

JUN 29 2015

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. AZ-14-1402-KiPaJu
)
6 JOSEPH P. PALMISANO and)
AMY K. PALMISANO,) Bk. No. 2:09-29570-GBN
)
7 Debtors.)
8 _____)

9 JOSEPH P. PALMISANO;)
AMY K. PALMISANO,)
10 Appellants,)
11)

v.)

MEMORANDUM¹

12 THE BANK OF NEW YORK MELLON)
13 TRUST COMPANY, N.A., f/k/a)
14 THE BANK OF NEW YORK TRUST)
COMPANY, N.A., AS TRUSTEE FOR)
15 CHASEFLEX TRUST SERIES 2007-2,)
Appellee.)
16 _____)

Argued and Submitted on June 19, 2015,
at Phoenix, Arizona

Filed - June 29, 2015

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable George B. Nielsen, Jr., Bankruptcy Judge, Presiding

Appearances: Appellant Joseph P. Palmisano argued pro se; Kyle
S. Hirsch of Bryan Cave LLP argued for appellee,
The Bank of New York Mellon Trust Company, N.A.

Before: KIRSCHER, PAPPAS and JURY, Bankruptcy Judges.

¹ 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.

1 Appellants, chapter 11² debtors Joseph and Amy Palmisano
2 ("Debtors"), appeal an order granting the motion of appellee, The
3 Bank of New York Mellon Trust Company, N.A., f/k/a The Bank of New
4 York Trust Company, N.A. as Trustee for Chaseflex Trust Series
5 2007-2 (the "Bank"), for relief from the automatic stay. The
6 bankruptcy court determined that Debtors' failure to make multiple
7 post-confirmation mortgage payments to the Bank constituted
8 "cause" to terminate the stay under § 362(d)(1).³ We DISMISS the
9 appeal as MOOT because Debtors' case has since been closed.

10 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

11 Debtors commenced a chapter 11 bankruptcy case on
12 November 17, 2009. The property at issue is Debtors' home located
13 on East Melody Court in Gilbert, Arizona ("Property"). Debtors
14 obtained a \$900,000 loan from JPMorgan Chase Bank ("Chase") for
15

16 ² Unless specified otherwise, all chapter, code and rule
17 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

18 ³ Debtors also attempt to appeal the bankruptcy court's order
19 denying reconsideration of the stay relief order. Debtors timely
20 appealed the stay relief order, but then filed a motion to
21 reconsider that order. At a hearing on September 24, 2014, the
22 bankruptcy court determined that it lacked jurisdiction to review
the motion to reconsider because Debtors had appealed the stay
relief order. On October 6, 2014, we granted limited remand for
the bankruptcy court to rule on the reconsideration motion. The
bankruptcy court denied that motion on November 6, 2014. Debtors
did not file an amended notice of appeal.

23 Consequently, on March 18, 2015, after Debtors had filed
24 their opening brief, we issued an order denying the Bank's motion
25 to dismiss but informing the parties that only the stay relief
26 order was the subject of this appeal; we lacked jurisdiction to
27 review the order denying reconsideration due to Debtors' failure
28 to file an amended notice of appeal. See Rule 8002(b)(3).
Therefore, we do not consider the documents submitted in Debtors'
excerpts of record that were presented to the bankruptcy court for
the motion to reconsider. We also do not consider any of Debtors'
arguments with respect to the bankruptcy court's denial of that
motion.

1 the Property in January 2007. In exchange for the funds, Debtors
2 executed a promissory note and first deed of trust in favor of
3 Chase to secure the note.

4 Chase filed a proof of claim for \$995,067.90. In June 2010,
5 Chase recorded an Assignment of Deed of Trust, assigning its
6 interest in the note and deed of trust to the Bank.

7 The bankruptcy court confirmed Debtors' chapter 11 plan in
8 January 2011 ("Plan"). Under the Plan, Debtors and Chase⁴ agreed
9 to value the Property at \$600,000 and agreed that Chase held a
10 secured claim in that amount; the remaining amount of Chase's
11 claim was treated as an allowed unsecured claim. The Plan
12 required Debtors to make monthly payments of \$3,207.61 to Chase.

13 The Bank moved for relief from the automatic stay on
14 January 2, 2013 ("Stay Relief Motion"), alleging that Debtors had
15 failed to make post-confirmation mortgage payments in accordance
16 with the Plan since September 2011. The Bank argued that Debtors'
17 default constituted "cause" for relief under § 362(d)(1). Debtors
18 opposed the Stay Relief Motion, denying the Bank's allegation of
19 any missed mortgage payments. A hearing on the Stay Relief Motion
20 was continued several times to accommodate the parties' settlement
21 attempts.

22 After settlement negotiations failed, the bankruptcy court
23 held a hearing on the Stay Relief Motion on August 5, 2014. The
24 Bank filed a reply brief the day before, reasserting that Debtors
25 had failed to make monthly mortgage payments per the Plan since

27 ⁴ The Plan still referred to Chase as the first-position
28 lender on the Property even though its interest in the note and
deed of trust had already been assigned to the Bank.

1 September 2011, rendering them \$96,250.00 in default.

2 Debtors were represented by their proposed new counsel, Alan
3 Meda. Mr. Meda admitted he was "still getting up to speed" on the
4 Stay Relief Motion, but said he could address the issue "at the
5 appropriate time." After brief argument by the parties, Mr. Meda
6 conceded to the court that Debtors had failed to make some of the
7 payments in accordance with the Plan. Based on the Bank's and
8 Mr. Meda's representations, the bankruptcy court granted the Stay
9 Relief Motion.

10 Debtors, acting pro se, timely appealed the order granting
11 the Stay Relief Motion for "cause" entered on August 8, 2014
12 ("Stay Relief Order").⁵ Per their request, Debtors' chapter 11
13 case was closed on January 9, 2015.

14 **II. JURISDICTION**

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

18 **III. ISSUES**

19 Is the Stay Relief Order moot? If not, did the bankruptcy
20 court abuse its discretion in granting the Stay Relief Motion?

21 **IV. STANDARD OF REVIEW**

22 We review our own jurisdiction, including questions of
23 mootness, de novo. Ellis v. Yu (In re Ellis), 523 B.R. 673, 677
24 (9th Cir. BAP 2014) (citing Silver Sage Partners, Ltd. v. City of
25 Desert Hot Springs (In re City of Desert Hot Springs), 339 F.3d

26
27 ⁵ The Bank agreed to stay any foreclosure sale pending the
28 appeal so long as Debtors tendered monthly mortgage payments of
\$2,750.00.

1 782, 787 (9th Cir. 2003)).

2 **V. DISCUSSION**

3 **The appeal of the Stay Relief Order is moot.**

4 We lack jurisdiction to hear moot appeals. Id. (citing
5 United States v. Pattullo (In re Pattullo), 271 F.3d 898, 901 (9th
6 Cir. 2001); GTE Cal., Inc. v. FCC, 39 F.3d 940, 945 (9th Cir.
7 1994)). Federal courts may only adjudicate actual cases and
8 controversies. Motor Vehicle Cas. Co. v. Thorpe Insulation Co.
9 (In re Thorpe Insulation Co.), 677 F.3d 869, 880 (9th Cir. 2012).
10 A moot case is one where the issues presented are no longer live
11 and no case or controversy exists. In re Ellis, 523 B.R. at 677
12 (citing Pilate v. Burrell (In re Burrell), 415 F.3d 994, 998 (9th
13 Cir. 2005)). The test for mootness is whether an appellate court
14 can still grant the appellant effective relief if it decides the
15 merits in his or her favor. Id. If an issue becomes moot while
16 the appeal is pending, an appellate court must dismiss the appeal.
17 Id. (citing In re Pattullo, 271 F.3d at 900). "We may take
18 judicial notice of events in the bankruptcy case occurring
19 subsequent to the filing of an appeal if they resolve the dispute
20 between the parties." Id. (citing Pitts v. Terrible Herbst, Inc.,
21 653 F.3d 1081, 1087 (9th Cir. 2011) ("[I]f events subsequent to the
22 filing of the case resolve the parties' dispute, we must dismiss
23 the case as moot.")).

24 Under § 362(a), when a petition is filed an automatic stay
25 becomes effective which operates to enjoin, among other things:

26 (3) any act to obtain possession of property of the estate
27 or of property from the estate or to exercise control over
property of the estate;

28 (4) any act to create, perfect, or enforce any lien

1 against property of the estate;

2 (5) any act to create, perfect, or enforce against
3 property of the debtor any lien to the extent that such
4 lien secures a claim that arose before the commencement of
5 the case under this title[.]

6 § 362(a)(3)-(5).

7 However, the stay is not permanent. Section 362(c) sets
8 forth the time limitations governing its duration:

9 (1) the stay of an act against property of the estate
10 under subsection (a) of this section continues until such
11 property is no longer property of the estate;

12 (2) the stay of any other act under subsection (a) of this
13 section continues until the earliest of -

14 (A) the time the case is closed;

15 (B) the time the case is dismissed; or

16 (C) if the case is a case under chapter 7 of this
17 title concerning an individual or a case under
18 chapter 9, 11, or 13 of this title, the time a
19 discharge is granted or denied.

20 § 362(c)(1), (2).

21 The Plan provided that as of the confirmation date, all
22 property of the estate reverted to Debtors and would no longer be
23 considered property of the estate as defined in § 541. Thus, the
24 stay established by § 362(a)(3) and (4) was terminated upon
25 confirmation since the Property was no longer "property of the
26 estate." Guild Mortg. Co. v. Cornist (In re Cornist), 7 B.R. 118,
27 120 (Bankr. S.D. Cal. 1980); § 362(c)(1); see also Gasprom, Inc.
28 v. Fateh (In re Gasprom, Inc.), 500 B.R. 598, 604 (9th Cir. BAP
 2013) (title to property reverted to debtor once trustee abandoned
 it and was no longer "property of the estate," so the aspect of
 the stay protecting estate property no longer applied).

 But confirmation of Debtors' Plan did not by operation of law

1 terminate the aspect of the stay arising from § 362(a)(5), which
2 protects "property of the debtor." In re Gasprom, Inc., 500 B.R.
3 at 604 (section 362(a)(5) continued to protect "property of the
4 debtor" from foreclosure); In re Cornist, 7 B.R. at 120
5 (section 362(a)(5) automatically stays a wide variety of actions
6 against the debtor's property, including private foreclosure
7 sales) (citing 2 COLLIER ON BANKRUPTCY ¶ 362.04(5) at 362-34 (15th
8 ed.)). However, the stay under § 362(a)(5) is also one of limited
9 duration and terminates automatically under § 362(c)(2) when a
10 discharge is granted or denied or when the case is closed or
11 dismissed. In re Cornist, 7 B.R. at 120; see also In re Gasprom,
12 Inc., 500 B.R. at 604 (absent a ruling granting relief under
13 § 362(d) to permit foreclosure to occur, § 362(a)(5) continues to
14 protect debtor's property from foreclosure, at least until the
15 bankruptcy court closes debtor's case). Therefore, no stay has
16 been in effect since Debtors' case was closed on January 9, 2015.
17 Consequently, even if we were to reverse the Stay Relief Order
18 which terminated the automatic stay in the Bank's favor under
19 § 362(d)(1), that stay has now terminated as a matter of law.⁶ As
20 a result, we are unable to provide any effective relief to
21 Debtors, and therefore the appeal is moot.

22 ////

23
24 ⁶ The Bank contends, alternatively, that it was not required
25 to seek an order terminating the stay because the stay terminated
26 by operation of law when Debtors' Plan was confirmed and they
27 received their discharge. Although the confirmation order states
28 that Debtors would receive a discharge upon Plan confirmation, the
Bank is incorrect. Because Debtors are individuals, they will not
receive a discharge until all plan payments have been made,
sometime around the end of 2016. See § 1141(d)(5). The order
closing Debtors' case reaffirms that they will not receive a
discharge until all plan payments have been made.

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VI. CONCLUSION

For the foregoing reasons, we DISMISS this appeal as MOOT.