

DEC 13 2013

NOT FOR PUBLICATION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

In re:) BAP No. WW-13-1170-TaKuD
)
 LORETTA J. BROWN,) Bk. No. 10-22724-TWD
)
 Debtor.) Adv. No. 11-01056-TWD
)
 LORETTA J. BROWN; MICHAEL B.)
 McCARTY, Chapter 7 Trustee,)
)
 Appellants,)
)
 v.) MEMORANDUM*
)
 BANK OF AMERICA, N.A., as)
 successor by merger to BAC)
 Home Loans Servicing, LP,)
 RECONTRUST COMPANY, N.A.;)
 MORTGAGE ELECTRONIC)
 REGISTRATION SYSTEMS, INC.,)
)
 Appellees.)

Argued and Submitted on October 17, 2013
at Seattle, Washington

Filed - December 13, 2013

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Timothy W. Dore, Bankruptcy Judge, Presiding

Appearances: Richard Llewelyn Jones, Esq. for Appellants
 Loretta J. Brown and Michael B. McCarty, Chapter 7
 Trustee; Steven Andrew Ellis, Esq. of Goodwin
 Procter LLP for Appellees Bank of America, N.A.,
 successor by merger to BAC Home Loans Servicing,
 LP, ReconTrust Company, N.A., and Mortgage
 Electronic Registration Systems, Inc.

*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 Before: TAYLOR, KURTZ, and DUNN, Bankruptcy Judges.
2

3 **INTRODUCTION**

4 Debtor Loretta Brown ("Debtor") and her chapter 7¹ trustee
5 Michael B. McCarty ("McCarty") seek appellate review of an order
6 denying a motion under Civil Rule 60(b) that the bankruptcy court
7 entered while the appeal from the final judgment in the same
8 adversary proceeding was pending before this Panel.² The
9 bankruptcy court correctly found that it lacked jurisdiction to
10 consider the motion, the order thereon is non-appealable, and
11 thus we DISMISS this appeal.

12 **PROCEDURAL AND FACTUAL BACKGROUND³**

13 Debtor filed a voluntary bankruptcy petition under chapter 7
14 and soon thereafter filed a complaint initiating adversary
15 proceeding 11-01056 ("Adversary Proceeding") against multiple
16 defendants ("Defendants") seeking a temporary restraining order
17 and permanent injunction, quiet title, and damages under various
18 legal theories, including wrongful foreclosure, the Consumer
19 Protection Act ("CPA"), the Fair Debt Collection Practices Act
20 ("FDCPA"), and malicious prosecution. Debtor and McCarty,
21

22 ¹ Unless specified otherwise, all chapter and section
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
24 "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037, and all "Civil Rule" references are
to the Federal Rules of Civil Procedure.

25 ² The notice of appeal in related BAP No. 12-1534 was filed
26 October 18, 2012. BAP No. 12-1534 was argued before this Panel
on October 17, 2013, along with this appeal.

27 ³ A fuller version of the procedural and factual background
28 is contained in the Memorandum disposition of BAP No. 12-1534.
We present here only those facts directly relevant to the
disposition of this appeal.

1 together, subsequently filed an amended complaint that
2 substantially mirrored the initially filed complaint.⁴ In
3 general, Debtor and McCarty (hereafter "Appellants") alleged that
4 Defendants violated the CPA by promulgating, recording and
5 relying on documents they should have known were false, including
6 an assignment of deed of trust executed by Mortgage Electronic
7 Registration Systems, Inc. ("MERS"), an appointment of successor
8 trustee, and a notice of default.

9 Defendants brought a motion to dismiss the first amended
10 complaint pursuant to Civil Rule 12(b)(6) ("First Dismissal
11 Motion"). The bankruptcy court granted the First Dismissal
12 Motion by order entered on January 10, 2012 ("January 10, 2012
13 Order").⁵ The bankruptcy court dismissed the wrongful
14 foreclosure claim with prejudice to the extent that it sought
15 monetary damages or a permanent injunction against the
16 defendants. It dismissed all remaining claims without prejudice.

17 Appellants filed a second amended complaint, which the
18 bankruptcy court ultimately resolved in favor of the Defendants
19 in its order entered October 2, 2012 ("Final Judgment"), which is
20
21

22 ⁴ As in the initially filed complaint, the caption in the
23 first amended complaint lists not only the claims contained
24 therein but also breach of contract, libel/defamation of title,
25 and violation of the Real Estate Settlement Procedures Act,
U.S.C. § 2601, none of which are contained in the first amended
complaint.

26 ⁵ The bankruptcy court stated its reasons for granting the
27 First Dismissal Motion orally on the record on December 22, 2011.
28 During its oral ruling, the bankruptcy court stated that the
Appellants withdrew their claim for malicious prosecution,
requiring the bankruptcy court to rule only as to the remaining
four causes of action.

1 the subject of BAP No. 12-1534.⁶ Appellants filed their notice
2 of appeal from the Final Judgment on October 18, 2012 and
3 included as an issue on appeal the bankruptcy court's dismissal
4 of Appellants' wrongful foreclosure claim.⁷

5 On March 8, 2013 and without obtaining remand from the BAP,
6 Appellants filed a motion with the bankruptcy court seeking
7 relief under Civil Rule 60(b)(6) from the bankruptcy court's
8 January 10, 2012 Order (on the First Dismissal Motion). On
9 March 29, 2013, the bankruptcy court held a hearing and docketed
10 its order denying the Appellants' motion ("March 29, 2013
11 Order"). On the record, the bankruptcy court stated that it had
12 previously disposed of all the claims in the Adversary Proceeding
13 and all claims were on appeal - the bankruptcy court found that
14 it was not appropriate for it to deal with the issues raised by
15 Appellants in their Civil Rule 60(b)(6) motion. Appellants filed
16 a notice of appeal on April 5, 2013.

17 DISCUSSION

18 The filing of a notice of appeal divests the trial court of
19 jurisdiction. Gould v. Mutual Life Ins. Co., 790 F.2d 769, 772
20 (9th Cir. 1986) (citations omitted). The Ninth Circuit has held,

21 _____
22 ⁶ The bankruptcy court dismissed all claims asserted in the
23 second amended complaint against MERS and all but the FDCPA
24 claims against the other two Defendants in response to
25 Defendants' second motion under Civil Rule 12(b)(6). In the
26 Final Judgment, the bankruptcy court granted summary judgment to
27 Defendants on the FDCPA Claims and denied the Appellants' motion
28 under Civil Rule 60(b) that sought review of the bankruptcy
court's order entered April 6, 2012 in favor of Defendants on the
second motion under Civil Rule 12(b)(6).

⁷ The notice of appeal from the Final Judgment incorporated
all earlier non-final orders and all rulings which produced the
judgment. See Munoz v. Small Bus. Admin., 644 F.2d 1361, 1364
(9th Cir. 1981).

1 as a result, that "where the underlying judgment has been
2 appealed, denial of a motion for relief from that judgment is a
3 nonappealable order." Id. (citing Los Angeles Memorial Coliseum
4 Comm' n v. NFL, 726 F.2d 1381, 1386 n.2 (9th Cir.), cert. denied,
5 469 U.S. 990 (1984)).

6 Once an appeal has been taken, the proper procedure is to
7 "ask the district court whether it wishes to entertain the
8 motion, or to grant it, and then move [the appellate] court, if
9 appropriate, for remand of the case." Id. (citation omitted).
10 Appellants sought relief from the January 10, 2012 Order without
11 complying with the rule set forth in Gould. And even if we
12 construe the March 29, 2013 Order as a denial of the Appellant's
13 request to "entertain" the motion for review, that denial is
14 interlocutory in nature and not appealable. See Defenders of
15 Wildlife v. Bernal, 204 F.3d 920, 930 (9th Cir. 1999); and Scott
16 v. Younger, 739 F.2d 1464, 1466 (9th Cir. 1984).

17 Here, the bankruptcy court was divested of jurisdiction over
18 the Adversary Proceeding when Appellants appealed from the Final
19 Judgment.⁸ As a result, its order denying the Civil
20 Rule 60(b)(6) motion is nonappealable.

21 CONCLUSION

22 Based on the foregoing, we DISMISS this appeal.
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26 ⁸ We acknowledge that the docket does not reflect
27 compliance with Civil Rule 58, as the Final Judgment was not
28 contained in a separate document. However, any concerns this may
have created were resolved upon the passage of 150 days from the
date of entry of the Final Judgment. See Civil Rule 58(c)(2)(B).