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SUSAN M SPRAUL, CLERK
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NOT FOR PUBLICATION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. CC-10-1020-DMkH
)	BAP No. CC-10-1021-DMkH
THE PRESERVE, LLC,)	(cross-appeals)
)	
Debtor.)	Bk. No. 08-23006-BB
_____)	
)	
POINT CENTER FINANCIAL, INC.,)	
)	
Appellant/)	
Cross-Appellee)	
)	
v.)	M E M O R A N D U M¹
)	
THE PRESERVE, LLC,)	
)	
Appellee/)	
Cross-Appellant.)	
_____)	

Argued and Submitted on July 23, 2010
at Pasadena, California

Filed - September 22, 2010

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

Hon. Sheri Bluebond, Bankruptcy Judge, Presiding

Before: DUNN, MARKELL, and HOLLOWELL, 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 Finding no proof in the record to establish that an
2 admittedly substantial decline in the value of debtor's
3 unimproved real property had occurred postpetition, the
4 bankruptcy court ruled that cause did not exist to grant relief
5 from the automatic stay to the loan servicing agent pursuant to
6 11 U.S.C. § 362(d)(1)² and did not require adequate protection
7 payments. The bankruptcy court further ruled that while debtor
8 did not have equity in the property, the property was necessary
9 to debtor's effective reorganization. Accordingly, the
10 bankruptcy court also denied relief from the automatic stay under
11 § 362(d)(2). The loan servicing agent appealed the order denying
12 it relief from the automatic stay. Debtor filed a cross appeal,
13 asserting that the loan servicing agent lacked standing to bring
14 the motion in the first instance.

15 We AFFIRM.

16 **I. FACTS**

17 A. The Loan (and the Parties to the Loan)

18 The Preserve, LLC ("The Preserve") is a limited liability
19 company that owns as its primary asset 1,331 acres of undeveloped
20 land near Beaumont, CA ("the Property"). The Preserve intends to
21 use the Property for a master planned community, the "Legacy
22 Highlands," which is to consist of residential single family
23 homes, parks, school sites, trails, and a gated "active adult"
24 community. The Preserve actively pursued obtaining the necessary
25 environmental and other permits, as well as funding, for

26
27 ² Unless otherwise indicated, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
All "Rule" or "FRBP" references are to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9037.

1 development of the Property. To that end, The Preserve entered
2 into the financial transaction that is the basis for this appeal.

3 Point Center Financial, Inc. ("PCF") is a private trust deed
4 lender that lends on commercial properties. PCF originates loans
5 secured by real estate and funded by private investors. After
6 PCF has approved a loan application, PCF begins to raise money
7 from individual investors ("Investors") to fund that loan. The
8 Investors own fractional, tenant-in-common interests in the loan,
9 including the trust deed securing the loan, in direct proportion
10 to the amounts of their respective investments.

11 On September 21, 2006, The Preserve executed a promissory
12 note ("Note") in the principal amount of \$39,000,000, payable "to
13 the order of the lenders identified on Exhibit 'A'" ³
14 Exhibit A to the Note consisted of seven pages identifying
15 Investors in 111 fractionalized interests in the Note. The Note
16 provided for monthly interest-only payments in the amount of
17 \$406,250 commencing December 1, 2006, until the maturity date of
18 November 1, 2008, at which time the entire balance of the Note
19 was due. Payment of the Note was to be made "c/o Point Center
20 Financial, Inc." Also on September 21, 2006, The Preserve
21 executed an addendum to the Note, which called for a staged
22 funding of the loan. ⁴

25 ³ The loan was a refinance of a previously existing loan
26 between the Preserve and PCF.

27 ⁴ The record reflects that after the Note was executed,
28 PCF continued selling fractionalized interests to additional
Investors.

1 To secure payment of the Note, The Preserve executed a deed
2 of trust ("Trust Deed") in favor of National Financial Lending,
3 Inc., who was designated as the Trustee for the benefit of the
4 beneficiaries identified in Exhibit C to the Trust Deed.⁵

5 Exhibit C to the Trust Deed consisted of seven pages identifying
6 the Investors holding 111 fractionalized interests in the Trust
7 Deed.

8 After the Note and Trust Deed were executed and recorded,
9 PCF prepared a Loan Servicing Agreement ("LSA") dated September
10 28, 2006, which it required each of the Investors to sign. As
11 relevant to this appeal, the LSA recitals state that the
12 Investors "desire to appoint [PCF] as their agent to . . .
13 service the [Note] and to protect their interest in and enforce
14 their rights under the [Note and Trust Deed], . . . in accordance
15 with the terms of [the LSA]."

16 To establish this agency relationship, the LSA contained
17 provisions empowering PCF to act on behalf of the Investors:

18 2. Appointment. The [Investors] hereby appoint
19 [PCF] as their agent . . . to service the [Note], to
20 protect their interest in and enforce their rights
21 under the [Note and Trust Deed], . . . in accordance
22 with the terms of [the LSA]. [PCF] hereby accepts this
23 appointment and agrees to exercise diligent and good
24 faith efforts in the execution of its duties as agent
25 in accordance with reasonable and customary commercial
26 practice.

27 The LSA authorized PCF to enforce the Investors' rights with
28 respect to the Note and Trust Deed as follows:

8. Enforcement. Upon the . . . occurrence of a .
. . default under the Loan Documents . . ., [PCF] . . .

28 ⁵ National Financial Lending, Inc. is an entity related
to PCF.

1 shall exercise the power of sale contained in the
2 [Trust Deed]

3 To ensure that PCF had the sole authority to enforce the
4 Investors' rights under the Note and Trust Deed, the LSA provided
5 that the Investors waived their rights to foreclose upon or
6 partition their interests in the Note and Trust Deed. In
7 addition, paragraph 4 of the LSA provided that PCF would
8 "maintain possession of all original Loan Documents on behalf of
9 all [Investors]. . . ." Finally, paragraph 18 of the LSA granted
10 PCF the Investors' power of attorney to perform the acts
11 authorized by the LSA.

12 PCF prepared, and on October 23, 2006, recorded, a
13 Memorandum of Servicing Agreement, which identified the LSA and
14 set forth PCF's rights to act on behalf of the Investors.

15 B. Default and Bankruptcy Proceedings

16 The loan to The Preserve was never fully funded. PCF
17 contends that it stopped funding the loan in October 2007 when
18 The Preserve fell substantially behind on the construction
19 schedule on which the loan was based. The Preserve contends that
20 it defaulted on the construction schedule because PCF failed to
21 fund the reserves required by the parties' agreement.

22 Ultimately, PCF initiated non-judicial foreclosure
23 proceedings to enforce the Trust Deed, and The Preserve commenced
24 litigation ("Litigation") in the Riverside, California Superior
25 Court against PCF based on its failure to fully fund the loan.⁶
26 The Preserve filed a voluntary chapter 11 petition on

27
28 ⁶ The Litigation has been removed to the bankruptcy court
and is pending.

1 September 25, 2008. The initiation of the bankruptcy case stayed
2 the foreclosure sale that was set for September 29, 2008.

3 On June 16, 2009, PCF filed a motion for relief from the
4 automatic stay ("RFS Motion") naming itself as the secured
5 creditor holding a claim in the amount of \$43,301,423, secured by
6 a first deed of trust on the Property.⁷ The RFS Motion included
7 the bankruptcy court's local form "Real Property Declaration"
8 executed by Dan Harkey, who represented himself to be "President
9 of [PCF] ('Movant'), which is the designated agent for the
10 various fractionalized interest holders on the loan to [The
11 Preserve] secured by the lien against the Property."

12 The RFS Motion sought relief from the automatic stay "for
13 cause" pursuant to § 362(d)(1), on the basis that its interest in
14 the Property was not adequately protected, either because there
15 was no equity cushion, or because the fair market value of the
16 Property was declining, and The Preserve was not making payments
17 sufficient to protect PCF from the declining value of the
18 Property. The RFS Motion also sought relief from the automatic
19 stay pursuant to § 362(d)(2), asserting that The Preserve had no
20 equity in the Property and that the Property was not necessary
21 for an effective reorganization.

22 The RFS Motion was supported by an appraisal ("PCF
23 Appraisal") valuing the property at \$15,970,000. The PCF
24 Appraisal was prepared by PCF's expert, Paul Chandler, as set
25
26
27

28 ⁷ The appendix to the RFS Motion listed 112 Investors;
that number was later increased, first to 175, then to 182.

1 forth in Mr. Chandler's declaration dated June 16, 2009.⁸ In
2 reaching the \$15,970,000 value for the Property, Mr. Chandler
3 relied heavily on what the parties refer to as the "Beaumont
4 Market Trend Report, and on the fact that a judgment (the "CEQA⁹
5 Judgment") had been entered on March 30, 2009, against The
6 Preserve and the City of Beaumont. The CEQA Judgment mandated
7 that the City of Beaumont "set aside and vacate its approvals of
8 the Legacy Highlands Project . . ." and that The Preserve suspend
9 all activity on the Project "until it has taken the actions
10 necessary to bring the Project into compliance with CEQA."

11 The Preserve opposed the RFS Motion alleging, inter alia,
12 that PCF had no standing as a party in interest to prosecute the
13 RFS Motion. Relying upon an "Appraisal Review Report" prepared
14 by its expert, C. Christopher Louis ("Louis Declaration"), The
15 Preserve also challenged the PCF Appraisal as being "materially
16 flawed."

17 The bankruptcy court conducted an evidentiary hearing on the
18 RFS Motion on September 17, 2009.¹⁰ As required by the
19

20 ⁸ PCF ultimately submitted into evidence two additional
21 declarations by Mr. Chandler on the issue of the value of the
22 Property (collectively, "Chandler Declarations").

23 ⁹ "CEQA" is the acronym for the California Environmental
24 Quality Act.

25 ¹⁰ A preliminary hearing on the RFS Motion was held
26 July 14, 2009 ("July 14 Hearing"). At the July 14 Hearing, the
27 bankruptcy court ruled in favor of The Preserve on the requested
28 relief under § 362(d)(2). The bankruptcy court recognized that
there was no equity in the Property. However, the bankruptcy
court stated that the "reorganization is largely going to succeed
or fail because of this particular piece of property," such that

(continued...)

1 bankruptcy court's "Order Setting Date for Evidentiary Hearing
2 and Establishing Procedures for Conduct of Trial," PCF submitted
3 the Chandler Declarations and the PCF Appraisal as its evidence
4 relating to value of the Property. The Chandler Declarations
5 stated generally that the value of the Property was declining and
6 that home values in the Beaumont, California, area had dropped
7 over the immediately preceding quarters. The Chandler
8 Declarations stated specifically that the median home price
9 dropped 38.5 percent from September 2007 through July 2009,
10 including a month-to-month decline from April to May 2009; that
11 the value of active adult housing dropped between 15.4 and 23.5
12 percent from September 2008 to July 2009; and that although home
13 sales rose by 25 percent in the surrounding area in June 2009,
14 the increase was on account of decreasing prices of 32.7 percent.
15 The Chandler Declarations asserted that housing prices were
16 relevant to the valuation of the Property because land values
17 would correspondingly rise or fall with housing prices.

18 The Preserve neither cross-examined Mr. Chandler on the PCF
19 Appraisal or the Chandler Declarations, nor submitted an
20 appraisal of its own. Instead, The Preserve presented evidence
21 through the Louis Declaration to demonstrate that the Property
22 was not likely to decline in value prospectively. Specifically,
23

24 ¹⁰(...continued)

25 the court could find that it was "necessary to an effective
26 reorganization." The bankruptcy court acknowledged that at some
27 point reorganization might become "hopeless," but that it was not
28 yet at that point. Based on this ruling, § 362(d)(2) was not a
part of subsequent proceedings on the RFS Motion. The order that
ultimately was entered on the RFS Motion did not address the
claim for relief under § 362(d)(2).

1 the Louis Declaration stated that the real estate market
2 currently was in the bottom of a trough, was not declining, but
3 rather was beginning to improve; that the housing supply had
4 decreased; that construction spending had increased; and that
5 home sales had risen 7.2 percent between June and July 2009.¹¹

6 In addition to the Louis Declaration, The Preserve also
7 submitted declarations from David Golkar ("Golkar Declaration")
8 and John Nolan ("Nolan Declaration"). The Golkar Declaration and
9 the Nolan Declaration addressed the impact of the CEQA Judgment
10 on the Property's value. In particular, they disputed the
11 contentions in the PCF Appraisal that the CEQA Judgment had
12 resulted in the loss of "entitlements" to develop the Property,
13 and they outlined the progress The Preserve had made to correct
14 the deficiencies raised in the CEQA Judgment.¹²

15 At the conclusion of the evidentiary hearing, the bankruptcy
16 court found, based upon the Louis Declarations, which the
17 bankruptcy court determined to be credible, that the Property was
18 not currently declining in value. The bankruptcy court then

19
20 ¹¹ PCF cross-examined Mr. Louis on the Louis Declaration.
21 This was the only live testimony presented at the Evidentiary
22 Hearing.

23 ¹² The Nolan Declaration stated that Mr. Nolan's firm was
24 working on making the necessary adjustments to gain CEQA
25 approval; that a revocation of the approvals was not a
26 death-knell, but only a necessary step in providing further
27 analysis; that the finding of the CEQA court was only that the
28 project was non-compliant, not that it was prohibited; and that
the City of Beaumont was still supportive of the project. The
Golkar Declaration stated that upon completion of the corrective
work, the entitlements would be restored, and that the City of
Beaumont had voted to proceed with the corrections necessary for
the water portion of the environmental impact report.

1 requested additional briefing on the issue of adequate
2 protection; specifically, what reference point in time should the
3 bankruptcy court use to determine whether property is declining
4 in value for the purposes of adequate protection - the date the
5 petition was filed, the date the RFS Motion was filed, or the
6 date of the hearing? The bankruptcy court also requested
7 additional briefing on the issue of whether the LSA was
8 sufficient to authorize PCF to prosecute the RFS Motion or
9 whether PCF instead needed a valid power of attorney from each of
10 the Investors, which the bankruptcy court found it did not have.

11 In the additional briefing, The Preserve emphasized that PCF
12 lacked authority to enforce the Trust Deed, because it did not
13 have the agreement of 100% of the Investors to be governed by
14 Investors holding more than 50% of the ownership interests as was
15 required by Cal. Civ. Code § 2941.9.¹³ Further, The Preserve
16 asserted that PCF could not act in the name of the Investors
17 because it did not hold a valid power of attorney. PCF countered
18 that Cal. Civ. Code § 2941.9 was not mandatory, and that the
19 Investors had opted to enter into the LSA rather than be bound by
20 the provisions of Cal. Civ. Code § 2941.9.¹⁴

21
22 ¹³ Cal. Civ. Code § 2941.9 provides a process through
23 which all beneficiaries under a trust deed may agree to be
24 governed by the holders of more than 50% of beneficial interests
25 in the same property. Its terms are discussed more fully in the
26 Discussion, infra.

27 ¹⁴ Prior to the post-briefing hearing, Deep Canyon
28 Holdings, Inc. ("DCHI"), filed its separate opposition to the RFS
Motion, based on PCF's alleged lack of authority to file the RFS
Motion on behalf of the Investors. When PCF notified The

(continued...)

1 After the additional briefing was complete, the bankruptcy
2 court held a hearing for further argument and to present its
3 ruling on the RFS Motion. After reviewing its earlier findings
4 of fact, the bankruptcy court held that PCF had authority to
5 bring the motion.¹⁵ The bankruptcy court found that the Property
6 had not necessarily declined in value after the petition date,
7 but instead that there could have been a cataclysmic drop in
8 value before or on or about the petition date. Based on the
9 evidence presented, the bankruptcy court could not determine when
10 the decline in value of the Property had occurred. Based on that
11 conclusion, and its finding that the Property was not continuing
12 to decline in value, the bankruptcy court ruled that no adequate
13 protection payments were necessary. The bankruptcy court entered
14 its order denying the RFS Motion on the basis that PCF had not
15 established "cause" for relief from the automatic stay and
16 because:

17
18 ¹⁴(...continued)

19 Preserve that additional investments were needed to fully fund
20 the loan, The Preserve contacted DCHI and arranged for additional
21 investments. DCHI contends that it made two initial investments
22 with PCF in the total amount of \$1,341,600, after which PCF
23 refused to accept further investments from DCHI. DCHI asserted
24 that it believed it held more than 50% of the non-PCF interests
25 in the Note and Trust Deed, that it had never signed the LSA to
26 the effect that the LSA never became effective, and that as a
precaution, it had sent a letter to PCF, purportedly in reliance
on Cal. Civ. Code § 2941.9, acting as the majority interest
holder which terminated any authority to act as loan servicer
that the LSA may have bestowed upon PCF.

27 ¹⁵ The bankruptcy court stated that, technically, the RFS
28 Motion should have been filed naming each of the Investors as the
"movant," with PCF acting as their agent, but that this defect
could be remedied by an amendment to the RFS Motion.

1 (1) PCF does not hold a valid power of attorney for
2 [the Investors] and therefore should have brought [the
3 RFS Motion] in [the] name of [the Investors] in its
4 capacity as an authorized agent; (2) [PCF] failed to
5 establish that [the] property's decline in value
6 occurred after the petition date rather than at or
7 shortly before the petition date; (3) [the bankruptcy
8 court] found that [the] property value was not likely
9 to decline in the foreseeable future.

10 **II. JURISDICTION**

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

14 **III. ISSUES**

15 1. Whether the bankruptcy court erred when it determined
16 that PCF, as agent for the Investors, had standing to pursue the
17 RFS Motion.

18 2. Whether the bankruptcy court erred in finding that PCF's
19 interest in the Property was adequately protected because the
20 Property's value was not declining prospectively.

21 3. Whether the bankruptcy court erred in finding that the
22 Property was necessary to The Preserve's effective
23 reorganization.

24 4. Whether the bankruptcy court abused its discretion when
25 it denied the RFS Motion.

26 **IV. STANDARDS OF REVIEW**

27 Standing is a legal issue that we review de novo. Loyd v.
28 Paine Webber, Inc., 208 F.3d 755, 758 (9th Cir. 2000); Kronemyer
v. Am. Contractors Indemn. 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.

1 Silverman, 861 F.2d 571, 576 (9th Cir. 1988); B-Real, LLC v.
2 Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008).

3 We review findings of fact for clear error, giving due
4 regard to the opportunity of the bankruptcy court to judge the
5 credibility of the witnesses. FRBP 8013. "A factual finding is
6 clearly erroneous if the appellate court, after reviewing the
7 record, has a firm and definite conviction that a mistake has
8 been committed." Wall St. Plaza, LLC v. JSJF Corp. (In re JSJF
9 Corp.), 344 B.R. 94, 99 (9th Cir. BAP 2006).

10 The decision of a bankruptcy court whether or not to grant
11 relief from the automatic stay under § 362(d) is reviewed for
12 abuse of discretion. Mataya v. Kissinger (In re Kissinger),
13 72 F.3d 107, 108 (9th Cir. 1995); In re Kronemyer, 405 B.R. at
14 919. To determine whether the bankruptcy court abused its
15 discretion, we conduct a two-step inquiry: (1) we review de novo
16 whether the bankruptcy court "identified the correct legal rule
17 to apply to the relief requested" and (2) if it did, whether the
18 bankruptcy court's application of the legal standard was
19 illogical, implausible or "without support in inferences that may
20 be drawn from the facts in the record." United States v.
21 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009).

22 V. DISCUSSION

23 Section 362(a) provides that the filing of a petition under
24 title 11 creates an automatic stay of, inter alia, "any act to
25 obtain possession of property of the estate or of property from
26 the estate. . . ." 11 U.S.C. § 362(a)(3). A party seeking to
27 enforce rights under a deed of trust must obtain "relief" from
28 the automatic stay. As relevant to this appeal, § 362(d)

1 requires the bankruptcy court to grant relief from the automatic
2 stay to a "party in interest," in the following circumstances:

3 (1) for cause, including the lack of adequate
4 protection of an interest in property of such party in
5 interest; [and]

6 (2) with respect to a stay of an act against property
7 under subsection (a) of this section, if -

8 (A) the debtor does not have an equity in such
9 property; and

10 (B) such property is not necessary to an effective
11 reorganization.

12 The issues raised by this appeal require that we first
13 determine whether PCF is a "party in interest," for purposes of
14 § 362(d).

15 A. PFC Was Authorized to Prosecute the RFS Motion

16 Because the term "party in interest" is not defined in the
17 Bankruptcy Code, whether a moving party has status as "a party in
18 interest" under § 362(d) is a factual matter to be determined on
19 a case-by-case basis, taking into account the claimed interest
20 and the impact of the automatic stay on that interest. In re
21 Kronemyer, 405 B.R. at 919. A party in interest can include any
22 party that has a pecuniary interest in the case, has a practical
23 stake in the resolution of the case, or is impacted by the
24 automatic stay. Brown v. Sobczak (In re Sobczak), 369 B.R. 512,
25 517-18 (9th Cir. BAP 2007) (internal citations omitted). The
26 Eleventh Circuit has stated that "[a] servicer is a party in
27 interest in proceedings involving loans which it services."
28 Greer v. O'Dell (In re O'Dell), 305 F.3d 1297, 1302 (11th Cir.
2002). Under the facts of this case, we agree that PCF, as the
loan servicer, is a party in interest for purposes of the RFS
Motion.

1 A motion for relief from the automatic stay is a contested
2 matter to be presented in accordance with Rule 9014. Rule
3 4001(a). Rule 9014(c) provides that Rule 7017 is applicable in
4 contested matters. In turn, Rule 7017 incorporates Fed. R. Civ.
5 P. 17 with respect to adversary proceedings. Fed. R. Civ. P.
6 17(a) provides that “[a]n action must be prosecuted in the name
7 of the real party in interest”

8 A party entitled to enforce a promissory obligation is a
9 real party in interest. In re Jacobson, 402 B.R. 359, 366
10 (Bankr. W.D. Wash. 2009); see also U-Haul Int’l v. Jartran, Inc.,
11 793 F.2d 1034, 1038 (9th Cir. 1986) (stating a real party in
12 interest is “any party to whom the relevant substantive law
13 grants a cause of action”); In re Aniel, 427 B.R. 811, 816
14 (Bankr. N.D. Cal. 2010); In re Weisband, 427 B.R. 13, 18 (Bankr.
15 D. Ariz. 2010); In re Wilhelm, 407 B.R. 392, 398 (Bankr. D. Idaho
16 2009). Thus, we look to California law to determine if PCF can
17 enforce the Note.

18 1. Under California law and the LSA, PCF is an agent with
19 authority to enforce the Note through a non-judicial
20 foreclosure proceeding

21 California law permits a note to be enforced through the
22 non-judicial foreclosure procedures established in Cal. Civ. Code
23 §§ 2924-2924i. A “trustee, mortgagee or beneficiary or any of
24 their authorized agents” is entitled to enforce the note through
25 a non-judicial foreclosure proceeding. Cal. Civ. Code §
26 2924(a)(1) (2006)(emphasis added); see also Morgera v.
27 Countrywide Home Loans, Inc., 2010 U.S. Dist. LEXIS 2037, at *20
28 (E.D. Cal. Jan. 11, 2010).

1 Because the LSA was in writing, an agency relationship was
2 created by the Investors' agreement that PCF act on their behalf.
3 See Restatement (Third) of Agency § 3.01 (2006); Cal. Civ. Code
4 § 2309 (2006). In this case, paragraph 8(a)(i)(A) of the LSA
5 specifically grants PCF the right to seek relief from a stay of
6 the foreclosure. Through the LSA the Investors agreed that PCF
7 was their agent for purposes of enforcing the Note through a
8 non-judicial foreclosure. PCF therefore has authority to enforce
9 the Note under Cal. Civ. Code § 2924(a)(1). With authority to
10 enforce the Note, PCF has status as a real party in interest.
11 Accordingly, under Fed. R. Civ. P. 17(a), PCF was authorized to
12 prosecute the RFS Motion as a party in interest.

13 2. Cal. Civ. Code § 2941.9 does not compel a different
14 result

15 Cal. Civ. Code § 2941.9(a) provides a mechanism for multiple
16 beneficiaries under a deed of trust to agree to be governed by
17 beneficiaries holding a majority of the record beneficial
18 interests secured by the same property. Similarly, Cal. Civ.
19 Code § 2941.9(b) provides a mechanism for the holders of
20 undivided interests in notes to agree to be governed by interest
21 holders holding a majority of the record interests in the
22 notes.¹⁶

23 We agree with PCF that Cal. Civ. Code § 2941.9 is not
24 mandatory. It offers an alternative for the governance of
25 multiple interests in real property secured transactions. "Civil
26 Code § 2941.9 provides decision-making procedures for when there

27
28 ¹⁶ See Appendix A to this Memorandum for the complete text
of Cal. Civ. Code § 2941.9.

1 are multiple beneficiaries of a deed of trust and no co-lender or
2 similar agreement between or among such beneficiaries exists."
3 Roger Bernhardt and Charles A. Hansen, et al., California
4 Mortgages, Deeds of Trust and Foreclosure Litigation, p. 865
5 (4th ed. 2010). The LSA is a co-lender agreement within the
6 contemplation of Cal. Civ. Code § 2941.9.

7 We note that paragraph 8a of the LSA provides PCF with
8 complete authority to enforce the Note and Trust Deed, while
9 paragraphs 8b and 8c require the approval of 50% of the interests
10 before certain other actions are permitted, such as exercising
11 rights under any Disbursement Agreement, modifying the terms of
12 the loan documents, or commencing a judicial (as opposed to a
13 non-judicial) foreclosure. These disparate approval provisions
14 reflect that the LSA was written and executed with the provisions
15 of Cal. Civ. Code § 2941.9 in mind, and suggest that the
16 Investors intended to authorize PCF to enforce the Note and Trust
17 Deed. If individual Investors contest PCF's authority to act
18 under the LSA, they can initiate appropriate proceedings in an
19 appropriate forum to pursue their claims. As the bankruptcy
20 court noted, no evidence of a final determination in any such
21 proceeding has been presented to date.

22 B. The Bankruptcy Court Did Not Err in Denying the RFS Motion

23 1. PCF did not lack adequate protection of its interest
24 in the Property

25 In the RFS Motion, PCF sought relief from the automatic stay
26 "for cause" pursuant to § 362(d)(1), on the basis that its
27 interest in the Property was not adequately protected.

28 "Adequate protection is provided to safeguard the creditor
against depreciation in the value of its collateral during the

1 reorganization process. If the value of the collateral
2 decreases, the creditor is entitled to cash payments so that the
3 value of its interest in the collateral remains constant." First
4 Fed. Bank Cal. v. Weinstein (In re Weinstein), 227 B.R. 284, 296
5 (9th Cir. BAP 1998) (citations omitted)(emphasis added).

6 We previously have held that adequate protection payments
7 are intended to compensate a secured creditor only for losses
8 occasioned by the imposition of the automatic stay. See Paccom
9 Leasing Corp. v. Deico Elects., Inc. (In re Deico Elects., Inc.),
10 139 B.R. 945, 947 (9th Cir. BAP 1992). Because the bankruptcy
11 court did not find when the value of the Property declined, but
12 concluded that any decline in the value of the Property could
13 have occurred before or at about the time of the petition date,
14 the Property value did not necessarily decline in value during or
15 as a result of the bankruptcy process. The bankruptcy court
16 further found that the value of the Property was not likely to
17 decline further, based upon the evidence presented through the
18 Louis Declaration. The implicit conclusion from these findings
19 was that PCF was adequately protected.

20 As we previously noted, we review the decision to deny a
21 motion for relief from the automatic stay for abuse of
22 discretion. In re Kissinger, 72 F.3d at 108; In re Kronemyer,
23 405 B.R. at 919. This requires that we first review de novo
24 whether the bankruptcy court "identified the correct legal rule
25 to apply to the relief requested." Hinkson, 585 F.3d at 1261-62.

26 The bankruptcy court clearly understood the need to
27 determine whether PCF and its Investors were adequately
28 protected. The bankruptcy court took evidence and authorized

1 extensive briefing on the issue. In finding that the decline in
2 value of the Property, albeit substantial, was attributable to
3 general economic conditions, and that the decline possibly
4 predated or was contemporaneous with the filing of the bankruptcy
5 petition, the bankruptcy court evinced a clear understanding of
6 the applicable legal rule as set forth in In re Deico Elects.,
7 Inc.

8 We next determine whether the bankruptcy court's application
9 of the legal rule in this case was "without support in inferences
10 that may be drawn from the facts in the record." Hinkson,
11 585 F.3d at 1261-62. We will not reverse the bankruptcy court
12 unless we have a definite and firm conviction that it made a
13 clear error in judgment. Valley Eng'rs, Inc. v. Electric Eng'g
14 Co., 158 F.3d 1051, 1057 (9th Cir. 1998).

15 PCF provided evidence through the PCF Appraisal and the
16 Chandler Declarations that the value of the Property as of
17 May 15, 2009, was \$15,970,000. The Preserve presented evidence,
18 which the bankruptcy court found credible, that this also was the
19 value of the Property as of the petition date given the dramatic
20 ("cataclysmic") decline in property values prior to and as of
21 September 2008. There is adequate support in the record for this
22 finding. Further, the bankruptcy court's finding that the
23 Property was not likely to decline in the immediate future is an
24 inference that also is supported by the record.

25 In these circumstances, the bankruptcy court did not err
26 when it determined that PCF's interest in the Property was
27 adequately protected. Accordingly, the bankruptcy court did not
28

1 abuse its discretion when it denied the § 362(d)(1) claim for
2 relief in the RFS Motion.

3 PCF asserts that the bankruptcy court improperly imposed on
4 PCF the burden to prove that its interest in the Property was not
5 adequately protected. In support of this assertion, PCF points
6 to § 362(g), which provides:

7 In any hearing under subsection (d) or (e) of this
8 section concerning relief from the stay of any act
under subsection (a) of this section -

9 (1) the party requesting such relief has the burden of
10 proof on the issue of the debtor's equity in the
property; and

11 (2) the party opposing such relief has the burden of
12 proof on all other issues.

13 The bankruptcy court did not impose on PCF the burden to
14 prove it was not adequately protected. It simply found, based on
15 the evidence presented, that the value of the Property had not
16 declined as a result of the automatic stay. As a consequence,
17 and as a matter of law, PCF was not entitled to adequate
18 protection. The suggestion by the bankruptcy court that
19 different evidence might have produced a different result does
20 not reflect a misallocation of the burden of proof.

21 2. The bankruptcy court did not err in finding that the
22 Property was necessary to The Preserve's effective
reorganization

23 PCF also sought relief from the automatic stay pursuant to
24 § 362(d)(2). The bankruptcy court found that although The
25 Preserve likely had no equity in the Property, the Property was
26 necessary for an effective reorganization.

27 Property is necessary for an effective reorganization for
28 purposes of § 362(d)(2) if "the property is essential for an
effective reorganization that is in prospect. This means . . .

1 that there must be 'a reasonable possibility of a successful
2 reorganization within a reasonable time.'" United Sav. Ass'n
3 Tex. v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365,
4 375-76 (1988) (emphasis in original)(quoting In re Timbers of
5 Inwood Forest Assoc., Ltd., 808 F.2d 363, 370-71 & nn.12-13
6 (5th Cir. 1987) (en banc)). "While it is true that a relief from
7 the stay hearing should not be converted into a confirmation
8 hearing, 'the "effective reorganization" requirement . . .
9 requires a showing by a debtor . . . that a proposed or
10 contemplated plan is not patently unconfirmable and has a
11 realistic chance of being confirmed.'" Sun Valley Newspapers,
12 Inc. v. Sun World Corp. (In re Sun Valley Newspapers, Inc.),
13 171 B.R. 71, 75 (9th Cir. BAP 1994) (internal citations omitted).
14 Mere indispensability of the property for the debtor's survival
15 is insufficient. In re Dev., Inc., 36 B.R. 998, 1005 (Bankr. D.
16 Haw. 1984).

17 The bankruptcy court found that, at the time the motion was
18 initially considered, the Property was necessary to The
19 Preserve's effective reorganization:

20 Yes, there are other assets and I did rule it
21 wasn't a single asset case but I'm satisfied that the
22 reorganization is largely going to succeed or fail
23 because of this particular piece of property. So that,
24 to me, we've gotten over the prong about it being
25 necessary to an effective reorganization. Now there
26 may come a time when I conclude that it's hopeless in
27 which case no matter how essential this property is, if
28 it's hopeless it's not necessary to an effective
reorganization and I'm not ready to go there yet.

For now, for the purposes of this discussion, it
seems to me that the property is necessary to an
effective reorganization. There isn't equity in the
property

Tr. of July 14, 2009 H'ring at 11:24-12:11.

1 On the record before us it is clear that the bankruptcy
2 court understood the correct legal rule in evaluating the
3 § 362(d)(2) request for relief contained in the RFS Motion. On
4 the issue of whether the Property was necessary to an effective
5 reorganization at that point, the record, specifically as set
6 forth in The Preserve's opposition to the RFS Motion, reflects
7 that "the Debtor is continuing in the development process through
8 post-petition borrowings and ongoing work to ensure the
9 development process stays on track and maintain the value of the
10 Legacy Highlands development." As we stated previously, the
11 Panel can only reverse if it finds the bankruptcy court abused
12 its discretion in its finding that relief from stay should not
13 have been granted.¹⁷ On this record we cannot say that the
14 bankruptcy court made a clear error in judgment.

15 VI. CONCLUSION

16 Under the LSA, PCF had standing to bring the RFS Motion, and
17 the bankruptcy court did not err in so determining.

18 In finding that PCF did not lack adequate protection of its
19 interest in the Property, the bankruptcy court did not shift the
20 burden of proof to PCF. The bankruptcy court's finding that
21 PCF's interest in the Property was adequately protected because
22 the Property's value was not declining prospectively was not
23 clearly erroneous.

24 The bankruptcy court's finding that the Property was
25 necessary to The Preserve's effective reorganization as of the
26

27
28 ¹⁷ Again, the Order denying the RFS Motion does not
address the § 362(d)(2) claim for relief.

1 time the RFS Motion was being considered was not clearly
2 erroneous.

3 The bankruptcy court did not abuse its discretion when it
4 denied the RFS Motion.

5 We AFFIRM.

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APPENDIX A

Cal. Civ. Code § 2941.9 provides:

(a) The purpose of this section is to establish a process through which all of the beneficiaries under a trust deed may agree to be governed by beneficiaries holding more than 50 percent of the record beneficial interest of a series of notes secured by the same real property or of undivided interests in a note secured by real property equivalent to a series transaction, exclusive of any notes or interests of a licensed real estate broker that is the issuer or servicer of the notes or interests or any affiliate of that licensed real estate broker.

(b) All holders of notes secured by the same real property or a series of undivided interests in notes secured by real property equivalent to a series transaction may agree in writing to be governed by the desires of the holders of more than 50 percent of the record beneficial interest of those notes or interests, exclusive of any notes or interests of a licensed real estate broker that is the issuer or servicer of the notes or interests of any affiliate of the licensed real estate broker, with respect to actions to be taken on behalf of all holders in the event of default or foreclosure for matters that require direction or approval of the holders, including designation of the broker, servicing agent, or other person acting on their behalf, and the sale, encumbrance, or lease of real property owned by the holders resulting from foreclosure or receipt of a deed in lieu of foreclosure.

(c) A description of the agreement authorized in subdivision (b) of this section shall be disclosed pursuant to Section 10232.5 of the Business and Professions Code and shall be included in a recorded document such as the deed of trust or the assignment of interests.

(d) Any action taken pursuant to the authority granted in this section is not effective unless all the parties agreeing to the action sign, under penalty of perjury, a separate written document entitled "Majority Action Affidavit" stating the following:

(1) The action has been authorized pursuant to this section.

(2) None of the undersigned is a licensed real estate broker or an affiliate of the broker that is the issuer or servicer of the obligation secured by the deed of trust.

1 (3) The undersigned together hold more than 50
2 percent of the record beneficial interest of a series
3 of notes secured by the same real property or of
undivided interests in a note secured by real property
equivalent to a series transaction.

4 (4) Notice of the action was sent by certified
5 mail, postage prepaid, with return receipt requested,
6 to each holder of an interest in the obligation secured
by the deed of trust who has not joined in the
execution of the substitution or this document.

7 This document shall be recorded in the office of the
8 county recorder of each county in which the real
property described in the deed of trust is located.
9 Once the document in this subdivision is recorded, it
shall constitute conclusive evidence of compliance with
10 the requirements of this subdivision in favor of
trustees acting pursuant to this section, substituted
11 trustees acting pursuant to Section 2934a, subsequent
assignees of the obligation secured by the deed of
12 trust, and subsequent bona fide purchasers or
encumbrancers for value of the real property described
therein.

13 (e) For purposes of this section, "affiliate of the
14 licensed real estate broker" includes any person as
defined in Section 25013 of the Corporations Code who
15 is controlled by, or is under common control with, or
who controls, a licensed real estate broker. "Control"
16 means the possession, direct or indirect, of the power
to direct or cause the direction of management and
17 policies.