

JUL 07 2016

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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NOT FOR PUBLICATION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. EC-15-1139-JuDta
	)	
ZOYA KOSOVSKA,	)	Bk. No. 14-25893
	)	
Debtor.	)	Adv. No. 14-02271
	)	
<u>ZOYA KOSOVSKA; LILIYA WALSH,</u>	)	
	)	
Appellants,	)	
	)	
v.	)	<b>MEMORANDUM*</b>
	)	
MAX DEFAULT SERVICES CORP.;	)	
FEDERAL NATIONAL MORTGAGE	)	
ASSOCIATION; SETERUS, INC.,	)	
	)	
Appellees.	)	

Argued and Submitted on June 23, 2016  
at Sacramento, California

Filed - July 7, 2016

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

Honorable Michael S. McManus, Bankruptcy Judge, Presiding

Appearances: Appellants Zoya Kosovska and Liliya Walsh argued  
pro se; Michael W. Stoltzman of The Ryan Firm  
argued for appellees Federal National Mortgage  
Association and Seterus, Inc.\*\*

Before: JURY, DUNN, and TAYLOR, 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.

\*\* Max Default Services Corp. has not participated in this  
appeal.

1 Chapter 11<sup>1</sup> debtor Zoya Kosovska (Kosovska) and non-debtor  
2 Liliya Walsh<sup>2</sup> (Walsh) (collectively, Appellants) removed a state  
3 court action alleging claims related to a non-judicial  
4 foreclosure to the bankruptcy court on the same day that  
5 Kosovska's bankruptcy case was dismissed. Appellees and  
6 defendants in the state court action, Seterus, Inc. and Federal  
7 National Mortgage Association (collectively, Appellees), moved  
8 to remand the matter. The bankruptcy court granted Appellees'  
9 motion and awarded them attorneys' fees and costs, finding  
10 Appellants did not have an objectively reasonable basis for  
11 removal. Appellants filed a motion for reconsideration, which  
12 the bankruptcy court denied. This appeal followed.

13 Appellees contend that Appellants' appeal of the remand  
14 order has become moot. Appellants argue it is not moot because  
15 the state court had no jurisdiction over the matter while this  
16 appeal was pending and the bankruptcy clerk failed to mail a  
17 certified copy of the remand order as required by 28 U.S.C.  
18 § 1447(c), which allowed the state court to proceed with the  
19 case. Appellants are mistaken on both assertions. The state  
20 court had jurisdiction over the matter because Appellants did  
21 not seek a stay pending appeal. Further, the record shows that  
22 the clerk mailed a certified copy of the remand order to the  
23 state court.

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25 <sup>1</sup> Unless otherwise indicated, all chapter and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
27 all "Rule" references are to the Federal Rules of Bankruptcy  
28 Procedure.

<sup>2</sup> Liliya Walsh is the daughter of Zoya Kosovska and Ivan Kosovskiy.

1 While this appeal was pending, the state court entered an  
2 order sustaining Appellees' demurrers to Appellants' second  
3 amended complaint without leave to amend, thus terminating the  
4 state court action. Therefore, the state court action no longer  
5 exists and cannot be revived. In addition, because Kosovska's  
6 chapter 11 case was dismissed there is no longer any case or  
7 controversy involving issues regarding the reorganization of the  
8 estate. Accordingly, we cannot grant Appellants any effective  
9 relief. We thus DISMISS as MOOT this aspect of the remand order  
10 on appeal.

11 Appellants also contend the bankruptcy court erred by  
12 awarding Appellees their fees and costs in the amount of  
13 \$1,459.50. Finding no abuse of discretion, we AFFIRM this  
14 aspect of the remand order.

#### 15 I. FACTS<sup>3</sup>

16 On December 19, 2013, Appellants commenced a civil action  
17 against Appellees in the California superior court seeking  
18 relief related to non-judicial foreclosure proceedings. The  
19 complaint included claims for violation of Cal. Civ. Code  
20 § 2924,<sup>4</sup> slander of title and cancellation of instrument. Among  
21 other adverse rulings, the state court denied Appellants'  
22 request for a preliminary injunction to enjoin the trustee's  
23 sale of the underlying property, dissolved the temporary  
24 restraining order, and sustained Appellees' demurrers to

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25  
26 <sup>3</sup> Many of the background facts are set forth in the  
bankruptcy court's ruling on the motion to remand.

27  
28 <sup>4</sup> This statute states the requirements for initiating a  
non-judicial foreclosure.

1 Appellants' complaint.

2 Due to the pending foreclosure, Kosovska filed a chapter 11  
3 petition on June 2, 2014. Despite the bankruptcy filing, eight  
4 days later Appellants filed a second amended complaint in the  
5 state court action.

6 A few months after the filing, the United States Trustee  
7 (UST) filed a motion to dismiss Kosovska's bankruptcy case.  
8 The bankruptcy court granted the motion by order entered on  
9 September 15, 2014. Kosovska did not appeal the dismissal  
10 order.

11 On September 15, 2014, the same day that Kosovska's case  
12 was dismissed, Appellants filed a notice of removal under  
13 28 U.S.C. § 1452(a)<sup>5</sup>, removing the state court action to the  
14 bankruptcy court. At the time of removal, Appellees had  
15 multiple motions pending in the state court action, including  
16 demurrers to Appellants' amended complaint and a motion to  
17 expunge the lis pendens recorded against the underlying  
18 property.

19 On October 14, 2014, Appellees moved to remand the action  
20 back to the state court on the grounds that Appellants' removal  
21 was untimely and the bankruptcy court lacked jurisdiction over  
22 the state court action since Kosovska's underlying bankruptcy  
23 case had been dismissed. Appellees also argued that they were  
24 entitled to an award of their attorneys' fees and costs because

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25  
26 <sup>5</sup> The statute provides that "a party may remove any claim or  
27 cause of action in a civil action . . . to the district court for  
28 the district where such civil action is pending, if such district  
court has jurisdiction of such claim or cause of action under  
Section 1334 of this title."

1 Appellants had no objectively reasonable basis for removal.

2 On November 24, 2014, the bankruptcy court granted  
3 Appellees' motion, finding: (1) it did not have subject matter  
4 jurisdiction over claims not involving the bankruptcy estate  
5 (specifically, claims of Walsh, who was not a debtor);  
6 (2) Appellants' claims arose solely under state law; (3) it did  
7 not have "related to" jurisdiction over the claims as Kosovska's  
8 bankruptcy case had been dismissed; (4) there was no basis to  
9 retain jurisdiction after the dismissal of the bankruptcy case;  
10 (5) equitable remand was proper; and (6) the removal was  
11 untimely.

12 The bankruptcy court further found that neither of the  
13 Appellants "had an objectively reasonable basis for removal"  
14 and, therefore, awarded Appellees their attorneys' fees and  
15 costs incurred in making the motion to remand in the amount of  
16 \$1,459.50. On January 5, 2015, the court entered an order  
17 remanding the state court action back to the state court.

18 On January 20, 2015, Appellants filed a motion for  
19 reconsideration of the remand order. The bankruptcy court  
20 denied the motion finding no grounds for reconsideration and  
21 concluding that its order granting Appellees' fees and costs was  
22 proper. On April 14, 2015, the bankruptcy court entered the  
23 order denying Appellants' motion for reconsideration.  
24 Appellants filed a timely notice of appeal.

25 In their responsive brief, Appellees informed the Panel  
26 that the state court proceeding had been concluded and argued  
27 that the appeal of the remand was moot. The Panel issued a one-  
28 judge order regarding mootness which required Appellants to file

1 a response by November 12, 2015.

2 On November 16, 2015, Appellants filed a request to extend  
3 the time to file a responsive brief regarding the order  
4 regarding mootness and preliminary response to the mootness  
5 argument (Mootness Brief). There, Appellants argued, among  
6 other things, that the state court had no jurisdiction to hear  
7 the matter given the appeal to the Panel. Based on this  
8 premise, they contended that the state court's decision was  
9 void. Appellants further argued that jurisdiction was not  
10 returned to the state court because "there is no indication in  
11 the record that the clerk of the bankruptcy court ever mailed a  
12 certified copy of an order remanding the case to Placer County  
13 Superior Court." According to Appellants, the state court never  
14 reacquired jurisdiction due to this deficiency.

15 On December 18, 2015, the Panel issued an order informing  
16 the parties that their respective arguments regarding mootness  
17 would be determined by the merits Panel. Accordingly, we  
18 address the mootness arguments below.

## 19 **II. JURISDICTION**

20 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
21 §§ 1334 and 157(b) (2) (A). We have jurisdiction under 28 U.S.C.  
22 § 158.

## 23 **III. ISSUES**

24 A. Whether appeal of the bankruptcy court's decision to  
25 remand the state court action is moot; and

26 B. Whether the bankruptcy court abused its discretion by  
27 awarding Appellees their attorneys' fees and costs under  
28 28 U.S.C. § 1447(c).

1 **IV. STANDARDS OF REVIEW**

2 We review our own jurisdiction, including questions of  
3 mootness, de novo. Ellis v. Junying Yu (In re Ellis), 523 B.R.  
4 673, 676 (9th Cir. BAP 2014) (citing Silver Sage Partners, Ltd.  
5 v. City of Desert Hot Springs (In re City of Desert Hot  
6 Springs), 339 F.3d 782, 787 (9th Cir. 2003)).

7 We review an award of fees and expenses for abuse of  
8 discretion. Lussier v. Dollar Tree Stores, Inc., 518 F.3d 1062,  
9 1065 (9th Cir. 2008). An abuse of discretion evaluation  
10 involves a two-prong test; first, we determine de novo whether  
11 the bankruptcy court identified the correct legal rule for  
12 application. See United States v. Hinkson, 585 F.3d 1247,  
13 1261-62 (9th Cir. 2009) (en banc). If not, then the bankruptcy  
14 court necessarily abused its discretion. See id. at 1262.  
15 Otherwise, we next review whether the bankruptcy court's  
16 application of the correct legal rule was clearly erroneous; we  
17 will affirm unless its findings were illogical, implausible, or  
18 without support in the record. See id.

19 **V. DISCUSSION**

20 **A. The appeal of the bankruptcy court's decision to remand is**  
21 **moot.**

22 We cannot exercise jurisdiction over a moot appeal. United  
23 States v. Pattullo (In re Pattullo), 271 F.3d 898, 900 (9th Cir.  
24 2001); GTE Cal., Inc. v. FCC, 39 F.3d 940, 945 (9th Cir. 1994).  
25 A moot case is one where the issues presented are no longer live  
26 and no case or controversy exists. Pilate v. Burrell  
27 (In re Burrell), 415 F.3d 994, 998 (9th Cir. 2005). The test  
28 for mootness is whether an appellate court can still grant

1 effective relief to the prevailing party if it decides the  
2 merits in his or her favor. Castaic Partners II, LLC v. Daca-  
3 Castaic, LLC (In re Castaic Partners II, LLC), \_\_\_ F.3d \_\_\_  
4 (9th Cir. 2016), 2016 WL 2957150, at \*2 (9th Cir. May 23, 2016)  
5 (citing Motor Vehicle Cas. Co. v. Thorpe Insulation Co.  
6 (In re Thorpe Insulation Co.), 677 F.3d 869, 880 (9th Cir.  
7 2012). "If it cannot grant such relief, the matter is moot. In  
8 a bankruptcy appeal, when the underlying bankruptcy case is  
9 dismissed and that dismissal is allowed to become final, there  
10 is likely no longer any case or controversy 'with respect to  
11 issues directly involving the reorganization of the estate.'" Id.

13 We conclude that Appellants' appeal of the bankruptcy  
14 court's decision to remand the matter to the state court is  
15 moot. After the January 2015 remand, Appellants did not seek  
16 and obtain stay of the bankruptcy court's order pending  
17 resolution of this appeal pursuant to Rule 8007, which would  
18 have preserved the status quo. Re Op Group v. ML Manager LLC  
19 (In re Mortgs. Ltd.), 771 F.3d 1211, 1215 (9th Cir. 2014).  
20 Appellants offer no reason for their failure to seek a stay; we  
21 further see nothing in the record supporting that a stay would  
22 have been appropriate.

23 Appellants also argue in their Mootness Brief that the  
24 remand portion of the order on appeal is not moot because the  
25 bankruptcy court never mailed a copy of the order remanding the  
26 matter to the state court, which Appellants argue was a pre-  
27 requisite to the state court's reacquisition of jurisdiction  
28 over the civil action. 28 U.S.C. § 1447(c) provides that "[a]



1 certified copy of the order of remand shall be mailed by the  
2 clerk to the clerk of the State court. The State court may  
3 thereupon proceed with such case." On January 6, 2015, the  
4 bankruptcy court issued a "Certificate of Mailing" which states  
5 that the "deputy clerk of U.S. Bankruptcy Court for the Eastern  
6 District of California" sent a certified copy of the remand  
7 order, along with the docket, to the "Placer County Superior  
8 Court" on January 6, 2015. Since the statutory requirement  
9 under 28 U.S.C. § 1447(c) has been met, Appellants' argument is  
10 without merit.

11 In short, the certified copy of the remand order restored  
12 jurisdiction in the state court and allowed it to proceed.  
13 Without a stay pending appeal, there was no bar to the state  
14 court exercising jurisdiction over the lawsuit. On May 5, 2015,  
15 the state court sustained Appellees' demurrers to Appellants'  
16 complaint without leave to amend, thus terminating the state  
17 court action by order entered on May 29, 2015. Contrary to  
18 Appellants' position, this order is not void as the state court  
19 had jurisdiction over the matter despite their appeal to the  
20 Panel.

21 Because the state court action has been terminated and  
22 cannot be revived, we are unable to grant any effective relief  
23 to Appellants by reversing the bankruptcy court's remand order  
24 even if it was warranted. Compare Staker v. Jubber  
25 (In re Staker), 498 B.R. 391 (10th Cir. BAP 2013) (Table)  
26 (finding appeal of remand order moot when after remand state  
27 court vacated default judgments and dismissed actions with  
28 prejudice). Further, Kosovska's underlying chapter 11 case had

1 been dismissed and that dismissal is final. The dismissal  
2 demonstrates that there is no longer any case or controversy  
3 “with respect to issues directly involving the reorganization  
4 of the estate.” In re Castaic Partners II, LLC, \_\_\_ F.3d \_\_\_  
5 (9th Cir. 2016), 2016 WL 2957150, at \*2 (9th Cir. May 23, 2016).  
6 Accordingly, Appellants’ appeal of the bankruptcy court’s  
7 decision to remand the matter is moot and must be dismissed.

8 **B. The bankruptcy court did not abuse its discretion in**  
9 **awarding Appellees their attorneys’ fees and costs in**  
10 **obtaining the Remand Order.**

11 Unlike the bankruptcy court’s decision to remand, its award  
12 of attorneys’ fees and costs to Appellees is not moot because we  
13 may give Appellants effective relief if we reverse the  
14 bankruptcy court’s decision. 28 U.S.C. § 1447(c) states in  
15 relevant part: “An order remanding the case may require payment  
16 of just costs and any actual expenses, including attorney fees,  
17 incurred as a result of the removal.” Courts have wide  
18 discretion to grant attorneys’ fees and costs for an improper  
19 removal. Billington v. Winograde (In re Hotel Mt. Lassen,  
20 Inc.), 207 B.R. 935, 943 (Bankr. E.D. Cal. 1997) (citing Moore  
21 v. Permanente Med. Group, Inc., 981 F.2d 443, 447 (9th Cir.  
22 1992)). In exercising this discretion, the court considers the  
23 “reasonableness of the removal.” Martin v. Franklin Capital  
24 Corp., 546 U.S. 132, 141 (2005). “Absent unusual circumstances,  
25 courts may award attorney’s fees under [28 U.S.C. § 1447(c)]  
26 only where the removing party lacked an objectively reasonable  
27 basis for seeking removal. Conversely, when an objectively  
28 reasonable basis exists, fees should be denied.” Id. “Bad  
faith need not be shown before making a fee award under

1 [28 U.S.C.] § 1447(c).” In re Hotel Mt. Lassen, Inc., 207 B.R.  
2 at 943 (citing Moore, 981 F.2d at 447).

3 Here, the bankruptcy court used the objectively reasonable  
4 standard when making its decision to award fees and costs. The  
5 court made several findings addressing why Appellants did not  
6 have an objectively reasonable basis for removal: (1) removal  
7 was untimely in violation of Rule 9027(a)(2);<sup>6</sup> (2) nearly nine  
8 months lapsed between initiation of the state court action and  
9 the removal to this court; (3) there was extensive litigation in  
10 state court during the approximately nine months prior to  
11 removal; (4) the underlying bankruptcy case had been pending for  
12 less than four months prior to dismissal; (5) the bankruptcy  
13 case was dismissed only after the UST filed a motion to dismiss;  
14 and (6) there was no timely appeal from the order dismissing the  
15 underlying bankruptcy case.

16 The bankruptcy court further noted that Appellants and  
17 other family members filed multiple bankruptcies - six cases  
18 were filed between Kosovska and her former husband, Ivan  
19 Kosovskiy, and four cases were filed by Walsh. These cases were  
20 filed without schedules or statements and dismissed. The court

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21  
22 <sup>6</sup> Rule 9027(a)(2) states:

23 If the claim or cause of action in a civil action is  
24 pending when a case under the Code is commenced, a  
25 notice of removal may be filed only within the longest  
26 of (A) 90 days after the order for relief in the case  
27 under the Code, (B) 30 days after entry of an order  
28 terminating a stay, if the claim or cause of action in  
a civil action has been stayed under § 362 of the Code,  
or (C) 30 days after a trustee qualifies in a chapter  
11 reorganization case but not later than 180 days  
after the order for relief.

1 found that all the cases were filed to benefit from the  
2 automatic stay and, with the exception of one case, all were  
3 dismissed shortly after the filing.

4 The bankruptcy court also found significant that Walsh was  
5 neither a debtor or creditor in the underlying bankruptcy case  
6 and that her property interest was never part of the bankruptcy  
7 estate. Accordingly, the court noted that it never had subject  
8 matter jurisdiction over Walsh's claims against the Appellees.

9 Although we found the bankruptcy court's decision regarding  
10 remand moot, some evaluation of the merits of the remand order  
11 is necessary to review an award of attorneys' fees. Moore,  
12 981 F.2d at 447. Here, we conclude that the underlying record  
13 supports the bankruptcy court's conclusion that there was no  
14 objectively reasonable basis for the removal.

15 First, contrary to Appellants' arguments that  
16 Rule 9027(a)(2)(B) or (C) applied to their notice of removal,  
17 only (a)(2)(A) is applicable. Rule 9027(a)(2)(A) states that a  
18 notice of removal may be filed 90 days after the order for  
19 relief in the case. Appellants did not file the notice of  
20 removal until after the 90-day period had expired. Second,  
21 Kosovska proceeded in state court for nine months prior to the  
22 removal which was precipitated by adverse rulings. See Moore,  
23 981 F.2d at 447 ("[R]ight to remove is waived by acts which  
24 indicate an intent to proceed in state court, and that  
25 Defendants may not 'experiment' in state court and remove upon  
26 receiving an adverse decision.").

27 Next, even if the removal were timely, the bankruptcy court  
28 did not have core or related to subject matter jurisdiction over

1 the claims asserted in the removed action since Kosovska's  
2 underlying bankruptcy case was in the process of dismissal. She  
3 did not appeal that decision. Appellants' assertion that the  
4 court had jurisdiction because the claims involved property of  
5 the estate are without merit. Upon dismissal, the automatic  
6 stay ceased to exist and there was no longer the possibility of  
7 a successful reorganization. See In re Castaic Partners II,  
8 LLC, \_\_\_ F.3d \_\_\_ (9th Cir. 2016), 2016 WL 2957150, at \*2 (9th  
9 Cir. May 23, 2016) (there is likely no longer any case or  
10 controversy after dismissal "'with respect to issues directly  
11 involving the reorganization of the estate.'"). Further, as the  
12 bankruptcy court noted, it did not have jurisdiction over  
13 Walsh's claims since her property interest was never part of  
14 Kosovska's bankruptcy estate.

15 Finally, although a finding of bad faith is not required,  
16 it is a factor which the bankruptcy court may consider since the  
17 court looks to whether Appellants had a good reason to remove  
18 the state court action. 28 U.S.C. § 1452(b) authorizes the  
19 court to remand claims on "any equitable ground." This standard  
20 is an "unusually broad grant of authority" that "subsumes and  
21 reaches beyond all of the reasons for remand under  
22 non-bankruptcy removal statutes." McCarthy v. Prince  
23 (In re McCarthy), 230 B.R. 414, 417 (9th Cir. BAP 1999). The  
24 bankruptcy court noted Kosovska's and Walsh's numerous prior  
25 bankruptcy filings without schedules or statements, all but one  
26 of which were dismissed. The clear implication is that the  
27 filings were made to obtain the benefit of the automatic stay  
28 and not for any broader legitimate bankruptcy purpose. The

1 bankruptcy court properly considered Appellants' prior conduct  
2 when exercising its discretion to award Appellees their  
3 attorneys' fees and costs.

4 In sum, the bankruptcy court did not abuse its discretion  
5 when it awarded Appellees their attorneys' fees and costs in an  
6 amount that appears reasonable and clearly is not excessive.

7 **VI. CONCLUSION**

8 For the reasons stated, the bankruptcy court's decision to  
9 remand is DISMISSED as MOOT and the bankruptcy court's decision  
10 to award Appellees their attorneys' fees and costs is AFFIRMED.