NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-04-1605-MaMoPa
G. GREGORY WILLIAMS,	Bk. No. LA 03-35597 SB
Debtor.	Adv. No. LA 04-02775 SB
G. GREGORY WILLIAMS,	
Appellant,	**MEMORANDUM**[1]
v.	
FRANKLIN TOWERS HOMEOWNERS ASSOCIATION, INC.; R.E.F.S., INC.; COUNTY OF LOS ANGELES SHERIFF'S DEPT.; BEVERLY HILLS INVESTORS, INC.; LEVI ESTATES, LLC; GOLD REALTORS; ELI LEVI; ALEX ROMAN; ROLAND WATKINS; CHRISTIE GAUMER; AARON G. BOVSHOW; PETER D. GORDON; HOWARD J. GOODMAN; WILLIAM K. CROWE; STEVEN CASSELBERRY; ELIZABETH BERBER; UNITED STATES TRUSTEE; NANCY CURRY, Chapter 13 Trustee,	
Appellees.[2]	

[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 rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

[2] Of the appellees, only the following submitted briefs: (1) Eli Levi; Levi Estates, LLC; Beverly Hills Investors, LLC; counsel Aaron G. Bovshow; Peter D. Gordon and Christie Gaumer; (2) Franklin Towers Homeowners Association; Roland Watkins and Alex Roman; and (3) R.E.F.S., Inc.; Elizabeth Berber; William K. Crowe and Steven Casselberry.

Argued and Submitted on November 18, 2005
at Los Angeles, California

Filed - March 10, 2006

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

Honorable Samuel L. Bufford, Bankruptcy Judge, Presiding.

Before: MARLAR, MONTALI and PAPPAS, Bankruptcy Judges.

INTRODUCTION

In this appeal, a former chapter 13[3] debtor seeks to overturn the bankruptcy court's order denying the debtor's motion to recuse and the bankruptcy court's order granting a motion to remand. We AFFIRM.

FACTS

1. The Townhouse Foreclosure

G. Gregory Williams ("Williams"), who describes himself as a "retired attorney," lived at a condominium unit in Los Angeles. Williams purchased the condo in 1995. By deed recorded April 21,

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[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.

1999, Williams transferred title to P. Toi Polpantu ("Polpantu"). By another deed, also dated April 21, 1999, Polpantu quitclaimed title back to Williams. This latter deed was not recorded at the time of transfer.

When approximately $11,000 in dues went unpaid, Franklin Towers Homeowners Association, Inc. ("Franklin HOA") gave notice of its intent to conduct a non-judicial foreclosure sale of the condo on April 3, 2003.

The scheduled non-judicial sale was conducted on April 3, 2003, and appellee Eli Levi ("Levi") was the successful purchaser with a bid of $215,000.

2. The Chapter 13

On April 1, 2003, two days before the foreclosure sale, Williams filed a chapter 13 bankruptcy petition.[4] It was only a "face sheet" or "skeleton" petition, without accompanying schedules, statement of financial affairs, or a proposed plan. Nothing that Williams filed on April 1, 2003 indicated that he claimed any interest in the condo. Levi claims that Williams did not provide notice of his bankruptcy filing to Levi before the foreclosure sale.[5]

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[4] This was Williams' second bankruptcy filing. Williams' first bankruptcy was filed on August 5, 2002. It was dismissed and is not relevant to this appeal.

[5] In this court's prior published decision regarding this controversy, this court states Levi "does not contest that Williams had given him notice of the filing of the chapter 13 petition before the sale occurred." In re Williams, 323 B.R. 691, (continued...)

Williams recorded the four year-old Polpantu to Williams quitclaim deed three days after filing his bankruptcy and one day after the foreclosure sale.

3. State Court Proceedings

On April 8, 2003, Levi filed and served on Polpantu a statutory notice to quit. Although Williams did not avail himself of his right under California law to file a notice of right to claim possession of the premises,[6] Levi does not dispute that he knew Williams was living in the condo. A foreclosure trustee's deed in favor of Levi was recorded on April 11, 2003.

On April 22, 2003, Levi filed an unlawful detainer action against Polpantu in state court. After Polpantu failed to respond to Levi's complaint, Levi obtained a default judgment against her and "all other occupants" in the unlawful detainer case.

Williams subsequently filed an ex parte application to enjoin the eviction, which the state court denied. Levi then took possession of the condo on June 18, 2003.

4. Proceedings in Bankruptcy Court

After the state court judge refused to enjoin the eviction,

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[5](...continued)
695 (9th Cir. BAP 2005). Regardless of the discrepancy, because Levi was not a creditor of Williams, Williams was not required to give Levi notice of his bankruptcy filing.

[6] Cal. Civ. Proc. Code § 1174.3.

Williams filed an ex parte motion in bankruptcy court, on June 20, 2003, to stay the eviction. On June 25, 2003, the bankruptcy court temporarily enjoined the eviction and Williams retook possession of the condo.

Williams then filed a motion to enjoin the state court unlawful detainer action, and Levi countered by moving for stay relief.

However, Williams' chapter 13 was then dismissed on August 7, 2003, for failure to comply with statutory requirements.

5. A New State Court Action is Filed

After the dismissal of Williams' chapter 13 bankruptcy, Levi filed an action in state court seeking to cancel Williams' deed, quiet title and obtain damages. On September 18, the state court issued a writ for eviction in favor of Levi.

6. Williams Files Bankruptcy Again

In order to stop the eviction, scheduled for October 8, 2003, Williams filed his third chapter 13 bankruptcy case, along with an ex parte application to stay eviction. The bankruptcy court granted temporary relief, once more stopping the scheduled eviction.

Levi then moved for stay relief in order to obtain possession of the condo. Williams opposed the motion and countered for stay-violation damages. Williams did not ask the bankruptcy court to rule that either the sale or the unlawful detainer action were

void. After a number of continuances, the bankruptcy court issued a written order retroactively granting relief from stay from and after April 1, 2003, the date of the foreclosure sale, and denying Williams' motion to stay eviction.

Williams appealed the December 31, 2003, bankruptcy court order to the Bankruptcy Appellate Panel.[7] Shortly after, on February 9, 2004, Williams' third chapter 13 was dismissed, again terminating the automatic stay.

7. In State Court Again

On March 2, 2004, Levi filed a state court action seeking to cancel the April 4, 2003 recorded deed from Polpantu to Williams.

Williams demurred to the complaint in the state court action, twice, each time asserting that Levi's purchase of the condo and conduct afterwards in the unlawful detainer action and the bankruptcy proceedings violated the automatic stay. Williams' demurrers were overruled, except as to one cause of action where the court granted leave to amend.

Williams subsequently filed a cross-complaint in the state court action naming Levi, Levi's businesses, Levi's attorneys, Franklin HOA, and R.E.F.S., Inc. (the foreclosure trustee), among other defendants, alleging that their actions had violated the automatic stay and that Williams was entitled to damages.

On September 20, 2004, Levi filed a motion to strike

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[7] In re Williams, 323 B.R. 691 (9th Cir. BAP 2005). The decision on that appeal was filed on March 25, 2005. See Facts, Sec. 10 of this Memorandum.

Williams' cross-complaint under California's anti-SLAPP statute. Cal. Civ. Proc. Code § 415.16. However, before the hearing on Levi's motion, Williams filed a notice of removal to the United States District Court. The state court acknowledged the removal notice and vacated the hearing on Levi's motion to strike.

8. District Court Proceedings

Shortly after removal, the district court issued an order to show cause as to why the case should not be remanded to state court, and Levi so moved, as well. However, prior to the remand hearing, Williams filed a motion requesting that the case be referred to bankruptcy court. The district court then assigned the case to bankruptcy court to consider Levi's remand motion.

9. In Bankruptcy Court Again, and the Instant Appeal

With the case back in bankruptcy court, Williams filed a motion to recuse the trial judge.[8] The motion was denied. The next day, the bankruptcy court granted Levi's remand motion, and Williams timely appealed. Both orders are included in the appeal currently before the Panel.

10. Earlier Appeal to the Bankruptcy Appellate Panel

On March 25, 2005, the Bankruptcy Appellate Panel issued its

[8] Honorable Samuel L. Bufford.

decision regarding Williams' appeal of the bankruptcy court's December 31, 2003 stay relief order. This court affirmed the bankruptcy court's decision to annul the automatic stay, but remanded for consideration of Williams' claim for § 362(h) stay violation damages. It also dismissed, as moot, Williams' appeal from the bankruptcy court's denial of a stay of the eviction action. Williams appealed this decision to the Ninth Circuit, which is currently pending. No stay pending appeal is in effect.

11. Continuation of State Court Proceeding

Following remand, on June 24, 2005, the state court granted Levi's motion to strike, and dismissed Williams' cross-complaint insofar as it applied to the Levi parties. Williams then filed, in the bankruptcy court, a second amended notice of appeal, and moved for a stay pending appeal, which this court denied.

ISSUES

1. Whether the bankruptcy court's order granting Levi's motion to remand is an appealable order.

2. If so, whether the bankruptcy court erred in granting Levi's motion to remand.

3. Whether the bankruptcy court's order denying Williams' motion to recuse is an appealable order.

4. If so, whether the bankruptcy court abused its discretion in denying Williams' motion to recuse.

5. Whether the panel may review the state court's order striking Williams' cross-complaint.

6. If so, whether the state court erred in striking Williams' cross complaint.

STANDARD OF REVIEW

A trial judge's decision, which declines a recusal request, is reviewed for an abuse of discretion. In re Fraschilla, 235 B.R. 449, 453 (9th Cir. BAP 1999) (citing Yagman v. Republic Ins., 987 F.2d 622, 626 (9th Cir. 1993)); Voigt v. Savell, 70 F.3d 1552, 1565 (9th Cir. 1995), cert. denied, 517 U.S. 1209 (1996). Under the abuse of discretion standard, the panel will not reverse unless it is "definitely and firmly convinced that the bankruptcy court committed a clear error of judgment." Warrick v. Birdsell (In re Warrick), 278 B.R. 182, 184 (9th Cir. BAP 2002).

Decisions to remand under 28 U.S.C. § 1452(b) are committed to the sound discretion of the bankruptcy judge and are reviewed for abuse of discretion. See Bethlahmy v. Kuhlman (In re ACI-HDT Supply Co.), 205 B.R. 231, 234 (9th Cir. BAP 1997).

Questions of law are reviewed *de novo*. Rubenstein v. Ball Bros. (In re New England Fish Co.), 749 F.2d 1277 (9th Cir. 1984).

In addition, an appellate court in the Ninth Circuit may consider any issue supported by the record and may affirm on any

basis supported by the record, even where the issue was not expressly considered by the bankruptcy court. In re E.R. Fegert, Inc., 887 F.2d 955, 957 (9th Cir. 1989) (citing In re Pizza of Hawaii, Inc., 761 F.2d 1374, 1379 (9th Cir. 1985)).

DISCUSSION

1. Whether the bankruptcy court's order granting Levi's motion to remand is an appealable order.

Williams argues that the panel has jurisdiction to hear the appeal from the bankruptcy court's order granting Levi's motion for remand because the order was final, since it conclusively determined disputed issues and effectively put the parties out of court by depriving them of a federal forum. He argues that this order had the effect of surrendering jurisdiction of a federal suit to a state court.

Levi argues that the order granting his motion to remand does not fit into any of the narrow exceptions of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). In addition, Levi argues that 28 U.S.C. § 1447(d) provides that an order remanding a case to state court is not reviewable on appeal or otherwise.

Franklin HOA and R.E.F.S. argue that the panel does not have jurisdiction to hear an appeal of the remand order because (1) the remand order is not a final judgment, order or decree; (2) orders remanding non-civil rights cases to state court are expressly not reviewable; and (3) appeals cannot lie on remand orders based on timely raised defects in the removal procedure.

However, 28 U.S.C. § 1492(b) allows remand under "any

equitable ground." "[A] bankruptcy court's decision to remand under that provision can be reviewed only by a district court or a bankruptcy appellate panel . . . ." McCarthy v. Prince (In re McCarthy), 230 B.R. 414, 417 (9th Cir. BAP 1999) (citing Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995)).

Williams provided the panel with the formal order granting Levi's motion for remand, which states "for good cause shown" and the transcript of the November 30, 2004 hearing where the bankruptcy court heard the motion for remand. However, the transcript of the November 30, 2004 hearing is not helpful because the court relies on its tentative ruling in granting the motion for remand. A copy of the court's tentative ruling, which presumably laid out its findings of fact and conclusions of law, was not included in the record. Bankr. R. 8006 requires that the "record on appeal shall include . . . findings of fact, and conclusions of law of the court."

Since Williams' record on appeal omits the bankruptcy court's findings of fact and conclusions of law regarding its decision to grant Levi's motion to remand, the record is, as a matter of law, incomplete.

Williams' "failure to provide the one document that would directly identify the manner in which the bankruptcy court exercised its discretion entitles us to dismiss this appeal." McCarthy, 230 B.R. at 417. However, the panel chooses to exercise its discretion to examine what record we have been provided. The panel will look for any plausible basis on which the bankruptcy court might have exercised its discretion to grant Levi's motion to remand. If we find any such basis, we must affirm.

Thus, we find that the remand order is an appealable order.

2. Whether the bankruptcy court erred in granting Levi's motion to remand.

Williams argues that the bankruptcy court erred in granting the remand motion because the case is a core proceeding, therefore requiring the bankruptcy court to exercise the exclusive jurisdiction given it under 28 U.S.C. § 1334(a).

Levi argues that the remand motion was properly granted because (1) Williams did not file the removal within 30 days after service of Levi's state court complaint; (2) Williams was not the only defendant and thus could not remove the state court action; (3) Williams was a plaintiff by virtue of his cross-complaint and therefore could not remove the state court action; and (4) the district court, to which the case was originally remanded, lacked jurisdiction to hear Williams' cross-complaint.

R.E.F.S. argues that the remand order should be affirmed on appeal because (1) Williams' removal was untimely; and (2) Williams did not have the right of removal because he was the plaintiff on the cross-complaint.

The "'any equitable ground' remand standard is an unusually broad grant of authority. It subsumes and reaches beyond all of the reasons for remand under nonbankruptcy removal statutes." McCarthy, 230 B.R. at 417.

First, a notice of removal "may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed or (B) 30 days after

receipt of the summons if the initial pleading has been filed with the court but not served with the summons". Bankr. R. 9027(a)(3). The initial pleading, which was Levi's state court complaint, was filed March 2, 2004. The record does not include a proof of service on Williams, so the date of service upon Williams is unknown. However, Williams filed a demurrer to Levi's complaint on April 5, 2005. Williams also filed an answer and cross-complaint on August 20, 2004. Since Williams did not file his notice of removal until October 15, 2004, well after thirty days of receiving Levi's complaint and responding thereto on the merits, we find Williams' notice of removal to be untimely.

Second, a defendant's filing of a cross-complaint invokes the state court's jurisdiction, thereby waiving the defendant's right to remove the case to federal court. Hansen v. Pacific Coast Asphalt Cement Co., 243 F. 283, 284 (S.D. Cal. 1917) (citing Texas & P. Ry. Co. v. Eastin & Knox, 214 U.S. 153 (1909)). Because Williams filed his cross-complaint in state court, he waived his right to remove the case to federal court.

Finally, Williams' removal notice stated that the district court had original jurisdiction over the causes of action set forth in the cross-complaint. Williams' cross-complaint generally alleges violations of the automatic stay, which claims are traditionally litigated as core proceedings in bankruptcy court, not district court.[9] The district court exercised its statutory

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[9] Of course, we acknowledge that under the bankruptcy statute, the district court has original jurisdiction of bankruptcy cases, 28 U.S.C. § 1334, but that district courts may refer "any or all proceedings arising under Title 11" to the (continued...)

power to refer the removed case to the bankruptcy court. Therefore, since the district court had exclusive jurisdiction to decide issues concerning the complaint, and also had the power to refer the matter to the bankruptcy court, we perceive no error in that decision.

Because Williams did not timely file his notice of removal, waived his right to removal by filing a cross-complaint in state court, and the district court properly referred the removal issues to the bankruptcy court, the bankruptcy court did not err in granting Levi's motion to remand.

3. Whether the bankruptcy court's order denying Williams' motion to recuse is an appealable order.

Williams argues that the order denying his recusal motion comes within the Cohen collateral order doctrine,[10] and is, therefore, reviewable.

Franklin HOA and R.E.F.S. argue that the order denying Williams' recusal motion is interlocutory, and not appealable. Therefore, the panel lacks jurisdiction to consider this issue on appeal.

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[9](...continued)
bankruptcy court. 28 U.S.C. § 157(a).

[10] The collateral order doctrine enunciated in Cohen v. Beneficia. Indus. Loan Corp., 337 U.S. 541 (1949), allows courts of appeals to treat orders that are interlocutory in nature as final under 28 U.S.C. § 1291 if three conditions are met. The order must (1) conclusively determine the disputed question; (2) resolve an important question completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from final judgment. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

An order denying a motion to recuse is interlocutory until a final decision is entered. "The decision of a bankruptcy judge not to disqualify himself, however, cannot be appealed until a direct appeal is taken from a final decision adverse to the moving party." Stewart Enterprises, Inc. v. Horton (In re Horton), 621 F.2d 968, 970 (9th Cir. 1980), quoted in Seidel v. Durkin (In re Goodwin), 194 B.R. 214, 221 (9th Cir. BAP 1996).

Appeals are authorized only from final orders and, with leave of the court, from interlocutory orders. 28 U.S.C. § 158(a). Thus, an order denying recusal is not final, and this panel did not grant leave to appeal.

However, interlocutory orders merge into the final judgment and may be challenged in an appeal of the final judgment. Baldwin v. Redwood City, 540 F.2d 1360, 1364 (9th Cir. 1976), cert. denied, 431 U.S. 913 (1977). Since the bankruptcy court's order to remand was a final order in this case, the interlocutory order denying the recusal motion merges into the final order to remand, and is therefore subject to review by this court.

4. Whether the bankruptcy court abused its discretion in denying Williams' motion to recuse the bankruptcy judge.

Williams argues that the bankruptcy judge had no jurisdiction to rule on his own recusal because, pursuant to Central District General Order 224, § 4.0, a judge who is the subject of a recusal motion is required to refer it to the Clerk for assignment to another judge. As it read at the time the order on appeal was entered, the General Order stated that "[i]f a motion is made to disqualify a judge in any civil case assigned to the judge

pursuant to this General Order, the motion shall be referred to the Clerk for assignment to another judge in the same manner as cases are assigned pursuant to this General Order."

However, by its own terms, Central District General Order 224, as it read at the time the order on appeal was entered, applied only to district court cases, and was inapplicable to bankruptcy court cases. Section 1.0 of Central District General Order 224 stated "all cases of a civil nature shall be assigned to the individual calendars of the judges of this Court pursuant to this General Order." Section 1.6 specifically exempted bankruptcy cases from the scope of Central District General Order 224 until the bankruptcy matter was assigned to a district court judge. The Order stated at section 1.6, "[n]o bankruptcy case, matter or proceeding shall be deemed to be a 'case of a civil nature,' as that term is used in Section 1.0, until the time for the assignment of such case to the individual calendar of a district court judge as provided in Section 16.1 of this General Order."

Since at the time of Williams' recusal motion, this matter was a bankruptcy case pending before the bankruptcy court, it was not subject to Central District General Order 224. Therefore, the bankruptcy judge assigned to the case was not precluded from ruling upon Williams' recusal motion.

Bankruptcy judges are subject to recusal solely pursuant to 28 U.S.C. § 455, which states in pertinent part:

> (a) any justice, judge, or magistrate judge 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[.]

In reviewing a bankruptcy judge's denial of a recusal motion under § 455 for abuse of discretion, the test is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986). The recusal of a judge is warranted in only the rarest of circumstances where a judge's actions "display a clear inability to render a fair judgment." Liteky v. United States, 510 U.S. 540, 551 (1994).

Williams argues that the bankruptcy judge assigned to this case should have recused himself because of allegedly repeated acts in excess of jurisdiction, which established the appearance of a lack of impartiality needed to support recusal. However, bias or lack of impartiality cannot be challenged by a litigant on the basis that the litigant disagrees with the bankruptcy judge's rulings or orders. Id. at 555. "Judges are known to make procedural and even substantive errors on occasion [but such] errors here would be the basis for appeal, not recusal." Focus Media, Inc. v. Nat'l Broad. Co., Inc. (In re Focus Media, Inc.), 378 F.3d 916, 930 (9th Cir. 2004). Therefore, even if Williams was correct that the bankruptcy judge made mistakes in his rulings, his option was to appeal the judge's decisions, not to seek recusal. Therefore, we hold that the bankruptcy judge did not abuse his discretion in denying Williams' motion to recuse.

5. Whether the panel may reiew the state court's order striking Williams' cross-complaint.

Williams filed a second amended notice of appeal concerning the state court's order granting Levi's motion to strike Williams' cross-complaint. However, the panel's jurisdiction is limited to appeals of decisions of bankruptcy courts, 28 U.S.C. § 158, and Williams' brief cites no authority to the contrary. Since Williams' second amended notice of appeal concerns a state court ruling, the panel has no jurisdiction to review it. The proper venue to address state court rulings is within the state appellate system.

6. Whether the state court erred in striking Williams' cross complaint.

As noted above, because the panel lacks jurisdiction to hear appeals of state court rulings, the panel cannot decide an appeal as to whether the state court erred in striking Williams' cross-complaint.

CONCLUSION

The bankruptcy court's order granting Levi's motion to remand is an appealable order. Because the bankruptcy court did not err in granting this motion, we AFFIRM on this issue. Second, the bankruptcy court's order denying Williams' motion to recuse is an appealable order by virtue of the merger doctrine. Because the bankruptcy court did not abuse its discretion in denying this

motion, we also AFFIRM on this issue. Finally, the panel lacks jurisdiction to review the state court's ruling striking Williams' cross-complaint. That portion of Williams' appeal is therefore DISMISSED.