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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NOT FOR PUBLICATION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

In re:)	BAP No.	EC-07-1140-MoJuNa
)		
KLARA JEAN BERGTHOLDT;)	Bk. No.	02-13531
ERIC DOUGLAS WILLIAMS,)		
)	Adv. No.	06-01185
Debtors.)		
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MITRA LYONS,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM ¹	
)		
JAMES E. SALVEN, Chapter 7)		
Trustee,)		
)		
Appellee.)		
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Submitted Without Oral Argument
on October 26, 2007

Filed - November 6, 2007

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

Honorable W. Richard Lee, Bankruptcy Judge, Presiding

Before: MONTALI, JURY and NAUGLE,² 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. David N. Naugle, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 Without approval of the bankruptcy court, real estate broker
2 Mitra Lyons ("Appellant") arranged for the sale of the debtors'
3 house and was paid a commission of \$8,166 out of escrow. She
4 knew that this bankruptcy case was pending at the time.
5 Chapter 7³ trustee James E. Salven ("Trustee") filed an adversary
6 proceeding (06-1185) to recover the commission. The bankruptcy
7 court granted Trustee's motion for summary judgment ("MSJ") under
8 Section 542(a) and, alternatively, Section 549. Appellant timely
9 appealed from the resulting judgment. We AFFIRM.

10 I. FACTS

11 The debtors in this case filed a petition under Chapter 13
12 on April 17, 2002. At that time they owned a house in Visalia,
13 California. They still owned the house when their case was
14 converted to Chapter 7 on March 9, 2004. They did not seek
15 abandonment of the house. They sold it on or about June 30,
16 2004. The bankruptcy court found that they neither sought nor
17 obtained approval for this sale.

18 Appellant acted as the listing broker in connection with the
19 sale of the house. The bankruptcy court found, and Appellant
20 does not dispute, that she had actual knowledge of the filing of
21 the debtors' bankruptcy petition. Her husband, Scott Lyons,
22 Esq., has at all times been the debtors' attorney, while also
23 acting as her attorney in this adversary proceeding.

24
25 ³ Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
28 enacted and promulgated prior to the effective date of The
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
119 Stat. 23, because the case from which this appeal arises was
filed before its effective date (generally October 17, 2005).

1 The bankruptcy court found that Appellant received a real
2 estate commission of \$8,166 from the proceeds of the debtors'
3 sale of their house. A title company closing statement and a
4 cancelled check show distributions in this amount to Lyons Real
5 Estate.

6 **II. ISSUE**

7 Did the bankruptcy court err in granting the MSJ?

8 **III. JURISDICTION**

9 Appellant's answer in this adversary proceeding denies that
10 this is a core proceeding. She has waived this issue by not
11 raising it thereafter in the bankruptcy court or on this appeal.
12 Price v. Lehtinen (In re Lehtinen), 332 B.R. 404, 410 (9th Cir.

13 BAP 2005). In any event we hold that core proceedings include
14 determining what is property of the estate and (a) requiring
15 turnover or (b) avoiding post-petition transfers of that
16 property. Accordingly, the bankruptcy court had jurisdiction
17 under 28 U.S.C. §§ 157(b)(2)(A), (E), and (O) and 1334.

18 Appellant also demanded a jury trial in the bankruptcy court, but
19 that does not deprive the bankruptcy court of jurisdiction to
20 rule on the MSJ. Sigma Micro Corporation v. Healthcentral.com
21 (In re Healthcentral.com), -- F.3d --, 2007 WL 2743497 at pp. *8-
22 9 (9th Cir. 2007). We have jurisdiction under 28 U.S.C. § 158.

23 **IV. STANDARD OF REVIEW**

24 We review summary judgment orders de novo. Tobin v. San
25 Souci Ltd. P'ship (In re Tobin), 258 B.R. 199, 202 (9th Cir. BAP
26 2001). Viewing the evidence in the light most favorable to the
27 non-moving party, we must determine "whether there are any
28 genuine issues of material fact and whether the trial court

1 correctly applied relevant substantive law." Id.

2 **V. DISCUSSION**

3 A. Section 542(a)

4 Section 542(a) provides, in relevant part, that an entity in
5 possession, custody, or control of property of the estate "shall
6 deliver to the trustee, and account for, such property or the
7 value of such property" 11 U.S.C. § 542(a). Appellant
8 argues that the dollars she received are not property of the
9 bankruptcy estate.

10 The estate generally includes any proceeds from the sale of
11 property of the estate, wherever located and by whomever held.
12 11 U.S.C. § 541(a) (6). Appellant admits that the house was
13 property of the estate,⁴ but she claims that the statute excludes
14 earnings from her services performed after the commencement of
15 the case. As Trustee argues, that is not what the statute says.
16 Section 541(a) (6) provides:

17 § 541. Property of the estate

18 (a) The commencement of a case . . . creates an
19 estate. Such estate is comprised of all the
20 following property, wherever located and by
21 whomever held:

22 * * *

23 (6) Proceeds, product, offspring, rents, or
24 profits of or from property of the estate,
25 except such as are earnings from services
26 performed by an individual debtor after
27 commencement of the case.

28 11 U.S.C. § 541(a) (6) (emphasis added).

27 ⁴ Appellant's Answer (¶ 4) denies that the house was
28 property of the estate, but she admitted the contrary in response
to Trustee's requests for admissions.

1 Appellant is not the debtor, so the exception is
2 inapplicable. Cf. Tully v. Taxel (In re Tully), 202 B.R. 481,
3 483 (9th Cir. BAP 1996) (discussing application of § 541(a)(6) to
4 debtor). Appellant argues on this appeal that Trustee "offers no
5 authority that the holding of Tully applies only to the debtor
6 and no one else." Trustee's authority is the statute. Section
7 541(a)(6) provides that (except for the debtor's post-petition
8 earnings) "[p]roceeds" of property of the estate are also
9 property of the estate, "wherever located and by whomever held."
10 11 U.S.C. § 541(a)(6). The bankruptcy court correctly found that
11 the \$8,166 now held by Appellant are proceeds from the sale of
12 the house. The house was property of the estate; the buyers
13 paid for the house; from the purchase price Appellant was paid
14 her commission. Therefore those dollars are property of the
15 estate.

16 In opposing the MSJ Appellant objected to Trustee's evidence
17 that she received \$8,166. She argues on this appeal that the
18 bankruptcy court did not rule on her evidentiary objections and
19 was required to do so.

20 Assuming without deciding that Appellant's evidentiary
21 objections had any merit,⁵ we need not resolve them on this
22

23 ⁵ Appellant objected that the closing statement and
24 canceled check showing the \$8,166 transfer lack proper
25 authentication and foundation and constitute inadmissible
26 hearsay. She filed a separate "request for ruling" on her
27 evidentiary objections. Trustee disputed these objections and
28 argued that Appellant admits receiving a commission, the only
purpose of the documents is to establish the amount received,
Appellant does not actually deny that the documents are
authentic, and the documents are admissible under Fed. R. Evid.
901. We need not resolve these disputes because Appellant has
waived her arguments, as noted in the text.

1 appeal. Her counsel, Mr. Lyons, conceded the issue at oral
2 argument on the MSJ:

3 THE COURT: . . . Arguably, there is a
4 factual dispute over whether [Appellant] actually
5 received \$8,166 from proceeds of the sale of the
debtor's house upon close of escrow. Is that
really a factual dispute?

6 MR. LYONS: No, that's not disputed.

7 THE COURT: Then what's left in dispute?
8 What factual -- what facts are in dispute?

9 MR. LYONS: None.

10 Transcript, March 29, 2007, p. 4:14-15.

11 Although Appellant has not explicitly argued the point, she
12 presumably believes that her commission would lose its character
13 as property of the estate if its transfer to her were authorized
14 by some order of the bankruptcy court. She argues below that
15 such an order exists, but we reject that argument. For all these
16 reasons, Trustee's MSJ was properly granted under Section 542(a).

17 B. Section 549(a)

18 Section 549(a) provides in relevant part that "the trustee
19 may avoid a transfer of property of the estate -- (1) that occurs
20 after the commencement of the case; and (2) . . . (B) that is not
21 authorized under this title or by the court." 11 U.S.C. § 549(a)
22 (emphasis added). Appellant relies on her Answer (¶ 10) which
23 denies the Complaint's allegation that the \$8,166 transfer "was
24 not authorized by any provision of the Bankruptcy Code." Section
25 541(a)(6) is the only provision of the Bankruptcy Code that she
26 cites, and we have already rejected her argument under that
27 provision.

1 In a confusing passage, Appellant's response to Trustee's
2 statement of undisputed facts (¶ 4) asserts that the transfer of
3 the debtors' house was authorized by an "order of the Bankruptcy
4 Code [sic]." (Emphasis added.) Appellant apparently means that
5 some unspecified order of the bankruptcy court implicitly
6 authorized the transfer to her of the \$8,166 commission, but she
7 does not specify any such order. The bankruptcy court's online
8 docket (of which we take judicial notice) does not reflect any
9 order that authorizes her commission. The party opposing summary
10 judgment "must do more than simply show that there is some
11 metaphysical doubt as to the material facts." Matsushita Elec.
12 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)
13 (citations omitted).

14 Appellant might be referring to an order of the bankruptcy
15 court approving a \$30,000 settlement between Trustee and the
16 buyers of the house. That order seems patently inapplicable,
17 because it explicitly states that it is "without prejudice as to
18 the Trustee's right, if any, to seek disgorgement of sales
19 commissions paid in connection with the sale."⁶ Nevertheless,
20 Appellant has argued both before the bankruptcy court and on this
21 appeal that Trustee has waived or abandoned any claim against her
22 by entering into the settlement with the transferees of the
23 house. Appellant's opposition to the MSJ argues:

25 ⁶ We grant Appellant's request for judicial notice of this
26 order and other documents, which Trustee has not opposed.
27 Granting that request is appropriate because it places before us
28 the same documents to which Appellant referred the bankruptcy
court in her statement of undisputed facts in opposition to the
MSJ.

1 [W]hen the [bankruptcy] Court approved the
2 [T]rustee's settlement [with the transferees of
3 the house], it effectively took the subject real
4 property out of the debtors' bankruptcy estate.
Regardless as to what is stated in the order, when
the real property is not property of the estate,
any brokers commission must invariably follow.

5 Appellant cites no authority, nor are we aware of any, that
6 Trustee's settlement with one set of transferees (the buyers of
7 the house) "invariably" bars recovery of a different transfer
8 (the \$8,166) from a different transferee (Appellant). We reject
9 this unsupported argument.

10 Alternatively, even if Appellant could point to a genuine
11 issue of material fact about the interpretation of some order of
12 the bankruptcy court (which she cannot), she has not adequately
13 preserved such a dispute. First, she never amended her Answer.
14 In the Answer she admits (¶¶ 5 and 11) the Complaint's
15 allegations (a) that the \$8,166 transfer "was not authorized by
16 any order of the Bankruptcy Court" and (b) that the debtors
17 "neither sought nor obtained Bankruptcy Court approval" for the
18 transfer of their house. Second, as noted above, her counsel
19 confirmed at the MSJ hearing that there are no factual disputes.
20 Transcript, March 29, 2007, p. 4:14-15.

21 For all of these reasons, Trustee's MSJ was properly granted
22 under Section 549(a) and the \$8,166 commission is recoverable
23 under Section 550.

24 VI. CONCLUSION

25 The debtors' house was not abandoned to them, so it remained
26 property of their Chapter 7 bankruptcy estate. Appellant
27 knowingly participated in the sale of this property and received
28 \$8,166 of the proceeds without authorization. The bankruptcy

1 court held that those proceeds are property of the estate,
2 recoverable under Section 542(a). The bankruptcy court ruled in
3 the alternative that Appellant received a post-petition transfer
4 of property of the estate that is avoidable under Section 549(a)
5 because the transfer was not authorized, either by any provision
6 of the Bankruptcy Code or by any order of the bankruptcy court.
7 Appellant has shown no error in either of these alternative
8 rulings, nor have we found any. The judgment against her is
9 therefore AFFIRMED.

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