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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. CC-13-1086-DPaKi
)	
MELISSA RODRIGUEZ LIRA,)	Bk. No. 12-35965-DS
)	
Debtor.)	
)	
MELISSA RODRIGUEZ LIRA,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM ¹
)	
BAYVIEW LOAN SERVICING, LLC,)	
)	
Appellee.)	
)	

Submitted Without Oral Argument on March 21, 2014²

Filed - April 23, 2014

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

Honorable Deborah J. Saltzman, Bankruptcy Judge, Presiding

Appearances: Appellant Melissa Rodriguez Lira pro se on brief;
Eric D. Houser and Sara Firoozeh of Houser &
Allison, APC on brief for Appellee Bayview Loan
Servicing, LLC.

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

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² By order entered on March 10, 2014, this appeal was deemed suitable for submission without oral argument. See Fed. R. Bankr. P. 8012 and Ninth Circuit BAP Rule 8012-1.

1 In this appeal, we are asked to consider the implications
2 arising when a party (1) fails to make a timely response to a
3 pleading and (2) fails to raise an issue before the bankruptcy
4 court. Here, a chapter 7³ debtor failed timely to respond to a
5 motion for relief from the automatic stay. Although debtor
6 asserts on appeal that she was precluded from filing a timely
7 response because service of the motion had been improper, i.e.,
8 filed too late for her to comply with the deadline for the
9 response set by the bankruptcy court's local rules, she never
10 raised that concern before the bankruptcy court. We AFFIRM.

11 I. FACTUAL BACKGROUND

12 On July 27, 2007, Francisco Gonzalez obtained a loan from
13 Bayview Loan Servicing, LLC ("Bayview"),⁴ secured by a deed of
14 trust on commercial real property ("Property") in San Diego,
15 California. Melissa Rodriguez Lira asserts that she loaned
16 Mr. Gonzalez, her cousin, \$50,000 ("Family Loan") on January 15,
17 2008. The Family Loan was to be repaid within one year; if not
18 repaid during that time Mr. Gonzalez was to "secure" the Family
19 Loan by adding Ms. Lira to the title of the Property as a joint
20

21 ³ 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 local rules of the Bankruptcy
25 Court for the Central District of California are referred to as
"LBRs." The Federal Rules of Civil Procedure are referred to as
"Civil Rules."

26 ⁴ The loan actually was extended by Bayview Financial
27 Small Business Funding, LLC, which assigned the Trust Deed to
28 Bayview Loan Servicing, LLC by Corporate Assignment recorded
December 11, 2007 at the County Record's Office.

1 tenant.

2 Mr. Gonzalez filed a chapter 7 petition ("Gonzalez
3 Bankruptcy Case") on June 18, 2012, including the Property in his
4 schedules. Bayview obtained an order in the Gonzalez Bankruptcy
5 Case granting relief from the automatic stay as to the Property
6 on October 18, 2012.⁵ It appears that Bayview thereafter
7 scheduled a foreclosure sale of the Property.

8 On November 19, 2012, Mr. Gonzalez recorded a Quitclaim
9 Deed, through which he transferred his interest in the Property
10 to himself and Ms. Rodriguez. The Quitclaim Deed states that an
11 unspecified valuable consideration was given for the transfer.⁶

12 Ms. Lira thereafter filed a chapter 7 petition ("Lira
13 Bankruptcy Case") on November 21, 2012. Ms. Lira did not include
14 the Property in the schedules she filed at the time she commenced
15 the Lira Bankruptcy Case.

16 On November 21, 2012, Bayview was informed by a facsimile
17 transmission it received, apparently from Mr. Gonzalez and
18 Ms. Lira, that the Lira Bankruptcy Case had been filed and that
19 it potentially impacted the scheduled foreclosure of the

20
21 ⁵ We exercised our discretion to review the bankruptcy
22 court's electronic docket for Mr. Gonzalez's bankruptcy case.
23 See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.),
24 887 F.2d 955, 957-58 (9th Cir. 1989); Atwood v. Chase Manhattan
Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP
2003).

25 ⁶ The Quitclaim Deed contains conflicting statements
26 regarding the consideration given to support it. The boilerplate
27 language of the Quitclaim Deed form utilized states "FOR A
28 VALUABLE CONSIDERATION, receipt of which is hereby acknowledged
... ." However, the words "no consideration" and "no cash" are
handwritten on the form.

1 Property. The facsimile transmission included a copy of the
2 petition in the Lira Bankruptcy Case. The facsimile cover sheet
3 contained the following statements: "Stop Trustee Sale on
4 Trustee #CA-BUS-12012114. Attached is Chapter 7 Bk to stop sale
5 on property" The statement included the address of the
6 Property.

7 On January 9, 2013, Bayview filed a motion ("Motion") in the
8 Lira Bankruptcy Case seeking relief from the automatic stay
9 pursuant to § 362(d)(1) for "cause," with that cause being the
10 filing of the Lira Bankruptcy Case in bad faith to delay, hinder,
11 or defraud Bayview. The Motion also sought relief from the
12 automatic stay pursuant to § 362(d)(4), alleging that the Lira
13 Bankruptcy Case was part of a scheme to delay, hinder or defraud
14 creditors that involved the transfer of all or part ownership of
15 the Property without the consent of Bayview or court approval.
16 In addition to relief from the automatic stay, the Motion sought
17 both a waiver of the 14-day stay described by Rule 4001(a)(3) and
18 "extraordinary relief" in the form of an in rem order as to the
19 Property. The Motion included a notice ("Notice") that a hearing
20 on the Motion would be held on January 30, 2013 ("RFS Hearing").
21 The Notice advised Ms. Lira that if she intended to oppose the
22 Motion, (1) she had until 14 days before the RFS Hearing to file
23 a written response, and (2) she was required to appear at the RFS
24 Hearing.

25 On January 24, 2013, Ms. Lira filed amended schedules to add
26 Bayview as a creditor in her case. She did not file an amended
27 Schedule A to add the Property as a real property asset in which
28 she held an interest. On the same date, Ms. Lira filed her

1 response to the Motion, which she supported by a declaration from
2 Mr. Gonzalez ("Gonzalez Declaration") and her own declaration
3 ("Lira Declaration"). In paragraph 6 of the Lira Declaration,
4 Ms. Lira admitted that she was not added to the title of the
5 Property in 2006 as agreed; in his declaration, Mr. Gonzalez
6 stated the Family Loan was entered into in 2006, that he was to
7 repay the Family Loan within one year, and that he had agreed to
8 add Ms. Lira to the title.⁷ Mr. Gonzalez further averred,
9 somewhat obliquely, that Bayview did consent to the transfer to
10 Ms. Lira of an interest in the Property.

11 On January 31, 2013, the bankruptcy court entered on the
12 docket its ruling with respect to the Motion. That ruling reads:

13 This motion was set for hearing in accordance with
14 Local Bankruptcy Rule (LBR) 9013-1(d).^[8] The failure
15 of the debtor, the trustee, and any other party to file
16 written opposition at least 14 days prior to the

17 ⁷ Both declarations refer to the year 2006 as the time at
18 which the Family Loan was entered into, not 2008 as Ms. Lira
19 states in her Opening Brief on appeal.

20 ⁸ LBR 9013-1(d) provides in relevant part:

21 **Time Limits for Service and Filing of Motions.**

22 (1) Persons or Entities to be Served with the Notice and Motion.
23 . . . [A] motion and notice thereof must be served upon the
24 adverse party (by serving the adverse party's attorney of record,
25 if any; or if the adverse party is the debtor, by serving the
debtor and the debtor's attorney, if any; or the adverse party,
if there is no attorney of record).

26 (2) Deadline for Filing and Serving of Notice and/or Notice and
27 Motion. The notice of motion and motion must be filed and served
28 not later than 21 days before the hearing date designated in the
notice

1 hearing pursuant to LBR 9013-1(f)^[9] is deemed consent
2 to the granting of the motion. LBR 9013-1(h);^[10]
3 Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995).
4 Further, because the court is granting the relief that
5 the moving party requested and for which a prima facie
6 case has been established, an actual hearing is not
7 necessary. Boone v. Burk (In re Eliapo), 468 F.3d 592,
8 602 (9th Cir. 2006). Their defaults are entered and
9 the court will resolve the matter without oral
10 argument. LBR 9013-1(j)(3).^[11] NO APPEARANCE IS
11 NECESSARY. GRANT under 11 U.S.C. § 362(d)(1) and
12 (d)(4). GRANT as binding despite conversion. GRANT
13 waiver of FRBP 4001(a)(3) stay. GRANT extraordinary
14 relief. MOVANT TO LODGE ORDER WITHIN 7 DAYS. BY VIRTUE
15 OF THE ENTRY OF THIS ORDER, THE BORROWER'S(S')
16 BANKRUPTCY PROCEEDINGS HAVE BEEN FINALIZED WITH REGARD
17 TO THE SUBJECT PROPERTY WITHIN THE MEANING OF
18 CALIFORNIA CIVIL CODE SECTION 2923.5(h)(3).

19 The order granting the Motion was entered February 8, 2013,
20
21

22 ⁹ LBR 9013-1(f) provides in relevant part:

23 **Opposition and Response to Motions.** . . . [E]ach interested party
24 opposing or responding to the motion must file and serve the
25 response (Response) on the moving party and the United States
26 trustee not later than 14 days before the date designated for
27 hearing. . . .

28 ¹⁰ LBR 9013-1(h) provides:

29 **Failure to File Required Documents.** If a party does not timely
30 file and serve documents, the court may deem this to be consent
31 to the granting or denial of the motion, as the case may be.

32 ¹¹ LBR 9013-1(j)(3) provides:

33 **Appearance at Hearing.**

34 . . .
35 (3) Oral Argument. If the court decides in its discretion to
36 dispense with oral argument on any motion, the clerk will attempt
37 to give counsel and unrepresented parties notice of the court's
38 intention to do so at least 24 hours prior to the hearing date
and time. The court may also dispense with oral argument and
waive appearance by tentative or final ruling posted on the
court's web site the day before the hearing.

1 and this appeal followed.^{12, 13}

2 **II. JURISDICTION**

3 The bankruptcy court had jurisdiction under 28 U.S.C.
4 §§ 1334 and 157(b) (2) (G). We have jurisdiction under 28 U.S.C.
5 § 158.

6 **III. ISSUE**

7 Whether the bankruptcy court abused its discretion when it
8 granted relief from the automatic stay, including "extraordinary
9 relief" in the form of an in rem order, to Bayview.

10 **IV. STANDARDS OF REVIEW**

11 We review the bankruptcy court's application of procedural
12 rules and whether a particular procedure comports with due
13 process de novo. All Points Cap. Corp. v. Meyer (In re Meyer),
14 373 B.R. 84, 87 (9th Cir. BAP 2007); Beneficial Cal. Inc. v.
15 Villar (In re Villar), 317 B.R. 88, 92 (9th Cir. BAP 2004); see
16 also Berry v. U.S. Trustee (In re Sustaita), 438 B.R. 198, 207
17 (9th Cir. BAP 2010) (whether adequate due process notice was
18 given in any particular instance is a mixed question of law and
19 fact reviewed de novo) (citing Demos v. Brown (In re Graves),
20 279 B.R. 266, 270 (9th Cir. BAP 2002)).

21 De novo review requires that we consider a matter anew, as
22 if no decision had been made previously. United States v.
23 Silverman, 861 F.2d 571, 576 (9th Cir.1988); B-Real, LLC v.

24
25 ¹² The bankruptcy court denied Ms. Lira's motion for a
26 stay pending appeal.

27 ¹³ During his bankruptcy case, Mr. Gonzalez initiated
28 attempts to obtain a loan modification from Bayview, which
resulted in a Stipulated Agreement dated March 1, 2013.

1 Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008).

2 We review the order of a bankruptcy court granting relief
3 from the automatic stay for an abuse of discretion. Kronemeyer
4 v. Am. Contractors Indem. Co., 405 B.R. 915, 918 (9th Cir. BAP
5 2009).

6 A bankruptcy court abuses its discretion if it applies an
7 incorrect legal standard or misapplies the correct legal
8 standard, or its factual findings are illogical, implausible or
9 without support from evidence in the record. TrafficSchool.com
10 v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

11 We may affirm the decision of the bankruptcy court on any
12 basis supported by the record. Shanks v. Dressel, 540 F.3d 1082,
13 1086 (9th Cir. 2008).

14 **V. DISCUSSION**

15 A. Ms. Lira Waived Her Right to Assert On Appeal That the
16 Bankruptcy Court Abused Its Discretion In Determining That
the Response Was Untimely.

17 It is a fundamental precept of appellate law that this Panel
18 generally will not review an issue that was not presented to the
19 bankruptcy court in the first instance. Francis v. Wallace
20 (In re Francis), 505 B.R. 914, 920 (9th Cir. BAP 2014), citing
21 Law Offices of Neil Vincent Wake v. Sedona Inst. (In re Sedona
22 Inst.), 220 B.R. 74, 76 (9th Cir. BAP 1998) (issues not raised at
23 the trial court ordinarily will not be considered for the first
24 time on appeal).

25 On appeal, Ms. Lira asserts for the first time that Bayview
26 served the Motion on her on January 18, 2013, making it
27 impossible for her to comply with LBR 9013-1 by filing the
28 Response at least 14 days prior to the RFS Hearing. Ms. Lira

1 includes in her excerpts of record a copy of an envelope from
2 Bayview's counsel to her which was postmarked January 18, 2013.
3 There is nothing in the record to show that Ms. Lira ever brought
4 to the bankruptcy court's attention her assertion that she was
5 not timely served with the Motion. The timeliness of service is
6 a question of fact for a trial court. As an appellate body, we
7 will not engage in fact finding.

8 Because Ms. Lira never presented the issue of the timeliness
9 of the service of the Motion to the bankruptcy court, she has
10 waived that issue for purposes of this appeal. We therefore do
11 not consider her issue that the bankruptcy court abused its
12 discretion when it refused to consider her untimely response to
13 the Motion.

14 B. The Bankruptcy Court Did Not Abuse Its Discretion When It
15 Failed to Consider Ms. Lira's Alleged Equity in the
16 Property.

17 As her second issue, Ms. Lira asserts in her Opening Brief
18 on Appeal that the bankruptcy court abused its discretion when it
19 did not take into consideration that there was equity in the
20 Property over and above Bayview's security interest. Ms. Lira
21 cites to the legal standard set forth in § 362(d)(2):

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

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

- 29 (A) the debtor does not have an equity in such
30 property; and
- 31 (B) such property is not necessary to an effective
32 reorganization.

33 The problem for Ms. Lira on this issue is that the Motion did not

1 seek relief pursuant to § 362(d)(2); nor did the Order grant
2 relief pursuant to § 362(d)(2). Neither the existence of equity
3 nor the necessity of the property to an effective reorganization
4 ever was presented as an issue for decision to the bankruptcy
5 court in the first instance. The bankruptcy court cannot have
6 abused its discretion on an issue it did not, and was not
7 required to, decide.

8 C. The Bankruptcy Court Did Not Abuse Its Discretion In
9 Determining, Without an Evidentiary Hearing, that the Motion
10 Presented a Prima Facie Case to Support Both Relief From
11 Stay and "Extraordinary Relief."

12 Ms. Lira next asserts that the bankruptcy court abused its
13 discretion when it granted Bayview relief from the automatic stay
14 pursuant to § 362(d)(4), and further granted "Extraordinary
15 Relief" in the form of an in rem order against the Property,
16 without conducting an evidentiary hearing. This issue also turns
17 on the timing of Ms. Lira's response and her failure to raise an
18 issue of untimely service at the bankruptcy court level.

19 Ms. Lira asserts that, pursuant to § 362(g), the bankruptcy
20 court was required to conduct an evidentiary hearing and allow
21 for presentation of evidence on both sides of an issue.

22 Section 362(g) provides:

23 In any hearing under subsection (d) or (e) of this
24 section concerning relief from the stay of any act
25 under subsection (a) of this section --
26 (1) the party requesting such relief has the burden of
27 proof on the issue of the debtor's equity in the
28 property; and
29 (2) the party opposing such relief has the burden on
30 all other issues.

31 We already have explained that equity in the property was not at
32 issue. Therefore, the burden of proof on the issues raised by

1 the motion was on Ms. Lira as the party opposing the relief.

2 Ms. Lira is correct that although couched in terms of
3 burdens of "proof," § 362(g) actually establishes the ultimate
4 burdens of "persuasion," where the burden of going forward with
5 the evidence initially is on the party seeking relief in the
6 first instance, in this case, Bayview. However, Ms. Lira appears
7 to contend that, until evidence has been presented from both
8 parties, the bankruptcy court could not, without committing
9 error, determine that Ms. Lira had failed to meet the burden
10 ascribed to her pursuant to § 362(g) (2).

11 Her position ignores the impact of § 102(1)(B)(i), which
12 provides:

13 In this title --
14 (1) "after notice and a hearing", or a similar phrase -
15 -
16 (A) means after such notice as is appropriate in the
17 particular circumstances, and such opportunity for
18 hearing as is appropriate in the particular
19 circumstances, but
20 (B) authorizes an act without an actual hearing if such
21 notice is given properly and if --
22 (i) such a hearing is not requested timely by a party
23 in interest

19 Because the bankruptcy court was not provided with an
20 opportunity to determine otherwise, any issue about the
21 timeliness of service for purposes of § 102(1)(B) is not before
22 us. Thus, the only question we must answer is whether Ms. Lira
23 timely requested a hearing.

24 LBR 9013-1(d) (2) required Bayview to file and serve both the
25 Notice and the Motion not later than 21 days before the hearing
26 date designated in the notice. The Notice designated the RFS
27 Hearing Date as January 30, 2013, and the certificate of service
28 states that the Notice and the Motion were served on January 9,

1 2013. January 9, 2013, was 21 days before the RFS Hearing Date.

2 The record before us is clear that Ms. Lira did not request
3 a hearing more than 14 days before the RFS Hearing, where her
4 response was filed on January 24, 2013. The Ninth Circuit has
5 explained the impact of a failure to timely request a hearing.
6 "Section 102(1)(B)(i) authorizes the bankruptcy court to 'act
7 without an actual hearing' after appropriate notice if 'such
8 hearing is not requested timely by a party in interest.'" Boone
9 v. Burk (In re Eliapo), 468 F.3d 592, 602 (9th Cir. 2006).

10 The bankruptcy court determined that Bayview made a prima
11 facie case, and therefore met its burden of going forward with
12 the evidence. Reviewing the Motion and its attachments, we
13 agree. The burden then shifted to Ms. Lira to persuade the
14 bankruptcy court that, notwithstanding its prima facie case,
15 Bayview was not entitled to prevail. While it is true that the
16 bankruptcy court did not provide Ms. Lira with that opportunity
17 at a further hearing, it was not required to do so. Ms. Lira had
18 waived her right to present evidence when she failed to file a
19 timely response to the Motion.

20 On appeal, Ms. Lira contends that the prima facie case was
21 not met, because Bayview made false statements in support of its
22 Motion for relief from stay pursuant to § 362(d)(4). She also
23 appears to suggest that Bayview failed to make an initial showing
24 of "cause" under § 362(d)(1). The record refutes these
25 assertions.

26 The bankruptcy court did not abuse its discretion in failing
27 to hold an evidentiary hearing where Ms. Lira failed to timely
28 request such a hearing.

1 **VI. CONCLUSION**

2 The bankruptcy court did not abuse its discretion when it
3 declined to consider Ms. Lira's untimely response. The
4 bankruptcy court correctly determined that the Motion stated a
5 prima facie case. On that basis, there was no abuse of
6 discretion when the bankruptcy court granted the Motion.

7 We AFFIRM.
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