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NOT FOR PUBLICATION

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

1 In re:) BAP No. CC-11-1222-KiPaH
2)
3 JOSEPH ANTHONY ORTOLA,) Bk. No. 10-34218-MJ
4)
5 Debtor.)
6)
7)
8)
9 JOSEPH ANTHONY ORTOLA,)
10)
11 Appellant,)
12)
13 v.) M E M O R A N D U M¹
14)
15 DEYANIRA ORTOLA; ROD)
16 DANIELSON, Chapter 13 Trustee,)
17)
18 Appellee.)
19)

Argued and Submitted on November 17, 2011
at Pasadena, California

Filed - December 16, 2011

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

Honorable Meredith A. Jury, Bankruptcy Judge, Presiding

20 Appearances: Elizabeth A. Larocque, Esq. of Goe & Forsythe, LLP
21 argued for appellant, Joseph A. Ortola;
22 John F. Mansour, Esq. of the Mansour Law Group
argued for appellee, Deyanira Ortola.

23 Before: KIRSCHER, PAPPAS, and HOLLOWELL, Bankruptcy Judges.
24
25

26 _____
27 ¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
28 have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 Appellant, chapter 13² debtor Dr. Joseph Ortola ("Ortola"),
2 appeals a bankruptcy court order granting a motion for relief
3 from the automatic stay pursuant to § 362(c)(3)(A) ("Stay Relief
4 Order") filed by Ortola's former spouse, appellee Deyanira Ortola
5 ("Deyanira"). We AFFIRM. However, the order contains an error,
6 which counsel for Deyanira acknowledged at oral argument. The
7 order suggests that the stay in Ortola's second chapter 13 case
8 expired on July 30, 2010 - the date he filed the petition. This
9 is incorrect. The stay did not expire until 30 days after the
10 filing date - August 29, 2010.

11 **I. FACTUAL AND PROCEDURAL BACKGROUND**

12 Ortola filed his first chapter 13 bankruptcy case on May 19,
13 2010. The chapter 13 trustee moved to dismiss for Ortola's
14 failure to provide a copy of his 2009 tax return as required
15 under § 521(e)(2)(A)(I).³ At a June 30, 2010 hearing on the
16 matter, Ortola's counsel stated that he had advised Ortola to
17 provide the tax return to the trustee prior to the § 341
18 creditor's meeting, and he was unsure why Ortola had not
19

20
21 ² Unless otherwise indicated, all chapter, section and rule
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
23 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
24 The Federal Rules of Civil Procedure will be referred to as
25 "FRCP."

26 ³ Section 521(e)(2)(A)(i) provides in relevant part:

27 (A) The debtor shall provide--

28 (i) not later than 7 days before the date first set
for the first meeting of creditors, to the trustee a copy of
the Federal income tax return required under applicable law
. . . for the most recent tax year ending immediately before
the commencement of the case and for which a Federal income
tax return was filed.

1 complied. The court denied Ortola's request for a 10-day
2 extension and dismissed the case without prejudice. An order
3 dismissing Ortola's first bankruptcy case was entered on July 6,
4 2010.

5 Ortola filed his second chapter 13 bankruptcy case on
6 July 30, 2010. On October 12, 2010, Deyanira moved to confirm
7 termination of the automatic stay under § 362(c)(3) or,
8 alternatively, that no stay was in effect under §
9 362(c)(4)(A)(ii) ("Stay Relief Motion"). Deyanira sought stay
10 relief to proceed in state court with pending dissolution
11 proceedings commenced in 2001. According to Deyanira's moving
12 papers, Ortola had filed for divorce in 2001. The case was
13 bifurcated as to marital status and division of property in 2003,
14 and judgment for termination of the marriage was entered at that
15 time. Deyanira contended the stay should be terminated to allow
16 the state court to determine her interest in their community
17 property. She further contended the automatic stay terminated as
18 to Ortola and his estate 30 days after he filed his second
19 chapter 13 case because his first case had been dismissed on
20 July 6, 2010.

21 Ortola opposed the motion, contending that Deyanira was not
22 entitled to relief because she had failed to show why his prior
23 bankruptcy case had been dismissed. Ortola further contended
24 that Deyanira had not shown "cause" for a determination of her
25 interests in what was undividable community property - the
26 building in which Ortola operated his dental practice. In his
27 supporting declaration, Ortola stated that he had dismissed his
28 first chapter 13 case because he did not yet have all the

1 required documents.

2 In her reply, Deyanira explained that Ortola had failed to
3 comply with prior state court orders ordering the sale of their
4 community property, which were issued to satisfy Ortola's
5 domestic support obligations. According to Deyanira, the state
6 court was prepared to issue a ruling granting her exclusive right
7 to sell certain real properties at a July 23, 2010 hearing in the
8 dissolution proceeding, but the matter was continued to September
9 10, 2010. She asserted that Ortola filed his second chapter 13
10 case on July 30 to circumvent entry of the state court orders.
11 Deyanira asked the bankruptcy court to take judicial notice of
12 her recently-filed adversary proceeding against Ortola that
13 sought to have these and other debts declared nondischargeable.⁴

14 At a hearing on December 1, 2010, the bankruptcy court
15 denied the Stay Relief Motion without prejudice. Without
16 controlling Ninth Circuit authority on the matter, the court
17 reasoned that under In re Jumpp, a case from the First Circuit
18 BAP, the automatic stay under § 362(c)(3)(A) terminated only as
19 to the debtor and debtor's property, not property of the estate.
20 The court concluded that the issues Deyanira raised in her
21 motion, which were the same issues raised in her adversary
22 complaint, would be better addressed by the bankruptcy court.
23 The court further noted that any orders entered by the state
24 court after July 30, 2010, violated the automatic stay and were
25 void. No order was ever entered on the Stay Relief Motion.

26

27 ⁴ Because Deyanira untimely filed her reply brief just one
28 day prior to the hearing, the bankruptcy court reviewed it but
did not consider it on the merits.

1 Deyanira subsequently filed a motion seeking to dismiss
2 Ortola's second bankruptcy case for exceeding debt limitations
3 under § 109(e). A hearing on that matter was held on
4 February 28, 2011. After discussing the pending matters in the
5 dissolution proceeding, the bankruptcy court inquired:

6 COURT: Did you get the stay continued in this case . . .
7 Mr. Chien?

8

9 MR. CHIEN: There's no -- this was addressed at the
10 previous hearing, your Honor. There is an automatic stay
11 with respect to the court.

12 COURT: No there isn't. The recent Resnick [sic] case,
13 BAP case, which I will follow, said there is no automatic
14 stay as to the estate, or the debtor in the second case,
15 unless it has been extended within 30 days of the filing.
16 So there is no automatic stay, which means that the state
17 court probably didn't violate anything when it had a
18 hearing on September the 10th.

19

20 COUNSEL FOR DEYANIRA: I filed a motion to carve out
21 relief from stay. Your Honor ruled that there was a stay
22 in place at that time.

23 COURT: Yeah. That was before the Resnick [sic] case came
24 down. I've had to change my precedent.

25

26 COURT: [I]f there's an order out there by which I deny
27 the request for relief from automatic stay, I would sua
28 sponte, based on the now new, precedential law -- or I
recognize it as precedent anyway from the BAP, I would
sign an amended order that would make it clear to the
family court they could proceed. I think -- I mean, I
think the law compels me to do that. So, somebody can
send me an order on that.

25 Hr'g Tr. (Feb. 28, 2011) 15:10-11, 15:25-16:10, 18:14-19,
26 25:15-22.

27 On March 16, 2011, the bankruptcy court entered the Stay
28 Relief Order under § 362(c)(3)(A), effectively reversing its

1 December 1, 2010 ruling denying the Stay Relief Motion.
2 According to the Stay Relief Order, any actions or orders issued
3 by the state court after July 30, 2010, were determined not void
4 or a violation of the automatic stay.

5 Ortola, appearing pro se, moved to reconsider the Stay
6 Relief Order on March 28, 2011, thus tolling the appeal time.
7 See Rule 8002(b). Deyanira opposed the motion. On April 20,
8 2011, Ortola filed a proposed motion to continue the stay under
9 § 362(c)(3)(B). The bankruptcy court denied both motions at a
10 hearing on April 25, 2011. The court reasoned that even if it
11 had not raised its own motion to reconsider its ruling denying
12 the Stay Relief Motion, it would have granted such a motion had
13 anyone filed one after Reswick.

14 Although no order had yet been entered on the motion to
15 reconsider, Ortola filed his notice of appeal on May 6, 2011,
16 seeking to appeal the Stay Relief Order and the "order" denying
17 his motion to reconsider. Subsequently, on June 2, 2011, the
18 bankruptcy court entered an order denying the motion to
19 reconsider, thus curing Ortola's ineffective appeal of the Stay
20 Relief Order. See Rule 8002(b).

21 II. JURISDICTION

22 The bankruptcy court had jurisdiction under 28 U.S.C.
23 §§ 157(b)(2)(G) and 1334. We have jurisdiction under 28 U.S.C.
24 § 158.⁵

25
26 ⁵ This appeal may be moot. Ortola did not seek a stay
27 pending appeal and, according to the parties at oral argument,
28 the property at issue was sold to a bona fide third-party
purchaser on October 3, 2011. Nonetheless, neither party
contended this matter was moot and neither party filed any
(continued...)

1 **III. ISSUES**

2 1. Did the bankruptcy court abuse its discretion when it
3 reversed its prior ruling and granted the Stay Relief Motion
4 under § 362(c)(3)(A)?

5 2. Did the bankruptcy court abuse its discretion in denying the
6 motion to reconsider?

7 **IV. STANDARDS OF REVIEW**

8 We review the bankruptcy court's findings of fact for clear
9 error and its conclusions of law de novo. Hoopai v. Countrywide
10 Home Loans, Inc. (In re Hoopai), 369 B.R. 506, 509 (9th Cir. BAP
11 2007).

12 We review a bankruptcy court's order granting relief from
13 the automatic stay for an abuse of discretion. Arneson v.
14 Farmers Ins. Exch. (In re Arneson), 282 B.R. 883, 887 (9th Cir.
15 BAP 2002). Denial of a motion to amend or alter judgment under
16 FRCP 59(e) or for relief from judgment under FRCP 60(b) is also
17 reviewed for an abuse of discretion. Dixon v. Wallowa Cty.,
18 336 F.3d 1013, 1022 (9th Cir. 2003). To determine whether the
19 bankruptcy court abused its discretion, we conduct a two-step
20 inquiry: (1) we review de novo whether the bankruptcy court
21 "identified the correct legal rule to apply to the relief
22 requested" and (2) if it did, whether the bankruptcy court's
23 application of the legal standard was illogical, implausible or
24 "without support in inferences that may be drawn from the facts
25 in the record." United States v. Hinkson, 585 F.3d 1247, 1261-62

26
27 ⁵(...continued)
28 documentation confirming the sale. Therefore, we proceed to
address the merits of this appeal.

1 (9th Cir. 2009)(en banc).

2 V. DISCUSSION

3 **A. The bankruptcy court did not abuse its discretion in**
4 **granting the Stay Relief Motion under § 362(c)(3)(A).**

5 Ortola first contends that § 362(c)(3)(A) is inapplicable
6 because Deyanira failed to carry her burden to prove why his
7 first chapter 13 case was dismissed - i.e., that he filed it in
8 "bad faith." Contrary to Ortola's belief, no such requirement
9 for moving parties exists under § 362(c)(3)(A). The only time a
10 "good faith/bad faith" determination comes into play is when a
11 party in interest timely moves for a continuation of the
12 automatic stay in compliance with § 362(c)(3)(B), and these
13 statutes apply to the second case filed, not the first. No such
14 motion occurred here. Even if it had, Ortola's second chapter 13
15 case was presumptively filed in bad faith because, by his own
16 admission and his attorney's statement, Ortola's first case was
17 dismissed for his failure to timely provide the trustee with a
18 copy of his 2009 tax return. See § 362(c)(3)(C)(i)(II)(aa).⁶

19 Despite Ortola's argument to the contrary, § 362(c)(3)(A)
20 applies because he filed a second bankruptcy case within less
21 than one year from when his first bankruptcy case had been
22 dismissed for failing to comply with § 521(e)(2)(A)(I), and no
23 order had been timely entered to continue the stay under §
24 362(c)(3)(B). Section 362(c)(3)(A) provides:

25
26 ⁶ A substantial excuse for a failure to timely provide a
27 required document may defeat the presumption of bad faith under
28 § 362(c)(3)(C)(i)(II)(aa). However, inadvertence or negligence
by the debtor (as opposed to debtor's counsel) does not qualify
as a substantial excuse. Id.

1 (3) if a single or joint case is filed by or against
2 debtor who is an individual in a case under chapter 7,
3 11, or 13, and if a single or joint case of the debtor
4 was pending within the preceding 1-year period but was
5 dismissed, other than a case refiled under a chapter
6 other than chapter 7 after dismissal under section
7 707(b) -

8 (A) the stay under subsection (a) with respect to any
9 action taken with respect to a debt or property
10 securing such debt or with respect to any lease shall
11 terminate with respect to the debtor on the 30th day
12 after the filing of the later case" (emphasis
13 added).

14 Since this provision was added to the Bankruptcy Code as
15 part of the Bankruptcy Abuse Prevention and Consumer Protection
16 Act of 2005 ("BAPCPA"), courts have been divided on whether the
17 phrase "with respect to the debtor" means that on the 30th day
18 after the petition date the automatic stay terminates only with
19 respect to the debtor and the debtor's property, or whether that
20 also includes property of the estate. The parties agreed that
21 the subject community property was property of the estate.

22 In its initial decision to deny Deyanira's motion for relief
23 from stay on December 1, 2010, the bankruptcy court,
24 acknowledging the lack of any Ninth Circuit precedent on this
25 issue, relied upon Jumpp v. Chase Home Finance, LLC (In re
26 Jumpp), 356 B.R. 789 (1st Cir. BAP 2006), which adopted the
27 majority view that the stay terminates only with the respect to
28 the debtor and the debtor's property. On February 4, 2011, the
Panel issued Reswick v. Reswick (In re Reswick), 446 B.R. 362,
373 (9th Cir. BAP 2011),⁷ which adopted the minority view,

⁷ In re Reswick is on appeal with the Ninth Circuit (case
no. 11-60014). On November 16, 2011, the parties in In re

(continued...)

1 holding that § 362(c)(3)(A) terminates the automatic stay in its
2 entirety - including property of the estate - on the 30th day
3 after the petition date.

4 On February 28, 2011, at the hearing on Deyanira's § 109(e)
5 motion, the issue regarding the stay was raised. The bankruptcy
6 court recognized the BAP's decision in In re Reswick and decided
7 to reverse its prior ruling denying the Stay Relief Motion and
8 grant it under § 362(c)(3)(A). Ortola contends the court erred
9 in applying In re Reswick retroactively because it unfairly, and
10 without notice, denied him the right to pursue continuing the
11 stay under § 362(c)(3)(B). For the reasons stated below, we
12 disagree.

13 As courts of equity, bankruptcy courts have broad discretion
14 under FRCP 59(e) and 60(b), made applicable here by Rules 9023
15 and 9024, to sua sponte reconsider, vacate, or modify past orders
16 so long as no intervening rights have become vested in reliance
17 on the order. Meyer v. Lenox (In re Lenox), 902 F.2d 737, 739-40
18 (9th Cir. 1990). No party's intervening rights became vested in
19 relying on the bankruptcy court's initial decision to deny the
20 Stay Relief Motion because the decision was not a final order.
21 FRCP 59(e) refers to "judgments." "Judgment" is defined in FRCP
22 54(a) as "a decree and any order from which an appeal lies." In
23 other words - a judgment is a "final" order. FRCP 60(b) also
24 refers to relief from "final" orders. All that exists in this
25 case is the docket entry which states: "Hearing Held - [Stay
26

27 ⁷(...continued)
28 Reswick notified the court of a pending settlement. As a result,
the appeal has been stayed until December 30, 2011.

1 Relief Motion] denied without prejudice." Even under local rule,
2 this mere docket entry does not constitute entry of a judgment or
3 final order.⁸

4 Accordingly, the bankruptcy court's ruling denying the Stay
5 Relief Motion never became a final order. As such, the court had
6 inherent power to modify, alter, or vacate it. United States v.
7 Martin, 226 F.3d 1042, 1048-49 (9th Cir. 2000)(authority of
8 district courts to reconsider their own orders before they become
9 final absent some contrary rule or statute allows them to correct
10 decisions based on shifting precedent). The bankruptcy court was
11 free to recognize the holding of In re Reswick and reverse its
12 prior ruling denying the Stay Relief Motion.

13 We reject Ortola's argument that the court's application of
14 In re Reswick unfairly denied him the right to pursue continuing
15 the stay under § 362(c)(3)(B). Any motion under § 362(c)(3)(B)
16 must have been filed, heard, and ruled upon before expiration of
17 the 30-day period. In this case, that date was August 29, 2010.
18 Ortola's proposed motion to continue the stay, filed on April 20,
19 2011, was grossly untimely. Even if Ortola had timely sought to
20 continue the stay under § 362(c)(3)(B) and it was granted, the
21 bankruptcy court made it clear at the hearing on Ortola's motion
22 to reconsider that it would have lifted the stay if a motion had

24 ⁸ Local Rule 58-6 of the Central District of California
25 dictates that a notation in the civil docket of entry of a
26 memorandum of decision, an opinion of the court, or a minute
27 order of the clerk, does not constitute entry of judgment unless
28 specifically ordered by the judge. This rule does not exist in
the Central District's Local Bankruptcy Rules; however, under
LBR 1001-1(e)(1), a matter not specifically covered by the Local
Bankruptcy Rules may be determined by parallel reference or
analogy to the District Court Rules.

1 been filed after In re Reswick. Thus, the result is the same -
2 no stay exists as to the subject property.⁹

3 **B. Ortola waived his appeal of the reconsideration order.**

4 Even though in his notice of appeal Ortola appealed the
5 order denying his motion to reconsider, he failed to provide any
6 argument on the issue in his brief. An appellate court in this
7 circuit "will not review issues which are not argued specifically
8 and distinctly in a party's opening brief." City of Emeryville
9 v. Robinson, 621 F.3d 1251, 1261 (9th Cir. 2010). Even if we did
10 review the matter, we see no abuse of discretion by the
11 bankruptcy court in denying it.

12 **VI. CONCLUSION**

13 We conclude that the bankruptcy court did not abuse its
14 discretion in reversing its prior ruling denying the Stay Relief
15 Motion and granting it under § 362(c)(3)(A). Accordingly, we
16 AFFIRM, but we REMAND for a corrected order reflecting the stay
17 termination date of August 29, 2010.

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26 ⁹ We also reject Ortola's argument that § 362(c)(3)(A) does
27 not apply because his first case was "closed" not "dismissed."
28 This argument defies common sense. Furthermore, Ortola admitted
in his declaration in support of his opposition to the Stay
Relief Motion that he "dismissed" his first chapter 13 case.