

JUL 18 2011

SUSAN M SPRAUL, CLERK
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NOT FOR PUBLICATION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. CC-10-1364-KiDMk
)
 FRANK LIRA, JR.,) Bk. No. RS 09-36534-DJS
)
 Debtor.)
 _____)
)
 FRANK LIRA, JR.,)
)
 Appellant,)
)
 v.) **MEMORANDUM**¹
)
 WELLS FARGO BANK, NATIONAL)
 ASSOCIATION AS TRUSTEE FOR)
 THE CERTIFICATEHOLDERS OF)
 STRUCTURED ASSET MORTGAGE)
 INVESTMENTS II, INC., BEAR)
 STERNS MORTGAGE FUNDING TRUST)
 2006-AR5, MORTGAGE PASS-)
 THROUGH CERTIFICATES, SERIES)
 2006-AR5,)
)
 Appellee.)
 _____)

Submitted Without Oral Argument
on June 10, 2011²

Filed - July 18, 2011

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.

² On June 1, 2011, the Panel issued an order determining preliminarily that this appeal was suitable for submission on the briefs without oral argument pursuant to Fed. R. Bankr. P. 8012. We allowed the parties SEVEN (7) days to file statements setting forth the reasons why oral argument should be allowed. No statements were filed. On June 10, 2011, the Panel issued an order determining that this appeal was suitable for disposition without oral argument. Fed. R. Bankr. P. 8012; 9th Cir. BAP Rule 8012-1.

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

3 Honorable Deborah J. Saltzman, Bankruptcy Judge, Presiding

4 Appearances: Appellant Frank Lira, Jr., pro se on brief
5 Brian A. Paino of Pite Duncan, LLP on brief for
6 Appellee

7 Before: KIRSCHER, DUNN, and MARKELL, Bankruptcy Judges.

8 Appellant, chapter 7³ debtor Frank Lira, Jr. ("Lira"),
9 appeals an order from the bankruptcy court granting appellee,
10 Wells Fargo Bank, National Association as Trustee for the
11 Certificateholders of Structured Asset Mortgage Investments II
12 Inc., Bear Sterns Mortgage Funding Trust 2006-AR5, Mortgage Pass-
13 Through Certificates, Series 2006-AR5 ("Wells Fargo"), relief
14 from the automatic stay to proceed with its state law remedies
15 against Lira's residence ("Stay Relief Order"). Lira also
16 appeals the bankruptcy court's order denying his motion to
17 alter/amend the Stay Relief Order ("Rule 9023 Order"). Because
18 this appeal is moot, and because Lira lacks standing, we DISMISS
19 for lack of jurisdiction.

20 **I. FACTUAL AND PROCEDURAL BACKGROUND**

21 **A. Prepetition Events.**

22 In early October 2006, Lira's son, Frankie Lira ("Frankie"),
23 obtained a loan for \$960,000 from Soma Financial to purchase a
24 residence located in Rancho Cucamonga, California ("Property"),
25 which Frankie purchased for \$1.2 million. Frankie executed a
26

27 ³ Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 note, which was secured by a first deed of trust on the Property
2 in favor of Soma Financial. Shortly thereafter, Soma Financial
3 sold its interest under the note to Wells Fargo.

4 On October 27, 2006, Frankie executed a grant deed
5 purporting to grant the Property to both Frankie and Lira as
6 joint tenants. The grant deed was recorded on November 1, 2006.

7 On December 1, 2006, Wells Fargo entered into a loan
8 servicing agreement with EMC Mortgage Corporation ("EMC") which
9 authorized EMC to service the obligations under the note and deed
10 of trust for Wells Fargo.

11 Lira⁴ eventually defaulted under the terms of the note. A
12 notice of default was recorded on April 3, 2009, a notice of sale
13 was recorded on July 14, 2009, and a foreclosure sale was set for
14 November 16, 2009. The pending sale was stayed once Lira filed a
15 voluntary chapter 7 petition for relief on November 3, 2009.

16 **B. Postpetition Events.**

17 According to Lira's Schedule A, at the time of petition the
18 Property had a fair market value of \$624,000. Lira's Schedule D
19 reflected that the Property was encumbered by Wells Fargo's first
20 position deed of trust in the amount of \$1,100,596, as well as
21 second and third deeds of trust by other parties in the amounts
22 of \$240,000 and \$75,000, respectively.

24 ⁴ The record does not reflect how Lira became obligated on
25 the note to Wells Fargo, but neither Lira nor Wells Fargo
26 disputed Lira's obligation at the bankruptcy court or on appeal.
27 Nonetheless, the record does show that Lira obtained a legal and
28 possessory interest in the Property when Frankie executed the
grant deed granting both men an interest in the Property as joint
tenants, and that Lira took his interest subject to the debt to
Wells Fargo. Therefore, this explains the need for Wells Fargo
to seek relief from the stay in Lira's bankruptcy case.

1 On or around November 16, 2009, Angela Fontanini, Esq.
2 ("Fontanini"), counsel for EMC, servicing agent for Wells Fargo,
3 sent Lira a forbearance/reaffirmation agreement proposing that
4 Lira reaffirm his outstanding debt of \$1,115,541.29 on the
5 Property. Fontanini requested that Lira, if interested, return a
6 signed copy of the enclosed reaffirmation agreement to her within
7 10 days. If Lira was not interested in retaining the Property,
8 he could avoid foreclosure with a deed in lieu of foreclosure or
9 a short sale of the Property. For either of those options,
10 however, Fontanini instructed Lira to contact EMC directly.
11 Finally, Fontanini noted that regardless of Lira's decision,
12 Wells Fargo would still proceed with obtaining relief from stay.

13 On December 21, 2009, the chapter 7 trustee ("Trustee")
14 filed a Report of No Distribution after finding that no property
15 was available for distribution from the estate. In the report,
16 Trustee stated that the estate had been fully administered, and
17 he requested relief from any further duties.

18 On December 29, 2009, Wells Fargo moved for relief from the
19 automatic stay ("Stay Relief Motion") against Lira and Trustee
20 under sections 362(d)(1) and (d)(2) in order to proceed with a
21 foreclosure sale of the Property, contending its interest was not
22 adequately protected, and that Lira lacked any equity in the
23 Property and that it was not necessary for an effective
24 reorganization. The Stay Relief Motion was properly noticed to
25 Lira and Trustee. With the Stay Relief Motion, Wells Fargo
26 submitted a declaration from Lori Harp, an employee of EMC. Harp
27 stated that Lira had not made any payments to Wells Fargo on the
28 note since October 31, 2008, that Lira's prepetition arrears were

1 \$72,575.68, his postpetition arrears were \$5,868.03, and that, as
2 of December 15, 2009, Lira owed Wells Fargo \$1,128,031.59 on the
3 note. Wells Fargo included copies of the note, deed of trust,
4 assignment of deed of trust, and Lira's Schedules A and D as
5 exhibits to the Stay Relief Motion. A hearing was set for
6 February 9, 2010, before the Hon. Richard Neiter.

7 Trustee did not file an opposition to the Stay Relief
8 Motion. However, Lira opposed it contending that the Property
9 was necessary for an effective reorganization and that he would
10 be prejudiced if Wells Fargo was allowed to foreclose. Lira
11 stated that after receiving the reaffirmation agreement in
12 November 2009, he made several attempts to contact Fontanini in
13 order to discuss a loan modification. Lira eventually reached
14 Fontanini in early January 2010, who advised him to contact Wells
15 Fargo directly. Lira then contacted Wells Fargo and was told
16 that all loan modifications must be done through EMC. Lira
17 contacted EMC's Mortgage Bankruptcy Department on January 15,
18 2010, requesting information about a loan modification. EMC told
19 Lira that it would send him a packet of information within two or
20 three weeks. When Lira did not receive the packet within two
21 weeks, he again contacted EMC on January 28, 2010, and was told
22 that the packet would be sent in two or three weeks, pending the
23 outcome of the February 9 hearing. On that same date, Lira
24 attempted, but was unable, to contact Fontanini and request that
25 she postpone the February 9 hearing so he could work out a loan
26 modification with EMC. However, the paralegal who spoke with
27 Lira stated that she would pass along Lira's request to
28 Fontanini. As of February 4, 2010, Lira had not heard from

1 Fontanini. Notably, Lira did not dispute that no equity existed
2 in the Property, or that he had not made any payments to Wells
3 Fargo on the note since October 31, 2008. Lira also never
4 disputed Wells Fargo's foreclosure rights under the note and deed
5 of trust.

6 The hearing on Wells Fargo's Stay Relief Motion proceeded on
7 February 9, 2010. Fontanini failed to appear and was not
8 responsive to the bankruptcy court's inquiry to her office.
9 Accordingly, the bankruptcy court (Judge Richard Neiter
10 presiding) continued the hearing to May 11, 2010, to allow Lira
11 the opportunity to work out a loan modification. The court
12 further determined that in the meantime Lira was not required to
13 make adequate protection payments to Wells Fargo.

14 While the Stay Relief Motion was pending, Lira received his
15 chapter 7 discharge on March 17, 2010.

16 On April 16, 2010, the bankruptcy court entered an order
17 rescheduling the continued hearing on the Stay Relief Motion to
18 May 12, 2010, and transferring the matter to the Hon. Deborah J.
19 Saltzman. The continued hearing on the Stay Relief Motion
20 proceeded before the court on May 12. Wells Fargo appeared
21 through new counsel, Balpreet Thiara, Esq. ("Thiara"). Thiara
22 stated that EMC needed an additional 30-60 days to review Lira's
23 loan modification documents, so Wells Fargo was willing to cancel
24 the pending sale of the Property set for May 23 and to postpone
25 any foreclosure activity for 60 days. Thiara also stated she
26 would provide Lira with contact information for the proper person
27 at EMC to discuss the loan modification, and that once the Stay
28 Relief Order was entered she would ask EMC to expedite review of

1 Lira's application. To address Lira's inquiry about what would
2 happen if no modification was concluded within 60 days, the court
3 explained that because Lira had already received his discharge,
4 the automatic stay was terminated as to him; thus, Wells Fargo
5 was free to schedule a new sale after the 60 days and Lira could
6 do nothing to stop it. Judge Saltzman asked Thiara to prepare
7 and submit an order granting the Stay Relief Motion providing
8 that Wells Fargo cancel the pending May 23 sale and that Lira be
9 given 60 days to work out a loan modification.⁵

10 On May 25, 2010, the bankruptcy court entered the Stay
11 Relief Order terminating the stay as to Trustee under sections
12 362(d)(1) and (d)(2); any relief as to Lira was moot because he
13 had received his discharge on March 17, 2010. As per the court's
14 oral ruling, the Stay Relief Order prohibited Wells Fargo from
15 conducting a foreclosure sale on the Property until after
16 July 23, 2010.⁶

17 On June 8, 2010, Lira filed a notice of objection to the
18 Stay Relief Order, which the bankruptcy court construed as a
19 timely motion to amend/alter judgment under Fed. R. Civ. P. 59,
20 as incorporated by Rule 9023 ("Rule 9023 Motion"). Although
21 difficult to decipher, it appears Lira thought that an order

22
23 ⁵ The court's May 12, 2010 tentative ruling on the Stay
Relief Motion states:

24 **As to Debtor: DENY as moot; discharge was entered on**
25 **3/17/10.**

26 As to Estate: GRANT under 11 U.S.C. § 362(d)(1) and (d)(2).
GRANT as binding despite conversion.

27 GRANT waiver of FRBP 4001(a)(3) stay (emphasis added).

28 ⁶ Lira's bankruptcy case was inadvertently closed on June 6,
2010. An order reopening the case was entered on June 10, 2010.
It remains open to date.

1 lifting the stay would not be entered until 60 days after the
2 May 12 hearing, i.e., after July 11, 2010, and thus he contended
3 that the bankruptcy court erroneously entered the Stay Relief
4 Order prematurely on May 25. Lira's Rule 9023 Motion was denied
5 on September 3, 2010. He timely appealed both the Stay Relief
6 Order and the Rule 9023 Order on September 17, 2010.

7 **II. JURISDICTION**

8 The bankruptcy court had jurisdiction under 28 U.S.C.
9 § 157(b)(2)(G). Orders granting or denying relief from the
10 automatic stay are final orders. Nat'l Env'tl. Waste Corp. v.
11 City of Riverside (In re Nat'l Env'tl. Waste Corp.), 129 F.3d
12 1052, 1054 (9th Cir. 1997). We have jurisdiction to determine
13 our jurisdiction. Hupp v. Educ. Credit Mgmt. Corp (In re Hupp),
14 383 B.R. 476, 478 (9th Cir. BAP 2008). We address our
15 jurisdiction under 28 U.S.C. § 158 below.

16 **III. ISSUES**

- 17 1. Is the appeal moot?
- 18 2. Does Lira have standing to prosecute the appeal?

19 **IV. STANDARDS OF REVIEW**

20 Our jurisdiction, including whether an appeal is moot, is a
21 question of law we address de novo. Menk v. Lapaqlia (In re
22 Menk), 241 B.R. 896, 903 (9th Cir. BAP 1999). Standing is a
23 legal issue also reviewed de novo. Kronemyer v. Am. Contractors
24 Indemn. Co. (In re Kronemyer), 405 B.R. 915, 919 (9th Cir. BAP
25 2009) "De novo review requires that we consider a matter anew,
26 as if it had not been heard before, and as if no decision had
27 been previously rendered." B-Real, LLC v. Chaussee (In re
28 Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008)(citing United

1 States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988)).

2 **V. DISCUSSION**

3 Lira, who appears pro se, fails to state the issues on
4 appeal, but we gather from his brief that he disputes the
5 bankruptcy court's decision to lift the automatic stay and its
6 subsequent denial of his Rule 9023 Motion. Lira requests that
7 the Panel vacate the Stay Relief Order, grant him time to secure
8 a loan modification, and that Wells Fargo be precluded from
9 foreclosing on the Property. While Lira's situation is
10 unfortunate, we agree with Wells Fargo that because this appeal
11 is moot and Lira lacks standing to prosecute it, we must DISMISS
12 for lack of jurisdiction.

13 **A. The appeal is moot.**

14 We do not have jurisdiction over appeals that are
15 constitutionally moot.⁷ Drummond v. Urban (In re Urban),
16 375 B.R. 882, 887 (9th Cir. BAP 2007). Constitutional mootness
17 derives from Article III of the U.S. Constitution, which provides
18 that the exercise of judicial power depends on the existence of a
19 case or controversy. Clear Channel Outdoor, Inc. v. Knupfer
20 (In re PW, LLC), 391 B.R. 25, 33 (9th Cir. BAP 2008)(citing
21 DeFunis v. Odegaard, 416 U.S. 312, 316 (1974)). In order for a
22 live case or controversy to exist, the parties must have an
23 actual interest in the outcome of the litigation. Id. An appeal
24

25 ⁷ Lira filed a motion to stay the Stay Relief Order pending
26 appeal on September 17, 2010. The matter was never set for
27 hearing, and the bankruptcy court has not ruled on it. If Wells
28 Fargo has since foreclosed on the Property and sold it to a third
party, this appeal would also be equitably moot. See, e.g.,
Clear Channel, 391 B.R. at 33-34. Neither party has stated in
their briefs the status of the Property.

1 is moot if events have occurred that prevent an appellate court
2 from granting effective relief. Focus Media, Inc. v. Nat'l
3 Broad. Co. Inc. (In re Focus Media, Inc.), 378 F.3d 916, 922 (9th
4 Cir. 2004); Ederel Sport, Inc. v. Gotcha Int'l L.P. (In re Gotcha
5 Int'l L.P.), 311 B.R. 250, 253-54 (9th Cir. BAP 2004).

6 Under section 541(a), upon filing a chapter 7 bankruptcy
7 petition an estate is created that comprises essentially all
8 property owned by the debtor. The filing of that petition also
9 creates an automatic stay under section 362(a), which enjoins
10 virtually all acts to create, perfect or enforce any lien against
11 property of the estate and/or to obtain possession of any
12 property of the estate. However, the stay under section 362(a)
13 is not permanent. Section 362(c) provides explicit time limits
14 governing the stay's duration:

15 (1) the stay of an act against property of the estate
16 under subsection (a) of this section continues until such
17 property is no longer property of the estate; and
18 (2) the stay of any other act under subsection (a) of
19 this section continues until the earliest of -

18
19 (C) if the case is a case under chapter 7 . . . the
20 time a discharge is granted or denied (emphasis
21 added).

20 Here, the automatic stay under section 362(a) expired as to
21 Lira and any interest he had, or may have had, in the Property
22 when he was granted a discharge on March 17, 2010, which was two
23 months prior to entry of the Stay Relief Order. Section
24 362(c)(2)(C). As a result, even if we were to reverse the Stay
25 Relief Order, we could not provide effective relief to Lira
26 because the stay had been dissolved as to him as a matter of law;
27 a reversal on appeal cannot alter that outcome. Further, since
28 the Stay Relief Order affected only Trustee and Lira's estate,

1 Lira has no actual interest in the outcome of the litigation.
2 Likewise, the same is true for the Rule 9023 Order; reversal of
3 that order would not accomplish the relief Lira seeks.

4 Accordingly, the appeal is moot, and we must DISMISS for
5 lack of jurisdiction.

6 **B. Lira lacks standing to prosecute the appeal.**

7 Even if the appeal were not moot, because Lira lacked
8 standing to oppose the Stay Relief Motion and, likewise, lacks
9 standing to challenge the Stay Relief Order and the Rule 9023
10 Order, we have no jurisdiction over this appeal.

11 We lack jurisdiction over appeals when the appellant lacks
12 standing. Paine v. Dickey (In re Paine), 250 B.R. 99, 104 (9th
13 Cir. BAP 2000). "Standing represents a jurisdictional
14 requirement which remains open to review at all stages of the
15 litigation." Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S.
16 249, 255 (1994). Whether an appellant is a person aggrieved is a
17 question of fact reviewed for clear error. McClellan Fed. Credit
18 Union v. Parker (In re Parker), 139 F.3d 668, 670 (9th Cir.
19 1998), overruled on other grounds by Dumont v. Ford Motor Credit
20 Co. (In re Dumont), 139 F.3d 1104 (9th Cir. 2009)(recognizing
21 BAPCPA superseded "ride through" provision of section
22 521(a)(2)(A)). If, however, the trial court did not make a
23 factual finding on the issue, and the relevant facts and evidence
24 are before this court, we may determine the issue ourselves. Id.

25 "To have standing to appeal a decision of the bankruptcy
26 court, an appellant must show that it is a 'person aggrieved' who
27 was 'directly and adversely affected pecuniarily by an order of
28 the bankruptcy court.'" Id. (quoting Fondiller v. Robertson

1 (In re Fondiller), 707 F.2d 441, 442-43 (9th Cir. 1983)). A
2 "person aggrieved" is someone whose interest is directly affected
3 by the bankruptcy court's order, either by a diminution in
4 property, an increase in the burdens on the property, or some
5 other detrimental effect on the rights of ownership inherent in
6 the property. Fondiller, 707 F.2d at 442-43. Generally, only a
7 bankruptcy trustee or a debtor-in-possession has standing on
8 appeal to pursue or defend the rights of the bankruptcy estate.
9 A chapter 7 debtor lacks standing on appeal unless: (1) the
10 debtor is pursuing or defending his or her own personal rights
11 (such as the right to a discharge); or (2) the bankruptcy estate
12 might be a surplus estate. Duckor Spradling & Metzger v. Baum
13 Trust (In re P.R.T.C., Inc.), 177 F.3d 774, 778 n.2 (9th Cir.
14 1999).

15 Here, only Trustee had standing to oppose Wells Fargo's Stay
16 Relief Motion. Since Lira had been granted a discharge, he was
17 not defending his own personal right; his estate is insolvent as
18 demonstrated by Trustee's Report of No Distribution; and his
19 bankruptcy case has not been closed. It is undisputed that no
20 equity existed in the Property to benefit the estate and, because
21 Lira is a chapter 7 liquidation debtor, no reorganization was in
22 process for which the Property could be necessary. Accordingly,
23 Trustee did not defend against the Stay Relief Motion, and the
24 Stay Relief Order was entered against Trustee. The bankruptcy
25 court correctly determined that any relief as to Lira was moot.

26 Therefore, because Lira is not the "person aggrieved" by the
27 Stay Relief Order, he lacks standing to appeal it, and we must
28 DISMISS for lack of jurisdiction.

1 **VI. CONCLUSION**

2 For the foregoing reasons, we DISMISS Lira's appeal for lack
3 of jurisdiction and do not reach the merits of whether the
4 bankruptcy court abused its discretion in granting Wells Fargo
5 relief from the automatic stay, or denying Lira's Rule 9023
6 Motion.

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