

NOT FOR PUBLICATION

MAY 28 2013

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.	WW-12-1260-MkKiJu
)		
6	DEVON MCKENNA and)	Bk. No.	11-48292-BDL
	CYNTHIA MCKENNA,)		
7)	Adv. No.	12-04005-BDL
	Debtors.)		
8	_____)		
)		
9	DEVON MCKENNA; CYNTHIA MCKENNA,)		
)		
10	Appellants,)		
)		
11	v.)	MEMORANDUM*	
)		
12	MICHAEL D. HITT, Chapter 7)		
	Trustee; COMMONWEALTH UNITED)		
13	MORTGAGE; PNC BANK, N.A.,)		
)		
14	Appellees.)		
	_____)		

Submitted Without Oral Argument
on May 16, 2013

Filed - May 28, 2013

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Brian D. Lynch, Bankruptcy Judge, Presiding

Appearances: Appellants Devon McKenna and Cynthia McKenna, pro se, on brief; Cassandra Kennan and Nigel P. Avilez of Davis Wright Tremaine LLP on brief, for appellees Commonwealth United Mortgage and PNC Bank, N.A.

Before: MARKELL, KIRSCHER and JURY, Bankruptcy Judges.

*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 **INTRODUCTION****

2 Appellants Devon McKenna and Cynthia McKenna (the
3 "McKennas") appeal the bankruptcy court's Order Granting Motion
4 to Dismiss ("Dismissal Order"). We hereby MODIFY the bankruptcy
5 court's Dismissal Order to provide that the adversary proceeding
6 is dismissed based on the McKennas' lack of standing, and we
7 AFFIRM the dismissal order, as MODIFIED.

8 **FACTS**

9 The McKennas filed a chapter 7 bankruptcy petition on
10 October 21, 2011. They subsequently filed an adversary
11 proceeding against appellee Commonwealth United Mortgage
12 ("Commonwealth")¹ on January 10, 2012. This was at least the
13 third action the McKennas brought against Commonwealth regarding
14 the foreclosure sale of their home.

15 On June 28, 2005, the McKennas executed a promissory note
16 ("Note") and deed of trust ("DOT") secured by real property
17 located in Yelm, Washington ("Property"). The McKennas defaulted
18 on the Note and Commonwealth recorded a substitution of trustee
19 and notice of trustee sale ("NOS") with a scheduled sale date of

20
21 **We have exercised our discretion to independently review
22 several electronically filed documents in the McKennas'
23 underlying bankruptcy case and adversary proceeding in order to
24 develop a fuller understanding of the record. See O'Rourke v.
Seaboard Sur. Co. (In re E. R. Fegert, Inc.), 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 ¹Commonwealth was a division of National City Bank ("NCB")
26 Indiana, which merged into NCB Ohio. NCB Ohio merged with PNC
27 Bank, N.A. ("PNC"), making PNC a successor in interest to
28 Commonwealth. For clarity, the appellees, other than Trustee
Michael D. Hitt ("Hitt"), are referred to as Commonwealth unless
otherwise indicated.

1 May 23, 2008.

2 On May 22, 2008, the eve of the trustee sale, the McKennas
3 filed a lawsuit against Commonwealth and others in the United
4 States District Court for the Western District of Washington. In
5 their complaint, the McKennas alleged the following nine causes
6 of action: breach of contract; wrongful foreclosure; breach of
7 fiduciary duty; unjust enrichment; violations of the Truth in
8 Lending Act ("TILA"); Real Estate Settlement Procedures Act
9 ("RESPA"); Fair Debt Collection Practices Act ("FDCPA"); Consumer
10 Protection Act ("CPA"); and Consumer Loan Act ("CLA").² They
11 sought a preliminary injunction to stop the foreclosure sale, but
12 their request was denied. Commonwealth acquired the Property at
13 the trustee sale, and a trustee's deed conveying the Property to
14 Commonwealth was recorded on June 3, 2008.

15 On June 19, 2008, the McKennas initiated a state court
16 action against Commonwealth. The complaint was entitled
17 "Objection to Foreclosure Sale" and identified three causes of
18 action: defamation of title; declaratory relief; and breach of
19 fiduciary duty. The complaint stated that "the [Property] was
20 wrongfully sold at a non-judicial [foreclosure] sale . . . on
21 May 23, 2008." Complaint (Jun. 12, 2008) at ¶ 11. The McKennas
22 also discussed TILA, RESPA, FDCPA, unjust enrichment and breach
23 of contract, which were many of the same claims brought in the
24 federal case.

25 Shortly after the McKennas filed their state lawsuit,
26 Commonwealth brought an unlawful detainer action against them,

27

28 ²The CLA and CPA claims were based on Washington law.

1 and the state court consolidated the two proceedings.

2 On September 9, 2008, the federal court granted summary
3 judgment to Commonwealth³ on all the federal (TILA, RESPA and
4 FDCPA) claims. On September 23, 2008, the federal court also
5 granted summary judgment as to all the remaining state claims.

6 The McKennas filed an amended complaint in the federal court
7 action, alleging a TILA violation against Commonwealth again, on
8 October 24, 2008. Commonwealth's motion to dismiss the amended
9 complaint was granted on December 30, 2008, because the TILA
10 claim was time barred.

11 On November 7, 2008, the state court granted Commonwealth's
12 motion for summary judgment as to the validity of the foreclosure
13 sale. The order ("Summary Judgment Order") provided that
14 "[s]ummary judgment is granted to [Commonwealth] as [to] the
15 . . . foreclosure sale being proper." Order for Summary Judgment
16 (Nov. 7, 2008) at p. 2. The state court declined to grant
17 summary judgment regarding the McKennas' CPA and breach of
18 contract claims. The state court then issued a writ of
19 restitution ordering the McKennas to vacate the Property.

20 After the state court's issuance of the Summary Judgment
21 Order and writ of restitution, the McKennas moved for
22 reconsideration. The reconsideration motion was denied, and the
23 McKennas appealed. On May 10, 2011, the state appellate court

25 ³Summary judgment was granted as to National City Mortgage
26 only, not Commonwealth, because the motion only requested relief
27 as to National City Mortgage, even though both entities were
28 represented by the same counsel. In their Corporate Disclosure
Statement, appellees refer to Commonwealth United Mortgage as a
division of National City Mortgage.

1 affirmed the Summary Judgment Order and the denial of the motion
2 for reconsideration.⁴

3 As previously noted, the McKennas filed for chapter 7
4 bankruptcy on October 21, 2011. They filed their adversary
5 proceeding against Commonwealth about three months later. Their
6 adversary complaint, which was styled as a combined motion for
7 summary judgment and motion to dismiss, did not identify
8 individual causes of action. On the last page, the McKennas set
9 forth what appears to be a claim for wrongful foreclosure. The
10 McKennas requested that the bankruptcy court find that the
11 original DOT was altered with notarial and other unspecified
12 markings,⁵ which made the DOT and foreclosure void. According to
13 the McKennas, this meant Commonwealth did not have a valid claim
14 to the Property and it should be reconveyed back to them.

15 On February 9, 2012, Commonwealth moved to dismiss the
16 McKennas' adversary complaint under the Federal Rules of Civil
17 Procedure, Rule 12(b)(6), based on claim preclusion. It also
18 argued that the McKennas failed to plead fraud with particularity
19 and that a fraud claim was time barred. Finally, it asserted
20 that the bankruptcy court lacked jurisdiction to void the
21 foreclosure sale and to convey the Property back to the McKennas

22
23 ⁴The McKennas filed a petition for review of the appellate
24 court's ruling, but the Supreme Court of Washington denied their
petition on September 7, 2011.

25 ⁵The McKennas alleged they did not learn that Commonwealth
26 had multiple versions of the DOT until April 14, 2009. They
27 asserted that those versions contain a notarial acknowledgment of
their signatures, but they did not sign the DOT before a notary.
28 They also took issue with other alleged alterations, but they did
not identify which markings they claim were unauthorized.

1 because it had been more than three and a half years since the
2 sale, there was no right of redemption, and title to the Property
3 had been transferred to it.

4 On April 18, 2012, the McKennas filed an opposition to the
5 motion to dismiss, arguing that the issue of the alleged DOT
6 alterations had not been heard by any court, and therefore, claim
7 preclusion did not apply. In addition, they argued that they
8 were not bringing a fraud claim, only suggesting that the
9 alterations appeared to be fraudulent. They further asserted
10 that Commonwealth and its counsel made several misrepresentations
11 in bad faith.

12 On April 25, 2012, the bankruptcy court held a hearing on
13 the motion to dismiss. After hearing argument from
14 Commonwealth's attorney and Mr. McKenna, the bankruptcy court
15 granted the motion to dismiss based on the McKennas' failure to
16 state a claim upon which relief may be granted. The bankruptcy
17 court found:

18 The prior ruling of the state court on [the
19 McKennas'] challenges to the foreclosure is res
20 judicata on all of the issues brought there. They
21 cannot bring their challenges to a foreclosure
22 piecemeal. A foreclosure sale was completed. The
[McKennas] had the opportunity to challenge it and to
raise any and all defenses to the foreclosure, and
their challenges were dismissed.

23 It also appears that they were aware of the one
24 challenge they specifically referenced, the
25 notarization of the deed of trust out of their
presence, at all times and failed to raise it prior to
the foreclosure which constitutes waiver.

26 Lastly, an error in the notarization, even if
27 true, would not be the basis for the debtors to set
aside the foreclosure.

28 Hr'g Tr. (April 25, 2012) at 16:3-17.

1 The Dismissal Order was entered on May 2, 2012, and the
2 McKennas appealed that order on May 15, 2012.

3 **JURISDICTION**

4 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
5 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.
6 § 158.

7 **ISSUE**

8 Did the McKennas have standing to prosecute the adversary
9 proceeding?

10 **STANDARD OF REVIEW**

11 We review de novo whether the McKennas had standing. See
12 Palmdale Hills Prop., LLC v. Lehman Commercial Paper, Inc.
13 (In re Palmdale Hills Prop., LLC), 654 F.3d 868, 873 (9th Cir.
14 2011); Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal),
15 450 B.R. 897, 906 (9th Cir. BAP 2011).

16 **DISCUSSION**

17 There is a threshold question as to whether the McKennas had
18 standing to pursue their wrongful foreclosure claim and have the
19 right to continue prosecuting it by taking this appeal. The type
20 of standing at issue herein is third party standing, which
21 requires litigants to pursue their own legal rights and not the
22 legal rights of others. See In re Veal, 450 B.R. at 906-07
23 (citing Sprint Commc'ns Co., LP v. APCC Servs., Inc., 554 U.S.
24 269, 289 (2008)). Third party standing is not jurisdictional;
25 rather, it is a judicially self-imposed prudential limitation on
26 federal court jurisdiction. Id.; see also Los Angeles v. County
27 of Kern, 581 F.3d 841, 844-45 (9th Cir. 2009) (distinguishing
28 between jurisdictional and prudential standing concerns).

1 The McKennas did not schedule a wrongful foreclosure claim
2 on their personal property Schedule B or exemption Schedule C.
3 Moreover, the claim does not appear to have been abandoned by
4 trustee Hitt.⁶ These facts lead to the conclusion that the
5 McKennas do not have standing to prosecute the wrongful
6 foreclosure action because it is estate property, and only the
7 estate representative may commence an action based on claims for
8 relief that are estate property. 11 U.S.C. § 541(a)(1); Estate
9 of Spirtos v. One San Bernardino Cnty. Super. Ct. Case Numbered
10 SPR 02211, 443 F.3d 1172, 1175-76 (9th Cir. 2006)(holding that
11 trustee has exclusive right to sue on bankruptcy estate's behalf,
12 and party that does not get consent of trustee to pursue claim
13 lacks standing to bring action); Seymour v. Bank of America, N.A.
14 (In re Seymour), 2013 WL 1736471 (9th Cir. BAP, Mem. Dec.,
15 April 23, 2013) (affirming dismissal of adversary complaint based
16 on lack of standing when debtor attempted to prosecute
17 unscheduled claim that had not been abandoned by trustee).

18 CONCLUSION

19 For the reasons set forth above, we hereby MODIFY the
20 bankruptcy court's Dismissal Order to provide that the adversary
21 proceeding is dismissed based on the McKennas' lack of standing,
22 and we AFFIRM the dismissal order, as MODIFIED.
23
24
25

26
27 ⁶On April 4, 2013, Hitt filed a final accounting and
28 distribution, detailing the assets that were abandoned. No
lawsuits were listed as abandoned.