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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. AZ-10-1239-PaJuMk
)	AZ-10-1267-PaJuMk
BARRY WEISBAND,)	(related appeals)
)	
Debtor.)	Bk. No. 09-05175-EWH
_____)	
BARRY WEISBAND,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
FIRST HORIZON HOME LOANS, A)	
DIVISION OF FIRST TENNESSEE BANK)	
NATIONAL ASSOCIATION,)	
)	
Appellee.)	
_____)	

Argued and Submitted on February 17, 2011
at Phoenix, Arizona

Filed - June 13, 2011

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Eileen W. Hollowell, Bankruptcy Judge, Presiding

Appearances: _____
 Ronald Ryan argued for Appellant Barry Weisband.
 Jessica R. Kenney of McCarthy Holthus Levine argued
 for Appellee First Horizon Home Loans.

Before: PAPPAS, JURY and MARKELL, 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 In appeal No. AZ-10-1239, chapter 13² debtor Barry Weisband
2 ("Weisband") appeals the decision of the bankruptcy court granting
3 relief from the automatic stay to creditor First Horizon Home
4 Loans, a Division of First Tennessee Bank National Association
5 ("First Horizon"), to enforce its lien against his rental property
6 at 2774 Fair Oaks Avenue, Tucson (the "2774 Property"). In appeal
7 No. AZ-10-1267, Weisband appeals the decision denying a motion to
8 alter or amend or for relief from judgment regarding the
9 bankruptcy court's decision to grant stay relief to First Horizon
10 regarding his rental property at 2764 Fair Oaks Avenue (the "2764
11 Property"). We AFFIRM in both appeals.

12 13 **FACTS**

14 Weisband filed a chapter 13 petition on March 13, 2009. On
15 his Schedule D, he listed the claims held by First Horizon secured
16 by the 2764 and 2774 Properties, and in his proposed chapter 13
17 plans, Weisband lists First Horizon Home Loans Corporation
18 ("FHHL")³ as the secured creditor for the trust deeds on both
19 properties.

20 Weisband commenced an adversary proceeding seeking to value
21

22
23 ² Unless otherwise indicated, all chapter, section and rule
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

25 ³ The appellee, First Horizon, is the successor by merger to
26 FHHL, which occurred on May 31, 2007. The premerger FHHL was
27 the original lender on the Notes in both appeals. At oral
28 argument on July 6, 2010, Weisband conceded that he did not
challenge the merger agreement. Hr'g Tr. 1:23-24. We will refer
to the premerger lender as FHHL, and to the postmerger lender,
appellee herein, as First Horizon.

1 the two properties, and to strip off the liens on the properties
2 junior to those of First Horizon, on August 11, 2009. See Zimmer
3 vs. PSB Lending Corp. (In re Zimmer), 313 F.3d 1220, 1227 (9th
4 Cir. 2002) (holding that a wholly unsecured mortgage may be
5 "stripped" in a chapter 13 case despite the anti-modification
6 provisions in § 1322(b)(2)). Weisband also sought to restructure
7 the payment terms on FHHLC's loans to pay the "crammed down" value
8 of the properties over a thirty-year period. After a trial, in
9 its order entered March 2, 2010, the bankruptcy court set the
10 value of each property at \$115,000; consequently, because there
11 was no equity in either property to secure the junior liens, they
12 were stripped. However, the bankruptcy court determined that
13 restructuring First Horizon's secured claims over thirty years in
14 the manner Weisband proposed was impermissible under chapter 13,
15 as provided in Enewally v. Wash. Mut. Bank (In re Enewally),
16 368 F.3d 1165 (9th Cir. 2004). The bankruptcy court's order was
17 not appealed.

18
19 The Motion for Relief from Stay and Weisband's
20 Motion Under Civil Rule 60(b) in Appeal No. AZ-10-1267

21 First Horizon filed a motion for relief from stay regarding
22 the 2764 Property on March 16, 2010, alleging that Weisband had
23 failed to make mortgage payments since November 1, 2008. First
24 Horizon asserted that it was the holder of the Note secured by the
25 trust deed on the 2764 Property and, therefore, a real party in
26 interest. In support of this allegation, First Horizon attached
27 to the motion a copy of the recorded Deed of Trust and the Note
28 signed by Weisband on November 2, 2005, both of which identify

1 FHHLC as the "Lender" and Weisband as the "Borrower." Also
2 attached to the motion was a copy of a merger agreement between
3 FHHLC and the First Bank of Tennessee, showing that the resulting
4 entity was First Horizon.

5 Weisband responded to the motion for stay relief on the 2764
6 Property on April 8, 2010. While he did not challenge any of the
7 factual allegations in the motion, Weisband objected that First
8 Horizon did not have constitutional standing because, he alleged,
9 the Note had been "securitized." Weisband demanded that First
10 Horizon produce the original Note.

11 A hearing was held in the bankruptcy court concerning First
12 Horizon's motion for relief from stay regarding the 2764 Property
13 on May 13, 2010. Weisband, First Horizon, and chapter 13 trustee
14 Diane Kerns were represented by counsel.

15 First Horizon argued that its standing to prosecute the
16 motion could not be questioned because FHHLC was lender under the
17 original loan documents, and there had been no transfer of the
18 Note. Weisband argued that general practices in the mortgage
19 industry tended to support that there was a servicer involved in
20 any mortgage transaction. At that point, the bankruptcy court
21 asked Weisband's attorney if he could present any hard facts to
22 support this allegation, and if he had conducted discovery. When
23 Weisband's attorney equivocated, the court responded: "This is a
24 motion for relief from stay, where the only issue [raised by
25 Weisband] is standing. . . . And they have demonstrated that
26 [First Horizon has] standing. And that's it. That's their only
27 burden. And you haven't come up with anything else." Hr'g Tr. at
28 5:5-10. The bankruptcy court granted the motion, and entered an

1 order on May 18, 2010.

2 On June 2, 2010, Weisband filed a motion for a new trial
3 under Civil Rule 59 or for relief from judgment under Civil Rule
4 60(b). Weisband repeated his standing objection. First Horizon
5 responded on June 21, 2010, arguing that to obtain stay relief
6 does not require a full adjudication of its rights, but only that
7 the moving creditor demonstrate it holds a colorable claim. As to
8 constitutional standing, First Horizon repeated that First
9 Horizon, as successor by merger to FHHLC, was the holder of the
10 Note with the right to enforce it, and that Weisband had defaulted
11 on his payment obligations.

12 The bankruptcy court hearing on Weisband's reconsideration
13 motion was held on July 6, 2010. The parties relied on their
14 submitted papers. The court asked Weisband's attorney if he
15 challenged the evidence of merger between FHHLC and First
16 Tennessee Bank. Counsel replied, "No." Hr'g Tr. 3:21-24 (July 6,
17 2010). The bankruptcy court then summarized:

18 All right. I agree that in this case I don't see that
19 we have the issues that sometimes come up about
20 transfers in mortgages into a securitized trust;
21 although I understand [Weisband's] position is that this
22 mortgage was transferred into a securitized trust. The
prima facie case has been shown. The merger agreement
hasn't been challenged; and accordingly, the motion for
new trial is denied.

23 Hr'g Tr. 4:12-15. The bankruptcy court's order denying the motion
24 for relief from judgment was entered on July 14, 2010. Weisband
25 filed a notice of appeal on July 18, 2010.

26
27 Motion for Relief from Stay in Appeal No. AZ-10-1239

28 First Horizon filed a motion for relief from stay regarding

1 the 2774 Property on May 3, 2010. In the motion, First Horizon
2 alleged it was holder of the Note and real party in interest and
3 that Weisband had failed to make mortgage payments since
4 November 1, 2008. First Horizon submitted copies of the relevant
5 Deed of Trust and Note, along with a copy of the merger agreement.
6 Weisband filed a response, again principally relying on his
7 standing argument.

8 The bankruptcy court held a hearing on the motion for relief
9 from stay regarding the 2774 Property on June 10, 2010. After
10 hearing from both parties, the court addressed Weisband's
11 attorney:

12 Here all that is required is that the movant have a
13 colorable claim. You assert that they don't have any
14 claim; but that would require an adversary proceeding.
15 The note shows that the lender was First Horizon Home
16 Loan Corporation. The deed of trust shows the lender
17 was First Horizon Home Loan Corporation. There's
18 evidence of an agreement of the merger between First
19 [Horizon] Home Loan Corporation and First Tennessee
20 Bank. You don't deny that that merger occurred. You
21 don't argue there's any equity in the property. You
22 don't argue that your client is making adequate
23 protection payments. . . . In a lift-stay proceeding, I
24 have to rule on what is in front of me. And what is in
25 front of me is that there is cause to lift the stay here
26 under both 362(d)(1) and (2). . . . Accordingly the
27 stay lifts.

28 Hr'g Tr. 4:3-5:11 (June 10, 2010). The bankruptcy court entered
its order granting relief from stay as to the 2774 Property on
June 17, 2010. Weisband filed a timely appeal on June 29, 2010.

JURISDICTION

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

1 the record, then the bankruptcy court has abused its discretion.
2 Id.

3
4 **DISCUSSION**

5 Before addressing the appeals separately, we note a problem
6 that infects both appeals.

7 In his opening briefs, Weisband makes numerous references to
8 what Weisband characterizes as "newly discovered evidence" that
9 Bank of New York/Mellon is the owner of the notes in question.
10 Apparently to support this argument, Weisband included in the
11 excerpts of record of both appeals materials that were never
12 submitted to, or included in the record of, the bankruptcy court:
13 a résumé of Neil Garfield, and certain "MERS" servicer records
14 concerning two properties dated October 18, 2010. First Horizon
15 asks us to strike these documents in both appeals.

16 In addition, Weisband submitted a six-page "Declaration
17 Appellant's Attorney" to this Panel as part of the excerpts. As
18 its title suggests, this document purports to be a declaration
19 signed and submitted by Weisband's lawyer, apparently attempting
20 to provide a factual foundation for the MERS service statements,
21 to explain the relevance of the Garfield résumé, and to support
22 the attorney's opinions and arguments in the briefs about certain
23 securitization practices in the mortgage industry.

24 The targeted documents and the attorney's declaration will be
25 stricken. These documents and the declaration were not presented
26 to the bankruptcy court. As an appellate tribunal, our charge is
27 to review the propriety of the bankruptcy court's decision based
28 on the record presented to that court. "Facts not presented to

1 the [trial] court are not part of the record on appeal." United
2 States v. Waters, 627 F.3d 345, 355 (9th Cir. 2010) (quoting Nat'l
3 Wildlife Fed'n v. Burlington N. R.R., Inc., 23 F.3d 1508, 1511 n.5
4 (9th Cir. 1994)); Brown & Cole Stores LLC v. Assoc. Grocers, Inc.
5 (In re Brown & Cole Stores LLC), 375 B.R. 876 (9th Cir. BAP 2007).
6 In deciding these appeals, clearly, the Panel can not consider
7 documents and a declaration the bankruptcy court was never given.⁴

8 We STRIKE the Garfield résumé, the MERS records, and the
9 declaration of Weisband's attorney from the excerpts of record in
10 both appeals, and we do not consider them in reviewing the
11 bankruptcy court's orders.

12 I.

13 **The bankruptcy court did not abuse its discretion in**
14 **granting relief from the stay in Appeal AZ-10-1239.**

15 When a bankruptcy petition is filed, a stay is automatically
16 imposed prohibiting creditors from taking action to enforce a lien
17 securing a prebankruptcy claim against property of the debtor or
18 estate. See §362(a)(4) and (5). As relevant here, the automatic
19 stay prevents "all proceedings relating to a foreclosure sale."
20 Mann v. ADI Invs., Inc. (In re Mann), 907 F.2d 923, 926-27 (9th
21 Cir. 1990).

22 Under § 362(d), a "party in interest" may request relief from
23 the operation of the automatic stay from the bankruptcy court.
24 See § 362(d). In reviewing such a request, the scope of
25 proceedings is limited:

26 Given the limited grounds for obtaining a motion for

27 _____
28 ⁴ We will briefly return to this new evidence question below
in our examination of Rule 60(b).

1 relief from stay, read in conjunction with the expedited
2 schedule for a hearing on the motion, most courts hold
3 that motion for relief from stay hearings should not
4 involve an adjudication on the merits of claims,
5 defenses, or counterclaims, but simply determine whether
6 the creditor has a colorable claim to the property of
7 the estate.

8 Biggs v. Stovin (In re Luz Int'l), 219 B.R. 837, 842 (9th Cir. BAP
9 1998); see also Johnson v. Righetti (In re Johnson), 756 F.2d 738,
10 740-41 (9th Cir. 1985) ("Hearings on relief from the automatic
11 stay are thus handled in a summary fashion. The validity of the
12 claim or contract underlying the claim is not litigated during the
13 hearing."); Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 33
14 (1st Cir 1994) ("We find that a hearing on a motion for relief
15 from stay is merely a summary proceeding of limited effect, and
16 . . . a court hearing a motion for relief from stay should seek
17 only to determine whether the party seeking relief has a colorable
18 claim to property of the estate."). In other words, stay relief
19 hearings do not include a full adjudication of the parties' claims
20 or defenses. First Fed. Bank v. Robbins (In re Robbins), 310 B.R.
21 626, 631 (9th Cir. BAP 2004). All that a bankruptcy court must do
22 before granting relief from the stay is determine whether the
23 moving creditor has presented a colorable claim that stay relief
24 is warranted. In re Luz Int'l, 219 B.R. at 842.

25 The party requesting stay relief bears the burden of proof
26 that it has a colorable claim and standing to bring the motion.
27 In re Wilhelm, 407 B.R. 392, 400 (Bankr. D. Idaho 2009). In this
28 context, standing has both constitutional and prudential
29 limitations. Warth v. Selden, 422 U.S. 490, 498-99 (1975).
30 However, in the bankruptcy court, and now in this appeal, Weisband
31 has challenged only First Horizon's constitutional standing to

1 request stay relief.

2 To demonstrate constitutional standing, a party requesting
3 relief must show that it has (1) suffered an injury, (2) that was
4 caused by the opposing party, and (3) that will likely be
5 redressed by the relief sought from the court. Lujan v. Defenders
6 of Wildlife, 504 U.S. 555, 559-60 (1992). The party invoking
7 federal jurisdiction bears the burden of establishing those
8 requirements. FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990).

9 As noted above, automatic stay hearings do not require a full
10 adjudication on the merits. In re Robbins, 310 B.R. at 631. All
11 that is required is a simple determination as to whether the party
12 seeking relief from the stay has a colorable claim. Id. A party
13 satisfies its burden of a colorable claim in a motion for stay
14 relief if it demonstrates that it has an interest in the relevant
15 promissory note, and that it has been injured by a debtor's
16 default on the note. In re Wilhelm, 407 B.R. at 398.

17 First Horizon submitted evidence to the bankruptcy court that
18 it was the holder of the Note. Indeed, the evidence was that
19 First Horizon' predecessor, FHHLIC, was the lender named in the
20 Note, and there was no proof that the Note ever left the
21 possession of FHHLIC or First Horizon. First Horizon also alleged,
22 without dispute, that Weisband was woefully delinquent in making
23 required monthly payments on the loan. This showing demonstrated
24 that First Horizon had standing to request, as relief for
25 Weisband's defaults, that the bankruptcy court modify the stay to
26 permit First Horizon to pursue foreclosure of its deed of trust on
27 Weisband's real estate.

28 Weisband challenged First Horizon's standing. However,

1 despite multiple invitations from the bankruptcy court, Weisband
2 never successfully substantiated his argument that the Note had
3 been securitized, and therefore, that First Horizon lacked
4 standing. In this regard, like the bankruptcy court, we decline
5 to accept Weisband's overbroad statements, conjectures and
6 generalizations about supposed practices in the mortgage industry
7 in the United States. Weisband's oft-repeated allegations and
8 arguments were not evidence. Weisband apparently did not conduct
9 any discovery designed to tie his general theories to the specific
10 facts in this bankruptcy case. In addition, his attorney admitted
11 that Weisband did not challenge the evidence of the merger between
12 FHHLC and First Tennessee Bank. Thus, Weisband never established,
13 despite his numerous statements to the contrary, that the Note had
14 ever been securitized.

15 Weisband's demand to produce the original note lacks merit
16 under these facts. The federal district courts in the District of
17 Arizona have "routinely held that Plaintiff's 'show me the note'
18 argument lacks merit." Diessner v. Mortg. Elec. Registration
19 Sys., 618 F.Supp.2d 1184 (D. Ariz. 2009), aff'd, 384 Fed. Appx.
20 609 (9th Cir. 2009); Blau v. America's Servicing Co., 2009 WL
21 3174823 (D. Ariz. 2009); Goodyke v. BNC Mortgage, Inc., 2009 WL
22 2971086 (D. Ariz. 2009); Mansour v. Cal-Western Reconveyance
23 Corp., 2009 WL 1066155 (D. Ariz. April 21, 2009).

24 As the holder of the Note, First Horizon had the right to
25 enforce it. Under Arizona law,

26 "Person entitled to enforce" an instrument means the
27 holder of the instrument, a nonholder in possession of
28 the instrument who has the rights of a holder or a
person not in possession of the instrument who is
entitled to enforce the instrument pursuant to section

1 47-3309 or section 47-3418, subsection D. A person may
2 be a person entitled to enforce the instrument even
3 though the person is not the owner of the instrument or
is in wrongful possession of the instrument.

4 A.R.S. § 47-3301. According to this statute, even if Weisband's
5 arguments that First Horizon was not the owner of the Note were
6 proved to be correct, it would not affect First Horizon's ability
7 to enforce the Note. As the bankruptcy court stated in an earlier
8 decision in this case, "If [a party] is the holder of the Note,
9 [it] would be a party injured by the Debtor's failure to pay it,
10 thus satisfying the constitutional standing requirement." In re
11 Weisband, 427 B.R. 13, 17 (Bankr. D. Ariz. 2010). We agree with
12 this conclusion.

13 In short, the facts and law before the bankruptcy court
14 established that First Horizon's predecessor, FHHLIC, was the
15 lender on the Note and beneficiary under the deed of trust, that
16 First Horizon was the company that emerged from the merger of
17 FHHLIC and First Tennessee, and that First Horizon was the current
18 holder of the Note. Weisband did not dispute that, for purposes
19 of § 362(d), Weisband had no equity in the 2774 Property, and that
20 Weisband was in default on the Note. The only defense to the stay
21 relief motion presented by Weisband was his suggestion that First
22 Horizon lacked standing to prosecute the motion. On the other
23 hand, the bankruptcy court found the Note, Deed of Trust, and
24 merger document submitted as exhibits to the motion were
25 sufficient to support First Horizon's claim for relief.

26 The bankruptcy court's decision to grant First Horizon stay
27 relief on the 2774 Property is supported by the record and was not
28 an abuse of discretion.

1 II.

2 The bankruptcy court did not abuse its discretion in
3 denying Weisband's motion for relief under Civil Rule 60(b)
4 in Appeal No. AZ-10-1267.

5 In this appeal, Weisband attempts to relitigate the merits of
6 First Horizon's motion for relief from stay as to the 2764
7 Property. However, because Weisband's Civil Rule 60(b) motion
8 seeking relief from the bankruptcy court's order granting stay
9 relief was not timely filed to toll the time for appeal, the stay
10 relief order is final, and we lack jurisdiction to consider
11 whether the bankruptcy court erred in entering that order. In
12 other words, on this record, the issues in this appeal are limited
13 solely to whether the bankruptcy court abused its discretion in
14 denying the Civil Rule 60(b) motion.⁵

15 Fairly construed, Weisband's Civil Rule 60(b) arguments
16 invoke three subsections of the Civil Rule:

17 (b) **Grounds for Relief from a Final Judgment, Order, or**
18 **Proceeding.** On motion and just terms, the court may
19 relieve a party or its legal representative from a final
20 judgment, order, or proceeding for the following
21 reasons: . . .

22 (2) newly discovered evidence that, with reasonable
23 diligence could not have been discovered in time to move
24 for a new trial under Rule 59(b);

25 (3) fraud (whether previously called intrinsic or
26 extrinsic), misrepresentation, or other misconduct by an
27 opposing party;

28 . . .

(6) any other reason that justifies relief.

26 ⁵ Although Weisband's original motion for relief from
27 judgment was submitted under both Civil Rules 59 and 60, in this
28 appeal, Weisband has argued he was entitled to relief only under
Rule 60(b): "This appeal pertains solely to the denial of [the]
Rule 60(b) Motion." Weisband's Op. Br. at 3.

1 Civil Rule 60(b), which is made applicable in bankruptcy cases by
2 Rule 9024.⁶

3 A. Rule 60(b)(2).

4 To obtain relief under Civil Rule 60(b)(2), the movant must
5 show that the "new" evidence: (1) existed at the time of the
6 trial; (2) could not have been discovered through due diligence;
7 and (3) was "of such magnitude that production of it earlier would
8 have been likely to change the disposition of the case." Jones v.
9 Aero/Chem Corp., 921 F.2d 875, 878 (9th Cir. 1990).

10 As discussed above, we decline to consider and have stricken
11 the documents and declaration included by Weisband in the excerpts
12 that were not submitted to the bankruptcy court. It is this
13 information which Weisband argues establishes the "new evidence"
14 he discovered. Therefore, Weisband's request for relief from the
15 stay relief order fails.

16 However, even were we to consider the material submitted for
17 the first time in this appeal, it would not be adequate to support
18 Weisband's Civil Rule 60(b)(2) claim. The supposedly new
19 evidence, by Weisband's own admission, did not even exist at the
20 time of the hearing. In addition, Weisband admits that he did not
21 conduct discovery that might have allowed him to discover it
22 earlier. Indeed, Weisband admits that he examined the MERS

23
24 ⁶ In his brief, Weisband makes a passing reference to relief
25 under Civil Rules 60(b)(1) and (4), without clearly explaining why
26 those subsections are implicated in his appeal. Weisband offers
27 no examples of how inadvertence, mistake, surprise or excusable
28 neglect led to entry of the bankruptcy court's order, and thus
§ 60(b)(1) does not apply. To the extent that Weisband argues
that First Horizon had no standing, and thus the bankruptcy
court's order granting stay relief was void, as discussed above,
this argument lacks merit and § 60(b)(4) does not apply.

1 internet website several days before the hearing on relief from
2 judgment, and that the "new evidence" was not there.

3 Weisband's appeal of the bankruptcy court's decision under
4 Civil Rule 60(b)(2) fails.

5 B. Rule 60(b)(3).

6 To secure relief under Rule 60(b)(3), a party must establish:
7 (1) by clear and convincing evidence that the court's order was
8 obtained through the fraud, misrepresentation, or other misconduct
9 of the movant's opponent; and (2) that the conduct complained of
10 prevented the losing party from fully and fairly presenting his
11 case or defense. Civil Rule 60(b)(3); Jones, 921 F.2d at 878.

12 Though he must meet the demanding clear and convincing
13 evidence standard, Weisband's argument that he was somehow
14 defrauded by First Horizon would not meet even a minimum
15 evidentiary standard. Weisband's attorney has provided no
16 evidence, or even reasoned argument, to show that First Horizon
17 engaged in fraudulent conduct. Under these circumstances,
18 counsel's repeated allegations without proof that "all mortgage
19 holders" engage in fraudulent behavior amounts to inappropriate
20 advocacy.⁷

21 C. Rule 60(b)(6).

22 The Rule 60(b)(6) "catch-all" provision is to be used by the
23

24 ⁷ While the Panel encourages zealous advocacy by counsel,
25 there is a limit. In Weisband's attorney's comments, he attacks
26 BAP precedent by arguing that "The 'colorable claim' argument has
27 become a meaningless clich[é] in today's environment. does [sic]
28 not really mean anything in today's context. It has been
bastardized due to evidentiary fraud." Debtor's Motion for New
Trial at 14 n.17. Here, again, Weisband's counsel provides no
evidence or reasoned argument, only this strident language, to
support his views.

1 courts sparingly as an equitable remedy to prevent manifest
2 injustice, and should be utilized only where extraordinary
3 circumstances prevented a party from taking timely action to
4 prevent or correct an erroneous judgment. United States v.
5 Washington, 394 F.3d 1152, 1157 (9th Cir. 2005). As such, under
6 Rule 60(b)(6), a party seeking relief from a judgment must
7 demonstrate both injury and circumstances beyond his control that
8 prevented him from proceeding with the prosecution or defense of
9 the action in a proper fashion. Id.

10 Apparently, Weisband bases his Civil Rule 60(b)(6) argument
11 on his claim that he was denied due process in the bankruptcy
12 court, because he was not given the opportunity for an evidentiary
13 hearing on First Horizon's motion. However, this does not
14 constitute an extraordinary circumstance, nor was the lack of an
15 evidentiary hearing a consequence of circumstances beyond his
16 control.

17 The bankruptcy court is granted considerable discretion in
18 deciding whether to conduct an evidentiary hearing in contested
19 matters. In re Int'l Fibercom, 503 F.3d at 940. Moreover, in this
20 case, Weisband neglected to make a request for an evidentiary
21 hearing in accordance with the applicable local rules. And, even
22 if he had made a proper request for an evidentiary hearing, the
23 "evidence" that Weisband desired to offer did not address a
24 material disputed fact.

25 Bankr. D. Ariz. Local R. 9014-2(a) provides that hearings
26 scheduled on contested matters, such as this relief from stay
27 motion, "will be conducted without live testimony except as
28 otherwise ordered by the court." Local R. 9014-2(b) provides that

1 a party may request an evidentiary hearing by submission of a
2 separate motion, detailing the time required for receipt of
3 evidence, when the parties would be ready to present the evidence,
4 time required for discovery, and whether a Rule 7012 scheduling
5 conference was required.

6 Weisband never submitted a separate motion for an evidentiary
7 hearing as required by the rules. And as near as we can tell from
8 the record, Weisband did not even request an evidentiary hearing
9 when he had the opportunity to do so at the bankruptcy court's
10 hearing on the stay relief motion on May 13, 2010, or at the
11 hearing on relief from judgment on July 6, 2010. Weisband made
12 only one oblique reference to the need for an evidentiary hearing
13 to resolve adequate protection questions in his response to the
14 motion for relief from stay, but did not explain why an
15 evidentiary hearing was needed or what evidence he would produce.
16 In his motion for relief from judgment, Weisband indicated that
17 his expert witness would testify regarding general practices in
18 securitization of mortgages, such that Weisband was never in
19 default.

20 Thus, Weisband failed to comply with the local rules and
21 never made the required motion for an evidentiary hearing.
22 Further, Weisband failed to take the opportunity at either of the
23 hearings in the bankruptcy court to request an evidentiary
24 hearing, instead relying on his submitted pleadings. His
25 reference in his pleadings to the need for an evidentiary hearing
26 was premised on the assumption that the Note had been securitized.
27 However, the bankruptcy court ruled that Weisband failed to
28 establish that the Note had ever been securitized. Consequently

1 the purported evidence did not address a disputed material fact
2 and, even if Weisband had properly requested an evidentiary
3 hearing (which he did not), the bankruptcy court would have been
4 justified in declining to grant his request.

5 On this record, Weisband has not demonstrated how the lack of
6 an evidentiary hearing on the stay relief motion was either an
7 extraordinary circumstance or beyond his control, and there are no
8 grounds for relief from the stay relief order under Civil Rule
9 60(b)(6).

10 For all the above reasons, we conclude that the bankruptcy
11 court did not abuse its discretion in denying Weisband's motion
12 for relief from the stay relief order in Appeal AZ-10-1267.

13

14

CONCLUSION

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The orders of the bankruptcy court are hereby AFFIRMED in
both appeals.

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