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NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

1 In re: ) BAP No. CC-08-1002-BMdK  
2 )  
3 STEPHEN LAW, ) Bk. No. LA 04-10052-TD  
4 )  
5 Debtor. )  
6 )  
7 )  
8 )  
9 STEPHEN LAW, )  
10 )  
11 Appellant, )  
12 )  
13 v. ) **MEMORANDUM**<sup>1</sup>  
14 )  
15 ALFRED H. SIEGEL, Chapter 7 )  
16 Trustee, )  
17 )  
18 Appellee. )  
19 )  
20 )

Submitted Without Oral Argument  
on March 19, 2008

Filed - April 3, 2008

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

Before: BRANDT,<sup>2</sup> MACDONALD<sup>3</sup> and KLEIN, Bankruptcy Judges.

<sup>1</sup> 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.

<sup>2</sup> Hon. Philip H. Brandt, U.S. Bankruptcy Judge for the Western District of Washington, sitting by designation.

<sup>3</sup> Hon. Donald MacDonald, Chief U.S. Bankruptcy Judge for the District of Alaska, sitting by designation.

1 Debtor appeals the bankruptcy court's order denying his motion to  
2 be paid his homestead exemption. We DISMISS the appeal as interlocutory.

3  
4 **I. FACTS<sup>4</sup>**

5 On January 5, 2004, Stephen Law filed for bankruptcy relief under  
6 chapter 7.<sup>5</sup> His residence, the sole asset of the bankruptcy estate, was  
7 subject to several liens, including a first deed of trust held by  
8 Washington Mutual Bank, a note and deed of trust held by Lin's Mortgage  
9 & Associates ("Lin Lien"), and three judgment liens. Law claimed a  
10 \$75,000 homestead exemption; the trustee did not object.

11 Five months after the petition date, the trustee initiated an  
12 adversary proceeding against Lili Lin, seeking to avoid the Lin lien as  
13 a fraudulent transfer under § 544(b) and California Civil Code  
14 § 3439.04(a), and to recover the transfer for the estate under § 550.  
15 Two people claiming to be Lili Lin stepped forward to take part in the  
16 adversary proceeding: Lili Lin of Artesia and Lili Lin of China.

17 The trustee settled with Lili Lin of Artesia by way of a stipulated  
18 judgment, whereby the transfer to Lili Lin of Artesia was avoided, and  
19 the interests of Lili Lin of Artesia in the Lin Lien were deemed  
20 recovered by and assigned to the trustee and preserved for the benefit  
21 of the bankruptcy estate. Over the objections of Lili Lin of China and

22 \_\_\_\_\_  
23 <sup>4</sup> The underlying case has a long and convoluted history, which  
24 includes a number of appeals before the Bankruptcy Appellate Panel.  
25 The Panel has already set forth in great detail the past events of the  
26 case in prior decisions. (CC-05-1303/1344 and 06-1195/1180 - 29  
27 December 2006; CC-06-1427/1379 - 10 July 2007; CC-07-1127 - 5 October  
28 2007).

<sup>5</sup> Unless otherwise indicated, all chapter, section, and rule  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 as  
28 enacted and promulgated prior to the effective date (October 17, 2005)  
of the provisions of the Bankruptcy Abuse Prevention and Consumer  
Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119. Stat. 23.

1 the debtor, the bankruptcy court entered an order approving the Lili Lin  
2 of Artesia Settlement ("Settlement Order").

3 Lili Lin of China appealed the Settlement Order to the Bankruptcy  
4 Appellate Panel (BAP No. CC-05-1303-KMoB);<sup>6</sup> we affirmed. We also held  
5 that Lili Lin of China could still assert her claim to the Lin Lien, and  
6 that the trustee needed to obtain a judicial determination as to the  
7 validity or nonexistence of her interest, as the case may be. The  
8 trustee appealed; the appeal is pending before the Ninth Circuit (No. 07-  
9 55200).

10 The trustee also initiated an adversary proceeding against Lili Lin  
11 of China to obtain a judicial determination as to her interest in the Lin  
12 lien ("Declaratory Judgment Action" - Adv. Pro. No. 07-1102), pursuant  
13 to our decision. The Declaratory Judgment Action has not been resolved.

14 After auctioning and selling the residence for \$680,000, the trustee  
15 moved to surcharge the debtor's entire homestead exemption ("Surcharge  
16 Motion") on the grounds that the debtor willfully and knowingly attempted  
17 to defraud his creditors by removing equity from the residence through  
18 the Lin Lien. Over the debtor's opposition, on May 8, 2006, the  
19 bankruptcy court entered an order approving the Surcharge Motion  
20 ("Surcharge Order").

21 The debtor appealed the Surcharge Order (BAP No. CC-06-1180-KMoB);  
22 we reversed on the ground that there were no extraordinary circumstances  
23 established to justify the surcharge of the entire exemption. Although  
24 the debtor's conduct toward the bankruptcy court and the trustee had been  
25 both resistant and antagonistic, his proven conduct was not shown to be

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27 <sup>6</sup> The Bankruptcy Appellate Panel addressed several appeals of  
28 the debtor and/or Lili Lin of China (BAP Nos. 05-1303/1344 and  
06-1180/1195) in a memorandum of decision filed on 29 December 2006  
("29 December 2006 Decision").

1 bad faith. Consequently, an equitable surcharge of his homestead  
2 exemption was not appropriate under current Ninth Circuit case law. We  
3 noted, however, that "specific instances of mischief by the debtor in the  
4 past might support further monetary sanctions in the future, including  
5 a surcharge against his exemption," though "any such relief . . . should  
6 be supported by specific findings of fact and appropriate conclusions of  
7 law regarding the debtor's conduct, including an adequate explanation why  
8 any surcharge based on specific damages or expenses incurred by the  
9 estate should be reimbursed from the debtor's exemptions." 29 December  
10 2006 Memorandum. We ultimately concluded that the surcharge of the  
11 debtor's entire homestead exemption was unwarranted, and reversed without  
12 elaboration.

13 The trustee and Lili Lin of China appealed; their appeal is pending  
14 before the Ninth Circuit (No. 07-55003).<sup>7</sup>

15 On February 5, 2007, the debtor moved for an order directing the  
16 trustee to pay him his claimed homestead exemption and to sanction the  
17 trustee for acting in "bad faith" by refusing to comply with the order  
18 of the Panel in its decision reversing the Surcharge Order ("Homestead  
19 Payment Motion"). The debtor asserted that the Panel's decision on the  
20 Surcharge Order directed the trustee to pay the debtor his claimed  
21 homestead exemption. As the trustee did not obtain a stay pending appeal  
22 within ten days after entry of the decision pursuant to Rule 8017, the  
23 debtor argued, the panel's decision became enforceable, and the trustee  
24 refused to respond to his requests for payment of the homestead  
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26 <sup>7</sup> The debtor and/or Lili Lin of China have appealed the 29  
27 December 2006 Decision, which is pending before the Ninth Circuit. The  
28 debtor and/or Lili Lin of China also have appealed the decision of the  
Bankruptcy Appellate Panel filed on 10 July 2007 (BAP Nos.  
CC-06-1427/1379).

1 exemption, thereby violating Rule 9011(b)(1).<sup>8</sup> Thus, the debtor argued,  
2 the bankruptcy court should impose sanctions against the trustee.

3 The trustee opposed the Homestead Payment Motion, contending that  
4 his appeal of the panel's reversal of the Surcharge Order divested the  
5 bankruptcy court of jurisdiction to rule on the Homestead Payment Motion.  
6 He argued that if the bankruptcy court entered an order requiring the  
7 trustee to pay the debtor his homestead exemption, that order would  
8 impact the issue(s) currently on appeal before the Ninth Circuit. The  
9 trustee further contended that, contrary to the debtor's argument, he did  
10 not need to obtain a stay of the Surcharge Order, as the bankruptcy court  
11 lacked authority to issue an order requiring payment of the homestead  
12 exemption to the debtor until the appeal before the Ninth Circuit was  
13 resolved.

14 Finally, the trustee also argued that the validity of the Lin Lien  
15 would have to be determined before he could pay the debtor his homestead  
16 exemption. Under the Lin note, the debtor agreed to pay all costs and  
17 expenses incurred in any action or proceeding purporting to affect the  
18 Lin Lien. Whether Lili Lin of China or the trustee ultimately prevails  
19 in the adversary proceeding or on appeal to the Ninth Circuit, the  
20 trustee argued, the debtor nonetheless would be liable for the costs and  
21 expenses incurred by Lili Lin of China or the trustee. Thus, the trustee  
22 concluded, it was unknown whether the proceeds from the sale of the  
23 residence were sufficient to pay the debtor's claimed homestead exemption  
24 in full. The trustee later filed a motion seeking an order authorizing  
25 him to use the remaining sale proceeds to pay the judgment lien creditors

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27 <sup>8</sup> The debtor relied on Rule 9011(b)(1) in support of his  
28 request for sanctions. However, Rule 9011(b)(1), which governs  
representations made by parties in documents presented to and/or filed  
with the bankruptcy court, is inapplicable.

1 ("Motion to Distribute Sale Proceeds"). In the Motion to Distribute Sale  
2 Proceeds, the trustee noted that he had approximately \$489,591.08 in net  
3 sale proceeds remaining.

4 With respect to the debtor's request for sanctions, the trustee  
5 argued that the sanctions were unwarranted, as there was no order  
6 directing the trustee to pay the debtor his homestead exemption. Without  
7 further court order regarding the distribution of the remaining sale  
8 proceeds and without a final judicial determination regarding the  
9 Surcharge Order, the trustee contended he could not pay the debtor his  
10 homestead exemption.

11 At hearing on 28 February 2007 the bankruptcy court denied the  
12 debtor's Homestead Payment Motion, reasoning that any ruling with respect  
13 to the debtor's homestead exemption would interfere with the appellate  
14 court's exercise of its jurisdiction over the issues on appeal concerning  
15 the Surcharge Order. Debtor appealed to the panel, which reversed and  
16 remanded by Memorandum Decision filed 5 October 2007 (No. CC-07-1127).  
17 We reasoned that because the debtor's homestead exemption was final, the  
18 bankruptcy court had the authority to act on his motion, and explicitly  
19 declined to express any view as to what the ruling should be.

20 Thereafter, on 11 October 2007, debtor filed a new motion for an  
21 order requiring the trustee to pay his homestead exemption ("Second  
22 Homestead Payment Motion"), making the same arguments as in the Homestead  
23 Payment Motion. The trustee objected, arguing that debtor's motion was  
24 premature as a final determination has not yet been made regarding the  
25 ownership of the deed of trust. He estimated that, assuming a payoff  
26 date of November 2008, there would be approximately \$159,000 available  
27 in the estate after payment of the deed of trust. Trustee also argued  
28 that if he were found to be the owner of the deed of trust, he would be

1 entitled to collect his attorney's fees, which exceeded \$650,000 (later  
2 corrected to \$475,000), \$230,000 of which relates to the deed of trust,  
3 thus leaving nothing in the estate with which to pay debtor's exemption  
4 claim. Even if there were funds left in the estate, the trustee  
5 contended the exemption should be surcharged on equitable grounds based  
6 on debtor's transfer of the property and fraudulent concealment of his  
7 interest, fraudulently listing the Lin deed of trust in his schedules,  
8 and filing of frivolous appeals.

9 The bankruptcy court denied debtor's motion, reciting a number of  
10 problems with the motion and the response, including that, contrary to  
11 debtor's assertion, the BAP had not ordered the trustee to pay debtor his  
12 exemption; debtor had not filed a separate motion for sanctions or  
13 recited adequate grounds therefor; trustee failed to provide sufficient  
14 analysis as to why he is entitled to attorney's fees or provide a clear  
15 accounting of the funds left in the estate and the potential claims  
16 against it; and debtor's evidence attached to his reply declaration was  
17 too late, and included a purported declaration of Lili Lin of China, who  
18 has never been ascertained to be a real person, and the balance of the  
19 evidence was in Chinese. The court concluded: "I don't have a basis to  
20 make any hard and fast decision one way or the other today other than to  
21 say I must deny Mr. Law's motion . . . ." Transcript, 7 November 2007,  
22 page 32.

23 The court also noted that the BAP had stayed distribution of sale  
24 proceeds "until the other Lili Lin's rights have been determined." Id.  
25 at 33-34 (quoting 29 December 2006 Decision, page 2). That stay was  
26 extended by order in CC-06-1379, also entered on 29 December 2006, to  
27 terminate without further order upon either the judicial determination  
28 of the lien status of Lili Lin of China, or the disposition of BAP Appeal

1 No. CC-06-1379 (which had, apparently unbeknownst to the judge, occurred  
2 several months earlier – neither party so advised the court).

3 Debtor timely appealed.

4

5

## II. JURISDICTION

6 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and  
7 § 157(b)(1) and (b)(2)(A), (B), and (O), and we do, if at all, under 28  
8 U.S.C. § 158(c).

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## III. ISSUES

11 A. Whether the order on appeal is final and, if not, whether we  
12 should grant leave.

13 B. Whether the bankruptcy court erred in concluding our stay  
14 prevented ruling on debtor's motion for payment of his homestead  
15 exemption.

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## IV. STANDARD OF REVIEW

18 The bankruptcy court's findings of fact are reviewed for clear  
19 error, and its conclusions of law de novo. In re Su, 290 F.3d 1140, 1142  
20 (9th Cir. 2002).

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22

## V. DISCUSSION

### 23 A. Finality

24 Although the parties did not raise finality, we have an independent  
25 duty to determine our own jurisdiction. In re Edelman, 237 B.R. 146, 150  
26 (9th Cir. BAP 1999) (citing FWIPBS, Inc. v. City of Dallas, 493 U.S. 215,  
27 231 (1990)). The order on appeal is interlocutory: although the  
28 bankruptcy court pointed out defects in the merits of the motion and



1 response, its primary reason for denying the motion was our stay pending  
2 appeal. Under that premise, debtor's motion was premature.

3 A final decision in the bankruptcy context is one that ends the  
4 litigation on the merits and leaves nothing for the court to do but  
5 execute the judgment. In re Bonner Mall P'ship, 2 F.3d 899, 903-04 and  
6 n.10 (9th Cir. 1993); In re Kashani, 190 B.R. 875, 882 (9th Cir. BAP  
7 1995). If further proceedings in the bankruptcy court will affect the  
8 scope of the order, the order is not subject to review. In re Frontier  
9 Properties, Inc., 979 F.2d 1358 (9th Cir. 1992).

10 However, we may elect to hear the appeal. Rule 8003(c); In re  
11 Wilborn, 205 B.R. 202, 206 (9th Cir. BAP 1996). Rule 8003(c) provides  
12 that, "[i]f a required motion for leave to appeal is not filed, but a  
13 notice of appeal is timely filed, the district court or bankruptcy  
14 appellate panel may grant leave to appeal." We look to 28 U.S.C.  
15 § 1292(b) to determine whether to hear an appeal from an interlocutory  
16 order. In re Kashani, 190 B.R. 875, 882 (9th Cir. BAP 1995). The appeal  
17 may be heard if it "involves a controlling question of law as to which  
18 there is substantial ground for difference of opinion and . . . an  
19 immediate appeal may materially advance the ultimate termination of the  
20 litigation." In re Roderick Timber Co., 185 B.R. 601, 604 (9th Cir. BAP  
21 1995). We also consider whether denying leave will result in wasted  
22 litigation and expense. Kashani, 190 B.R. at 882. None of these  
23 considerations pertain.

24 Accordingly, we have no basis on which to grant leave, and will  
25 dismiss the appeal as interlocutory.

26 However, we will briefly address the salient issues, as they will  
27 arise in further proceedings.

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1 **B. Stay**

2 The bankruptcy court interpreted our stay as preventing distribution  
3 of the sale proceeds until the matter of Lili Lin of China's rights in  
4 the proceeds are determined. The applicable language provides: "[W]e  
5 will . . . extend the stay of distribution of the sale proceeds that we  
6 previously entered pending the resolution of this appeal until the other  
7 Lili Lin's rights have been determined." 29 December 2006 Decision, page  
8 2. As noted, that stay was extended in BAP Appeal No. CC-06-1379 in the  
9 Panel's "Order Modifying Stay Pending Appeal" entered 29 December 2006.  
10 That order provides:

11 IT IS ORDERED THAT the stay pending appeal of the  
12 bankruptcy court's October 23, 2006, "Order on Trustee's  
13 Continued Motion to Sell Real Property Free and Clear of  
14 Liens, Interests, and Encumbrances," will terminate without  
15 further order of the Panel upon the earlier of the two  
16 following events: (1) the judicial determination of the lien  
17 status of Lili Lin of China with respect to the residence in  
18 Hacienda Heights, California as set forth in the Panel's  
19 memoranda of decision entered on December 29, 2006; or (2) the  
20 disposition of BAP Appeal No. CC-06-1379.

21 [Emphasis added].

22 We issued our memorandum decision in No. CC-06-1379 on 10 July 2007,  
23 affirming the bankruptcy court's order authorizing the trustee to  
24 distribute proceeds from the sale of real property. That was the  
25 disposition, and the stay terminated upon its entry.

26 Although Law has appealed the decision to the Ninth Circuit Court  
27 of Appeals, our order modifying stay pending appeal refers only to the  
28 BAP appeal, and does not purport to encompass subsequent appeals. And  
the clerk of the Court of Appeals indicates that there is no order  
imposing a stay pending appeal from that court. Accordingly, the  
bankruptcy court erred in its conclusion that it was barred from granting  
debtor's motion because of the stay.

1 **C. Proceeds**

2 Nor does the math support the proposition that it is necessary first  
3 to resolve the ownership of the Lin Lien: using the trustee's figures,  
4 as of November 2008 he will be holding \$159,000 proceeds of the sale,  
5 after payoff of the Lin lien. He has not established any right to  
6 surcharge the debtor's homestead in any amount, nor even brought a motion  
7 to do so since we reversed his earlier attempt. Nor is it at all clear  
8 that the trustee is entitled to recover any fees as the successor of Lili  
9 Lin of Artesia, even if she is ultimately determined to be the real Lili  
10 Lin, and the assignment of her deed of trust is effective. The  
11 attorney's fee provision provides:

12 To protect the security of this Deed of Trust, Trustor agrees  
13 . . . to appear in and defend any action or proceeding  
14 purporting to affect the security hereof or the rights or  
15 powers of Beneficiary of Trustee, and to the extent permitted  
by law, to pay all costs and expenses, including the cost  
of . . . attorneys' fees, in any such action or proceeding in  
which Beneficiary or Trustee may appear. . . .

16 [Emphasis added].

17 It is unclear how the trustee could claim any fees under that  
18 provision for work done prior to his becoming the beneficiary on 19 May  
19 2005. And the fight since seems largely to be over who the original  
20 beneficiary was, with excursions into whether debtor's exemption should  
21 be surcharged. It is highly doubtful that any of the trustee's  
22 attorneys' fees relating to those issues can be properly construed as  
23 affecting "the rights or powers of Beneficiary or Trustee" under the deed  
24 of trust - there has been no challenge to its enforceability or the  
25 amount due.

26 We see no reason why the court should not direct the disbursement  
27 of debtor's homestead exemption to him in 60 days, less the amount of any  
28 surcharge motion supported with evidence prima facie establishing the

1 propriety of a surcharge in that amount, and except to the extent that  
2 the trustee can establish that payment of the homestead would impair his  
3 ability to pay Lili Lin of China on the deed of trust were she to  
4 prevail. Of course, if the trustee files a facially-meritorious  
5 surcharge or attorney's fee motion, it should expeditiously be  
6 determined.

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## VI. CONCLUSION

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As the order denying debtor's motion to pay him his homestead  
10 exemption is interlocutory, we DISMISS the appeal.

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