

JUL 26 2016

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NOT FOR PUBLICATION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 No.	CC-16-1053-KuFKi
	)		
YAN SUI,	)	Bk. No.	8:11-bk-20448-CB
	)		
Debtor.	)		
_____	)		
YAN SUI; PEI-YU YANG,	)		
	)		
Appellants,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
RICHARD A. MARSHACK, Chapter 7	)		
Trustee,	)		
	)		
Appellee.	)		
_____	)		

Submitted Without Oral Argument  
on June 23, 2016

Filed - July 26, 2016

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

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

Appearances: Appellants Yan Sui and Pei-Yu Yang, pro se, on  
brief; David Edward Hays and Chad V. Haes of  
Marshack Hays LLP on brief for appellee Richard A.  
Marshack, Chapter 7 Trustee.

Before: KURTZ, FARIS and KIRSCHER, Bankruptcy Judges.

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\*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 **INTRODUCTION**

2 Chapter 7<sup>1</sup> debtor Yan Sui and his wife Pei-Yu Yang appeal,  
3 pro se, from the bankruptcy court's order authorizing the trustee  
4 Richard A. Marshack to offset against Yang's interest in the  
5 proceeds from the sale of the couple's residence \$93,832.72 in  
6 contempt sanctions awarded in favor of the trustee and against  
7 Sui and Yang. The order also authorized the trustee to pay  
8 roughly \$70,000 to Yang in full satisfaction of her claimed  
9 interest in the sale proceeds and further authorized the trustee  
10 to file a notice of acknowledgment of satisfaction of judgment  
11 reflecting Yang's "payment" of the sanctions award by way of the  
12 offset.

13 On appeal, Sui and Yang argue that the bankruptcy court  
14 lacked jurisdiction to enter the setoff order while their appeals  
15 from other, prior orders were pending. Sui and Yang's  
16 jurisdictional argument lacks merit. Even so, in one of their  
17 other appeals, the Panel has vacated the sanctions order on which  
18 the setoff order was based. Based thereon, we also must VACATE  
19 the setoff order, and we must REMAND for further proceedings.

20 **FACTS**

21 In July 2011, Sui filed a voluntary chapter 7 petition, and  
22 Marshack was appointed to serve as the chapter 7 trustee in Sui's  
23 bankruptcy case. In May 2013, Marshack obtained from the United  
24 States District Court for the Central District of California a  
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26 <sup>1</sup>Unless specified otherwise, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
28 all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037.

1 judgment avoiding Sui's fraudulent transfer to Yang of his  
2 interest in the couple's residence located in Costa Mesa,  
3 California. This judgment provided in relevant part that the  
4 avoidance resulted in the revesting of the residence in the names  
5 of both Sui and Yang as joint tenants. Yang appealed the  
6 fraudulent transfer avoidance judgment, but the Ninth Circuit  
7 Court of Appeals affirmed.<sup>2</sup>

8 In October 2014, Marshack obtained a second judgment, this  
9 one from the bankruptcy court. The bankruptcy court's judgment  
10 required Sui and Yang to turn over possession of the Costa Mesa  
11 residence to Marshack and authorized Marshack to sell the  
12 residence free and clear of all liens, claims and other  
13 interests, including Yang's joint tenancy interest. The order  
14 further provided that the trustee could divide the sale proceeds  
15 in accordance with § 363(j) and other applicable law.

16 In June 2015, the bankruptcy court entered an order  
17 authorizing Marshack to sell the Costa Mesa residence to third  
18 party EFK Properties, LLC. Among other things, the sale order  
19 specified as follows: "Neither Yan Sui nor Pei-yu Yang shall  
20 assert any lien, claim, or interest in the Property in violation  
21 of the free and clear provisions of this order. Any actions  
22 taken in violation of this order may be adjudicated to be  
23 contempt."

24 Sui and Yang appealed both the bankruptcy court judgment and  
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26 <sup>2</sup>We have exercised our discretion to take judicial notice of  
27 the contents of the district court's and the bankruptcy court's  
28 dockets and the imaged documents attached thereto. See O'Rourke  
v. Seaboard Surety Co. (In re E.R. Fegert, Inc.), 887 F.2d 955,  
957-58 (9th Cir. 1989).

1 the sale order to this Panel, which dismissed both appeals as  
2 moot. Sui and Yang then appealed the Panel's dismissals to the  
3 Ninth Circuit Court of Appeals, which appeals are still pending.

4 On November 5, 2015, the bankruptcy court entered an order  
5 holding Sui and Yang in contempt of court. As set forth in the  
6 contempt order, Sui and Yang had violated both the bankruptcy  
7 court's judgment and its sale order by interfering with  
8 Marshack's efforts to sell the Costa Mesa residence. The  
9 bankruptcy court awarded in favor of the trustee and against Sui  
10 and Yang, jointly and severally, civil contempt sanctions in the  
11 aggregate amount of \$93,832.72.

12 This brings us to the motion from which this appeal arose.  
13 In December 2015, Marshack filed his motion seeking to setoff  
14 from Yang's share of the sale proceeds the \$93,832.72 contempt  
15 sanction award. Marshack's motion also requested authorization  
16 to pay to Yang roughly \$70,000 in full satisfaction of Yang's  
17 claimed interests in the sale proceeds and authorization for  
18 Marshack to file a notice acknowledging full satisfaction of  
19 judgment, reflecting Yang's "payment" of the sanctions award by  
20 way of the offset.

21 Sui and Yang filed a four-page opposition to the setoff  
22 motion. Sui and Yang noted that appeals were pending from all of  
23 the orders and judgments leading up to Marshack's setoff motion,  
24 including the bankruptcy court judgment, the sale order and the  
25 contempt order. Sui and Yang asserted that the bankruptcy court  
26 lacked jurisdiction to hear and decide Marshack's setoff motion  
27 while these appeals were pending.

28 At the hearing on the setoff motion, the bankruptcy court

1 granted all of the relief Marshack requested in his motion. On  
2 February 19, 2016, the bankruptcy court entered an order granting  
3 Marshack's motion in full, and Sui and Yang timely filed a notice  
4 of appeal.

5 Recently, the Panel issued a decision in Sui and Yang's  
6 appeal from the bankruptcy court's sanctions order (BAP No.  
7 CC-15-1352). In that decision, the Panel affirmed in part,  
8 reversed in part, and (most importantly for our purposes) vacated  
9 the sanctions order.

#### 10 **JURISDICTION**

11 Subject to the jurisdictional discussion set forth below,  
12 the bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
13 §§ 1334 and 157(b) (2) (A). We have jurisdiction under 28 U.S.C.  
14 § 158.

#### 15 **ISSUES**

- 16 1. Did the bankruptcy court have jurisdiction to hear and  
17 decide Marshack's setoff motion while Sui and Yang's appeals  
18 from other, prior orders were pending?
- 19 2. Can the bankruptcy court's setoff order stand in light of  
20 the Panel's decision vacating the sanctions order?

#### 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 The issue presented here regarding the availability of  
26 setoff is a question of law. The resolution of this appeal  
27 merely requires us to identify and apply the the correct legal  
28 rule to the undisputed facts presented. We review questions of

1 law de novo. Bechtold v. Gillespie (In re Gillespie), 516 B.R.  
2 586, 590 (9th Cir. BAP 2014)

3 **DISCUSSION**

4 The only comprehensible argument that Sui and Yang raised in  
5 their appeal brief is jurisdictional. Sui and Yang contend that  
6 the bankruptcy court lacked jurisdiction to hear and decide  
7 Marshack's setoff motion while their appeals from the bankruptcy  
8 court's other, prior orders were pending. We disagree.

9 It generally is true that the filing of an appeal will  
10 divest the bankruptcy court of jurisdiction to hear and decide  
11 matters that will affect the order on appeal. Hill & Sandford,  
12 LLP v. Mirzai (In re Mirzai), 236 B.R. 8, 10 (9th Cir. BAP 1999).  
13 However, there are several exceptions to this rule. Id. One  
14 exception recognizes the trial court's continuing authority,  
15 while an appeal is pending and in the absence of a stay pending  
16 appeal, to issue orders enforcing a prior judgment or order. Id.  
17 (citing Wedbush, Noble, Cooke, Inc. v. SEC, 714 F.2d 923, 924  
18 (9th Cir. 1983)). Another exception recognizes the trial court's  
19 continuing authority to "proceed with matters not involved in the  
20 appeal." Id. (citing Pyrodyne Corp. v. Pyrotronics Corp.,  
21 847 F.2d 1398, 1403 (9th Cir. 1988)). This latter exception is  
22 particularly important in bankruptcy cases. The rule divesting  
23 courts of jurisdiction during the pendency of an appeal must be  
24 applied with caution in the bankruptcy context because it is not  
25 practicable for all aspects of a bankruptcy case to come to a  
26 halt when an appeal is filed from a bankruptcy court ruling. To  
27 hold otherwise would enable one recalcitrant party in interest to  
28 bring a bankruptcy case to a standstill by the simple expedient

1 of filing appeals from various bankruptcy court orders.

2 Here, no stay pending appeal had been granted, so the  
3 bankruptcy court had authority to enter the setoff order to  
4 effectuate and enforce the contempt order and the sale order.  
5 Absent a stay pending appeal, federal judgments are immediately  
6 enforceable. Bennett v. Gemmill (In re Combined Metals Reduction  
7 Co.), 557 F.2d 179, 190 (9th Cir. 1977).

8 Accordingly, we reject Sui and Yang's jurisdictional  
9 argument.

10 Sui and Yang's other complaints set forth in their appeal  
11 brief either make no sense or demonstrate a fundamental  
12 misunderstanding of how bankruptcy courts and federal appellate  
13 courts resolve matters before them. For instance, Sui and Yang  
14 complain that the bankruptcy court should not have affirmed its  
15 own order and should not have taken steps that might render Sui  
16 and Yang's other appeals moot. The bankruptcy court did not  
17 "affirm" any of its prior orders. It merely permitted Marshack  
18 to proceed with administration of the bankruptcy estate in  
19 accordance with the orders' terms. As for their mootness  
20 complaint, we express no opinion as to whether the bankruptcy  
21 court's setoff order might have rendered any of Sui and Yang's  
22 other, prior appeals moot, but we note that there is no rule  
23 generally prohibiting bankruptcy courts from taking subsequent  
24 actions that might render an appeal moot. In fact, appeals from  
25 bankruptcy court orders often become moot upon the occurrence of  
26 subsequent events, including further action by the bankruptcy  
27 court. See, e.g., Armel Laminates, Inc. v. Lomas & Nettleton Co.  
28 (In re Income Prop. Builders, Inc.), 699 F.2d 963, 964 (9th Cir.

1 1983); Bay Vista Apartments, LLC v. Fed. Nat'l Mortg. Ass'n  
2 (In re Bay Vista Apartments, LLC), 2011 WL 7145995, at \*1  
3 (Mem. Dec.) (9th Cir. BAP Dec. 19, 2011); Omoto v. Ruggera  
4 (In re Omoto), 85 B.R. 98, 100 (9th Cir. BAP 1988).

5 Finally, Sui and Yang complain that the bankruptcy court  
6 should not have authorized Marshack to file the notice  
7 acknowledging satisfaction of the judgment unless and until Yang  
8 actually cashed the sale proceeds check Marshack sent to Yang  
9 pursuant to the setoff order. This complaint is premised on Sui  
10 and Yang's mistaken belief that there is some relationship  
11 between the notice of acknowledgment and **Marshack's** payment of  
12 sale proceeds to Yang. To the contrary, the notice of  
13 acknowledgment only concerned **Yang's** satisfaction of the  
14 sanctions award provided for in the bankruptcy court's contempt  
15 order. That satisfaction occurred as a result of the setoff the  
16 bankruptcy court authorized Marshack to make. Yang's cashing (or  
17 not cashing) of the sale proceeds check has no relevance to the  
18 setoff.

19 Notwithstanding Sui and Yang's failure to present a  
20 meritorious argument in their appeal brief, we nonetheless will  
21 vacate the bankruptcy court's setoff order. The Panel's recent  
22 decision vacating the bankruptcy court's sanctions order fatally  
23 undermines the setoff order because the relief granted in the  
24 setoff order was premised on the validity of the sanctions order.  
25 It is axiomatic that there can be no right of setoff unless there  
26 exist two valid offsetting debts. See generally McDaniel v. City  
27 & Cty. of S.F., 259 Cal. App. 2d 356, 364-65 (1968) (describing  
28 when right of setoff arises under California law); FDIC v.

1 Mademoiselle of Cal., 379 F.2d 660, 663 (9th Cir. 1967)

2 (describing same under federal common law).

3 Thus, we consider ourselves compelled to vacate and remand  
4 the setoff order so that the bankruptcy court, on remand, can  
5 take a fresh look at the setoff motion in light of the Panel's  
6 ruling on the sanctions order.

7 There is one other issue we need to address. Sui and Yang  
8 filed a motion in both this appeal and in the sanctions order  
9 appeal requesting that the Panel order Marshack to withdraw his  
10 filing of the notice acknowledging satisfaction of the sanctions  
11 award, which reflects Yang's "payment" of the sanctions award by  
12 way of the offset. According to Sui and Yang, the filed notice  
13 of acknowledgment might interfere with or hinder disposition of  
14 the sanctions order appeal, the setoff order appeal, or both. We  
15 will DENY this motion as unnecessary. The notice of  
16 acknowledgment has not, in fact, interfered with either appeal.  
17 Nor are we aware of any other grounds necessitating the  
18 withdrawal of the notice of acknowledgment. All the notice of  
19 acknowledgment currently does is give notice of the satisfaction  
20 of a vacated sanctions award. If, for whatever reason, either  
21 party on remand decides it is necessary to take action with  
22 respect to the notice of acknowledgment, they are free to revisit  
23 the issue with the bankruptcy court.

#### 24 **CONCLUSION**

25 For the reasons set forth above, we conclude that the  
26 bankruptcy court had jurisdiction to hear and decide Marshack's  
27 setoff motion. However, the recent decision of the Panel  
28 vacating the bankruptcy court's sanctions order fatally

1 undermined the bankruptcy court's setoff order. Therefore, we  
2 also must VACATE the setoff order, and we REMAND for further  
3 proceedings.

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