NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP No. AZ-10-1345-JuMkPa
	)	
CARLOS RAMON FONTES and EVA MARIE FONTES,	)	Bk. No. 08-13133
	)	
Debtors.	)	
	)	
CARLOS RAMON FONTES; EVA MARIE FONTES,	)	
	)	
Appellants,	)	
	)	
v.	)	M E M O R A N D U M*
	)	
HSBC BANK, USA, NA; DIANNE CRANDELL KERNS, Chapter 13 Trustee,	)	
	)	
Appellees.	)	

Argued and Submitted on February 17, 2011
at Phoenix, Arizona

Filed - April 22, 2011

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Eileen W. Hollowell, Bankruptcy Judge, Presiding

Appearances: Ronald Ryan, Esq. argued for Appellants Carlos and Eva Fontes
Steven D. Jerome, Esq. of Snell & Wilmer LLP argued for Appellee HSBC Bank USA, NA
Craig Morris, Esq. argued for Appellee Dianne Crandell Kerns

Before: JURY, MARKELL, 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.

Appellants, chapter 13[1] debtors Carlos R. Fontes and Eva M. Fontes, appeal the bankruptcy court's orders granting appellee HSBC Bank USA, National Association ("HSBC") relief from the automatic stay and denying debtors' motion for reconsideration.

The bankruptcy court decided that confirmation of debtors' chapter 13 plan barred them from contesting whether HSBC was a party in interest with standing in the later-filed proceeding to terminate the automatic stay. We REVERSE.

I. FACTS

On November 16, 2006, debtors executed a promissory note for $172,000 in favor of Infinity Funding Corporation ("Infinity") which was secured by a deed of trust on their residence located in Tucson, Arizona. The deed of trust named Mortgage Electronic Registration Systems, Inc. ("MERS") as a beneficiary, solely as the nominee of Infinity. Debtors defaulted on their payments in August 2008.

On September 27, 2008, debtors filed their chapter 13 petition. In Schedule D, debtors listed America's Servicing Company ("ASC")[2] as the creditor on the mortgage of their residence holding non-contingent, liquidated, and undisputed claims for $170,162 (principal) and $8,155 (prepetition arrearages).

On October 6, 2008, ASC filed a proof of claim reflecting

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[1] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

[2] In its brief on appeal, HSBC refers to ASC as "the servicer for HSBC."

the principal balance of the loan and prepetition arrearages.[3] The claims docket indicates that the only attachment to the proof of claim was a copy of the Infinity deed of trust.

On October 8, 2008, debtors filed their chapter 13 plan. Their plan acknowledged that ASC's claim for prepetition arrearages was a secured claim and provided for those payments through the plan. The plan also provided that debtors' current monthly payments would be made outside the plan. Debtors reserved their right to object to the claim of "Homecomings Financial,"[4] requested documentation regarding the amount of arrearages, and authorized the mortgagee or its agent to communicate directly with debtors to renegotiate and restructure the mortgage terms.

Also on October 8, 2008, debtors filed a Motion to Approve Negotiation of Mortgage and Direct Contact With Debtor Notwithstanding the Automatic Stay. The court granted the motion by order entered on the same date.

On October 16, 2008, ASC filed an amended proof of claim to reflect the arrearage amount through September 27, 2008, rather than the date of filing to conform to the terms of debtors' plan. Debtors did not object to ASC's proof of claim or amended

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[3] Rule 3001(b) states that a proof of claim shall be executed by the creditor or the creditor's authorized agent. ASC's proof of claim did not mention that it was acting as the authorized agent for HSBC. We take judicial notice of ASC's proof of claim under Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

[4] Nothing in the record explains the relationship of Homecomings Financial to this case.

proof of claim. Therefore, the claim was "deemed allowed" under § 502(a).

Debtors' plan was confirmed by an order entered on January 23, 2009. The order changed the distribution amount to ASC to comport with the arrearages stated in ASC's proof of claim. The confirmed plan also stated that the "first mortgage [was] held by America's Servicing Company."

On September 11, 2009, HSBC filed a motion for relief from stay to foreclose on debtors' residence. Attached to the motion were the note, deed of trust, and an assignment of the deed of trust dated September 11, 2009. Pursuant to the assignment, MERS, as nominee for Infinity, granted, assigned, and transferred to HSBC all of the beneficial interest under the deed of trust together with the note. The assignment was not recorded until June 3, 2010, after the court granted HSBC's motion for relief from stay.

Debtors opposed the motion, arguing that HSBC was not the real party in interest and also did not have constitutional standing to bring the motion.[5]

At the January 7, 2010 preliminary hearing, the chapter 13 trustee's counsel informed the court that debtors had confirmed their plan. The bankruptcy court stated that "[w]e have a confirmed plan . . . . [T]hat means . . . the time for objecting to proofs of claim has come and gone." The court commented that

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[5] Debtors contend on appeal that the MERS Servicer ID website shows that Beneficial Finance One Inc., is the owner of the note. Nowhere do Debtors show this information from the website constitutes admissible evidence. Debtors further contend that the note has never been indorsed by Infinity.

"there may be a judicial admission here that they are the real party in interest." The court continued the matter for a final hearing.

On February 1, 2010, HSBC submitted the declaration of Terressa J. Williams ("Williams"), who stated that HSBC was "the holder or servicer of a Note dated November 16, 2006 in the amount of $172,000."

At the February 11, 2010 final hearing, the bankruptcy court made the following statements on the record:

> [S]ince you treated them as a Creditor in the plan, I don't really - - I think that, you know, you're barred from making that [real party in interest] argument now
> . . . .
>
> There's a confirmed plan where you basically allowed their claim, and provided for their treatment, and now you want to challenge that in the context of a motion for relief from stay.
> . . . .
>
> Here, the plan gives this Creditor a colorable claim in the property.

Finally, the court noted that debtors did not object to ASC's proof of claim. The court granted HSBC relief from the stay by order entered on February 24, 2010.

On March 9, 2010, debtors filed a request to amend or reform the order and for a hearing or rehearing or reconsideration.[6] Debtors argued that the bankruptcy court did

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[6] Debtors actually filed two motions for reconsideration on March 9, 2010. In addition to the motion for reconsideration of the order granting HSBC relief from stay, debtors filed a motion for reconsideration of an order denying their motion to extend the time for filing their motion for reconsideration of the order granting HSBC relief from stay. The court denied both of debtors' motions by a single order entered on August 30, 2010. (continued...)

not consider their brief regarding whether the confirmation of their plan precluded them from challenging HSBC's standing to seek relief from stay. On August 24, 2010, after a short oral argument, the court denied the motion.[7] The order denying the motion was entered on August 30, 2010. On the same day, debtors filed this appeal.

On September 2, 2010, the bankruptcy court granted debtors a temporary stay to allow them time to request a stay pending appeal from this Panel. On October 8, 2010, the Panel granted debtors a stay pending appeal and ordered expedited briefing.

II. JURISDICTION

The bankruptcy court had jurisdiction over this proceeding under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (G). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUE

Whether the bankruptcy court erred in granting HSBC relief from stay.

IV. STANDARDS OF REVIEW

HSBC's standing is a conclusion of law that we review de novo. Smith v. Arthur Andersen LLP, 421 F.3d 989, 1001 (9th Cir. 2005).

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[6](...continued)
Debtors appealed only that portion of the order denying their motion for reconsideration of the order granting HSBC relief from stay.

[7] Debtors' counsel did not promptly set the reconsideration motions for hearing, nor did the court. Apparently no party was concerned with the non-finality of the February 23, 2010, order until August.

The bankruptcy court's grant of a motion to terminate the stay under § 362(d) is reviewed for an abuse of discretion, Groshong v. Sapp (In re Mila, Inc.), 423 B.R. 537, 542 (9th Cir. BAP 2010), as is the bankruptcy court's denial of a motion to alter or amend the judgment. Ta Chong Bank Ltd. v. Hitachi High Techs. Am., Inc., 610 F.3d 1063, 1066 (9th Cir. 2010).

We follow a two-part test to determine objectively whether the bankruptcy court abused its discretion. United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). First, we "determine de novo whether the bankruptcy court identified the correct legal rule to apply to the relief requested." Id. Second, we examine the bankruptcy court's factual findings under the clearly erroneous standard. Id. at 1262 n.20. We affirm the court's factual findings unless those findings are "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" Id. (internal quotation marks omitted). If the bankruptcy court did not identify the correct legal rule, or its application of the correct legal standard to the facts was illogical, implausible, or without support in the record, then the bankruptcy court abused its discretion. Id.

V. DISCUSSION

Under § 362(d), only a "party in interest" may seek relief from the operation of the automatic stay from the bankruptcy court. This appeal involves a slightly different twist on a movant's real party in interest prudential standing under Fed.

R. Civ. P. 17(a)(1)[8] (made applicable by Rule 7017) for purposes of obtaining relief from stay under § 362(d).

The primary question before us is whether debtors' listing of ASC (the loan servicer) as a creditor with an undisputed secured claim in their Schedule D, and debtors' treatment of ASC in their confirmed plan, barred them from subsequently contesting whether a different entity (HSBC) lacked real party in interest standing for purposes of obtaining relief from stay. The bankruptcy court answered the question in the affirmative. However, the bankruptcy court did not state what precise legal doctrines it was relying upon or articulate the standards that they entail and how those standards were met. The parties, however, advance myriad theories to support or challenge the court's decision, which we address below.

A. HSBC's Theories

HSBC argues that we should affirm the court's decision on the ground that debtors' statements in their schedules and confirmed plan regarding ASC were judicial admissions[9] that HSBC had standing to bring the motion for relief from stay because ASC was HSBC's loan servicer. HSBC further argues that the doctrine of judicial estoppel[10] should bar debtors from

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[8] Fed. R. Civ. P. 17(a)(1) provides: "An action must be prosecuted in the name of the real party in interest . . . ."

[9] The bankruptcy court made a perfunctory reference to the judicial admission doctrine at the preliminary relief from stay hearing but that precise concept was not mentioned again.

[10] There is no explicit reference to this doctrine in the record.

challenging HSBC's standing because debtors acknowledged their debt to ASC, HSBC's loan servicer, in their schedules and plan. Thus, HSBC maintains that debtors should not be able to take an inconsistent position in the context of the relief from stay proceeding. Finally, HSBC contends that despite these grounds for affirming the bankruptcy court's ruling, it independently met its burden of proof that it had a colorable claim to debtors' property.[11]

Although we may affirm the bankruptcy court's decision on any ground fairly supported by the record, Wirum v. Warren (In re Warren), 568 F.3d 1113, 1116 (9th Cir. 2009), we disagree with HSBC that it should prevail under any of these theories.

We first address HSBC's argument that it proved it had a colorable claim to debtors' property. The record shows that the bankruptcy court did not directly address this question because it relied on debtors' confirmed plan for its decision. Regardless, we review standing issues de novo and there is no evidence in the record that supports HSBC's contention.

The assignment of the deed of trust from MERS, as nominee for Infinity, to HSBC also purported to assign the note. However, HSBC, as MER'S assignee, would take subject to the rights and remedies of its assignor. HSBC overlooks the fact

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[11] All that a bankruptcy court must do before granting relief from the stay is determine whether the moving creditor has presented a colorable claim that stay relief is warranted. Biggs v. Stovin (In re Luz Int'l, Ltd.), 219 B.R. 837, 842 (9th Cir. BAP 1998). HSBC as the party requesting stay relief had the burden of proving that it had a colorable claim and standing to bring the motion. In re Wilhelm, 407 B.R. 392, 400 (Bankr. D. Idaho 2009).

that there is no evidence in the record that shows MERS had any interest in the note to assign. Although the deed of trust gave MERS, as nominee, the power to assign the deed of trust, it did not mention the note, nor did the note itself name MERS as nominee, so MERS could not take this right from the documents themselves. Further, there is no independent evidence that Infinity conveyed the note to MERS. Finally, debtors were not obligated under the note to make payments to MERS. In short, the language in the deed of trust which names MERS as a beneficiary, solely as nominee of Infinity, was insufficient to confer any economic benefit on MERS. In re Weisband, 427 B.R. 13, 20 (Bankr. D. Ariz. 2010).

In Weisband, the bankruptcy court considered whether a MERS assignment of a deed of trust provided the loan servicer with standing for purposes of obtaining relief from stay. The court concluded that MERS had no interest in the note and would suffer no injury if the note was not paid and the deed of trust not foreclosed. As a result, the court concluded that MERS did not have constitutional standing and, if MERS did not have constitutional standing, its assignee could not satisfy the requirements for constitutional standing either. Id.; see also Wilhelm, 407 B.R. at 404 (discussing validity of MERS's assignments related to the note). We do not perceive a different result is warranted under these circumstances.[12]

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[12] It is axiomatic that HSBC must show that it has both constitutional standing and prudential, or party in interest, standing to bring the motion for relief for stay. Satisfying one (continued...)

Moreover, HSBC gives the Williams' declaration more credence than the rules of evidence allow. Williams' declaration was conclusory, simply stating that she was familiar with the business records of HSBC and that HSBC was the "holder or servicer" of the note. Williams also stated that HSBC had a contractual right to collect payments and maintain legal actions for the beneficial note holder, either as the current note holder or pursuant to either a Master Servicing Agreement or Power of Attorney. However, neither of those documents were attached to her declaration and there is no other foundation for her to have made these equivocal statements. Finally, the declaration creates an ambiguity because Williams stated that HSBC was "the holder or servicer" of the Note. Which is it? If HSBC was a servicer of the note, it does not necessarily follow that HSBC was the holder of the note under Ariz. Rev. Stat. § 47-1201(B)(21)(a).[13] See Weisband, 427 B.R. at 21 (noting that "[E]ven if a servicer has constitutional standing, it may still not be the 'real party in interest' under Fed. R. Civ. P. 17 and may not, therefore be able to satisfy the requirements for prudential standing."). In short, Williams' declaration did not

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[12](...continued)
standing requirement and not the other is insufficient. See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474-75 (1982).

[13] This section provides in relevant part: "Holder" means:

> (a) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession . . . .

establish that HSBC had constitutional or prudential standing or that HSBC had authority to act for any entity that did have standing.

HSBC's judicial admission and estoppel theories as grounds for affirmance are also unpersuasive. HSBC seeks to have these doctrines applied to itself vis-a-vis ASC. The only manner in which HSBC links itself to ASC in the record is through its repeated assertion without reference to any evidence that ASC was its "servicer."[14] No further details are given. Does HSBC mean that ASC was its agent at the time of debtors' filing? Or, does HSBC mean it somehow became the successor in interest to ASC? The record does not support either theory.

Generally, a loan servicer acts only as the agent of the owner of the instrument. We do not find any evidence in the record that establishes an agency relationship between HSBC and ASC that existed when debtors filed their petition and proposed their plan. The record contains no servicing agreement between ASC and HSBC indicating that ASC was HSBC's agent, and ASC's proof of claim did not state that it was acting as the authorized agent for HSBC. Further, MERS's assignment to HSBC of the trust deed and note is dated September 11, 2009 — a date well past the petition and plan confirmation dates. Thus, the only inference to be drawn from the record is that ASC was acting as servicer for some party other than HSBC when debtors

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[14] HSBC argues that debtors never contested its assertion that ASC was HSBC's servicer and, therefore, debtors have waived that issue on appeal. Regardless, whether or not ASC was HSBC's servicer alone does not control the outcome of this appeal.

filed their petition.

We also cannot conclude on this record that HSBC established that it was ASC's successor in interest. A successor in interest is "one who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." Black's Law Dictionary, (9th ed. 2009). Nothing in the record shows ASC was in the line of assignments of the note or trust deed. In reality, ASC and HSBC appear to be separate unrelated entities at the time of debtors' filing. Without a direct link to ASC, HSBC cannot take advantage of the judicial admission or estoppel doctrines to bar debtors' challenge to its standing.

In sum, the record is devoid of evidence that would support any of HSBC's theories.

B. The Trustee's Theory

The trustee urges affirmance of the bankruptcy court's ruling based on the binding effect of § 1327(a). However, again, the record does not provide us with any details regarding the court's purported reliance on § 1327(a) which provides:

> [T]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

Nonetheless, the statute does not have the broad sweeping effect espoused by the trustee. Application of the statute requires a careful case-by-case evaluation of the terms of the plan in question. Alonso v. Summerville (In re Summerville), 361 B.R. 133, 139 (9th Cir. 2007). Here, none of the provisions

of debtors' plan address any issues that relate to ASC's ability, as the loan servicer, to enforce the note within the meaning of Ariz. Rev. Stat. § 47-1201(B)(21)(a). Moreover, there is nothing in debtors' plan that restricts the transfer of the note post-confirmation to another entity. For these reasons, we are not persuaded that the confirmation of debtors' plan as written had any binding effect on the standing issues that arose in the context of the motion for relief from stay.

C. Debtors' Theory

Debtors' sole argument is that the bankruptcy court erred by applying the doctrine of issue preclusion to their confirmed plan. In light of our decision, it is unnecessary to address debtors' argument or the court's decision to deny their motion for reconsideration of the order granting HSBC relief from stay. We would remark, however, that issue preclusion was never mentioned by the court and was not the basis of the court's ruling.

VI. CONCLUSION

For all these reasons, we REVERSE.