

NOV 28 2012

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

1 In re:) BAP No. NV-11-1124-JuPaD
2)
3 PATRICIA NIETO,) Bk. No. 09-26688
4)
5 Debtor.)
6)
7)
8 BAC HOME LOANS SERVICING, LP)
9 f/k/a COUNTRYWIDE HOME LOANS)
10 SERVICING, LP,)
11)
12 Appellant,)
13)
14 v.) M E M O R A N D U M *
15)
16 PATRICIA NIETO,)
17)
18)
19 Appellee.)
20)
21)
22)
23)
24)

Submitted Without Oral Argument
on November 15, 2012**

Filed - November 28, 2012

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

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding

20 Appearances: Ariel Edward Stern, Esq. and Heidi Parry Stern,
21 Esq. of Akerman Senterfitt LLP on brief for
22 appellant BAC Home Loans Servicing; David M.
23 Crosby, Esq. and Troy S. Fox, Esq. of Crosby &
24 Associates on brief for appellee Patricia Nieto.

25 * This disposition is not appropriate for publication.
26 Although it may be cited for whatever persuasive value it may
27 have (see Fed. R. App. P. 32.1), it has no precedential value.
28 See 9th Cir. BAP Rule 8013-1.

** This case was submitted without oral argument pursuant to
a stipulation by the parties.

1 Before: JURY, PAPPAS, and DUNN Bankruptcy Judges.
2

3 BAC Home Loans Servicing, LP ("BAC") appeals the bankruptcy
4 court's determination of Debtor Patricia Nieto's ("debtor")
5 principal residence pursuant to 11 U.S.C. § 1322(b)(2)¹, arguing
6 that the pertinent date for determining principal residence is
7 the loan origination date. The bankruptcy court held that plan
8 confirmation was the proper date for determination of a debtor's
9 principal residence. While this appeal was pending, this Panel
10 decided that the petition date was the correct date for
11 determination of a debtor's principal residence. Benafel v. One
12 West Bank, FSB (In re Benafel), 461 B.R. 581 (9th Cir. BAP
13 2011). While the bankruptcy court applied an incorrect legal
14 rule to resolve the issues in this appeal, because we agree with
15 the outcome, we AFFIRM.

16 **I. FACTS**

17 Debtor's ex-husband purchased the residence at 816 Orr
18 Avenue, North Las Vegas, Nevada in February 1990. Debtor began
19 to occupy the residence at that time. In June 2000, as a result
20 of her divorce, debtor's ex-husband transferred title of the
21 residence to debtor as her sole and separate property. In April
22 2006, debtor refinanced the residence with SFG Mortgage. BAC is
23 successor in interest to SFG Mortgage.

24 On June 1, 2006, debtor purchased a second residence at
25 5308 Coleman Street, North Las Vegas, Nevada ("Coleman
26

27 ¹ Unless otherwise indicated, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 Property"). Shortly thereafter, debtor moved into the Coleman
2 Property and began to rent out the residence. On September 6,
3 2009, debtor filed for bankruptcy. On the petition date, debtor
4 resided in the Coleman Property.

5 On September 9, 2009, debtor filed her Chapter 13 plan.
6 BAC objected to debtor's plan on grounds that the value of the
7 residence stated in the plan was too low and that the plan
8 failed to provide any evidence of value. On December 31, 2009,
9 debtor filed a Motion to Value Collateral for the residence.
10 Debtor sought to reduce BAC's secured claim to the appraised
11 value of the residence. BAC opposed the motion, contending the
12 residence was debtor's principal residence exempt from
13 modification pursuant to § 1322(b)(5). BAC argued that a
14 debtor's principal residence is determined on the date the
15 creditor takes an interest in the property, and because debtor
16 listed the residence as her principal residence when she filled
17 out her loan application in 2006, BAC's contractual rights were
18 exempt from modification pursuant to § 1322(b)(5).

19 On October 25, 2010, the bankruptcy court granted debtor's
20 Motion to Value Collateral, holding the critical date for
21 determining a debtor's principal residence under § 1322(b)(5) is
22 the plan confirmation date. On March 1, 2011, the bankruptcy
23 court issued an order confirming debtor's Chapter 13 plan, which
24 relied in part on the valuation order. BAC timely appealed the
25 bankruptcy court's confirmation order.

26 After BAC and debtor submitted their briefs on appeal, this
27 Panel held in a different appeal that the petition date was the
28 correct date for determination of a debtor's principal

1 residence. Benafel, 461 B.R. 581. BAC and debtor were asked to
2 supplement their briefs in light of Benafel.

3 **II. JURISDICTION**

4 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
5 §§ 1334 and 157(b)(1). This Panel has jurisdiction under
6 28 U.S.C. § 158.

7 **III. ISSUE**

8 Whether the bankruptcy court erred in permitting debtor to
9 modify BAC's rights in the residence.

10 **IV. STANDARD OF REVIEW**

11 We review the bankruptcy court's construction of the
12 Bankruptcy Code de novo. Educ. Credit Mgmt. Corp. v. Mason
13 (In re Mason), 464 F.3d 878, 881 (9th Cir. 2006). We may
14 consider any issue evident on the record and may affirm on any
15 basis supported by the record. O'Rourke v. Seaboard Sur. Co.
16 (In re E.R. Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. 1989).
17 We do not reverse for errors not affecting substantial rights of
18 the parties, and as noted, may affirm for any reason supported
19 by the record. Williams v. Levi (In re Williams), 323 B.R. 691,
20 696 (9th Cir. BAP 2005).

21 **V. DISCUSSION**

22 In Benafel, this Panel answered the legal question
23 presented in this appeal, deciding that the proper date for
24 determination of a debtor's principal residence is the petition
25 date. 461 B.R. 581. The only question remaining then is
26 whether the bankruptcy court's decision that the proper date is
27 the plan confirmation date constitutes reversible error.

28 On October 25, 2010, the bankruptcy court issued a

1 memorandum of decision. Therein, the bankruptcy court found,
2 "[w]hen she filed for bankruptcy, debtor was living in the
3 Coleman [Property]" BAC's opening brief also
4 acknowledges debtor resided in the Coleman Property on the
5 petition date. For example, BAC states, "[o]n June 1, 2006,
6 Debtor purchased a second residence Debtor apparently
7 moved to the Coleman property and began to rent out the
8 [residence] around this time." Given these statements, and with
9 no evidence to the contrary, the record supports a determination
10 that debtor did not reside in the residence on the petition
11 date. As a consequence, Benafel controls the outcome of this
12 appeal.

13 VI. CONCLUSION

14 While the bankruptcy court applied an incorrect legal rule,
15 because debtor did not reside in the residence on the petition
16 date, the bankruptcy court's decision does not constitute
17 reversible error. We AFFIRM.

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