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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In re

REGINALD ESCOBAR SILVA
AND CARLITA MARIE SILVA,

Debtors.

CARLITA MARIE SILVA,

Appellant,

vs.

MBB PROPERTIES, LLC,

Appellee

Case No. 15-56123

MEMORANDUM OF POINTS
AND AUTHORITIES IN
OPPOSITION TO URGENT
MOTION SEEKING STAY
PENDING APPEAL AND WAIVER
OF BOND; CORPORATE
DISCLOSURE STATEMENT

On Appeal from Orders of the United
States District Court for the Central
District of California - The
Honorable André Birotte, Jr.
Case No. CV 15-02061-AB

Bk Case No. 9:10-bk-14135-PC

Adv. Proc. No. 9:15-ap-01014-PC

CORPORATE DISCLOSURE STATEMENT

Appellee MBB Properties, LLC, a nongovernmental corporate party,
provides the following statement to comply with the Federal Rule of Appellate
Procedure 26.1:

MBB Properties, LLC, has no parent corporation or publicly held
corporation that owns 10% or more of its shares.

Dated: October 21, 2015

GRIFFITH & THORNBURGH, LLP

By: /s/ Joseph M. Sholder
Joseph M. Sholder,
Attorneys for
MBB Properties, LLC

TABLE OF CONTENTS AND AUTHORITIES

A.	INTRODUCTION AND SUMMARY OF ARGUMENT	1
B.	FACTS.....	2
C.	ARGUMENT	3
1.	LIKELIHOOD OF SUCCESS ON THE MERITS	3
a.	Bollag’s Recordation of the Foreclosure Sale Deed was Exempt from the Automatic Stay under 11 U.S.C. sec. 362(b)(3)and 362(b)(24)	3
b.	Ms. Silva’s Contention that 11 U.S.C. sec. 549(c) Only Applies to Debtor-Initiated Transfers is Misleading and Irrelevant	5
2.	IRREPARABLE INJURY	7
3.	INJURY TO MBB, THE OWNER OF THE PROPERTY	8
4.	THE PUBLIC INTEREST.....	8
D.	CONCLUSION	8
	CERTIFICATE OF COMPLIANCE	10
	TABLE OF AUTHORITIES.....	ii

TABLE OF AUTHORITIES

Cases

<i>40235 Washington Street Corp. v. Lusardi</i> 329 F.3d 1076 (9th Cir. 2003)	5, 6, 7, 8
<i>Beame v. Friends of the Earth</i> . 434 U.S. 1310 (1977)	2
<i>Burkart v. Coleman (In re Tippet)</i> , 542 F.3d 684 (9th Cir. 2008)	5, 6
<i>Chua v. IB Property Holdings, LLC</i> , 2011 WL 3322884 (C.D.Ca. 2011)	7
<i>Hunt, Ortmann, Blasco, Palffy & Rossell, Inc. v. Jim L. Shetakis</i> <i>Distributing Co. (In re Jim L. Shetakis Distributing Co.)</i> 401 Fed.Appx. 249 (9th Cir. 2010)	6
<i>In re Mitchell</i> , 279 B.R. 839 (9th Cir. BAP 2002)	7
<i>In re Stork</i> , 212 B.R. 970 (Bankr.N.D. Cal. 1997)	4
<i>Lopez v. Heckler</i> , 713 F.2d 1432 (9th Cir. 1983)	2
<i>Niken v. Holder</i> , 556 U.S. 418 (2009)	3
<i>Pimentel v. Deutsche Bank National Trust Co.</i> 2009 WL 3398789 (S.D.Ca. 2009)	7
<i>Schwartz v. United States (In re Schwartz)</i> , 954 F.2d 569 (9th Cir. 1992)	6, 7
<i>Sencion v. Saxon Mortgage Services, LLC</i> , 2011 WL 1364007 (N.D. ca. 2011)	7

Statutes

11 U.S.C. §362(a)	1
11 U.S.C. §362(b)(3)	1, 3, 5, 6, 7
11 U.S.C. §362(b)(24)	1, 3, 5, 6, 7
11 U.S.C. §544(a)	3, 5, 6
11 U.S.C. §546(b)	3, 5
11 U.S.C. §549(c)	1, 5, 6

1 **A. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Ms. Silva lost her property at a foreclosure sale over five years ago and a
3 year before she filed her bankruptcy case. Michael Bollag and the Bollag Family
4 Trust (collectively, “Bollag”) bought the property at that foreclosure sale and
5 transferred it to MBB Properties. MBB has been trying to evict Ms. Silva and
6 take possession of its property since March 10, 2015,¹ only to be stymied by Ms.
7 Silva’s delaying tactics, which include four failed stay-pending-appeal motions in
8 the federal and state courts.²

9 Ms. Silva’s argument that she is likely to prevail on the merits is based
10 upon Bollag’s recording its trustee’s foreclosure deed after Ms. Silva filed her
11 bankruptcy case. She contends that the post-bankruptcy recording violated the
12 automatic stay. See 11 U.S.C. § 362(a). That argument was rejected by the
13 bankruptcy and district courts, which held that Bollag’s recording of the deed was
14 exempted from the automatic stay by sections 362(b)(3) and 362(b)(24). In a
15 complicated and convoluted statutory-construction argument, Ms. Silva argues
16 that neither of these exceptions applies because they contain as an element the
17 standards of 11 U.S.C. § 549(c), which doesn’t apply to automatic stay violations.
18
19

20 ¹ That is when the bankruptcy court granted relief from the automatic stay. See
21 Silva’s Excerpts of Record (“ER”), Vol. 1, pages 56-58.

22 ² See ER Vol. 1 page 43 (bankruptcy court order denying motion for stay
23 pending appeal); ER Vol 1 page 23 (district court order denying motion for stay
24 pending appeal); ER Vol. 1 page 12 (district court order denying motion for
25 reconsideration of order denying motion for stay pending appeal); and Ms. Silva’s
26 Exhibit F at pages 41-42 (California Superior Court Appellate Department order
27 denying writ of supersedeas).
28

1 But her interpretation of these statutes can't be correct because it would render
2 both stay exemption sections a nullity.

3 Finally, Ms. Silva's argument that she will suffer irreparable harm if she is
4 not granted a stay also fails. Her claim that this an urgent matter is belied by the
5 fact that she waited more than three months after filing her notice of appeal in this
6 Court to seek a stay. See *Beame v. Friends of the Earth*, 434 U.S. 1310, 1312
7 (1977); *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). Her claim that
8 she will lose *her* property if no stay is granted is false because she hasn't owned
9 the property for more than five years since she lost it to foreclosure. She is
10 simply trying to avoid being evicted from property she doesn't own. Numerous
11 district courts have held that parties like Ms. Silva, who have lost their homes to
12 foreclosure and who are seeking stays to prevent their evictions, do not suffer
13 irreparable harm. Also, Ms. Silva has an adequate remedy at law to challenge the
14 foreclosure issues she is raising in this court: her fraud claim against Bollag and
15 MBB, as to which the bankruptcy court granted Bollag and MBB summary
16 judgment and which is subject to Ms. Silva's appeal pending in the district court.³

17 For these reasons, Ms. Silva cannot establish that she has a likelihood of
18 success on the merits or that she will suffer irreparable harm and her motion for a
19 stay should be denied.

20 **B. FACTS**

21 Ms. Silva's motion mainly accurately describes the background of this
22 case. The key facts for the purpose of this motion are (1) Bollag bought Ms.
23 Silva's property at a foreclosure sale held on August 10, 2009; (2) about a year
24 later, on August 10, 2010, Ms. Silva filed a chapter 13 bankruptcy case but she
25 didn't list Bollag or MBB Properties as creditors and didn't record a copy of her
26

27 ³ See Bollag's Exhibits 1 and 2.
28

1 bankruptcy petition; and (3) on October 16, 2014, without notice of the
 2 bankruptcy filing, Bollag recorded its foreclosure trustee's deed. It is that
 3 recording that Ms. Silva claims violated the automatic stay.⁴

4 **C. ARGUMENT**

5 To obtain a stay, Ms. Silva must satisfy four factors: “(1) whether the stay
 6 applicant has made a strong showing that [s]he is likely to succeed on the merits;
 7 (2) whether the applicant will be irreparably injured absent a stay; (3) whether
 8 issuance of the stay will substantially injure the other parties interested in the
 9 proceeding; and (4) where the public interest lies.” *Niken v. Holder*, 556 U.S.
 10 418, 433-34 (2009). Ms. Silva's motion fails to show a likelihood of success on
 11 the merits, and doesn't show irreparable harm, and fails to address the remaining
 12 factors.

13 **1. LIKELIHOOD OF SUCCESS ON THE MERITS.**

14 **a. Bollag's Recordation of the Foreclosure Sale Deed was** 15 **Exempt from the Automatic Stay under 11 U.S.C. §** 16 **362(b)(3) or § 362(b)(24).**

17 11 U.S.C. § 362(b)(3) is an exception to the automatic stay. It states, in
 18 pertinent part, that the filing of a bankruptcy petition does not operate as a stay
 19 “of any act to perfect . . . an interest in property to the extent that the trustee's —
 20 Ms. Silva, in this case — rights and powers are subject to such perfection under
 21 section 546(b).” 11 U.S.C. § 546(b) provides that Ms. Silva's “right to avoid a
 22 transfer pursuant to 11 U.S.C. §§ 544(a) or 549 is subject to any generally
 23 applicable law that permits perfection to relate back and to be effective against
 24 one who acquires rights in the property before the date of perfection.”

25 11 U.S.C. § 549(c) states, in pertinent part:

27 ⁴ See Ms. Silva's motion at pages 7, 9-12; ER Vol. 1, pages 25, 36-37 .
 28

1 The trustee may not avoid under [§ 549(a)] a transfer of an interest in
2 real property to a good faith purchaser without knowledge of the
3 commencement of the case and for present fair equivalent value
4 unless a copy or notice of the petition was filed, where a transfer of
5 an interest in such real property may be recorded to perfect such
6 transfer, before such transfer is so perfected that a bona fide
7 purchaser of such real property, against whom applicable law
8 permits such transfer to be perfected, could not acquire an interest
9 that is superior to such interest of such good faith purchaser.

10 Reading all of these sections together, under section 362(b)(3) a bona fide
11 purchaser of real property without notice of the bankruptcy filing can properly
12 record a trustee's deed after a bankruptcy case is filed and not violate the
13 automatic stay at any time after the foreclosure sale. See *In re Stork*, 212 B.R.
14 970, 971-72 (Bankr. N.D. Cal. 1997). Here, it is uncontested that Bollag paid
15 value — \$34,127.49 — for the Lompoc Property at a foreclosure sale by the
16 second trust deed holder.⁵ It is also uncontested that Ms. Silva did not record her
17 bankruptcy petition and that Bollag had no knowledge that she had filed
18 bankruptcy when it recorded the foreclosure trustee's deed on October 16, 2014.⁶
19 So, Bollag was protected by section 362(b)(3) when it recorded the trustee's deed
20 and it did not violate the automatic stay.

21 Like section 362(b)(3), section 362(b)(24) also refers to section 549.
22 Section 362(b)(24) exempts from the stay transfers that are “not avoidable under
23 section 544 and 549.” In this court, Ms. Silva hasn't claimed that Bollag's
24 recordation of the foreclosure deed was avoidable under 11 U.S.C. § 544. And

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26 ⁵ Ms. Silva's motion at pages 9-10.

27 ⁶ Ms. Silva's motion at pages 10-11
28

1 the district court correctly found that Bollag's post-bankruptcy recording of its
2 foreclosure deed could not have been avoided by a trustee pursuant to section 549
3 for the same reason that the bankruptcy court found the section 549 element
4 satisfied with respect to the section 362(b)(3) stay exception: Bollag had no
5 knowledge of Ms. Silva's bankruptcy when it recorded its foreclosure deed;
6 Bollag paid fair value for the foreclosure deed; and Ms. Silva failed to record a
7 notice of her bankruptcy case, which would have given Bollag notice of her
8 bankruptcy.⁷

9 **b. Ms. Silva's Contention that 11 U.S.C. § 549 (c) Only Applies**
10 **to Debtor-Initiated Transfers is Misleading and Irrelevant.**

11 Ms. Silva contends that Bollag's recordation of its foreclosure deed is not
12 protected by section 549(c) because that section only applies to debtor-initiated
13 transfers — those post-bankruptcy transfers where a debtor voluntarily transfers
14 her property to a creditor. That argument is misleading and irrelevant. Ms. Silva
15 is appealing from the bankruptcy court's relief from stay order and the district
16 court's opinion affirming that order. This implicates sections 362(b)(3) and
17 362(b)(24) — the applicable automatic stay exemptions — not section 549(c),
18 which doesn't directly apply to automatic stay proceedings, only actions by
19 trustee's to invalidate post-bankruptcy transfers.

20 The law in this circuit is that section 549(c) applies only to debtor-initiated
21 transfers. See *Burkart v. Coleman (In re Tippett)*, 542 F.3d 684, 691 (9th Cir.
22 2008); *40235 Washington Street Corp. v. Lusardi*, 329 F.3d 1076, 1081 (9th Cir.
23 2003) (“The purpose of section 549 . . . is to provide a just resolution when the
24 debtor himself initiates an unauthorized post-petition transfer.”). But Ms. Silva's
25 unstated leap of logic — that because sections 362(b)(3) and 362(b)(24) refer to
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27 ⁷ ER Vol. 1 pages 26, 36-37.
28

1 section 549(c), these automatic stay exceptions themselves only apply to debtor-
2 initiated transfers — is wrong and nonsensical.

3 Indeed the opposite is true: the stay exemption sections 362(b)(3) and
4 section 362(b)(24) apply only to creditor-initiated transfers — those transfers,
5 like Bollag’s, where the creditor takes an interest in a debtor’s property without
6 the debtor’s participation or concurrence — because only creditor-initiated
7 actions can violate the stay. See *In re Schwartz*, 954 F.2d at 573 (“Section 362’s
8 automatic stay does not apply to sales or transfers of property initiated by the
9 debtor.”). So, not surprisingly, the exemptions to the automatic stay in section
10 362(b), including sections 362(b)(3) and 362(b)(24), exist to shield creditor-
11 initiated actions that would otherwise violate the automatic stay. See 40235
12 *Washington Street Corp. v. Lusardi*, supra, 329 F.3d at 1081 (“The purpose of the
13 automatic stay is to protect debtors from their creditors while bankruptcy
14 proceedings are underway.”) If sections 362(b)(3) and 362(b)(24), by their
15 incorporation of the section 549(c) standards as one of their elements, apply only
16 to debtor-initiated transfers, then they exempt nothing because only creditor-
17 initiated transfers can violate the automatic stay. See *In re Schwartz*, supra, 954
18 F.2d at 573. Ms. Silva’s argument, therefore, would render sections 362(b)(3)
19 and 362(b)(24) meaningless.

20 Nor does it do any violence to the Bankruptcy Code if the provisions of
21 section 549(c) as incorporated in sections 362(b)(3) and 362(b)(24) are applied to
22 creditor-initiated actions. Because the automatic stay provisions in section 362
23 serve a different purpose than the unauthorized post-bankruptcy transfer
24 provisions in section 549, those provisions are applied differently. For example,
25 unauthorized post-bankruptcy transfers are only voidable, not void like transfers
26 in violation of the automatic stay because section 362 and 549 serve different
27 purposes. See *Hunt, Ortmann, Blasco, Palffy & Rossell, Inc. v. Jim L. Shetakis*
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1 *Distributing Co. (In re Jim L. Shetakis Distributing Co.)*, 401 Fed.Appx. 249, 251
2 (9th Cir. 2010).

3 Because this is an automatic stay case, not a case where Ms. Silva is trying
4 to avoid an unauthorized post-bankruptcy transfer, the cases cited by Ms. Silva
5 — *40235 Washington Street Corp. v. Lusardi*, supra and *In re Mitchell*, 279 B.R.
6 839 (9th Cir. BAP 2002) — are inapposite. *Lusardi* involved a post-bankruptcy
7 property sale that violated the automatic stay and did not involve section
8 362(b)(3), 362(b)(24) or any other section 362(b) stay exception. *Lusardi*, 329
9 F.3d at 1080 (noting that the creditor did not argue that any of the automatic stay
10 exceptions applied). *Mitchell* also involved a post-petition property sale in
11 violation of the automatic stay. 279 B.R. at 840-41. In *Mitchell*, the creditor did
12 argue that section 362(b)(3) exempted its post-bankruptcy recordation of the
13 trustee's deed, but the *Mitchell* court said it was unnecessary to address the
14 recordation argument because the foreclosure sale itself violated the automatic
15 stay and was void. 279 B.R. at 844.

16 In sum, Ms. Silva's latest argument also fails to meet the likelihood of
17 success on the merits test. Like the bankruptcy court and the district court, this
18 Court should also deny her a stay pending appeal.

19 **2. IRREPARABLE INJURY**

20 Ms. Silva's argument that she will be irreparably injured if she is evicted
21 from property she doesn't own is meritless. Federal district courts have repeatedly
22 held that a party who has lost her home to foreclosure cannot get an injunction
23 staying an eviction because she has adequate remedy at law: a damages claim.
24 See, e.g., *Sencion v. Saxon Mortgage Services, LLC*, 2011 WL 1364007 at *3
25 (N.D.Ca. 2011); *Chua v. IB Property Holdings, LLC*, 2011 WL 3322884 at *3
26 (C.D.Ca. 2011); *Pimentel v. Deutsche Bank National Trust Co.*, 2009 WL
27 3398789 at *3 (S.D.Ca. 2009).

1 Here, Ms. Silva has already asserted and continues to litigate her claim that
2 Bollag defrauded her. That damages claim is an adequate remedy at law.

3 **3. INJURY TO MBB, THE OWNER OF THE PROPERTY**

4 The bankruptcy court found that “MBB will suffer pending a final
5 judgment if it is stayed from exercising its rights with respect to the Subject
6 Property.”⁸ Silva does not rebut that finding and it is amply supported by the
7 record. MBB Properties owns the property Ms. Silva is living on and she hasn’t
8 owned it for over five years. MBB Properties has every right to lease or sell that
9 property but will not be able to do so if it is stayed pending the outcome of this
10 appeal.

11 **4. THE PUBLIC INTEREST**

12 Ms. Silva has not tried to articulate a public interest that would be served
13 by allowing her to continue living in a home she lost to foreclosure five years
14 ago. To the contrary, the public interest in the enforcement of the foreclosure
15 laws, and in having buyers at foreclosure sales be able to exercise their remedies
16 to take possession of the properties they purchased will be served by allowing
17 MBB Properties to exercise its state law remedies to obtain possession of the
18 Lompoc Property.

19 **D. CONCLUSION**

20 Ms. Silva has shown neither that she is likely to prevail on appeal, nor that
21 she will suffer irreparable harm if the ex parte stay application is not granted. At
22 worst, she will be required to vacate property that she hasn’t owned for five years
23 and can pursue her fraud complaint against Bollag and MBB Properties for
24 damages. Ms. Silva has skillfully utilized that federal and state courts for seven
25 months to avoid eviction, but that needs to stop and Bollag should be entitled to
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28 ⁸ ER Vol. 1 at page 54.

1 get possession of its property. For these reasons, the stay motion should be
2 denied.

3
4 Dated: October 21, 2015

GRIFFITH & THORNBURGH, LLP

5
6 By: /s/ Joseph M. Sholder
7 JOSEPH M. SHOLDER
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C)(i), FRAP, I hereby certify that Appellees' Opposition points and authorities herein complies with the type-volume limitations of Rule 32(a)(7)(B)(ii). Appellees' Opposition filed October 21, 2015 contains 2980 words of text according to the word count in Microsoft 2010 version, the word processing system used in Times Roman font.

Dated: October 21, 2015

GRIFFITH & THORNBURGH, LLP

By: /s/ Joseph M. Sholder
Joseph M. Sholder,
Attorneys for
MBB Properties, LLC

CERTIFICATE OF SERVICE

**Carlita Silva, Appellant, vs. MBB Properties, LLC, et al.
Ninth Circuit Case No. 15-56123**

I hereby certify that on October 21, 2015, I electronically filed the foregoing document with the Clerk of the Court for the Ninth Circuit by using the CM/ECF system. I further certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM /ECF system.

Executed this 21st day of October 2015, at Santa Barbara, California.

/s/ Evelyn R. Downs
Evelyn R. Downs