

MAY 29 2013

NOT FOR PUBLICATION

SUSAN M SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No. CC-12-1395-DKiTa
6	ALEN L. LY,	)	Bk. No. LA 12-25257-TD
7	Debtor.	)	
8	_____	)	
9	ALEN L. Ly,	)	
10	Appellant,	)	
11	v.	)	<b>M E M O R A N D U M</b> <sup>1</sup>
12	MICHELLE V. CHE,	)	
13	Appellee.	)	
	_____	)	

Argued and Submitted on May 15, 2013  
at Pasadena, California

Filed - May 29, 2013

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

Appearances: Edgardo M. Lopez, Esq. argued for Appellant  
Alen L. Ly; Caroline S. Kim, Esq. argued  
for Appellee Michelle V. Che.

Before: DUNN, KIRSCHER, and TAYLOR, Bankruptcy Judges.

<sup>1</sup> 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 appellant, Alen L. Ly ("Ly"), appeals the decision of  
2 the bankruptcy court granting relief from stay for cause to the  
3 appellee, Michelle V. Che ("Che"), to pursue her California state  
4 law unlawful detainer action against Ly for all purposes.  
5 Subsequent to this appeal being filed, Che filed a motion with  
6 this Panel for sanctions ("Sanctions Motion") against Ly and his  
7 counsel for pursuing a frivolous appeal. We AFFIRM the  
8 bankruptcy court's relief from stay order, and we GRANT the  
9 Sanctions Motion and award sanctions in the amount of Che's  
10 attorney's fees, totaling \$6,650, and costs in the amount of  
11 \$114, for a total award of \$6,764, jointly and severally against  
12 Ly and his attorney.

#### 13 I. FACTS

14 Although the parties dispute one another's accounts of  
15 prebankruptcy events, what occurred in Ly's chapter 7<sup>2</sup> case is  
16 essentially undisputed.

17 In Appellant's Opening Brief, Ly states that he filed his  
18 bankruptcy petition on May 14, 2012. The record reflects that  
19 Ly's bankruptcy petition actually was filed on April 30, 2012.<sup>3</sup>  
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21 <sup>2</sup> Unless otherwise indicated, all chapter and section  
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
23 all "Rule" references are to the Federal Rules of Bankruptcy  
24 Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure  
are referred to as "Civil Rules."

25 <sup>3</sup> The original excerpts of record submitted by Ly did not  
26 include any of the exhibits filed by Che to her Declarations  
27 filed in support of her motion for relief from stay. After Che  
28 filed a Motion to Augment Record with this Panel and the  
subsequent order of the motions panel requiring Ly to supplement  
(continued...)

1 On June 20, 2012, Che filed a motion for relief from stay  
2 ("Stay Motion") with respect to certain residential property in  
3 Long Beach, California ("Property"). In his Schedule A, Ly  
4 declared that he owned the Property. In the Stay Motion, Che  
5 stated that she was a "Holder of Deed of Trust." In her Real  
6 Property Declaration, however, Che stated that she was "the  
7 Movant and owner of the Property." In her further Declaration  
8 ("Further Declaration") in support of the Stay Motion, Che stated  
9 that she had leased the Property to Ly's sister, Vanessa A. Ly  
10 ("Vanessa"), on or about March 1, 2006. Che further stated that  
11 she did not find out that Ly was residing at the Property until  
12 October 2008. Che also stated that after making one rent  
13 payment, neither Vanessa nor Ly paid any further rent.

14 In the Further Declaration, Che stated that Ly "forged my  
15 signature and transferred the [Property] to himself." Che stated  
16 that she sued Ly in 2009 for the alleged fraudulent transfer of  
17 the Property ("State Court Lawsuit") and obtained a judgment  
18 ("Judgment"). A certified copy of the Judgment was attached as  
19 Exhibit A to the Further Declaration. The Judgment, that was  
20 entered on Ly's default, included a specific description of the  
21 Property and ordered that it be transferred from Ly to Che. The  
22 Judgment included the following additional provisions:

- 23 2) The previously recorded Grant Deed, Los Angeles  
24 County recorder number 061576358 recorded on July 18,  
25 2006 is hereby declared void based upon the forged  
signature of Michelle Che.  
26 3) The clerk of this court is empowered and ordered to

27 <sup>3</sup>(...continued)  
28 the record, Ly filed supplemental excerpts of record, including  
the critical exhibits for our review.

1 sign a quit claim deed and all of the related papers on  
2 behalf of Alen Lang Ly and to Plaintiff Michelle Che.  
3 4) Defendant Alen Lang Ly is hereby prohibited from  
4 approaching less than 100 yards from said [Property].

5 Ly, through his counsel, Edgardo M. Lopez ("Lopez"), opposed  
6 the Stay Motion ("Opposition"). In his Declaration in support of  
7 the Opposition ("Opposition Declaration"), Ly stated that he  
8 purchased the Property from Che in July 2006 for \$525,000. He  
9 further stated that he had been living on the Property as his  
10 primary residence since July 2006 and had paid monthly mortgage  
11 payments and annual property taxes.

12 Ly admitted in the Opposition Declaration that he had  
13 received service of the summons and Che's complaint in the State  
14 Court Lawsuit. He further declared that he had retained counsel  
15 to represent him in the State Court Lawsuit who assured him that  
16 "he will take care of everything." Thereafter, he stated that he  
17 was "completely shocked" when he received a five-day notice to  
18 vacate the Property from Che's attorney and blamed attorney  
19 neglect for the entry of the Judgment against him. In the  
20 Memorandum of Points and Authorities filed in support of the  
21 Opposition, Lopez argued that stay relief should be denied  
22 because Che was not a real party in interest and therefore lacked  
23 standing to seek stay relief, and Che was not a secured creditor  
24 entitled to invoke § 362(d)(1) to argue a lack of adequate  
25 protection of her interest in the Property.

26 Che filed a Reply ("Reply") to the Opposition. In her  
27 Memorandum of Points and Authorities filed in support of the  
28 Reply, Che argued that she never sold the Property to Ly, and  
Che's standing arose from the fact that Che was the "legal owner

1 of the Property." Among other things, Che argued that "cause" to  
2 grant the Stay Motion existed to allow Che to undo Ly's  
3 "fraudulent transaction."

4 The bankruptcy court heard argument ("Hearing") on the Stay  
5 Motion on July 12, 2012. At the outset of the Hearing, the  
6 bankruptcy court stated its tentative conclusions that Che had  
7 produced evidence, including the Judgment, that she owned the  
8 Property and was entitled to relief to pursue her unlawful  
9 detainer action in state court. Lopez essentially argued that  
10 the fact that the Judgment was obtained by default cut against  
11 Che's position that she retained an ownership interest in the  
12 Property. Reminding Lopez that, "A judgment is a judgment," the  
13 bankruptcy court overruled Ly's argument and advised the parties  
14 that he would grant the Stay Motion but would not waive the  
15 fourteen-day stay of the effectiveness of his order under  
16 Rule 4001(a)(3).

17 On July 26, 2012, the bankruptcy court entered an order  
18 ("Order") granting the Stay Motion for cause under § 362(d)(1) to  
19 allow Che to "pursue her state court unlawful detainer suit  
20 against [Ly] for all purposes." In effect, the bankruptcy court  
21 granted relief from stay to allow the parties to resolve their  
22 competing claims to the Property in state court. Ly filed a  
23 timely notice of appeal on August 7, 2012.

24 Che filed the Sanctions Motion with this Panel, requesting  
25 an award of sanctions against both Ly and his counsel, Lopez, for  
26 filing a frivolous, meritless appeal, on November 16, 2012. Ly  
27 has not responded to the Sanctions Motion.

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1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction under 28 U.S.C.  
3 §§ 1334 and 157(b)(2)(A) and (G). We have jurisdiction under  
4 28 U.S.C. § 158.

5 **III. ISSUES**

6 1. Did the bankruptcy court err in determining that Che had  
7 standing to pursue the Stay Motion?<sup>4</sup>

8 2. Should sanctions be awarded against Ly and Lopez under  
9 Rule 8020 for filing and pursuing a frivolous appeal?

10 **IV. STANDARD OF REVIEW**

11 Standing is an issue that we review de novo. Loyd v. Paine  
12 Webber, Inc., 208 F.3d 755, 758 (9th Cir. 2000); Kronemyer v. Am.  
13 Contractors Indem. Co. (In re Kronemyer), 405 B.R. 915, 919 (9th  
14 Cir. BAP 2009). De novo review requires that we consider a  
15 matter anew, as if it had not been heard before, and as if no  
16 decision had been rendered previously. United States v.  
17 Silverman, 861 F.2d 571, 576 (9th Cir. 1988); B-Real, LLC v.  
18 Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008).

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22  
23 <sup>4</sup> In Appellant's Statement of Issues on Appeal, Ly also  
24 asserts as an issue whether the bankruptcy court erred in  
25 granting the Stay Motion under § 362. However, in Appellant's  
26 Opening Brief, Ly only argues that Che lacked standing to seek  
27 stay relief. Accordingly, any argument that the Stay Motion was  
28 improperly granted, beyond the question of Che's standing, is  
waived. City of Emeryville v. Robinson, 621 F.3d 1251, 1261 (9th  
Cir. 2010) (Appellate courts in this circuit "will not review  
issues which are not argued specifically and distinctly in a  
party's opening brief.").

1 **V. DISCUSSION**

2 1. Che had standing to seek stay relief.

3 Ly argues one issue on appeal: whether Che had standing to  
4 seek relief from the automatic stay in Ly's bankruptcy case.

5 Whether a party has standing to pursue a claim is a  
6 "threshold question in every federal case, determining the power  
7 of the court to entertain the suit." Warth v. Seldin, 422 U.S.

8 490, 498 (1975); Edwards v. Wells Fargo Bank, N.A.

9 (In re Edwards), 454 B.R. 100, 104 (9th Cir. BAP 2011).

10 "Standing" has both constitutional and prudential aspects, but Ly  
11 only challenges Che's standing as a prudential matter.<sup>5</sup>

12 Ly argues that Che has no prudential standing because she is  
13 not a real party in interest. Appellant's Opening Brief at 6-10.

14 In stay relief proceedings, the moving party bears the burden of  
15 proof to establish that it has standing to prosecute the motion.

16 See In re Wilhelm, 407 B.R. 392, 399-400 (Bankr. D. Id. 2009),

17 citing Lujan v. Defenders of Wildlife, 504 U.S. at 561. Under

18 § 362(d), a "party in interest" may request relief from the

19 automatic stay. Because "party in interest" is not defined in

20 the Bankruptcy Code, whether a party moving for relief from stay

21 \_\_\_\_\_  
22 <sup>5</sup> Constitutional standing relates to whether a party's stake  
23 in a matter is adequate to create a "case or controversy" to  
24 which the federal judicial authority under Article III of the  
25 Constitution may apply. Warth v. Seldin, 422 U.S. at 498-99;  
26 Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992). In  
27 her Further Declaration, Che declared that she had been paid no  
28 rent for the Property, occupied by Ly, since March 2006 and that  
Ly had forged her signature to engineer a fraudulent transfer of  
the Property to himself. That evidence is adequate to establish  
Che's constitutional standing to file and prosecute the Stay  
Motion.

1 has the status of a party in interest under § 362(d) is a fact-  
2 based inquiry, determined on a case-by-case basis, considering  
3 the claimed interest of the moving party and the impact of the  
4 stay on that interest. In re Kronemyer, 405 B.R. at 919. A  
5 party in interest can include any party that has a pecuniary  
6 interest in the matter, a practical stake in its resolution or  
7 whose interest is impacted by the stay. Brown v. Sobczak  
8 (In re Sobczak), 369 B.R. 512, 517-18 (9th Cir. BAP 2007).

9 Motions for relief from stay are contested matters. See  
10 Rules 4001(a) and 9014(a). Rule 9014(c) provides that Rule 7017  
11 applies in contested matters. Rule 7017 incorporates Civil  
12 Rule 17(a), which provides that “[a]n action must be prosecuted  
13 in the name of the real party in interest. . . .” Considering  
14 the application of these rules, as a threshold matter, relief  
15 from stay proceedings are very limited in scope.

16 Given the limited grounds for obtaining . . . relief  
17 from stay, read in conjunction with the expedited  
18 schedule for a hearing on the motion, most courts hold  
19 that motion for relief from stay hearings should not  
20 involve an adjudication on the merits of claims,  
defenses, or counterclaims, but simply determine  
whether the creditor has a colorable claim to the  
property of the estate.

21 Biggs v. Stovin (In re Luz Int’l), 219 B.R. 837, 842 (9th Cir.  
22 BAP 1998) (emphasis added). See, e.g., Johnson v. Righetti  
23 (In re Johnson), 756 F.2d 738, 740-41 (9th Cir. 1985).

24 Cornell University Law School’s Legal Information Institute  
25 defines a “colorable claim” as:

26 A plausible legal claim. In other words, a claim  
27 strong enough to have a reasonable chance of being  
28 valid if the legal basis is generally correct and the  
facts can be proven in court. The claim need not  
actually result in a win.



1 [http://topics.law.cornell.edu/wex/colorable claim](http://topics.law.cornell.edu/wex/colorable_claim).

2 As noted above, in her Real Property Declaration filed in  
3 support of the Stay Motion, Che stated that she was the "Movant  
4 and owner of the Property." Attached as Exhibit A to her Further  
5 Declaration was a certified copy of the Judgment voiding Ly's  
6 deed to the Property as obtained through forgery and ordering  
7 that the Property be transferred from Ly to Che. That the  
8 Judgment was obtained by default does not negate its impact as  
9 providing clear evidence that Che had at least a "colorable  
10 claim" to ownership of the Property. In fact, there is no  
11 evidence in the record before us that Ly ever moved to set aside  
12 the default or appealed the Judgment. At oral argument, Lopez  
13 confirmed that the Judgment had become final. A party moving for  
14 stay relief has a colorable claim sufficient to establish  
15 standing to prosecute the motion if it has an ownership interest  
16 in the subject property. In re Edwards, 454 B.R. at 105; Veal v.  
17 Am. Home Mortg. Servicing, Inc. (In re Veal), 450 B.R. 897, 913  
18 (9th Cir. BAP 2011).

19 Ly lays down a red herring when he argues, "It is clear from  
20 [Che's] relief from stay motion that she is seeking to enforce  
21 the right of a holder of a deed of trust on the subject property  
22 . . . ; [Che] claims as a holder of the deed of trust and to have  
23 an interest on the [Property] given as collateral." Appellant's  
24 opening Brief at 8-9. The bankruptcy court did not take that  
25 bait, and neither do we.

26 It is true that when the Stay Motion was filed, Che's  
27 counsel checked the box on the motion form stating that "Movant  
28

1 is the (check one) Holder of Deed of Trust.”<sup>6</sup> However, again as  
2 noted above, Che’s declarations filed in support of the Stay  
3 Motion asserted and provided evidence to support her claim that  
4 she owned the Property. The Judgment provided admissible  
5 evidence, independent of Che’s own self-serving statements, of  
6 her ownership interest in the Property.

7 Based on the evidence before the bankruptcy court, focusing  
8 on the Judgment, the bankruptcy court did not err in finding that  
9 Che had standing to file and prosecute the Stay Motion as a real  
10 party in interest. As the bankruptcy court aptly noted, “A  
11 judgment is a judgment.” Ly’s appeal of the Order, based solely  
12 on his argument that Che lacked prudential standing to pursue  
13 stay relief, is patently meritless.

14 2. Che’s motion to sanction Ly and his counsel for pursuing a  
15 frivolous appeal should be granted.

16 In the Sanctions Motion, Che requested sanctions against Ly  
17 and his counsel for filing a meritless and frivolous appeal  
18 pursuant to Federal Rule of Appellate Procedure (“FRAP”) 38. The  
19 relevant Rule before this Panel is Rule 8020. Rule 8020, which  
20 conforms to the language of FRAP 38, provides in relevant part  
21 that:

22 If a . . . bankruptcy appellate panel determines that  
23 an appeal from an order . . . of a bankruptcy judge is  
24 frivolous, it may, after a separately filed  
25 motion . . . and reasonable opportunity to respond,  
award just damages and single or double costs to the  
appellee.

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26 <sup>6</sup> The other two choices on the motion form that were not  
27 checked were: “Assignee of Holder of Deed of Trust,” and  
28 “Servicing Agent for Holder of Deed of Trust or Assignee of  
Holder of Deed of Trust.”

1 As previously noted, Che filed the Sanctions Motion on  
2 November 16, 2012. Ly has not filed any response to the  
3 Sanctions Motion. However, in response to the Clerk's Notice of  
4 Possible Mootness of this appeal, Ly responded that the appeal  
5 was not moot because the Property now was subject to a pending  
6 adversary proceeding in Ly's bankruptcy, and "the state court  
7 action affecting the subject [Property] has been held in  
8 abeyance." Compliance Statement Re: Notice of Possible Mootness,  
9 filed with this Panel on February 11, 2013.

10 Rule 8020 requires that all filed papers, including appeal  
11 briefs, be signed, "thereby certifying that the signer has done  
12 appropriate legal and factual research and believes that the  
13 submission of the paper has merit." 10 Collier on Bankruptcy  
14 ¶ 8020.02 (Alan N. Resnick and Henry J. Sommer eds., 16th ed.  
15 2013). The Panel may impose sanctions to penalize an appellant  
16 and/or counsel who pursue a frivolous appeal and to compensate  
17 the appellee for the delay and expense of defending the appeal.  
18 Id. ¶ 8020.03. Cf. Burlington N. R. Co. v. Woods, 480 U.S. 1, 7  
19 (1987).

20 "An appeal is frivolous if the result is obvious or the  
21 arguments of error are wholly without merit." Coghlan v.  
22 Starkey, 852 F.2d 806, 811 (5th Cir. 1988). See Henry v. Farmer  
23 City State Bank, 808 F.2d 1228, 1241 (7th Cir. 1986); Cannon v.  
24 The Hawaii Corp. (In re The Hawaii Corp.), 796 F.2d 1139, 1144  
25 (9th Cir. 1986). Unfortunately, this appeal meets that standard  
26 on both counts.

27 Lopez should have known from our published opinions in  
28 In re Veal and In re Edwards that Panel precedent quite clearly

1 recognizes that a party moving for relief from stay who has a  
2 colorable claim to ownership of the subject property has  
3 prudential standing. We assume that he read the Panel's opinion  
4 in In re Veal because he cited it to us in Appellant's Opening  
5 Brief specifically for its "exhaustive" discussion of standing  
6 and real party in interest issues. See Appellant's Opening Brief  
7 at 8.

8         Particularly troubling to us is the fact that when Lopez  
9 submitted Ly's original excerpts of record, he omitted to include  
10 the exhibits to Che's Declarations filed in support of the Stay  
11 Motion, including the certified copy of the Judgment, even though  
12 he did include the exhibits to Ly's Declaration filed in  
13 opposition to the Stay Motion. Lopez had to be aware that the  
14 Judgment was a critical part of the evidentiary record before the  
15 bankruptcy court supporting its finding that Che had standing to  
16 seek stay relief, because the bankruptcy court specifically  
17 discussed the importance of the Judgment to its decision at the  
18 Hearing in its direct responses to Lopez's arguments. Lopez  
19 supplemented the excerpts of record to include the Judgment  
20 exhibit only after Che's counsel filed her motions requesting  
21 judicial notice and to supplement the record and the Sanctions  
22 Motion, and the motions panel ordered Ly to supplement the record  
23 with a complete copy, "including exhibits," of the Stay Motion.

24         As we previously have determined, Ly's appeal on the issue  
25 of Che's standing lacks merit, and that lack of merit is obvious  
26 from review of the Judgment alone. We conclude that Ly's appeal  
27 is both meritless and frivolous, justifying the imposition of  
28 sanctions.

1 "If we determine that an appeal is frivolous, then damages  
2 and single or double costs may be awarded to the appellee."  
3 Burkhart v. Fed. Deposit Ins. Corp. (In re Burkhart), 84 B.R.  
4 658, 661 (9th Cir. BAP 1988). In conjunction with the Sanctions  
5 Motion, Kim filed her Declaration itemizing her attorney's fees  
6 in this appeal totaling \$6,650 and costs totaling \$114 "for  
7 attorney service" to file Appellee's Brief and the Sanctions  
8 Motion. We find the attorney's fees and costs requested to be  
9 reasonable. In the circumstances of this appeal, we conclude  
10 that the Sanctions Motion should be granted, and we award Che  
11 attorney's fees of \$6,650 and costs in the amount of \$114, for  
12 total sanctions of \$6,764, jointly and severally against Ly and  
13 Lopez.

#### 14 VI. CONCLUSION

15 Based on the foregoing analysis, findings and conclusions,  
16 we AFFIRM the Order granting relief from stay to Che and GRANT  
17 the Sanctions Motion, awarding sanctions for pursuing a frivolous  
18 appeal totaling \$6,764 jointly and severally against Ly and his  
19 counsel, Lopez.