NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NC-04-1326-PSBr
BARBARA J. MITCHELL,	Bk. No. 03-41371
Debtor.	Adv. No. 03-04855
ANGELA L. MORGAN,	
Appellant,	
v.	**MEMORANDUM**[1]
LOIS I. BRADY, Ch. 7 Trustee; UNITED STATES TRUSTEE,	
Appellees.	

Argued and Submitted on
March 24, 2005 at San Francisco, California

Filed - April 14, 2005

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

Honorable Randall J. Newsome, Chief Bankruptcy Judge, Presiding

_____

Before: PERRIS, SMITH and BARR,[2] Bankruptcy Judges.

---

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

[2] Hon. James N. Barr, United States Bankruptcy Judge for the Central District of California, sitting by designation.

Angela Morgan, who represented debtor in her chapter 7[3] case, appeals a judgment entered after trial ordering her to turn over to the trustee $21,437.56, which represents surplus proceeds from the prepetition foreclosure sale of real property in which debtor had an interest. We REVERSE and REMAND.

FACTS

Morgan represented debtor in a state court unlawful detainer action brought as the result of a prepetition foreclosure sale that took place on January 30, 2003. The property that was the subject of the foreclosure sale was titled in the name of debtor and her uncle, John Morris, as joint tenants.

Debtor filed a chapter 7 petition pro se on March 7, 2003. The bankruptcy schedules apparently did not disclose the foreclosure sale or debtor's entitlement to any surplus proceeds from the sale. Either on March 7 or shortly thereafter, Morgan received in the mail a check for $21,437.56, made out to debtor and John Morris, representing the surplus proceeds of the sale. Although Morgan knew about the bankruptcy filing either at the time she received the check or shortly thereafter, she placed the check in her drawer and did not disclose its existence to the bankruptcy trustee.

Later in March, Morgan substituted as counsel in the bankruptcy case. Thereafter, on April 24, Morris and debtor endorsed the check and it was deposited into Morgan's trust account. At debtor's

---

[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.

request, Morgan wrote checks totaling $13,792.43 to debtor. Morgan kept $6,372.68 as her fee. Morgan has not accounted for the remaining approximately $1,700 that she neither disbursed to debtor nor applied to her fees.

Neither debtor nor counsel[4] disclosed at the § 341(a) meeting that debtor had surplus proceeds from the prepetition sale of her house, nor did Morgan disclose, on inquiry from the trustee, that she was holding or had held the funds. On June 30, after Morgan had distributed the funds to debtor and retained the remainder for herself, she wrote a letter to the trustee explaining that debtor and her uncle had received surplus proceeds from the prepetition foreclosure sale of the house. She never indicated that the funds were received on or about the same date as debtor filed bankruptcy, but were not distributed until after the petition had been filed. Nor did she provide information about how the funds were distributed.

Debtor filed amended bankruptcy schedules and statement of financial affairs on July 18, 2003, in which she disclosed that she was holding $10,500 cash for John Morris, but also indicated that John Morris held the funds. Debtor also claimed an exemption in $10,500, listed as "excess cash proceeds from sale of home." Amended Schedule C. The schedules did not disclose the $21,437.56 check or the distribution of those funds to debtor.

Morgan filed her Rule 2016(b) statement on August 21, 2003,

---

[4] Morgan did not attend the § 341(a) meeting, but an associate of hers did.

which failed to disclose the fees she had received from debtor from the sale proceeds.

The trustee and United States Trustee (hereafter referred to collectively as "the trustee") filed a complaint against Morgan and her associate, Carolyn Mosby-Thomason, under § 542, seeking turnover of the $21,437.56 as property of the estate. The trustee filed a motion for summary judgment. At a status hearing in the adversary proceeding, held on May 26, 2004, the court decided to hold a trial rather than decide the matter on cross-motions for summary judgment, and set the trial for June 14. At that hearing, it was brought to the court's attention that a discharge and final decree closing the case had been entered in the main bankruptcy case. The court said that the order may have been entered improvidently, and that the court would check on it. According to the main case docket, the case was reopened on June 10, 2004. The trial was held on June 14, 2004, and the court ruled from the bench that Morgan and debtor had "worked together to conceal the existence of [the] money until it could not be concealed any longer[,]" Transcript of June 14, 2004 trial at 83:8-10, and ordered Morgan to turn over the $21,437.56, which amount could be reduced by any amount Morgan could establish had been received by Morris.[5]

Morgan appeals.

[5] The claim against Morgan's associate, Mosby-Thomason, was dismissed.

ISSUES[6]

1. Whether the court erred in holding the trial and entering judgment after the bankruptcy case had been closed.
2. Whether the bankruptcy court was biased against Morgan.
3. Whether the bankruptcy court erred in finding that the surplus proceeds check was property of the estate.
4. Whether the bankruptcy court improperly delegated to the trustee the power to determine whether Morgan could establish that a portion of the proceeds had been received by Morris.

STANDARD OF REVIEW

The issues related to closure and reopening of the bankruptcy case are jurisdictional, and so are reviewed de novo. See Barrus v. Sylvania, 55 F.3d 468, 469 (9th Cir. 1995); In re Kashani, 190 B.R. 875, 881 (9th Cir. BAP 1995). Because Morgan failed to raise the issue of the court's bias before the bankruptcy court, we review the court's failure to recuse itself under the plain error standard. United States v. Bosch, 951 F.2d 1546, 1548 (9th Cir. 1991). "'Plain error' will be found only if the error was 'highly prejudicial' and there was a 'high probability that the error materially affected the verdict.'" United States v. Anguiano, 873 F.2d 1314, 1319 (9th Cir. 1989)(citation omitted). The issue Morgan raises with regard to property of the estate is a legal one, as is the question of whether the bankruptcy court improperly delegated adjudicatory power to the trustee. We review issues of law de novo. In re Devers, 759 F.2d 751, 753 (9th Cir. 1985).

---

[6] Morgan's brief is somewhat disjointed. We have tried to distill the issues from Morgan's argument.

DISCUSSION

1. Effect of closure of bankruptcy case

It is not clear precisely what Morgan's argument is with regard to the closure of the bankruptcy case.[7] We interpret her argument to raise three issues: that closure of the bankruptcy case (1) deprived the bankruptcy court of jurisdiction to proceed with the trial in the adversary proceeding; (2) discharged the trustee of her duties so that she no longer had standing to pursue the turnover action against Morgan; and (3) resulted in abandonment of the proceeds as property of the estate.

The case was closed on May 25, 2004. On June 10, 2004, the court sua sponte entered an order reopening the case. Therefore, by the time the trial was held and judgment was entered, the bankruptcy case was open. Therefore, this is not a case where the court acted in a closed case.

Morgan argues that the court erred in reopening the case sua sponte. Even assuming that she can raise that argument without having timely appealed the order reopening the case (and it is not clear why she would have had standing to complain about the reopening), she is wrong. Morgan argues that the bankruptcy court cannot reopen a case sua sponte, but instead must act only on motion, citing Rule 5010. Rule 5010 provides that "[a] case may be

---

[7] Morgan also mentions the entry of discharge of debtor's debts. But she does not explain, and we cannot comprehend, how discharge of debts of the debtor would affect the trustee's pursuit of property of the estate. Therefore, we will not discuss the entry of discharge.

reopened on motion of the debtor or other party in interest . . . ." The Ninth Circuit has explained, however, that the bankruptcy court has the authority under § 105(a) to reopen a case sua sponte. In re Castillo, 297 F.3d 940, 944-45 (9th Cir. 2002). Because the court had discretion to reopen the case on its own motion, and the case was open when the court held the trial and entered the judgment in the adversary proceeding, the court did not lack jurisdiction over the adversary proceeding.[8]

Morgan is correct that closure of the case discharges the trustee of her duties, and that, upon reopening of the case, a trustee is not necessarily appointed. See § 350(a). Closure terminates many of the trustee's recovery powers, including powers under §§ 546(a), 549(d)(2), and 550(f)(2).[9]

Merely reopening a closed case "has little impact upon the estate and upon jurisdiction in light of what occurs as a result of closing the case." In re Menk, 241 B.R. 896, 913 (9th Cir. BAP 1999). Reopening "does not undo any of the statutory consequences of closing." Id. Nor does reopening automatically reinstate the trustee; the court must order that a trustee be appointed, if one is

---

[8] It is clear that the case was closed in error. The trustee had not filed a final report, and the assets were not fully administered, so the case was not ready for closure pursuant to § 350(a). In fact, the trustee was in the process of pursuing the surplus proceeds of the prepetition foreclosure sale as property to be administered in the estate.

[9] The trustee's turnover action in this case was not brought under any of those statutes, however, but under § 542, which requires anyone in possession of property of the estate to turn over that property to the trustee.

necessary. Id. at 914.

If, then, the order reopening merely reopened this case without undoing any of the statutory consequences of closure, Morgan might be correct that the trustee had lost her power to pursue the turnover action. However, Morgan has not provided a copy of the order reopening the case. The trustee argues that the court vacated the order closing the case. Vacating the order closing the case would have negated the consequences of the closure. Without a copy of the order, we cannot tell whether the court erred in proceeding with the trial after the case had been closed and reopened. It is the appellant's burden to demonstrate the merits of her appeal. In re Webb, 212 B.R. 320, 322 n.1 (8th Cir. BAP 1997). Because the order reopening the case may have avoided the consequences of closure, Morgan has not demonstrated that the trustee lacked authority to pursue the turnover action after reopening.[10]

Morgan also argues that closure of the case resulted in abandonment of unadministered property of the estate, including the surplus proceeds, and therefore the trustee had no estate asset to pursue in this adversary proceeding.

Unless the court orders otherwise, closure of a case results in abandonment of any property listed in the schedules that is not otherwise administered at the time the case is closed. § 554(c). This is termed "technical abandonment" and is generally considered

---

[10] We note that this complaint was brought by both the case trustee and the United States Trustee. Morgan does not argue that the United States Trustee lacked standing to pursue the action if the case trustee were not a plaintiff.

irrevocable. In re DeVore, 223 B.R. 193, 197 (9th Cir. BAP 1998). There are exceptions to irrevocable abandonment, such as when "the trustee is given false or incomplete information about the asset by the debtor; the debtor fails to list the asset altogether; or where the trustee's abandonment was the result of a mistake or inadvertence, and no undue prejudice will result in revocation of the abandonment." Id. at 198. Simply reopening a case will not negate technical abandonment; the abandonment must be expressly revoked. Id.

The bankruptcy court found that the surplus proceeds had not been technically abandoned by closure of the bankruptcy case, because the asset had never been fully disclosed in the schedules. Transcript of June 14, 2004 trial at 85:4-86:11. Morgan does not challenge that finding on appeal. Because the asset had not been fully disclosed, it was not abandoned by closure of the case. See Cusano v. Klein, 264 F.3d 936, 945 (9th Cir. 2001)(asset not properly scheduled is not abandoned by closure). Morgan has failed to demonstrate that the court lacked jurisdiction to hold the trial and enter judgment ordering turnover.

We note that Morgan does not point to any prejudice to her from the closure and reopening. At the time the case was closed, the parties were ready for trial or summary judgment in this adversary proceeding. Morgan could not have relied on the closure of the case in receiving and disbursing the proceeds of the foreclosure sale, as those events occurred well before the case was closed. We reject her attempts to latch onto the inadvertent closure to avoid the

consequences of her actions, which were taken in clear violation of the Bankruptcy Code.

2. Bias

Morgan also argues that the bankruptcy court was biased against her, thereby depriving her of a fair trial. She asserts that the court's rulings in the case indicate a bias toward her that demonstrated a lack of fairness.

It is true that a fair trial is one of the requirements of due process. In the Matters of Murchison, 349 U.S. 133, 136 (1955). This requires that the court not demonstrate actual bias in the trial. Id.

Congress enacted 28 U.S.C. § 455 governing recusal of judges, including bankruptcy judges, for bias or prejudice.[11] That statute requires a judge to recuse himself or herself if "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." In re Goodwin, 194 B.R. 214, 222 (9th Cir. BAP 1996).

> Judicial rulings and remarks not based on an extrajudicial source "almost never constitute a valid basis" for recusal. In the end, it is fundamentally a question of degree.

---

[11] That statute provides, as relevant:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]

> Disqualification is warranted only when judicial rulings and remarks not based on extrajudicial sources rise to "such a high degree of favoritism or antagonism as to make fair judgment impossible." Liteky v. United States, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994).

In re Fraschilla, 235 B.R. 449, 459 (9th Cir. BAP 1999), aff'd, 242 F.3d 381 (9th Cir. 2000)(table).

The conduct of which Morgan complains does not demonstrate bias, let alone "such a high degree of favoritism or antagonism as to make fair judgment impossible." Liteky, 510 U.S. at 555. Morgan complains about the court's refusal to dismiss debtor's bankruptcy petition on debtor's motion in April 2003 and its order vacating a discharge that had been entered in error in July 2003, and the court's June 10, 2004 sua sponte vacation of the order closing the case. It is not clear how the court's actions with regard to debtor's bankruptcy case demonstrated any bias toward Morgan, who was not the debtor. In any event, we have explained above that the court was within its authority to reopen the case sua sponte, where it was clear that the requirements for closure had not been met and that the case had been closed in error. There is nothing in the record to indicate that the erroneous entry of discharge in July 2003 or the erroneous closing of the case in May 2004 were events over which the judge exercised any specific control.

Morgan also complains about the court's decisions to proceed to trial after the case had been closed and to allow the trustee to treat her summary judgment brief as her trial brief while requiring Morgan to file a trial brief. As we have explained, the case had been closed in error, and the court promptly corrected that error by

reopening the case before the date of the trial. Further, the court's decision to treat the trustee's summary judgment brief as a trial brief while requiring Morgan to file a trial brief does not demonstrate bias. The trustee had briefed the issues for the summary judgment motion; Morgan had not. The court presumably felt that Morgan should have an opportunity to file a trial brief, but saw no reason to require the trustee to do again what she had already done.

In her opening brief, Morgan cites pages 55 through 57 of the trial transcript as evidence of the court's bias. Those pages are a transcription of the testimony of Morgan's co-defendant, Carolyn Mosby-Thomason. In that portion of the testimony, the court questioned Mosby-Thomason, who was not licensed to practice law in California, about how she could appear as counsel in the case without having been admitted pro hac vice in the adversary proceeding, and sought to understand the relationship of Mosby-Thomason to Morgan and her firm.

The exchange between the judge and the witness does not indicate any bias toward Morgan. The court was trying to understand the witness's relationship to representation of debtor in this case, which was far from clear. To the extent the court took issue with some of the witness's testimony, such judicial conduct does not rise to the level of partiality. "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." Liteky, 510 U.S. at 555.

Morgan has not provided any support in the record for her argument that the court's rulings were based on "deep-seated favoritism or antagonism that [made] fair judgment impossible." Id. Nor has she explained how the court's interchange with the co-defendant witness demonstrates any bias toward Morgan. Having failed to demonstrate that a reasonable person would conclude, based on all the circumstances, that the court's impartiality might reasonably be questioned, Morgan has not demonstrated that the judge erred in failing to recuse himself or that she was denied a fair trial.

3. Surplus proceeds as property of the estate

Morgan argues that the bankruptcy court erred in requiring her to turn over the full amount of the surplus proceeds check, reduced by any amount that had been paid to Morris, because the check belonged to debtor and Morris as tenants in common, and therefore the estate was entitled to only one-half of the proceeds. The trustee argues that the check was owned by the two payees as joint tenants, and therefore the estate had an interest in the full amount of the check, subject only to the amounts actually paid to Morris for his share.

This was an action for turnover of property of the estate.[12] Section 542(a) provides that, with certain exceptions not applicable

---

[12] The trustee argues about violation of the automatic stay and disgorgement of attorney fees for failure to disclose and to be employed as required by the Bankruptcy Code. Because the complaint was limited to turnover under § 542, and because the court's turnover order appears to have been based on the § 542 action, we will not discuss the other issues.

here,

> an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

Section 363(b)(1) provides that the trustee "may use, sell, or lease, other than in the ordinary course of business, property of the estate."

The commencement of a bankruptcy case "creates an estate," which is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." § 541(a)(1). There is no real dispute in this case that debtor had an interest in the surplus proceeds that became property of the estate when she filed her petition. The issue is whether the entire surplus proceeds were property of the estate, or only a portion.

The court applies state law to determine the nature and extent of a debtor's interest in property. Butner v. United States, 440 U.S. 48, 54 (1979); In re Summers, 332 F.3d 1240, 1242 (9th Cir. 2003). Thus, we apply California law to determine the extent of interest that debtor had in the surplus proceeds check.

Although the deed to the real property that produced the surplus proceeds was not introduced as evidence at the trial, there does not seem to be any dispute that the title showed debtor and Morris as joint tenants. The surplus proceeds check was made out to debtor and Morris jointly. Under California law, "proceeds of property held in joint tenancy retain that character, i.e., are also

regarded as joint tenancy property." 4 B.E. Witkin, Summary of California Law "Real Property" § 256 (9th ed. 2004). Thus, as of the date of debtor's bankruptcy petition, it appears that debtor was a joint tenant with Morris of the surplus proceeds.[13]

Morgan argues that the filing of the bankruptcy petition severed the joint tenancy, resulting in a tenancy in common. From this proposition, Morgan argues that debtor had only a one-half interest in the proceeds that became property of the estate, and therefore the estate had no interest in Morris's one-half interest.

The trustee notes correctly that Morgan did not make this severance argument to the bankruptcy court. She did argue that the estate's interest was limited by the joint tenancy, but did not argue that the joint tenancy had been severed by the bankruptcy filing so that ownership had changed from a joint tenancy to a tenancy in common. Because Morgan failed to raise this argument to the bankruptcy court, we need not address it. In re Ehrle, 189 B.R. 771, 776 (9th Cir. BAP 1995).

Even if the argument had been raised in the bankruptcy court, we still need not address it, because the answer to that argument makes no difference to the outcome of this appeal. Under California

---

[13] There is some evidence that Morris in fact did not have an interest in the property. The trustee does not argue in her brief on appeal that debtor was the sole owner of the property or the proceeds. Because there is some question about whether Morris actually had an interest in the property, or whether debtor was the sole owner when she filed her petition, our determination in this appeal is without prejudice to any action the trustee might decide to take to obtain a determination of Morris's interest in the property.

law, real property owned in joint tenancy is owned jointly in undivided equal shares. "Each joint tenant is vested with title to an undivided equal share of the joint tenancy property, but this interest, being undivided, runs to the entire property." 5 Harry D. Miller and Marvin B. Starr, California Real Estate § 12:22 (3d ed. 2004). Joint tenancy carries with it the right of survivorship. Id.

When a debtor who is a joint tenant in property files bankruptcy, only the debtor's joint tenancy interest becomes property of the bankruptcy estate. Although the joint tenancy interest may run to the entire property, the estate does not obtain an interest in the entire estate, but instead obtains the joint tenant's undivided one-half interest. Thus, the Ninth Circuit has recognized that the bankruptcy estate has a one-half interest in jointly held property, while the joint tenant retains the other one-half interest. See In re Summers, 332 F.3d 1240 (9th Cir. 2003); In re Reed, 940 F.2d 1317, 1323 (9th Cir. 1991). Accord In re Gorman, 159 B.R. 543 (9th Cir. BAP 1993)(bankruptcy estate of joint tenant entitled to one-half of sale proceeds of property held in joint tenancy). Therefore, if debtor and Morris owned the surplus proceeds in this case as joint tenants, the estate's interest was in debtor's one-half of the proceeds, not in the entire proceeds.

The same result obtains for property held by two persons as tenants in common. Tenants in common do not have a right of survivorship. 5 California Real Estate at § 12:35. Unlike a joint tenancy, in which the tenants hold undivided equal shares, tenants

in common can own their interests proportionate to each tenant's unequal contribution. Id. Because the bankruptcy estate includes only the debtor's interest in property, if property is held prepetition by a debtor and another as tenants in common, each with a one-half interest, upon the filing of the bankruptcy petition, the bankruptcy estate obtains only the debtor's one-half share. Thus, where property is held by the debtor and another in equal shares, the estate obtains the same one-half share, whether the property is held in joint tenancy or tenancy in common.

The trustee argues that the estate was entitled to turnover of the entire amount of surplus proceeds because, had the real property not been sold prepetition, the trustee could have sold the entire property pursuant to § 363(h). Section 363(h) permits the trustee to sell both the estate's interest and the interest of a co-owner in property, under certain circumstances. The problem with the trustee's argument on this point is that, by the time debtor filed bankruptcy, the real property had already been sold in foreclosure, and the only interest remaining for debtor was her interest in the surplus proceeds. The trustee would not have been able to sell the interest of debtor's co-owner in the surplus proceeds, because a "partition in kind of such property among the estate and such co-owners" was not impracticable. § 363(h)(1). All that the trustee had to do to "partition" the joint interest was to have the check endorsed and cashed, and pay one-half to Morris. Thus, there would have been no basis for the trustee's exercise of the power to sell under § 363(h).

The bankruptcy court erred by requiring Morgan to turn over to the trustee the entire proceeds, subject to reduction by any amount that Morgan established had been paid over to Morris. Whether or not Morris actually received any of the surplus proceeds, the trustee failed to establish that any more than one-half of the proceeds, or $10,718.78, was property of the estate. Although the court correctly ordered turnover of the value of estate property to the trustee, it erred in requiring turnover of the entire amount, because there had been no determination that the half of the proceeds that appeared from the documentary evidence to belong to Morris did not, in fact, belong to Morris.

4. Purported delegation of factual determination to trustee

Finally, Morgan argues that the bankruptcy court improperly delegated to the trustee the power to determine what amount of proceeds belonged to Morris rather than to debtor. Because we have concluded that the bankruptcy court erred in ordering turnover of the entire amount of the proceeds, less amounts actually paid to Morris, we need not address this argument. On remand, the judgment will be amended to require turnover of one-half of the amount of the surplus proceeds check, which is an amount certain.

Because Morris was not a party to the turnover action, the court did not determine and could not have determined Morris's interest in this proceeding. Our determination in this appeal that the estate is entitled to turnover of only one-half of the surplus proceeds is without prejudice to the trustee, if she finds it appropriate, to commence an action naming Morris to determine

whether he holds any interest in the surplus proceeds, or whether the property was solely owned by debtor and therefore subject to turnover in its entirety.

CONCLUSION

The bankruptcy court did not err in requiring Morgan to turn over to the trustee the portion of the surplus proceeds that the trustee established was property of the estate. The court did err, however, in ordering turnover of the entire amount, subject only to reduction upon proof of payment to Morris, rather than ordering turnover of only the estate's one-half interest in the surplus proceeds. Therefore, we REVERSE and REMAND with instructions to enter judgment requiring Morgan to turn over to the trustee $10,718.78. This disposition is without prejudice to any action the trustee may decide to take to obtain a determination of Morris's interest in the remaining surplus proceeds and an order requiring turnover of any part of the remaining surplus proceeds that are determined to belong to the estate rather than to Morris.