

OCT 22 2013

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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NOT FOR PUBLICATION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. | CC-12-1418-TaPaKi |
| 6 | NANCY EUW-JONG SITANGGANG, |) | Bk. No. | RS 12-20905-MH |
| 7 | Debtor. |) | Adv. No. | RS 12-01168-MH |
| 8 | _____ |) | | |
| 9 | NANCY EUW-JONG SITANGGANG, |) | | |
| 10 | Appellant, |) | | |
| 11 | v. |) | MEMORANDUM* | |
| 12 | NATHAN THOMAS MCINTYRE, dba |) | | |
| 13 | McIntyre Law Group, ISAOA; |) | | |
| 14 | CLIFFHAVEN MAINTENANCE |) | | |
| 15 | CORPORATION, |) | | |
| 16 | Appellees. |) | | |
| 17 | _____ |) | | |

Submitted Without Oral Argument**
on June 18, 2013

Filed - October 22, 2013

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

Honorable Mark D. Houle, Bankruptcy Judge, Presiding

Appearances: Appellant Nancy Euw-Jong Sittanggang, pro se, on
brief; David Brian Lally, Esq. on brief, for
Appellee Cliffhaven Maintenance Corporation

Before: TAYLOR, PAPPAS, and KIRSCHER, Bankruptcy Judges.

* 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.

** In an order entered on February 1, 2013, the Panel
determined that this matter was suitable for disposition without
oral argument. Fed. R. Bankr. P. 8012; 9th Cir. BAP Rule 8012-1.

1 case.

2 On May 14, 2012, she initiated an adversary proceeding
3 against her homeowner's association, Cliffhaven Maintenance
4 Corporation ("Cliffhaven"), and its attorney, Nathan Thomas
5 McIntyre, ("McIntyre" and, collectively, "Defendants"). In her
6 complaint, Sitanggang alleged two causes of action, the FDCPA
7 Claims and a request for declaratory relief related to the
8 Property (the "Property Claim"). Under the Property Claim,
9 Sitanggang sought a determination that the Defendants² had no
10 security interest in the Property and, thus, no right to complete
11 a foreclosure. In her prayer for relief, she requested an
12 injunction. Under the FDCPA Claims, Sitanggang sought damages
13 based on multiple alleged violations of the FDCPA by both
14 Defendants.

15 Sitanggang did not timely file schedules, statements, and a
16 chapter 13 plan. As a result, the bankruptcy court dismissed her
17 case on May 23, 2012, nine days after she filed her adversary
18 proceeding. The Defendants did not answer timely in the
19 adversary proceeding. On the same date, Sittanggang obtained
20 entry of default, and they tardily answered.

21 **Dismissal of the Adversary**

22 The bankruptcy court held a status conference in the
23 adversary proceeding well after dismissal of the bankruptcy case.
24 While it acknowledged that both sides requested determinations
25

26 _____

27 ² The complaint is internally inconsistent with respect to
28 the parties against whom Sitanggang seeks the various forms of
relief.

1 based on alleged procedural defects,³ it declined to consider
2 these issues as it also declined to exercise jurisdiction over
3 the adversary proceeding. The bankruptcy court based this
4 decision on the prior dismissal of the bankruptcy case, the fact
5 that the complaint contained only non-bankruptcy claims, and the
6 fact that the adversary proceeding had just commenced such that
7 discovery had not started. The bankruptcy court concluded that
8 the "efficiencies of all parties are best served by having this
9 heard either in state court or a federal district court." Hr'g
10 Tr. (July 25, 2012) at 3:14-15. The bankruptcy court, therefore,
11 dismissed the complaint without prejudice.

12 **Motion for Reconsideration**

13 On August 1, 2012, Sitanggang filed a motion for
14 reconsideration under Rule 9024 and Civil Rule 60(b)(3). She
15 argued only that the bankruptcy court erroneously based dismissal
16 on McIntyre's false representation that she filed the adversary
17 proceeding after the dismissal of the underlying bankruptcy case.
18 The bankruptcy court ruled without a hearing and entered both an
19 Order Denying Motion for Reconsideration ("Initial
20 Reconsideration Order") and an Amended Order Denying Motion for
21 Reconsideration ("Amended Reconsideration Order").⁴ In the
22

23 ³ Sitanggang argued that she did not receive service of the
24 Defendants' untimely answer. McIntyre erroneously argued that
25 she filed her adversary proceeding after dismissal of the
bankruptcy case. In so doing, he apparently confused the current
case with the previous case where a dismissal order also issued.

26 ⁴ The Initial Reconsideration Order erroneously recited that
27 the alleged misrepresentation took place at a hearing on
28 Defendants' motion to dismiss. The Amended Reconsideration Order
correctly recites that the alleged misrepresentation took place
at the status conference.

1 Amended Reconsideration Order, the bankruptcy court explained
2 that McIntyre's misstatement was not a basis for its decision.
3 The bankruptcy court held that Sitanggang did not "allege
4 sufficient grounds to warrant reconsideration pursuant to
5 rule 60(b) of the Federal Rules of Civil Procedure." Adv. Pro.
6 dkt. #40 at 2:13-15. Sitanggang filed a timely Notice of Appeal.

7 JURISDICTION

8 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
9 §§ 1334 and 157(b)(1). Subject to the mootness discussion below,
10 we have jurisdiction under 28 U.S.C. § 158.

11 Mootness

12 We have an independent duty to determine whether an appeal
13 is moot within the meaning of Article III's case or controversy
14 requirement. See United States v. Golden Valley Elec. Ass'n,
15 689 F.3d 1108, 1112 (9th Cir. 2012); Hunt v. Imperial Merch.
16 Servs., Inc., 560 F.3d 1137, 1141 (9th Cir. 2009). As an
17 appellate court, our jurisdiction is limited to actual cases and
18 controversies. Motor Vehicle Cas. Co. v. Thorpe Insulation Co.
19 (In re Thorpe Insulation Co.), 671 F.3d 980, 990 (9th Cir. 2012)
20 (citing U.S. Const. art. III, § 2, cl. 2.). "The test for
21 mootness of an appeal is whether the appellate court can give the
22 appellant any effective relief in the event that it decides the
23 matter on the merits in his favor. If it can grant such relief,
24 the matter is not moot." Id. (internal quotation and citations
25 omitted.)

26 Prior to conclusion of this appeal the bankruptcy court
27 dismissed the underlying bankruptcy case and closed it. Case
28 dismissal and closure did not automatically divest the bankruptcy

1 2. Did the bankruptcy court abuse its discretion by denying the
2 motion for reconsideration?

3 STANDARD OF REVIEW

4 We review a bankruptcy court's decision not to exercise
5 jurisdiction over an adversary proceeding following the dismissal
6 of the underlying bankruptcy case for an abuse of discretion.
7 Davis v. C.G. Courington (In re Davis), 177 B.R. 907, 910 (9th
8 Cir. BAP 1995). Likewise, we review the bankruptcy court's sua
9 sponte dismissal of an action for an abuse of discretion. Snell
10 v. Cleveland, Inc., 316 F.3d 822, 825 (9th Cir. 2002). And, the
11 denial of a motion for reconsideration is also reviewed for abuse
12 of discretion. Ta Chong Bank Ltd. v. Hitachi High Techs. Am.,
13 Inc., 610 F.3d 1063, 1066 (9th Cir. 2010).

14 Under the abuse of discretion standard, we apply a two-part
15 test. First, we consider de novo whether the bankruptcy court
16 identified the correct law to consider in light of the relief
17 requested. United States v. Hinkson, 585 F.3d 1247, 1262
18 (2009)(en banc). Second, we review the bankruptcy court's
19 factual findings, and its application of those findings to the
20 relevant law, to determine whether they were either
21 "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in
22 inferences that may be drawn from the facts in the record.'" Id.
23 (quoting Anderson v. City of Bessemer City, N.C., 470 U.S. 564,
24 577 (1985)).

25 DISCUSSION

26 In addressing the issues raised in Sitanggang's appellate
27 brief, we are aware of our duty to interpret her brief liberally
28 and to ensure that her substantive contentions are not deemed

1 waived simply as a result of her failure to comply with mere
2 technical procedural requirements or her inability to state her
3 contentions using formal legal terminology. See Balistreri v.
4 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). And,
5 in keeping with this duty, we conclude that her arguments
6 challenging the Dismissal Order all boil down to a single
7 assertion: that sua sponte dismissal was not fair to her under
8 the circumstances of the case. Based on our mootness
9 determination above, we consider this argument only in connection
10 with the FDCPA Claims.

11 **Retention of jurisdiction**

12 The Ninth Circuit recognizes the general rule that "the
13 dismissal or closing of a bankruptcy case should result in the
14 dismissal of related proceedings." See In re Carraher, 971 F.2d
15 at 328. Notwithstanding this general rule, the Bankruptcy Code
16 does not mandate dismissal. See 11 U.S.C. § 349; In re Carraher,
17 971 F.2d at 328; Linkway Inv. Co., Inc. v. Olsen (Casamont Inv.,
18 Ltd.), 196 B.R. 517, 525 (9th Cir. BAP 1996) ("Discretion is given
19 the bankruptcy court to retain jurisdiction when judicial
20 economy, fairness, convenience and comity favor retention").

21 Here, the bankruptcy court exercised its discretion to
22 decline retention of jurisdiction because the complaint contained
23 only non-bankruptcy claims, discovery had not commenced, and the
24 bankruptcy court concluded that it would be more efficient for
25 the claims to proceed in another court. The bankruptcy court
26 verbally dismissed the adversary proceeding without prejudice and
27 allowed Sitanggang to pursue her claims in another court
28 immediately. In the exercise of its discretion not to retain

1 jurisdiction, the bankruptcy court appropriately considered the
2 correct factors. See id. And, we conclude that the bankruptcy
3 court's finding that it would be more efficient and otherwise
4 appropriate for Sitanggang to pursue her claims in another forum
5 is not illogical or implausible and is firmly based on inferences
6 from the record.

7 On appeal, Sitanggang argues first that the bankruptcy court
8 should not have dismissed the adversary proceeding in reliance on
9 McIntyre's false statement that she filed the adversary
10 proceeding after dismissal of her bankruptcy case. The
11 bankruptcy court made clear repeatedly, however, that it did not
12 rely on McIntyre's assertion when determining that dismissal was
13 appropriate. This argument does not support reversal.

14 She also argues that dismissal was inappropriate where she
15 obtained entry of default against both Defendants and contends
16 that the bankruptcy court should have stricken the late-filed
17 answer sua sponte. The record evidences the bankruptcy court's
18 awareness that the Defendants answered on the default entry date,
19 and at the status conference the Defendants expressed their
20 intent to seek default set aside. Further, default prove-up must
21 follow the ministerial entry of default. In short, Sitanggang's
22 progress in the case was not significant, and the bankruptcy
23 court did not err when it implicitly balanced default entry
24 against the obstacles to judgment, default or otherwise, and the
25 lack of any discovery or other progress towards resolution on the
26 merits and concluded that dismissal without prejudice was
27 appropriate.

28 Further, the bankruptcy court had no motion before it

1 seeking to strike the answer, and Sitanggang fails to present any
2 argument as to how the bankruptcy court erred by not sua sponte
3 striking the answer. Thus, we consider this portion of her
4 argument waived. City of Emeryville v. Robinson, 621 F.3d 1251,
5 1261 (9th Cir. 2010) (appellate courts in this circuit "will not
6 review issues which are not argued specifically and distinctly in
7 a party's opening brief.").

8 Sitanggang finally contends that she should have received
9 leave to amend the complaint to include "bankruptcy claims."
10 This argument does not support reversal. When the bankruptcy
11 court dismissed the complaint, Sitanggang's bankruptcy case was
12 dismissed, and she, therefore, had no "bankruptcy claims" to
13 include in an amendment to the complaint.

14 The bankruptcy court correctly identified the relevant law
15 and its determination not to retain jurisdiction is not illogical
16 or implausible based on the record here; we conclude that the
17 bankruptcy court did not abuse its discretion when it declined to
18 retain jurisdiction and dismissed without prejudice.

19 **Sua sponte dismissal**

20 Sitanggang's stated issues on appeal emphasize that the
21 dismissal was "sua sponte;" however, she does not specifically or
22 distinctly argue that the bankruptcy court erred by making its
23 decision on its own motion. Given the centrality of this
24 argument to her statement of issues, we consider this point, but
25 conclude that the bankruptcy court did not abuse its discretion
26 by so doing.

27 The bankruptcy court's decision involved assessment of its
28 subject matter jurisdiction. A bankruptcy court "may raise the

1 question of subject matter jurisdiction, sua sponte, at any time
2 during the pendency of the action." Snell v. Cleveland, Inc.,
3 316 F.3d 822, 826 (9th Cir. 2002); Civil Rule 12(h)(3).⁵ And, if
4 subject matter were lacking, a sua sponte decision to dismiss
5 would be appropriate. Although the bankruptcy court did not find
6 subject matter jurisdiction lacking, it decided not to retain
7 jurisdiction based on its well-reasoned consideration of the
8 state of the litigation. Based on our review of the record, and
9 in light of Sitanggang's failure to specify any legal authority
10 or argument that the bankruptcy court abused its discretion, we
11 conclude that the bankruptcy court did not abuse its discretion
12 by ruling on a sua sponte basis.

13 **Motion for reconsideration**

14 Sitanggang based her motion for reconsideration on Rule 9024
15 and in particular Civil Rule 60(b)(3). "A 'motion for
16 reconsideration' is treated as a motion to alter or amend
17 judgment under Federal Rule of Civil Procedure 59(e) if it is
18 filed within ten days of entry of judgment. Otherwise, it is
19 treated as a Rule 60(b) motion for relief from a judgment or
20 order." Am. Ironworks & Erectors Inc. v. N. Am. Constr. Corp.,
21 248 F.3d 892, 898-99 (9th Cir. 2001) (citation omitted).⁶ Here,
22 Sitanggang filed her motion for reconsideration within seven days
23

24 ⁵ Civil Rule 12(h)(3), incorporated under Rule 7012,
25 provides: "Whenever it appears by suggestion of the parties or
26 otherwise that the court lacks jurisdiction of the subject
matter, the court shall dismiss the action."

27 ⁶ Rule 9023, incorporating Civil Rule 59, was amended and
28 now requires a motion under Civil Rule 59(e) to be filed no later
than 14 days after entry of judgment.

1 of the bankruptcy court's oral ruling on July 25, 2012, and well
2 before entry of the Dismissal Order on August 31, 2012.
3 Therefore, Sitanggang's motion for reconsideration required
4 consideration under Civil Rule 59. The bankruptcy court,
5 however, reviewed the motion for reconsideration under Civil
6 Rule 60(b)(3) as requested by Sitanggang.

7 Sitanggang argued solely that the bankruptcy court
8 erroneously based its decision on McIntyre's erroneous statement
9 regarding case dismissal. The record clearly establishes that
10 this misstatement was not a basis for the bankruptcy court's
11 decision. Thus, Sitanggang failed to adequately support
12 reconsideration under either Rule 60 or 59, and the bankruptcy
13 court did not abuse its discretion by denying it. Any error
14 attributable to evaluation of the motion for reconsideration
15 under Civil Rule 60 was harmless.

16 **CONCLUSION**

17 For the reasons discussed above, we DISMISS the appeal as to
18 the Property Claim, and otherwise AFFIRM.