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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NOT FOR PUBLICATION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

5	In re:)	BAP No. SC-10-1436-HKiMk
6	RICHARD PEREZ,)	Bk. No. 10-13174-LA7
7	Debtor.)	
8	_____)	
9	RICHARD PEREZ,)	
10	Appellant,)	
11	v.)	M E M O R A N D U M¹
12	JAMES L. KENNEDY, Trustee;)	
13	DEUTSCHE BANK NATIONAL TRUST)	
14	COMPANY,)	
	Appellees.)	
	_____)	

Argued and Submitted on October 20, 2011
at San Diego, California

Filed - December 1, 2011

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

Honorable Louise DeCarl Adler, Bankruptcy Judge, Presiding

Appearances: _____
Appellant Richard Perez argued pro se. Sara L. Markert of Houser & Allison, APC argued for Appellee, Deutsche Bank National Trust Company.

Before: HOLLOWELL, KIRSCHER 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 Chapter 7² debtor, Richard Perez (the Debtor), appeals the
2 bankruptcy court's order granting relief from stay to Deutsche
3 Bank National Trust Company, as Trustee for the Registered
4 Holders of New Century Home Equity Loan Trust, Series 2005-B,
5 Asset-Backed Pass Through Certificates (Deutsche Bank). We
6 DISMISS the appeal as moot.

7 **I. FACTS**

8 The Debtor executed an adjustable rate mortgage loan in
9 August 2005, with New Century Mortgage Corporation (New Century)
10 in the amount of \$344,250 (the Note). The Note was secured by a
11 deed of trust, in favor of New Century, on the Debtor's residence
12 in Santee, California (the Property). The deed of trust was
13 recorded on August 24, 2005. New Century assigned its interest
14 in the deed of trust to Deutsche Bank on November 1, 2005 (the
15 Assignment). The Assignment was recorded on September 24, 2008.
16 Ocwen Loan Servicing, LLC (Ocwen) services the Note for Deutsche
17 Bank.

18 The Debtor defaulted on the Note. Deutsche Bank scheduled a
19 foreclosure sale for July 27, 2010. That same day, the Debtor
20 filed a chapter 7 bankruptcy petition. James Kennedy was
21 appointed as the bankruptcy trustee (the Trustee). On his
22 bankruptcy Schedule A, the Debtor listed the Property as having a
23 value of \$198,980. The Debtor named Ocwen on Schedule D as a
24 holder of a \$362,364 secured claim against the Property.

25
26 ² Unless otherwise specified, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

1 On August 23, 2010, the Trustee filed a Report of No
2 Distribution, finding that there was no property available for
3 distribution from the estate over and above that exempted by the
4 Debtor.³ In the report, the Trustee stated that the estate had
5 been fully administered and requested relief from any further
6 duties.

7 On September 22, 2010, Deutsche Bank filed a motion for
8 relief from stay against the Debtor and the Trustee in order to
9 proceed with foreclosure proceedings on the Property (Stay Relief
10 Motion). Deutsche Bank sought termination of the stay for cause
11 and because it contended that the Debtor had no equity in the
12 Property and the Property was unnecessary to an effective
13 reorganization. In support of the Stay Relief Motion, Deutsche
14 Bank attached employee declarations, a copy of the Note, deed of
15 trust, and Assignment.

16 On October 15, 2010, the Debtor filed a 62-page response to
17 the Stay Relief Motion (the Opposition). In the Opposition, the
18 Debtor argued that the Stay Relief Motion should be denied
19 "because the total amount of arrearages is inaccurate and
20 fraudulent based on TILA and [RESPA] violations."⁴ The Debtor
21

22 ³ We have taken judicial notice of various documents filed
23 with the bankruptcy court through the electronic docketing
24 system. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert),
25 887 F.2d 955, 957-58 (9th Cir. 1988); Atwood v. Chase Manhattan
26 Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP
2003).

27 ⁴ The Truth In Lending Act, 15 U.S.C. § 1601 et seq., and,
28 the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et
seq.

1 contended that Deutsche Bank was not entitled to enforce the debt
2 and foreclose on the Property because it had violated the
3 automatic stay, TILA, and RESPA, by assessing various inspection
4 fees, late fees, and attorney's fees, as well as because it
5 engaged in predatory lending practices and fraudulent conduct.
6 The Debtor did not, however, dispute that he was in default on
7 his payment obligations under the Note or that there was no
8 equity in the Property.⁵ The Trustee did not file an opposition
9 to the Stay Relief Motion.

10 A hearing on the Stay Relief Motion was held on October 21,
11 2010. At the hearing, Deutsche Bank appeared through counsel,
12 and the Debtor appeared pro se. The Trustee did not participate.
13 The Debtor asserted that Deutsche Bank could not seek relief
14 because the original noteholder had not declared a default on the
15 Note and that the fees and arrearages assessed by Deutsche Bank
16 were "illegal based on criminal activity." Hr'g Tr. (Oct. 21,
17 2010) at 6:12-20.

18 The bankruptcy court informed the Debtor that because stay
19 relief hearings were summary in nature, it was determining only
20 whether there was equity in the Property for the benefit of the
21 estate, and that the Debtor could raise in state court all his
22 other claims relating to the Note. Based on the Debtor's own
23 admission that there was no equity in the Property, the
24 bankruptcy court entered a Civil Minute Order granting the Stay
25 Relief Motion.

26
27 ⁵ According to the Debtor's scheduled value of the Property,
28 even without any assessment of fees and arrearages, Deutsche
Bank's lien exceeded the value of the Property by over \$150,000.

1 On October 25, 2010, the Debtor received his chapter 7
2 discharge. His case was inadvertently closed by the bankruptcy
3 court clerk's office on October 28, 2010, while the order
4 granting the Stay Relief Motion was still pending. It was
5 administratively reopened to correct the error on November 5,
6 2010. The final order granting the Stay Relief Motion was
7 entered on November 10, 2010 (the Stay Order). The Debtor
8 appealed.⁶

9 The Debtor did not request or obtain a stay pending appeal
10 of the Stay Order. Deutsche Bank conducted a foreclosure sale on
11 the Property on December 16, 2010. The Trustee's Deed Upon Sale
12 was recorded on February 2, 2011.

13 II. JURISDICTION

14 The bankruptcy court had jurisdiction under 28 U.S.C.
15 § 157(b)(1) and (b)(2)(G). We address our jurisdiction under
16 28 U.S.C. § 158 below.

17 III. ISSUE

18 Is the appeal moot? If it is not moot, did the bankruptcy
19 court abuse its discretion in entering the Stay Order?

20 IV. STANDARDS OF REVIEW

21 We lack jurisdiction to hear moot appeals. I.R.S. v.
22 Pattullo (In re Pattullo), 271 F.3d 898, 901 (9th Cir. 2001). If
23 an appeal becomes moot while it is pending before us, we must
24 dismiss it. Id.

27 ⁶ The Debtor prematurely filed his notice of appeal on
28 November 5, 2010. See Rule 8002(a).

1 The bankruptcy court's decision to grant a motion for relief
2 from stay is reviewed for an abuse of discretion. Gruntz v.
3 County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1084 n.9
4 (9th Cir. 2000); Veal v. Am. Home Mortg. Servicing, Inc. (In re
5 Veal), 450 B.R. 897, 915 (9th Cir. BAP 2011).

6 We apply a two-part test to determine whether the bankruptcy
7 court abused its discretion. United States v. Hinkson, 585 F.3d
8 1247, 1261-62 (9th Cir. 2009) (en banc). First, we consider de
9 novo whether the bankruptcy court applied the correct legal
10 standard to the relief requested. Id. Then, we review the
11 bankruptcy court's fact findings for clear error. Id. at 1262 &
12 n.20. We must affirm the bankruptcy court's fact findings unless
13 we conclude that they are illogical, implausible, or without
14 support in inferences that may be drawn from the facts in the
15 record. Id.

16 V. DISCUSSION

17 Constitutional mootness is derived from Article III of the
18 U.S. Constitution, which provides that the exercise of judicial
19 power depends on the existence of a case or controversy. DeFunis
20 v. Odegaard, 416 U.S. 312, 316 (1974); Clear Channel Outdoor,
21 Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 33 (9th Cir. BAP
22 2008). The mootness doctrine applies when events occur during
23 the pendency of the appeal that make it impossible for the
24 appellate court to grant effective relief. Id. The determining
25 issue is "whether there exists a 'present controversy as to which
26 effective relief can be granted.'" People of Village of Gambell
27 v. Babbitt, 999 F.2d 403, 406 (9th Cir. 1993) (quoting NW Env'tl.
28 v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988)). If no effective

1 relief is possible, we must dismiss for lack of jurisdiction.

2 United States v. Arkison (In re Cascade Rds., Inc.), 34 F.3d 756,
3 759 (9th Cir. 1994).

4 Our review of the record leads us to conclude that we cannot
5 provide effective relief to the Debtor even if we were to reverse
6 the Stay Order because the estate has no interest in the Property
7 and the stay has been dissolved as a matter of law as to property
8 of the estate and the Debtor.

9 When a chapter 7 bankruptcy petition is filed, an estate is
10 created that comprises essentially all property owned by the
11 debtor. 11 U.S.C. § 541(a); Fitzsimmons v. Walsh (In re
12 Fitzsimmons), 725 F.2d 1208, 1210 (9th Cir. 1984); Towers v. Wu
13 (In re Wu), 173 B.R. 411, 413 (9th Cir. BAP 1994). The filing of
14 a petition under title 11 also creates an automatic stay under
15 § 362(a), which operates to enjoin, among other things,

16 (3) any act to obtain possession of property of
17 the estate or of property from the estate;

18 (4) any act to create, perfect, or enforce any
19 lien against property of the estate;

20 (5) any act to create, perfect, or enforce against
21 property of the debtor any lien to the extent that such
22 lien secures a claim that arose before the commencement
23 of the case.

24 11 U.S.C. § 362(a)(3),(4) and (5).

25 However, the stay under § 362 is not permanent. There are
26 explicit time limits governing the duration of the stay:

27 (1) the stay of an act against property of the
28 estate under subsection (a) of this section continues
until such property is no longer property of the
estate; and

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

- 1 (A) the time the case is closed;
2 (B) the time the case is dismissed; or
3 (C) if the case is a case under chapter 7 . . .
the time a discharge is granted or denied.

4 11 U.S.C. § 362(c)(1), (2); see also Severo v. Comm'r of Internal
5 Revenue, 586 F.3d 1213, 1216 (9th Cir. 2009).

6 The Debtor did not seek or obtain a stay pending appeal from
7 the bankruptcy court or from the Bankruptcy Appellate Panel.

8 Without a stay in place, Deutsche Bank has since concluded
9 foreclosure proceedings against the Property. Additionally, the
10 stay has terminated. The stay is terminated under §§ 362(a)(3)
11 and (a)(4) when the property is no longer property of the estate.
12 Property is no longer property of the estate after the property
13 is sold, abandoned, or returned to the debtor as exempt property.

14 3 COLLIER ON BANKRUPTCY, ¶ 362.06 (Alan N. Resnick & Henry J.
15 Sommer, eds., 16th rev. ed. 2011).

16 On August 23, 2010, the Trustee filed a Report of No
17 Distribution indicating that there were no assets to benefit the
18 estate and the estate was fully administered and could be closed.
19 Although filing a report of no distribution may demonstrate a
20 trustee's intent to abandon an asset, the report in and of itself
21 does not result in abandonment unless the bankruptcy court closes
22 the case. Schwaber v. Reed, 940 F.2d 1317, 1321 (9th Cir. 1991);
23 11 U.S.C. § 554(c). Since the Debtor's bankruptcy case has not
24 yet been closed, the Property has not been technically abandoned.
25 Id. However, it is undisputed that there is no equity in the
26 Property to benefit the estate; therefore, the Trustee did not

1 defend against the Stay Relief Motion.⁷ Consequently, the stay
2 terminated as to the estate when the Stay Order was entered
3 against the Trustee.

4 Moreover, any protection of the Debtor's interest in the
5 Property under § 362(a)(5) has also terminated. The stay
6 dissolved as to "property of the debtor" as a matter of law when
7 the Debtor received his discharge on October 25, 2010. A
8 reversal on appeal cannot alter that outcome.

9 Therefore, any possibility that we could provide effective
10 relief to the Debtor if we were to reverse the Stay Order has
11 been overtaken by the dissolution of the stay as a matter of law.
12 The Debtor has received his discharge and the Property is no
13 longer property of the estate and has been sold. The appeal is
14 moot. Accordingly, we dismiss the appeal for lack of
15 jurisdiction and do not reach the merits of whether the
16 bankruptcy court erred in determining that Deutsche Bank was
17 entitled to relief from stay.

18 VI. CONCLUSION

19 For the foregoing reasons, we DISMISS the appeal as moot.
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25 ⁷ Equity, for purposes of § 362(d)(2)(A), is the difference
26 between the value of the property and all encumbrances on it.
27 Sun Valley Newspapers, Inc. v. Sun World Corp. (In re Sun Valley
28 Newspapers, Inc.), 171 B.R. 71, 75 (9th Cir. BAP 1994) (citing
Stewart v. Gurley, 745 F.2d 1194, 1196 (9th Cir. 1984)).