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ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-13-1554-KiTad
	)		
GUIDO YAROL CRUZ,	)	Bk. No.	06:13-20368-MH
	)		
Debtor.	)		
_____	)		
GUIDO YAROL CRUZ,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>O P I N I O N</b>	
	)		
STEIN STRAUSS TRUST #1361,	)		
PDQ INVESTMENTS, LLC,	)		
	)		
Appellee.	)		
_____	)		

Submitted Without Oral Argument  
on June 26, 2014

Filed - August 29, 2014

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

Honorable Mark D. Houle, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Appearances: Appellant Guido Yarol Cruz appeared pro se on  
brief; Joseph C. Delmotte, Esq. of Pite Duncan, LLP  
appeared on brief for appellee, Stein Strauss Trust  
#1361, PDQ Investments, LLC.

Before: KIRSCHER, TAYLOR and DUNN, Bankruptcy Judges.

1 KIRSCHER, Bankruptcy Judge:  
2

3 Guido Yarol Cruz ("Cruz") appeals the order granting the  
4 motion of PDQ Investments, LLC as trustee for the Stein Strauss  
5 Trust #1361 ("SS Trust") to annul retroactively the automatic stay  
6 or, in the alternative, to confirm that no stay was in effect, and  
7 he appeals the order denying reconsideration of the prior order.  
8 We AFFIRM.

9 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

10 **A. Prepetition events**

11 Mr. Doo Ko obtained a loan from IndyMac Bank, FSB ("IndyMac")  
12 to purchase a residence located on Stein Strauss Street in  
13 Fullerton, California ("Property"). The deed of trust in favor of  
14 IndyMac was recorded on June 8, 2007. On June 25, 2007, Mr. Ko  
15 transferred his 100% interest in the Property to a Ms. Eun H. Ko  
16 by way of a grant deed for no consideration. The grant deed was  
17 recorded on June 28, 2007.

18 Ultimately, the loan went into default, and a Notice of  
19 Default was recorded against the Property on February 9, 2009. A  
20 Notice of Sale was recorded some three years later on September  
21 25, 2012. A trustee's sale was set for October 24, 2012.

22 The parties have not explained why it took over three years  
23 before the Notice of Sale was recorded. We discovered in  
24 reviewing the bankruptcy court docket, however, that Ms. Ko, under  
25 the names "Eun H. Ko" and "Eun Ko" (same Social Security Number),  
26 filed no less than six bankruptcy cases in the Central District of  
27  
28

1 California between November 2009 and February 2013.<sup>1</sup> All cases  
2 were skeletal filings and dismissed for either failing to file  
3 documents or to appear at the § 341(a)<sup>2</sup> meeting of creditors after  
4 multiple continuances. Mr. Ko filed three bankruptcy cases in  
5 2009, all of which were skeletal filings and dismissed for failing  
6 to file documents.

7 Notably, in Ms. Ko's third case filed on November 5, 2010,  
8 the servicer for IndyMac sought relief from stay against the  
9 Property. The moving papers referenced a grant deed (not noted in  
10 this case) executed on January 20, 2010, and recorded on January  
11 22, 2010, wherein Ms. Ko purported to transfer a 5% interest in  
12 the Property back to Mr. Ko and a 5% interest to a Mr. Tae Hoon  
13 Ko. Mr. Tae Hoon Ko filed one skeletal chapter 13 bankruptcy case  
14 on January 4, 2010, which was converted to chapter 7 and  
15 ultimately dismissed for failing to appear at the § 341(a)  
16 meeting. IndyMac was granted stay relief on May 31, 2011, and the  
17 order included a bad faith finding under § 362(d)(4). The two-  
18 year in rem bar contained in that order presumably expired on or  
19 about May 31, 2013, which is about two weeks before Cruz filed his  
20 chapter 7 case.<sup>3</sup>

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21  
22 <sup>1</sup> We have taken judicial notice of Ms. Ko's multiple cases  
23 filed with the bankruptcy court through its electronic docketing  
24 system. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert,  
25 Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989); Atwood v. Chase  
Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th  
Cir. BAP 2003).

26 <sup>2</sup> Unless specified otherwise, all chapter, code and rule  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The  
Federal Rules of Civil Procedure are referred to as "Civil Rules."

28 <sup>3</sup> Clearly, Ms. Ko has a history of filing multiple  
bankruptcy cases and transferring fractional interests in the  
(continued...)

1 **B. Postpetition events**

2 Cruz, pro se, filed a skeletal chapter 7 bankruptcy case on  
3 June 13, 2013. Pursuant to Rule 1007(c), Cruz was ordered to file  
4 his schedules and other requisite documents by June 27. On June  
5 27, Cruz sought an extension to July 11 to file all documents,  
6 which was granted. Cruz failed to file all required documents by  
7 July 11, no further extensions were requested, and his bankruptcy  
8 case was dismissed on July 17, 2013 ("Dismissal Order").<sup>4</sup> In the  
9 Dismissal Order, the bankruptcy court retained jurisdiction "on  
10 all issues arising under Bankruptcy Code § 110, 329 and 362."  
11 Cruz did not appeal the Dismissal Order.<sup>5</sup>

12 **1. SS Trust's motion for relief from stay**

13 On July 15, 2013, Ms. Ko, who now held only an 80% interest  
14 in the Property, executed a grant deed purporting to transfer a 5%  
15 interest in the Property to Cruz (the "Cruz Deed"). The Cruz Deed  
16 was recorded at 12:52 p.m. on July 15, 2013. On that same day at  
17 approximately 2:18 p.m., the Property was sold by the lender at a  
18 trustee's sale to SS Trust, who was the highest bidder at

19 \_\_\_\_\_  
20 <sup>3</sup>(...continued)

21 Property to persons in bankruptcy in an attempt to subvert the  
22 foreclosure process. We have no doubt Cruz, who now claims to  
live with Ms. Ko at the Property, is yet another participant in  
her ongoing scheme.

23 <sup>4</sup> Cruz did, however, file some documents untimely on July 15  
at 2:13 p.m., which is the same day he acquired his 5% interest in  
24 the Property and about one hour after the Cruz Deed was recorded.  
He did not claim an interest in the Property in his Schedule A.

25 <sup>5</sup> Cruz filed a motion to reconsider the Dismissal Order  
26 under Civil Rule 60(b)(1) about two months after the order's  
entry. The bankruptcy court denied it. Because the motion to  
27 reconsider was not filed within 14 days of the entry of the  
Dismissal Order, the time to appeal the Dismissal Order was not  
28 tolled. Rule 8002(b). Therefore, Cruz's arguments about the  
merits of the Dismissal Order are untimely, and we lack  
jurisdiction to consider them.

1 \$711,000. SS Trust established that it had no knowledge of the  
2 Cruz Deed or of Cruz's bankruptcy case at the time of the sale.

3       Shortly thereafter, SS Trust became aware of Cruz's  
4 bankruptcy. On August 13, 2013, after Cruz's case had been  
5 dismissed, SS Trust moved to annul the automatic stay to validate  
6 the sale or, in the alternative, to confirm that no stay was in  
7 effect at the time of the sale ("Stay Relief Motion"). SS Trust  
8 also sought a finding that Cruz's bankruptcy case was filed as  
9 part of a bad faith scheme to delay, hinder and defraud creditors  
10 under § 362(d)(4).<sup>6</sup>

11       Specifically, SS Trust argued that because Cruz, a chapter 7  
12 debtor, did not acquire his interest in the Property until after  
13 he filed for bankruptcy, the Property was never property of the  
14 estate. Consequently, his bankruptcy filing had no effect on the  
15 validity of the sale. Alternatively, SS Trust argued that even if  
16 the Property was estate property and the sale violated the  
17 automatic stay, cause existed to annul the stay because: (1) SS  
18 Trust was a bona fide purchaser who purchased the Property without  
19 any knowledge of Cruz's bankruptcy or of the Cruz Deed recorded  
20 the day of the sale; (2) SS Trust took immediate action to annul

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22       <sup>6</sup> SS Trust used the mandatory local form,  
23 F 4001-1.RFS.RP.MOTION, required by bankruptcy court, which in  
24 compliance with amendments of the Bankruptcy Abuse Prevention and  
25 Consumer Protection Act of 2005, contained the statutory language  
26 of "delay, hinder, and defraud[.]" as required by § 362(d)(4).  
27 The mandatory order, F 4001-1.RFS.RP.ORDER, required by the local  
28 forms and issued by the bankruptcy court, contained this same  
statutory language. The Bankruptcy Technical Corrections Act of  
2010 amended the statutory language to read "delay, hinder, or  
defraud[.]" The statutory amendment changed the proof of the  
required elements from the conjunctive to the disjunctive.  
Subsequent to the filing of this appeal, the bankruptcy court has  
amended its mandatory forms to contain the 2010 amended statutory  
language. See Bankruptcy Technical Corrections Act of 2010, Pub.  
L. No. 111-327, 124 Stat 3557.

1 the stay once it learned of Cruz's bankruptcy filing, whereas Cruz  
2 had not taken any action to set the sale aside; (3) the facts and  
3 circumstances suggested Cruz's bankruptcy case was filed as part  
4 of a bad faith scheme to delay and/or hinder the sale; and (4)  
5 both SS Trust and the lender who sold the Property would be  
6 prejudiced if the sale were deemed void.

7 In support of the Stay Relief Motion, SS Trust offered copies  
8 of the various grant deeds and the recorded Notice of Default and  
9 Notice of Sale. SS Trust did not submit a trustee's deed, but it  
10 did submit a copy of a document entitled "Trustee's Sale Results"  
11 that showed SS Trust was the winning bidder at the July 15 sale.

12 Cruz opposed the Stay Relief Motion, contending that SS Trust  
13 had failed to prove it was the new owner of the Property; no  
14 trustee's deed had been shown or recorded. He further argued SS  
15 Trust was not a BFP. In his supporting declaration, Cruz stated  
16 that he had notified the sale trustee by fax at 1:03 p.m. on July  
17 15, 2013, about thirty minutes before the scheduled sale, of his  
18 bankruptcy filing on June 13, 2013. Nonetheless, the sale trustee  
19 "ignored [his] bankruptcy stay and sold to an unknown third party  
20 investor." Cruz also stated that even though his paralegal friend  
21 helped him fill out his untimely filed schedules, he did not know  
22 where in the schedules to list his interest in the Property. Cruz  
23 further stated that the lender was looking into the alleged  
24 improper trustee's sale.

25 Attached to Cruz's opposition was a copy of the "Notice of  
26 Bankruptcy Case Filing" Cruz asserted he faxed to the lender just  
27 minutes before the trustee's sale and the cover sheet to a  
28 complaint Cruz filed in state court on August 26, 2013, against

1 the lender and SS Trust to set aside the sale.

2 In reply, SS Trust argued that it was a BFP without notice of  
3 Cruz's bankruptcy. SS Trust also argued that it had standing to  
4 bring the Stay Relief Motion despite the lack of a recorded  
5 trustee's deed; it became the beneficiary of the trustee's deed by  
6 being the successful bidder at the sale.

7 The bankruptcy court issued a tentative ruling on the Stay  
8 Relief Motion on September 9, 2013, which it adopted as its final  
9 ruling at the related hearing on September 10, 2013. Cruz did not  
10 appear. The bankruptcy court found that the automatic stay never  
11 took effect as to the Property and that it was never property of  
12 the estate because Cruz acquired his interest in it postpetition.  
13 Alternatively, cause existed to annul the stay based on the  
14 postpetition transfer of a fractionalized interest to Cruz on the  
15 day of the foreclosure sale. In addition, the court found that  
16 Cruz's bankruptcy was part of a scheme to hinder, delay and<sup>7</sup>  
17 defraud creditors because: (1) he filed a skeletal petition; (2)  
18 a partial interest in the Property was transferred to him  
19 postpetition; (3) he failed to list the Property on Schedule A or  
20 amend it after obtaining an interest; and (4) despite receiving an  
21 extension to file all necessary bankruptcy documents, he still  
22 failed to cure the deficiencies and the case was dismissed.

23 The bankruptcy court entered an order granting the Stay  
24 Relief Motion under § 362(d)(1) and (d)(4) on September 25, 2013

25

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26 <sup>7</sup> At all times relevant to this appeal, § 362(d)(4) required  
27 a finding that the filing of debtor's petition was part of a  
28 scheme to delay, hinder or defraud creditors. The bankruptcy  
court's order found that Cruz's petition was filed as part of a  
scheme to delay, hinder and defraud creditors. Cruz does not  
assign any error by the bankruptcy court on this specific issue.  
In any event, it has no bearing on the outcome of this appeal.

1 ("Stay Relief Order").

2 **2. Cruz's motion to reconsider**

3 Cruz timely moved for reconsideration of the Stay Relief  
4 Order under Civil Rule 60(b)(1) ("Motion to Reconsider"). Cruz  
5 contended the Stay Relief Order should be vacated due to excusable  
6 neglect because his counsel failed to appear at the hearing and  
7 because he had "new" evidence establishing the court should not  
8 have granted it. Cruz reasserted his argument that SS Trust  
9 lacked standing to bring the Stay Relief Motion and he raised a  
10 new argument, without any supporting evidence, that the sale was  
11 void because the trustee was not authorized to conduct it.

12 SS Trust opposed the Motion to Reconsider, contending that  
13 the failure of Cruz's alleged attorney to attend the hearing on  
14 the Stay Relief Motion did not establish excusable neglect under  
15 Civil Rule 60(b)(1). Cruz had no attorney of record; no evidence  
16 from any attorney was offered to explain why he or she was not  
17 there. Although not raised by Cruz, SS Trust also argued he was  
18 not entitled to relief under Civil Rule 60(b)(6).

19 Cruz's reply reiterated his prior arguments and he argued for  
20 the first time: that SS Trust lacked standing to seek relief from  
21 stay because it was not registered with the California Secretary  
22 of State; that the Cruz Deed was valid upon delivery; and that the  
23 foreclosure sale was being litigated in state court. Finally,  
24 Cruz contended that his attorney, Jessica De Anda Leon, appeared  
25 for the stay relief hearing, albeit, thirty minutes late.

26 Attached to Cruz's reply was a photo copy of a business card  
27 from Ms. De Anda Leon. Attached also was a copy of a demurrer  
28 dated September 9, 2013, filed in state court by the Property



1 lender (OneWest Bank, FSB) in response to Ms. Ko's complaint to  
2 set aside the sale. Curiously, the lender's demurrer stated that  
3 the foreclosure sale had not yet taken place.

4 The bankruptcy court issued its tentative ruling denying the  
5 Motion to Reconsider, which it adopted as its final ruling at the  
6 related hearing. Pursuant to Local Bankruptcy Rule 9013-1(g)(1),  
7 the court refused to consider new arguments raised by Cruz that  
8 were not responsive to SS Trust's opposition, such as the  
9 foreclosure sale was being litigated, that SS Trust was not  
10 registered with the California Secretary of State, and that the  
11 Cruz Deed was a lawful transfer. In reviewing the factors set  
12 forth in Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,  
13 507 U.S. 380, 385 (1993), the bankruptcy court determined Cruz had  
14 failed to establish excusable neglect because: (1) he provided no  
15 evidence that he was unable to attend the stay relief hearing; (2)  
16 the Motion to Reconsider did not include a declaration from Ms. De  
17 Anda Leon; and (3) Cruz had no attorney of record.

18 The bankruptcy court also found Cruz had failed to establish  
19 entitlement to relief under Civil Rule 60(b)(2), because even  
20 though he claimed he had "new" evidence, he failed to state what  
21 that evidence was.

22 Lastly, the bankruptcy court determined relief also was not  
23 warranted under Civil Rule 60(b)(6). Cruz had not offered any  
24 authority for a reversal of the bad faith finding, and, in any  
25 event, vacation of a bad faith finding was not grounds for  
26 reconsideration under Civil Rule 60(b). Further, despite Cruz's  
27 arguments to the contrary, SS Trust had established a colorable  
28 claim to the Property with the "Trustee's Sale Results" document.

1 Finally, the stay was never in effect as to the Property because  
2 Cruz acquired his 5% interest in it postpetition.

3 At the hearing on the Motion to Reconsider, attorney Robert  
4 L. Bachman specially appeared for Cruz. Mr. Bachman explained  
5 that Cruz's "new" evidence was the demurrer filed by the lender in  
6 the state court action, in which the lender had asserted that the  
7 foreclosure sale had not yet taken place. In response, the  
8 bankruptcy court opined, and Mr. Bachman agreed, that the demurrer  
9 filed on September 9 was filed after the hearing on the Stay  
10 Relief Motion and, therefore, that it could not be "newly"  
11 discovered evidence.

12 An order denying the Motion to Reconsider the Stay Relief  
13 Order was entered on November 1, 2013 ("Reconsideration Order").  
14 This timely appeal followed.

## 15 II. JURISDICTION

16 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
17 and 157(b)(2)(G). We have jurisdiction under 28 U.S.C. § 158.

## 18 III. ISSUES

19 1. Did the bankruptcy court abuse its discretion when it granted  
20 the Stay Relief Motion?

21 2. Did the bankruptcy court abuse its discretion when it denied  
22 Cruz's Motion to Reconsider?

## 23 IV. STANDARDS OF REVIEW

24 Standing is a legal issue we review de novo. Loyd v. Paine  
25 Webber, Inc., 208 F.3d 755, 758 (9th Cir. 2000); Kronemyer v. Am.  
26 Contractors Indem. Co. (In re Kronemyer), 405 B.R. 915, 919 (9th  
27 Cir. BAP 2009).

28 A bankruptcy court's decision to grant retroactive relief

1 from the automatic stay is reviewed for an abuse of discretion.  
2 Nat'l Env'tl. Waste Corp. v. City of Riverside (In re Nat'l Env'tl.  
3 Waste Corp.), 129 F.3d 1052, 1054 (9th Cir. 1997); Williams v.  
4 Levi (In re Williams), 323 B.R. 691, 696 (9th Cir. BAP 2005). We  
5 also review the bankruptcy court's denial of a motion for  
6 reconsideration for an abuse of discretion. Tracht Gut, LLC v.  
7 Cnty. of L.A. Treasurer & Tax Collector (In re Tracht Gut, LLC),  
8 503 B.R. 804, 810 (9th Cir. BAP 2014). A bankruptcy court abuses  
9 its discretion if it applied the wrong legal standard or its  
10 findings were illogical, implausible or without support in the  
11 record. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820,  
12 832 (9th Cir. 2011).

#### 13 **V. DISCUSSION**

14 As a threshold argument, SS Trust contends the Stay Relief  
15 Order is not reviewable on appeal. We disagree. When a motion  
16 for reconsideration under Civil Rule 60(b), applicable here by  
17 Rule 9024, is filed within 14 days of entry of the underlying  
18 order, as it was here, we have jurisdiction to review both the  
19 underlying order and the order denying reconsideration. Wall St.  
20 Plaza, LLC v. JSJF Corp. (In re JSJF Corp.), 344 B.R. 94, 99 (9th  
21 Cir. BAP 2006)(applying former 10-day rule); Rule 8002(b).  
22 Nonetheless, Cruz designated and attached to his notice of appeal  
23 only the Reconsideration Order, not the Stay Relief Order.  
24 Although Rule 8001(a) does not require a notice of appeal to  
25 designate the order or judgment from which an appeal is taken, our  
26 Local Rule 8001(a)-1 does. However, we may depart from our local  
27 rules absent prejudice. In re JSJF Corp., 344 B.R. at 100 (citing  
28 Alfred M. Lewis, Inc. v. Holzman (In re Telemart Enters., Inc.),

1 524 F.2d 761, 766 (9th Cir. 1975)). No prejudice is present here  
2 because the parties have briefed the issues regarding the Stay  
3 Relief Order. Accordingly, the Stay Relief Order and the  
4 Reconsideration Order are properly before us. See United States  
5 v. Arkison (In re Cascade Rds., Inc.), 34 F.3d 756, 761 (9th Cir.  
6 1994)(appellate court may review merits of a bankruptcy court  
7 order where parties have fully briefed those issues even if the  
8 order was not identified in the notice of appeal).

9 **A. The bankruptcy court did not abuse its discretion when it**  
10 **granted the Stay Relief Motion.**

11 Cruz raises a variety of arguments asserting that the  
12 bankruptcy court abused its discretion in granting the Stay Relief  
13 Motion. We address each in turn.

14 **1. The bankruptcy court had jurisdiction to consider the**  
15 **Stay Relief Motion.**

16 Cruz first argues the bankruptcy court lacked jurisdiction to  
17 consider the Stay Relief Motion because his bankruptcy case had  
18 been dismissed. Cruz is incorrect. In the Dismissal Order, the  
19 bankruptcy court expressly reserved jurisdiction over all issues  
20 arising under § 362. Further, after a case is dismissed, "the  
21 court may annul the automatic stay, thereby retroactively  
22 ratifying an act otherwise violative of the stay." Johnson v. TRE  
23 Holdings LLC (In re Johnson), 346 B.R. 190, 194 (9th Cir. BAP  
24 2006).

25 **2. SS Trust established it had a colorable claim to the**  
26 **Property.**

27 Cruz contends SS Trust was not the real party in interest and  
28 lacked standing to seek relief from stay. We disagree.

The filing of a petition for bankruptcy relief automatically

1 stays the commencement of any act to obtain possession of or to  
2 enforce a lien against property of the debtor or of the estate.  
3 See § 362(a)(3), (a)(4) and (a)(5). The automatic stay does not  
4 apply to property that is not property of the estate. It does,  
5 however, stay the enforcement of a lien securing a prepetition  
6 claim against property of the debtor, which includes property  
7 acquired by an individual debtor postpetition. 3 COLLIER ON  
8 BANKRUPTCY ¶ 362.03[7] (Alan N. Resnick & Henry J. Sommers, eds.,  
9 16th ed. 2012).

10 Under § 362(d), a "party in interest" may request relief from  
11 the stay. A "party in interest" can include any party that has a  
12 pecuniary interest in the matter, that has a practical stake in  
13 the resolution of the matter or that is impacted by the automatic  
14 stay. Brown v. Sobczak (In re Sobczak), 369 B.R. 512, 517-18 (9th  
15 Cir. BAP 2007). Proceedings to decide motions for relief from the  
16 automatic stay are very limited. "[A] party seeking relief from  
17 stay need only establish that it has a colorable claim to enforce  
18 a right against property of the estate." Veal v. Am. Home Mortg.  
19 Servicing, Inc. (In re Veal), 450 B.R. 897, 914-15 (9th Cir. BAP  
20 2011). A party has a "colorable claim" sufficient to establish  
21 standing to prosecute the motion if it has an ownership interest  
22 in the subject property. Id. at 913; Edwards v. Wells Fargo Bank,  
23 N.A. (In re Edwards), 454 B.R. 100, 105 (9th Cir. BAP 2011).

24 Cruz appears to argue that SS Trust failed to establish a  
25 colorable claim to the Property because it did not record a  
26 trustee's deed. Without a recorded trustee's deed, Cruz argues,  
27 the foreclosure sale cannot be deemed final, SS Trust's alleged  
28 interest in the Property was not perfected and, thus, his interest

1 is superior. Cruz misinterprets California law.

2 Section 2924h(c) of the California Civil Code provides that  
3 for the purposes of this subsection (dealing with finalizing a  
4 trustee's sale), "the sale shall be deemed final upon the  
5 acceptance of the last and highest bid." It then discusses when  
6 the sale "is perfected," based on timing of recordation of the  
7 trustee's deed within 15 days. See also 4 Harry D. Miller &  
8 Marvin B. Starr, CAL. REAL ESTATE § 10:252 (3d ed. 2013)(Under  
9 California law "[t]he purchaser at the foreclosure sale receives  
10 title free and clear of any right, title, or interest of the  
11 trustor or any grantee or successor of the trustor."). Therefore,  
12 title technically transferred to SS Trust, by law, even without  
13 recordation of a trustee's deed on sale.

14 In support of its Stay Relief Motion, SS Trust provided a  
15 declaration from an employee who testified that he attended the  
16 sale on July 15, 2013, and purchased the Property. Although a  
17 trustee's deed had not yet been recorded at that time, SS Trust  
18 offered a document entitled "Trustee's Sale Results," which  
19 indicated that SS Trust had purchased the Property for \$711,000.<sup>8</sup>  
20 Accordingly, SS Trust's ownership interest in the Property  
21 established a "colorable claim" and, hence, standing to prosecute  
22 the Stay Relief Motion.

23 **3. The Property was not property of the estate, but it was**  
24 **property of the debtor.**

25 Cruz contends the Property was estate property because he

26 \_\_\_\_\_  
27 <sup>8</sup> Cruz has attached in his reply brief a copy of the now-  
28 recorded trustee's deed, recorded on October 1, 2013, which states  
that SS Trust, "being the highest bidder" at the sale on July 15,  
2013, "was the beneficiary of said Deed of Trust at the Time of  
said Trustee's Sale."

1 received a grant deed from Ms. Ko. Even presuming the Cruz Deed  
2 was valid, the record reflects that he did not obtain an interest  
3 in the Property until July 15, 2013, when the Cruz Deed was  
4 executed and recorded. Therefore, the Property was not estate  
5 property because Cruz, a chapter 7 debtor, acquired his interest  
6 in it after the commencement of the case. See § 541(a)(1)  
7 (property of the estate is defined as "all legal or equitable  
8 interests of the debtor in property as of the commencement of the  
9 case")(emphasis added). Because of this, the bankruptcy court  
10 found that the Property was never protected by the automatic stay.

11 We agree the Property was not "property of the estate," but  
12 it arguably was "property of the debtor" and still protected by  
13 the stay under § 362(a)(5)<sup>9</sup> at the time of the sale. However, any  
14 potential stay violation was cured by the bankruptcy court's  
15 proper annulment of the stay.

16 **4. Cause existed to annul the stay.**

17 Actions taken in violation of the automatic stay are void.  
18 However, an action taken in violation of the automatic stay that  
19 would otherwise be void may be declared valid if cause exists for  
20 retroactive annulment of the stay. Schwartz v. United States (In  
21 re Schwartz), 954 F.2d 569, 573 (9th Cir. 1992). Section 362(d)  
22 empowers the bankruptcy court to annul the stay. It provides:

23 (d) On request of a party in interest and after notice  
24 and a hearing, the court shall grant relief from the stay  
provided under subsection (a) of this section, such as by

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25  
26 <sup>9</sup> Section 362(a)(5) provides that a bankruptcy petition  
27 stays "any act to create, perfect, or enforce against property of  
the debtor any lien to the extent that such lien secures a claim  
that arose before the commencement of the case under this title."  
28

1 terminating, annulling, modifying, or conditioning such  
2 stay-

3 (1) for cause, including the lack of adequate protection  
4 of an interest in property of such party in interest[.]

5 § 362(d)(1); In re Schwartz, 954 F.2d at 572 (“[S]ection 362(d)  
6 gives the bankruptcy court wide latitude in crafting relief from  
7 the automatic stay, including the power to grant retroactive  
8 relief from the stay.”).

9 In deciding whether “cause” exists to annul the stay, a  
10 bankruptcy court should examine the circumstances of the specific  
11 case and balance the equities of the parties’ respective  
12 positions. Gasprom, Inc. v. Fateh (In re Gasprom, Inc.), 500 B.R.  
13 598, 607 (9th Cir. BAP 2013)(citing In re Nat’l Envtl. Waste  
14 Corp., 129 F.3d at 1055); Fjelsted v. Lien (In re Fjelsted), 293  
15 B.R. 12, 24 (9th Cir. BAP 2003). Under this approach, the  
16 bankruptcy court considers (1) whether the creditor was aware of  
17 the bankruptcy petition and automatic stay and (2) whether the  
18 debtor engaged in unreasonable or inequitable conduct. In re  
19 Nat’l Envtl. Waste Corp., 129 F.3d at 1055. In Fjelsted, we  
20 approved additional factors for consideration in assessing the  
21 equities:

- 22 1. Number of [bankruptcy] filings;
- 23 2. Whether, in a repeat filing case, the circumstances indicate  
24 an intention to delay and hinder creditors;
- 25 3. A weighing of the extent of prejudice to creditors or third  
26 parties if the stay relief is not made retroactive, including  
27 whether harm exists to a bona fide purchaser;
- 28 4. The [d]ebtor’s overall good faith (totality of circumstances  
test)(citation omitted);
5. Whether creditors knew of the stay but nonetheless took  
action, thus compounding the problem;
6. Whether the debtor has complied, and is otherwise complying,



- 1 with the Bankruptcy Code and Rules;
- 2 7. The relative ease of restoring the parties to the status quo  
3 ante;
- 4 8. The costs of annulment to debtors and creditors;
- 5 9. How quickly creditors moved for annulment, or how quickly  
6 debtors moved to set aside the sale or violative conduct;
- 7 10. Whether, after learning of the bankruptcy, creditors  
8 proceeded to take steps in continued violation of the stay,  
9 or whether they moved expeditiously to gain relief;
- 10 11. Whether annulment of the stay will cause irreparable injury  
11 to the debtor; and
- 12 12. Whether stay relief will promote judicial economy or other  
13 efficiencies.

14 293 B.R. at 25. These factors merely present a framework for  
15 analysis and “[i]n any given case, one factor may so outweigh the  
16 others as to be dispositive.” Id.

17 The record supports the bankruptcy court’s decision to grant  
18 the Stay Relief Motion on the alternate basis that cause existed  
19 to annul the stay. The court identified only one factor as  
20 justifying annulment of the stay: the postpetition transfer of a  
21 fractionalized interest in the Property to Cruz on the day of the  
22 sale. In other words, Cruz had engaged in unreasonable or  
23 inequitable conduct, or the court certainly questioned his overall  
24 good faith, which satisfies factor four. The court’s additional  
25 findings under § 362(d)(4) also support annulment. In particular,  
26 Cruz was found to have filed his case in bad faith as part of a  
27 scheme to delay, hinder and defraud creditors. This finding  
28 satisfies factor four. Cruz denies that he filed his case in bad  
29 faith and contends the bankruptcy court erred by not considering  
30 all of the facts. We disagree. Our review of the record shows  
31 the court considered all of the facts. Further, Cruz’s skeletal

1 filing, his failure to file all necessary bankruptcy documents  
2 resulting in dismissal of his case and his failure to list the  
3 Property on his Schedule A or to amend it after obtaining his  
4 interest satisfies factor six.

5 In addition, the record reflects that SS Trust was unaware of  
6 the stay at the time of the sale, which satisfies factor five.  
7 Cruz disputes this. It is highly unlikely that SS Trust, a third-  
8 party purchaser, was on notice of Cruz's bankruptcy case when he  
9 faxed his Notice of Bankruptcy Filing to the lender and recorded  
10 the Cruz Deed just minutes before the sale. Moreover, SS Trust  
11 presented uncontroverted evidence that it was not aware of Cruz's  
12 bankruptcy filing. Once SS Trust learned of Cruz's bankruptcy, it  
13 did not take any further steps which could violate the automatic  
14 stay and it promptly moved for relief, which satisfies factors  
15 nine and ten.

16 We conclude the bankruptcy court did not abuse its discretion  
17 in finding that cause existed for retroactive annulment of the  
18 stay to validate the foreclosure sale.

19 **B. The bankruptcy court did not abuse its discretion in denying**  
20 **the Motion to Reconsider.**

21 Cruz did not present any argument in his opening brief as to  
22 how the bankruptcy court abused its discretion by denying the  
23 Motion to Reconsider the Stay Relief Order. However, he attempted  
24 to do so in his reply brief. Generally, we will not consider  
25 arguments raised for the first time in the reply. Sec. Pac. Nat'l  
26 Bank v. Kirkland (In re Kirkland), 915 F.2d 1236, 1241 n.7 (9th  
27 Cir. 1990). But, considering Cruz's pro se status, which dictates  
28 that we must construe his briefs liberally, and that SS Trust has

1 fully briefed this issue, we will consider his argument.

2 Cruz first argues the bankruptcy court erred by not granting  
3 the Motion to Reconsider under Civil Rule 60(b)(2) based on his  
4 newly discovered evidence of the lender's demurrer filed in the  
5 state court action, in which the lender stated the sale had not  
6 yet occurred. Civil Rule 60(b)(2) provides relief from a judgment  
7 or order based on "newly discovered evidence that, with reasonable  
8 diligence, could not have been discovered in time to move for a  
9 new trial under [Civil] Rule 59(b)." In general, the evidence  
10 must have existed at the time the judgment or order was entered.  
11 See Fantasyland Video, Inc. v. Cnty. of San Diego, 505 F.3d 996,  
12 1005 (9th Cir. 2007); Jones v. Aero/Chem Corp., 921 F.2d 875, 878  
13 (9th Cir. 1990)(relief under Civil Rule 60(b)(2) requires that the  
14 evidence: (1) existed at the time of the trial; (2) could not  
15 have been discovered through due diligence; and (3) was of such  
16 magnitude that production of it earlier would have been likely to  
17 change the disposition of the case). In other words, the evidence  
18 must be "newly discovered" by the movant rather than simply "new."

19 In reviewing the transcript from the reconsideration hearing,  
20 the bankruptcy court made incorrect statements about the record.  
21 The demurrer, filed on September 9, 2013, came before the hearing  
22 on the Stay Relief Motion, which was held on September 10, 2013,  
23 and before the Stay Relief Order entered on September 25, 2013.  
24 Thus, it could have been "newly discovered" evidence; it existed  
25 at the time of trial, could not have been discovered through due  
26 diligence because it was filed just one day before the stay relief  
27 hearing, and it was potentially of such magnitude that production  
28 of it earlier could have undermined SS Trust's standing to seek

1 relief from stay. Nonetheless, the court's error here was  
2 harmless. Cruz admitted the sale had occurred on July 15, 2013,  
3 rightfully or wrongfully, and that SS Trust was the buyer. Thus,  
4 his own admission negates any potential relevance the lender's  
5 statement about the sale could have had. Further, we know now  
6 that the sale did occur on July 15, 2013, as evidenced by the now-  
7 recorded trustee's deed, which Cruz submitted to the Panel.

8 Cruz also appears to argue the bankruptcy court erred by not  
9 granting the Motion to Reconsider under Civil Rule 60(b)(6), but  
10 he fails to articulate any argument to support entitlement to such  
11 relief. Civil Rule 60(b)(6) provides for relief from a judgment  
12 or order based on "any other reason that justifies relief." This  
13 rule is "used sparingly as an equitable remedy to prevent manifest  
14 injustice and is to be utilized only where extraordinary  
15 circumstances prevented a party from taking timely action to  
16 prevent or correct an erroneous judgment." Latshaw v. Trainer  
17 Wortham & Co., 452 F.3d 1097, 1103 (9th Cir. 2006)(internal  
18 quotations omitted). Cruz had to demonstrate both injury and  
19 circumstances beyond his control which prevented him from  
20 proceeding with the defense of the action in a proper fashion.  
21 Id.

22 The bankruptcy court ruled that relief under Civil Rule  
23 60(b)(6) was not warranted "[g]iven the facts of the case,  
24 including post-petition transfer of the Property to Debtor on the  
25 eve of bankruptcy filing[.]" Tentative Ruling (Oct. 23, 2013) 10-  
26 11. This is incorrect factually. Cruz engaged in a postpetition  
27 transfer of the Property, but it was not on the eve of his  
28 bankruptcy filing; it occurred after the fact. Nonetheless, the

1 record does not support relief for Cruz under Civil Rule 60(b)(6).  
2 Cruz did not present any evidence establishing that circumstances  
3 beyond his control kept him from defending against the Stay Relief  
4 Motion. In fact, he diligently defended against it, filing his  
5 opposition, declaration and supporting documents. Although his  
6 alleged attorney failed to appear at the hearing, no evidence  
7 suggests it would have changed the outcome of the bankruptcy  
8 court's ruling had she appeared. Given the facts before the  
9 court, which Cruz's attorney would have been limited to, SS Trust  
10 established that it was entitled to stay relief.<sup>10</sup>

11 Accordingly, we conclude the bankruptcy court did not abuse  
12 its discretion in denying the Motion to Reconsider.

#### 13 VI. CONCLUSION

14 For the foregoing reasons, we AFFIRM.  
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26  
27 <sup>10</sup> Although Cruz was also denied relief under Civil Rule  
28 60(b)(1), he did not articulate any argument regarding this issue.  
In any event, the record reflects the bankruptcy court applied the  
correct law, and none of its findings appear to be clearly  
erroneous.