

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE CHERYL DIANNE MYERS,
also known as Cheryl D. Myers, Attorney
at Law, also known as Myers & Myers
Attorneys at Law,

Debtor.

CHERYL D. MYERS,

Appellant,

v.

FIRST NATIONAL BANK OF
CENTRALIA,

Appellee.

BAP No. KS-05-038

Bankr. No. 04-41322-11

Chapter 11

ORDER DENYING REHEARING

November 16, 2005

Before McFEELEY, Chief Judge, CORNISH, and THURMAN, Bankruptcy Judges.

The matter before the Court is the Motion for Reconsideration or in the Alternative for an Order Nunc Pro Tunc (“Motion”) of the Court’s October 13, 2005 Order and Judgment (“Order”), filed May 24, 2005, by the Appellant. The Appellee opposes the Motion. The Court has reviewed the pleadings and applicable case law and determines that the Motion should be denied.

Neither Federal Rule of Bankruptcy Procedure 8015 nor Rule 8015-1 of this Court’s Local Rules states the substantive requirements for motions for reconsideration.

However, when those Federal and Local Rules are silent, Local Rule 8018-11(b) provides that we may order application of the Federal Rules of Appellate Procedure or the Tenth Circuit Rules. Federal Rule of Appellate Procedure 40(a)(2) declares that a petition for rehearing before one of the United States Courts of Appeals “must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition.” Tenth Circuit Rule 40.1(A) adds that: “A petition for rehearing should not be filed routinely. Rehearing will be granted only if a significant issue has been overlooked or misconstrued by the court.” We believe that the standards set by these rules should apply to the Motion.

The Appellant argues that this Court should grant her Motion and reconsider its Order because she intends to ask the bankruptcy court to recall its mandate and grant a stay pending appeal. This argument does not meet the criteria of either the Federal Rules of Appellate Procedure or the Tenth Circuit Rules delineated above as it presents no significant issues of law or fact. We conclude that there are no grounds for reconsidering the Order.

Alternatively, Appellant asks this court to enter an order nunc pro tunc to correct a statement in the Order that Myers had filed eight motions for reconsideration of the bankruptcy court’s dismissal order. While Myers acknowledges that she had filed eight motions for reconsideration of various bankruptcy court rulings during the entire pendency of the bankruptcy proceedings, she contends that she did not file eight motions for reconsideration of the dismissal order. Rather, Myers filed only two motions with

respect to the dismissal order: first, a motion to alter or amend the dismissal order, and then, a motion to alter or amend the judgment.

Generally, when an Appellant has demonstrated an insignificant error in an issued Opinion or an Order and Judgment by this Court, this Court has issued a correction memo. The Appellant has given us no reason for issuing an Order Nunc Pro Tunc rather than a correction memo; therefore, we will deny her Motion for an Order Nunc Pro Tunc.

The Court will revise the Order and Judgment to clarify that the Appellant did not file eight motions for reconsideration of the dismissal order. In all other respects the Motion will be denied. No significant issue has been overlooked or misconstrued by the Court.

Accordingly, it is HEREBY ORDERED that:

1. The Order and Judgment entered October 13, 2005, is WITHDRAWN, and the following Order and Judgment is substituted in its place.
2. The remainder of the Motion is DENIED.
3. The Court's mandate will issue immediately.

For the Panel:

Barbara A. Schermerhorn, Clerk of Court

By: 

Deputy Clerk

October 13, 2005

Barbara A. Schermerhorn
ClerkNOT FOR PUBLICATIONUNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT

IN RE CHERYL DIANNE MYERS,
also known as Cheryl D. Myers,
Attorney at Law, also known as Myers
& Myers Attorneys at Law,

Debtor.

BAP No. KS-05-038

CHERYL D. MYERS,

Appellant,

v.

FIRST NATIONAL BANK OF
CENTRALIA,

Appellee.

Bankr. No. 04-41322-11
Chapter 11

ORDER AND JUDGMENT*

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

Before McFEELEY, Chief Judge, CORNISH, and THURMAN, Bankruptcy
Judges.

CORNISH, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted on the record and briefs..

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Appellant/Debtor, Cheryl Dianne Myers, appeals from an Order Granting Centralia's Amended Motion for Relief from Stay entered by the bankruptcy court for the district of Kansas on May 2, 2005. Myers argues that the bankruptcy court erred when it granted First National Bank of Centralia ("the Bank") relief from stay to pursue its in rem rights on real and personal property. The Bank argues that because Myers's Chapter 11 case has now been dismissed, this appeal is moot. We agree with the Bank and decline to address the merits of this appeal for lack of jurisdiction.¹

I. Background

Myers is a lawyer who prior to her divorce practiced law with her ex-husband in a firm entitled Myers & Myers LLC.

Myers has real and personal property securing a debt to the Bank.² The real property includes two tracts: a residential property and another residential property that has been converted into an office (hereinafter referred to respectively as "residential property" and "office property"). The personal

¹ After this appeal came before this panel, Myers filed three additional motions.

First she filed a Motion for Extension of One Business Day to File Reply Brief. This motion is unopposed; therefore we grant it.

Second, she filed a "Motion for the Court to Take Judicial Notice" of various documents that had been submitted to state court. This motion is opposed by the Bank.

Third, Myers filed a "Consolidated Motion to Strike Appellee's Response to Motion for the Court to Take Judicial Notice and Suggestion of Mootness for Fraud on the Court and Response to Suggestion of Mootness and Reply to Judicial Notice Issues."

Because of our disposition of this appeal, we deny Myers's second and third motions.

² It appears that at one time this property was jointly owned by both Myers and her ex-husband. It is not clear from the record how title was apportioned following their divorce. However, at the time of the bankruptcy, none of the real property was in use.

property includes all of Myers & Myers LLC's accounts receivable and property rights. The Bank initiated proceedings in Kansas state court and obtained two judgments foreclosing on the real and personal property.

On May 24, 2004, Myers filed as an individual a petition under Chapter 11 of the Bankruptcy Code. Her bankruptcy filing stayed any further proceedings in the state case.

On December 9, 2004, the Bank filed a Motion for Relief from Stay. This Motion was Amended on January 11, 2005.

On March 8, 2005, Myers filed an Amended Complaint to Compel Turnover of Property, asking that the court order the Bank to turn over the real and personal property under 11 U.S.C. § 542.³ On April 26, 2005, Myers filed a Complaint asking that the court avoid the security interests the Bank holds under §§ 544 or 547 on the grounds that the state court judgment was not final and that the Bank's security interest was never properly perfected ("Complaint").

The bankruptcy court heard the Motion for Relief from Stay on April 28th, 2005. On May 2, 2005, the bankruptcy court entered an Order Granting First National Bank of Centralia's Amended Motion for Relief From Stay ("Order"). That Order references findings of fact and conclusions of law that were made on the record at a telephonic conference the same day.

Myers timely appealed the Order on May 12, 2005. Myers did not obtain a stay of the Order pending appeal.

On August 1, 2005, the bankruptcy court dismissed Myers's Chapter 11 case, granting motions to dismiss filed by both the Internal Revenue Service and the Bank. Myers has filed two motions for reconsideration of the Dismissal Order. The bankruptcy court has denied them.

³ Unless otherwise indicated, all future statutory references will be to Title 11 of the United States Code.

On June 21, 2005, both the residential property and the office property were sold by foreclosure to the Bank. Subsequently, the state court confirmed the sale of both properties in orders entered on August 17, 2005, and on August 22, 2005.

We have jurisdiction over the Debtor and subject matter of this appeal. The bankruptcy court's judgment is a final order subject to appeal under 28 U.S.C. § 158(a)(1). *See Quakenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996). The parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the District of Kansas. 28 U.S.C. § 158(b)-(c); Fed. R. Bankr. P. 8001(e); 10th Cir. BAP L.R. 8001-1.

II. Discussion

However, before reaching the merits of an appeal, we must make an initial inquiry as to whether we still have jurisdiction. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). The Constitution authorizes federal courts to hear only "cases" or "controversies." U.S. Const., Art. III § 2 cl.1. If there is no live case or controversy, then an appeal will be moot. *See Out of Line Sports, Inc. v. Rollerblade, Inc.*, 213 F.3d 500, 501 (10th Cir. 2000). A controversy is no longer "live" if the reviewing court cannot render "any effectual relief whatever." *Church of Scientology of Calif. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). "The crucial question is whether 'granting a present determination of the issues offered . . . will have some effect in the real world.'" *Citizens for Responsible Government State Political Action Committee v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000) (quoting *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1266 (10th Cir.1999) (further quotations and citations omitted)). "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67

(1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (further quotation omitted)).

The Bank argues that because the Chapter 11 case has been dismissed and the state court has confirmed the real estate foreclosure sales, this appeal is moot. In opposition, Myers argues that the dismissal of her bankruptcy case and the state court proceedings do not moot this appeal. First, Myers argues that the dismissal of her Chapter 11 case is not conclusive because she has filed an appeal of the dismissal of her case as well as an appeal of the denials of her motions for reconsideration. This Court notes that the appeal of her dismissal is not part of these appeal proceedings; that is reserved for another day. Second, she contends that the state court proceedings are not final for the following reasons: (1) Myers has filed motions for reconsideration with the state court as to both orders confirming the sale of the real property and these motions are still pending; and (2) no final decision has been made by the state court with respect to the personal property because the state court has entered an Order of Continuance in anticipation of an evidentiary hearing. Myers's arguments fail.

The Order at issue lifted the stay in Myers's bankruptcy case so that state court proceedings could continue. The relief Myers requests is reversal of that Order. However, since the notice of appeal, Myers's Chapter 11 case has been dismissed. The dismissal order was not stayed and therefore the automatic stay terminated. Because the bankruptcy stay is created by the Bankruptcy Code and is applied only within a bankruptcy case, it is not relevant outside bankruptcy. *See* 11 U.S.C. § 362. The fact that Myers has appealed the dismissal of her Chapter 11 case does not revive the bankruptcy case for the purposes of our review. Furthermore, the status of the state court proceedings is irrelevant to our decision because this court has no authority to review state court decisions. *Verizon Md., Inc. v. Public Serv. Com'n of Md.*, 535 U.S. 635, 644 n.3 (2002) (observing "28

U.S.C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to [the Supreme Court], see § 1257(a).”). If we were to conclude that Myers’s appeal had merit, we would be unable to offer her any effectual relief.⁴ Therefore, this appeal is moot.

III. Conclusion

For the reasons set forth above, we conclude that we have no jurisdiction to address the merits of this appeal and the trial court’s order is affirmed.

⁴ Moreover, even if Myers’s bankruptcy case had not been dismissed, she did not obtain a stay of the Order pending her appeal and the foreclosure sales have been completed. Under § 363(m), a purchaser of property of the estate is protected from the effects of reversal or modification on appeal of an order authorizing such a sale under § 363(b) or (c), if the buyer was a good faith purchaser and a stay pending the appeal was not obtained. In effect, if both prongs of § 363(m) are met, the section moots an appeal because the court cannot grant any remedy that will revoke the sale. *Osborn v. Durant Bank & Trust Co. (In re Osborn)*, 24 F.3d 1199, 1203-1204 (10th Cir. 1994); *In re Lotspeich*, 328 B.R. 209, 218 (10th Cir. BAP 2005). Section 363(m) does not moot an appeal where state law or the Bankruptcy Code provide remedies that do not negate the validity of a sale. *Osborn*, 24 F.3d at 1204. Here, Myers has not argued that the Bank was not a good faith purchaser.