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NOT FOR PUBLICATION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. CC-16-1009-DKuF
6	TERESA A. BRYANT,)	Bk. No. 8:10-bk-25064-CB
7	Debtor.)	
8	_____)	
9	TERESA A. BRYANT,)	
10	Appellant,)	
11	v.)	MEMORANDUM¹
12	THE BANK OF NEW YORK MELLON;)	
13	SELECT PORTFOLIO SERVICING,)	
14	INC.,)	
15	Appellees.)	
16	_____)	

Argued and Submitted on July 28, 2016
at Pasadena, California

Filed - August 3, 2016

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

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

Appearances: Fritz J. Firman argued for appellant; Shiva D.
Beck of Locke Lord LLP argued for appellees.

Before: DUNN, KURTZ, and FARIS, 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 This appeal revolves around real property in Hawaii (the
2 "Hawaii Property"). Teresa A. Bryant (the "Debtor"), who owns
3 but does not reside at the Hawaii Property, filed a chapter 13²
4 petition in 2010. The Debtor successfully stripped the lien of
5 the second position mortgage holder on the Hawaii Property via an
6 order entered by the bankruptcy court valuing the Hawaii Property
7 at \$375,000. In 2013, the Bank of New York Mellon ("BNY
8 Mellon"), the current holder of the first-position mortgage,
9 obtained relief from the automatic stay to foreclose on the
10 Hawaii Property.

11 While contesting BNY Mellon's judicial foreclosure in
12 Hawaii, the Debtor simultaneously proceeded to deal with the
13 Hawaii Property and BNY Mellon in the bankruptcy case. The
14 Debtor modified her chapter 13 plan to "cram down" the previously
15 determined value of the Hawaii Property to reduce the secured
16 portion of BNY Mellon's claim. She then moved the court to
17 direct the chapter 13 trustee (the "Trustee") to pay \$375,000 to
18 BNY Mellon. After the court orally granted the motion at a
19 hearing, BNY Mellon reappeared in the bankruptcy case,
20 represented by new counsel, to file an opposition to the
21 Trustee's notice of intent to file a final report and account to
22 close the case. Sixty-eight days after the first hearing, a
23 second hearing was held, at which BNY Mellon complained that its
24

25
26 ² Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 All "Rule" references are to the Federal Rules of Bankruptcy
Procedure. All "Civil Rule" references are to the Federal Rules
of Civil Procedure.

1 state court counsel in Hawaii had not been apprised of the
2 Debtor's continued actions in the bankruptcy court. The
3 bankruptcy court concluded for various reasons that the Debtor's
4 conduct necessitated reversal of the previous decision and
5 entered an order denying the debtor's motion.

6 The Debtor appeals. We VACATE the bankruptcy court's order
7 and REMAND for further proceedings.

8 I. FACTUAL AND PROCEDURAL BACKGROUND

9 The Debtor filed her chapter 13 petition on October 22,
10 2010. Her schedule of real property included one entry, the
11 Hawaii Property, which she valued at \$558,000. She listed three
12 secured debts in her schedules, each secured by the Hawaii
13 Property: a first mortgage held by Bank of America in the amount
14 of \$800,000; a second mortgage, also held by Bank of America, in
15 the amount of \$198,771; and a precautionary entry for the City
16 and County of Honolulu for property taxes, with a debt amount of
17 \$0. The Debtor's chapter 13 plan, which was confirmed on
18 February 7, 2011, required the Debtor to make monthly payments of
19 \$2,380 directly to Bank of America for the first mortgage.³ The
20 plan also provided that the Debtor would file a motion to avoid
21

22
23 ³ Though the excerpts of record provided by the Debtor on
24 appeal are extensive, the procedural complexity of the underlying
25 case makes it necessary for us to consider other documents,
26 including the chapter 13 plan, which were filed with the
27 bankruptcy court but not included in the appellate record.
28 Hence, we exercise our discretion to take judicial notice of such
documents. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert,
Inc.), 887 F.2d 955, 957-58 (9th Cir. 1988); Atwood v. Chase
Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th
Cir. BAP 2003).

1 the second mortgage. The mandatory form of the plan further
2 provided that property of the bankruptcy estate would not revert
3 in the Debtor until discharge was entered, or until the case was
4 closed without discharge.

5 As provided in the plan, in August 2012, the Debtor filed a
6 motion to determine the value of the Hawaii Property and to avoid
7 the second-position lien of Bank of America (the "Valuation
8 Motion"). The Valuation Motion was served by certified mail on
9 the CEO of Bank of America, as both first and second mortgage
10 holder, and on BAC Home Loans Servicing, LP, its servicer. In
11 the body of the Valuation Motion, the Debtor explained that
12 "[t]he only issue is whether there is sufficient value in the
13 [Hawaii] Property to secure the BAC Home Loans Servicing, LP
14 lien." To answer this question, the Debtor attached the
15 declaration of a real estate appraiser estimating that the fair
16 market value of the Hawaii Property was \$375,000, significantly
17 less than the value the Debtor had stated on her schedules, and
18 far less than the amount owed on the first mortgage. No
19 opposition was filed. After a hearing, the bankruptcy court
20 entered an order on October 1, 2012, captioned "Order on Debtor's
21 Motion to Value Real Property for the Purposes of Plan Treatment
22 and to Extinguish Lien of BAC Home Loans Servicing, LP Not on
23 Debtor's Residence" (the "Valuation Order").⁴ The Valuation

24
25 ⁴ Before the Valuation Motion, the Debtor filed a
26 substantially similar motion which referred to the Hawaii
27 Property as her "principal residence." That motion was withdrawn
28 after a hearing, and the Valuation Motion was filed in its place.
According to the Debtor, the bankruptcy court insisted that the
(continued...)

1 Order was served by certified mail on Bank of America and BAC
2 Home Loans Servicing, LP. In addition to avoiding the second-
3 position lien, the Valuation Order provided: "As of October 22,
4 2010 [i.e., the petition date] and at all times since October 22,
5 2010, the [Hawaii Property] is valued at no more than \$375,000
6 based on adequate evidence."

7 In August 2013, BNY Mellon appeared in the case for the
8 first time to move for relief from the automatic stay. BNY
9 Mellon indicated that it was the assignee of the holder of the
10 first-position mortgage⁵ on the Hawaii Property and that the
11 Debtor had failed to make postpetition mortgage payments as
12 required by the confirmed plan. Over the Debtor's various
13 evidentiary and other objections, relief from the automatic stay
14 was granted by court order ("Relief from Stay Order") on
15 September 19, 2013, permitting BNY Mellon to pursue its
16 foreclosure remedies in state court. In January 2014, BNY Mellon
17 commenced judicial foreclosure proceedings in Hawaii.

18 While the foreclosure proceedings were ongoing, the Debtor
19 filed a motion to modify her chapter 13 plan ("Modification

20 _____
21 ⁴(...continued)

22 Valuation Motion be re-filed to reflect that the Hawaii Property
23 was not the Debtor's residence. Unfortunately, there is no
24 transcript of that hearing, so we have no way of confirming what
25 was discussed. The record is consistent with the Debtor's
26 explanation.

27 This is one of many points at which the record leaves us
28 uncertain as to why things were done in the way they were done.

29 ⁵ An exhibit attached to the relief from stay motion shows
30 that BNY Mellon received an assignment of the mortgage on
31 December 21, 2012, approximately twelve weeks after the Valuation
32 Order had been entered.

1 Motion"). The Modification Motion stated as follows: "Debtor
2 will cram down the first trust deed [sic] on [the Hawaii
3 Property] to the secured value of the subject property, to wit
4 \$375,000. Said secured sum will be paid through the Chapter 13
5 Plan in a lump sum to the first trust deed holder which shall be
6 paid to the Chapter 13 trustee or directly to the lender with the
7 Chapter 13 trustee's fee thereon paid to the Chapter 13 trustee
8 by March 1, 2014 dividend will be reduced to 1%." (Errors in
9 original.) In an attached declaration, the Debtor's attorney
10 expressed his view that the Valuation Order, which was not
11 appealed, was now "the law of this case." He further declared
12 that the Debtor had "a lender in place" that would pay BNY Mellon
13 the full value of the Hawaii Property as determined in the
14 Valuation Order. The Modification Motion was served by certified
15 mail on officers of Bank of America and BNY Mellon. In addition,
16 it was served on the attorney who had filed the relief from stay
17 motion for BNY Mellon and on another attorney who had filed a
18 proof of claim supplement for BNY Mellon.

19 The only response to the Modification Motion came from the
20 Trustee, who opposed it on the following grounds:

21 1. The Modification Motion was a duplicate of a second,
22 identical document filed on the same day. The Trustee requested
23 that one of those documents be withdrawn.

24 2. The proof of service did not indicate that the current
25 Modification Motion had been served properly. The Trustee noted
26 that the Debtor had filed a substantially identical modification
27 motion months earlier and that certain documents bore dates that
28 appeared to correspond to that previous motion.

1 indicated that BNY Mellon's claim was fully secured in the amount
2 of \$375,000. The Debtor attached the Valuation Order to the
3 proof of claim. The following day, the Debtor filed a motion
4 ("Payment Motion") asking the bankruptcy court to direct the
5 Trustee to pay the secured claim. According to the Payment
6 Motion, "[t]he Debtor was unable to get anyone to open an escrow
7 to pay [BNY] Mellon's secured debt. . . . The Debtor's lender is
8 willing to wire the Chapter 13 Trustee \$375,000, plus the
9 Chapter 13 Trustee's fees to pay the secured claim of [BNY]
10 Mellon the \$375,000 necessary to pay [BNY] Mellon's claim in full
11 [sic]." The Payment Motion was served on the CEO of BNY Mellon
12 by certified mail, and the attorneys who had appeared on behalf
13 of BNY Mellon in the bankruptcy case received electronic notice.

14 The Trustee filed comments indicating he approved of the
15 Payment Motion. No other response was filed. The court held a
16 hearing on the Payment Motion on October 8, 2015. The following
17 is the entire colloquy that took place at the October 8 hearing:

18 THE COURT: Number 11, Teresa Bryant. Motion
19 for the trustee to pay the secured claim of Mellon

20
21 ⁵(...continued)

22 Mellon already had become the assignee for the first mortgage, so
23 it is unclear why Bank of America filed the proof of claim.
24 Apparently, Bank of America is or was BNY Mellon's servicer for
25 the mortgage.

26 It is conceivable that the "reference document" claim was
27 intended to apply to the second, stripped mortgage. But this
28 seems unlikely, since BNY Mellon in 2014 filed a Notice of
Postpetition Mortgage Fees, Expenses, and Charges linked to the
claim filed by Bank of America. See Main Case Claims Register,
claim no. 7. Perhaps most significantly for purposes of this
appeal, this filing shows that BNY Mellon was actively
participating in the bankruptcy case as early as February 2014.

1 Bank.

2 [DEBTOR'S ATTORNEY]: Good afternoon, your
Honor. Fritz Firman appearing on behalf of the Debtor.

3 THE COURT: Good afternoon.
4 How does the trustee feel about this?

5 [TRUSTEE'S ATTORNEY]: You know, if the Court
orders us to pay funds to a party, we will do that.
6 But, there's no escrow in this case. We can't vouch
for anything, other than that we'll send funds.

7 THE COURT: Well, I mean, as long as it works,
8 I guess. I'll go ahead and grant.

9 [DEBTOR'S ATTORNEY]: Thank you, your Honor.

10 A docket entry concerning the hearing likewise indicates that the
11 Payment Motion was granted.

12 A few days after the October 8 hearing, the Trustee filed a
13 notice of intent to submit a final report and account in
14 anticipation of closure of the chapter 13 case. The attached
15 proposed final report and account indicated payment of \$0 to BAC
16 Home Loans Servicing, LP, evidently as BNY Mellon's servicer, on
17 its claim of \$375,000. Approximately one month later, BNY Mellon
18 filed, through new counsel, an opposition to the proposed final
19 account and report. BNY Mellon explained that it had no
20 objection to the filing of a final account and report, but that
21 it opposed the proposed payment to it (or its servicer) of \$0.
22 BNY Mellon expressed its displeasure with the Debtor's activities
23 in the foreclosure action and the bankruptcy case, particularly
24 the fact that the Debtor had proceeded in these two forums
25 independently and without keeping each court apprised of events
26 occurring elsewhere. Similarly, BNY Mellon complained that the
27 Debtor had not informed the attorneys representing it in the
28 foreclosure action of the pendency of the Debtor's various

1 motions in the bankruptcy court. Concurrently, BNY Mellon also
2 filed declarations and requested judicial notice of a document
3 filed in the foreclosure proceeding stating that the value of the
4 Hawaii Property was \$502,000.

5 The Trustee filed a response indicating that he took no
6 position on BNY Mellon's response to the proposed final report
7 and account. He acknowledged that the notice of intent to file
8 the final report was premature and should not have been filed
9 before entry of an order granting the Payment Motion. The
10 Trustee also noted that BNY Mellon's opposition to the proposed
11 final report and account "cannot on its face procedurally or
12 materially challenge" any of the Debtor's motions, whether
13 pending or previously granted.

14 The court held an additional hearing on the Payment Motion
15 on December 15, 2015 ("December 15 hearing"), at which the Debtor
16 and BNY Mellon appeared through counsel. The bankruptcy court
17 suggested that the Debtor ought to have served her bankruptcy
18 court motions on BNY Mellon's foreclosure counsel in Hawaii,
19 rather than proceeding without such service in the hope that
20 "they may not catch it," an approach the court characterized as
21 an "underhanded" attempt to "get around the fact that relief from
22 stay had been granted" In response to the Debtor's
23 counsel's protestations that he had complied with the service
24 requirements imposed by the Rules and that BNY Mellon's Hawaii
25 counsel was well aware of the bankruptcy,⁶ the court elaborated:

26
27 ⁶ The Debtor's counsel told the court that the Debtor's
28 bankruptcy motions relating to the Hawaii Property had been
(continued...)

1 I granted relief from stay. To most creditors, once
2 they're granted relief from stay by the bankruptcy
3 court, it's not property of the estate, they go forward
4 and they do what they need to do, they're not paying
5 attention to the bankruptcy anymore. They're done.
6 They got relief from stay. Yet all these things that
7 are going on that aren't served on counsel in Hawaii,
8 but they're served to other places because that's all
9 you have to serve them to. It's okay. I'm not buying
10 it. I'm having trouble here.

11 The court further commented that the Payment Motion was
12 "basically . . . a collateral attack on the relief from stay
13 proceeding." The Debtor's counsel vigorously disputed that
14 characterization, arguing that the Relief from Stay Order did not
15 amount to an order granting the Hawaii Property to BNY Mellon and
16 that the Debtor was entitled to oppose the foreclosure. The
17 court agreed that the Debtor was permitted to oppose foreclosure,
18 but disagreed that the bankruptcy court could continue to
19 "affect" the foreclosure after the Relief from Stay Order had
20 been entered.

21 The Debtor's counsel further argued that the Payment Motion
22 had been granted already and that BNY Mellon had not moved to
23 vacate the court's oral ruling. In response, the bankruptcy
24

25 ⁶(...continued)
26 attached to documents filed in the state court. BNY Mellon's
27 counsel denied that his client's state court counsel was aware of
28 "everything that was going on," but he apparently conceded that
state court counsel had become aware of at least some of the
Debtor's recent bankruptcy activities in November 2014.

A declaration submitted by BNY Mellon's state court counsel
stated that her office had learned of the Modification Order in
connection with a document filed in state court in May 2015. It
appears that BNY Mellon's state court counsel was aware of the
Debtor's continuing bankruptcy activities for at least four
months before the October 8 hearing on the Payment Motion.

1 court announced its intention to vacate not only the oral ruling
2 on the Payment Motion, but also the 2012 Valuation Motion, based
3 upon "fraud on the court." When the Debtor's counsel argued that
4 it was inappropriate to vacate a three-year-old order sua sponte,
5 the court proposed instead to "clarify" the Valuation Order to
6 provide that it governed only the lien-stripping procedure, not
7 other aspects of plan treatment. The court stated that the
8 Valuation Order was not binding against BNY Mellon, even though
9 BNY Mellon's predecessor in interest Bank of America held both
10 the first and second liens at the time of the Valuation Order, on
11 the ground that "a first[-position lienholder] doesn't
12 necessarily come in and defend a motion like that." Finally, the
13 Debtor's counsel argued that the Modification Motion had been
14 granted by final order, BNY Mellon having made no objection. The
15 court reiterated that the "real issue" was the failure to serve
16 BNY Mellon's counsel in Hawaii.

17 Before the hearing ended, BNY Mellon's counsel briefly
18 raised an additional argument, namely that the Modification
19 Order, which was entered in November 2014, seemed to require a
20 payment of \$375,000 to have been made to BNY Mellon in March
21 2014. That payment had not been made. The court did not comment
22 on this argument or invite the Debtor's counsel to respond to it.
23 Following the hearing, BNY Mellon's counsel lodged a proposed
24 order vacating both the Modification Order and the oral ruling
25 granting the Payment Motion, as well as denying the Payment
26 Motion. The Debtor objected to the form of order on the grounds
27 that it proposed to grant relief that was neither requested nor
28 granted at the December 15 hearing. Ultimately, the court

1 entered an order that vacated the oral ruling at the October 8
2 hearing and denied the Payment Motion ("Payment Order"). The
3 Payment Order made no mention of the Modification Order or the
4 Valuation Order. The Debtor appealed.

5 **II. JURISDICTION**

6 The bankruptcy court had jurisdiction under 28 U.S.C.
7 §§ 1334 and 157(b)(2)(B) and (O). We have jurisdiction under
8 28 U.S.C. § 158.

9 **III. ISSUES**

10 1. Whether the bankruptcy court abused its discretion in
11 reconsidering its prior oral ruling.

12 2. Whether the bankruptcy court abused its discretion in
13 denying the Payment Motion.

14 **IV. STANDARDS OF REVIEW**

15 We review a bankruptcy court's legal conclusions de novo and
16 its findings of fact for clear error. Bronitsky v. Bea
17 (In re Bea), 533 B.R. 283, 285 (9th Cir. BAP 2015). We review
18 the bankruptcy court's application of procedural rules and
19 whether a procedure comports with due process de novo. Frates v.
20 Wells Fargo Bank, N.A. (In re Frates), 507 B.R. 298, 301 (9th
21 Cir. BAP 2014). A decision to vacate a previous order generally
22 is reviewed for abuse of discretion. Jeff D. v. Otter, 643 F.3d
23 278, 283 (9th Cir. 2011).

24 An abuse of discretion occurs if the bankruptcy court fails
25 to apply the correct legal standard or applies it in a way that
26 is illogical, implausible or unsupported by the record. United
27 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc);
28 Greif & Co. v. Shapiro (In re Western Funding Inc.), 550 B.R.

1 841, 849 (9th Cir. BAP 2016).

2 **V. DISCUSSION**

3 Based on the transcript of the December 15 hearing, it
4 appears that the bankruptcy court reached its ultimate decision
5 to deny the Payment Motion on four bases: (I) the Debtor failed
6 to serve any of her motions on BNY Mellon's state court counsel
7 in Hawaii; (ii) the Debtor acted in bad faith and committed fraud
8 on the court; (iii) the Payment Motion was an improper collateral
9 attack on the Relief from Stay Order; and (iv) neither the
10 Valuation Order nor the Modification Order controlled the
11 outcome. We address each of these bases below, but first we must
12 address the Debtor's argument that it was procedurally improper
13 for the bankruptcy court to enter the Payment Order after
14 previously announcing a contrary oral ruling.

15 **A. The bankruptcy court did not err by revisiting the Payment**
16 **Motion after announcing an oral ruling.**

17 In the Payment Order, the bankruptcy court purported to
18 "vacate" the oral ruling it had made at the October 8, 2015,
19 hearing. On appeal, both parties frame the issue in terms of
20 "vacating" or "reconsidering" that oral ruling under Rule 9023 or
21 Rule 9024. See Apl't Opening Brief at 12-13; Apl'e Brief at
22 11-15. The parties are arguing from a false premise. The oral
23 ruling did not constitute an effective order and therefore did
24 not need to be vacated before the bankruptcy court could revisit
25 the matter.

26 Rules 9023 and 9024 incorporate Civil Rules 59 and 60, which
27 govern amendment of judgments and relief from judgments or
28 orders. Rule 9021 provides that a "judgment or order is

1 effective when entered under Rule 5003." Rule 5003, in turn,
2 provides for the maintenance by the clerk of a docket on which
3 "each judgment, order, and activity" must be entered.
4 Rule 5003(a). Thus, a ruling is only an "order" when it is in
5 written form and entered on the bankruptcy court docket. See,
6 e.g., Neal v. Wells Fargo Bank, N.A. (In re Neal), 508 B.R. 243
7 (M.D. Ga. 2014) (bankruptcy court's oral ruling was not an
8 order). A written order need not take any particular form to fit
9 within the Rules' definition. "Even a minute entry can be a
10 final, appealable order 'if it fully adjudicates the issues and
11 clearly evidences the court's intent that the order be the
12 court's final act.'" Key Bar Invs., Inc. v. Cahn (In re Cahn),
13 188 B.R. 627, 630 (9th Cir. BAP 1995) (quoting McDonald v. Sperna
14 (In re Sperna), 173 B.R. 654, 657 (9th Cir. BAP 1994)). This
15 qualification, that a minute entry is a final order only if it is
16 intended to be the court's final act, is crucial. In an
17 unpublished decision that referred to Cahn, the Ninth Circuit
18 refused to regard a minute entry as a final order, in part
19 because "everyone involved anticipated the future lodging of [a]
20 substantive order." Valley Nat'l Bank v. B.C. Enters., Ltd.
21 (In re B.C. Enters., Ltd.), 82 F.3d 422, 1996 WL 169350 at *3-*5
22 (unpub.) (9th Cir. Apr. 10, 1996). Though these decisions
23 concern the finality of orders for purposes of appeal, they help
24 in clarifying whether a ruling is an "order" for purposes of
25 Rule 9021.

26 The bankruptcy court here did not make even a minute entry
27 resolving the Payment Motion after its oral ruling. The only
28 written reference to the oral ruling that appears on the

1 bankruptcy court's docket is an unsigned text-only entry, made by
2 a deputy clerk, reading as follows: "Hearing Held (RE: related
3 document(s)109 Generic Motion filed by Debtor Teresa A. Bryant) -
4 GRANTED." We cannot conclude that the bankruptcy court intended
5 this docket text entry as its "final act" in the matter. Nor did
6 the Debtor so conclude, as evidenced by the fact that her counsel
7 lodged a form of order granting the Payment Motion, which the
8 court refused to sign. As noted above, the Trustee apparently
9 had the same expectation.

10 It is apparent from the record that the court and parties
11 expected a formal, written order to be lodged and entered.
12 Unless and until such an order was entered, the bankruptcy
13 court's "final act" in the matter had yet to take place. In such
14 circumstances, we agree with the district court in Neal that the
15 bankruptcy court was "free to modify its oral [ruling] by
16 entering a separate written order." In re Neal, 508 B.R. at 246.

17 Needless to say, the bankruptcy court's freedom to revisit
18 its oral ruling before entering a final order does not obviate
19 the need to comport with due process. Here, the bankruptcy court
20 did not simply reverse itself, but instead held an additional
21 hearing in response to arguments BNY Mellon raised in its
22 opposition to the Trustee's proposed final report. The Debtor
23 argues that those arguments were not properly before the court
24 and could not justify reconsideration, but it is clear from the
25 record that Debtor's counsel was aware of BNY Mellon's arguments
26 and arrived at the December 15 hearing prepared to rebut them.
27 We are satisfied that the Debtor received adequate notice and
28 opportunity to address the concerns that prompted the bankruptcy

1 court to deny the Payment Motion.

2 **B. The Debtor was not required to serve BNY Mellon's state**
3 **court counsel.**

4 Procedures for contested matters in bankruptcy cases are
5 governed by Rule 9014, which requires service of a motion "in the
6 manner provided for service of a summons and complaint by
7 Rule 7004" Rule 9014(a). If the recipient of a motion
8 is an insured depository institution, which BNY Mellon was and
9 is, service

10 shall be made by certified mail addressed to an officer
of the institution unless—

11 (1) the institution has appeared by its attorney, in
12 which case the attorney shall be served by first-class
mail;

13 (2) the court orders otherwise after service upon the
institution of notice of an application to permit
14 service on the institution by first-class mail sent to
an officer of the institution designated by the
institution; or

15 (3) the institution has waived in writing its
16 entitlement to service by certified mail by designating
an officer to receive service.

17 Rule 7004(h). We have characterized the requirements of
18 Rule 7004(h) as "more rigorous" than the minimum notice required
19 for constitutional purposes. In re Frates, 507 B.R. at 302.

20 "Plainly, Rule 7004(h) is the standard against which we measure
21 the adequacy of the service" where that Rule applies. Id.

22 As discussed above, the Debtor complied with Rule 7004(h) in
23 serving the Valuation Motion, the Modification Motion and the
24 Payment Motion. Her counsel served officers of Bank of America
25 and BNY Mellon, respectively, by certified mail, in addition to
26 serving, either by first-class mail or electronically, every
27 attorney who had made an appearance on BNY Mellon's behalf in the
28 bankruptcy case. What BNY Mellon and the bankruptcy court found

1 unacceptable was that the Debtor had not also served BNY Mellon's
2 counsel in the Hawaii state court action.

3 We considered a related argument in Frates, which concerned
4 a motion to avoid a judicial lien. The appellee bank in Frates
5 argued that service of the lien avoidance motion was improper due
6 to the debtors' failure to serve the attorney who had represented
7 the bank in the underlying state court action. Id. at 303-05.
8 We concluded that compliance with Rule 7004(h) was all that was
9 required. Id. at 305. Even though California law would have
10 required service of post-judgment motions on the attorney, we did
11 not "perceive any reason why compliance [with California law]
12 should be compelled in light of the procedural due process
13 safeguards provided by the [R]ules themselves." Id. As was the
14 case in Frates, the Debtor served BNY Mellon in accordance with
15 the Rules, and no additional service on state court counsel was
16 required.

17 It is apparent from the transcript of the December 15
18 hearing that the bankruptcy court was troubled by what it
19 regarded as the Debtor's bad faith in neglecting to serve state
20 court counsel. More specifically, the bankruptcy court seemed to
21 suspect that the Debtor or her counsel subjectively hoped that
22 BNY Mellon would fail to respond to the various motions as long
23 as they were not served on counsel in the foreclosure action in
24 Hawaii. Objectively, however, it is not obvious that such a hope
25 would have appeared realistic at the time. BNY Mellon had
26 participated in the bankruptcy case more than once, including its
27 filing of the relief from stay motion and documents relating to
28 the claims process. As noted, Debtor's counsel served the

1 attorney who had filed the relief from stay motion on behalf of
2 BNY Mellon, in addition to serving an officer by certified mail.
3 If this was an effort to elude detection by the relevant decision
4 makers at BNY Mellon, it was not an especially bold effort. More
5 importantly, however, what matters is not whether the Debtor
6 hoped BNY Mellon would not respond, but whether service was
7 consistent with the requirements of due process and the Rules.
8 It certainly is possible that service on state court counsel
9 would have provoked a swifter and more effectual response, but
10 the Debtor was not obligated to do more than the Rules require to
11 invite such a response.

12 **C. The record does not support a determination that the Debtor**
13 **committed fraud on the court.**

14 During colloquy with the Debtor's counsel, the bankruptcy
15 court stated its intention to vacate the 2012 Valuation Order
16 based upon fraud on the court. Though the court's statement
17 seems to indicate a finding that the Valuation Order was procured
18 by fraud on the court, BNY Mellon takes the position that the
19 finding of fraud on the court justified reconsideration of the
20 Payment Motion.⁷ Though the court ultimately did not vacate the
21 Valuation Order, it nevertheless made clear its intention to
22 disregard both the Valuation Order and the Modification Order for
23 purposes of reconsidering the Payment Motion. It is unclear from
24

25
26 ⁷ More precisely, BNY Mellon argues that the bankruptcy
27 court was authorized to "vacate" its oral ruling on the Payment
28 Motion due to fraud on the court. As discussed above, the court
was not required to vacate the oral ruling before conducting
further proceedings on the Payment Motion.

1 the record whether or to what extent the bankruptcy court's
2 finding of fraud on the court influenced its decision to deny the
3 Payment Motion, but for the avoidance of doubt on remand, we
4 review the finding.

5 Courts must use "'restraint and discretion'" in exercising
6 their power to vacate judgments due to fraud on the court.
7 United States v. Estate of Stonehill, 660 F.3d 415, 443 (9th Cir.
8 2011), quoting Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991).
9 A finding of fraud on the court requires clear and convincing
10 evidence. Estate of Stonehill, 660 F.3d at 443. Nondisclosure
11 of evidence and even perjury usually are insufficient, unless the
12 misconduct is "so fundamental that it undermined the workings of
13 the adversary process itself." Id. at 444-45. Fraud on the
14 court may be found in cases involving "a scheme by one party to
15 hide a key fact from the court and the opposing party" by
16 "intentionally misrepresent[ing] facts that were critical to the
17 outcome of the case" Id. at 445, 452.

18 We note initially that none of the Debtor's actions that the
19 bankruptcy court considered inappropriate were related to the
20 Valuation Order itself. That order was entered in 2012, well
21 before the Relief from Stay Order was entered and foreclosure
22 proceedings began. We are unaware of any principle that would
23 permit a court to vacate or disregard a final order years after
24 its entry due to unrelated **subsequent** misconduct, even if that
25 misconduct qualifies as fraud on the court. In any event, the
26 record does not support a finding by clear and convincing
27 evidence that the Debtor committed fraud on the court. The
28 behavior the bankruptcy court apparently deemed fraudulent

1 amounted to no more than the Debtor's failure to provide the
2 bankruptcy court and the Hawaii state court, respectively, with
3 complete information regarding the Debtor's activities in the
4 other tribunal. There is no indication that the Debtor did
5 anything to conceal these activities.

6 The declaration of Debtor's counsel attached to the
7 Modification Motion referred the bankruptcy court to the Relief
8 from Stay Order previously entered in favor of BNY Mellon.
9 Though the declaration does not state expressly that the
10 foreclosure proceedings had begun, this omission is not the kind
11 of intentional misrepresentation of "key facts" that might
12 "undermine[] the workings of the adversary process" and support a
13 finding of fraud on the court. Estate of Stonehill, 660 F.3d at
14 444-45. The fact that BNY Mellon had sought and obtained relief
15 from stay in order to foreclose on the Hawaii Property was part
16 of the bankruptcy court's record. Of course, had it chosen to
17 respond to the Modification Motion while it was pending, BNY
18 Mellon could have informed the bankruptcy court of any additional
19 facts regarding the foreclosure proceeding that it deemed
20 significant.

21 The bankruptcy court's finding of fraud on the court was not
22 supported by facts in the record. To the extent that the
23 bankruptcy court relied on that finding in denying the Payment
24 Motion, it abused its discretion.

25 **D. The Modification Motion and the Payment Motion were not a**
26 **collateral attack on the Relief from Stay Order.**

27 At the December 15 hearing, the bankruptcy court repeatedly
28 stated that the Modification Motion and/or the Payment Motion

1 constituted a collateral attack on the Relief from Stay Order or
2 an inappropriate attempt to interfere with the foreclosure. The
3 premise implicit in these comments is that the Relief from Stay
4 Order precluded the bankruptcy court from taking any further
5 action with respect to the Hawaii Property or BNY Mellon's claim.
6 This premise is incorrect. "[A]n order lifting or modifying the
7 automatic stay by itself does not constitute a de facto
8 abandonment of the property from the bankruptcy estate."
9 Catalano v. Comm'r of Internal Revenue, 279 F.3d 682, 687 (9th
10 Cir. 2002).

11 Though an order granting relief from stay may provide for
12 abandonment of estate property, this abandonment is effective
13 only if expressly included in the order, and even then only if
14 "the procedures specified in § 554 are satisfied." Id. Nothing
15 in the language of the Relief from Stay Order provided that the
16 Hawaii Property would be abandoned from the Debtor's bankruptcy
17 estate. Thus, the Hawaii Property continued and still continues
18 to be property of the estate, and the Relief from Stay Order does
19 not preclude the Debtor from taking action in the bankruptcy case
20 with respect to the Hawaii Property. It may be true that "most
21 creditors" believe an order lifting the stay removes property
22 from the estate, but if so, they are mistaken. Such creditors
23 ignore the ongoing bankruptcy proceedings at their peril.

24 The tenor of the bankruptcy court's comments suggests that
25 it viewed the Relief from Stay Order as granting affirmative
26 permission to BNY Mellon to foreclose successfully on the Hawaii
27 Property. But the language of the Relief from Stay Order did not
28 provide that the Debtor must refrain from taking any action in

1 bankruptcy court to affect BNY Mellon's interest in the Hawaii
2 Property. It merely removed one barrier - the automatic stay -
3 that stood in the way of foreclosure. The termination of the
4 automatic stay cannot be construed as an abdication of the
5 bankruptcy court's jurisdiction over property of the estate or
6 its authority to restructure the debtor-creditor relationship.
7 If this were so, then bankruptcy courts would have no authority
8 over creditors not subject to the stay. See § 362(b)(1)-(28),
9 (c)(3)-(4). For these reasons, the Debtor's efforts to
10 restructure her relationship with BNY Mellon notwithstanding the
11 ongoing foreclosure proceeding cannot properly be construed as a
12 collateral attack on the Relief from Stay Order.

13 The bankruptcy court's conclusion that the Payment Motion
14 was a collateral attack on the Relief from Stay Order was based
15 on an erroneous view of the law. To the extent the bankruptcy
16 court based its decision to deny the Payment Motion on this view,
17 it abused its discretion.

18 **E. On remand, the bankruptcy court should determine the impact**
19 **of the Valuation Order and the Modification Order.**

20 The Debtor has argued both before the bankruptcy court and
21 on appeal that the Valuation Order is "law of the case" and binds
22 the bankruptcy court and BNY Mellon with respect to the value of
23 the Hawaii Property. Under the doctrine of law of the case,
24 "when a court decides upon a rule of law, that decision should
25 continue to govern the same issues in subsequent stages in the
26 same case." Musacchio v. United States, ___ U.S. ___, ___, 136
27 S. Ct. 709, 716 (2016). The doctrine often forms the basis of
28 "an appellate court's decision not to depart from a ruling that

1 it made in a prior appeal in the same case.” Id. In the
2 bankruptcy context, the proceedings following the Payment Motion
3 should not be viewed as a “subsequent stage in the same case”
4 that would require application of the law of the case doctrine.
5 The Valuation Order was a final determination of “the discrete
6 issue to which it [wa]s addressed,” hence it was a final order in
7 its own right under the flexible standard used in bankruptcy
8 cases. See Eden Place, LLC v. Perl (In re Perl), 811 F.3d 1120,
9 1126 (9th Cir. 2016) (a final order must resolve and seriously
10 affect substantive rights and determine the discrete issue to
11 which it is addressed). The question of the preclusive effect,
12 if any, of a prior final order of the bankruptcy court is a
13 question of claim or issue preclusion. We regard the Debtor’s
14 references to “law of the case” to be an invocation, albeit
15 inartful, of issue preclusion.⁸

16 Issue preclusion bars the relitigation of particular issues
17 of fact or law decided in a prior proceeding. In re Summerville,
18 361 B.R. at 143. “The preclusive effect of a federal-court
19 judgment is determined by federal common law.” Taylor v.
20 Sturgell, 553 U.S. 880, 891 (2008). Issue preclusion requires
21 that the following elements be met:

- 22 (1) there was a full and fair opportunity to litigate
23 the issue in the previous action;
24 (2) the issue was actually litigated in that action;

25 ⁸ Claim preclusion is concerned with relitigation of claims
26 that were or should have been raised in prior proceedings.
27 Alonso v. Summerville (In re Summerville), 361 B.R. 133, 142 (9th
28 Cir. BAP 2007). The Debtor does not contend that the
Modification Motion or the Payment Motion raised a **claim** that was
decided by the Valuation Order.

1 (3) the issue was lost as a result of a final judgment
in that action; and
2 (4) the person against whom collateral estoppel is
asserted in the present action was a party or in
3 privity with a party in the previous action.

4 United States Internal Revenue Svc. v. Palmer (In re Palmer),
5 207 F.3d 566, 568 (9th Cir. 2000). The bankruptcy court alluded
6 tangentially to some of these elements during the December 15
7 hearing. Because we conclude that remand to the bankruptcy court
8 is necessary, we decline to make a determination of the
9 preclusive effect of the Valuation Order. Instead, we leave that
10 determination to the bankruptcy court in the first instance,
11 noting, however, that by its terms, the Valuation Order stated
12 that, "As of October 22, 2010 and at all times since October 22,
13 2010 [i.e., through October 1, 2012, the date of entry of the
14 Valuation Order], the subject property is valued at no more than
15 \$375,000.00 based on adequate evidence."

16 Likewise, the bankruptcy court on remand should determine
17 what impact the Modification Order has on the proper disposition
18 of the Payment Motion. As BNY Mellon's counsel noted at the
19 December 15 hearing, the Modification Motion appeared to propose
20 payment to BNY Mellon by March 1, 2014, a date five months before
21 the Modification Motion was filed. Because the Modification
22 Order simply states that the Modification Motion was "Granted,"
23 it is unclear what impact the payment date proposed in the
24 Modification Motion had on the effectiveness of the Modification
25 Order. We leave the interpretation of this aspect of the
26 Modification Order to the bankruptcy court in the first instance.
27 See Marciano v. Fahs (In re Marciano), 459 B.R. 27, 35 (9th Cir.
28 BAP 2011), aff'd, 708 F.3d 1123 (9th Cir. 2013) ("We owe

1 substantial deference to the bankruptcy court's interpretation of
2 its own orders").

3 **VI. CONCLUSION**

4 Based on the foregoing, we conclude that the bankruptcy
5 court did not err in revisiting the Payment Motion after having
6 made an oral ruling at the October 8, 2015, hearing. However, we
7 further conclude that the bankruptcy court erred in determining
8 that service on BNY Mellon was improper. To the extent the
9 bankruptcy court's denial of the Payment Motion was based on its
10 finding of fraud on the court or its conclusion that the Payment
11 Motion was a collateral attack on the Relief from Stay Order, the
12 bankruptcy court abused its discretion. Therefore, we VACATE and
13 REMAND the Payment Order for further proceedings consistent with
14 this memorandum decision.