

DEC 06 2010

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	EC-10-1106-HMoD
6	KIRK STEVEN TRIPE,)	Bk. No.	09-47959
7	Debtor.)		
8	_____)		
9	KIRK STEVEN TRIPE,)		
10	Appellant,)		
11	v.)	M E M O R A N D U M ¹	
12	DEUTSCHE BANK NATIONAL TRUST)		
13	COMPANY,)		
14	Appellee.)		
	_____)		

Argued and Submitted on November 18, 2010
at Sacramento, California

Filed - December 6, 2010

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

Honorable Thomas C. Holman, Bankruptcy Judge, Presiding

Appearances: Appellant Kirk Steven Tripe argued pro se.

Before: HOLLOWELL, MONTALI² and DUNN, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. Dennis Montali, Bankruptcy Judge for the Northern District of California, sitting by designation.

1 Chapter 7³ debtor, Kirk Tripe (the Debtor), challenges the
2 bankruptcy court's order granting Deutsche Bank National Trust
3 Company (the Bank) relief from the automatic stay in order to
4 foreclose on the Debtor's home. The Debtor contends that the
5 Bank did not demonstrate it was the real party in interest with
6 standing to seek stay relief. However, because relief from stay
7 was granted against the estate by default, and the Debtor
8 exempted the property and received his discharge, no stay remains
9 to protect the home even if we were to reverse the bankruptcy
10 court's order. Moreover, because the Debtor was not successful
11 in obtaining a stay pending appeal, the Bank has now foreclosed
12 on the home. As a result, we cannot provide effective relief to
13 the Debtor. Therefore, we DISMISS the appeal as moot.

14 I. FACTS

15 The Debtor filed chapter 7 bankruptcy on December 22, 2009.
16 Michael Kasolas was appointed as the bankruptcy trustee (the
17 Trustee). On Schedule A, the Debtor listed real property, his
18 residence in Elverta, California (Residence), with a value of
19 \$250,000 and secured claims against it in the amount of
20 \$640,000.⁴ He noted that the Residence was in foreclosure and a
21 sale had been set for the petition date.

22
23 ³ Unless otherwise indicated, all chapter and section
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
25 All "Rule" references are to the Federal Rules of Bankruptcy
26 Procedure, Rules 1001-9037.

27 ⁴ We have taken judicial notice of the Debtor's bankruptcy
28 schedules and underlying documents filed with the bankruptcy
court through the electronic docketing system. See O'Rourke v.
Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58
(9th Cir. 1988); Atwood v. Chase Manhattan Mrtg. Co. (In re
Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 According to the Debtor's Schedule D, the Residence was
2 encumbered by a first position deed of trust in the amount of
3 \$556,288 held by American Home Mortgage and a second position
4 deed of trust held by Citimortgage, Inc. in the amount of
5 \$67,373. The Debtor also claimed a homestead exemption in the
6 Residence, even though he acknowledged there was no equity to
7 exempt.

8 On February 1, 2010, the Bank filed a motion for relief from
9 stay (Stay Relief Motion) against the Debtor and the Trustee in
10 order to proceed with foreclosure proceedings on the Residence,
11 contending there was no equity in the Residence and the Residence
12 was not necessary for an effective reorganization. The Stay
13 Relief Motion was properly noticed to the Debtor and the Trustee.

14 In its Stay Relief Motion, the Bank identified itself as
15 "Trust for the Certificate holders of Soundview Home Loan Trust
16 2005-OPT3, Asset-Backed Certificates, Series 2005-OPT3 its
17 assignees and/or successors and the servicing agent American Home
18 Mortgage Servicing, Inc." With the Stay Relief Motion, it
19 submitted a declaration by Rosalind Perry, an employee of
20 American Home Mortgage Servicing, Inc. (American Servicing),
21 servicing agent for the Bank. The Perry declaration stated that
22 the Bank was the holder of the promissory note dated August 3,
23 2005, executed by the Debtor and Option One Mortgage Corporation
24 (Option One) in the amount of \$578,000 (the Note) secured by a
25 deed of trust on the Residence (Deed of Trust). Copies of the
26 Note and Deed of Trust were included as exhibits to the Stay
27 Relief Motion.

1 On February 1, 2010, the Debtor filed an opposition to the
2 Stay Relief Motion (Opposition) contending that the Bank did not
3 demonstrate it had standing to seek relief as the "real party in
4 interest." The Trustee did not file an opposition.

5 The Bank filed a response to the Opposition on February 8,
6 2010, asserting that whether it was the real party in interest
7 was "irrelevant" and beyond the scope of the stay proceeding.
8 However, the Bank also asserted that the Note and Deed of Trust
9 were sufficient to demonstrate its entitlement to enforce the
10 Note. Additionally, the Bank submitted documents evidencing
11 (1) that American Servicing acquired Option One and became the
12 successor servicer to Option One, and (2) that American Servicing
13 assigned the Deed of Trust securing the Note to the Bank along
14 with all rights to enforce the Deed of Trust under the terms of
15 the Note.

16 On February 11, 2010, the Trustee filed a Report of No
17 Distribution after finding that there was no property available
18 for distribution from the estate over and above that exempted by
19 the Debtor. In the report, the Trustee stated that the estate
20 had been fully administered and requested relief from any further
21 duties. The bankruptcy case has not yet been closed.

22 On March 15, 2010, the Debtor filed a Request for an
23 Evidentiary Hearing and Statement of Disputed Material Facts and
24 Law. The Debtor's request for an evidentiary hearing was based
25 on the allegations that (1) the Bank was not the holder of the
26 Note; (2) the Bank failed to establish what entity American
27 Servicing was; (3) the Bank failed to establish a valid
28 assignment from Option One to American Servicing; (4) the Bank

1 omitted a second assignment of the Deed of Trust from American
2 Servicing to the Bank; and (5) the Bank failed to demonstrate
3 that the assignment was executed by an authorized agent of
4 American Servicing. See Appellant's Opening Br. at 3.

5 The next day, on March 16, 2010, the bankruptcy court issued
6 Civil Minutes that served as a tentative ruling to grant stay
7 relief. The bankruptcy court considered the issue of standing
8 raised by the Debtor in his Opposition. It concluded that
9 because the Bank submitted the Deed of Trust, Note, and legal
10 assignment of the Deed of Trust, it sufficiently established its
11 standing to seek stay relief as an assignee holding legal title
12 to the claim being asserted.

13 A hearing on the Stay Relief Motion was held the same day.
14 At the hearing, the Debtor reasserted his request for an
15 evidentiary hearing; however, the bankruptcy court did not
16 consider the Debtor's late-filed request and arguments, in part
17 because the Debtor asserted that the Bank acted fraudulently in
18 connection with the assignment of the Deed of Trust, which was
19 outside the scope of a motion for stay relief. Hr'g Tr.
20 (Mar. 16, 2010) at 4:9-25. Additionally, the Debtor requested
21 the bankruptcy court to take judicial notice of his
22 documentation. However, the bankruptcy court determined that it
23 could not take judicial notice of unadjudicated facts. On
24 March 19, 2010, the bankruptcy court entered a Civil Minute Order
25 overruling the Debtor's Opposition and granting the Bank relief
26 from stay to foreclose on the Residence (the Stay Relief Order).
27 On March 26, 2010, the Debtor filed a notice of appeal. At
28 the same time, the Debtor also filed a motion for reconsideration

1 (Reconsideration Motion) and a motion for stay pending appeal
2 (Stay Motion). The Debtor requested reconsideration to correct a
3 manifest injustice that he contended resulted from the denial of
4 his ability to present allegations of fraud and forgery against
5 the Bank in connection with the transfer and assignment of the
6 Deed of Trust.

7 On April 2, 2010, the Debtor received his discharge.

8 On April 5 and 6, 2010, the Bank filed oppositions to the
9 Reconsideration Motion and the Stay Motion.

10 On April 20, 2010, the bankruptcy court tentatively denied
11 the Reconsideration Motion through Civil Minutes issued prior to
12 a hearing on the Reconsideration Motion and Stay Motion scheduled
13 that same day. It found that the Reconsideration Motion failed
14 to satisfy the standards for altering or amending a judgment.
15 Additionally, it found that the Debtor failed to cite to or
16 analyze the standards for a stay pending appeal under the factors
17 enunciated in Wymer v. Wymer (In re Wymer), 5 B.R. 802, 806
18 (9th Cir. BAP 1980). The bankruptcy court subsequently entered
19 Civil Minute Orders on April 23, 2010, denying both motions in
20 accordance with the Civil Minutes. The Debtor's appeal was
21 timely. At oral argument, the Debtor informed us that the Bank
22 has foreclosed the Residence, that he has vacated it and does not
23 seek its return to him.

24 **II. JURISDICTION**

25 The bankruptcy court had jurisdiction under 28 U.S.C.
26 § 157(b)(1) and (b)(2)(G). We address our jurisdiction under
27 28 U.S.C. § 158 below.

1 the pendency of the appeal that make it impossible for the
2 appellate court to grant effective relief. Id. The determining
3 issue is "whether there exists a 'present controversy as to which
4 effective relief can be granted.'" People of Village of Gambell
5 v. Babbitt, 999 F.2d 403, 406 (9th Cir. 1993) (quoting NW Env'tl.
6 v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988)). If no effective
7 relief is possible, we must dismiss for lack of jurisdiction.
8 United States v. Arkison (In re Cascade Rds., Inc.), 34 F.3d 756,
9 759 (9th Cir. 1994).

10 For the reasons outlined below, we conclude that we cannot
11 provide effective relief to the Debtor even if we were to reverse
12 the orders on appeal because (1) the Residence has been
13 foreclosed, and (2) the stay has been dissolved as a matter of
14 law as to property of the estate and the debtor.

15 When a chapter 7 bankruptcy petition is filed, an estate is
16 created that comprises essentially all property owned by the
17 debtor. 11 U.S.C. § 541(a); Fitzsimmons v. Walsh (In re
18 Fitzsimmons), 725 F.2d 1208, 1210 (9th Cir. 1984); Towers v. Wu
19 (In re Wu), 173 B.R. 411, 413 (9th Cir. BAP 1994). The filing of
20 a petition under title 11 also creates an automatic stay under
21 § 362(a), which operates to enjoin, among other things,

22 (3) any act to obtain possession of property of
23 the estate or of property from the estate;

24 (4) any act to create, perfect, or enforce any
25 lien against property of the estate;

26 (5) any act to create, perfect, or enforce against
27 property of the debtor any lien to the extent that such
28 lien secures a claim that arose before the commencement
of the case.

11 U.S.C. § 362(a)(3),(4),(5).

1 However, the stay under § 362 is not permanent. Section
2 362(c) provides explicit time limits governing the duration of
3 the stay:

4 (1) the stay of an act against property of the
5 estate under subsection (a) of this section continues
6 until such property is no longer property of the
7 estate; and

8 (2) the stay of any other act under subsection (a)
9 of this section continues until the earliest of -

10 (A) the time the case is closed;

11 (B) the time the case is dismissed; or

12 (C) if the case is a case under chapter 7 . . . the
13 time a discharge is granted or denied.

14 U.S.C. § 362(c)(1),(2); see also Severo v. C.I.R., 586 F.3d
15 1213, 1216 (9th Cir. 2009).

16 Section 362(d) permits the court to grant relief from the
17 automatic stay for a variety of reasons on the request of a party
18 in interest.

19 The Debtor was not successful in obtaining a stay pending
20 appeal from the bankruptcy court and did not seek a stay from the
21 Bankruptcy Appellate Panel. As a result, the Bank was able to
22 conclude foreclosure proceedings against the Residence.
23 Therefore, the appeal is moot. Even if the Debtor had obtained a
24 stay pending appeal and the Residence had not been foreclosed on,
25 we could not provide the Debtor with relief because, at this
26 point, as a matter of law, the automatic stay no longer protects
27 the Residence.

28 On February 11, 2010, the Trustee filed a Report of No
Distribution indicating there were no assets to benefit the
estate and the estate was fully administered and could be closed.
Although filing a report of no distribution may demonstrate a

1 trustee's intent to abandon an asset, the report in and of itself
2 does not result in abandonment unless the bankruptcy court closes
3 the case. Schwaber v. Reed, 940 F.2d 1317, 1321 (9th Cir. 1991);
4 11 U.S.C. § 554(c). Since the Debtor's bankruptcy case is not
5 closed, the Residence was not abandoned. Id.

6 However, it is undisputed that there was no equity in the
7 Residence to benefit the estate.⁵ Accordingly, the Trustee did
8 not defend against the Stay Relief Motion.⁶ As a result, the
9 stay terminated as to the estate when the Trustee did not respond
10 to the Stay Relief Motion and an order lifting the stay was
11 entered against the Trustee.

12 To the extent the Debtor's interest in the Residence
13 remained protected under § 362(a)(5), that protection has also
14

15 ⁵ Equity, for purposes of § 362(d)(2)(A), is the difference
16 between the value of the property and all the encumbrances on it.
17 Sun Valley Newspapers, Inc. v. Sun World Corp. (In re Sun Valley
18 Newspapers, Inc.), 171 B.R. 71, 75 (9th Cir. BAP 1994) (citing
Stewart v. Gurley, 745 F.2d 1194, 1196 (9th Cir. 1984)).

19 ⁶ The Trustee, therefore, did not raise any standing issues,
20 and any prudential standing issues are waived as to the estate.

21 The issue of standing involves both "constitutional
22 limitations on federal court jurisdiction and prudential
23 limitations on its exercise." Warth v. Seldin, 422 U.S. 490, 498
24 (1975). Constitutional standing concerns whether the plaintiff
25 has a stake in the lawsuit sufficient to create a case or
26 controversy to which the federal judicial power may extend. Id.
27 Prudential standing is comprised of judicial and statutory
28 limitations, such as the requirement that suits be maintained by
the real party in interest. Gilmartin v. City of Tucson, 2006 WL
5917165 *4 (D. Ariz. 2006). Unlike constitutional standing,
prudential standing is not jurisdictional and may be waived if
not properly or timely raised. Pershing Park Villas Homeowners
Ass'n v. Unified Pac. Ins. Co., 219 F.3d 895, 900 (9th Cir.
2000).

1 terminated. The stay terminated as to "property of the debtor"
2 as a matter of law under § 362(c)(2)(C)⁷ when the Debtor received
3 his discharge on April 2, 2010. A reversal on appeal cannot
4 alter that outcome.

5 Thus, even if the Residence had not been foreclosed on, any
6 possibility that we could provide effective relief to the Debtor
7 from the bankruptcy court's lifting of the stay has been
8 overtaken by the dissolution of the stay as a matter of law. The
9 Residence is no longer property of the estate and the stay no
10 longer protects the Debtor. The appeal is moot.

11 **VI. CONCLUSION**

12 Accordingly, we DISMISS the appeal for lack of jurisdiction
13 and do not reach the merits of whether the bankruptcy court erred
14 in determining that the Bank had standing to seek relief from the
15 automatic stay.

16
17
18
19
20
21
22
23
24
25
26

27 ⁷ Section 362(c)(2)(C) provides, in relevant part, that a
28 stay under § 362(a) continues in a Chapter 7 until "the time a
discharge is granted or denied."