McKinney in any event. See § 362(c)(2).

22 Accordingly, we hold that McKinney's appeal of the two  
23 relief from stay orders is moot, and that this appeal should be  
24 dismissed.

25 **CONCLUSION**

26 Based on the analysis set forth above, we DISMISS McKinney's  
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1 appeal as moot.<sup>10</sup>

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25 <sup>10</sup>McKinney's opening brief contains numerous requests for  
26 relief that are well beyond his request for review of the two  
27 relief from stay orders. Each of these extraneous requests is  
28 beyond the scope of our limited appellate jurisdiction. See  
11 U.S.C. § 158. Consequently, each of these requests is hereby  
ORDERED DENIED.