UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re: TERESA A. PEQUIGNOT, Debtor.	CASE NO. C09-1688JLR Bankruptcy No. 08-18197TTG ORDER DENYING DEUTSCHE BANK'S MOTION TO DISMISS APPEAL AND DENYING TERESA A. PEQUIGNOT'S MOTION FOR STAY PENDING APPEAL
TERESA A. PEQUIGNOT, Appellant, v. DEUTSCHE BANK NATIONAL TRUST COMPANY, Appellee.	

This matter comes before the court on the following motions: (1) Appellee Deutsche Bank National Trust Company's ("Deutsche Bank") motion to dismiss Appellant Teresa A. Pequignot's bankruptcy appeal, or in the alternative for an extension of time to file its appellate brief (Dkt. # 8); and (2) Ms. Pequignot's motion for stay

pending appeal (Dkt. # 6). Having considered these motions, as well as all papers filed in support and opposition, and deeming oral argument unnecessary, the court DENIES Deutsche Bank's motion to dismiss Ms. Pequignot's bankruptcy appeal and DENIES Ms. Pequignot's motion for stay pending appeal. Deutsche Bank shall file and serve its appellate brief no later than 14 days after entry of this order.

I. BACKGROUND

Ms. Pequignot filed a Chapter 13 bankruptcy petition on November 28, 2008 (Bankr. No. 08-18197TTG). Deutsche Bank, the holder of a note evidencing Ms. Pequignot's home loan obligation, subsequently filed a proof of claim, to which Ms. Pequignot objected. On November 2, 2009, the bankruptcy court denied Ms. Pequignot's objection, and Ms. Pequignot immediately filed a notice of appeal. After Deutsche Bank elected to have the appeal heard by a district court, the Bankruptcy Appellate Panel transferred Ms. Pequignot's appeal to this court.

While the appeal was pending, the bankruptcy trustee moved to dismiss Ms. Pequignot's case, and Ms. Pequignot filed a motion for stay pending appeal. On February 11, 2010, the bankruptcy court denied Ms. Pequignot's motion for stay pending appeal and dismissed her bankruptcy.

Following dismissal of her bankruptcy, Ms. Pequignot filed another motion for stay pending appeal with this court (Dkt. # 6), and Deutsche Bank filed a motion to dismiss Ms. Pequignot's appeal as moot, or in the alternative for additional time to file its appellate brief (Dkt. # 8).

II. ANALYSIS

A. Deutsche Bank's motion to dismiss Ms. Pequignot's bankruptcy appeal

The court cannot hear Ms. Pequignot's appeal if dismissal of her bankruptcy rendered it moot. U.S. CONST. art. III, § 2; *see also Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir. 1999) (federal courts have no jurisdiction to hear a case where no actual or live controversy exists). "In the bankruptcy context the determination of whether a case or controversy remains after the dismissal of a bankruptcy case hinges on the question of how closely the issue in the case is connected to the underlying bankruptcy." *Spacek v. Thomen* (*In re Universal Farming Indus.*), 873 F.2d 1334, 1335 (9th Cir. 1989). "When the issue being litigated directly involves the debtor's reorganization the case is mooted by the dismissal of the bankruptcy." *Spacek v. Tabatabay* (*In re Universal Farming Indus.*), 873 F.2d 1332, 1332 (9th Cir. 1989). Both *Thomen* and *Tabatabay* involved disputes between creditors about the relative priorities of their claims. In both cases, the bankruptcy court ruled on the dispute, the losing creditor appealed, and the underlying bankruptcy was dismissed while the appeal was pending.

In *Tabatabay*, the Ninth Circuit held that the appeal was moot because no live controversy remained. Any controversy regarding the relative priority of the parties' claims was "a purely hypothetical one" because, while the appeal was pending, the appellant sold his promissory note to the appellee. *Tabatabay*, 873 F.2d at 1334. The court recognized that a controversy might remain as to whether the appellee paid fair value for the note, but there was, at the time of the appeal, "no allegation that an action

requiring such value to be determined either has or will be brought." *Id.* As such, any opinion on the matter would be impermissibly advisory. *Id.* (citing *Hall v. Beals*, 396 U.S. 45, 48 (1969)) (to avoid advisory opinions, courts must not hear a case that has lost its character as a present, live controversy).

In *Thomen*, however, the same panel of the Ninth Circuit came to the opposite conclusion. There, creditors Spacek and Thomen both held trust deeds on a piece of the bankruptcy debtor's real property. Although Thomen held the prior trust deed, Spacek argued that Thomen's trust deed was either invalid, or that it should be equitably subordinated. The bankruptcy court granted judgment to Thomen, and Spacek appealed. The underlying bankruptcy was dismissed while Spacek's appeal was pending.

The Ninth Circuit held that dismissal of the underlying bankruptcy did not moot Spacek's appeal because the relative priority of the trust deeds was an ancillary issue not directly related to the debtor's reorganization. *Thomen*, 873 F.2d at 1335 ("[I]f the issue is ancillary to the bankruptcy, the dismissal of the petition does not necessarily cause the case to become moot."). Even in the absence of a bankruptcy, the Ninth Circuit reasoned, "[t]he value of the claims . . . will depend in part on how many [other] claims will precede them in a *potential* insolvency. Thus, a legally cognizable interest in the outcome survives the bankruptcy." *Id.* at 1336 (emphasis added).

Deutsche Bank compares Ms. Pequignot's appeal to *Tabatabay*, but *Thomen*

controls.[1] Even in the absence of a bankruptcy, the value of Deutsche Bank's claim depends on Deutsche Bank's ability to enforce its note in the event of a *potential* insolvency. *See id.* Since Ms. Pequignot asserts that Deutsche Bank is not entitled to enforce the note *at all* (Resp. (Dkt. # 9) at 2),[2] the issue on appeal is "not so . . . closely linked to the underlying bankruptcy that the dismissal . . . renders the case moot." *Thomen*, 873 F.2d at 1335. Furthermore, the dispute about the validity of Deutsche Bank's claim is not a "purely hypothetical one," *Tabatabay*, 873 F.2d at 1334, because Ms. Pequignot has indicated that she may file another bankruptcy or otherwise seek to enjoin foreclosure of her home. (Resp. at 5.)

The court concludes that Deutsche Bank has not established that the dismissal of Ms. Pequignot's bankruptcy mooted her appeal. *See Suter v. Goedert*, 504 F.3d 982, 986 (9th Cir. 2007) (burden to establish mootness lies on the party asserting it). Deutsche Bank's brief does not address *Thomen*. Instead, Deutsche Bank asserts that a finding of mootness would be "in accordance with the majority of other cases that have considered the issue." (Mot. at 4 (citing as an example *First Union Real Estate Equity & Mortgage Invs. v. Club Assocs.* (*In re Club Assocs.*), 956 F.2d 1065 (11th Cir. 1992)).) However, in *In re Club Associates*, the court was primarily concerned with protecting third parties

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[1] Rather than addressing the *Thomen* / *Tabatabay* distinction, Ms. Pequignot argues that her appeal is not moot because it fits within the "capable of repetition, yet evading review" exception to the mootness doctrine. Because this motion can be resolved based on *Thomen* and *Tabatabay*, the court need not determine whether that exception applies.

[2] Ms. Pequignot asserts that Deutsche Bank has not proven that it is a "person entitled to enforcement" under RCW 62A.3-301 because Deutsche Bank has not produced the original note evidencing Ms. Pequignot's obligation. (Resp. at 2.) The court makes no determination as to the merits of Ms. Pequignot's assertion.

who had detrimentally relied on the debtor's reorganization plan, which by that time had been substantially consummated. 956 F.2d at 1070. In contrast, Ms. Pequignot's plan was never confirmed, and was effectively vacated when her bankruptcy was dismissed. *See Nash v. Kester* (*In re Kester*), 765 F.2d 1410, 1412-13 (9th Cir. 1985). Therefore, because Deutsche Bank has not met its burden to demonstrate mootness, the court denies its motion to dismiss Ms. Pequignot's appeal.

B. Ms. Pequignot's motion for stay pending appeal

"Where the bankruptcy court has already denied a stay[,] review is limited to a simple determination of whether the bankruptcy court abused its discretion." *Dynamic Fin. Corp. v. Kipperman* (*In re N. Plaza, LLC*), 395 B.R. 113, 119 (Bankr. S.D. Cal. 2008) (citing *Wymer v. Wymer* (*In re Wymer*), 5 B.R. 802, 807 (B.A.P. 9th Cir. 1980)). Ms. Pequignot has the burden of demonstrating that the bankruptcy court abused its discretion. *Wymer*, 5 B.R. at 808.

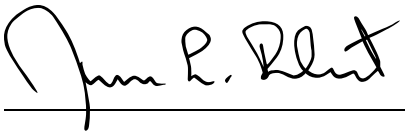
To facilitate the court's abuse-of-discretion review, a motion for stay that has been denied by the bankruptcy court and made to the district court "shall show why the relief . . . was not obtained from the bankruptcy judge." Fed. R. Bankr. P. 8005. Although Ms. Pequignot correctly moved for a stay with the bankruptcy court first, she has not complied with Rule 8005 because her motion to this court does not state the reasons why the bankruptcy judge denied relief. *See* 10 COLLIER ON BANKRUPTCY ¶ 8005.10 (15th ed. 2007) ("Although Rule 8005 does not expressly require the bankruptcy judge to state the reasons for [denying] a stay, its clear implication is that the applicant is entitled to them upon request."). Without such a statement, Ms. Pequignot cannot establish that the

bankruptcy court abused its discretion. The court therefore denies Ms. Pequignot's motion for stay pending appeal.[3]

III. CONCLUSION

For the foregoing reasons, the court DENIES Deutsche Bank's motion to dismiss Ms. Pequignot's bankruptcy appeal (Dkt. # 8) and DENIES Ms. Pequignot's motion for stay pending appeal (Dkt. # 6). Deutsche Bank shall file and serve its appellate brief no later than 14 days after entry of this order.

Dated this 19th day of April, 2010.



JAMES L. ROBART
United States District Judge

[3] Because Ms. Pequignot has failed to meet this threshold requirement, the court makes no determination as to her likelihood of success on the merits or the harm she asserts would result if the stay is denied. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983) ("The standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction.").