

MAY 29 2015

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP Nos.	EC-13-1409-KuPaJu
)		EC-13-1410-KuPaJu
DDJ, INC.,)	Bk. No.	05-10001
)		
Debtor.)		
<hr/>			
JOE FLORES; CONNIE FLORES,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM*	
)		
JAMES E. SALVEN, Chapter 7)		
Trustee; DDJ, INC.; ROBERT)		
ROSE; STATE OF CALIFORNIA)		
FRANCHISE TAX BOARD; UNITED)		
STATES TRUSTEE,)		
)		
Appellees.)		
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Submitted Without Oral Argument
on May 14, 2015**

Filed - May 29, 2015

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

Honorable Fredrick E. Clement, Bankruptcy Judge, Presiding

Appearances: Appellants Joe Flores and Connie Flores, pro se,
on brief; Thomas H. Armstrong, on brief, for
Appellee James E. Salven, chapter 7 trustee

Before: KURTZ, PAPPAS and JURY, Bankruptcy Judges.

*This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8024-1.

**By order entered on August 15, 2014, a motions panel
determined these appeals suitable for submission on the briefs
and record without oral argument.

1 **INTRODUCTION**

2 Joe and Connie Flores appeal pro se from an order of the
3 bankruptcy court overruling their objections to chapter 7¹
4 trustee James Salven's final report in the DDJ, Inc. bankruptcy
5 case. Because none of the Floreses' factual or legal contentions
6 on appeal have any merit, we AFFIRM.

7 **FACTS**

8 In 2004, the Floreses obtained a judgment after a jury trial
9 against DDJ, Inc. and its affiliate DDJ, LLC. Since that time,
10 the Floreses have been attempting, unsuccessfully, to collect on
11 that judgment. In 2005, both DDJ, Inc. and DDJ, LLC commenced
12 their chapter 7 bankruptcy cases, and Salven was duly appointed
13 to serve as the chapter 7 trustee in the DDJ, Inc. bankruptcy
14 case.² Both before and after the bankruptcy filings, the
15 Floreses in furtherance of their collection efforts have sued a
16 host of individuals and entities related to the debtors. The
17 specifics of this litigation and the parties involved are not
18 material to our resolution of this appeal, except to note that
19 none of the litigation has resulted in the Floreses successfully
20 collecting on their judgment.

21 A dispute arose between the debtors, their bankruptcy
22

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

26 ²Even though someone other than Salven was appointed to
27 serve as the chapter 7 trustee for DDJ, LLC, Salven effectively
28 became responsible for the assets of both estates as a result of
a September 2007 settlement between the Floreses and Salven,
among others, as described infra.

1 trustees and the Floreses regarding, among other things, who was
2 entitled to pursue claims against third parties. One of the
3 critical issues was whether the claims in question belonged to
4 the debtors' bankruptcy estates or to the Floreses. The
5 Floreses, Salven and the DDJ, LLC trustee entered into a
6 settlement, which was approved by the bankruptcy court in
7 September 2007, and which cleared the way for Salven to sell the
8 estates' interest in the litigation to a group of defendant
9 entities. As one of the settlement terms, the parties agreed
10 that all of DDJ, LLC's rights were to be assigned to DDJ, Inc.
11 Another settlement term provided that Salven as the chapter 7
12 trustee for DDJ, Inc. would pursue all claims on behalf of both
13 DDJ, Inc. and DDJ, LLC.³

14 The Floreses later sought to vacate the order approving the
15 settlement, but the bankruptcy denied the Floreses' motion to
16 vacate that order and all other attempts by the Floreses to undo
17 the settlement and Salven's claims sale.

18 After extensive and repetitive disputes with the Floreses,
19 Salven sought and obtained from the bankruptcy court an order
20 declaring the Floreses to be vexatious litigants. Before
21 entering that order in February 2012, the court issued detailed
22 and comprehensive findings of fact addressing each of the

23
24 ³In addition to reviewing the record presented by the
25 parties, we also have reviewed the bankruptcy court's electronic
26 docket in the underlying bankruptcy case and the imaged documents
27 attached thereto. We can take judicial notice of the filing and
28 content 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);
Atwood v. Chase Manhattan Mrtg. Co. (In re Atwood), 293 B.R. 227,
233 n.9 (9th Cir. BAP 2003).

1 vexatious litigant standards articulated by the Ninth Circuit
2 Court of Appeals. Among other things, the court's analysis
3 included an examination of the myriad motions the Floreses had
4 filed since the beginning of 2011 in both debtors' bankruptcy
5 cases and concluded that all of the Floreses' motions since at
6 least the beginning of 2011 were frivolous.

7 The bankruptcy court narrowly tailored its vexatious
8 litigant order to address the specific problem it perceived - the
9 Floreses' frivolous filings in the debtors' bankruptcy cases.
10 The order in relevant part required the Floreses to obtain
11 advance approval from any bankruptcy court in the Eastern
12 District of California before filing any additional papers in the
13 debtors' bankruptcy cases. The order also set forth specific
14 procedures the Floreses needed to follow if they sought to obtain
15 such approval.

16 The vexatious litigant order is a final order. The Floreses
17 have exhausted all of their appeal rights with respect to that
18 order and have not obtained its vacatur or reversal. More
19 specifically, the BAP entered an order dismissing as moot roughly
20 twenty of the Floreses' appeals, including their appeals from the
21 vexatious litigant order, because the sole remaining asset of the
22 bankruptcy estates over which the parties were litigating - their
23 claimed interests in a state court lawsuit - had become
24 valueless: the state court lawsuit had been dismissed and that
25 dismissal had been affirmed on appeal.

26 In turn, the Floreses appealed the BAP dismissals to the
27 Court of Appeals, but the Court of Appeals denied the Floreses'
28 request to pursue their appeals in forma pauperis and ultimately

1 dismissed their appeals for nonpayment of the filing fees. The
2 Court of Appeals issued mandates returning full jurisdiction to
3 the bankruptcy court during the first week of August 2013.

4 In April 2013, the bankruptcy court entered an order in DDJ,
5 Inc.'s bankruptcy case approving the final fee application of
6 Thomas Armstrong, Salven's general counsel. That application was
7 unopposed, and no timely appeal was taken from the order.

8 In June 2013, Salven filed his final report, and notice was
9 issued to the estate's creditors and interested parties advising
10 them that, if they objected to the final report, they needed to
11 file a written objection within twenty-one days. In July 2013,
12 the Floreses filed several papers with the court in opposition to
13 Salven's final report. The Floreses asserted that the bankruptcy
14 court lacked jurisdiction to approve the final report while their
15 appeals to the Ninth Circuit were pending. The Floreses also
16 asserted that the court should not approve the final report
17 because many of the prior orders of the bankruptcy court were
18 void and invalid. In this respect, the Floreses' opposition
19 papers largely reiterated the arguments they had made in the
20 bankruptcy court in 2011 and before. More importantly, before
21 filing their opposition papers, the Floreses did not make any
22 attempt to comply with the pre-filing procedures imposed on them
23 by the vexatious litigant order.

24 After Salven filed a reply and the Floreses filed a sur-
25 reply (again without complying with the vexatious litigant
26 order), the bankruptcy court held a hearing on the Trustee's
27 final report, at which time it concluded that there was no
28 remaining jurisdictional impediment to it considering Salven's

1 final report because the Court of Appeals by that time had
2 disposed of all of the Floreses' appeals. The court proceeded to
3 overrule the Floreses' opposition to the final report because the
4 Floreses had not complied with the vexatious litigant order. The
5 court entered an order memorializing this ruling on August 20,
6 2013.

7 On August 22, 2013, the Floreses timely filed a notice of
8 appeal from the order overruling their opposition to Salven's
9 final report.

10 JURISDICTION

11 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
12 §§ 1334 and 157(b) (2) (A) and (B). Except as noted in the
13 jurisdiction discussion set forth below, we have jurisdiction
14 under 28 U.S.C. § 158.

15 ISSUES

- 16 1. Do we have jurisdiction over the portions of the Floreses'
17 appeal challenging the order approving Armstrong's final fee
18 application?
- 19 2. Did the bankruptcy court abuse its discretion when it
20 overruled the Floreses' objections to Salven's final report?

21 STANDARDS OF REVIEW

22 We review jurisdictional issues de novo. See Wilshire
23 Courtyard v. Cal. Franchise Tax Bd. (In re Wilshire Courtyard),
24 729 F.3d 1279, 1284 (9th Cir. 2013).

25 As with most rulings concerning estate administration, we
26 review the bankruptcy court's order on the trustee's final report
27 for an abuse of discretion. See, e.g., Goodwin v. Mickey
28 Thompson Entm't. Grp., Inc. (In re Mickey Thompson Entm't. Grp.,

1 Inc.), 292 B.R. 415, 420 (9th Cir. BAP 2003) (reviewing
2 compromise order for abuse of discretion); Vu v. Kendall
3 (In re Vu), 245 B.R. 644, 647 (9th Cir. BAP 2000) (reviewing
4 abandonment order for abuse of discretion).

5 The bankruptcy court abuses its discretion when it applies
6 an incorrect legal standard or when its findings are illogical,
7 implausible or without support in the record. See United States
8 v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

9 **DISCUSSION**

10 While the Floreses timely appealed the order overruling
11 their objections to Salven's final report, the Floreses also seek
12 by way of this appeal to challenge the court's order approving
13 Armstrong's final fee application. The court entered that order
14 in April 2013, but the Floreses did not file their notice of
15 appeal until August 2013. The order disposing of Armstrong's
16 final fee application was a final order subject to immediate
17 appellate review. See, e.g., Circle K Corp. v. Houlihan, Lokey,
18 Howard & Zukin, Inc., (In re Circle K Corp.), 279 F.3d 669 (9th
19 Cir. 2002). As such, the Floreses needed to appeal that order
20 within the fourteen-day time period set forth in Rule 8002(a).
21 See Anderson v. Kalashian (In re Mouradick), 13 F.3d 326, 327
22 (9th Cir. 1994).

23 Rule 8002 is jurisdictional. The untimely filing of the
24 notice of appeal deprives this Panel of jurisdiction to review
25 the bankruptcy court's order granting the fee application. Id.;
26 see also Bowles v. Russell, 551 U.S. 205, 214 (2007) ("The timely
27 filing of a notice of appeal in a civil case is a jurisdictional
28 requirement.").

1 Consequently, we cannot consider any of the Floreses'
2 arguments challenging the order granting Armstrong's fee
3 application. It does not matter whether the Floreses assert that
4 the order is void or merely wrong. We have no authority to
5 review or consider the order given the untimeliness of the
6 Floreses' appeal.

7 Nonetheless, we can and will review the bankruptcy court's
8 order overruling the Floreses' opposition to Salven's final
9 report. The Floreses' main argument is that the order is void
10 because the bankruptcy court lacked jurisdiction to approve the
11 final report. According to the Floreses, in light of their Ninth
12 Circuit appeals, the court could not rule upon Salven's final
13 report.

14 Generally speaking, when an appeal is taken from a trial
15 court's final judgment or order, the trial court is divested of
16 most of its authority to hear and decide matters in that same
17 case. Rains v. Flinn (In re Rains), 428 F.3d 893, 903 (9th Cir.
18 2005). However, the rule regarding the effect of an appeal on
19 trial court jurisdiction is a judge-made prudential doctrine and
20 is far from absolute. Id. at 904 (citing Neary v. Padilla
21 (In re Padilla), 222 F.3d 1184, 1190 (9th Cir. 2000)). While an
22 appeal is pending, the trial court can still take certain actions
23 and decide certain matters, so long as the trial court does not
24 interfere with the status quo of the order on appeal. See
25 Hill & Sanford, LLP v. Mirzai (In re Mirzai), 236 B.R. 8, 10 (9th
26 Cir. BAP 1999) (stating that, while appeal is pending, trial
27 court may still "correct clerical errors, take steps to maintain
28 the status quo, take steps that aid in the appeal, award

1 attorney's fees, impose sanctions, and proceed with matters not
2 involved in the appeal.”).

3 As a matter of necessity, a bankruptcy court often needs to
4 continue to preside over the administration of a bankruptcy case,
5 even while appeals from prior, discrete orders are pending. A
6 pending appeal does not preclude a bankruptcy court from doing
7 so, as long as the bankruptcy court’s subsequent actions and
8 orders do not interfere with the status quo of the matters on
9 appeal. See id. The Floreses have not identified any impact the
10 bankruptcy court’s order on Salven’s final report had on their
11 appeals, nor are we aware of any such impact.

12 Even if we were to assume that the bankruptcy court’s order
13 on the final report somehow could have affected matters on
14 appeal, the Floreses’ argument regarding exclusive appellate
15 jurisdiction is fatally flawed as a factual matter. By virtue of
16 the mandates the Court of Appeals issued during the first week of
17 August 2013, all of the Floreses’ appeals were disposed of and
18 full jurisdiction was returned to the bankruptcy court before the
19 bankruptcy court ruled on the final report. See Sgaraglino v.
20 State Farm Fire & Cas. Co., 896 F.2d 420, 421 (9th Cir. 1990);
21 In re Mirzai, 236 B.R. at 10-11. Accordingly, we reject on both
22 factual and legal grounds the Floreses’ argument regarding
23 exclusive appellate jurisdiction.

24 The Floreses also assert that this Panel’s dismissal of
25 their prior appeals as moot automatically voided or invalidated
26
27
28

1 the bankruptcy court's vexatious litigant order.⁴ This assertion
2 is simply wrong. In the absence of an order explicitly vacating
3 the orders on appeal, the dismissal of the appeals as moot did
4 not automatically vacate the orders appealed. See U.S. Bancorp
5 Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 22-24 (1994).
6 Instead, upon learning that their appeals might be dismissed as
7 moot, it was incumbent on the Floreses to request vacatur of the
8 orders appealed on mootness grounds if that is what they desired.
9 See United States v. Munsingwear, Inc., 340 U.S. 36, 39-41
10 (1950). Because they never requested a Munsingwear vacatur
11 order, they forfeited any entitlement they otherwise might have
12 held to such an order. Id. We cannot go back now into the prior
13 appeals and fix the Floreses' omission. Id.

14 The Floreses claim that this result - the dismissal of their
15 appeals as moot followed by the continued enforcement of the
16 vexatious litigant order - effectively denied them due process of
17 law. We disagree. The Floreses' due process argument is
18 inconsistent with Munsingwear, which held that an appellant
19 desiring vacatur of an order on appeal that has become moot must
20 timely ask for vacatur. Id. In the prior appeals, the Floreses
21 filed voluminous papers addressing the mootness issue both before
22 and after this Panel ruled. Thus, the Floreses had ample
23 opportunity to request a Munsingwear vacatur order in the prior

24
25 ⁴The Floreses do not otherwise challenge the bankruptcy
26 court's finding that their conduct violated the vexatious
27 litigant order or its decision to disregard their opposition.
28 Consequently, we decline to address any other issues potentially
arising from these rulings. See Christian Legal Soc'y v. Wu,
626 F.3d 483, 487-88 (9th Cir. 2010); Brownfield v. City of
Yakima, 612 F.3d 1140, 1149 n.4 (9th Cir. 2010).

1 appeals. Their failure to do so does not constitute a denial of
2 due process.

3 The Floreses' other arguments on appeal focus on the
4 bankruptcy court's order approving Armstrong's final fee
5 application. Indeed, the last seven pages of the Floreses'
6 appeal brief appear exclusively devoted to the court's order on
7 Armstrong's fees. Even so, it is conceivable (albeit barely so)
8 that the Floreses also meant to challenge the order on Salven's
9 final report on the same grounds: based on allegations of fraud
10 on the court. We must liberally interpret the Floreses' pro se
11 appeal brief, so we will briefly address their fraud on the court
12 argument. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699
13 (9th Cir. 1988), partially overruled on other grounds by Bell
14 Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

15 The Floreses' fraud on the court argument is a nonstarter.
16 The argument is premised on the allegation that Salven and his
17 counsel Armstrong made misrepresentations to the bankruptcy court
18 regarding: (1) the scope of their authority to represent the
19 interests of both debtors; and (2) the scope of Armstrong's work
20 on behalf of both debtors. More specifically, the Floreses
21 contend that neither Salven nor Armstrong was authorized to do
22 anything on behalf of DDJ, LLC. As the Floreses explain, Salven
23 only was appointed to serve as chapter 7 trustee for DDJ, Inc.,
24 and Armstrong only was retained to represent Salven as chapter 7
25 trustee in the DDJ, Inc. bankruptcy case. According to the
26 Floreses, Salven and Armstrong led the court to believe that
27 Armstrong's services were performed solely for DDJ, Inc. when in
28 fact many of those services actually were performed for DDJ, LLC.

