

MAR 26 2014

NOT FOR PUBLICATION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-12-1538-KuPaTa  
2 VAHE AFTANDILIAN, )  
3 Debtor. ) Bk. No. 11-12992  
4  
5 VAHE AFTANDILIAN, )  
6 Appellant, )  
7 v. ) **MEMORANDUM\***  
8 PRESTIGE MANAGEMENT GROUP, LLC, )  
9 Appellee. )  
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13

Argued and Submitted on February 20, 2014  
at Pasadena, California

Filed - March 26, 2014

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

Honorable Maureen A. Tighe, Bankruptcy Judge, Presiding

19 Appearances: Appellant Vahe Aftandilian argued pro se; Lewis R.  
20 Landau of Horgan, Rosen, Beckham & Coren, LLP  
21 argued for appellee Prestige Management Group,  
22 LLC.

Before: KURTZ, PAPPAS and TAYLOR, Bankruptcy Judges.

26 \*This disposition is not appropriate for publication.  
27 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 filing a chapter 11 petition.<sup>2</sup> In his bankruptcy schedules,  
2 Aftandilian listed Prestige as a secured creditor holding first  
3 and second trust deeds against Aftandilian's commercial real  
4 property located in Reseda, California. Aftandilian operated a  
5 car wash and an oil change business on part of the property and  
6 leased another portion of the property to a restaurant operator.

7 In August 2011, roughly five months after the bankruptcy  
8 filing, Prestige filed a motion for relief from the automatic  
9 stay under § 362(d)(1) and (2) to enable it to proceed with  
10 foreclosure and an action for possession of the property. On  
11 September 23, 2011, the bankruptcy court entered an order on  
12 Prestige's initial relief from stay motion. The order left the  
13 automatic stay in place, but required Aftandilian to make  
14 adequate protection payments of \$22,547 per month. If  
15 Aftandilian defaulted on his adequate protection payments, the  
16 order further provided, Prestige could obtain termination of the  
17 automatic stay on an expedited basis and thereafter proceed with  
18 its foreclosure and its other remedies against the property.

19 Aftandilian apparently made the ordered adequate protection  
20 payments to Prestige, but Prestige nonetheless filed a new relief  
21 from stay motion in January 2012. According to Prestige, it had  
22 discovered that Aftandilian also owed a substantial amount of  
23 unpaid prepetition secured real property taxes against the

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24  
25 <sup>2</sup>Most of the facts set forth herein are undisputed and are  
26 drawn from the bankruptcy court's docket and the imaged documents  
27 attached thereto. We take judicial notice of the filing and  
28 contents of those documents. See O'Rourke v. Seaboard Sur. Co.  
(In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989)  
(holding that the Panel can take judicial notice of contents of  
the bankruptcy court record).

1 property. These additional secured obligations, Prestige  
2 asserted, left its interest in the property inadequately  
3 protected.

4 The bankruptcy court once again declined to grant Prestige  
5 immediate relief from the automatic stay. Instead, the court set  
6 a schedule of monthly installments that it directed Aftandilian  
7 to pay in order to satisfy the unpaid prepetition property taxes,  
8 and it continued the relief from stay hearing so that the motion  
9 could be considered in conjunction with Aftandilian's and  
10 Prestige's competing reorganization plans and proposed disclosure  
11 statements.

12 In conjunction with the disclosure statement proceedings,  
13 the bankruptcy court ruled, on March 30, 2012, that it would  
14 grant Prestige relief from the stay. However, in granting stay  
15 relief, the court also granted Aftandilian a concession. Instead  
16 of permitting Prestige to immediately record a notice of sale, it  
17 ruled that the notice of sale could not be recorded before May  
18 15, 2012, provided that Aftandilian made the adequate protection  
19 payments and the tax payments that were due in the interim. The  
20 order granting relief from stay, in relevant part, provided as  
21 follows:

22 Movant may record its Notice of Trustee Sale on the  
23 first to occur of the following dates:

24 a. Immediately upon dishonor of any check for one of  
the payments referred to in the following sections;

25 b. April 2, 2012 if Debtor fails to email not later  
26 than April 2, 2012 to Movant's counsel a Los Angeles  
County receipt for payment of \$3,548.98 paid on or  
27 before March 15, 2012 for the March, 2012 payment due  
under the Court's order entered February 21, 2012;

28 c. April 2, 2012 but only if Debtor fails to deliver

1           \$22,547.40 to Movant on or before April 2, 2012;

2           d. April 10, 2012 but only if Debtor: (1) fails to  
3           deliver \$20,384.94 to the Los Angeles County Treasurer  
4           and Tax Collector by April 10, 2012 (with direction  
5           that payment is for the real property tax payments due  
6           on parcels 2103-026-034 & 2103-026-035 due not later  
7           than April 10, 2012); or (2) Debtor fails to email on  
8           or before April 10, 2012 to Movant's counsel a Los  
9           Angeles County receipt for payment of \$20,384.94;

10           e. April 15, 2012 but only if Debtor: (1) fails to  
11           deliver \$3,548.98 to the Los Angeles County Treasurer  
12           and Tax Collector by April 15, 2012; or (2) Debtor  
13           fails to email not later than April 15, 2012 to  
14           Movant's counsel a Los Angeles County receipt for such  
15           payment;

16           f. May 1, 2012 but only if Debtor fails to deliver  
17           \$22,547.40 to Movant on or before May 1, 2012;

18           g. May 15, 2012 but only if Debtor: (1) fails to  
19           deliver \$3,548.98 to the Los Angeles County Treasurer  
20           and Tax Collector by April 15, 2012; or (2) Debtor  
21           fails to email not later than May 15, 2012 [sic] to  
22           Movant's counsel a Los Angeles County receipt for such  
23           payment;

24           h. May 16, 2012.

25           Order Granting Relief from Stay (April 23, 2012) at ¶ 11.d.

26           Aftandilian appealed the relief from stay order, and also  
27           sought an emergency stay of the foreclosure from the Panel. The  
28           Panel issued an order on May 30, 2012 granting a temporary stay  
29           to maintain the status quo while the Panel considered the  
30           emergency stay motion. However, the Panel issued a subsequent  
31           order on June 5, 2012, denying Aftandilian's emergency stay  
32           motion and dissolving the temporary stay. According to the  
33           Panel's June 5 order, Aftandilian had not demonstrated a  
34           sufficient likelihood of success on the merits of the appeal to  
35           justify a stay for the remainder of the appeal.

36           Prestige thereafter completed its nonjudicial foreclosure  
37           sale against the property, and purchased the property at the

1 foreclosure sale by credit bid. Prestige then obtained an  
2 unlawful detainer judgment in the Los Angeles County Superior  
3 Court, which entitled Prestige to take possession of the  
4 property. Ultimately, the Panel dismissed as moot Aftandilian's  
5 appeal from the relief from stay order.

6 In July 2012, roughly one month after Prestige's foreclosure  
7 sale, Aftandilian commenced a lawsuit against Prestige in the Los  
8 Angeles County Superior Court seeking to set aside the  
9 foreclosure sale. The operative complaint, Aftandilian's first  
10 amended complaint, stated several legal theories, all of which  
11 were based on the same predicate facts: (1) that, on June 1,  
12 2012, Aftandilian made an adequate protection payment of \$22,547  
13 to Prestige; (2) that, on June 4, 2012, Prestige accepted that  
14 payment; (3) that, on June 6, 2012, Prestige conducted its  
15 foreclosure sale and purchased the property at the sale; and  
16 (4) having accepted the June 1, 2012 adequate protection payment,  
17 Prestige could not lawfully foreclose on the property on June 6,  
18 2012.

19 Prestige removed Aftandilian's lawsuit to the bankruptcy  
20 court, and, while the lawsuit was pending before the bankruptcy  
21 court Aftandilian filed a separate motion in his bankruptcy case  
22 seeking to have Prestige's foreclosure sale declared void.  
23 Aftandilian never disputed that his declaratory relief motion  
24 arose from exactly the same facts as set forth in his lawsuit.  
25 Instead, he merely asserted that the lawsuit focused on his state  
26 law legal theories, whereas the motion focused on his bankruptcy  
27 law legal theories. More specifically, Aftandilian's motion  
28 asserted that, pursuant to the bankruptcy court's September 23,

1 2011 adequate protection order, the automatic stay continued in  
2 effect so long as he was current on his adequate protection  
3 payments. And since he was current on his adequate protection  
4 payments at the time of foreclosure sale, that sale was void.

5 The bankruptcy court dismissed the lawsuit with prejudice.  
6 In the process of so ruling, the court held that nothing in its  
7 September 23, 2011 adequate protection order, nor in its  
8 April 23, 2012 relief from stay order, nor in the Panel's  
9 temporary stay order prohibited Prestige from foreclosing as it  
10 did on June 6, 2012. The court further explained that the  
11 explicit intent of the April 23, 2012 relief from stay order was  
12 to unconditionally permit Prestige to move forward with all  
13 foreclosure related proceedings on and after May 16, 2012. The  
14 court also pointed out that the September 23, 2011 adequate  
15 protection order explicitly provided that Prestige could accept  
16 adequate protection payments from Aftandilian without affecting  
17 Prestige's entitlement to foreclose under applicable  
18 nonbankruptcy law. In essence, the court held that, no matter  
19 how Aftandilian characterized Prestige's acceptance of the  
20 June 1, 2012 adequate protection payment, no state law theory, no  
21 bankruptcy law theory, and no court order prohibited Prestige  
22 from foreclosing on June 6, 2012.

23 On or about October 3, 2012, the bankruptcy court issued a  
24 tentative ruling on Aftandilian's declaratory relief motion. In  
25 the tentative ruling, the court pointed out that, under  
26 Rule 7001, Aftandilian's motion should have been brought as an  
27 adversary proceeding. The court also noted that the facts  
28 alleged, issues raised and relief sought all were duplicative of

1 other proceedings that Aftandilian had previously brought before  
2 the court. According to the court, it had recently considered  
3 and rejected the points made in the declaratory relief motion in  
4 conjunction with its dismissal of Aftandilian's removed state  
5 court lawsuit. The court concluded that nothing in Aftandilian's  
6 motion had persuaded it to change its position regarding its  
7 analysis and resolution of Aftandilian's claims seeking to set  
8 aside Prestige's foreclosure sale.

9 On October 4, 2012, the bankruptcy court held a hearing on  
10 Aftandilian's declaratory relief motion, at which it adopted its  
11 tentative ruling and denied the motion. On October 9, 2012, the  
12 bankruptcy court entered its order denying Aftandilian's  
13 declaratory relief motion, and on October 23, 2012, Aftandilian  
14 timely appealed that order.

#### 15 **JURISDICTION**

16 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
17 §§ 1334 and 157(b)(2)(O), and we have jurisdiction under  
18 28 U.S.C. § 158.

19 Prestige has argued strenuously that this appeal is moot.  
20 According to Prestige, the following facts would make it either  
21 impossible or inequitable for this Panel to grant relief on  
22 appeal to Aftandilian: (1) after the bankruptcy court denied the  
23 declaratory relief motion, Aftandilian did not attempt to obtain  
24 a stay or injunction in order to maintain the status quo while  
25 his appeal was pending; (2) Prestige has taken a number of  
26 actions in reliance on its ownership of the property, including  
27 the eviction of the restaurant tenant, the leasing of the car  
28 wash to a new tenant and the construction of improvements to the



1 property; and (3) while this appeal has been pending, the  
2 underlying bankruptcy case has been dismissed. A BAP motions  
3 panel already has considered whether this appeal has been  
4 rendered moot, and the motions panel concluded that this appeal  
5 is not moot. We agree with the motions panel that this appeal is  
6 not moot.

7 The party asserting mootness has a heavy burden to establish  
8 that the appeal should be dismissed as moot. Focus Media, Inc.  
9 v. Nat'l Broad. Co. Inc. (In re Focus Media, Inc.), 378 F.3d 916,  
10 923 (9th Cir. 2004). Prestige must therefore persuade us that  
11 it was either impossible or inequitable for us to grant any  
12 meaningful relief. See id. We are not persuaded.

13 If Aftandilian were to prevail on the merits of his appeal,  
14 we do not perceive how the dismissal of the underlying bankruptcy  
15 case would preclude this Panel from issuing a decision reversing  
16 the bankruptcy court and holding that Prestige's foreclosure sale  
17 was void as a violation of the automatic stay. Nor would  
18 Prestige's post-foreclosure actions with respect to the property  
19 necessarily render it impossible or inequitable for Aftandilian,  
20 armed with such a decision, to seek at least some measure of  
21 relief in state court.

22 Simply put, Prestige has not sufficiently demonstrated to us  
23 that a "comprehensive change of circumstances" has occurred such  
24 that it would be impossible or inequitable for us to hold that  
25 its foreclosure sale was void. See Motor Vehicle Cas. Co. v.  
26 Thorpe Insulation Co. (In re Thorpe Insulation Co.), 677 F.3d  
27 869, 880 (9th Cir. 2012); In re Focus Media, Inc., 378 F.3d  
28 922-23. We acknowledge that any such relief could not, in

1 fairness, affect the rights of third parties currently leasing  
2 portions of the property. But we are not aware of any reason why  
3 our declaration that Prestige's foreclosure sale is void  
4 necessarily must do so. Unlike those third parties, Prestige is  
5 a party to this appeal and was a party to all of the proceedings  
6 in the bankruptcy court, so it would not necessarily be unfair if  
7 its rights and duties were altered by this decision. See Spirtos  
8 v. Moreno (In re Spirtos), 992 F.2d 1004, 1007 (9th Cir. 1993).

9 Accordingly, this appeal is not moot, and we will consider  
10 the merits of the appeal.

#### 11 **ISSUE**

12 Did the bankruptcy court err when it denied Aftandilian's  
13 declaratory relief motion?

#### 14 **STANDARDS OF REVIEW**

15 We review de novo the bankruptcy court's interpretation and  
16 application of Rule 7001. See Collect Access LLC v. Hernandez  
17 (In re Hernandez), 483 B.R. 713, 719 (9th Cir. BAP 2012).

18 We also review de novo the bankruptcy court's interpretation  
19 of its orders. See Treasurer of Snohomish Cnty. v. Seattle First  
20 Nat'l Bank (In re Glasply Marine Indus., Inc.), 971 F.2d 391, 393  
21 (9th cir. 1992). Even so, a trial court's interpretation of its  
22 own orders is entitled to special deference. See Officers for  
23 Justice v. Civil Serv. Comm'n of City and Cnty. of San Francisco,  
24 934 F.2d 1092, 1094 (9th Cir. 1991); Marciano v. Fahs  
25 (In re Marciano), 459 B.R. 27, 35 (9th Cir. BAP 2011), aff'd,  
26 708 F.3d 1123 (9th Cir. 2013).

#### 27 **DISCUSSION**

28 Under Rule 7001(2), an action to determine the validity of a

1 party's interest in property must be pursued as an adversary  
2 proceeding. The same is true of an action seeking a declaratory  
3 judgment regarding the validity of a party's interest in  
4 property. See Rule 7001(9). The bankruptcy court correctly  
5 ruled that Aftandilian's failure to present his declaratory  
6 relief motion as an adversary proceeding was a sufficient ground,  
7 by itself, to justify denial of the motion. See Bear v. Coben  
8 (In re Golden Plan of Cal., Inc.), 829 F.2d 705, 711-12 (9th Cir.  
9 1986); In re DBSI, Inc., 432 B.R. 126, 134-35 (Bankr. D. Del.  
10 2010).

11 We generally will not consider arguments that the appellant  
12 did not specifically and distinctly brief. See Brownfield v.  
13 City of Yakima, 612 F.3d 1140, 1149 n.4 (9th Cir. 2010) (citing  
14 Greenwood v. F.A.A., 28 F.3d 971, 977 (9th Cir. 1994)); Cashco  
15 Fin. Servs., Inc. v. McGee (In re McGee), 359 B.R. 764, 771 n.7  
16 (9th Cir. BAP 2006) (citing Doty v. Cnty. of Lassen, 37 F.3d 540,  
17 548 (9th Cir. 1994)). In his opening appeal brief, Aftandilian  
18 did not even mention, let alone challenge, the bankruptcy court's  
19 ruling that an adversary proceeding was required. This is a  
20 sufficient reason alone to affirm.

21 We also agree with the bankruptcy court's alternate ground  
22 for denying Aftandilian's declaratory relief motion. The  
23 bankruptcy court in essence held that Prestige's acceptance of  
24 Aftandilian's June 1, 2012 adequate protection payment did not  
25 prohibit Prestige from immediately proceeding with its  
26 foreclosure sale as soon as the Panel terminated its temporary  
27 stay on June 5, 2012.

28 Aftandilian contends that the bankruptcy court got it wrong.

1 Because Prestige accepted the June 1, 2012 adequate protection  
2 payment, Aftandilian reasons, the September 23, 2011 adequate  
3 protection order continued to control the application of the  
4 automatic stay vis-a-vis Prestige's right to foreclose. And  
5 because the adequate protection order kept the automatic stay in  
6 place so long as Aftandilian did not default on his adequate  
7 protection payments, Prestige's foreclosure sale, which occurred  
8 while Aftandilian was current on his adequate protection  
9 payments, was void as a violation of the automatic stay.<sup>3</sup>

10 In other words, Aftandilian is arguing that, by virtue of  
11 the June 1, 2012 adequate protection payment it made and Prestige  
12 accepted, the terms of the September 23, 2011 adequate protection  
13 order enjoyed primacy over the terms of the April 23, 2012 relief  
14 from stay order, at least until Aftandilian's next adequate  
15 protection payment was due. However, we don't understand why, as  
16 Aftandilian apparently claims, Prestige's acceptance of the  
17 adequate protection payment vitiated the intended effect of the  
18 April 23, 2012 relief from stay order.

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20 <sup>3</sup>In his opening appeal brief, Aftandilian for the first time  
21 attempts to argue that Prestige's acceptance of the June 1, 2012  
22 adequate protection payment invalidated the notice of sale  
23 Prestige recorded before that payment was made. Aftandilian  
24 cited no legal authority to support this proposition. Moreover,  
25 the bankruptcy court did not have any opportunity to consider  
26 this argument because Aftandilian did not raise it in his  
27 declaratory relief motion. Accordingly, we decline to consider  
28 this argument. See United Student Aid Funds, Inc. v. Espinosa,  
559 U.S. 260, 270 n. 9 (2010) ("We need not settle that question,  
however, because the parties did not raise it in the courts  
below."); Scovis v. Henrichsen (In re Scovis), 249 F.3d 975, 984  
(9th Cir. 2001) (holding that court will not consider issue  
raised for the first time on appeal absent exceptional  
circumstances).

1 In interpreting the effect of a bankruptcy court order, we  
2 primarily rely on the bankruptcy court's intent as manifested in  
3 the order's language. See Mullen v. Hamlin (In re Hamlin),  
4 465 B.R. 863, 868 (9th Cir. BAP 2012) (citing Brown v. Wilshire  
5 Credit Corp. (In re Brown), 484 F.3d 1116, 1120 (9th Cir. 2007)).  
6 And the bankruptcy court's interpretation of its own orders is  
7 entitled to special deference. See Rosales v. Wallace  
8 (In re Wallace), 490 B.R. 898, 906 (9th Cir. BAP 2013).

9 Here, as manifested by the unequivocal language of the  
10 order, and as subsequently interpreted by the bankruptcy court at  
11 the adversary proceeding dismissal hearing, the April 23, 2012  
12 relief from stay order was intended to supersede the  
13 September 23, 2011 adequate protection order and was intended to  
14 modify the automatic stay so as to permit Prestige to  
15 unconditionally move forward with foreclosure proceedings on and  
16 after May 16, 2012.

17 We acknowledge that the Panel's temporary stay order, for a  
18 period of several days, stayed the effectiveness of the relief  
19 from stay order. However, when the Panel terminated that  
20 temporary stay on June 5, 2012, the bankruptcy court's relief  
21 from stay order immediately became effective and once again  
22 superseded the adequate protection order and permitted immediate  
23 foreclosure. Nothing in this Panel's temporary stay order was  
24 intended to have any other effect.

25 We are not aware of any law supporting Aftandilian's  
26 argument regarding the supposed effect of the June 1, 2012  
27 adequate protection payment. Nor has Aftandilian cited any.  
28 Therefore, the bankruptcy court correctly determined that the

1 plain terms of the April 23, 2012 relief from stay order mandated  
2 denial of Aftandilian's declaratory relief motion.

3 **CONCLUSION**

4 For the reasons set forth above, we AFFIRM the bankruptcy  
5 court's order denying Aftandilian's declaratory relief motion.

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