

APR 03 2008

NOT FOR PUBLICATION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**¹
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,² MACDONALD³ and KLEIN, 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. Philip H. Brandt, U.S. Bankruptcy Judge for the Western District of Washington, sitting by designation.

³ 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. FACTS⁴**

5 On January 5, 2004, Stephen Law filed for bankruptcy relief under
6 chapter 7.⁵ 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

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23 ⁴ 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).

⁵ Unless otherwise indicated, all chapter, section, and rule
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 as
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);⁶ 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 ⁶ 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).⁷

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
25

26 ⁷ 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).⁸ 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 ⁸ 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.

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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 (C), 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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