

MAY 28 2013

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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NOT FOR PUBLICATION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. WW-12-1443-MkKiJu  
 )  
 6 DEVON MCKENNA and ) Bk. No. 11-48292-BDL  
 CYNTHIA MCKENNA )  
 7 )  
 Debtors. )  
 8 \_\_\_\_\_ )  
 )  
 9 DEVON MCKENNA; CYNTHIA MCKENNA )  
 )  
 10 Appellants, )  
 )  
 11 v. ) **MEMORANDUM\***  
 )  
 12 PNC BANK, N.A.; MICHAEL D. )  
 HITT, Chapter 7 Trustee, )  
 13 )  
 Appellees. )  
 14 \_\_\_\_\_ )

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; Michelle R. Riel of RCO Legal, P.S.,  
 on brief, for appellee PNC Bank, N.A.

Before: MARKELL, KIRSCHER and JURY, Bankruptcy Judges.

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\*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 **I. INTRODUCTION\*\***

2 Appellants Devon McKenna and Cynthia McKenna ("McKennas")  
3 appeal the bankruptcy court's Order Granting Relief from Stay  
4 ("Relief Order"), which terminated the automatic stay as to PNC  
5 Bank, N.A. ("PNC") based on § 362(d)(1) and (2).<sup>1</sup> We AFFIRM.

6 **II. FACTS**

7 The McKennas filed a chapter 7 bankruptcy petition on  
8 October 21, 2011. Prior to their bankruptcy filing, Commonwealth  
9 United Mortgage ("Commonwealth") foreclosed on the McKennas'  
10 residence ("Property") and purchased the Property at the  
11 trustee's sale. The trustee's deed conveying the Property to  
12 Commonwealth was recorded on June 3, 2008.

13 The McKennas attempted to have the foreclosure sale deemed  
14 void in federal and state court actions, but were unsuccessful.

15 After more than three years of litigation surrounding the  
16 foreclosure, the McKennas continued to reside in the Property and  
17 filed for bankruptcy. In the interim period between the  
18 foreclosure and bankruptcy filing, PNC had become the successor  
19 in interest to Commonwealth through multiple mergers.

20 On November 29, 2011, PNC filed a motion for relief from the

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21  
22 \*\*We have exercised our discretion to independently review  
23 several electronically filed documents in the McKennas'  
24 underlying bankruptcy case and adversary proceeding in order to  
25 develop a fuller understanding of the record. See O'Rourke v.  
Seaboard Sur. Co. (In re E. R. Fegert, Inc.), 887 F.2d 955,  
26 957-58 (9th Cir. 1989); Atwood v. Chase Manhattan Mortg. Co.  
(In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

27 <sup>1</sup>Unless specified otherwise, all chapter and section  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
References to "FRCP" are to the Federal Rules of Civil Procedure,  
Rules 1-86.

1 automatic stay as to the Property. That motion was denied on  
2 February 6, 2012.

3 PNC filed a second motion for relief from stay ("Relief  
4 Motion") on July 12, 2012. PNC requested relief from stay under  
5 § 362(d)(1) and (2) so that it could pursue unlawful detainer and  
6 evict the McKennas.

7 PNC argued that cause existed for stay relief under  
8 § 362(d)(1) because the McKennas no longer held an interest in  
9 the Property after the trustee's sale. Because they were no  
10 longer the Property's owners, the McKennas could not have equity,  
11 and their continued occupation of the residence inhibited PNC  
12 from preserving the Property.

13 As to relief being warranted under § 362(d)(2), PNC again  
14 asserted that the McKennas had no equity in the Property and  
15 noted that the Property could not be necessary to an effective  
16 reorganization because they had no interest in it.

17 Several supporting documents were attached to the Relief  
18 Motion. The recorded trustee's deed evidencing the Property's  
19 conveyance to Commonwealth was attached. There was also a  
20 declaration of Trisha Payton ("Payton"), an employee and  
21 authorized signer of PNC. In the declaration, Payton stated that  
22 she was trained in reviewing PNC's business records regarding  
23 loans. She further attested that Commonwealth was a division of  
24 National City Bank ("NCB") Indiana, which merged into NCB Ohio,  
25 effective July 22, 2006. NCB Ohio merged with PNC, effective  
26 November 6, 2009. To support her assertions, Payton attached the  
27 official certification of the Comptroller of Currency detailing  
28 the mergers and a Federal Deposit Insurance Corporation history

1 for NCB Indiana, which identifies NCB Indiana as a part of PNC.

2 The McKennas opposed the Relief Motion, arguing that  
3 (1) Payton's declaration was inadmissible because of her lack of  
4 personal knowledge and because it was false, (2) PNC was not  
5 their lender and had no standing to move for relief, (3) PNC had  
6 violated the Truth in Lending Act ("TILA"), (4) the deed of trust  
7 and trustee's sale were void, and (5) there had been an appeal to  
8 this Panel of the bankruptcy court's order dismissing their  
9 wrongful foreclosure claim, therefore, ruling on the Relief  
10 Motion would be improper.<sup>2</sup>

11 The bankruptcy court heard PNC and Mr. McKenna's arguments  
12 regarding the Relief Motion on August 8, 2012.<sup>3</sup> At the conclusion  
13 of the hearing, the court granted PNC's Relief Motion, stating:

14 The foreclosure sale was held on May 23rd, 2009.<sup>4</sup>  
15 This bankruptcy was filed October 21st, 2011. The  
16 debtors filed an adversary against Commonwealth United  
17 seeking to invalidate the foreclosure sale. I dismissed  
18 the action on various grounds, including the fact that  
19 the debtors had already challenged the foreclosure sale  
20 in state court and had lost, and I was precluded from  
21 rehearing that issue.

18 PNC Bank, which is Commonwealth United's successor  
19 by merger, seeks relief from stay to proceed with the  
20 state law eviction remedies pursuant to its trustee's  
21 deed. There's no equity in the property for the  
22 bankruptcy estate. It's not necessary for an effective  
23 reorganization. In addition, there is cause for

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23 <sup>2</sup>The McKennas did not obtain a stay pending their appeal of  
24 the order dismissing their wrongful foreclosure claim.

25 <sup>3</sup>During the hearing, PNC made an argument that the automatic  
26 stay had lapsed because the McKennas received a discharge in  
27 March of 2012. The bankruptcy did not rule on that argument.

27 <sup>4</sup>The bankruptcy court misstated that the foreclosure sale  
28 occurred in 2009. The trustee's deed reflects that the year was  
2008.

1 granting relief, as the debtors continue to live in the  
2 property, despite a three-year-old foreclosure, and  
3 PNC Bank's interest is not adequately protected.  
4 Mr. McKenna has already acknowledged that he does not  
5 maintain insurance on the property, nor has he paid the  
6 taxes on the property since foreclosure.

7 The debtors argue that the appeal of my order  
8 dismissing the adversary should somehow prevent  
9 PNC Bank from proceeding with eviction. However, absent  
10 a stay by the Court, the appeal does not stay the  
11 lender's rights pursuant to its foreclosure. I'll grant  
12 the motion of the creditor.

13 The bankruptcy court entered the Relief Order on August 14,  
14 2012, which the McKennas appealed.

15 On appeal, the McKennas argue that PNC's counsel was  
16 improperly allowed to argue the Relief Motion without a  
17 representative of PNC being present. They contend this violated  
18 their right to confront their accuser and contravenes Trinsey v.  
19 Pagliari, 229 F.Supp. 647 (E.D. Penn. 1964) and Cinco Enters.,  
20 Inc. v. Benso, 890 P.2d 866 (Okla. 1994). They also assert that  
21 the Relief Motion was not supported by evidence or testimony, but  
22 rather the misrepresentations of PNC's counsel. Their two  
23 remaining arguments are that PNC lacked standing to file the  
24 Relief Motion and that the bankruptcy court was prejudiced  
25 against them.

### 26 **III. JURISDICTION**

27 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
28 §§ 1334 and 157(b)(1) and (b)(2)(A). We have jurisdiction under  
29 28 U.S.C. § 158.

### 30 **IV. ISSUE**

- 31 A. Did PNC have standing to seek relief from the automatic  
32 stay?
- 33 B. Did the bankruptcy court commit reversible error by granting  
34 PNC relief from stay based on § 362(d)(1) and (2) when the

1 McKennas' residence had been sold at a trustee's sale more  
2 than three years before they filed for bankruptcy?

### 3 V. STANDARDS OF REVIEW

4 We review standing de novo. Veal v. Am. Home Mortg.  
5 Servicing, Inc. (In re Veal), 450 B.R. 897, 905 (9th Cir. BAP  
6 2011) (citations omitted).

7 Orders granting relief from the automatic stay are subject  
8 to abuse of discretion review. Id. at 915 (citation omitted). The  
9 appellate court makes two inquiries to determine if an abuse of  
10 discretion has occurred: (1) did the court apply the correct  
11 legal standard; and (2) were the court's factual findings clearly  
12 erroneous. Id. (citation omitted).

13 Whether the correct legal standard was applied is reviewed  
14 de novo. Id. (citation omitted). Application of an incorrect  
15 legal standard is an abuse of discretion. Id. (citation omitted).

16 Factual findings are clearly erroneous if they are  
17 illogical, implausible, or unsupported by the record. Id.  
18 (citations and quotations omitted).

### 19 VI. DISCUSSION

#### 20 A. Standing and Colorable Claim for Relief

21 Standing is required in every federal case and determines  
22 whether the court may entertain the proceeding. Veal, 450 B.R. at  
23 906. Standing has both constitutional and prudential dimensions.  
24 Edwards v. Wells Fargo Bank, N.A. (In re Edwards), 454 B.R. 100,  
25 103 (9th Cir. BAP 2011).

26 "Constitutional standing requires an injury in fact, which  
27 is caused by or fairly traceable to some conduct or some  
28 statutory prohibition, and which the requested relief will

1 likely redress." Veal, 450 B.R. at 906.

2 In this case, PNC suffered an injury in fact because the  
3 automatic stay restricted its pursuit of remedies to obtain  
4 possession of the Property. Causation existed between the stay  
5 and PNC's inability to evict the McKennas and gain possession.  
6 The Relief Order addressed and remedied PNC's injury.

7 Prudential standing is implicated in the real party in  
8 interest requirement under FRCP 17. Id. at 907. In this case, the  
9 relevant inquiry is whether PNC asserted its own rights as  
10 opposed to the rights of others. Id.

11 Commonwealth was conveyed title to the Property prepetition.  
12 By the time the McKennas filed for bankruptcy, PNC had become  
13 owner of the Property, based on mergers tracing from Commonwealth  
14 to PNC. Thus, PNC was asserting its own rights when it sought  
15 relief from the stay.

16 To summarize, PNC had both constitutional and prudential  
17 standing to file the Relief Motion. It was not a reversible error  
18 for the bankruptcy court to allow PNC to prosecute the motion as  
19 Commonwealth's successor.

20 A party moving for relief from stay must demonstrate that it  
21 has a colorable claim to enforce its rights against estate  
22 property. Veal, 450 B.R. 897, 914-15. Under Washington law,  
23 physical delivery of the trustee's deed to the grantee conveys  
24 the rights to the real or personal property sold to the grantee.  
25 WASH. REV. CODE ANN. § 61.24.050(1)

26 Here, PNC met its burden to establish a colorable claim by  
27 proving that Commonwealth acquired ownership interest in the  
28 Property as grantee, and that PNC was Commonwealth's successor in

1 interest.

2 **B. Relief from the Automatic Stay**

3 A bankruptcy court must grant relief from the automatic stay  
4 when a party in interest demonstrates cause under § 362(d)(1).  
5 Cause for relief exists “[w]hen state law foreclosure proceedings  
6 have been completed prepetition,” and the new owner seeks to  
7 obtain possession of the property, for example, through an  
8 eviction action. Baghdasarian v. SRT Partners, LLC  
9 (In re Baghdasarian), BAP No. CC-10-1277-DMkKi, 2011 WL 4485244,  
10 at \*6 (9th Cir. BAP July 8, 2011).

11 In addition, pursuant to § 362(d)(2), relief from stay is  
12 warranted when the debtor lacks equity in the subject property  
13 and the property is not necessary to an effective reorganization.  
14 The party seeking relief from stay bears the burden of showing a  
15 lack of equity, but the debtor carries the burden of  
16 demonstrating the necessity of the property to an effective  
17 reorganization. § 362(g)(1) and (2).

18 If a debtor loses ownership interest in property through  
19 foreclosure, there is no claim to equity in that property.  
20 Baghdasarian, 2011 WL 4485244, at \*6. Moreover, reorganization of  
21 debts is not contemplated for chapter 7 cases. Nev. Nat’l Bank v.  
22 Casgul of Nev., Inc. (In re Casgul of Nev., Inc.), 22 B.R. 65, 66  
23 (9th Cir. BAP 1982) (citation omitted).

24 The bankruptcy applied the correct standards under  
25 § 362(d)(1) and (2) when determining if cause existed to grant  
26 PNC relief from stay, and if the McKennas had equity in the  
27 Property or if it was necessary for effective reorganization.

28 The question is then whether the bankruptcy court’s factual

1 findings to support granting relief from stay under those  
2 provisions were clearly erroneous. We find that they were not.

3         The court found that the McKennas were still living in the  
4 Property more than three years after foreclosure. It also noted  
5 that PNC was the successor in interest to Commonwealth, who  
6 obtained title to the Property by trustee's deed. These facts  
7 could be drawn from Payton's declaration and supporting  
8 documentation regarding the mergers from Commonwealth to PNC and  
9 the trustee's deed.

10         The McKennas argued in their opposition to the Relief Motion  
11 and at the hearing on the motion that Payton lacked personal  
12 knowledge regarding the matters she attested to, and that she was  
13 not a person who could make a declaration on behalf of PNC  
14 because she was not a party. The bankruptcy court's determination  
15 to allow Payton's declaration into the record over the McKennas'  
16 objection is an evidentiary ruling to which we grant considerable  
17 deference. Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379,  
18 384 (2008). Mr. McKenna argued at the hearing that Payton did not  
19 establish that she had personal knowledge of bank mergers;  
20 however, Payton stated that she was trained to review PNC's  
21 business records, which plausibly would include the documentation  
22 of its mergers, and the records of those companies with which it  
23 merged, i.e., the records of NCB Indiana and Ohio and  
24 Commonwealth.

25         Also at the hearing, Mr. McKenna expressed confusion as to  
26 how Payton could be both a non-party and authorized signer for  
27 PNC. The explanation is that Payton is not personally a party to  
28 the Relief Motion, but PNC authorized her to sign on its behalf

1 for purposes of the motion. Her lack of personal involvement with  
2 the matter did not make her ineligible to submit a declaration as  
3 employee of PNC, and sign on PNC's behalf as authorized.

4 Based on the foregoing, none of the bankruptcy court's  
5 factual findings as to whether cause existed to grant stay relief  
6 were illogical, implausible or unsupported by the record.

7 In addition, the bankruptcy court's findings that the  
8 McKennas lacked equity and that the Property was not necessary to  
9 an effective reorganization logically followed from the evidence  
10 of the prepetition foreclosure sale and the fact that the  
11 McKennas are in a chapter 7 bankruptcy.

12 In conclusion, the bankruptcy court did not abuse its  
13 discretion when it granted PNC relief from the automatic stay  
14 pursuant to § 362(d)(1) and (2).

15 **C. The McKennas' Remaining Arguments**

16 The bankruptcy court did not err by allowing PNC's counsel  
17 to argue the Relief Motion without a representative from PNC  
18 present. PNC, as a corporation, was required to appear by  
19 counsel, In re Jacobson, 402 B.R. 359, 364 (Bankr. W.D. Wash.  
20 2009) (citing Rowland v. Cal. Men's Colony, 506 U.S. 194 (1993)),  
21 and there was sufficient evidence submitted prior to the hearing  
22 to support the Relief Motion as found above.<sup>5</sup>

23 Moreover, neither Trinsey, 229 F.Supp. 647, nor Cinco  
24 Enters., 890 P.2d 866, stand for the McKennas' proposition that a  
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26 <sup>5</sup>In addition, if the McKennas wanted to submit oral  
27 testimony, they were required to request a special hearing  
28 setting. Bankr. W.D. Wash. R. 9013-1(a), (e)(2). The record does  
not reflect any such request.

1 client must be present at every hearing.

2 As to their next argument, the McKennas had no right to  
3 confront their purported accuser, PNC, because the bankruptcy  
4 proceeding and the Relief Motion were civil matters, and the  
5 Sixth Amendment right to confrontation of witnesses only applies  
6 in criminal cases. Manta v. Mukasey, No. 04-74623, 263 F. App'x  
7 626, 629 (9th Cir. Jan. 16, 2008).

8 The McKennas' final argument is without merit because they  
9 failed to bring attention to any actions by the bankruptcy court  
10 evidencing prejudice.

11 **VII. CONCLUSION**

12 For all of the reasons set forth above, we AFFIRM the  
13 bankruptcy court's Relief Order.

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