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NOT FOR PUBLICATION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

In re:)	BAP No.	CC-07-1127-DKMo
)		
STEPHEN LAW,)	Bk. No.	LA 04-10052 TD
)		
Debtor.)		
_____)		
)		
STEPHEN LAW,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
ALFRED H. SIEGEL, Chapter 7)		
Trustee,)		
)		
Appellee.)		
_____)		

Submitted Without Oral Argument on September 21, 2007

Filed - October 5, 2007

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

Hon. Thomas B. Donovan, Bankruptcy Judge, Presiding.

Before: DUNN, KLEIN and MONTALI, 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.

1 The debtor, Stephen Law, appeals an order denying his motion
2 for an order directing the chapter 7 trustee, Alfred H. Siegel,
3 to pay the debtor's claimed homestead exemption, and imposing
4 sanctions on the trustee for "bad faith" in refusing to comply
5 with an order of the Bankruptcy Appellate Panel entered in an
6 earlier appeal. For the reasons set forth below, we REVERSE and
7 REMAND.

8
9 **I. FACTS²**

10 On January 5, 2004, the debtor filed for bankruptcy relief
11 under chapter 7.³ The debtor's residence was the sole asset of
12 the bankruptcy estate.

13 The residence was subject to several liens, including a
14 first deed of trust held by Washington Mutual Bank, a note and
15 deed of trust held by Lin's Mortgage & Associates (collectively,
16 the "Lin Lien"), and three judgment liens.

17 The residence further was subject to a \$75,000 homestead
18

19 ² The underlying case has a long and convoluted history,
20 which includes a number of appeals before the Bankruptcy
21 Appellate Panel. The Panel already has set forth in great detail
22 the past events of the case in prior decisions. Law v. Siegel
23 (In re Law), BAP Nos. CC-05-1303/1344 and 06-1195/1180 (filed
24 December 29, 2006); Lin v. Siegel (In re Law), BAP Nos. CC-06-
25 1427/1379 (filed July 10, 2007). To avoid unnecessary
26 repetition, we recount only those facts relevant to the instant
27 appeal.

28 ³ Unless otherwise indicated, all chapter, section and rule
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, 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 exemption claim by the debtor.⁴ The trustee did not object to
2 the debtor's claimed homestead exemption.

3 Five months after the petition date, the trustee initiated
4 an adversary proceeding against Lili Lin, seeking to avoid the
5 Lin Lien as a fraudulent transfer under § 544(b) and California
6 Civil Code § 3439.04(a), and to recover the transfer under § 550.
7 Two people claiming to be Lili Lin stepped forward to take part
8 in the adversary proceeding: Lili Lin of Artesia and Lili Lin of
9 China.

10 The trustee settled with Lili Lin of Artesia by way of a
11 stipulated judgment. Under the stipulated judgment, the transfer
12 to Lili Lin of Artesia was avoided, and the interests of Lili Lin
13 of Artesia in the Lin Lien were deemed recovered by and assigned
14 to the trustee and preserved for the benefit of the bankruptcy
15 estate.⁵ Over the objections of Lili Lin of China and the
16 debtor, the bankruptcy court entered an order approving the Lili
17 Lin of Artesia Settlement ("Settlement Order").

18 Lili Lin of China appealed the Settlement Order to the
19
20

21
22 ⁴ The debtor executed and recorded a homestead declaration
on August 4, 1995.

23
24 ⁵ According to the trustee, the amount of the Lin Lien
recovered by the trustee was \$280,813.17. The record provides no
25 information, however, as to how the trustee calculated the amount
26 of the Lin Lien. Based on certain language in the order on the
Surcharge Motion ("Surcharge Order"), which the bankruptcy court
27 redacted, we speculate that the trustee may have included
interest on the Lin note in his calculation. According to the
28 trustee, the interest on the Lin note was 10% or \$16,800 per
year, based on the original principal of \$168,000.

1 Bankruptcy Appellate Panel (BAP No. CC-05-1303-KMoB).⁶ The Panel
2 affirmed the Settlement Order. The Panel also held that Lili Lin
3 of China remained entitled to assert her claim to the Lin Lien
4 and that the trustee needed to obtain a judicial determination as
5 to the validity or nonexistence of her interest, as the case may
6 be.

7 The trustee appealed the Panel's decision requiring him to
8 obtain a judicial determination of Lili Lin of China's interest,
9 if any, in the Lin Lien. The appeal is pending before the Ninth
10 Circuit.

11 The trustee also initiated an adversary proceeding against
12 Lili Lin of China to obtain a judicial determination as to her
13 interest in the Lin Lien ("Declaratory Judgment Action"),
14 pursuant to the Panel's decision. To date, the Declaratory
15 Judgment Action has not been resolved.⁷

16
17 ⁶ The Bankruptcy Appellate Panel addressed several appeals
18 of the debtor and/or Lili Lin of China (BAP Nos. 05-1303/1344 and
19 06-1180/1195) in a memorandum of decision filed on December 29,
2006 ("December 29, 2006 Decision").

20 ⁷ On March 5, 2007, Lili Lin of China filed an answer
21 ("March Answer") in the Declaratory Judgment Action. The trustee
22 moved to strike the March Answer and requested entry of default
23 against her. Lili Lin of China opposed. (Lili Lin of China
24 filed another answer on March 9, 2007, which is nearly identical
25 to the March Answer; the only difference is the date of the
26 attorney's signature and date of service of the answer. The
27 answer filed on March 9, 2007 was not mentioned in the trustee's
28 motion to strike.) After notice and a hearing, on August 15,
2007, the bankruptcy court entered an order striking the March
Answer, but did not enter a default. On August 27, 2007, Lili
Lin of China filed a second answer ("August Answer"). She also
has appealed the order striking her March Answer to the
Bankruptcy Appellate Panel (BAP No. CC-07-1323).

(continued...)

1 After auctioning and selling the residence for \$680,000, the
2 trustee filed a motion to surcharge the debtor's homestead
3 exemption ("Surcharge Motion"). The trustee sought to surcharge
4 the debtor's entire homestead exemption on the grounds that the
5 debtor willfully and knowingly attempted to defraud his creditors
6 by removing equity from the residence through the Lin Lien. Over
7 the debtor's opposition, on May 8, 2006, the bankruptcy court
8 entered an order approving the Surcharge Motion ("Surcharge
9 Order").

10 The debtor appealed the Surcharge Order to the Bankruptcy
11 Appellate Panel (BAP No. CC-06-1180-KMoB). The Panel reversed
12 the Surcharge Order on the ground that there were no
13 extraordinary circumstances present justifying the surcharge of
14 the debtor's entire homestead exemption. Although the debtor's
15 conduct toward the bankruptcy court and the trustee had been both
16 resistant and antagonistic, his proven conduct did not equate
17 with bad faith. Consequently, an equitable surcharge of his
18 homestead exemption was not appropriate under current Ninth
19

20 ⁷(...continued)

21 Meanwhile, the trustee filed a motion for entry of default
22 on August 29, 2007, and a motion for default judgment on
23 September 11, 2007 (collectively, the "Default Motions"). Lili
24 Lin of China filed an opposition to the motion for entry of
25 default.

26 On September 27, 2007, the court entered an order for the
27 following, which were set for hearing on October 18, 2007 at
28 11:00 a.m.: (1) order to show cause why Lili Lin's August Answer
should not be stricken; (2) order requiring Lili Lin to appear
personally at the hearing; (3) order requiring the trustee to
brief the issue(s) regarding the order striking the March Answer;
and (4) order setting a status conference on the Default Motions
for the same date and time.

1 Circuit case law. The Panel noted, however, that "specific
2 instances of mischief by the debtor in the past might support
3 further monetary sanctions in the future, including a surcharge
4 against his exemption," though "any such relief . . . should be
5 supported by specific findings of fact and appropriate
6 conclusions of law regarding the debtor's conduct, including an
7 adequate explanation why any surcharge based on specific damages
8 or expenses incurred by the estate should be reimbursed from the
9 debtor's exemptions." December 29, 2006 Decision (emphasis
10 added). The Panel ultimately concluded that the surcharge of the
11 debtor's entire homestead exemption was unwarranted. Aside from
12 its reversal, the Panel gave no other directive regarding the
13 Surcharge Order.

14 The trustee appealed the Panel's decision reversing the
15 Surcharge Order. The appeal is pending before the Ninth
16 Circuit.⁸

17 On February 5, 2007, the debtor filed a motion for an order
18 directing the trustee to pay the debtor his claimed homestead
19 exemption and to sanction the trustee for acting in "bad faith"
20 by refusing to comply with the order of the Panel in its decision
21 reversing the Surcharge Order ("Homestead Payment Motion"). The
22 debtor asserted that the Panel's decision on the Surcharge Order
23 directed the trustee to pay the debtor his claimed homestead
24 exemption. As the trustee did not obtain a stay pending appeal

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26 ⁸ The debtor and/or Lili Lin of China have appealed the
27 December 29, 2006 Decision, which is pending before the Ninth
28 Circuit. The debtor and/or Lili Lin of China also have appealed
the decision of the Bankruptcy Appellate Panel filed on July 10,
2007 (BAP Nos. CC-06-1427/1379).

1 within ten days after entry of the decision pursuant to Rule
2 8017, the debtor argued, the Panel's decision became enforceable.
3 The trustee did not comply with the Panel's decision, however,
4 and refused to respond to the debtor's requests for payment of
5 the homestead exemption, thereby violating Rule 9011(b)(1).⁹
6 Thus, the debtor argued, the bankruptcy court should impose
7 sanctions against the trustee.

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

21 The trustee also argued that the validity of the Lin Lien
22 must be determined before he could pay the debtor his homestead
23 exemption. Under the Lin note, the debtor agreed to pay all
24 costs and expenses incurred in any action or proceeding

26 ⁹ The debtor relied on Rule 9011(b)(1) in support of his
27 request for sanctions. However, Rule 9011(b)(1), which governs
28 representations made by parties in documents presented to and/or
filed with the bankruptcy court, is inapplicable.

1 purporting to affect the Lin Lien. Whether Lili Lin of China or
2 the trustee ultimately prevails in the adversary proceeding or on
3 appeal to the Ninth Circuit, the trustee argued, the debtor
4 nonetheless would be liable for the costs and expenses incurred
5 by Lili Lin of China or the trustee. Thus, the trustee
6 concluded, it was unknown whether the proceeds from the sale of
7 the residence were sufficient to pay the debtor's claimed
8 homestead exemption in full.¹⁰

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

16 The hearing on the Homestead Payment Motion took place on
17 February 28, 2007. At the hearing, the bankruptcy court agreed
18 with the trustee that the pending appeal of the Surcharge Order
19 deprived it of jurisdiction. The bankruptcy court reasoned that
20 any ruling with respect to the debtor's homestead exemption would
21 interfere with the appellate court's exercise of its jurisdiction
22 over the issue(s) on appeal concerning the Surcharge Order. The
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26 ¹⁰ The trustee later filed a motion, seeking an order
27 authorizing him to use the remaining sale proceeds to pay the
28 judgment lien creditors ("Motion to Distribute Sale Proceeds").
In the Motion to Distribute Sale Proceeds, the trustee noted that
he had approximately \$489,591.08 in net sale proceeds remaining.

1 bankruptcy court denied the debtor's Homestead Payment Motion.¹¹

2 The debtor appealed.

3
4 **II. JURISDICTION**

5 The bankruptcy court had jurisdiction under 28 U.S.C.
6 §§ 1334 and 157(b). We have jurisdiction under 28 U.S.C. § 158.

7
8 **III. ISSUE**

9 Whether the bankruptcy court erred in denying the Homestead
10 Payment Motion based on its determination that it lacked
11 jurisdiction in light of the trustee's appeal of the Surcharge
12 Order currently pending before the Ninth Circuit.

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14 **IV. STANDARD OF REVIEW**

15 Whether the bankruptcy court has jurisdiction is an issue of
16 law that we review de novo. Marino v. Classic Auto Refinishing,
17 Inc. (In re Marino), 234 B.R. 767, 769 (9th Cir. BAP 1999).

18
19 **V. DISCUSSION**

20 An appeal divests a trial court of jurisdiction, barring the
21 trial court from acting on those aspects of the case involved in
22 the appeal. Hill & Sandford, LLP v. Mirzai (In re Mirzai), 236
23 B.R. 8, 10 (9th Cir. BAP 1999). The trial court can enforce a
24 judgment, however, provided that the judgment has been neither
25 superseded nor stayed, as the pendency of an appeal does not

26 _____
27 ¹¹ With respect to the debtor's argument regarding
28 sanctions, the bankruptcy court made no specific ruling either on
the record at the hearing or in its order.

1 destroy its finality. Id. (quoting Wedbush, Noble, Cooke, Inc.
2 v. SEC, 714 F.2d 923, 924 (9th Cir. 1983)).

3 An unopposed homestead exemption claim is analogous to a
4 judgment. In the absence of an order granting an extension of
5 time, once the period to object to a claimed exemption expires, a
6 party-in-interest is time-barred from challenging the validity of
7 the exemption claim, and the property claimed as exempt is
8 exempt.¹² Smith v. Kennedy (In re Smith), 235 F.3d 472, 475 (9th
9 Cir. 2000). “[D]eadlines may lead to unwelcome results, but
10 they prompt parties to act and they produce finality.” Smith,
11 235 F.3d at 476 (quoting Taylor v. Freeland & Kronz, 503 U.S.
12 638, 644 (1992)) (emphasis added). Similar to an unstayed
13 judgment, an unopposed homestead exemption claim stands final.

14 Here, the trustee did not challenge the validity of the
15 debtor’s claimed homestead exemption within the prescribed
16 period. Thus, the debtor’s right to his homestead exemption
17 became final; the \$75,000 of value in his residence that the
18 debtor claimed as exempt is exempt. Taylor, 503 U.S. at 643-44.

20
21 ¹² A party-in-interest has 30 days from the conclusion of
22 the § 341(a) meeting to object to the debtor’s exemption claims.
23 Smith, 235 F.3d at 475. There are exceptions to the 30-day
24 deadline, however. For example, if the debtor is unclear as to
25 what property he or she is claiming exempt, to the extent that
26 the trustee and/or creditors have insufficient notice, the 30-day
27 period begins to run upon the debtor amending the schedules or
28 upon the objecting creditors and/or trustee receiving actual
notice. Preblich v. Battley, 181 F.3d 1048, 1052 (9th Cir.
1999). Also, if the debtor amends his or her schedules to
include an exemption claim not initially listed, the 30-day
period begins to run from the date of the amendment with respect
to the newly claimed exemption(s). Bernard v. Coyne (In re
Bernard), 40 F.3d 1028, 1032 (9th Cir. 1994).

1 Because the debtor's claimed homestead exemption is final,
2 the bankruptcy court had the authority to act on the Homestead
3 Payment Motion, notwithstanding the appeal of the Surcharge
4 Order. The bankruptcy court could and should have made a
5 determination and issued an order with respect to the Homestead
6 Payment Motion - but it declined to do so. Therefore, we remand
7 the Homestead Payment Motion to the bankruptcy court for further
8 proceedings. We emphasize that this remand results solely from
9 the bankruptcy court's view that it lacked jurisdiction, and we
10 intimate no view as to what the court should rule.

11 The trustee argues, both in his opposition to the Homestead
12 Payment Motion and in his opening brief, that the estate may not
13 have sufficient funds to pay the debtor's claimed homestead
14 exemption in full due to the ongoing dispute over the validity of
15 the Lin Lien. In light of the competing claims in the instant
16 case, the bankruptcy court should consider on remand whether
17 there are sufficient funds available to pay the debtor's claimed
18 homestead exemption in full or in part.

19 We further note that although the debtor is entitled to his
20 claimed homestead exemption, it still may be subject to
21 surcharge, based upon an appropriately supported motion filed by
22 the trustee. Although a surcharge cannot be used to punish a
23 debtor, Onubah v. Zamora (In re Onubah), 2007 WL 2701336, at *6
24 (9th Cir. BAP Aug. 29, 2007), it may be used to prevent fraud,
25 caused by the debtor's misconduct, upon the court and estate
26 creditors, Latman v. Burdette, 366 F.3d 774, 785 (9th Cir. 2004).
27 For example, if the debtor's misconduct denies creditors access
28 to nonexempt property, a surcharge of the debtor's exemption is

1 appropriate. Onubah, 2007 WL 2701336, at *5. As the Panel
2 earlier held, a bankruptcy court may surcharge the debtor's
3 exemption to ensure that the debtor not only retains his or her
4 statutory "fresh start," but also to protect the interests of
5 creditors in nonexempt property. Id. (quoting Latman, 366 F.3d
6 at 786).

7 In its December 29, 2006 Decision, the Panel stated that the
8 debtor's past misconduct may constitute grounds for monetary
9 sanctions in the future, including a surcharge of his homestead
10 exemption, provided that any such surcharge is supported by
11 specific factual findings and appropriate legal conclusions.
12 Thus, the trustee may renew his motion to surcharge the debtor's
13 claimed homestead exemption, as long as appropriate factual and
14 legal bases exist to justify such a surcharge under the standards
15 set out in Latman and Onubah.

17 **V. CONCLUSION**

18 The bankruptcy court had jurisdiction to consider the
19 Homestead Payment Motion and to issue an appropriate order
20 thereon, notwithstanding the appeal of the Surcharge Order
21 pending before the Ninth Circuit. Thus, we REVERSE and REMAND to
22 the bankruptcy court for further proceedings and to issue an
23 appropriate order in the circumstances of this case.