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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-13-1264-BaPaKu
)
 JOHN E. HUDSON,) Bk. No. 2:13-bk-15622-SK
)
 Debtor.)
)
 _____)
 JOHN E. HUDSON,)
)
 Appellant,)
)
 v.) **O P I N I O N**
)
 MARTINGALE INVESTMENTS, LLC;)
 KATHY A. DOCKERY, Chapter 13)
 Trustee,)
)
 Appellees.)
 _____)

Argued and Submitted on November 21, 2013
at Pasadena, California

Filed - January 14, 2014
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Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Sandra R. Klein, Bankruptcy Judge, Presiding

Appearances: _____
 Thomas B. Ure, III, argued for Appellant John E.
 Hudson; William S. Fitch argued for Appellee
 Martingale Investments, LLC.

Before: _____
 BALLINGER, Jr.,* PAPPAS and KURTZ, Bankruptcy Judges.

 * Hon. Eddward P. Ballinger, Jr., Bankruptcy Judge for the
 District of Arizona, sitting by designation.

1 BALLINGER, Bankruptcy Judge:

2
3 Appellant, John E. Hudson ("Hudson" or "Debtor"), appeals
4 the bankruptcy court's "Order Granting Motion For Relief From
5 Stay Under 11 U.S.C. § 362 (Unlawful Detainer)" (the "Stay Lift
6 Order"). The Stay Lift Order annulled the automatic stay
7 retroactive to the bankruptcy petition date. The central issue
8 on appeal is whether the bankruptcy court erred in admitting
9 evidence that a foreclosure sale occurred pre-petition. We
10 REVERSE the bankruptcy court's ruling that the sale occurred pre-
11 petition and the order annulling the stay.

12 **I. FACTS**

13 Hudson filed a chapter 13¹ bankruptcy petition on March 5,
14 2013, at 10:28 a.m., in the Central District of California.
15 According to Appellee, Martingale Investments, LLC
16 ("Martingale"), earlier that day, at 10:01 a.m., a trustee's sale
17 was completed at which Martingale purchased Hudson's home located
18 at 1658, 1660, 1662 and 1664 South Van Ness Avenue, Los Angeles,
19 California ("Property"). A Trustee's Deed Upon Sale was issued
20 to Martingale on March 12, 2013 ("Trustee Deed"). After
21 receiving a Notice to Quit, Hudson did not vacate the Property.
22 On March 26, 2013, Martingale filed a complaint for unlawful
23 detainer in state court.

24 In April, 2013, Martingale filed a motion to lift the stay
25

26 ¹ Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
The Federal Rules of Evidence are referred to as "FRE."

1 in order to continue the unlawful detainer action and obtain
2 possession of the Property. In the stay lift motion, Martingale
3 asserted that it purchased the Property at a foreclosure sale
4 just prior to the filing of the petition and that Martingale
5 subsequently commenced the unlawful detainer action without
6 knowledge of the bankruptcy filing. Martingale sought annulment²
7 of the stay retroactive to the petition date to avoid having to
8 re-file the unlawful detainer action. Attached to the stay lift
9 motion was a declaration of Olivia Reyes, Martingale's property
10 manager (the "Reyes Declaration").

11 In her declaration, Reyes stated that she was a "custodian"
12 of Martingale's books and records with "personal knowledge" of
13 the Hudson account and that Martingale was unaware of the
14 bankruptcy at the time the unlawful detainer action was
15 commenced. More important, Reyes claimed Martingale purchased
16 the Property at a public sale on March 5, 2013, and that the
17 "sale was completed at 10:01 a.m." Attached in support of the
18 Reyes Declaration was a report ("Sale Report") obtained from the
19 trustee who conducted the sale, NDex West, LLC ("NDex"). The
20 Sale Report is actually an e-mail message prepared by Priority
21 Posting & Publishing, Inc. ("Priority Posting") containing
22 essential information about the sale, including the date and time
23 it was conducted, sales price, number of bidders and witnesses,
24 etc.

26 ² "[S]ection 362 gives the bankruptcy court wide latitude in
27 crafting relief from the automatic stay, including the power to
28 grant retroactive relief from the stay." In re Schwartz, 954
F.2d 569, 572 (9th Cir. 1992).

1 Hudson objected to the stay lift motion, arguing two main
2 points. First, he claimed there was no admissible evidence that
3 the sale occurred pre-petition because the Sale Report was not
4 properly authenticated and was comprised of inadmissible hearsay
5 statements by Reyes, who lacked personal knowledge regarding the
6 sale. Second, Hudson argued the post-petition recording of the
7 Trustee Deed voided the sale. Hudson attached a declaration to
8 his objection in which he stated his intention to file a motion
9 to rescind the sale.³ He also asserted that while the Sale
10 Report indicated "Sale Conducted at: 10:01 AM," "conducted" does
11 not mean the same as "completed" or "concluded."

12 Martingale replied, claiming *inter alia*, that the recording
13 of the Trustee Deed did not violate the automatic stay because it
14 related back to the date of the trustee sale. Martingale
15 submitted the declaration of Ric Juarez ("Juarez Declaration"),
16 an NDex employee, in which Juarez stated that "the sale was
17 completed at 10:01 a.m." The Juarez Declaration also based its
18 conclusion solely on the contents of Priority Posting's email
19 message.

20 The bankruptcy court held a hearing on the stay relief
21 request on May 15, 2013, and stated:

22 THE COURT: I reviewed the motion, as well as the
23 opposition, and the timing is that - - and I believe
24 there is admissible evidence, although Debtor argues
25 there isn't. The foreclosure sale took place at 10:01
26 a.m. on March 5th. The bankruptcy case was filed a few
27 minutes later....

28 ³ The bankruptcy court docket does not indicate such motion
was ever filed. The administrative case was dismissed by Order
dated September 30, 2013.

1 May 15, 2013 Hr'g Tr. at 1:13-18. After hearing from the
2 parties, the court addressed Martingale's counsel:

3 THE COURT: [Y]ou included supplemental evidence
4 regarding the time of sale, and it was before the time
5 of the bankruptcy. The foreclosure was at 10:01 and
6 the bankruptcy was at 10:28.

7 May 15, 2013 Hr'g Tr. at 2:19-22. The bankruptcy court granted
8 the stay lift motion, finding that Martingale's evidence as to
9 the time of the sale was admissible and that under California law
10 the post-petition recording of the Trustee Deed did not violate
11 the automatic stay.⁴ On May 21, 2013, the court entered the Stay
12 Lift Order granting the motion.⁵ This timely appeal followed.

12 II. JURISDICTION

13 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
14 §§ 1334 and 157(b)(2)(A) and (G). This Court has jurisdiction
15 under 28 U.S.C. § 158.

16 We also have an independent duty to determine whether an
17 appeal is moot.⁶ See United States v. Golden Valley Elec. Ass'n,
18 689 F.3d 1108, 1112 (9th Cir. 2012). We lack jurisdiction over
19 moot appeals. I.R.S. v. Pattullo (In re Pattullo), 271 F.3d 898,
20 901 (9th Cir. 2001). Generally, the failure to obtain a stay of
21

22 ⁴ Hudson does not appeal the bankruptcy court's finding that
23 the recording of the Trustee Deed was not void and did not
24 violate the automatic stay.

25 ⁵ The bankruptcy court annulled the automatic stay under
26 section 362(d)(1).

27 ⁶ Hudson filed a response to this Court's notice of possible
28 mootness and asserted that the matter is not moot. Martingale
did not respond and has not otherwise moved for dismissal on
mootness grounds.

1 an order that approves a sale or lifts the automatic stay moots
2 an appeal. See Onouli-Kona Land Co. v. Estate of Richards
3 (In re Onouli-Kona Land Co.), 846 F.2d 1170, 1171 (9th Cir.
4 1988). The record indicates Hudson did not obtain a stay of the
5 Stay Lift Order. However, the issue here is whether there was an
6 automatic stay in effect at the time of the foreclosure sale.
7 See Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571
8 (9th Cir. 1992) (violations of the automatic stay are void, not
9 voidable). The failure to obtain a stay pending appeal does not
10 prevent us from determining whether the automatic stay was
11 applicable at the time of the foreclosure sale. If the stay was
12 in effect, then the sale is void.

13 We also find that it is possible to grant Hudson effective
14 relief by vacating the Stay Lift Order. "The test for mootness
15 of an appeal is whether the appellate court can give the
16 appellant any effective relief in the event that it decides the
17 matter on the merits in his favor. If it can grant such relief,
18 the matter is not moot." Pilate v. Burrell (In re Burrell),
19 415 F.3d 994, 998 (9th Cir. 2005) (quoting Garcia v. Lawn,
20 805 F.2d 1400, 1402 (9th Cir. 1986)). "The basic question in
21 determining mootness is whether there is a present controversy as
22 to which effective relief can be granted." See Feldman v. Bomar,
23 518 F.3d 637, 642 (9th Cir. 2008) (quoting Nw. Env'tl. Def. Ctr.
24 v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988)). Here, there is
25 a live controversy as to whether the foreclosure sale occurred
26 prior to the petition date.

27 **III. ISSUE**

28 Did the bankruptcy court abuse its discretion when it

1 admitted evidence as to the time of the foreclosure sale?

2 **IV. STANDARDS OF REVIEW**

3 We review an order granting relief from stay for abuse of
4 discretion. Veal v. Am. Home Mortg. Servicing, Inc.
5 (In re Veal), 450 B.R. 897, 915 (9th Cir. BAP 2011). A
6 bankruptcy court's evidentiary rulings are also reviewed under
7 the abuse of discretion test and should not be reversed unless
8 the error was prejudicial. Latman v. Burdette, 366 F.3d 774, 786
9 (9th Cir. 2004) ("To reverse on the basis of an erroneous
10 evidentiary ruling, we must conclude both that the bankruptcy
11 court abused its discretion and that the error was
12 prejudicial.").

13 In applying an abuse of discretion test, we first "determine
14 de novo whether the [bankruptcy] court identified the correct
15 legal rule to apply to the relief requested." United States v.
16 Hinkson, 585 F.3d, 1247, 1262 (9th Cir. 2009). If the bankruptcy
17 court identified the correct legal rule, we then determine
18 whether its "application of the correct legal standard [to the
19 facts] was (1) 'illogical,' (2) 'implausible,' or (3) without
20 'support in inferences that may be drawn from the facts in the
21 record.'" Id. (quoting Anderson v. City of Bessemer City, N.C.,
22 470 U.S. 564, 577, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)). If
23 the bankruptcy court did not identify the correct legal rule, or
24 its application of the correct legal standard to the facts was
25 illogical, implausible, or without support in inferences that may
26 be drawn from the facts in the record, then the bankruptcy court
27 has abused its discretion. Id. We may also affirm on any ground
28 supported by the record. Shanks v. Dressel, 540 F.3d 1082, 1086

1 (9th Cir. 2008).

2 **V. DISCUSSION**

3 Hudson argues that the bankruptcy court erred when it found
4 the Sale Report constituted admissible evidence.⁷ Specifically,
5 Hudson claims that the Sale Report is unauthenticated because
6 both Reyes and Juarez lacked personal knowledge of the date and
7 time of the sale.

8 With respect to the question of when the Property was sold,
9 the bankruptcy judge acknowledged Hudson's objection at the stay
10 lift hearing, but found there was admissible evidence supporting
11 Martingale's position. The bankruptcy court made no specific
12 reference to the Sale Report.⁸ However, because the Sale Report
13 is the only substantive evidence supporting Martingale's position
14 as to the time of the trustee's sale, it is clear the court gave
15 it evidentiary value. If the admission of the Sale Report was an
16 abuse of discretion and prejudicial, then the Stay Lift Order
17 must be reversed.

18 **The Business Records Exception**

19 Bankruptcy court decisions must be supported by admissible
20 evidence. All of the evidence supporting the court's ruling in
21
22
23

24 ⁷ The trial court has broad discretion as to whether to
25 admit or exclude evidence. See Burgess v. Premier Corp., 727
26 F.2d 826, 833 (9th Cir. 1984).

27 ⁸ The hearing was primarily focused on the debtor's failed
28 argument that the recording of the Trustee Deed was void and
violated the stay.

1 this case is hearsay.⁹ FRE 802 requires that when, as here,
2 there is an objection to this type of evidence, it must be
3 excluded unless an exception to the hearsay rule applies.

4 FRE 803(6) sets forth an often-used hearsay exception,
5 commonly referred to as the "business records exception" that
6 provides, in pertinent part:

7 The following are not excluded by the rule against
8 hearsay, regardless of whether the declarant is
available as a witness:

9 . . .

10 (6) Records of a Regularly Conducted Activity. A
11 record of an act, event, condition, opinion, or
diagnosis if:

12 (A) the record was made at or near the time by -- or
13 from information transmitted by -- someone with
knowledge;

14 (B) the record was kept in the course of a regularly
15 conducted activity of a business, organization,
occupation, or calling, whether or not for profit;

16 (C) making the record was a regular practice of that
17 activity;

18 (D) all these conditions are shown by the testimony of
19 the custodian or another qualified witness, . . . ;
and

20 (E) neither the source of the information nor the
21 method or circumstances of preparation indicate a
lack of trustworthiness.

22 As shown below, although Reyes and Juarez are qualified
23 custodians or witnesses, the proper foundation was not laid for
24

25
26 ⁹ Both the Reyes and Juarez Declarations rely on the time of
27 sale representation contained in the Sale Report. This
28 representation was made out of court, by one other than a trial
witness and was offered to prove that the trustee's sale was
consummated at the time stated in the report. FRE 801(c).

1 the admission of the Sale Report.

2 **The Declarants are Custodians or Qualified Witnesses**
3 **Under FRE 803(6)**

4 The foundational requirement found in FRE 803(6) dictates
5 that offered records be authenticated by testimony from a
6 custodian or other qualified witness from the business. Hudson
7 argues that because there is no declaration from a party with
8 first-hand knowledge of the time of the sale, the bankruptcy
9 court should have excluded the Sale Report as hearsay. It is
10 true that both Reyes and Juarez lacked knowledge as to whether
11 the Sale Report was "made at or near the time" by "someone with
12 knowledge." But subsection (6) of FRE 803 does not require the
13 business custodian to certify he or she has first-hand knowledge
14 of the facts set forth in the records being authenticated.¹⁰ In
15 addition, the business records exception does not require the
16 records' custodian to lay the foundational evidence for
17 admission; some other qualified witness can provide the
18 foundation. "A witness does not have to be the custodian of
19 documents offered into evidence to establish Rule 803(6)'s
20 foundational requirements." United States v. Childs, 5 F.3d
21 1328, 1334 (9th Cir. 1993). "The phrase 'other qualified
22 witness' is broadly interpreted to require only that the witness
23

24 ¹⁰ It is clear both Reyes and Juarez qualify as
25 authenticating witnesses. First, in their declarations, Reyes
26 states she is "custodian of records" of Martingale, and Juarez
27 states he has "custody and control" of the books and records of
28 NDex. Second, the declarations establish that Reyes and Juarez
"understand the record-keeping system." And both the Reyes and
Juarez Declarations establish that they have custody of the Sale
Report and are familiar with the record-keeping system.

1 understand the record-keeping system.” Id. (quoting United
2 States v. Ray, 930 F.2d 1368, 1370 (9th Cir. 1991)). Although
3 Reyes and Juarez did not prepare the Sale Report, their
4 declarations establish that they qualify both as custodians and
5 other qualified witnesses. The problem here is that neither
6 declaration contains the foundational showing required for
7 admissibility of materials such as the Sale Report, which is not
8 a Martingale document, but is a third party record of Priority
9 Posting found in Martingale’s and NDex’s files.

10 **FRE 803(6) Applies to Third Party Business Records**

11 Where a business has a substantial interest in the
12 trustworthiness and accuracy of the records, documents received
13 from another business are admissible as business records under
14 FRE 803(6). The Ninth Circuit has held that a document kept in
15 the regular course of business, but not made by the business, can
16 still qualify as a business record of the enterprise if there is
17 testimony that the document was kept in the regular course of
18 business and the business regularly relied on the document.
19 Childs, 5 F.3d at 1334. In Childs, the Ninth Circuit held that
20 documents prepared by third parties and incorporated into the
21 records of an auto dealership were properly admitted based on
22 witness testimony that the documents were kept in the regular
23 course of the dealership’s business and were relied upon by the
24 dealership. Id.; see also MRT Constr. Inc. v. Hardrives, Inc.,
25 158 F.3d 478, 483 (9th Cir. 1998) (“[R]ecords a business receives
26 from others are admissible under [FRE 803(6)] when those records
27 are kept in the regular course of that business, relied upon by
28 that business, and where that business has a substantial interest

1 in the accuracy of the records.”). Several other circuits also
2 interpret FRE 803(6) to permit admission of documents
3 incorporated into a business’s records that were prepared by
4 third parties.¹¹ Simply put, for the Sale Report¹² to be properly
5 admitted, Martingale must establish (through a custodian of
6 record or qualified witness) that it or NDex kept and relied on
7 the Sale Report in the regular course of business.

8
9 **Martingale Failed to Establish the Admissibility
of the Sale Report**

10 The Reyes Declaration referred to (and attached) Priority
11 Posting’s Sale Report as evidence of the time of the sale. Reyes
12 stated that “I have personal knowledge concerning the method of
13 entry into the records and books. Those entries are made at or
14 near the time of the occurrence during the ordinary course and
15 scope of my duties.” Reyes then stated that the sale occurred at
16 10:01 a.m.

17 The Juarez Declaration also referred to the Sale Report as
18 evidence of the time of sale. Juarez stated that he had “custody
19 and control of the books and records” and that entries into those
20 books and records were “made at or near the time of the
21 occurrence during the ordinary course and scope of my duties.”
22 However, neither Reyes nor Juarez testified that the Sale Report

23
24 ¹¹ United States v. Doe, 960 F.2d 221, 223 (1st Cir. 1992);
25 United States v. Jakobetz, 955 F.2d 786, 801 (2d Cir. 1992);
26 United States v. Sokolow, 91 F.3d 396, 403 (3d Cir. 1996); United
States v. Ullrich, 580 F.2d 765, 772 (5th Cir. 1978); United
States v. Parker, 749 F.2d 628, 633 (11th Cir. 1984).

27
28 ¹² The Sale Report is “[a] record of an act, event,
condition . . .” under FRE 803(6).

1 was kept in the regular course of Martingale's or NDex's
2 business.

3 The declarations also failed to provide any evidence that
4 either Martingale or NDex relied upon the Sale Report. No
5 custodian or other qualified witness provided this required
6 foundation. Thus the declarations fail to provide the necessary
7 foundational showing required under the test set forth in Childs
8 and MRT. Because the Sale Report lacks proper authentication, it
9 cannot satisfy the business records exception to the hearsay
10 rule. We conclude that the bankruptcy court abused its
11 discretion when it admitted the Sale Report.

12
13 **Hudson was Prejudiced by the Improper Admission
of the Sale Report**

14 For us to reverse based on an erroneous evidentiary ruling,
15 we must conclude not only that the bankruptcy court abused its
16 discretion, but this error must have been prejudicial. Latman,
17 366 F.3d at 786; see also Johnson v. Neilson (In re Slatkin),
18 525 F.3d 805, 811 (9th Cir. 2008). We recognize trial courts are
19 given broad discretion to choose between two reasonable views of
20 the evidence. See Anderson v. City of Bessemer City, N.C.,
21 470 U.S. 564, 573-574, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518
22 (1985). The Ninth Circuit's abuse of discretion test as stated
23 in Hinkson, supra, was founded on the general principles
24 contained in Anderson. Both of those cases hold that a trial
25 court's findings are not clearly erroneous, even if the appellate
26 court has a definite and firm conviction that a mistake has been
27 made, so long as the trial court's findings were not illogical,
28 implausible and had support in inferences that may be drawn from

1 facts in the record. See also Lundell v. Ulrich (In re Lundell),
2 236 B.R. 720, 725 (9th Cir. BAP 1999); Amick v. Bradford
3 (In re Bradford), 112 B.R. 347, 352 (9th Cir. BAP 1990).

4 Had the proper foundation been laid, we would find that the
5 bankruptcy court was within its discretion when it considered and
6 accepted the facts from the Sale Report. However, no
7 foundational witness testified that Martingale or NDex kept and
8 relied upon the Sale Report in the regular course of business.
9 Therefore, the Sale Report cannot be admitted as a business
10 record under FRE 803(6). Accordingly, the Sale Report is
11 inadmissible, and the bankruptcy court abused its discretion when
12 it considered the Sale Report in granting the stay lift motion.

13 Given the lack of any other evidence in the record of the
14 time of the trustee's sale, we cannot say that the erroneous
15 admission of the Sale Report was harmless error. The evidence
16 was critical to the granting of the Stay Lift Order, which
17 retroactively annulled the automatic stay, thereby prejudicing
18 the debtor and his ability to reorganize.

19 **VI. CONCLUSION**

20 For the foregoing reasons, the bankruptcy court abused its
21 discretion when it admitted the Sale Report. We REVERSE the
22 bankruptcy court's ruling that the sale occurred pre-petition and
23 the Stay Lift Order.