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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	NC-14-1510-TaDJu
6	GREEN HORIZON MANUFACTURING,)	Bk. No.	14-30105
7	LLC,)		
8	Debtor.)		
9	GREEN HORIZON MANUFACTURING,)		
10	LLC,)		
11	Appellant,)		
12	v.)	MEMORANDUM*	
13	ENCINAL DEL MONTE PLANT 48)		
14	REUSE, LLC,)		
15	Appellee.)		

Argued and Submitted on October 23, 2015
at San Francisco, California

Filed - November 10, 2015

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

Honorable Dennis Montali, Bankruptcy Judge, Presiding

Appearances: Ann McFarland Draper of Draper Law Offices argued
for appellant Green Horizon Manufacturing, LLC;
Matthew J. Shier of Shierkatz RLLP argued for
appellee Encinal Del Monte Plant 48 Reuse, LLC.

Before: TAYLOR, DUNN, 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(c)(2).

1 **INTRODUCTION**

2 Former chapter 7¹ debtor Green Horizon Manufacturing, LLC
3 appeals from a bankruptcy court order terminating its lease with
4 Encinal Del Monte Plant 48 Reuse, LLC.

5 We dismiss the appeal as MOOT.

6 **FACTS²**

7 Green Horizon leased commercial real property in Alameda,
8 California (the "Premises") from Encinal. Eventually, a lease
9 dispute arose; Encinal alleged non-payment of rent while Green
10 Horizon defended based on allegations that Encinal improperly
11 shut off the delivery of water to the Premises. Encinal sought
12 resolution through an unlawful detainer action. Green Horizon
13 responded with a chapter 11 petition.

14 Green Horizon did not undertake its chapter 11
15 responsibilities with alacrity. It filed monthly operating
16 reports only after seven months and only then in response to a
17 bankruptcy court order. And its chapter 11 case did not move
18 smoothly toward plan confirmation. The lease dispute spilled
19 over to the bankruptcy court, and, over a nine-month period, the
20 parties filed hotly contested motions, including competing
21 motions to terminate and to assume the lease.

22 During this time and pursuant to bankruptcy court orders,
23

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

26 ² We exercise our discretion to take judicial notice of
27 documents filed in the bankruptcy case. See Atwood v. Chase
28 Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th
Cir. BAP 2003).

1 however, Green Horizon paid post-petition rent to Encinal.
2 Green Horizon paid nothing in May 2014 as it claimed entitlement
3 to a month of "free" rent pursuant to the lease.

4 Eventually, with no prospect for unassisted assumption and
5 cure on the horizon, Green Horizon focused on assignment of the
6 lease to a third party; in September 2014, it filed a
7 supplemental motion to assume and assign. The parties' disputes
8 continued unabated, however. They did not agree on either the
9 amount, timing, or feasibility of cure. Accordingly, the
10 bankruptcy court set an evidentiary hearing for the last week of
11 October.

12 An already acrimonious situation got only more complicated
13 when Encinal learned that Green Horizon did not intend to pay
14 October rent based on a new interpretation of the lease.
15 Encinal promptly obtained an emergency hearing from the
16 bankruptcy court. At the hearing, Green Horizon, Encinal, and
17 the Unsecured Creditors' Committee appeared.

18 Green Horizon explained its new position and argued that
19 under its new calculations it had overpaid post-petition rent by
20 \$2,000 and owed nothing for October. Encinal vigorously
21 disputed these allegations and requested that the lease
22 terminate if October rent was not paid.

23 The bankruptcy court focused on risk allocation under these
24 disputed facts. It ascertained that Green Horizon might not
25 have funds to pay October rent, and it acknowledged that an
26 order to pay rent might unfairly cause lease termination if
27 Green Horizon's new calculations carried the day. But it also
28 acknowledged that if Green Horizon was incorrect, Encinal would

1 unfairly bear the loss. Ultimately, the bankruptcy court
2 adopted the Creditors' Committee's suggestion and ordered Green
3 Horizon to pay \$9,000 - half of the October rent allegedly due -
4 to Encinal's counsel with the payment to be held in trust
5 pending determination of the issue at the evidentiary hearing.
6 The bankruptcy court required the payment by the end of the
7 second week of October; this allowed Green Horizon a week to
8 make the payment.

9 Green Horizon, however, neither paid any amount nor
10 requested additional time to do so. Consequently, Encinal's
11 counsel filed an ex-parte declaration so stating and renewed its
12 request for termination of the lease.

13 The following day, the bankruptcy court entered an order
14 granting Encinal's motion to terminate the lease and denying
15 Green Horizon's supplemental motion to assume and assign (the
16 "Lease Order"). The order stayed Green Horizon's surrender of
17 the Premises for 30 days to allow for an orderly transition. It
18 provided, however, that if Green Horizon did not vacate the
19 Premises within 30 days, Encinal could obtain stay relief.

20 Green Horizon timely appealed the Lease Order.

21 **JURISDICTION**

22 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
23 §§ 1334 and 157(b)(2)(A) and (O). Our jurisdiction is founded
24 on 28 U.S.C. § 158, which we address below.

25 **ISSUES**

26 Whether this appeal is moot; and, if not, whether the
27 bankruptcy court erred in terminating the lease.

1 "A case is moot if the issues presented are no longer live
2 and there fails to be a 'case or controversy' under Article III
3 of the Constitution." Pilate v. Burrell (In re Burrell),
4 415 F.3d 994, 998 (9th Cir. 2005). Determining constitutional
5 mootness turns on whether "the appellate court can give the
6 appellant any effective relief in the event that it decides the
7 matter on the merits in [its] favor." Id.

8 Here, the Panel could reverse the Lease Order and, thus,
9 accord Green Horizon facial relief. But, Green Horizon seeks
10 this outcome only as a means to an end – reinstatement of the
11 lease and repossession of the Premises. This desired outcome is
12 foreclosed. Encinal has relet the Premises, and the bankruptcy
13 court has dismissed the chapter 7 case. On this record, we
14 cannot provide meaningful relief to Green Horizon.⁴

15 Even if the appeal is not constitutionally moot, we may
16 dismiss the appeal based on equitable mootness; that is, when
17 there has been a "comprehensive change of circumstances . . . so
18 as to render it inequitable for this court to consider the
19 merits of the appeal." Rev Op Group v. ML Manager LLC

21 ³(...continued)
22 of the Premises to a third party purchaser. Notwithstanding an
23 order issued by the BAP Clerk of Court requiring an affirmative
24 response on the mootness issue, Green Horizon did not respond.

25 ⁴ To the extent Green Horizon believes it has a damages
26 claim against Encinal - something that we neither decide nor
27 insinuate - it is free to pursue any such claims in state court.
28 To the extent Green Horizon's focus is on the preclusive effect
of the Lease Order in a state court proceeding, we also express
no opinion except to note that nothing in the Lease Order
discusses or determines a damages claim.

1 (In re Mortgs. Ltd.), 771 F.3d 1211, 1214 (9th Cir. 2014). For
2 an appeal to be equitably moot, “[t]he question is whether the
3 case presents transactions that are so complex or difficult to
4 unwind that the doctrine of equitable mootness would apply.”
5 Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe
6 Insulation Co.), 677 F.3d 869, 880 (9th Cir. 2012) (internal
7 quotation marks and citation omitted). “Ultimately, the
8 decision whether or not to unscramble the eggs turns on what is
9 practical and equitable.” Baker & Drake, Inc. v. Pub. Serv.
10 Comm’n of Nev. (In re Baker & Drake, Inc.), 35 F.3d 1348, 1352
11 (9th Cir. 1994) (citations omitted).

12 The Panel examines several considerations in determining
13 whether an appeal is equitably moot. First, we determine
14 whether the appellant sought a stay pending appeal. JPMCC 2007-
15 C1 Grasslawn Lodging, LLC v. Transwest Resort Properties, Inc.
16 (In re Transwest Resort Properties, Inc.), 801 F.3d 1161, 1167
17 (9th Cir. 2015). As stated, Green Horizon did not seek a stay
18 of the Lease Order. See Fed. R. Bankr. P. 8007(a)-(b). And,
19 following the notice of appeal, the bankruptcy court issued not
20 one, but two, additional orders directing Green Horizon’s
21 immediate vacation and surrender of the Premises. Green Horizon
22 did not appeal from either of these orders and, pursuant to
23 them, Encinal obtained a writ of possession and relet the
24 Premises. Green Horizon’s failure to seek a stay pending appeal
25 is, thus, fatal to its appeal. See In re Mortgs. Ltd., 771 F.3d
26 at 1216.

27 This conclusion is underscored by consideration of two
28 other equitable mootness factors: the effect a remedy may have

1 on third parties not before the appellate court and whether the
2 bankruptcy court can fashion effective and equitable relief
3 without creating an inequitable and uncontrollable situation.
4 See id. Here, any reversal would be unfair to the new tenant
5 who lawfully obtained possession, and the inequity is
6 accentuated by Green Horizon's complete failure to argue that it
7 can or will cure the many years of default.

8 Finally, the bankruptcy court could not fashion equitable
9 relief to Green Horizon. The chapter 7 case has been dismissed.
10 Thus, even if we reversed the Lease Order, it is not possible
11 for the bankruptcy court to conduct additional proceedings in
12 the case, let alone accord Green Horizon any equitable relief.

13 The two exceptions to the equitable mootness test do not
14 compel a different result. Notwithstanding a failure to seek a
15 stay pending appeal, an appeal is not equitably moot where the
16 appellant has a statutory right or remedy to the property under
17 state law, such as a right of redemption, or where the appellant
18 solely seeks monetary damages from a solvent debtor. Id. at
19 1217 (discussing the "narrow exceptions" cabined in Suter v.
20 Goedert, 504 F.3d 982, 990 (9th Cir. 2007), and In re Sylmar
21 Plaza, L.P., 314 F.3d 1070, 1074 (9th Cir. 2002)). Green
22 Horizon does not argue that either exception is applicable here,
23 and we conclude that they are not.

24 On this record, a determination of equitable mootness is
25 required.

26 CONCLUSION

27 Based on the foregoing, we dismiss the appeal as moot.