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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NOT FOR PUBLICATION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.

*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)¹ 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 **FACTS²**

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

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

22 ¹Unless 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 ²Unless otherwise indicated, the facts set forth below have
28 not been disputed.

³In 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, 2010.⁴

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

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10 ³(...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 ⁴The 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.⁵
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 ⁵Citing 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, 2010.⁶ 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
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25 ⁶On 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 **ISSUE⁷**

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

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18 ⁷McKinney'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.⁸ 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),⁹ when the bankruptcy court granted McKinney his
12 discharge on October 12, 2010. In other words, the operation of
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14 ⁸McKinney 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 ⁹Aside 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.¹⁰

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25 ¹⁰McKinney'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.