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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
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Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE PATRICIA ANN EVANS, Debtor.	BAP No. CO-10-031
PATRICIA ANN EVANS, Appellant, v. THE BANK OF NEW YORK TRUST COMPANY, N.A., as successor to JPMorgan Chase Bank, N.A., as Trustee, Appellee.	Bankr. No. 10-12741 Chapter 7 OPINION*

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

Before NUGENT, THURMAN, and KARLIN, Bankruptcy Judges.

KARLIN, Bankruptcy Judge.

Debtor, Patricia Ann Evans ("Debtor"), appeals a bankruptcy court order granting relief from the automatic stay in this bankruptcy proceeding. We affirm.

I. BACKGROUND

In her bankruptcy filings, Debtor listed her primary residence as 1933 S. Downing St., Denver, Colorado (the "Property"). Apparently, Debtor has resided

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

on the Property as a "guest" of its former owner, Vicki Dillard-Crowe, but holds no ownership or other interest in it.[1]

Appellee, Bank of New York ("Bank"), filed a motion for relief from stay to allow it to proceed with its recovery of the Property. Bank is the successor in interest to the original grantee of a Trust Deed on the Property, which was executed by Dillard-Crowe in 2005. In March 2007, Bank began proceedings in Colorado state court seeking sale of the Property due to Dillard-Crowe's default under the terms of the Trust Deed. Dillard-Crowe did not respond to Bank's state court filings and, pursuant to state law, the Property was sold at public sale on August 7, 2007. Bank purchased the Property at that sale for $238,500.

In November 2007, Bank initiated an eviction action in state court against Dillard-Crowe and any other occupants of the Property. On June 27, 2008, the state court issued a judgment of possession and a writ of restitution to Bank, which has attempted to exercise its right to possess the Property ever since.

Due to appeals within the state court system, and the filing by Dillard-Crowe of her own bankruptcy petition, the writ of restitution that was issued in June 2008 expired before it could be executed. However, following Bank's successful request for relief from stay in the Dillard-Crowe bankruptcy, the state court issued a new writ of restitution to Bank on February 11, 2010.

Debtor filed her bankruptcy petition the very next day, on February 12, 2010, and listed the Property as her primary residence. Bank requested relief from the automatic stay, which was granted on May 13, 2010. Debtor filed her notice of appeal the next day, and the Chapter 7 trustee for her estate filed a Report of No Distribution on May 21, 2010. Debtor was granted a discharge on July 9, 2010.

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[1] See *Transcript of May 13, 2010, hearing* ("*Trans.*") at 13, *ll.* 23, 25, *in* Revised Appellant's Appendix ("R. App.") at 38, wherein Debtor admits to being a "guest."

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit unless one of the parties elects to have the district court hear the appeal.[2] In this case, Debtor timely filed her notice of appeal from the bankruptcy court's order granting relief from stay, which is a final order for purposes of appeal.[3] Neither party has elected to have the district court hear this appeal.

Bank contends that this Court is without jurisdiction because Debtor's appeal was rendered moot by the trustee's Report of No Distribution and entry of the Order of Discharge. Thus, Bank's position is that these acts alone terminated the stay pursuant to 11 U.S.C. § 362(c)[4] and, therefore, this Court cannot grant effective relief by reversing the bankruptcy court's order granting relief from that stay.

Pursuant to § 362(c)(1), the automatic stay that prohibits acts against property of the estate terminates when "such property is no longer property of the estate."[5] In addition, in individual Chapter 7 cases, the stay of "any other act" terminates when a discharge is granted.[6] As the bankruptcy court noted, the action Bank sought permission to take is only arguably covered by the § 362(a)

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[2] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

[3] *In re JE Livestock, Inc.*, 375 B.R. 892, 893 (10th Cir. BAP 2007).

[4] Unless otherwise noted, all further statutory references in this decision will be to the Bankruptcy Code, which is Title 11 of the United States Code.

[5] *See, e.g.*, *Trans.* at 15, *in* R. App. at 40.

[6] § 362(c)(2)(C). Specifically, § 362(c)(2) provides that the automatic stay terminates at the earliest of three events, which are case closure, case dismissal, or discharge. However, the earliest of the identified events in the present case was Debtor's discharge.

automatic stay.[7] However, the bankruptcy court deemed it unnecessary to resolve that issue, inasmuch as it chose to grant the requested relief. We therefore assume, for the purposes of this appeal, that Bank's attempts to obtain possession of the Property fall within the coverage of the § 362(a) automatic stay.[8]

Bank is correct in its assertion that termination of the § 362(a) automatic stay would result from a proper abandonment of the Property by the trustee. However, as this Court recently noted in *In re Bishop*,[9] the filing of a no distribution report by a Chapter 7 trustee does not result in abandonment of estate property. Although such a report indicates the trustee's intent to abandon, an actual abandonment requires notice and a hearing, as well as the bankruptcy court's entry of an order approving the abandonment.[10] There was neither a hearing nor an abandonment order in this case. Therefore, pursuant to § 554(c), the Property remains in the estate until Debtor's case is closed.[11] Accordingly, Debtor's appeal is not moot, and this Court has valid appellate jurisdiction to consider it.

III. ISSUE AND STANDARD OF REVIEW

The single issue on appeal is whether the bankruptcy court properly granted

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[7] Debtor has never claimed an ownership interest in the Property, and denies even the existence of a rental agreement. *See, e.g.*, *Trans.* at 13-14, *in* R. App. at 38-39. However, "estate property" covers a vast array of property interests that are, or might be, held by a debtor. *See Parks v. FIA Card Servs., N.A., (In re Marshall)*, 550 F.3d 1251, 1255 (10th Cir. 2008), *cert. denied*, 129 S.Ct. 2871 (2009) (noting that 11 U.S.C. § 541, which defines estate property, is broad in scope and should be "generously construed" (internal quotation marks omitted)).

[8] The general rule is that appellate courts do not consider issues that were not considered by the trial court. *Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992).

[9] Appeal No. CO-10-032, 2010 WL 4456165, at *4 (10th Cir. BAP Nov. 4, 2010).

[10] *Id.* *See also* § 554, which provides the manner in which property of the estate may be abandoned.

[11] § 554(d).

Bank's motion for relief from stay pursuant to 11 U.S.C. § 362(d). Whether to grant or deny relief from the automatic stay is within the discretion of the bankruptcy court, and this Court reviews such orders under an abuse of discretion standard.[12] Under the abuse of discretion standard, an appellate court may not reverse an appealed order unless it "has a definite and firm conviction" that the bankruptcy court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances."[13]

IV. DISCUSSION

Requests for relief from stay are governed by § 362(d), which provides:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> > (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; [or]
> >
> > (2) with respect to a stay of an act against property under subsection (a) of this section, if—
> >
> > > (A) the debtor does not have an equity in such property; and
> > >
> > > (B) such property is not necessary to an effective reorganization.

In this case, Debtor does not dispute that she has no equity in the Property. Moreover, since this is a Chapter 7 case, there is no reorganization as to which the Property could possibly be "necessary." Thus, without even reaching the issue of "cause" under § 362(d)(1), the bankruptcy court clearly had authority to grant Bank's request for relief from the automatic stay to allow it to proceed with its efforts to obtain possession of the Property. As the bankruptcy court noted, granting relief from the stay is not a determination that the Bank's claim to the

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[12] *In re Busch*, 294 B.R. 137, 140 (10th Cir. BAP 2003).

[13] *Id.* at 140 (citation and internal quotation marks omitted).

Property is valid, but is only a determination that the Property is not something that warrants bankruptcy protection in this case. The Bank's claim to the Property simply returns to the state court and is governed by whatever rights and restrictions are imposed by Colorado law.

Debtor has never addressed the issue now before this Court, which is simply whether Bank may proceed with its efforts to obtain possession of the Property within the state court system, or should be precluded from doing so by virtue of the filing by this Debtor of a bankruptcy petition. Debtor's assertions on appeal essentially all relate to her contention that Dillard-Crowe, who is not a party, is "indispensable" to these proceedings.[14]

Debtor's joinder or intervention argument concerning Dillard-Crowe has already been considered and rejected by this Court on two previous occasions. On June 9, 2010, we denied Debtor's request to join Dillard-Crowe to this appeal as the "real party in interest" on the ground that Dillard-Crowe was not a party to the bankruptcy court proceedings. We again, on September 8, 2010, denied a motion to intervene by non-party Dillard-Crowe, in which she asserted "unequivocal superior/paramount title" to the Property, as seeking the same relief as the previously denied joinder request. We decline to revisit the "intervention" issue yet again.[15]

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[14] In its brief on appeal, Bank suggests that Debtor has also asserted that she was denied due process in the bankruptcy court. *See* Response Brief at 8-9. If she indeed did so, her argument is so minimal and vague as to essentially be no argument at all. Beyond generally referring to the bankruptcy court as a "kangaroo court" (Debtor's Opening Brief at 1, ¶ 4; Debtor's Reply Brief at 7, ¶ 11), Debtor's briefs fail to identify a single instance in which she was denied due process of law. An inadequately briefed appellate argument is waived. *See Harsco Corp. v. Renner*, 475 F.3d 1179, 1190 (10th Cir. 2007).

[15] Federal Rule of Civil Procedure 24, which defines the procedure for intervention, is made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7024. However, this is not an adversary proceeding, but rather, a contested matter, to which Rule 7024 does not apply. *See* Fed. R. Bankr. P. 9014. In any event, intervention requires, among other things, a timely

(continued...)

Debtor's other arguments are that the bankruptcy court lacked jurisdiction to consider a "void" state court judgment, and that the Bank's conduct was an illegal eviction under the Protecting Tenants at Foreclosure Act of 2009.[16] These arguments are also inadequately briefed.[17] In any event, Debtor's claim that a state court judgment is "void" by virtue of a pending appeal is without merit. A Colorado judgment that is appealed may still be pursued by the prevailing party unless a stay on appeal is obtained by the filing of a supersedeas bond.[18]

Debtor's argument regarding the Protecting Tenants Act is even less meritorious. The Act was adopted in 2009, and applies only to certain foreclosures "after the date of enactment."[19] Because the foreclosure and sale in this case occurred in 2007, Debtor has failed to identify either how Bank violated the Act or the Act's applicability to the Property.

V. DAMAGES AND COSTS FOR FRIVOLOUS APPEAL

In its brief on appeal, Bank requested damages and costs pursuant to

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[15] (...continued)
application and a demonstration of a valid interest in the subject property. *In re Kaiser Steel Corp.*, 998 F.2d 783, 790 (10th Cir. 1993). The requests to add Dillard-Crowe as a party to this appeal were neither timely nor accompanied by a showing of a "significantly protectable interest" in the Property. *Id.* at 790-91. In fact, Bank has established, as a matter of fact, that it alone holds valid legal title to the Property as a result of the prior public sale, at which it purchased the Property.

[16] Pub. L. No. 111-22, §§ 701-04, 123 Stat. 1632, 1660-62 (2009).

[17] Interestingly, in her Reply Brief, Debtor denies that she is seeking reinstatement of the automatic stay in this appeal, contending that she seeks declaratory relief and "to hold the bank accountable for their unlawful behavior." Debtor's Reply Brief at 3, ¶ 4. However, the only relief available to Debtor from this appeal is reversal of the bankruptcy court's order granting relief from stay. She did not assert any claims against Bank below, and we could not consider them in this appeal if she had.

[18] *See Colo. Korean Ass'n v. Korean Senior Ass'n of Colo.*, 151 P.3d 626, 628 (Colo. Ct. App. 2006) (failure to file a supersedeas bond means that prevailing party may enforce the judgment while appeal is pending).

[19] Pub. L. No. 111-22, § 702(a), 123 Stat. at 1660-61.

Federal Rule of Bankruptcy Procedure 8020, on the ground that Debtor's appeal is "frivolous."[20] Although Debtor had an opportunity to respond to that request in her reply brief, she elected not to.

"An appeal is frivolous if the result is obvious or the arguments are wholly without merit."[21] Applying this standard to the present appeal, it certainly appears to this Court that Debtor's appeal is frivolous. However, because Bank did not file its request for damages by separate motion, this Opinion shall constitute notice from this Court that, pursuant to Rule 8020, Debtor shall show cause, within 14 days of the entry of this Opinion, why sanctions should not be granted to Bank in a sum equal to the damages and costs it incurred in connection with this appeal.

The Court admonishes Debtor to not repeat arguments already made in her briefs filed with this Court, of which the Court can and will take judicial notice, and to confine her response to 5 pages. Bank will then have 14 days to both reply to Debtor's response and to provide an itemization of its damages and costs. Debtor will then have 14 days from the date of service of that itemization and response within which to file any reply. This panel will then determine if damages and costs should be awarded to Bank and if so, in what amount.

VI. CONCLUSION

The bankruptcy court's order granting relief from stay is AFFIRMED, and the Court will determine, after the responses and reply noted above, whether the appeal was frivolous and whether Appellant should have to pay Appellee's

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[20] *See* Response Brief of Appellee at 9-10. Pursuant to Rule 8020, "[i]f a . . . bankruptcy appellate panel determines that an appeal from an order . . . of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the . . . bankruptcy appellate panel and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

[21] *Joseph v. Lindsey (In re Lindsey)*, 229 B.R. 797, 802 (10th Cir. BAP 1999).

damages and costs incurred on appeal pursuant to Rule 8020.[22]

[22] The Clerk's Office is directed to stay entry of the mandate in this appeal pending our determination of Bank's damages and costs, if any.