

DEC 22 2010

SUSAN M SPRAY, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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,) **MEMORANDUM**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 SALTZMAN², Bankruptcy Judges.

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.

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

6 I. FACTS

7 Shirley Remmert (the Debtor) filed an individual chapter 11³
8 bankruptcy petition on June 19, 2008⁴. The case was converted to
9 chapter 7 on August 9, 2008.

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

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

21
22 ³ Unless otherwise specified, all chapter and section
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
24 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

25 ⁴ The Debtor had previously filed a chapter 13 bankruptcy
26 case on October 15, 2007. The case was dismissed on January 10,
27 2008, due to the Debtor's failure to make plan payments. During
28 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.

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

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

15 Ever since Venoya initiated proceedings against the Debtor
16 (and possibly before), the Debtor has been engaged in litigation
17 alleging that Venoya, the courts, and others have been conspiring
18 to defraud her of the Property.⁶ In March 2008, Venoya prevailed
19 on his state court complaint. A state court judgment (State
20 Court Judgment) was entered, which declared the deed purporting
21 to transfer the Property to the Debtor void and ordered the
22 Debtor to vacate the Property. In March 2008, foreclosure
23

24 ⁵ We have taken judicial notice of pleadings filed with the
25 bankruptcy court through the electronic docketing system See
26 O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert), 887 F.2d 955,
27 957-58 (9th Cir. 1988); Atwood v. Chase Manhattan Mrtg. Co. (In
re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

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

1 proceedings were initiated and a sale was scheduled for June 19,
2 2008.

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

9 The same day the bankruptcy court dismissed the bankruptcy
10 case, it also dismissed the Adversary Proceeding because it found
11 there were no factors that weighed in favor of retaining
12 jurisdiction over its resolution (the Dismissal Order). The
13 Debtor appealed the Dismissal Order; however on February 27,
14 2009, the Bankruptcy Appellate Panel dismissed the appeal as
15 untimely.

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

20 On August 13, 2009, the Debtor filed a motion for leave to
21 reopen the Adversary Proceeding based on "present harm" to her
22 mother and daughter by the alleged unlawful sale of the Property.
23 The bankruptcy court denied the Debtor's motion on August 27,
24 2009, reiterating that no factors weighed in retaining
25 jurisdiction over the Adversary Proceeding or in resolving the
26 Complaint in the bankruptcy court.

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

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

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

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

1 associated with preparing the motion to expunge. The Debtor
2 timely appealed.⁷

3 On June 28, 2010, the Debtor filed a motion for stay pending
4 appeal with the Bankruptcy Appellate Panel (BAP). The motion was
5 considered by the BAP and denied on July 27, 2010. On August 17,
6 2010, the Debtor filed a motion for stay pending appeal with the
7 bankruptcy court, which was denied. The Debtor then filed a new
8 motion for stay pending appeal with the BAP on August 30, 2010.
9 The BAP denied the motion on September 30, 2010, because the
10 Debtor did not demonstrate she was entitled to the stay under the
11 factors enunciated in Wymer v. Wymer (In re Wymer), 5 B.R. 802,
12 806 (9th Cir. BAP 1980).

13 After the BAP heard oral arguments on this appeal, the
14 Debtor filed two additional motions requesting a stay or
15 injunction pending the disposition of the appeal. On October 25,
16 2010, the Debtor filed a motion for en banc hearing of the
17 September 30, 2010 order denying a stay, and on November 5, 2010,
18 the Debtor filed an emergency motion for stay pending appeal. In
19 neither motion did the Debtor reference the factors enunciated in
20 In re Wymer to demonstrate her entitlement to a stay.

21 Furthermore, the Debtor sought an en banc hearing to "challenge
22 existing precedent," but did not articulate what precedent was
23 being challenged or comply with the BAP Rules on en banc
24 proceedings. As a result, we DENY both motions.

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26 ⁷ The appeal named the bankruptcy court, the State of
27 California, the Bank, Washington Mutual Bank, JP Morgan Chase
28 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.

1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
3 § 157(b) (1). We address our jurisdiction under 28 U.S.C. § 158
4 below.

5 **III. ISSUES**

- 6 1. Does the Panel have jurisdiction over the appeal?
7 2. Did the bankruptcy court err in ordering the
8 expungement of the Lis Pendens?

9 **IV. STANDARDS OF REVIEW**

10 When there is a question as to our jurisdiction, we are
11 entitled to raise that issue sua sponte and address it de novo.
12 Giesbrecht v. Fitzgerald (In re Giesbrecht), 429 B.R. 682, 687
13 (9th Cir. BAP 2010); Menk v. Lapaglia (In re Menk), 241 B.R. 896,
14 903 (9th Cir. BAP 1999). We review the bankruptcy court's
15 findings of fact for clear error and issues of law de novo.
16 Hansen v. Moore (In re Hansen), 368 B.R. 868, 874-75 (9th Cir.
17 BAP 2007).

18 **V. DISCUSSION**

19 A. Jurisdictional Issues

20 Appellate jurisdiction requires that the order to be
21 reviewed is final. 28 U.S.C. § 158. "A disposition is final if
22 it contains a 'complete act of adjudication,' that is, a full
23 adjudication of the issues at bar, and clearly evidences the
24 judge's intention that it be the court's final act in the
25 matter." Slimick v. Silva (In re Slimick), 928 F.2d 304, 307
26 (9th Cir. 1990) (emphasis in original) (internal citation
27 omitted). In bankruptcy, a complete act of adjudication does not
28 need to end the entire case, but must "end any of the interim

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

3 Under the pragmatic approach to finality used in bankruptcy
4 cases, an order may be final if it resolves and seriously affects
5 substantive rights and finally determines the discrete issue to
6 which it is addressed. See Bonham v. Compton (In re Bonham), 229
7 F.3d 750, 761 (9th Cir. 2000) (internal citations omitted). In
8 this case, the Expungement Order fully determined the Debtor’s
9 right to record the Lis Pendens when the underlying litigation
10 was no longer pending. Therefore, while the Expungement Order
11 could arguably be final in this case, we acknowledge that
12 generally an order expunging a lis pendens is held to be
13 interlocutory because it does not end the litigation on the
14 merits. Orange County v. Hongkong & Shanghai Banking Corp. Ltd.,
15 52 F.3d 821, 823 (9th Cir. 1995); Pac. Horizons, Inc. v. Erickson
16 (In re Pac. Horizons, Inc.), 37 B.R. 653, 655 (9th Cir. BAP
17 1984).

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

22 We do so here.

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

1 The Bank argues that the Debtor may not appeal the
2 Expungement Order because under California law, expungement
3 orders may not be appealed but only reviewed by writ of mandate
4 made within 20 days of the entry of the expungement. Cal. Code
5 Civ. P. § 405.39; Sixells, LLC v. Cannery Bus. Park, 170
6 Cal.App.4th 648, 652 n.3 (2008) ("An order granting or denying a
7 motion to expunge a lis pendens is not an appealable order.").
8 However, the use of the writ of mandate is to allow the review of
9 an interlocutory appeal. Even if the Expungement Order was not
10 final, we construe the Debtor's pro se appellate brief liberally
11 as a request to review an interlocutory order and grant leave to
12 decide the appeal. See Woods v. Carey, 525 F.3d 886, 889 (9th
13 Cir. 2008) (A document filed pro se is to be liberally
14 construed). Therefore, we have jurisdiction under 28 U.S.C.
15 § 158 to address the merits.

16 B. The Merits

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

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

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

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

18 **CONCLUSION**

19 For the foregoing reasons, we AFFIRM.
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