

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

5	DAVID ANTHONY TURTURICI and	)	
6	TRINISHA DANIELLE TURTURICI,	)	
7	Appellants,	)	2:10-CV-00146-GEB
8	v.	)	<u>ORDER REVERSING DISMISSAL</u>
9	NATIONAL MORTGAGE SERVICING LP,	)	<u>OF DEBTORS' ADVERSARY</u>
10	Appellee.	)	<u>PROCEEDING*</u>

David Anthony Turturici and Trinisha Danielle Turturici ("Appellants" or "Debtors"), debtors in the underlying chapter 7 bankruptcy proceeding, filed an appeal on January 20, 2010, challenging the bankruptcy court's November 25, 2009 order dismissing Debtors' adversary proceeding. Debtors filed their appellant brief on April 25, 2010<sup>1</sup> and Appellee National Mortgage Servicing LP ("National Mortgage") submitted a response on May 9, 2010. Debtors waived filing a reply brief. For the reasons stated below, the bankruptcy court's dismissal of Debtors' adversary proceeding is reversed and this case is remanded to the bankruptcy court for further proceedings.

**I. FACTUAL AND PROCEDURAL HISTORY**

On May 20, 2009, National Mortgage purchased a parcel of real property located at 6708 Palm Avenue in Fair Oaks, California

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\* This matter is deemed suitable for decision without oral argument. E.D. Cal. R. 230(g).

<sup>1</sup> Debtors' opening brief was untimely under Federal Rule of Bankruptcy Procedure 8009(a)(1) and they are cautioned that a late filing could warrant a sanction, including dismissal of their bankruptcy appeal. Fed. R. Bankr. P. 8001(a).

1 (the "Palm Avenue property") from ETS Services, LLC ("ETS") at a  
2 trustee's sale for \$217,000. (App. to Appellant's Opening Br. 00011-  
3 00012.) The Palm Avenue property was Debtors' personal residence.

4 Two days after the trustee's sale, on May 22, 2009, Trinisha  
5 Turturici filed a complaint in the California Superior Court for  
6 Sacramento County against Homecomings Financial, Mortgage Electronic  
7 Registration Systems, Inc., Citimortgage, National Mortgage, American  
8 Mortgage Express Corporation and ETS, seeking to quiet title to the  
9 Palm Avenue property, set aside the foreclosure sale and reform a loan  
10 modification agreement with Homecomings Financial. (Id. 00071-00077.)

11 Sixteen days after the trustee's sale, on June 5, 2009 at  
12 approximately 9:15 a.m., Debtors filed a chapter 7 bankruptcy petition  
13 in the Sacramento Division of the Bankruptcy Court for the Eastern  
14 District of California. (Id. 0001-0003.) National Mortgage recorded  
15 its trustee's deed upon sale for the Palm Avenue Property at  
16 approximately 12:54 p.m. that same day. (Id. 00011-00012.)

17 On July 21, 2009, Debtors filed a "Complaint for Avoidance  
18 of Transfer and for Turnover of Property of the Estate and Opposition  
19 to National Mortgage Servicing LP's Motion for Relief from Automatic  
20 Stay," which initiated an adversary proceeding before the bankruptcy  
21 court. After National Mortgage's motion for a more definite statement  
22 was granted, Debtors filed a first amended complaint in the adversary  
23 proceeding on October 6, 2009. Debtors allege in their first amended  
24 complaint in the adversary proceeding claims under sections 522(h),  
25 544 and 549 of the Bankruptcy Code and seek to avoid National  
26 Mortgage's allegedly unperfected lien on the Palm Avenue property.

27 On September 14, 2009, the trustee filed a statement,  
28 disclaiming any interest in the Palm Avenue property. (Id. 000062.)

1 Specifically, the trustee stated he had "investigated the valuation of  
2 the debtors['] [Palm Avenue property] . . . and determined that due to  
3 the extreme 'upside down' equity position in the property that there  
4 was no value to the bankruptcy estate." (Id.) The next day, on  
5 September 15, 2009, the trustee filed notice of his "Report of No  
6 Distribution," which concluded that "there are no funds available from  
7 the [Debtors' bankruptcy] estate for distribution to creditors." The  
8 Trustee also certified "that the estate of the [Debtors] has been  
9 fully administered." Debtors' bankruptcy was discharged in an order  
10 filed on September 21, 2009.

11 After their discharge, on October 20, 2009, Debtors filed a  
12 motion to compel the Trustee to abandon to them the Palm Avenue  
13 property and "any claims thereto"; National Mortgage filed a  
14 countermotion on November 3, 2009, seeking to compel the Trustee to  
15 abandon to it the Palm Avenue property. On November 17, 2009, the  
16 bankruptcy court held a hearing on Debtors' and National Mortgage's  
17 abandonment motions. At the hearing, the bankruptcy court stated:

18 Typical abandonment is to the debtor but that is  
19 without determining what the debtor's interest in  
20 the property happens to be . . . . The appropriate  
21 thing for me to do, . . . is to conclude that the  
22 property is of inconsequential benefit to the  
23 estate, to grant the motion to abandon without  
24 taking sides on the question of the ownership of  
25 the property. It's the subject of state court  
26 litigation as well as bankruptcy court litigation  
27 and I will let nature take its course.

24 (Id. 00086-00087.) After alerting the parties that a minute order  
25 would issue granting Debtors' abandonment motion, the bankruptcy court  
26 further informed Debtors that at an upcoming status conference, the  
27 court would "want to know why [it] should not dismiss th[e] adversary  
28 proceeding." (Id. 00088.) Following the November 17 hearing, on

1 November 24, 2009, the bankruptcy court granted Debtors' abandonment  
2 motion and denied National Mortgage's abandonment motion. (Id. 00090-  
3 91.)

4 On November 24, 2009, a status conference was held in the  
5 adversary proceeding. (Id. 000104.) At the conference, the  
6 bankruptcy court questioned Debtors as to whether they had standing to  
7 bring their claims under sections 544 and 549 of the Bankruptcy Code.  
8 (See id. 000105-000108.) The bankruptcy court also probed why the  
9 substance of the adversary proceeding could not be resolved in state  
10 court. Specifically, the bankruptcy court stated:

11 So the question is fundamentally a state law  
12 question about who owns the real property in  
13 question. And the state court communicated, and as  
14 I read the state court's grant of the demurrer,  
15 with leave to re-plead . . . . So there are  
16 remedies in state court if you have invalid  
17 foreclosure, and I don't see any reason to clutter  
18 up the bankruptcy machinery . . . .

16 (Id. 000114.)

17 After the status conference, the bankruptcy court filed an  
18 order on November 24, 2009, dismissing Debtors' adversary proceeding.  
19 (Id. 000115.) The bankruptcy court's dismissal order states only:

20 The court having abstained in favor of the state  
21 court to determine the ownership of the subject  
22 real property, IT IS ORDERED that this adversary  
23 proceeding is DISMISSED.

23 (Id.)

24 On December 8, 2009, Debtors moved to alter or amend the  
25 bankruptcy court's judgment and sought relief from the dismissal  
26 order. Debtors argued their "adversarial complaint was dismissed at a  
27 status conference . . . without reasonable notice and opportunity to  
28 be heard in objection." Further, Debtors argued that they "requested

1 additional time to address each of the court's concerns [but] . . .  
2 were denied additional notice or time to respond." National Mortgage  
3 opposed the motion. A hearing was scheduled for January 5, 2010;  
4 Debtors, however, did not appear.

5 In an order filed on January 5, 2010, the bankruptcy court  
6 denied Debtors' motion to amend the judgment, stating:

7 This court previously dismissed this adversary  
8 proceeding for reasons stated on the record after  
9 giving plaintiff David Turturici, who is a self-  
10 represented attorney, an opportunity to articulate  
11 why he has standing, why the court should not  
12 abstain from hearing the dispute, why the complaint  
states a claim, and why the expiration of the  
automatic stay does not effectively lead to a  
mooting of the dispute. The plaintiffs contend  
there was surprise and that they were not prepared  
to address such questions . . . .

13 The plaintiffs did not appear at the time set  
14 for the hearing on this motion, which they had set  
on calendar for January 5, 2010, at 9:30 a.m. The  
defendant did appear.

15 The motion will be denied for two adequate,  
16 independent reasons. First, the plaintiffs, having  
set the matter on calendar for January 5, 2010, at  
17 9:30 a.m., did not appear on that day and time.  
The defendant did appear through counsel. From  
18 this, the court infers that plaintiffs have  
abandoned their motion. Second, while the court is  
19 mindful that it did not provide an opportunity for  
advanced briefing on all of the questions that were  
20 addressed during the hearing at which the adversary  
proceeding was dismissed, it is satisfied that the  
21 extensive colloquy that occurred was adequate under  
the circumstances and that the court's ruling is  
22 well-taken on the merits. It is important to  
recall that the consequences of the ruling is that  
23 the plaintiffs, who contend that there was an  
improperly completed foreclosure sale, will be able  
24 to challenge the validity of the foreclosure sale  
in a non-bankruptcy forum.

25 On January 16, 2010, Debtors filed an appeal of the  
26 Bankruptcy Court's November 24, 2009 order dismissing their adversary  
27 proceeding and elected to have their appeal heard before the district  
28 court. (Id. 000127-29.)

1 Debtors argue their appeal presents four issues for  
2 decision:

- 3 1. Did the bankruptcy court err in its abstention  
4 order (dismissing the adversarial  
proceeding[])?
- 5 2. Did the bankruptcy court err in ruling the  
6 debtors lacked standing to pursue the turnover  
claims?
- 7 3. Did the bankruptcy court err in ruling that  
8 the debtors failed to state a valid claim?
- 9 4. Did the bankruptcy court err in ruling the  
claims were rendered moot?

10 (Appellants' Op. Br. 1.)

## 11 I. LEGAL STANDARD

12 When considering an appeal of a bankruptcy court's ruling, a  
13 district court reviews the bankruptcy court's findings of fact under  
14 "a clearly erroneous standard" while "conclusions of law are reviewed  
15 *de novo*." Lundell v. Anchor Const. Specialists, Inc., 223 F.3d 1035,  
16 1039 (9th Cir. 2000) (citing In re Lazar, 83 F.3d 306, 308 (9th Cir.  
17 1996)). A bankruptcy court's decision to abstain is reviewed for  
18 abuse of discretion. In re Consol. Pioneer Mortg. Entities, 205 B.R.  
19 422, 424 (B.A.P. 9th Cir. 1997) (citing C-Y Dev. Co. v. City of  
20 Redlands, 703 F.2d 375, 377 (9th Cir. 1983)); see also In re DeLorean  
21 Motor Co., 155 B.R. 521, 524 (B.A.P. 9th Cir. 1993) (stating that  
22 decisions to permissively abstain are reviewed for abuse of  
23 discretion).

## 24 II. DISCUSSION

### 25 A. Did the Bankruptcy Court Abuse its Discretion by Abstaining?

26 Debtors argue the bankruptcy court abused its discretion in  
27 abstaining since the court "failed to address" the twelve factors that  
28 are to be considered by a court when deciding whether to abstain.

1 (Appellant's Op. Br. 8.) Debtors also argue the bankruptcy court  
2 erred in its decision since their claims arise solely under the  
3 Bankruptcy Code; no state court will be able to decide their claims  
4 and there is no pending state court action. (Id. at 10.) National  
5 Mortgage responds that the bankruptcy court properly abstained under  
6 28 U.S.C. § 1334(c) (1) since there was a concurrent state court  
7 proceeding that also involved title to the Palm Avenue property.  
8 (Appellee's Op. Br. 12-13.)

9 A bankruptcy court may, in its discretion, abstain from  
10 hearing an adversary proceeding under 28 U.S.C. § 1334(c) (1) ("section  
11 1334(c) (1)").<sup>2</sup> Section 1334(c) (1) provides in pertinent part:  
12 "nothing in this section prevents a district court in the interests of  
13 justice, or in the interest of comity with State courts or respect for  
14 State law, from abstaining from hearing a particular proceeding  
15 arising under title 11, or arising in or related to cases under title  
16 11." 28 U.S.C. § 1334(c) (1). "Abstention can exist only where there  
17 is a parallel proceeding in state court. That is, inherent in the  
18 concept of abstention is the presence of a pendant state action in  
19 favor of which the federal court must, or may, abstain." Sec. Farms  
20 v. Int'l Brotherhood of Teamsters, 124 F.3d 999, 1009 (9th Cir. 1997).  
21 The Ninth Circuit has identified the following factors a court should  
22 consider when deciding whether to abstain under section 1334(c) (1):

23 (1) the effect or lack thereof on the efficient  
24 administration of the estate if a Court recommends  
25 abstention, (2) the extent to which state law  
26 issues predominate over bankruptcy issues, (3) the  
difficulty or unsettled nature of the applicable  
law, (4) the presence of a related proceeding  
commenced in state court or other nonbankruptcy

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27  
28 <sup>2</sup> Debtors argument that mandatory abstention was not required in  
this case is disregarded since only permissive abstention is at issue.

1 court, (5) the jurisdictional basis, if any, other  
2 than 28 U.S.C. § 1334, (6) the degree of  
3 relatedness or remoteness of the proceeding to the  
4 main bankruptcy case, (7) the substance rather than  
5 form of an asserted "core" proceeding, (8) the  
6 feasibility of severing state law claims from core  
7 bankruptcy matters to allow judgments to be entered  
8 in state court with enforcement left to the  
9 bankruptcy court, (9) the burden of the bankruptcy  
10 court's docket, (10) the likelihood that the  
11 commencement of the proceeding in bankruptcy court  
12 involves forum shopping by one of the parties, (11)  
13 the existence of a right to a jury trial, and (12)  
14 the presence in the proceeding of nondebtor  
15 parties.

9 In re Tucson Estates, Inc., 912 F.2d 1162, 1167 (9th Cir. 1990)  
10 (citation omitted); see also In re Eastport Assocs., 935 F.2d 1071,  
11 1076 (9th Cir. 1991) (adopting the abstention factors identified in In  
12 re Tucson). "Although the bankruptcy court should consider all twelve  
13 factors, one should not be beguiled into a false sense that a head  
14 count will yield the answer with mathematical certainty. Rather, the  
15 list serves to provide an intellectual matrix to guide the judge who  
16 considers abstention and to enable a reviewing court to ascertain  
17 whether there has been an abuse of discretion." In re Franklin, 179  
18 B.R. 913, 928 (Bankr. E.D. Cal. 1995) (citing Eastport Assocs., 935  
19 F.2d at 1075).

## 20 **1. Pending State Court Action**

21 Debtors argue that abstention was improper because there  
22 "was no pendant state action" since Debtors' state court complaint had  
23 been dismissed when the bankruptcy court acted. (Appellants' Opening  
24 Br. 10.) National Mortgage contends Debtors' state court proceeding  
25 was pending at the time of the bankruptcy court's dismissal.  
26 (Appellee's Op. Br. 12.)

27 Debtors filed their initial state court complaint seeking to  
28 quiet title to the Palm Avenue property on May 22, 2009. Debtors then



1 sought chapter 7 bankruptcy relief on June 5, 2009 and filed their  
2 initial complaint in the adversary proceeding on July 21, 2009.  
3 Therefore, at the time Debtors initiated their adversary proceeding,  
4 there was a pending state court proceeding and this threshold  
5 abstention requirement is satisfied. See In re Siragusa, 27 F.3d 406,  
6 409 (9th Cir. 1994) (finding that since state court action was pending  
7 when debtor filed bankruptcy court complaint, there was a pending  
8 state court action for purposes of abstention); In re Baldwin Park Inn  
9 Assocs., 144 B.R. 475, 481 (C.D. Cal. 1992) (stating that a state  
10 court action is pending for abstention purposes if the state court  
11 action was "commenced at some point in time before the court considers  
12 abstention"); see also Wiener v. County of San Diego, 23 F.3d 263, 266  
13 (9th Cir. 1994) (in the context of Younger abstention, stating that  
14 "[t]he critical question is not whether the state proceedings are  
15 still ongoing but whether the state proceedings were underway before  
16 initiation of the federal proceedings") (quoting Kitchens v. Bowen,  
17 825 F.3d 1337, 1341 (9th Cir. 1987)).

## 18 **2. Weighing of the Abstention Factors**

19 Debtors further argue the bankruptcy court erred in  
20 dismissing their adversary proceeding on abstention grounds since the  
21 court did not evaluate or address the In re Tucson "abstention"  
22 factors. National Mortgage contends the bankruptcy court's decision  
23 to abstain was proper because "[i]f the bankruptcy court had . . . .  
24 retained jurisdiction over the issue of title to the Palm Avenue  
25 property, it is possible that different results on matters concerning  
26 the interest in real property situated in California . . . would have  
27 been reached . . . ." (Appellee's Op. Br. 14.)

28

1           At the November 24, 2009 hearing, the bankruptcy court  
2 probed Debtors as to whether they had standing to pursue their claims  
3 and stated that the "fundamental issue" involved in both the state  
4 court proceeding and Debtors' adversary proceeding is "who owns the  
5 Palm Avenue property." The bankruptcy court's dismissal order,  
6 however, states "[t]he court having abstained in favor of the state  
7 court to determine ownership of the subject real property, IT IS  
8 ORDERED that this adversary proceeding is DISMISSED."

9           The record does not reveal that the bankruptcy court  
10 considered the In re Tucson abstention factors when deciding to  
11 abstain in this case. "[B]y failing to consider the[se] twelve  
12 [abstention factors]" "[t]he Bankruptcy Court abused its discretion  
13 . . . ." Snider v. Sherman, no. CV-F-03-6605 OWW, 2007 WL 1174441,  
14 at \*44 (E.D. Cal. Apr. 19, 2007); see also In re Davis, 177 B.R. 907,  
15 913 (B.A.P. 9th Cir. 1995) (stating that "[w]e cannot affirm the order  
16 dismissing the adversary proceeding as an exercise of discretionary  
17 abstention . . . because the trial judge did not consider the  
18 appropriate factors in making his decision.") When the record does  
19 not disclose that the bankruptcy judge "necessarily would have  
20 dismissed the action if he had considered the appropriate factors"  
21 "the order dismissing the adversary proceeding as an exercise of  
22 discretionary abstention" cannot be affirmed. In re Davis, 177 B.R.  
23 at 913. "Although there are factors that support dismissal . . . ,  
24 there [also are factors] . . . that weigh[] against dismissal . . . ."  
25 Id. Further, the relief sought by Debtors in their adversary  
26 proceeding appears to differ from the relief sought in their state  
27 court action; through their adversary proceeding, Debtors seek to  
28 avoid an allegedly unperfected lien on their property and obtain

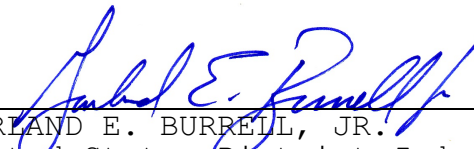
1 relief that could impact their bankruptcy petition and can only be  
2 awarded through a bankruptcy proceeding. Therefore, since the  
3 bankruptcy court has not explained the factors underlying its  
4 abstention decision, the bankruptcy court's order dismissing Debtors'  
5 adversary proceeding is reversed.

6 The bankruptcy court's decision to abstain is the only issue  
7 ripe for appeal. Although the bankruptcy court questioned whether  
8 Debtors had standing to bring the claims alleged in their adversary  
9 proceeding, and whether their claims remained ripe in light of the  
10 expiration of the automatic stay, the bankruptcy court did not  
11 expressly rule on these issues in its order. Therefore, these issues  
12 are not decided and this court expresses no opinion on the merits or  
13 viability of Debtors' claims alleged in their adversary proceeding  
14 complaint.

15 **IV. CONCLUSION**

16 For the reasons stated above, the bankruptcy court's order  
17 dismissing Debtors' adversary proceeding is reversed. This case is  
18 remanded to the bankruptcy court for further proceedings.

19 Dated: August 11, 2010

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GARLAND E. BURRELL, JR.  
United States District Judge