UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NC-10-1157-HKiSa
SHIRLEY VENOYA REMMERT,	Bk. No. 08-31074
Debtor.	Adv. No. 08-03063
SHIRLEY VENOYA REMMERT,	**M E M O R A N D U M**[1]
Appellant,	
v.	
BANK OF NEW YORK MELLON; THE SPIEKER COMPANY, et al.	
Appellees.	

Argued and Submitted on October 20, 2010
at San Francisco, California

Filed - December 22, 2010

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Dennis Montali, Bankruptcy Judge, Presiding

Appearances: Shirley Venoya Remmert argued, pro se, for the Appellant.
Katherine Agbayani of Adorno Yoss Alvarado & Smith argued for Appellee, Bank of New York Mellon.

Before: HOLLOWELL, KIRSCHER and SALTZMAN[2], Bankruptcy Judges.

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

[2] Hon. Deborah J. Saltzman, Bankruptcy Judge for the Central District of California, sitting by designation.

The debtor filed a lis pendens asserting a real property claim in an adversary case that had been dismissed and closed. Because a lis pendens is ineffective where the action to which it pertains is no longer pending, the bankruptcy court entered an order expunging the lis pendens. We AFFIRM.

I. FACTS

Shirley Remmert (the Debtor) filed an individual chapter 11[3] bankruptcy petition on June 19, 2008[4]. The case was converted to chapter 7 on August 9, 2008.

On the same day she filed her bankruptcy petition, the Debtor filed a complaint against Delfin Venoya (Venoya); nine various individuals; six different medical institutions, clinics or hospitals; six attorneys; the Muslim Community Association of Santa Ana, California; the State of California; the Superior Court of San Mateo County; the United States; the State Department; and, the FBI, alleging violations of the RICO act, U.S. Constitution, judicial process and for negligence (the Complaint or Adversary Proceeding).

The contentions in the Complaint are difficult to follow; however, because the litigation was dismissed and the dismissal

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[3] Unless otherwise specified, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

[4] The Debtor had previously filed a chapter 13 bankruptcy case on October 15, 2007. The case was dismissed on January 10, 2008, due to the Debtor's failure to make plan payments. During the course of that case, like this case, the Debtor filed various pleadings and complaints in an attempt to forestall the foreclosure of real property on which she was residing.

was not timely appealed, we need not be concerned with the allegations in the Complaint in order to resolve this appeal. Nevertheless, to give content to our decision, some relevant facts of the litigation have been pieced together from other pleadings filed in the bankruptcy case and the Adversary Proceeding.[5]

Apparently, sometime in 2003, the Debtor obtained a $805,000 loan secured by her residence, real property on Berkeley Avenue in Menlo Park, California (the Property). However, there has been a longstanding dispute about who is the title holder of the Property. In 2004, the Debtor's father, Venoya, filed a state court complaint against the Debtor alleging that she had effected a fraudulent transfer of the Property's title from him to herself and then encumbered the Property with over $1 million in debt.

Ever since Venoya initiated proceedings against the Debtor (and possibly before), the Debtor has been engaged in litigation alleging that Venoya, the courts, and others have been conspiring to defraud her of the Property.[6] In March 2008, Venoya prevailed on his state court complaint. A state court judgment (State Court Judgment) was entered, which declared the deed purporting to transfer the Property to the Debtor void and ordered the Debtor to vacate the Property. In March 2008, foreclosure

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[5] We have taken judicial notice of pleadings filed with the bankruptcy court through the electronic docketing system See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert), 887 F.2d 955, 957-58 (9th Cir. 1988); Atwood v. Chase Manhattan Mrtg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

[6] The Debtor has been declared a vexatious litigant by the California state court and the federal district court.

proceedings were initiated and a sale was scheduled for June 19, 2008.

The Debtor sought bankruptcy protection and filed various pleadings, including the Complaint, collaterally attacking the State Court Judgment and seeking to forestall the foreclosure of the Property. The Debtor received her discharge and her chapter 7 bankruptcy case was dismissed on December 22, 2008. The case was then closed.

The same day the bankruptcy court dismissed the bankruptcy case, it also dismissed the Adversary Proceeding because it found there were no factors that weighed in favor of retaining jurisdiction over its resolution (the Dismissal Order). The Debtor appealed the Dismissal Order; however on February 27, 2009, the Bankruptcy Appellate Panel dismissed the appeal as untimely.

On July 8, 2009, the Property was sold at a foreclosure sale. The Bank of New York Mellon (the Bank) was named as the grantee under the trustee's deed of sale and became the legal owner of the Property.

On August 13, 2009, the Debtor filed a motion for leave to reopen the Adversary Proceeding based on "present harm" to her mother and daughter by the alleged unlawful sale of the Property. The bankruptcy court denied the Debtor's motion on August 27, 2009, reiterating that no factors weighed in retaining jurisdiction over the Adversary Proceeding or in resolving the Complaint in the bankruptcy court.

Notwithstanding the denial of her motion ro re-open the Adversary Proceeding, on September 4, 2009, the Debtor filed a

Notice of Pendency of Action (the Lis Pendens) in the Adversary Proceeding, giving notice that "a post-judgment action (Motion to Reopen this case)" had been commenced in the bankruptcy court and alleging a real property claim affecting the Property. On that same date, the Lis Pendens was recorded with the San Mateo County Recorder's Office. Also on September 4, 2009, the bankruptcy court entered an order directing the clerk to not docket the Lis Pendens because the Debtor did not have authority to file a notice of pendency of litigation since the Adversary Proceeding was dismissed, the motion to reopen denied, and the case closed.

On March 26, 2010, the Bank filed a petition to have the Lis Pendens expunged because it was unable to sell or transfer the Property due to the recording of the Lis Pendens (the Motion to Expunge). The Bank contended that the Debtor did not have a valid real property claim because she had no interest in the Property and because there was no pending litigation involving the Property. On April 14, 2009, the Debtor filed an opposition to the Motion to Expunge. She contended that the Lis Pendens was filed "concurrent with [her] criminal complaint of RICO violations and judicial abuse to the U.S. Department of Justice" and state and local law enforcement agencies. The Debtor asserted that she had served a Petition for Writ of Mandate "regarding the fraudulent takeover" of the Property and so she had a real property claim that affected the Property.

On April 28, 2008, the bankruptcy court entered an order expunging the Lis Pendens on the basis that it had previously directed the Lis Pendens not be filed (the Expungement Oder). The bankruptcy court awarded the Bank reasonable fees and costs

associated with preparing the motion to expunge. The Debtor timely appealed.[7]

On June 28, 2010, the Debtor filed a motion for stay pending appeal with the Bankruptcy Appellate Panel (BAP). The motion was considered by the BAP and denied on July 27, 2010. On August 17, 2010, the Debtor filed a motion for stay pending appeal with the bankruptcy court, which was denied. The Debtor then filed a new motion for stay pending appeal with the BAP on August 30, 2010. The BAP denied the motion on September 30, 2010, because the Debtor did not demonstrate she was entitled to the stay under the factors enunciated in Wymer v. Wymer (In re Wymer), 5 B.R. 802, 806 (9th Cir. BAP 1980).

After the BAP heard oral arguments on this appeal, the Debtor filed two additional motions requesting a stay or injunction pending the disposition of the appeal. On October 25, 2010, the Debtor filed a motion for en banc hearing of the September 30, 2010 order denying a stay, and on November 5, 2010, the Debtor filed an emergency motion for stay pending appeal. In neither motion did the Debtor reference the factors enunciated in In re Wymer to demonstrate her entitlement to a stay. Furthermore, the Debtor sought an en banc hearing to "challenge existing precedent," but did not articulate what precedent was being challenged or comply with the BAP Rules on en banc proceedings. As a result, we DENY both motions.

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[7] The appeal named the bankruptcy court, the State of California, the Bank, Washington Mutual Bank, JP Morgan Chase Bank, Wells Fargo Home Mortgage, Inc., the Spieker Company and the California High Speed Rail Authority as opposing parties. The Spieker Company joined in the Bank's appellee brief.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. § 157(b)(1). We address our jurisdiction under 28 U.S.C. § 158 below.

III. ISSUES

1. Does the Panel have jurisdiction over the appeal?

2. Did the bankruptcy court err in ordering the expungement of the Lis Pendens?

IV. STANDARDS OF REVIEW

When there is a question as to our jurisdiction, we are entitled to raise that issue sua sponte and address it de novo. Giesbrecht v. Fitzgerald (In re Giesbrecht), 429 B.R. 682, 687 (9th Cir. BAP 2010); Menk v. Lapaglia (In re Menk), 241 B.R. 896, 903 (9th Cir. BAP 1999). We review the bankruptcy court's findings of fact for clear error and issues of law de novo. Hansen v. Moore (In re Hansen), 368 B.R. 868, 874-75 (9th Cir. BAP 2007).

V. DISCUSSION

A. Jurisdictional Issues

Appellate jurisdiction requires that the order to be reviewed is final. 28 U.S.C. § 158. "A disposition is final if it contains a 'complete act of adjudication,' that is, a full adjudication of the issues at bar, and clearly evidences the judge's intention that it be the court's final act in the matter." Slimick v. Silva (In re Slimick), 928 F.2d 304, 307 (9th Cir. 1990) (emphasis in original) (internal citation omitted). In bankruptcy, a complete act of adjudication does not need to end the entire case, but must "end any of the interim

disputes from which appeal would lie." Id. at 307 n.1; see also White v. White (In re White), 727 F.2d 884, 885 (9th Cir. 1984).

Under the pragmatic approach to finality used in bankruptcy cases, an order may be final if it resolves and seriously affects substantive rights and finally determines the discrete issue to which it is addressed. See Bonham v. Compton (In re Bonham), 229 F.3d 750, 761 (9th Cir. 2000) (internal citations omitted). In this case, the Expungement Order fully determined the Debtor's right to record the Lis Pendens when the underlying litigation was no longer pending. Therefore, while the Expungement Order could arguably be final in this case, we acknowledge that generally an order expunging a lis pendens is held to be interlocutory because it does not end the litigation on the merits. Orange County v. Hongkong & Shanghai Banking Corp. Ltd., 52 F.3d 821, 823 (9th Cir. 1995); Pac. Horizons, Inc. v. Erickson (In re Pac. Horizons, Inc.), 37 B.R. 653, 655 (9th Cir. BAP 1984).

Nonetheless, if an order is interlocutory, and no motion for leave has been filed, we can consider a timely notice of appeal to be a motion for leave. See Rule 8003(c); Roderick v. Levy (In re Roderick Timber Co.), 185 B.R. 601, 604 (9th Cir. BAP 1995). We do so here.

Granting leave is appropriate when an appeal would materially advance resolution of the dispute and minimize further litigation expenses. Id. In this case, reviewing the Expungement Order would materially advance resolution of the dispute about whether the Lis Pendens was properly recorded and minimize further litigation.

The Bank argues that the Debtor may not appeal the Expungement Order because under California law, expungement orders may not be appealed but only reviewed by writ of mandate made within 20 days of the entry of the expungement. Cal. Code Civ. P. § 405.39; Sixells, LLC v. Cannery Bus. Park, 170 Cal.App.4th 648, 652 n.3 (2008) ("An order granting or denying a motion to expunge a lis pendens is not an appealable order."). However, the use of the writ of mandate is to allow the review of an interlocutory appeal. Even if the Expungement Order was not final, we construe the Debtor's pro se appellate brief liberally as a request to review an interlocutory order and grant leave to decide the appeal. See Woods v. Carey, 525 F.3d 886, 889 (9th Cir. 2008) (A document filed pro se is to be liberally construed). Therefore, we have jurisdiction under 28 U.S.C. § 158 to address the merits.

B. The Merits

A lis pendens provides "notice that an action which affects title of real property or right of possession of designated real property has been instituted and is pending. That is the literal meaning of the two Latin words included in the phrase 'lis pendens.'" Garcia v. Pinchero, 22 Cal.App.2d 194, 196 (1937) (emphasis added). A lis pendens is tied to the underlying litigation it references and has no existence separate and apart from the specific pending action.

Here, the Lis Pendens referenced the Adversary Proceeding, which had been dismissed. Thus, there was no underlying litigation for the Lis Pendens to reference. Indeed, a lis pendens is ineffective where the action to which it pertains has

been dismissed or no longer pending. See 3 B.E. Witkin, Cal. Proc. 5th, Actions, 388 at 492-93 (2008) (emphasis added). The Lis Pendens stated that it was giving notice of a real property claim asserted in a "motion to reopen" the Adversary Proceeding. That statement is false. There was simply no pending action in which the real property claim was being asserted when the Debtor recorded the Lis Pendens. The bankruptcy court dismissed the Adversary Proceeding on December 22, 2008. The Adversary Proceeding was closed on January 8, 2009. The bankruptcy court denied the Debtor's motion to reopen on August 27, 2009, and that order was not appealed.

Furthermore, on September 4, 2009, the bankruptcy court ordered that the Lis Pendens not be docketed because there was no litigation pending in the bankruptcy court when the Debtor recorded the Lis Pendens. Accordingly, the bankruptcy court did not err in expunging the Lis Pendens and awarding the Bank its fees and costs pursuant to C.C.P. § 405.38.

CONCLUSION

For the foregoing reasons, we AFFIRM.