

FEB 15 2011

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. CC-10-1218-KiPaD
)	
ADWOA NYAMEKYE, ¹)	Bk. No. 10-27592
)	
Debtor.)	
_____)	
)	
ADWOA NYAMEKYE,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM²
)	
WELLS FARGO BANK N.A.,)	
)	
Appellee.)	
_____)	

Argued and Submitted on January 21, 2011
at Pasadena, California

Filed - February 15, 2011

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

Honorable Richard M. Neiter, Bankruptcy Judge, Presiding

Appearances: Appellant Adwoa Nyamekye argued pro se
Kenneth A. Freedman argued for appellee, Wells
Fargo Bank N.A.

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

¹ On our docket, appellant's surname appears as "Nyameke." However, she confirmed at oral argument that her surname is spelled "Nyamekye." We direct the clerk to correct the spelling of appellant's surname.

² 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 Debtor-Appellant, Adwoa Nyamekye ("Nyamekye"), appeals an
2 order from the bankruptcy court granting appellee relief from the
3 automatic stay to proceed with enforcement of a Writ of
4 Possession, which was issued after the entry of an unlawful
5 detainer judgment against Nyamekye in state court. We AFFIRM.

6 **I. FACTUAL AND PROCEDURAL BACKGROUND**

7 **A. Prepetition Events.**

8 On or around March 12, 2004, Miriam Gilliam granted to
9 Nyamekye a residence on Gramercy Place in Los Angeles, California
10 (the "Property").³ The transfer appears to have been a gift.
11 For reasons unknown, in August 2005, Miriam Gilliam again granted
12 the Property to Nyamekye as a gift.

13 On February 1, 2007, Worlds Savings Bank ("World Savings")
14 provided a loan to Nyamekye for \$871,500. For this loan,
15 Nyamekye executed a note, which was secured by a first deed of
16 trust on the Property in favor of World Savings. World Savings
17 recorded its deed of trust on February 7, 2007.

19
20 ³ On August 25, 2010, we issued an order waiving Nyamekye's
21 responsibility for filing and serving an appendix of the record
22 under Fed. R. Bankr. P. 8009(b). Nyamekye did not file an
23 appendix but filed an "Emergency Request for Judicial Notice of
24 Supplemental Excerpts of the Record as a Matter of Law," which
essentially serves the same purpose. It contains certain state
court documents that were not before the bankruptcy court. Wells
Fargo objects to Nyamekye's submission. We sustain Wells Fargo's
objection to the extent that Nyamekye's submission presents
documents not before the bankruptcy court.

25 Nyamekye's Emergency Request also contains documents Wells
26 Fargo submitted in its moving papers to the bankruptcy court
27 which the Panel does need to review and Wells Fargo did not
28 submit on appeal. As for those documents not presented to the
bankruptcy court, we reviewed them strictly to determine the
background of this case as Nyamekye's opening brief provides few
relevant facts. These documents do not affect our disposition of
this appeal.

1 On June 10, 2009, Executive Trustee Services, LLC ("ETS"),
2 the substitute trustee under the deed of trust, recorded and
3 served a Notice of Default on the Property. On or about
4 September 21, 2009, ETS recorded and served a Notice of Trustee's
5 Sale on the Property. The sale was scheduled for October 15,
6 2009. The total amount owed on the note was \$999,155.

7 A nonjudicial foreclosure sale of the Property occurred on
8 November 25, 2009. Appellee, Wells Fargo Bank N.A., successor by
9 merger to Wells Fargo Bank Southwest, f/k/a Wachovia Mortgage,
10 f/k/a World Savings ("Wells Fargo"), was the successful bidder.
11 No evidence exists in the record that Nyamekye sought any action
12 in state court to prevent the foreclosure. A Trustee's Deed of
13 Sale was recorded conveying the Property to Wells Fargo on
14 December 4, 2009.

15 On December 16, 2009, Wells Fargo served a Notice to Quit on
16 Nyamekye and any other occupants living on the Property, which
17 ordered all occupants to vacate the Property within three days -
18 December 19.

19 **B. Events During The First Bankruptcy.**

20 To fend off eviction, Nyamekye filed a voluntary chapter 7⁴
21 petition for relief on December 21, 2009, Case No. 09-46121-VK
22 (the "First Bankruptcy"). Nyamekye filed her initial Schedules
23 and Statement of Financial Affairs ("SOFA") on January 4, 2010.
24 Nyamekye did not list the Property in her Schedule A. No secured
25 creditors were listed in her Schedule D. Her SOFA was completely

26
27 ⁴ Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 blank, as were almost all of her other Schedules.

2 On January 4, 2010, Wells Fargo filed a motion for an order
3 terminating the automatic stay because: (1) Wells Fargo had
4 acquired title to the Property by foreclosure prepetition and
5 recorded the deed within the requisite time period under
6 California law; and (2) Nyamekye had no equity in the Property
7 and thus it was not necessary for reorganization. Alternatively,
8 Wells Fargo asked for an order confirming that no automatic stay
9 was in effect. Wells Fargo requested stay relief in order to
10 prosecute an unlawful detainer action against Nyamekye in state
11 court. Nyamekye opposed Wells Fargo's motion. In her
12 declaration, Nyamekye contended that she did not receive adequate
13 notice of Wells Fargo's motion. She conceded, however, that
14 Wells Fargo obtained title to the Property by trustee sale on
15 November 25, 2009, but contended that she received no
16 "notification" of the sale. Nyamekye requested a 14-day
17 continuance in order to file an adversary complaint against Wells
18 Fargo.

19 The bankruptcy court held a hearing on Wells Fargo's motion
20 on January 13, 2010. The court entered an order granting Wells
21 Fargo's motion on January 14, 2010. Nyamekye never filed the
22 adversary complaint.

23 Wells Fargo filed a Complaint for Unlawful Detainer against
24 Nyamekye in Los Angeles Superior Court on January 21, 2010, Case
25 No. 10U00860. Wells Fargo claimed ownership of the Property
26 based on the foreclosure sale and the recording of the Trustee's
27 Deed in its favor. A bench trial was held on March 8, 2010. The
28 state court determined that Nyamekye failed to provide any

1 defense to the Unlawful Detainer action, and a judgment was
2 entered in favor of Wells Fargo on that same date.⁵ On April 16,
3 2010, the state court issued to Wells Fargo a Writ of Possession
4 for the Property. A lockout was scheduled for May 6, 2010.

5 Meanwhile, in the bankruptcy court, Nyamekye filed certain
6 amended schedules and an amended SOFA on January 29, 2010.
7 Nyamekye again did not list the Property in her first amended
8 Schedule A. In her first amended SOFA, item #4, Nyamekye
9 represented that she had a "pending" lawsuit against Wells Fargo
10 in state court for "Wrongful Foreclosure." The chapter 7 trustee
11 filed his Report of No Distribution on March 3, 2010. On
12 April 22, 2010, after the state court issued the Writ of
13 Possession, Nyamekye filed, inter alia, a second amended Schedule
14 A and a first amended Schedule D, this time listing the Property
15 and Wells Fargo as the secured creditor. Nyamekye received her
16 discharge on April 29, 2010. The First Bankruptcy was closed on
17 June 11, 2010.

18 **C. Events During The Second Bankruptcy.**

19 On May 4, 2010, just two days before the scheduled lockout,
20 two creditors filed an involuntary chapter 7 petition against
21 Nyamekye, commencing Case No. 10-27592 ("Second Bankruptcy").
22

23
24 ⁵ In connection with Wells Fargo's Unlawful Detainer action,
25 Nyamekye filed in state court a motion to transfer or consolidate
26 that case with an action she filed against Wells Fargo - Case No.
27 BC432882. See Unlawful Detainer judgment. Nyamekye confirmed at
28 oral argument that in Case No. BC432882 she is suing Wells Fargo
over a mortgage refinancing issue. In the Unlawful Detainer
judgment, the state court determined that Nyamekye's evidence of
fraud or conversion by Wells Fargo in Case No. BC432882 was "so
weak as not to be credible," and thus her motion to transfer was
denied.

1 On May 13, 2010, Wells Fargo filed a motion for relief from
2 stay under sections 362(d)(1) and 362(d)(2)(A) and (B), asserting
3 that, prepetition, it had acquired title to the Property by
4 foreclosure, that an Unlawful Detainer judgment had also been
5 entered in its favor, and that Nyamekye had no equity in the
6 Property and that it was not necessary to an effective
7 reorganization. Alternatively, Wells Fargo asked for an order
8 confirming that no automatic stay was in effect. This time,
9 Wells Fargo requested stay relief so it could enforce its Writ of
10 Possession. Nyamekye opposed Wells Fargo's motion, contending
11 (without supporting evidence) that Wells Fargo lacked standing to
12 foreclose on the Property because it failed to produce the note,
13 a different defense than she asserted in her First Bankruptcy.
14 Nyamekye requested that the stay be continued until Wells Fargo
15 demonstrated it had standing to foreclose.

16 The bankruptcy court held a hearing on Wells Fargo's motion
17 on June 8, 2010. We have no copy of the transcript and no
18 minutes of the hearing are on the docket. The bankruptcy court
19 entered an order granting Wells Fargo's motion under sections
20 362(d)(1) and (d)(2) on June 16, 2010 ("Stay Relief Order").
21 Nyamekye appealed.

22 II. JURISDICTION

23 The bankruptcy court had jurisdiction under 28 U.S.C.
24 §§ 1334 and 157(b)(2)(G). An order granting or denying a motion
25 for relief from the automatic stay is a final, appealable order.
26 Centofante v. CBJ Dev., Inc. (In re CBJ Dev., Inc.), 202 B.R.
27 467, 469 (9th Cir. BAP 1996). Nyamekye's premature Notice of
28 Appeal filed on June 10, 2010, was deemed timely once the

1 bankruptcy court entered the Stay Relief Order on June 16, 2010.
2 Rule 8002(a).

3 At oral argument, counsel for Wells Fargo informed the Panel
4 that the Property has since been sold to a third party.⁶ The
5 sale occurred on December 17, 2010, while this appeal was
6 pending. We lack jurisdiction over appeals that are moot. Baker
7 & Drake, Inc. v. Pub. Serv. Comm'n of Nev. (In re Baker & Drake,
8 Inc.), 35 F.3d 1348, 1351 (9th Cir. 1994). Bankruptcy appeals
9 become moot when events occur that make it impossible for the
10 appellate court to fashion effective relief. Focus Media, Inc.
11 v. Nat'l Broad. Co. Inc. (In re Focus Media, Inc.), 378 F.3d 916,
12 922 (9th Cir. 2004). "The classic example of mootness in the
13 bankruptcy context is a case in which the debtor has failed to
14 seek a stay of foreclosure and the debtor's property has been
15 sold. The transfer to a third party precludes meaningful
16 relief." Baker & Drake, Inc., 35 F.3d at 1351. The nonjudicial
17 foreclosure occurred prior to Nyamekye's First Bankruptcy. She
18 never sought an injunction in state court to prevent the sale.⁷
19 Nyamekye also never sought a stay of, or appealed, the Unlawful
20 Detainer judgment or the Writ of Possession. Now, according to
21 Wells Fargo, the Property has been sold in good faith, at arms-

22 _____
23 ⁶ Counsel for Wells Fargo contacted our clerk of court on
24 December 28, 2010, prior to oral argument, to inform her that the
25 Property had been sold on December 17, 2010, and that he would be
filing documentation to that effect. As explained below, he did
not file the promised documents.

26 ⁷ Because the foreclosure sale was nonjudicial, Nyamekye
27 retained no post-sale redemption rights in the Property under
28 California law. Vista Del Mar Assocs., Inc. v. W. Coast Land
Fund (In re Vista Del Mar Assocs., Inc.), 181 B.R. 422, 425
(9th Cir. BAP 1995).

1 length, to an independent third party. Accordingly, we lack
2 jurisdiction over this moot appeal. Nonetheless, counsel for
3 Wells Fargo did not, as he promised our clerk of court on
4 December 28, 2010, file the documentation confirming the
5 subsequent sale of the Property. Therefore, we alternatively
6 assume we have jurisdiction over this appeal under 28 U.S.C.
7 § 158 and provide our decision accordingly. We AFFIRM.

8 **III. ISSUE**

9 Did the bankruptcy court abuse its discretion in granting
10 relief from stay to Wells Fargo?

11 **IV. STANDARD OF REVIEW**

12 We review the bankruptcy court's decision to grant relief
13 from the automatic stay for an abuse of discretion. Kronemeyer
14 v. Am. Contractors Indem. Co. (In re Kronemeyer), 405 B.R. 915,
15 918 (9th Cir. BAP 2009). In applying an abuse of discretion
16 test, we first determine de novo whether the bankruptcy court
17 identified the correct legal rule to apply to the relief
18 requested. United States v. Hinkson, 585 F.3d 1247, 1262
19 (9th Cir. 2009). If it did, we then determine whether its
20 "application of the correct legal standard [to the facts] was
21 (1) illogical, (2) implausible, or (3) without support in
22 inferences that may be drawn from the facts in the record." Id.
23 (internal quotation marks omitted). If the bankruptcy court did
24 not identify the correct legal rule, or its application of the
25 correct legal standard to the facts was illogical, implausible,
26 or without support in inferences that may be drawn from the facts
27 in the record, then the bankruptcy court has abused its
28 discretion. Id.

1
2 **V. DISCUSSION**

3 In short, Nyamekye's opening brief does not address the
4 issue on appeal - how the bankruptcy court abused its discretion
5 in granting Wells Fargo relief from stay. Rather, she challenges
6 the propriety of the foreclosure sale that occurred before she
7 filed her First Bankruptcy. The crux of Nyamekye's brief is that
8 Wells Fargo lacked standing at the time of the foreclosure sale,
9 and therefore she is the owner of record on the Property, not
10 Wells Fargo. Wells Fargo contends that Nyamekye raised none of
11 the foreclosure issues before the bankruptcy court. Counsel for
12 Wells Fargo also indicated at oral argument, and Nyamekye
13 confirmed, that the state court considered, and apparently
14 rejected, her allegations of wrongful foreclosure during the
15 trial for Unlawful Detainer. We have no findings from the state
16 court on this matter.

17 In any event, Nyamekye failed to comply with our August 25,
18 2010 order to file and serve the June 8, 2010 transcript. At the
19 June 8 hearing, the bankruptcy court announced its decision in
20 favor of Wells Fargo and made its oral findings and conclusions
21 on the Stay Relief Order. The bankruptcy court's oral findings
22 unambiguously qualify as findings of fact and conclusions of law
23 within the meaning of Rule 8006. McCarthy v. Prince (In re
24 McCarthy), 230 B.R. 414, 417 (9th Cir. BAP 1999). They are the
25 findings that are required under Fed. R. Civ. P. 52(a), which
26 applies in contested matters by way of Rules 9014 and 7052. Id.
27 A motion for relief from the automatic stay is a contested matter
28 governed by Rule 9014. See Rule 4001(a)(1).

As appellant, Nyamekye has the responsibility to provide an

1 adequate record on appeal. Kritt v. Kritt (In re Kritt),
2 190 B.R. 382, 387 (9th Cir. BAP 1995). Without any findings in
3 the record, we cannot properly review the bankruptcy court's
4 decision to determine whether it abused its discretion in
5 granting Wells Fargo relief. Under such circumstances, we are
6 entitled to assume that nothing exists in the transcript that
7 will help Nyamekye's position on her appeal. Gionis v. Wayne (In
8 re Gionis), 170 B.R. 675, 680-81 (9th Cir. BAP 1994). Without
9 the necessary transcript, we are also entitled to dismiss her
10 appeal. Syncom Capital Corp. v. Wade, 924 F.2d 167, 169 (9th
11 Cir. 1991).

12 Here, we will exercise our discretion to examine what small
13 record exists - the Stay Relief Order, the moving papers
14 submitted by Wells Fargo, and what Nyamekye submitted in her
15 opposition. In reviewing the record, "we look for any plausible
16 basis upon which the bankruptcy court might have exercised its
17 discretion to do what it did. If we find any such basis, then we
18 must affirm." McCarthy, 230 B.R. at 417.

19 The Stay Relief Order granted Wells Fargo relief from stay
20 under sections 362(d)(1) and (d)(2). Those sections provide:

21 (d) On request of a party in interest and after notice
22 and a hearing, the court shall grant relief from the stay
23 provided under subsection (a) of this section, such as by
terminating, annulling, modifying, or conditioning such
stay -

24 (1) for cause, including the lack of adequate
protection of an interest in property of such party
in interest;

25 (2) with respect to a stay of an act against
property under subsection (a) of this section, if -

26 (A) the debtor does not have an equity in such
property; and

27 (B) such property is not necessary to an
effective reorganization[.] (emphasis added).

1 Bankruptcy courts must look to state law to determine
2 whether and to what extent the debtor has any legal or equitable
3 interests in property as of the commencement of the case. Butner
4 v. United States, 440 U.S. 48, 54-55 (1979). Under California
5 law, a trustee's sale is deemed final upon the acceptance of the
6 last and highest bid. CAL. CIV. CODE § 2924h(c). The successful
7 bidder "at a nonjudicial foreclosure sale receives title under a
8 trustee's deed free and clear of any right, title or interest of
9 the trustor." Wells Fargo Bank v. Neilsen, 100 Cal. Rptr. 3d
10 547, 554 (Cal. Ct. App. 2009).

11 Here, the bankruptcy court had uncontroverted evidence that
12 Wells Fargo was the successful bidder at a nonjudicial
13 foreclosure sale of the Property held on November 25, 2009, and
14 that Wells Fargo recorded its Trustee's Deed on December 4, 2009,
15 all of which occurred prior to Nyamekye's First Bankruptcy.
16 Nyamekye even conceded this fact in her opposition to Wells
17 Fargo's motion for relief from stay in her First Bankruptcy. As
18 such, under California law, title to the Property passed to Wells
19 Fargo free and clear of any right, title or interest of
20 Nyamekye's about three weeks before she filed her First
21 Bankruptcy, and almost five months before the involuntary
22 petition was filed against her. The evidence also showed that
23 Wells Fargo obtained a judgment against Nyamekye for Unlawful
24 Detainer. No evidence exists that Nyamekye sought a stay of, or
25 appealed, that judgment. Further, the state court had issued a
26 Writ of Possession ordering Nyamekye and all other occupants to
27 vacate the Property. Therefore, at the time Wells Fargo filed
28 its motion, neither Nyamekye nor her estate had any ownership

1 interest or right in the Property. This clearly provided "cause"
2 for the bankruptcy court to grant Wells Fargo's motion under
3 section 362(d)(1):

4 Prepetition loss of an ownership interest in property
5 constitutes cause for relief from stay. Where the debtor
6 (or the estate) no longer has a right to the property,
7 there is no reason not to allow the creditor to repossess
8 because filing a bankruptcy petition after loss of
9 ownership cannot reinstate the debtor's title.

10 Kathleen R. March and Alan M. Ahart, CALIFORNIA PRACTICE GUIDE:
11 BANKRUPTCY ¶ 8:1195-96 (2009). Moreover:

12 Where a real property nonjudicial foreclosure was
13 completed and the deed recorded prepetition, the debtor
14 has neither legal nor equitable title to the property at
15 the time the bankruptcy petition is filed. Although the
16 debtor may still be in possession of the premises, his or
17 her status is essentially that of a "squatter." The
18 mortgagee (or purchaser at the foreclosure sale) is
19 entitled to the property and thus relief from the stay
20 should be granted.

21 Id. at ¶ 8:1196 (emphasis in original).

22 Nothing in the bankruptcy court's Stay Relief Order is
23 illogical, implausible, or without support in inferences that may
24 be drawn from the facts in the record. Accordingly, we conclude
25 that the bankruptcy court did not abuse its discretion when it
26 granted Wells Fargo's motion for relief from stay to proceed with
27 enforcement of its Writ of Possession against Nyamekye.

28 VI. CONCLUSION

Based on the foregoing reasons, we AFFIRM.⁸

⁸ Because the bankruptcy court had cause to grant Wells Fargo's motion for relief from stay under section 362(d)(1), we need not address its decision also to grant the motion under section 362(d)(2).