

MAY 30 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NOT FOR PUBLICATION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. SC-12-1604-JuBaPa |
| |) | |
| STEVEN HARRY LUCORE, SR. and |) | Bk. No. 11-14196 |
| JUDY LYNNE LUCORE, |) | |
| |) | |
| Debtors. |) | |
| |) | |
| <hr/> |) | |
| STEVEN HARRY LUCORE, SR.; |) | |
| JUDY LYNNE LUCORE, |) | |
| |) | |
| Appellants, |) | |
| |) | |
| v. |) | M E M O R A N D U M* |
| |) | |
| US BANK, NA; DAVID L. SKELTON, |) | |
| Chapter 13 Trustee, |) | |
| |) | |
| Appellees. |) | |
| <hr/> |) | |

Argued and Submitted on May 15, 2013
at Pasadena, California

Filed - May 30, 2013

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

Honorable Peter W. Bowie, Bankruptcy Judge, Presiding

Appearances: Appellant Steven Harry Lucore, Sr. argued pro se;
Bernard J. Kornberg, Esq., Severson & Werson,
argued for Appellee US Bank, N.A.

Before: JURY, BASON** and PAPPAS, 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.

** Hon. Neil W. Bason, United States Bankruptcy Judge for
the Central District of California, sitting by designation.

1 Chapter 13¹ debtors, Steven Harry Lucore, Sr. and Judy
2 Lynne Lucore, appeal from the bankruptcy court's order denying
3 their motion for reconsideration of an order granting U.S. Bank,
4 N.A. (Bank) relief from the automatic stay. We AFFIRM.

5 **I. FACTS**

6 **A. Prepetition Events**

7 In April 2006 debtors obtained a loan from American Home
8 Mortgage (AHM). The loan was evidenced by a note and secured by
9 a deed of trust (DOT) encumbering their property located on
10 Summit Avenue, Santee, California. The DOT named AHM as the
11 lender, Fidelity National Title Company as the trustee and
12 Mortgage Electronic Registration Systems, Inc. (MERS) as nominee
13 and beneficiary.

14 At some point debtors defaulted on the loan. On
15 September 1, 2010, a notice of default was recorded.

16 On November 10, 2010, debtors filed a thirty-seven page
17 complaint against Bank and other parties in the San Diego
18 Superior Court which was based on the wrongful foreclosure of
19 their property. Debtors alleged that they had no "formal"
20 evidence that their mortgage was sold or transferred to Bank.
21 Debtors further alleged that MERS did not have the authority to
22 record a substitution of trustee and assignment of DOT on
23 August 30, 2010. Due to MERS' alleged lack of authority,
24 debtors alleged that Bank was not a beneficiary under the DOT

25
26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure and "Civil Rule" references are to the Federal Rules of
Civil Procedure.

1 with power to declare a default on the loan. Bank filed a
2 demurrer, which was sustained without leave to amend, and
3 judgment entered in its favor.

4 Debtors appealed the order. Their appeal was dismissed and
5 the order became final.

6 On August 18, 2011, Bank purchased the property at a
7 trustee's sale held by Recontrust Company, N.A. (Recontrust).

8 On August 26, 2011, Recontrust prepared and executed a
9 trustee's deed upon sale (Trustee's Deed) memorializing the sale
10 of the property to Bank.

11 Fifteen days after the trustee's sale, on September 2,
12 2011, the Trustee's Deed was recorded in the San Diego County's
13 Recorders Office.

14 **B. Bankruptcy Events**

15 On August 25, 2011, debtors filed their chapter 13
16 petition. Debtors' original plan provided for payments of
17 \$1,714.65 per month, with \$1,114.65 allocated to AHM and \$600
18 allocated to non-priority unsecured claims. Debtors' plan has
19 not been confirmed.

20 On July 27, 2012, Bank filed a motion for relief from stay
21 to initiate unlawful detainer proceedings. Debtors opposed the
22 motion on several grounds: (1) no default had occurred because
23 they had been making payments through their chapter 13 plan;
24 (2) Bank was not a real party in interest; and (3) the Trustee's
25 Deed was defective. Bank responded by asserting that the
26 Trustee's Deed was conclusive evidence of its standing to move
27 for relief from stay.

28 On August 22, 2012, the bankruptcy court heard the matter

1 and orally granted Bank's motion at the hearing.

2 On September 11, 2012, the bankruptcy court entered the
3 order.

4 On September 4, 2012, prior to the entry of the order,
5 debtors filed a motion for reconsideration (MFR). Debtors again
6 asserted that Bank lacked standing and was not the real party in
7 interest. Debtors continued to allege that all the foreclosure
8 procedures were fundamentally flawed, including a defective
9 notice of default and a defective substitution of trustee and
10 assignment of the deed of trust due to the forging of signatures
11 by a notary.²

12 Bank opposed the motion, asserting that no new issues were
13 raised and that the resolution of the state court proceeding
14 collaterally estopped debtors' arguments as to Bank's standing.

15 On October 31, 2012, the bankruptcy court heard debtors'
16 MFR and took the matter under submission.

17 On November 9, 2012, the bankruptcy court issued a five-
18 page order upholding its decision granting the Bank relief from
19 stay and denying debtors' MFR.³

20 On November 19, 2012, debtors filed their notice of appeal.

21 Thereafter, debtors sought a stay of the order granting
22 Bank relief from stay in the bankruptcy court. The bankruptcy
23

24 ² Debtors also asserted that the judge in this matter
25 refuses to recuse himself from these proceedings. From our
26 review of the docket, debtors never brought a separate motion to
27 recuse the bankruptcy judge in the bankruptcy court. We revisit
the recusal request in our discussion below.

28 ³ This order contains the court's written findings and
conclusions.

1 court denied the motion on November 21, 2012.

2 On December 7, 2012, debtor filed a motion before this
3 Panel seeking a stay pending appeal. On December 19, 2012, the
4 Panel denied the motion.

5 **II. JURISDICTION**

6 The bankruptcy court had jurisdiction over this proceeding
7 under 28 U.S.C. §§ 1334 and 157(b)(2)(G). We have jurisdiction
8 under 28 U.S.C. § 158.⁴

9 **III. ISSUES**

10 A. Whether the bankruptcy court erred in finding that
11 Bank was a real party in interest with standing to prosecute the
12 motion for relief from the automatic stay;

13 B. Whether the bankruptcy court abused its discretion in
14 granting Bank relief from the automatic stay;

15 C. Whether the bankruptcy court abused its discretion in
16 denying debtor's MFR; and

17 D. Whether the bankruptcy judge should be recused.

18 _____
19 ⁴ Here, the appeal was taken solely from the order denying
20 reconsideration of the order granting relief from stay. The
21 issues addressed by the parties, however, relate to the
22 appropriateness of the underlying order granting relief from
23 stay. Moreover, in the bankruptcy court's written ruling denying
24 debtors' MFR, the court addressed the merits of the underlying
25 order granting relief from stay. Thus, the court's decision to
26 deny the MFR was inextricably intertwined with the correctness of
27 the original order. Accordingly, we conclude that debtors'
28 limited notice of appeal does not present a jurisdictional bar to
our review of the order granting relief from stay. McCarthy v.
Mayo, 827 F.2d 1310, 1314 (9th Cir. 1987) (stating that a notice
of appeal from the denial of a Civil Rule 60(b) motion extended
to underlying judgment where district court incorporated
underlying judgment in Civil Rule 60(b) order, appellant's
opening brief addressed the propriety of the underlying judgment
and the appellee fully briefed the issues).

1 IV. STANDARDS OF REVIEW

2 Standing is a legal issue that we review de novo. Loyd v.
3 Paine Webber, Inc., 208 F.3d 755, 758 (9th Cir. 2000); Kronemyer
4 v. Am. Contractors Indem. Co. (In re Kronemyer), 405 B.R. 915,
5 919 (9th Cir. BAP 2009).

6 We review an order granting relief from stay for abuse of
7 discretion. Veal v. Am. Home Mortg. Servicing, Inc.
8 (In re Veal), 450 B.R. 897, 913 (9th Cir. BAP 2011). We also
9 review a motion for reconsideration of an order for abuse of
10 discretion. First Ave. W. Bldg., LLC v. James (In re Onecast
11 Media, Inc.), 439 F.3d 558, 561 (9th Cir. 2006). A bankruptcy
12 court abuses its discretion if it applied the wrong legal
13 standard or its findings were illogical, implausible or without
14 support in the record. TrafficSchool.com, Inc. v. Edriver Inc.,
15 653 F.3d 820, 832 (9th Cir. 2011).

16 When the issue of recusal has been raised for the first
17 time on appeal, we review for plain error. United States v.
18 Holland, 501 F.3d 1120, 1122 (9th Cir. 2007); see also United
19 States v. Bosch, 951 F.2d 1546, 1548 (9th Cir. 1991) ("[E]ven
20 assuming that [the defendant] may raise his [28 U.S.C.] section
21 455 recusal claim for the first time on appeal . . . we would
22 review the district court's failure to recuse himself under the
23 plain error standard."). Plain error review involves four
24 prongs: (1) there must be an error, (2) "the legal error must be
25 clear or obvious, rather than subject to reasonable dispute,"
26 (3) the error "must have affected the appellant's substantial
27 rights, which in the ordinary case means he must demonstrate
28 that it affected the outcome of the district court proceedings,"

1 and (4) if the first three prongs are satisfied, we have the
2 discretion to remedy the error only if it "seriously affects the
3 fairness, integrity or public reputation of the judicial
4 proceedings." Puckett v. United States, 556 U.S. 129, 135
5 (2009) (internal quotation marks omitted).

6 V. DISCUSSION

7 A. Standing

8 The central issue on appeal is whether Bank was the "real
9 party in interest" with standing to seek relief from the
10 automatic stay with respect to debtors' property. Our review on
11 the standing issue is de novo.

12 Standing is a "threshold question in every federal case,
13 determining the power of the court to entertain the suit."
14 Warth v. Seldin, 422 U.S. 490, 498 (1975). Standing has both
15 constitutional and prudential dimensions. See Edwards v. Wells
16 Fargo Bank, N.A. (In re Edwards), 454 B.R. 100, 103 (9th Cir.
17 BAP 2011). Only prudential standing is at issue in this case.
18 To have prudential standing, "the plaintiff generally must
19 assert his own legal rights and interest, and cannot rest his
20 claim to relief on the legal rights or interests of third
21 parties." Warth, 422 U.S. at 499. In turn, prudential standing
22 implicates the real party in interest requirement under
23 § 362(d)(1) through application of Civil Rule 17.⁵ See
24 In re Veal, 450 B.R. at 907.

25 Under § 362(d)(1), on request of a party in interest,
26 _____

27 ⁵ Civil Rule 17 states in part: "An action must be
28 prosecuted in the name of the real party in interest." This rule
applies in bankruptcy proceedings through Rules 7017 and 9014(c).

1 relief from the stay shall be granted "for cause, including the
2 lack of adequate protection of an interest in property of such
3 party in interest." Because the term "party in interest" is not
4 defined in the Bankruptcy Code, whether a movant has the status
5 of a party in interest under § 362(d) is a fact-dependent matter
6 to be determined on a case-by-case basis, taking the claimed
7 interest and the alleged impact of the stay on that interest
8 into account. Kronemyer v. Am. Contractors Indem. Co.
9 (In re Kronemyer), 405 B.R. 915, 919 (9th Cir. BAP 2009).

10 Our inquiry into standing and who is a real party in
11 interest in the context of a relief from stay motion does not
12 involve finally deciding a creditor's claim or security.
13 In re Veal, 450 B.R. at 914 (citing Johnson v. Righetti
14 (In re Johnson), 756 F.2d 738, 740-41 (9th Cir. 1985) ("Hearings
15 on relief from stay are thus handled in a summary fashion. The
16 validity of the claim or contract underlying the claim is not
17 litigated during the hearing."). Rather, relief from stay
18 hearings are limited to determining whether "the creditor has a
19 colorable claim to the property of the estate." United States
20 v. Gould (In re Gould), 401 B.R. 415, 425 n.14 (9th Cir. BAP
21 2009), aff'd, 603 F.3d 1100 (9th Cir. 2010) (citing Biggs v.
22 Stovin (In re Luz Int'l, Ltd.), 219 B.R. 837, 842 (9th Cir. BAP
23 1998)); In re Edwards, 454 B.R. at 105; In re Veal, 450 B.R. at
24 914-15.

25 We have held that a moving party may demonstrate a
26 "colorable claim" by showing that it has some property interest
27 in debtors' property. Thi Ho v. Bank of Am. (In re Ho), 2011 WL
28 4485895, at *3 (9th Cir. BAP 2011). Therefore, the question

1 before us is whether the recorded Trustee's Deed shows that Bank
2 had some property interest in debtors' property under California
3 law.

4 The Panel has previously examined similar standing issues
5 in Bebensee-Wong v. Fed. Nat'l Mortg. Ass'n
6 (In re Bebensee-Wong), 248 B.R. 820, 822-823 (9th Cir. BAP 2000)
7 and In re Edwards, 454 B.R. 100. From these cases, two rules
8 emerge which control the outcome of this case. First, under
9 § 362(b)(3), a trustee's deed executed and recorded postpetition
10 is still valid if recorded within fifteen days of the sale due
11 to the relation-back effect of Cal. Civil Code § 2924h(c).⁶
12 In re Bebensee-Wong, 248 B.R. at 822-823.⁷ Second, under
13 applicable California law, a "duly-recorded Trustee's Deed
14 provides that [the bank] is the presumptive current record owner
15 with respect to the Property." In re Edwards, 454 B.R. at 106
16 (citing In re Salazar, 448 B.R. 814, 819 (Bankr. S.D. Cal. 2011))

18 ⁶ Cal. Civil Code § 2924h(c) provides in relevant part:

19 For the purposes of this subdivision, the trustee's
20 sale shall be deemed final upon the acceptance of the
21 last and highest bid, and shall be deemed perfected as
22 of 8 a.m. on the actual date of sale if the trustee's
23 deed is recorded within 15 calendar days after the
24 sale, or the next business day following the 15th day
if the county recorder in which the property is located
is closed on the 15th day.

25 ⁷ See also In re Gonzalez, 456 B.R. 429 (Bankr. C.D. Cal.
26 2011). To the extent Gonzalez construes Cal. Civil Code
27 § 2924h(c) differently than Bebensee-Wong, it is a long standing
28 policy of this panel that rulings in published opinions of a
panel are binding on subsequent panels. Ball v. Payco-Gen. Am.
Credits, Inc. (In re Ball), 185 B.R. 595, 597 (9th Cir. BAP
1995).

1 (the bank moving for relief from stay established standing as
2 the title holder of the subject property under a recorded
3 Trustee's Deed upon Sale)).

4 Here, the sale was held on August 18, 2011, seven days
5 before debtors' petition (filed on August 25, 2011) and the
6 Trustee's Deed was recorded on September 2, 2011, within the
7 fifteen-day period as required under Cal. Civil Code § 2924h(c).
8 Therefore, under our holding in Bebensee-Wong, perfection
9 relates back before debtors' filing, even though Bank recorded
10 postpetition.⁸ As a result, under Edwards, the duly-recorded
11 Trustee's Deed provides that Bank is the presumptive current
12 record owner with respect to the Property.

13 It follows then that Bank had an interest in debtors'
14 property at the time of their petition. In re Bebensee-Wong,
15 248 B.R. at 823; see also In re Edwards, 454 B.R. at 106 (citing
16 4 Harry D. Miller and Marvin B. Starr, Cal. Real Estate § 10:208
17 (3d ed. 2009) (under California law, "[t]he purchaser at the
18 foreclosure sale receives title free and clear of any right,
19 title, or interest of the trustor or any grantee or successor of
20 the trustor.").

21 As evidence of Bank's lack of standing, debtors point to
22 numerous purported defects in the chain of title culminating in
23
24

25
26 ⁸ Section 546(b) provides that a trustee may not avoid a
27 postpetition transfer if applicable law allows perfection to
28 relate back to before the petition filing date. Section 362(b)(3) provides that any such act of perfection does not violate the stay.

1 Bank's alleged wrongful foreclosure of their property.⁹ The
2 alleged defects included, among others, forgery by a notary on
3 some of the documents. Debtors also contend that they have
4 evidence that Fannie Mae and Freddie Mac "were the owners of
5 Appellants' mortgage" and not Bank. However, resolution of
6 these contentions would have required the adjudication of the
7 parties' underlying substantive rights, which was beyond the
8 scope of Bank's relief from stay motion. In re Veal, 450 B.R.
9 at 914. In short, for purposes of the relief from stay motion,
10 debtors' contentions regarding Bank's underlying substantive
11 rights did not undermine or defeat Bank's status as the holder
12 of a colorable claim.¹⁰

13 Based on these authorities and the record before us, we
14 conclude that Bank satisfied its threshold burden of showing a
15 colorable claim to an ownership interest in the property.
16 Accordingly, the bankruptcy court correctly found that Bank was
17 a real party in interest with standing to seek relief from the
18 automatic stay.

21 ⁹ Based on the dismissal of debtors' state court litigation,
22 Bank argues on appeal that collateral estoppel (or issue
23 preclusion) precludes debtors from relitigating the propriety of
24 its foreclosure and thus its standing to seek relief from stay.
25 Bank raised the issue in its opposition to debtors' MFR, but the
26 bankruptcy court's written decision denying debtors' MFR did not
27 mention issue preclusion. In light of our affirmance, we do not
28 discuss this issue for the first time in this appeal.

¹⁰ Indeed, the bankruptcy court stated in its written ruling
that in granting Bank relief from stay, it was not addressing
debtors' claims of wrongful foreclosure which they may be
eligible to assert in a different forum.

1 **B. Relief from Stay: "Cause"**

2 On appeal, debtors contend that "cause" did not exist to
3 grant Bank from relief from stay. In support, debtors cite
4 Benedor Corp. v. Conejo Enter., Inc. (In re Conejo Enter.,
5 Inc.), 96 F.3d 346, 349 (9th Cir. 1996) and Christensen v.
6 Tucson Estates, Inc. (In re Tucson Estates, Inc.), 912 F.2d
7 1162, 1166 (9th Cir. 1990). Debtors' reliance on these cases is
8 misplaced. The "cause" for relief from stay in those cases was
9 related to abstention issues which were factually and legally
10 distinguishable from the "cause" analysis here.

11 "Cause" for relief from stay exists when a foreclosure sale
12 concludes and the purchaser records the deed in accordance with
13 applicable law because the original trustor or borrower no
14 longer has an interest or right in the subject real property.
15 In re Bebensee-Wong, 248 B.R. at 823. Accordingly, under these
16 circumstances, when debtors filed their petition, there was no
17 reason not to allow Bank to repossess "because filing a
18 bankruptcy petition after loss of ownership cannot reinstate the
19 debtor[s'] title." In re Edwards, 454 B.R. at 106. Instead,
20 debtors are essentially "'squatter[s],' and thus cause for
21 relief from stay is established." Id.

22 In sum, Bank acquired title to the property by submitting
23 the prevailing bid at a foreclosure sale and the Trustee's Deed
24 which transferred title was recorded fifteen days later. Based
25 on these facts and on our review of Bank's rights as a purchaser
26 at a foreclosure sale under California law, we find no abuse of
27 discretion in the bankruptcy court's decision to grant Bank's
28 motion for relief from stay so that it could pursue its rights to

1 gain possession of the property.

2 **C. Debtors' Motion for Reconsideration**

3 Debtors sought reconsideration from the order granting Bank
4 relief from stay pursuant to Civil Rule 60(b)(1) and (d)(3),¹¹
5 applicable in contested matters under Rule 9024. Debtors' MFR
6 simply reiterated that all of the foreclosure procedures were
7 fatally flawed, the Trustee's Deed was defective and fatally
8 flawed, and Bank did not have standing to move for relief from
9 stay. However, as noted above, the resolution of debtors'
10 contentions would have required the adjudication of the parties'
11 underlying substantive rights, which was beyond the scope of
12 Bank's relief from stay. In re Veal, 450 B.R. at 914. Further,
13 the bankruptcy court's decision to grant Bank relief from stay
14 was consistent with applicable law and the facts before it.

15 A bankruptcy court has discretion in deciding whether to
16 reconsider its own orders under Civil Rule 60(b). However, the
17 grounds for granting such relief are not without limits; they
18 are clearly set forth within the rule. Debtors' MFR did not
19 show "mistake, inadvertence, surprise, or excusable neglect"
20 within the meaning of Civil Rule 60(b)(1). Moreover, debtors
21 advanced no grounds that would warrant setting aside the
22 underlying order granting relief from stay to Bank due to fraud
23 on the court under Civil Rule 60(b)(3). Accordingly, we do not
24 see any abuse of discretion in the bankruptcy court's decision

25
26 ¹¹ Civil Rule 60(b)(1) gives the bankruptcy court discretion
27 "to relieve a party . . . from a final . . . order . . . based on
28 mistake, inadvertence, surprise, or excusable neglect." Civil
Rule 60(d)(3) makes clear that the bankruptcy court has the power
to "set aside a judgment for fraud on the court."

1 to deny debtors' MFR.

2 **D. Recusal of the Bankruptcy Judge Is Unwarranted**

3 Debtors imply that the bankruptcy judge should be
4 disqualified because he showed bias toward them throughout this
5 case. Debtors did not file a motion for recusal in the
6 bankruptcy court. However, failure to move for recusal at the
7 trial court level does not preclude raising the issue of recusal
8 on appeal. Holland, 501 F.3d at 1122.

9 28 U.S.C. § 455 applies to bankruptcy judges. Seidel v.
10 Durkin (In re Goodwin), 194 B.R. 214, 221 (9th Cir. BAP 1996).
11 Under 28 U.S.C. § 455(a), a judge shall disqualify himself or
12 herself in any proceeding in which his or her impartiality might
13 reasonably be questioned. Under subsection (b)(1) of the
14 statute, a judge shall disqualify himself or herself where he or
15 she has a personal bias or prejudice against a party or personal
16 knowledge of disputed evidentiary facts concerning the
17 proceeding.

18 "Judicial impartiality is presumed." First Interstate Bank
19 of Ariz., N.A. v. Murphy, Weir & Butler, 210 F.3d 983, 987 (9th
20 Cir. 2000). An objective standard is used for judging the
21 appearance of impartiality for purposes of recusal under 28
22 U.S.C. § 455: "whether a reasonable person with knowledge of all
23 the facts would conclude that the judge's impartiality might
24 reasonably be questioned." Seidel, 194 B.R. at 222.

25 Debtors had the burden on appeal to demonstrate that the
26 bankruptcy court had such a bias against them as to warrant
27 recusal. However, all that is before us are their general
28 conclusory allegations. We have reviewed the transcript and it

1 reflects no bias. Reading between the lines, debtors'
2 allegation of bias appear to stem solely from their
3 dissatisfaction with the judge's rulings. "[J]udicial rulings
4 alone almost never constitute a valid basis for a bias or
5 partiality motion Almost invariably, they are proper
6 grounds for appeal, not for recusal." Liteky v. United States,
7 510 U.S. 540, 555 (1994).

8 In sum, we find nothing in the record provided that would
9 cause us to question the bankruptcy judge's impartiality or that
10 shows us that he had a personal bias or prejudice against the
11 debtors. Accordingly, there are no grounds for recusal.

12 **E. Judicial Notice**

13 On April 22, 2013, debtors filed a request for judicial
14 notice with the Panel which consisted of numerous documents.
15 None of these documents is relevant to the issues in this
16 appeal. Accordingly, debtors' request for judicial notice is
17 denied. See Santa Monica Food Not Bombs v. City of Santa
18 Monica, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006) (declining to
19 take judicial notice of documents that were not relevant to the
20 resolution of the appeal).

21 **VI. CONCLUSION**

22 For the reasons stated, we AFFIRM.
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