

AUG 19 2013

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

NOT FOR PUBLICATION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-12-1359-KiPaD
)		
KAREN MICHELE ROZIER,)	Bk. No.	8:11-21727
)		
Debtor.)		
_____)		
)		
KAREN MICHELE ROZIER,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
U.S. BANK N.A., as Trustee,)		
as successor in interest to)		
Bank of America, N.A., as)		
Trustee, successor by merger)		
to LaSalle Bank, N.A., as)		
Trustee for RAAC 2007 RP1,)		
)		
Appellee.)		
_____)		

Argued and Submitted on June 20, 2013,
at Pasadena, California

Filed - August 19, 2013

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

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

Appearances: Karen Michele Rozier, appellant, argued pro se;
Bernard J. Kornberg, Esq. of Severson & Werson
argued for appellee, U.S. Bank, N.A.

Before: KIRSCHER, PAPPAS and DUNN, 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.

1 Appellant, chapter 7² debtor Karen Michele Rozier ("Rozier"),
2 appeals an order from the bankruptcy court granting a motion for
3 relief from stay filed by appellee, U.S. Bank N.A., as trustee, as
4 successor in interest to Bank of America, N.A., as trustee,
5 successor by merger to LaSalle Bank N.A., as trustee for RAAC 2007
6 RP1 ("U.S. Bank"). We AFFIRM.³

7 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

8 A. Prepetition events

9 On December 23, 2005, Rozier obtained a \$576,000 loan
10 ("Loan") from WMC Mortgage Corporation ("WMC") for her principal
11 residence located in Buena Park, California ("Property"). In
12 exchange for the Loan, Rozier executed a promissory note and deed
13 of trust ("DOT") encumbering the Property in favor of the lender.
14

15 ² Unless specified otherwise, all chapter, code and rule
16 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
17 the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

18 ³ Rozier filed a request for judicial notice on December 4,
19 2012, asking the Panel to take notice of four documents. (She
20 also requested that we take judicial notice of the Stay Relief
21 Order, but that is not necessary). We GRANT the request in part
22 and DENY it in part.

23 We DENY her request to take judicial notice of (1) the
24 "Notice of Right to Cancel" dated February 24, 2006, (2) a
25 complaint filed in state court, and (3) the "Public Service
26 Information Form." These documents are either irrelevant to the
27 issues in this appeal or they were not before the bankruptcy court
28 when it entered the Stay Relief Order. See Santa Monica Food Not
Bombs v. City of Santa Monica, 450 F.3d 1022, 1025 n.2 (9th Cir.
2006)(declining to take judicial notice of documents not relevant
to resolution of the appeal); Oyama v. Sheehan (In re Sheehan),
253 F.3d 507, 512 n.5 (9th Cir. 2001)("Evidence that was not
before the lower court will not generally be considered on
appeal."); Kirschner v. Uniden Corp. of Am., 842 F.2d 1074,
1077-78 (9th Cir. 1988)(court is concerned only with the record
before the trial court when it made its decision). However, we
GRANT her request as to the declaration from Mini Ali, the
appraiser of the Property for U.S. Bank. That document is
relevant and was filed in support of the Stay Relief Motion.

1 The DOT named Mortgage Electronic Registration Systems, Inc.
2 ("MERS") as the beneficiary, as nominee for WMC and its successors
3 and assigns.

4 Rozier ultimately defaulted on the Loan, and a notice of
5 default was recorded on March 4, 2008. It is not clear when the
6 notice of sale was recorded, but a trustee's sale was scheduled
7 for June 27, 2008. No sale occurred because Rozier filed her
8 first chapter 13 bankruptcy case on June 25, 2008, thereby
9 imposing the automatic stay. (See case no. 8:08-13583). Rozier
10 was unable to confirm a plan, and the case was eventually
11 dismissed on October 10, 2008.

12 In March 2011, MERS executed an assignment transferring all
13 beneficial interests under the DOT to Bank of America. That
14 assignment was recorded on March 9, 2011. In January 2012, Bank
15 of America executed an assignment transferring all beneficial
16 interests under the DOT to U.S. Bank. U.S. Bank's assignment was
17 recorded on January 13, 2012.

18 **B. The instant bankruptcy case and U.S. Bank's motion for relief**
19 **from stay⁴**

20 Rozier, pro se, filed her second chapter 13 bankruptcy case
21 on August 22, 2011. She listed the Property in her Schedule A as
22 having a value of \$800,000 with a secured claim of \$0. She did
23 not list any secured claims regarding the Property in her
24 Schedule D, but her Schedule F identified a May 2006 note with WMC

25
26 ⁴ We have exercised our discretion to independently review
27 certain electronically filed documents in Rozier's bankruptcy case
28 to 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).

1 in the amount of \$576,000.⁵

2 Rozier was again unable to confirm a plan, and the case was
3 converted to chapter 7 on February 16, 2012. James J. Joseph was
4 appointed the chapter 7 trustee ("Trustee"). Due to the
5 conversion, Rozier's pending objection to the proof of claim filed
6 by GMAC Mortgage, LLC ("GMAC"), servicing agent for Bank of
7 America (the lender for the Loan at the time), was rendered moot
8 and taken off-calendar.

9 U.S. Bank filed a motion for relief from stay to proceed with
10 its foreclosure rights on the Property on June 18, 2012.
11 U.S. Bank contended that "cause" existed for relief under
12 § 362(d)(1) due to Rozier's failure to pay, and that it was also
13 entitled to relief under § 362(d)(2) because she lacked equity in
14 the Property and it was not necessary to an effective
15 reorganization ("Stay Relief Motion"). In support, U.S. Bank
16 submitted the declaration of Joseph Lyons ("Lyons"), employee of
17 GMAC, servicing agent for U.S. Bank, and copies of the original
18 promissory note, the DOT, the assignments, and a broker's
19 appraisal valuing the Property at \$375,000. According to Lyons,
20 Rozier had failed to make payments on the Loan for fifty-four
21 months, which totaled \$230,802.86. Therefore, based on
22

23 ⁵ For reasons not entirely clear on the record, Rozier and
24 WMC executed a modified promissory note in May 2006 with respect
25 to the Property, which appears to be the basis for Rozier's
26 overall complaints. As we explain more thoroughly below, and
27 despite Rozier's beliefs to the contrary, the 2006 note had no
28 bearing as to U.S. Bank's motion for relief from stay and has no
bearing in this appeal. Rozier's complaints regarding the Loan,
the 2006 note, and her claims for quiet title and other related
claims, are matters for the state court. Indeed, Rozier confirmed
at oral argument that she is currently pursuing her claims against
U.S. Bank in state court.

1 U.S. Bank's claim for \$574,669.63, the Property's appraised value
2 of \$375,000, and the costs of sale estimated at \$30,000, U.S. Bank
3 contended that its interest in the Property was not adequately
4 protected with a negative equity of (\$199,669.93).

5 A hearing on the Stay Relief Motion was set for July 10,
6 2012. Oppositions were due by June 26, 2012. U.S. Bank's notice
7 warned that failure to file a timely written response could waive
8 a party's right to oppose the Stay Relief Motion, and the court
9 could grant the requested relief. Trustee and Rozier were
10 properly served.

11 Rozier, pro se, filed an untimely 98-page opposition to the
12 Stay Relief Motion on July 5, 2012, which she has included only in
13 part in the record. In short, Rozier contended that U.S. Bank was
14 not the actual holder or current assignee of the note, was not the
15 real party in interest, and lacked standing to bring the motion.
16 Specifically, Rozier contended that U.S. Bank had failed to prove
17 that it was the real party in interest because: (1) U.S. Bank had
18 not filed a proof of claim in her chapter 7 case; (2) WMC never
19 executed an assignment to another entity; (3) MERS was not
20 recognized in California; and (4) the DOT was void because the
21 original note had been rescinded in 2006. Rozier further alleged
22 that Lyons had lied under oath and that the documents filed in
23 support of the Stay Relief Motion were fraudulent. Rozier valued
24 the Property at \$800,000, which was based on a 2005 appraisal she
25 attached only in part and is missing the page(s) showing the
26 \$800,000 (or any other) value. Trustee did not oppose the Stay
27 Relief Motion.

28 At the hearing on July 10, 2012, counsel for U.S. Bank and

1 counsel for Rozier, Robert Chen ("Chen"), appeared.⁶ Rozier also
2 appeared. The bankruptcy court started off by noting that no
3 opposition had been filed. Chen informed the court that Rozier's
4 opposition had been filed on July 5th. The bankruptcy court then
5 reviewed the document on ECF. U.S. Bank contended that it was
6 entitled to relief because its debt was unsecured to the extent of
7 \$200,000 and Rozier had failed to make fifty-four payments on the
8 Loan. Rozier informed the court that the issues between her and
9 the various lenders were pending in state court. She did not deny
10 the fifty-four delinquent payments. She also admitted to not
11 paying taxes on the Property since March 2008, but stated that she
12 had recently started working with the tax authorities to resolve
13 the issue.

14 After considering U.S. Bank's moving papers, Rozier's
15 untimely opposition, and the parties' oral arguments, the
16 bankruptcy court granted U.S. Bank relief from stay:

17 COURT: Okay. I'm going to grant relief from stay. You
18 can go back to state court and deal with it. These are
19 state court issues. They're not bankruptcy issues.
20 Ma'am, I'm going to grant relief from stay. You're going
21 to need to go back to state court on these issues. These
22 are not bankruptcy issues. They're state court issues.

23 CHEN: Your Honor, will you please not waive the 14 days?

24 COURT: No, I'm waiving the 14 day stay. This woman
25 hasn't paid in years. You can go back to state court.
26

27 ROZIER: Even though there's equity in the property?

28 COURT: Yeah, you haven't paid. That's cause right there.
You haven't paid in 54 months. That's cause.

⁶ Rozier has alleged that she does not know Mr. Chen (who remains nameless in her brief as an "unknown stranger") and that she never authorized him to represent her. Notably, she voiced no objections to his appearance at the hearing.

1 Hr'g Tr. (July 10, 2012) 4:16-5:6.

2 The bankruptcy court entered an order granting the Stay
3 Relief Motion under § 362(d)(1) and (d)(2) on July 30, 2012 ("Stay
4 Relief Order"), thereby rendering Rozier's premature notice of
5 appeal timely per Rule 8002(a). The motions panel denied Rozier's
6 emergency motion for stay pending appeal on October 19, 2012,
7 because, as a chapter 7 debtor, she could not show a likelihood of
8 success on the merits as she had no possibility of restructuring
9 the debt on the Property in her bankruptcy case.

10 II. JURISDICTION

11 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
12 §§ 1334 and 157(b)(2)(G). We have jurisdiction under 28 U.S.C.
13 § 158.

14 III. ISSUES

15 Did the bankruptcy court abuse its discretion when it entered
16 the Stay Relief Order?

17 IV. STANDARDS OF REVIEW

18 Standing is a legal issue reviewed de novo. Mayfield v.
19 United States, 599 F.3d 964, 970 (9th Cir. 2010); Veal v. Am. Home
20 Mortg. Servicing, Inc. (In re Veal), 450 B.R. 897, 906 (9th Cir.
21 BAP 2011).

22 The bankruptcy court's decision to grant a motion for relief
23 from stay is reviewed for an abuse of discretion. Gruntz v. Cnty.
24 of L.A. (In re Gruntz), 202 F.3d 1074, 1084 n.9 (9th Cir. 2000);
25 In re Veal, 450 B.R. at 915. A bankruptcy court abuses its
26 discretion if it applied the wrong legal standard or its findings
27 were illogical, implausible or without support in the record.
28 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th

1 Cir. 2011).

2 V. DISCUSSION

3 **The bankruptcy court did not abuse its discretion when it**
4 **entered the Stay Relief Order.**

5 The only order appealed, and relevant matter before us, is
6 the Stay Relief Order.⁷ Rozier contends that the bankruptcy court
7 erred in entering the Stay Relief Order because U.S. Bank did not
8 establish that it was the real party in interest to seek relief
9 from stay against the Property. Specifically, she contends that
10 U.S. Bank failed to establish standing because it did not file a
11 proof of claim in her case, or show that it had any interest in
12 the 2006 note.

13 Secured creditors such as U.S. Bank are not required to file
14 proofs of claim in chapter 7 cases in order to preserve their
15 security interests or liens; such interests pass through the
16 bankruptcy unaffected despite the absence of a proof of claim.
17 § 501(a); Rule 3002(a); Dewsnup v. Timm, 502 U.S. 410, 418 (1992);
18 Long v. Bullard, 117 U.S. 617, 620-21 (1886); Brawders v. Cnty. of
19 Ventura (In re Brawders), 503 F.3d 856, 872 (9th Cir. 2007).

20 Rozier's attempt to turn U.S. Bank's secured lien into an
21 unsecured one by scheduling it as unsecured and "disputed" in her
22 Schedule F was ineffective.

23 As for her standing argument, it too lacks merit. Motions
24 for relief from stay are contested matters under Rule 9014.
25 Rule 9014(c) provides that Rule 7017, which in turn incorporates

26
27 ⁷ Rozier has not yet received a discharge, her chapter 7 case
28 is still open, and the Property has not been sold. Therefore,
this appeal is not moot.

1 Civil Rule 17(a), is applicable to contested matters. Civil
2 Rule 17(a)(1) provides that "[a]n action must be prosecuted in the
3 name of the real party in interest" Thus, to satisfy the
4 requirements of prudential standing and Civil Rule 17(a)(1), "the
5 action must be brought by the person who, according to the
6 governing substantive law, is entitled to enforce the right."
7 6A Wright, Miller, Kane & Marcus, FED. PRAC. & CIV. PROC. ¶ 1543 (3d
8 ed. 2011); In re Veal, 450 B.R. at 908.⁸ Simply put, the party
9 moving for relief from the automatic stay must be the "real party
10 in interest."

11 Under § 362(d), a "party in interest" can request relief from
12 the automatic stay. Section 362(d)(1) authorizes relief from stay
13 "for cause, including the lack of adequate protection of an
14 interest in property of such party in interest." Whether a moving
15 party is a "party in interest" under § 362(d) is determined on a
16 case-by-case basis, taking into account both the claimed interest
17 and how that interest is affected by the automatic stay.

18 In re Veal, 450 B.R. at 913; Kronemyer v. Am. Contractors Indem.
19 Co. (In re Kronemyer), 405 B.R. 915, 919 (9th Cir. BAP 2009). A
20 "party in interest" can include any party that has a pecuniary
21 interest in the matter, that has a practical stake in the
22 resolution of the matter, or that is impacted by the automatic
23 stay. Brown v. Sobczak (In re Sobczak), 369 B.R. 512, 517-18 (9th
24 Cir. BAP 2007).

25
26 ⁸ Constitutional standing is satisfied because U.S. Bank
27 established the minimum requirements of injury in fact, causation,
28 and redressability. The automatic stay's prohibition on
U.S. Bank's right to exercise its alleged nonbankruptcy rights
could be redressed by obtaining relief from stay. See In re Veal,
450 B.R. at 906.

1 "A proceeding to determine eligibility for relief from a stay
2 only determines whether a creditor should be released from the
3 stay in order to argue the merits in a separate proceeding."
4 Arkison v. Griffin (In re Griffin), 719 F.3d 1126, 1128 (9th Cir.
5 2013). "Given the limited nature of . . . this proceeding and
6 because final adjudication on the parties' rights and liabilities
7 is yet to occur, a party . . . need only establish . . . a
8 colorable claim to the property . . ." Id. See In re Veal,
9 450 B.R. at 913 (holding same and citing First Fed. Bank of Cal.
10 v. Robbins (In re Robbins), 310 B.R. 626, 631 (9th Cir. BAP
11 2004)); and Biggs v. Stovin (In re Lux Int'l, Ltd.), 219 B.R. 837,
12 842 (9th Cir. BAP 1998) (an adjudication of the claims, defenses
13 or counterclaims is not involved; only a determination of a
14 colorable claim is made).

15 Veal recognized that a movant has a colorable claim under
16 § 362 if it either: (1) owns or has another form of property
17 interest in a note secured by the debtor's (or the estate's)
18 property; or (2) is a "person entitled to enforce such a note
19 under applicable state law." 450 B.R. at 910. In Veal, the Panel
20 determined that the mortgagee had failed to establish its standing
21 to obtain relief from stay because it could not show that it
22 possessed the note, or that it had an interest in the note. Id.
23 at 918. Veal, however, is distinguishable from the instant case
24 because Veal was applying Illinois law, which follows the common
25 law rule under the Uniform Commercial Code ("UCC") that a
26 mortgagee must hold the note to foreclose. Id. at 916. Likewise,
27 under the common law rule, an assignment of a mortgage without the

28

1 note is a nullity. Id. In this case, California law applies,⁹
2 which has altered the common law rule by statute.

3 California has enacted nonjudicial foreclosure statutes that
4 have changed the common law rule. Id. at 916-17 & n.34.
5 California's nonjudicial foreclosure statutes are governed by CAL.
6 CIV. CODE ("CCC") §§ 2924 through 2924k, which are exhaustive.
7 California law does not require that the party initiating
8 foreclosure be in possession of the note. Debrunner v. Deutsche
9 Bank Nat'l Trust Co., 204 Cal.App.4th 433, 440 (2012)(collecting
10 cases); Lane v. Vitek Real Estate Indus. Grp., 713 F.Supp.2d 1092,
11 1099 (E.D. Cal. 2010)("There is no stated requirement in
12 California's non-judicial foreclosure scheme that requires a
13 beneficial interest in the Note to foreclose. Rather,
14 [CCC § 2924(a)(1)] broadly allows a trustee, mortgagee,
15 beneficiary, or any of their agents to initiate non-judicial
16 foreclosure. Accordingly, the statute does not require a
17 beneficial interest in both the Note and the Deed of Trust to
18 commence a non-judicial foreclosure sale.").

19 Therefore, in California, a party with a nonbankruptcy right
20 to commence foreclosure proceedings may have prudential standing -
21 i.e., a colorable claim to the property - to prosecute a motion
22 for relief from stay. By establishing its interest in the DOT,
23 U.S. Bank did not have to show that it held the original note or

24
25 ⁹ The DOT, the security instrument at issue, contains a
26 choice of law provision, which states that it shall be governed by
27 federal law "and the law of the jurisdiction in which the Property
28 is located." Here, that would be California. As the Panel held
in Veal, the forum state's choice of law rules determine which
state's substantive law applies. 450 B.R. at 916 n.32. In
California, generally deeds of trust as opposed to mortgages are
used as the security instrument for the note.

1 the 2006 note, or an interest in either of those notes, or to
2 produce the actual note(s) to establish its standing to prosecute
3 the Stay Relief Motion. Given that U.S. Bank could commence
4 foreclosure of the Property without either of the notes, it
5 certainly would not need to possess or show any interest in them
6 in the lesser action of establishing a colorable claim entitling
7 it to relief from stay.

8 We conclude, on this record, that U.S. Bank demonstrated that
9 it had a colorable claim to the Property. In support of the Stay
10 Relief Motion, U.S. Bank offered the Lyons declaration. Lyons
11 stated that GMAC was the authorized loan servicing agent for
12 U.S. Bank and that the DOT had been assigned to U.S. Bank.
13 Attached was a copy of the original note, the DOT, and two
14 recorded assignments - the assignment of WMC's beneficial interest
15 in the DOT to Bank of America, and the assignment of the DOT from
16 Bank of America to U.S. Bank. As the beneficiary under the DOT,
17 U.S. Bank may initiate the foreclosure process against the
18 Property. See CCC § 2924(a)(1); Debrunner, 204 Cal.App.4th at
19 440. Accordingly, these foreclosure rights give U.S. Bank a
20 colorable claim in the Property, and therefore it has standing to
21 prosecute the Stay Relief Motion.

22 While Rozier's arguments on appeal do not appear to extend
23 beyond challenging U.S. Bank's standing, the bankruptcy court
24 found that "cause" existed under § 362(d)(1) to grant relief from
25 stay. "Cause" has no clear definition and is determined on a
26 case-by-case basis. Mac Donald v. Mac Donald (In re Mac Donald),
27 755 F.2d 715, 717 (9th Cir. 1985); In re Kronemyer, 405 B.R. at
28 921. Once a party seeking relief establishes a prima facie case

1 that cause exists for relief under § 362(d)(1), the burden shifts
2 to the debtor to show that relief from the stay is not warranted.
3 USA v. Gould (In re Gould), 401 B.R. 415, 426 (9th Cir. BAP 2009).

4 The record supports the bankruptcy court's finding that
5 "cause" existed to terminate the automatic stay and allow
6 U.S. Bank to exercise its foreclosure remedies against the
7 Property. U.S. Bank established its standing and a colorable
8 claim to the Property. It further established that Rozier had
9 failed to tender fifty-four payments owing on the Loan, a fact she
10 did not seem to dispute at the hearing, and that its debt was
11 unsecured by \$200,000. A chapter 7 debtor's failure to make
12 monthly payments to a secured creditor can constitute "cause" for
13 granting relief from the automatic stay. In re Bushee, 319 B.R.
14 542, 552 (Bankr. E.D. Tenn. 2004)(citing Price v. Del. State
15 Police Fed. Credit Union (In re Price), 370 F.3d 362, 373 (3d Cir.
16 2004)("A persistent failure to make monthly payments under loan
17 documents can constitute cause for granting relief from the
18 automatic stay.")). See also In re Vicente, 446 B.R. 26, 32
19 (Bankr. D. Mass. 2011) (chapter 7 debtor's failure to make
20 thirty-five mortgage payments constituted cause to terminate the
21 automatic stay under § 362(d)(1)). Rozier also conceded that she
22 had not paid taxes on the Property since 2008. Finally, the
23 issues Rozier would like to resolve against U.S. Bank with respect
24 to the Loan, which are strictly state law issues, are pending in
25 state court. For these reasons, Rozier did not meet her burden to
26 show that relief from stay was not warranted.

27 Accordingly, the bankruptcy court did not abuse its
28 discretion in entering the Stay Relief Order, and we AFFIRM.

1 Because the record establishes that U.S. Bank was entitled to
2 relief for "cause" under § 362(d)(1), we need not review the
3 bankruptcy court's decision to also grant relief under
4 § 362(d)(2).

5 **VI. CONCLUSION**

6 We AFFIRM.

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28