

NOV 19 2014

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	NC-14-1052-PaJuKu
6	GIGI ELLIS,)	Bk. No.	13-32612
7)		
8	Debtor.)		
9	GIGI ELLIS,)		
10	Appellant,)		
11	v.)		
12	JUNYING YU,)		
13	Appellee. ¹)		

O P I N I O N

Argued and Submitted on October 23, 2014
at San Francisco, California

Filed - November 19, 2014

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

Hon. Hannah L. Blumenstiel, U.S. Bankruptcy Judge, Presiding²

Appearances: George S. Wynns argued for appellant Gigi Ellis.

Before: PAPPAS, JURY, AND KURTZ, Bankruptcy Judges.

¹ Appellee Junying Yu did not file a brief or appear in this appeal.

² Judge Blumenstiel presided at the hearing and entered the order reviewed in this appeal. However, Judge Dennis Montali is the presiding bankruptcy judge in the case and later entered a decision and order denying Appellant's request for a stay pending appeal.

1 PAPPAS, Bankruptcy Judge:

2
3 Chapter 7³ debtor Gigi Ellis ("Ellis") appeals the order of
4 the bankruptcy court granting Junying Yu's ("Yu") motion for
5 relief from the automatic stay under §§ 362(d)(1) and (2), and
6 granting in rem relief pursuant to § 362(d)(4). We DISMISS the
7 appeal from the stay relief order as MOOT because Ellis has since
8 been granted a discharge in her bankruptcy case and, therefore,
9 the automatic stay has terminated by operation of § 362(c)(2)(C).
10 We REVERSE the grant of in rem relief because Yu was not a
11 creditor with a claim secured by an interest in the subject
12 property as required by § 362(d)(4).

13 **FACTS**

14 Ellis purchased a house in San Francisco in 2005 (the
15 "Property"). She financed this purchase with a loan from Long
16 Beach Mortgage Company; the loan was evidenced by a note and deed
17 of trust on the Property.

18 Ellis defaulted on the note and deed of trust by failing to
19 make required payments in mid-2008. Since her default, Ellis has
20 filed five chapter 13 and chapter 7 bankruptcy cases in the
21 Northern District of California bankruptcy court, including the
22 case out of which this appeal arises. All of her prior cases
23 were dismissed either because Ellis failed to file required
24

25
26 ³ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
28 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 1-86.

1 documents or because she failed to make chapter 13 plan payments.

2 On June 11, 2009, Deutsche Bank National Trust Company, as
3 Trustee for Long Beach Mortgage Loan Trust 2005-2 ("Deutsche
4 Bank") purchased the Property at a trustee's foreclosure sale.
5 Deutsche Bank then sued Ellis in state court, and on August 7,
6 2012, obtained an unlawful detainer judgment by default against
7 Ellis and her uncle, who also resided at the Property.

8 On August 23, 2013, Yu purchased the Property from Deutsche
9 Bank and a grant deed in Yu's favor was recorded the same day.
10 Deutsche Bank also assigned all of its rights under the unlawful
11 detainer judgment to Yu on October 15, 2013; Yu recorded that
12 assignment on October 28, 2013.

13 After Ellis filed the current chapter 13 case on December 9,
14 2013, Yu filed a Motion for Relief from Stay and In Rem Relief
15 under § 362(d)(2) and § 362(d)(4) on January 3, 2014. As grounds
16 for his request that the bankruptcy court allow him to continue
17 his efforts to take possession of the Property, Yu alleged in the
18 motion that he owned the Property, that Ellis lacked any
19 cognizable interest in it, and that "[t]he evidence shows that
20 Debtor has filed this petition in an attempt to delay, hinder,
21 and defraud Movant, and that her scheme involved multiple
22 bankruptcy filings affecting such real property."

23 The same day, Yu filed an ex parte motion for an order
24 shortening the time for the hearing on the stay relief motion,
25 alleging that there was an imminent danger of irreparable damage
26 to the Property, and also because of the history of allegedly bad
27 faith bankruptcy filings by Ellis. The bankruptcy court granted
28 the request for shortened notice on the hearing, but subject to a

1 proviso:

2 The court hereby GRANTS the request for a hearing on
3 shortened notice, on the condition that [Yu's] counsel
4 delivers this order and the motion for relief from stay
(and supporting documents) to Debtor by personal
service no later than the close of business on
Wednesday, January 8, 2014.

5 Order Shortening Time at 1, January 7, 2014.

6 According to a certificate, Yu's process server attempted to
7 personally serve Ellis on January 7, and twice on January 8,
8 2014. He finally effected personal service on Ellis at 6:00 a.m.
9 on January 9, 2014. Yu had also sent copies of the documents by
10 overnight mail to Ellis on January 7, 2014; according to a
11 receipt, they were delivered to Ellis on January 8, 2014.⁴

12 Ellis filed a lengthy objection to Yu's stay relief motion
13 on January 9, 2014, arguing, among other things, that "Yu is not
14 a secured creditor of the Debtor and does not claim to be a
15 secured creditor of the Debtor" and that the alleged assignment
16 of the unlawful detainer judgment from Deutsche Bank to Yu was
17 invalid. The objection was accompanied by Ellis' five-page
18 declaration disagreeing with several of Yu's factual allegations
19 regarding the alleged deterioration of the Property and asserting
20

21 ⁴ At oral argument before the Panel, Debtor argued that the
22 reported mail delivery of the documents on January 8, 2014 was
23 not true, and that the documents were actually received on
24 January 9, 2014. The declaration of Jordan Fong of Yu's
25 attorney's office, "Proof of Service by Overnight Delivery,"
26 found in the bankruptcy court's docket attaches "FedEx Travel
27 History Statement 862783209546" showing actual delivery to Ellis'
28 address on Wednesday, January 8, 2014, at 8:32 p.m. While the
precise date and time of delivery will not impact our decision,
we exercise our discretion to review that declaration in
resolving the issues in this appeal. O'Rourke v. Seaboard Surety
Co. (In re E.R. Fegert), 887 F.2d 955, 957-58 (9th Cir. 1989).

1 legal defenses.⁵ On January 10, 2014, Ellis also filed a five-
2 page "Notice of Noncompliance," accompanied by a nine-page
3 affidavit, indicating that the Yu's service of the stay relief
4 motion on her was untimely and that she would not attend the
5 scheduled hearing on January 13.⁶

6 The bankruptcy court conducted the hearing on the stay
7 relief motion on January 13, 2014. Ellis did not attend. After
8 noting her absence, and hearing from counsel for Yu, the court
9 granted the motion, finding:

10 Regarding service, I am going to find that service was
11 sufficient. . . . I find it to have been substantially
12 in compliance with Judge Montali's order, based in part
13 on the fact that the Debtor herself acknowledges when
14 she received the papers and that she has filed detailed
15 opposition to the relief sought.

16 Regarding the merits of the motion, I find that Ms.
17 Ellis' ownership and possessory interest in the
18 property has been terminated. Ownership interest
19 terminated upon the sale of the Property in
20 foreclosure, and possessory interest terminated upon
21 the entry of the unlawful detainer judgment for
22 possession, of which your client has accepted what

23 ⁵ Ellis' declaration was not included in the excerpts of
24 record on appeal. We have located what appears to be the
25 declaration Ellis submitted to the bankruptcy court in its docket
26 at 25. Again, we exercise our discretion to review that
27 declaration. In re E.R. Fegert, 887 F.2d at 957-58.

28 ⁶ The bankruptcy court would later observe, in an Order
Denying Further Stay Pending Appeal entered on February 20, 2014,
that:

Debtor was aware of the [stay relief motion and request
for hearing on shortened notice] on or before January
9, as she filed an 11-page objection and a 5-page
declaration on that date. This detailed response is
compelling proof that Debtor was not denied any due
process and any defects in the service of the moving
papers were harmless.

1 appears to me to be a valid assignment. So I'm going
2 to grant the motion for relief from stay under [§]
362(d)(1)⁷ and (2).

3 With regard to [Yu's request for in rem relief], I note
4 that the Debtor has filed a number of bankruptcy cases
5 since acquiring the Property. . . . She has failed to
6 prosecute most of the cases that she has filed, and all
7 of the cases that she has filed in the years since
8 acquiring the Property. . . . She was required to, but
9 did not, attend a meeting of creditors pursuant to
section 341 of the Bankruptcy Code. . . . It appears
that she has filed the several cases that she has filed
since acquiring the Property as part of a scheme to
hinder and delay her creditors, including J.P. Morgan,
and by virtue of your client's assignment, your client.
So I'm going to grant in rem relief as well.

10 Hr'g Tr. 4:11-6:1, January 13, 2014.

11 On January 27, 2014, the bankruptcy court entered an Order
12 Granting In Rem Relief from the Automatic Stay. The order
13 memorialized the findings made on the record at the January 13,
14 2014 hearing and terminated the automatic stay under §§ 362(d)(1)
15 and (2). The order also granted in rem relief in Yu's favor
16 under § 362(d)(4), providing that, "this order terminating the
17 automatic stay under 11 U.S.C. § 362 as to [Yu's] interest in the
18 Property shall be binding in any other case filed under the
19 Bankruptcy Code purporting to affect the Property that is filed
20 not later than two years after the date of this Order, such that
21 the automatic stay under 11 U.S.C. § 362(a) shall not apply to
22 [Yu's] interest in the Property." Order at 2.

23
24 _____
25 ⁷ Yu had not sought stay relief under § 362(d)(1); his
26 motion alleged that relief was warranted under § 362(d)(2). But
27 that the bankruptcy court granted Yu relief from the stay for
28 "cause" when Yu had not asserted that in his motion is of no
moment. Ellis did not challenge this discrepancy on appeal, and
below, we deem Ellis' appeal from that aspect of the motion is
now moot and must be dismissed.

1 Ellis filed a timely notice of appeal of the stay relief
2 order on February 3, 2014.

3 **EVENTS SUBSEQUENT TO THE APPEAL**

4 We may take judicial notice of events in the bankruptcy case
5 occurring subsequent to the filing of an appeal if they resolve
6 the dispute between the parties. Pitts v. Terrible Herbst, Inc.,
7 653 F.3d 1081, 1087 (9th Cir. 2011) (“[I]f events subsequent to
8 the filing of the case resolve the parties’ dispute, we must
9 dismiss the case as moot.”). We have done so, and observe that
10 on April 16, 2014, Ellis voluntarily converted her chapter 13
11 case to a case under chapter 7, and that on July 22, 2014, the
12 bankruptcy court granted Ellis a discharge under § 727(a).

13 **JURISDICTION**

14 The bankruptcy court had jurisdiction under 28 U.S.C.
15 §§ 1334 and 157(b)(2)(G). Our jurisdiction is based upon 28
16 U.S.C. § 158, and we discuss one aspect of that jurisdiction
17 below.

18 **ISSUES**

19 Whether the bankruptcy court’s order terminating the
20 automatic stay is moot.

21 Whether the bankruptcy court abused its discretion in
22 granting in rem relief.

23 **STANDARDS OF REVIEW**

24 We review our own jurisdiction, including questions of
25 mootness, de novo. Silver Sage Partners, Ltd. v. City of Desert
26 Hot Springs (In re City of Desert Hot Springs), 339 F.3d 782, 787
27 (9th Cir. 2003).

28 The decision of a bankruptcy court to grant in rem relief

1 under § 362(d)(4) is reviewed for abuse of discretion. First
2 Yorkshire Holdings, Inc. v. Pacifica L 22, LLC (In re First
3 Yorkshire Holdings, Inc.), 470 B.R. 864, 868 (9th Cir. BAP 2012).
4 A bankruptcy court abuses its discretion if it applies an
5 incorrect legal standard, misapplies the correct legal standard,
6 or if its factual findings are illogical, implausible or without
7 support from evidence in the record. TrafficSchool.com v.
8 Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011) (citing United
9 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009)(en banc)).

10 DISCUSSION

11 I.

12 **The appeal of the stay relief provisions** 13 **in the stay relief order is moot.**

14 We cannot exercise jurisdiction over a moot appeal. United
15 States v. Patullo (In re Patullo), 271 F.3d 898, 900 (9th Cir.
16 2001); GTE Cal., Inc. v. FCC, 39 F.3d 940, 945 (9th Cir. 1994)
17 ("The jurisdiction of federal courts depends on the existence of
18 a 'case or controversy' under Article III of the Constitution.").
19 A moot case is one where the issues presented are no longer live
20 and no case or controversy exists. Pilate v. Burrell (In re
21 Burrell), 415 F.3d 994, 998 (9th Cir. 2005). The test for
22 mootness is whether an appellate court can still grant effective
23 relief to the prevailing party if it decides the merits in his or
24 her favor. Id. If an issue becomes moot while the appeal is
25 pending, an appellate court must dismiss the appeal. In re
26 Patullo, 271 F.3d at 900.

27 As noted above, after Ellis commenced this appeal, she filed
28 a motion to convert her bankruptcy case from one under chapter 13

1 to one under chapter 7; the case was converted. Thereafter, the
2 bankruptcy court granted Ellis a discharge under § 727(a).

3 Under § 362(c)(2)(C), the provisions of the § 362(a)
4 automatic stay that would shield Ellis from any legal actions by
5 Yu to recover the Property from her continued in effect only
6 "until the earliest of . . . the time a discharge is granted or
7 denied." Here, it is not disputed that Ellis has been granted a
8 discharge by the bankruptcy court. Since the entry of the
9 discharge order in the bankruptcy case there has been no
10 automatic stay in effect. Consequently, even were we to overturn
11 that part of the stay relief order that terminated the automatic
12 stay in Yu's favor under § 362(d)(1) and (2), that stay has now
13 terminated as a matter of law. Bigelow v. Comm'r, 65 F.3d 127,
14 129 (9th Cir. 1995) ("a stay immediately dissolves upon issuance
15 of a discharge by the bankruptcy court. §362(2)(C)"). Simply
16 put, we lack the ability to grant Ellis any effective relief as
17 to this aspect of the order on appeal.

18 The Ninth Circuit has instructed that, when an appellate
19 court cannot grant effective relief to an appellant, the appeal
20 must be dismissed as moot. Pitts, 653 F.3d at 1087 (9th Cir.
21 2011) ("[I]f events subsequent to the filing of the case resolve
22 the parties' dispute, we must dismiss the case as moot."); Cook
23 v. Fletcher (In re Cook), 730 F.2d 1324, 1326 (9th Cir. 1984)
24 (dismissing appeal of stay relief order as moot where the chapter
25 7 discharge was issued after the appeal was filed).

26 The appeal of that part of the stay relief order terminating
27 the automatic stay under §§ 362(d)(1) and (2) is therefore
28 DISMISSED as MOOT.

1 II.

2 **The bankruptcy court abused its discretion in granting in rem**
3 **relief to Yu under § 362(d)(4) because he is not a creditor**
4 **whose claim is secured by an interest in the Property.**

5 Ellis argues that we should reverse the stay relief order
6 because she was not served with copies of the stay relief motion
7 in accordance with the bankruptcy court's order shortening time
8 for the hearing. While we are skeptical of this argument, there
9 is another, more fundamental reason appearing in the record
10 requiring reversal.

11 Section 362(d)(4)(B) provides:

12 (d) On request of a party in interest and after notice
13 and a hearing, the court shall grant relief from the
14 stay provided under subsection (a) of this section,
15 such as by terminating, annulling, modifying, or
16 conditioning such stay- . . .

17 (4) with respect to a stay of an act against real
18 property under subsection (a), by a creditor whose
19 claim is secured by an interest in such real property,
20 if the court finds that the filing of the petition was
21 part of a scheme to delay, hinder, or defraud creditors
22 that involved . . . (B) multiple bankruptcy filings
23 affecting such real property.

24 (emphasis added). Applying its plain meaning, this provision of
25 the Code authorizes a bankruptcy court to grant the extraordinary
26 remedy of in rem stay relief only upon the request of a creditor
27 whose claim is secured by an interest in the subject property.

28 In this case, after a review of the record presented to us,
Yu has never claimed that he was a secured creditor of Ellis.
And in particular, Yu did not assert he was a secured creditor in
the stay relief motion. Instead, in the bankruptcy court, and
now on appeal, both Ellis and Yu each assert that they own the
Property. In other words, this is a dispute between two putative
owners of the same real property, not a contest where the parties

1 occupy a debtor-creditor relationship.⁸

2 Two recent decisions, also from the Northern District of
3 California bankruptcy court, emphasize that a party seeking in
4 rem relief under § 362(d)(4) must establish, and the bankruptcy
5 court must find, that the movant is a creditor whose claim is
6 secured by an interest in the property in question. In re
7 Laconico, 2014 WL 3687202, at *1 (Bankr. N.D. Cal. July 24,
8 2014); In re Robles, 2014 WL 3715092, at *1 (Bankr. N.D. Cal.
9 July 24, 2014).

10 In In re Laconico, the bankruptcy court concluded that
11 “[b]efore a creditor can obtain in rem relief under § 362(d)(4),
12 the creditor must establish that the creditor holds a security
13 interest in the subject property.” 2014 WL 3687202, at *1. The
14 bankruptcy court found that the moving party seeking in rem
15 relief in that case had adequately shown the bankruptcy court
16 proof that it was an assignee of both a note and the deed of
17

18 ⁸ In Yu’s stay relief motion, the ex parte request for an
19 order shortening time, and in the declaration of Yu’s counsel
20 supporting the stay relief motion, Yu never refers to himself as
21 a creditor, let alone a secured creditor. Instead, he refers to
22 himself as “Movant.” Section 101(10) defines creditor to mean
23 “an entity that has a claim against the debtor that arose at the
24 time of or before the order for relief concerning the debtor . .
25 . .” “Claim” is defined by the Code, as relevant here, to mean
26 “a right to payment, whether or not such right is reduced to
27 judgment, liquidated, unliquidated, fixed, contingent, matured,
28 unmatured, disputed, undisputed, legal, equitable, secured or
unsecured” § 101(5)(A). We have reviewed the record,
including the state court’s unlawful detainer judgment, and there
was no documentation or other evidence presented to the
bankruptcy court at the time it granted in rem stay relief to
show that Yu’s entitlement to possession of the Property would
constitute a claim in the bankruptcy case as defined by the Code.

1 trust securing the loan on the affected property. Id.

2 In re Robles is even more on point. There, the bankruptcy
3 court again noted that to obtain in rem relief under § 362(d)(4),
4 "the creditor must establish that the creditor holds a security
5 interest in the subject property." 2014 WL 3715092, at *1. And
6 like this case, Robles addressed a scenario where the party
7 seeking in rem relief based the request on its alleged ownership
8 of the property. The Robles court rejected that request for
9 relief under § 362(d)(4), observing that a party without an
10 ownership interest does not benefit from the protections
11 contemplated in § 362(d)(4). In rem relief was granted under
12 § 105(a). Id.

13 Other bankruptcy courts in this circuit have likewise held
14 that the party seeking in rem relief must demonstrate that it is
15 a secured creditor. In re Gonzalez, 456 B.R. 429, 442 (Bankr.
16 C.D. Cal. 2011), rev'd on other grounds, Quality Loan Serv. Corp.
17 v. Gonzalez (In re Gonzalez), 2012 U.S. Dist. LEXIS 188105 (C.D.
18 Cal. June 14, 2012). So have courts from other circuits: In re
19 McCray, 342 B.R. 668, 670 (Bankr. D.D.C. 2006) ("§ 362(d)(4) is
20 limited to a stay of an act against real property and to 'a
21 creditor whose claim is secured by an interest in such real
22 property.' Here, [the movant] holds no claim secured by an
23 interest in the subject property. Instead, it claims to own the
24 property pursuant to a foreclosure sale (which by definition
25 would extinguish the security interest it had in the

1 property)");⁹ see also In re Stoltzfus, 2009 WL 2872860, at *6
2 (Bankr. E.D. Pa. March 30, 2009) ("because the movants . . . do
3 not hold claims secured by the . . . interest in real property,
4 the provisions of section 362(d)(4) are not applicable"). This
5 view is also shared by a leading treatise on bankruptcy law:
6 "the relief under § 362(d)(4) is available only to a creditor
7 whose claim is secured by an interest in real property."
8 3 Collier on Bankruptcy ¶ 362.05[19][a] (Alan N. Resnick & Henry
9 J. Sommer, eds. 16th ed. 2013).

10 Though Ellis argued the point,¹⁰ the bankruptcy court did
11 not address the undisputed fact that Yu was not a creditor whose
12 claim was secured by the Property. However, the evidence
13

14
15 ⁹ Although the bankruptcy court in McCray ruled that only
16 secured creditors could obtain in rem relief under § 362(d)(4),
17 it granted such relief to the property owner pursuant to its
18 § 105(a) powers. However, this Panel has held that in rem stay
19 relief is not available under § 105(a). Johnson v. TRE Holdings,
20 LLC (In re Johnson), 346 B.R. 190, 195-96 (9th Cir. BAP 2006).
21 Further, a request for in rem relief other than under the strict
22 rules of § 362(d)(4) would involve a request for an injunction or
23 other equitable relief affecting an interest in property for
24 purposes of Rules 7001(2) and 7001(7). In re van Ness, 399 B.R.
25 897, 904 (Bankr. E.D. Cal. 2009). Such a request would therefore
26 require the procedural protections of an adversary proceeding
27 rather than a contested matter under Rule 9014. Id.

28 ¹⁰ In her objection to the stay relief motion, the very
first line reads, "Movant Junying Yu is not a secured creditor of
the Debtor and does not claim to be a secured creditor of the
Debtor." Later, in opposition to the ex parte request for stay
pending appeal to the bankruptcy court, she repeated the
argument: "Movant Yu does not claim to be either a secured or an
unsecured creditor of the Debtor here." Yu never responded to
Ellis' argument that he is not a secured creditor, and the
bankruptcy court did not rule on Ellis' argument.

1 submitted to the bankruptcy court by Yu unequivocally
2 demonstrates that he sought in rem relief, not as a secured
3 creditor, but as the putative owner of the Property. Because Yu
4 was not a "creditor whose claim is secured by an interest" in the
5 Property, we conclude that the bankruptcy court applied an
6 incorrect legal rule and thereby abused its discretion when it
7 granted Yu in rem relief under § 362(d)(4). Accordingly, that
8 aspect of the bankruptcy court's order is REVERSED.

9 **CONCLUSION**

10 We DISMISS the appeal from the bankruptcy court's order
11 terminating the automatic stay under § 362(d)(1) and (2) as MOOT.
12 We REVERSE the bankruptcy court's grant of in rem relief to Yu
13 under § 362(d)(4) because Yu was not a creditor whose claim is
14 secured by the Property.