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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	AZ-10-1345-JuMkPa
)		
6	CARLOS RAMON FONTES and EVA)	Bk. No.	08-13133
	MARIE FONTES,)		
7)		
	Debtors.)		
8	_____)		
)		
9	CARLOS RAMON FONTES;)		
	EVA MARIE FONTES,)		
10)		
	Appellants,)		
11)		
	v.)	M E M O R A N D U M*	
12)		
	HSBC BANK, USA, NA;)		
13	DIANNE CRANDELL KERNS,)		
	Chapter 13 Trustee,)		
14)		
	Appellees.)		
15	_____)		

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.

1 Appellants, chapter 13¹ debtors Carlos R. Fontes and Eva M.
2 Fontes, appeal the bankruptcy court's orders granting appellee
3 HSBC Bank USA, National Association ("HSBC") relief from the
4 automatic stay and denying debtors' motion for reconsideration.

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

9 **I. FACTS**

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

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

23 On October 6, 2008, ASC filed a proof of claim reflecting
24

25 ¹ Unless otherwise indicated, all chapter, section and
26 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
27 1532, and to the Federal Rules of Bankruptcy Procedure, Rules
28 1001-9037.

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

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

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

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

18 On October 16, 2008, ASC filed an amended proof of claim to
19 reflect the arrearage amount through September 27, 2008, rather
20 than the date of filing to conform to the terms of debtors'
21 plan. Debtors did not object to ASC's proof of claim or amended
22

23
24 ³ Rule 3001(b) states that a proof of claim shall be
25 executed by the creditor or the creditor's authorized agent.
26 ASC's proof of claim did not mention that it was acting as the
27 authorized agent for HSBC. We take judicial notice of ASC's
28 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.

1 proof of claim. Therefore, the claim was "deemed allowed" under
2 § 502(a).

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

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

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

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

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26 ⁵ Debtors contend on appeal that the MERS Servicer ID
27 website shows that Beneficial Finance One Inc., is the owner of
28 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.

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

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

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

10 [S]ince you treated them as a Creditor in the plan, I
11 don't really - - I think that, you know, you're barred
12 from making that [real party in interest] argument now
13

14 There's a confirmed plan where you basically allowed
15 their claim, and provided for their treatment, and now
16 you want to challenge that in the context of a motion
17 for relief from stay.
18

19 Here, the plan gives this Creditor a colorable claim
20 in the property.

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

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

27 ⁶ Debtors actually filed two motions for reconsideration
28 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...)

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

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

11 II. JURISDICTION

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

15 III. ISSUE

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

18 IV. STANDARDS OF REVIEW

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

23 ⁶(...continued)

24 Debtors appealed only that portion of the order denying their
25 motion for reconsideration of the order granting HSBC relief from
stay.

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

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

7 We follow a two-part test to determine objectively whether
8 the bankruptcy court abused its discretion. United States v.
9 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).
10 First, we "determine de novo whether the bankruptcy court
11 identified the correct legal rule to apply to the relief
12 requested." Id. Second, we examine the bankruptcy court's
13 factual findings under the clearly erroneous standard. Id. at
14 1262 n.20. We affirm the court's factual findings unless those
15 findings are "(1) 'illogical,' (2) 'implausible,' or (3) without
16 'support in inferences that may be drawn from the facts in the
17 record.'" Id. (internal quotation marks omitted). If the
18 bankruptcy court did not identify the correct legal rule, or its
19 application of the correct legal standard to the facts was
20 illogical, implausible, or without support in the record, then
21 the bankruptcy court abused its discretion. Id.

22 V. DISCUSSION

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

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

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

15 **A. HSBC's Theories**

16 HSBC argues that we should affirm the court's decision on
17 the ground that debtors' statements in their schedules and
18 confirmed plan regarding ASC were judicial admissions⁹ that HSBC
19 had standing to bring the motion for relief from stay because
20 ASC was HSBC's loan servicer. HSBC further argues that the
21 doctrine of judicial estoppel¹⁰ should bar debtors from
22

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

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

27 ¹⁰ There is no explicit reference to this doctrine in the
28 record.

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

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

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

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

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24 ¹¹ All that a bankruptcy court must do before granting
25 relief from the stay is determine whether the moving creditor has
26 presented a colorable claim that stay relief is warranted. Biggs
27 v. Stovin (In re Luz Int'l, Ltd.), 219 B.R. 837, 842 (9th Cir.
28 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).

1 that there is no evidence in the record that shows MERS had any
2 interest in the note to assign. Although the deed of trust gave
3 MERS, as nominee, the power to assign the deed of trust, it did
4 not mention the note, nor did the note itself name MERS as
5 nominee, so MERS could not take this right from the documents
6 themselves. Further, there is no independent evidence that
7 Infinity conveyed the note to MERS. Finally, debtors were not
8 obligated under the note to make payments to MERS. In short,
9 the language in the deed of trust which names MERS as a
10 beneficiary, solely as nominee of Infinity, was insufficient to
11 confer any economic benefit on MERS. In re Weisband, 427 B.R.
12 13, 20 (Bankr. D. Ariz. 2010).

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

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

1 Moreover, HSBC gives the Williams' declaration more
2 credence than the rules of evidence allow. Williams'
3 declaration was conclusory, simply stating that she was familiar
4 with the business records of HSBC and that HSBC was the "holder
5 or servicer" of the note. Williams also stated that HSBC had a
6 contractual right to collect payments and maintain legal actions
7 for the beneficial note holder, either as the current note
8 holder or pursuant to either a Master Servicing Agreement or
9 Power of Attorney. However, neither of those documents were
10 attached to her declaration and there is no other foundation for
11 her to have made these equivocal statements. Finally, the
12 declaration creates an ambiguity because Williams stated that
13 HSBC was "the holder or servicer" of the Note. Which is it? If
14 HSBC was a servicer of the note, it does not necessarily follow
15 that HSBC was the holder of the note under Ariz. Rev. Stat.
16 § 47-1201(B)(21)(a).¹³ See Weisband, 427 B.R. at 21 (noting that
17 "[E]ven if a servicer has constitutional standing, it may still
18 not be the 'real party in interest' under Fed. R. Civ. P. 17 and
19 may not, therefore be able to satisfy the requirements for
20 prudential standing."). In short, Williams' declaration did not

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

25 ¹³ This section provides in relevant part: "Holder"
26 means:

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

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

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

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

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

1 filed their petition.

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

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

15 **B. The Trustee's Theory**

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

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

23 Nonetheless, the statute does not have the broad sweeping
24 effect espoused by the trustee. Application of the statute
25 requires a careful case-by-case evaluation of the terms of the
26 plan in question. Alonso v. Summerville (In re Summerville),
27 361 B.R. 133, 139 (9th Cir. 2007). Here, none of the provisions
28

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

9 **C. Debtors' Theory**

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

18 **VI. CONCLUSION**

19 For all these reasons, we REVERSE.
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