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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NOT FOR PUBLICATION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. AZ-10-1368-DMkMa
KIRAN SARDANA,	Bk. No. 08-12830-CGC
Debtor.	
KIRAN SARDANA,	
Appellant,	
v.	**MEMORANDUM**[1]
BANK OF AMERICA, N.A.,	
Appellee.	

Argued and Submitted on May 13, 2011
at Phoenix, Arizona

Filed - June 7, 2011

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

Honorable Charles G. Case, Bankruptcy Judge, Presiding

Appearances: Trucly Pham Swartz of John Joseph Volin, P.C. argued for Appellant; Leonard McDonald, Jr. if Tiffany & Bosco, P.A. argued for Appellee

Before: DUNN, MARKELL and MANN,[2] Bankruptcy Judges.

[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have, FRAP 32.1, it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Margaret M. Mann, Bankruptcy Judge for the Southern District of California, sitting by designation.

Debtor and appellant Kiran Sardana ("Ms. Sardana") appeals the bankruptcy court's order granting relief from stay to appellee Bank of America, N.A. ("Bank of America"). We VACATE and REMAND to the bankruptcy court to conduct an evidentiary hearing.

FACTS

On September 23, 2008, Ms. Sardana filed her chapter 13[3] bankruptcy petition. On her Schedule A – Real Property, Ms. Sardana listed her residence in Chandler, Arizona ("Property"), as having a value of $249,000 and secured claims against it in the amount of $342,001.12. In her Schedule D, Ms. Sardana stated that Bank of America had undisputed claims secured by the Property in the amounts of $288,619.18 and $53,381.94, respectively. Based on Ms. Sardana's valuation of the Property, Bank of America had a secured claim on its first trust deed ("Trust Deed") in the amount of $249,000, with the balance of $39,619.18 unsecured, and Bank of America's line of credit second lien on the Property, in the amount of $53,381.94, was wholly unsecured.

On April 13, 2010, Bank of America filed a motion for relief from stay ("Motion") requesting an order granting relief from the stay of § 362(a) to permit Bank of America to foreclose its Trust Deed and obtain possession and control of the Property. In the

[3] Unless otherwise specified, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

Motion, Bank of America alleged that Ms. Sardana had signed a promissory note ("Note") secured by the Trust Deed on the property. Copies of the Note and Trust Deed were attached as Exhibits "A" and "B" to the Motion. Bank of America is identified as the "Lender" in both the Note and the Trust Deed. In the Trust Deed, Bank of America, as "Lender," is identified as the "beneficiary under this Security Instrument." Bank of America alleged that it had a secured claim against Ms. Sardana and a secured interest in the Property by virtue of the Note and Trust Deed.

In the Motion, Bank of America further alleged that Ms. Sardana was in default of her Note obligation in that she had failed to pay the postpetition maintenance payments to Bank of America for January through April, 2010, for a total postpetition default of $6,617.02, after a setoff of funds in suspense.

Ms. Sardana filed a response ("Response") to the Motion on or about April 27, 2010. In her Response, Ms. Sardana did not dispute that she was in postpetition default of her payment obligations under the Note and Trust Deed. Her sole defense was her argument that Bank of America did not hold the original Note and thus was not a real party in interest, lacking standing to file the Motion. Ms. Sardana alleged that, as opposed to being the current "owner and holder" of the Note, "Bank of America is only a servicer, a sub-servicer or a default servicer of the debt pursuant to a pooling and servicing agreement with the actual holder. . . ."

The bankruptcy court held a preliminary hearing ("Preliminary Hearing") on the Motion on May 27, 2010. At the

Preliminary Hearing, counsel for Ms. Sardana advised the bankruptcy court that based on a preliminary investigation, it appeared that the Note had been assigned to Fannie Mae, and counsel assumed that Bank of America just retained servicing rights. Counsel for Ms. Sardana requested about 60 days to investigate the situation further and offered that Ms. Sardana was prepared to make an adequate protection payment to Bank of America.

The bankruptcy court noted that,

> There are a number of cases from the Arizona – from the District of Arizona – district judges who say Arizona is not a quote, "Show me the note state." A conclusion with which I happen to agree.

May 27, 2010 Hrg. Tr. at 10: 17-20. However, the bankruptcy court further stated its willingness to grant a short continuance based upon Ms. Sardana making adequate protection payments. The bankruptcy court also stated that during the time before a final hearing, the ownership of the Note could be explored, but its greater concern was who was the beneficiary under the Trust Deed.

Ms. Sardana submitted discovery requests to Bank of America, Fannie Mae and the chapter 13 trustee. In the Appendix to Appellant's Reply Brief, Ms. Sardana included a copy of a Motion to Compel Discovery ("Motion to Compel") and attached exhibits prepared and served on or about August 20, 2010, alleging that Bank of America had not responded to Ms. Sardana's Interrogatories and Requests for Production of Documents. Nothing in the record on appeal informs us of the disposition of the Motion to Compel.

A further hearing ("Final Hearing") on the Motion was held

on September 14, 2010. At the Final Hearing, counsel for Bank of America argued that Bank of America was the originator of the Note and Trust Deed and that they had not been transferred. Bank of America's counsel further reported that Ms. Sardana had made some discovery requests "demanding to see the original note and deed of trust." Bank of America had refused to provide access to the original Note and Trust Deed but had provided copies on three separate occasions. Counsel for Bank of America confirmed that the Trust Deed had been recorded. Bank of America's counsel concluded, "Again, they're parked in this 13 and not making payments. And we'd like relief from stay." September 14, 2010 Hrg. Tr. at 3: 12-13.

Counsel for Ms. Sardana confirmed that Ms. Sardana did not dispute that Bank of America was the original holder of the Note, but argued there was conflicting evidence as to whether Bank of America or Fannie Mae was the current holder of the Note. However, counsel for Ms. Sardana confirmed that there was no record of transfer of the Trust Deed. Ultimately, counsel for Ms. Sardana offered to present evidence that Fannie Mae was the current owner of the Note. The bankruptcy court did not receive that evidence because, "It doesn't sound like there's any dispute as to that." September 14, 2010 Hrg. Tr. at 4: 13-14. Counsel for Ms. Sardana did not dispute that she was behind on her payments for the Property postpetition.[4]

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[4] In Appellant's Opening Brief, Ms. Sardana states that, "In compliance with the court's order, Appellant made the required adequate payment to Appellee." Appellant's Opening (continued...)

After hearing the arguments of counsel, the bankruptcy court stated its findings and conclusions orally on the record. After noting that a motion for relief from stay is an "interim proceeding," the bankruptcy court stated that the beneficiary under a recorded deed of trust is entitled to proceed with foreclosure under Arizona state law.

> It is my view that the production of the original note is not necessary. Even if the note has been transferred the right to foreclose the deed of trust, among other people, remains with the beneficiary of record.

September 14, 2010 Hrg. Tr. at 5: 13-16. Since Bank of America was "indisputably the beneficiary of record it seems to me that they are entitled to bring this motion for relief from stay." Id. at 5: 17-19. Accordingly, the bankruptcy court overruled Ms. Sardana's argument that Bank of America was not the real party in interest and lacked standing to prosecute the Motion.

The bankruptcy court then determined that since there was no dispute that Ms. Sardana was behind on her postpetition payments under the Trust Deed obligation, there was "cause" to grant relief from stay. The bankruptcy court concluded by ordering that the stay was lifted.

An order ("Order") granting the Motion was entered by the bankruptcy court on September 20, 2010. Ms. Sardana timely

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[4](...continued)
Brief at 6. However, there is no evidence in the record before us of any payment(s) made by Ms. Sardana postpetition, except for one payment that Ms. Sardana's husband advised the bankruptcy court at the Preliminary Hearing had been made to Bank of America's counsel. Bank of America's counsel confirmed receipt of one payment in the amount of $1,938.50.

appealed the Order.

JURISDICTION

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

ISSUE

Did the bankruptcy court err when it determined that Bank of America had standing to pursue the Motion?

STANDARDS OF REVIEW

Standing is a legal issue that we review de novo. Loyd v. Paine Webber, Inc., 208 F.3d 755, 758 (9th Cir. 2000); Kronemyer v. Am. Contractors Indem. Co. (In re Kronemyer), 405 B.R. 915, 919 (9th Cir. BAP 2009). De novo review requires that we consider a matter anew, as if it had not been heard before, and as if no decision had been rendered previously. United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988); B-Real, LLC v. Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008).

DISCUSSION

Although Ms. Sardana divides her argument into two parts, the only issue before us in this appeal is whether Bank of America has standing to file and prosecute the Motion.[5]

I. General Standing Principles

Standing considerations involve both "constitutional

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[5] Ms. Sardana's argument that because Bank of America has no standing to prosecute the Motion, the bankruptcy court has no jurisdiction to consider the Motion, is derived from Ms. Sardana's base argument that Bank of America has no standing to begin with.

limitations on federal court jurisdiction and prudential limitations on its exercise." Warth v. Seldin, 422 U.S. 490, 498 (1975). Constitutional standing concerns whether a claimant's stake in a matter is sufficient to create a "case or controversy" to which the federal judicial power under Article III of the Constitution may extend. Id. at 498-99; Pershing Park Villas Homeowners Assoc. v. Unified Pac. Ins. Co., 219 F.3d 895, 899 (9th Cir. 2000); Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992).

In Appellant's Opening Brief, Ms. Sardana admits that Bank of America has constitutional standing because the Note "is payable to Appellee," and Ms. Sardana was in default of her postpetition payment obligations under the Note when the Motion was filed. Appellant's Opening Brief at 10.

However, Ms. Sardana asserts that Bank of America does not have prudential standing because it is not the "real party in interest" to prosecute the Motion. In analyzing prudential standing requirements, the Supreme Court has held:

> "[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. [at 499].

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982). Ms. Sardana argues that "[t]he real party in interest in a Motion for Relief is a party entitled to enforce the right being asserted under applicable substantive law." Appellant's Opening Brief at 11.

The moving party bears the burden of proof to establish its standing to prosecute a motion for relief from stay. See In re

Wilhelm, 407 B.R. 392, 399-400 (Bankr. D. Id. 2009), citing Lujan v. Defenders of Wildlife, 504 U.S. at 561.

II. Standing to File a Motion for Relief from Stay

When a bankruptcy petition is filed, § 362(a) automatically imposes a very broad injunction, the "automatic stay," on collection and enforcement activities against the debtor, the debtor's property, and property of the estate. § 362(a)(3) specifically stays "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."

Under § 362(d), a "party in interest" may request relief from the automatic stay. Section 362(d)(1) authorizes relief from stay "for cause, including the lack of adequate protection of an interest in property of such party in interest."

Because the term "party in interest" is not defined in the Bankruptcy Code, whether a moving party, such as Bank of America, has the status of a party in interest under § 362(d) is a fact intensive matter to be determined on a case-by-case basis, taking into account the claimed interest and the impact of the stay on that interest. In re Kronemyer, 405 B.R. at 919. A "party in interest" can include any party that has a pecuniary interest in the case, a practical stake in the resolution of the matter, or is impacted by the stay." Brown v. Sobczak (In re Sobczak), 369 B.R. 512, 517-18 (9th Cir. BAP 2007).

Motions for relief from the stay are contested matters. See Rules 4001(a) and 9014(a). Rule 9014(c) provides that Rule 7017 is applicable in contested matters. Rule 7017, in turn, incorporates Civil Rule 17. Civil Rule 17(a) provides that "[a]n

action must be prosecuted in the name of the real party in interest. . . ." Given the application of these various rules, proceedings to decide motions for relief from stay are nonetheless very circumscribed matters.

> Given the limited grounds for obtaining a motion for relief from stay, read in conjunction with the expedited schedule for a hearing on the motion, most courts hold that motion for relief from stay hearings should not involve an adjudication on the merits of claims, defenses, or counterclaims, but simply determine whether the creditor has a colorable claim to the property of the estate.

Biggs v. Stovin (In re Luz Int'l), 219 B.R. 837, 842 (9th Cir. BAP 1998) (emphasis added). See, e.g., Johnson v. Righetti (In re Johnson), 756 F.2d 738, 740-41 (9th Cir. 1985).

Cornell University Law School's Legal Information Institute defines a "colorable claim" in a straightforward manner as:

> A plausible legal claim. In other words, a claim strong enough to have a reasonable chance of being valid if the legal basis is generally correct and the facts can be proven in court. The claim need not actually result in a win.

http://topics.law.cornell.edu/wex/colorable_claim.

Resolving a motion for relief from stay involves consideration of the specific grounds for granting relief from stay set forth in § 362(d), i.e., generally whether "cause," including a lack of adequate protection of the moving party's interest, is established; whether the debtor has any equity in the subject property; and/or whether the subject property is necessary to an effective reorganization of the debtor's affairs. It generally is not an appropriate context for a definitive ruling on the merits of the underlying claims between the parties. In re Johnson, 756 F.2d at 740-41 ("Hearings on relief

from the automatic stay are . . . handled in a summary fashion. [citation omitted] The validity of the claim or contract underlying the claim is not litigated during the hearing.”).

> [I]t is analogous to a preliminary injunction hearing, requiring a speedy and necessarily cursory determination of the reasonable likelihood that a creditor has a legitimate claim or lien as to a debtor’s property. If a court finds that likelihood to exist, this is not a determination of the validity of those claims, but merely a grant of permission from the court allowing that creditor to litigate its substantive claims elsewhere without violating the automatic stay.

Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 33-34 (1st Cir. 1994). See In re Vitreous Steel Prod. Co., 911 F.2d 1223, 1234 (7th Cir. 1990) (“Questions of the validity of liens are not generally at issue in a § 362 hearing, but only whether there is a colorable claim of a lien on property of the estate.”) (Emphasis in original.)

The Eleventh Circuit has concluded that “[a] servicer is a party in interest in proceedings involving loans which it services.” Greer v. O’Dell (In re O’Dell), 305 F.3d 1297, 1302 (11th Cir. 2002). In her Reply Brief, Ms. Sardana agrees that in some circumstances, loan servicers may have standing to prosecute a motion for relief from stay. Appellant’s Reply Brief at 5-6.

III. The Record Before the Bankruptcy Court

In this case, Ms. Sardana raised questions as to Bank of America’s ownership of the Note, and indeed established to the bankruptcy court’s satisfaction that Fannie Mae owned the Note. However, the bankruptcy court focused on who was the beneficiary under the Trust Deed. The Trust Deed was before the bankruptcy

court as an exhibit to the Motion.[6] The Trust Deed identified Bank of America as the "Lender" and further defined the "Lender" as the beneficiary under the Trust Deed. At the Final Hearing, the bankruptcy court confirmed that the Trust Deed had been recorded properly, and counsel for Ms. Sardana admitted that there had been no change of record to the Trust Deed.

As noted by the bankruptcy court, under Arizona state law, the beneficiary of a trust deed is entitled to proceed with foreclosure. Arizona Revised Statutes ("A.R.S") § 33-807, in relevant part, provides:

> A. . . . At the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property in which event chapter 6 of this title governs the proceedings. The beneficiary or trustee shall constitute the proper and complete party plaintiff in any action to foreclose a deed of trust. . . .
> B. The trustee or beneficiary may file and maintain an action to foreclose a deed of trust at any time before the trust property has been sold under the power of sale. . . .

(Emphasis added.) Accordingly, under Arizona law, a trust deed beneficiary, whether it is the holder of the related promissory note or the agent for such holder, along with the trustee under the deed of trust, is generally a party with standing to prosecute a foreclosure action.

In addition to, and as a complement to, the statutory authority of the Trust Deed beneficiary under A.R.S. § 33-807 to

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[6] Unauthenticated copies of the Note and Trust Deed were attached as exhibits to the Motion. On remand, for their admission as evidence, copies or originals of the Note and Trust Deed will need to be properly authenticated as required by the Federal Rules of Evidence. See Rule 901, Federal Rules of Evidence.

initiate a foreclosure action with respect to the Property, the Trust Deed by its terms provides that the Lender/beneficiary has authority to initiate a nonjudicial foreclosure sale in the event of Ms. Sardana's default of her obligations secured by the Trust Deed.[7]

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[7] Section 22 of the Trust Deed provides, in relevant part, as follows:

> Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in the Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) the date, not less than 30 days from the date the notice is given to the Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by the Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and cost of title evidence.
>
> If Lender invokes the power of sale, Lender shall give written notice to Trustee of the occurrence of an event of default and of Lender's election to cause the Property to be sold. Trustee shall record a notice of sale in each county in which any part of the Property is located and shall mail copies of the notice as prescribed by applicable law to Borrower and to the other persons prescribed by Applicable Law. After the time required by applicable law and after publication and posting of

(continued...)

But that is not all that is required under Arizona law in this context. A.R.S. § 33-801(1) defines "Beneficiary" under a trust deed as "the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the person's successor in interest." A.R.S. § 33-817 further provides that, "The transfer of any contract or contracts secured by a trust deed shall operate as a transfer of the security for such contract or contracts." Accordingly, if the holder of the beneficial interest in the Note changes, even if the named beneficiary under the Trust Deed remains the same, the beneficiary's right to enforce the Note obligation and foreclose the Trust Deed must be based on some further agreement with the new owner or holder of the Note. See Hill v. Favour, 52 Ariz 561, 568, 84 P.2d 575, 578 (1938):

> The law seems to be well settled that the mortgage is a mere incident to the debt and that its transfer or assignment does not transfer or assign the debt or the note. The mortgage goes with the note. If the latter is assigned, the mortgage automatically goes along with the assignment or transfer.

Ms. Sardana relies on Arizona UCC law, particularly on A.R.S. § 47-3301, to argue that the "person entitled to enforce" instruments, such as the Note, under Arizona law is the holder of

[7](...continued)
the notice of sale, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder for cash at the time and place designated in the notice of sale. Trustee may postpone sale of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

the Note.[8] See Appellant's Opening Brief at 11. However, A.R.S. § 47-3301 provides:

> "Person entitled to enforce" an instrument means the holder of an instrument, a nonholder in possession of the instrument who has the rights of a holder or a person not in possession of the instrument who is entitled to enforce the instrument pursuant to § 47-3309 or § 47-3418, subsection D. A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument. (Emphasis added.)

Accordingly, based on the highlighted language of § 47-3301 alone, the statute does not say what Ms. Sardana wants it to say: Under Arizona law, a party entitled to enforce the Note obligation is not necessarily required to be the "holder" of the Note. Indeed, the Arizona district court rejected Ms. Sardana's argument, albeit in a different context, in Mansour v. Cal-Western Reconveyance Corp., 318 F. Supp. 2d 1178, 1181 (D. Ariz. 2009), citing A.R.S. § 47-3301. In fact, as noted by the bankruptcy court at the Preliminary Hearing, there are a number of decisions from federal district courts in Arizona determining that Arizona is not a "show me the note" state. See, e.g., Levine v. Downey Sav. & Loan F.A., 2009 WL 4282471 (D.Ariz. Nov.

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[8] Ms. Sardana's argument (see Appellant's Opening Brief at 13) that because she was prepared to present evidence that Fannie Mae had purchased the Note, the "power of sale" may have been exercised and the Trust Deed beneficiary changed for purposes of § 33-807(b), is disingenuous. No suggestion was made by either party at the Preliminary Hearing or the Final Hearing that a nonjudicial foreclosure sale of the Property had occurred. Indeed, it is logical to assume from this record that Ms. Sardana opposed the Motion in order to prevent a nonjudicial foreclosure sale of the Property from taking place.

25, 2009); Garcia v. GMAC Mortgage, LLC, 2009 WL 2782791 (Aug. 31, 2009) (unpublished); Diessner v. Mortgage Elec. Registration Systems, 618 F. Supp. 2d 1184, 1187 and n.16 (D. Ariz. 2009) (citing A.R.S. § 33-807); and Mansour v. Cal-Western Reconveyance Corp., 318 F. Supp. 2d at 1181.

Even so, as counsel for Bank of America admitted at oral argument, to be a "real party in interest" for standing purposes to prosecute a motion for relief from stay, the moving party must have a right to enforce the subject obligation under Arizona law. See, e.g., BAC Home Loans Servicing, L.P. v. Zitta (In re Zitta), 2011 WL 677289 (Bankr. D. Ariz. Jan. 25, 2011); In re Weisband, 427 B.R. 13 (Bankr. D. Ariz. 2010); and In re Hill, 2009 WL 1956174 (Bankr. D. Ariz. July 6, 2009). With Ms. Sardana having made an offer of proof, which the bankruptcy court apparently accepted but disregarded, that the Note had been assigned to Fannie Mae, Bank of America needed to establish that it retained the right to enforce the Note obligation in order to establish its standing to prosecute the Motion. It did not meet its burden of proof to make that showing. Accordingly, we determine that it is appropriate to vacate the Order and remand to the bankruptcy court to conduct an evidentiary hearing on the issue of Bank of America's standing as a real party in interest to prosecute the Motion and on such other matters as the bankruptcy court determines to be appropriate.

CONCLUSION

For the foregoing reasons, we VACATE the Order and REMAND to the bankruptcy court to conduct an evidentiary hearing.