

JUL 12 2011

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NOT FOR PUBLICATION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

| | | | | |
|----|----------------------------|---|--------------------|------------------|
| 5 | In re: |) | BAP No. | CC-11-1015-MkKiD |
| | |) | | |
| 6 | DENNIS HUGO BUDD, |) | Bk. No. | RS 10-48055-DS |
| | |) | | |
| 7 | Debtor. |) | | |
| | _____ |) | | |
| 8 | |) | | |
| 9 | DENNIS HUGO BUDD, |) | | |
| | |) | | |
| 10 | Appellant, |) | | |
| | |) | | |
| 11 | v. |) | MEMORANDUM* | |
| | |) | | |
| 12 | FIDELITY ASSET MANAGEMENT, |) | | |
| | LLC, |) | | |
| | |) | | |
| 13 | Appellee. |) | | |
| | _____ |) | | |

Submitted Without Oral Argument
on June 17, 2011**

Filed - July 12, 2011

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

Honorable Deborah J. Saltzman, Bankruptcy Judge, Presiding

Before: MARKELL, KIRSCHER and DUNN, 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.

**This matter was set for oral argument on the Panel's June 17, 2011 calendar in Pasadena, California. Appellant Dennis Hugo Budd, in propria persona, did not appear at the date and time set for argument. Allan Calomino of the Law Office of Allan Calomino, counsel for Appellee Fidelity Asset Management, LLC, appeared but consented to submission of the matter without argument.

1 Services, LLC dba ETS Services, LLC as trustee and grantor, and
2 Fidelity as grantee. On its face, the TDUS conveyed title to the
3 Property to Fidelity based on the completion of a nonjudicial
4 foreclosure sale at which Fidelity was the successful bidder.

5 Fidelity also attached to its relief from stay motion the
6 complaint from the Eviction Litigation and an order remanding the
7 Eviction Litigation to the state court, after Budd unsuccessfully
8 attempted to remove the Eviction Litigation to the United States
9 District Court for the Central District of California. To the
10 best of our knowledge, the Eviction Litigation is still pending.

11 On December 13, 2010, Budd filed a response to Fidelity's
12 relief from stay motion. Budd asserted that the Property was
13 unencumbered and that he had equity in the Property of \$150,000.

14 Budd further argued:

- 15 (1) The movant unlawfully foreclosed this property &
16 executed an UNLAWFUL EVICTION against the debtor.
17 (2) Movant has NO STANDING to bring this motion, (3) An
18 ADVERSARY PROCEEDING is pending in this case against
19 Movant [Fidelity] to recover property and money, and
20 the motion should be DENIED so that the debtor's rights
21 are not prejudiced by Movant's and attorneys wrongful
22 actions against the debtor and the bankruptcy estate.

23 Response to relief from stay motion (Dec. 13, 2010) at p. 2.²

24 Budd's response referred to a pending adversary proceeding,
25 which Budd filed the same day he filed his response. In his
26 complaint, Budd asserted that he had four claims for relief:

- 27 (1) to recover money or property; (2) to determine the validity,
28

26 ²The only exhibits attached to Budd's response relate to his
27 claim that he had insured the Property. The presence (or
28 absence) of this insurance is not material to our resolution of
this appeal.

1 priority or extent of lien; (3) for injunction and other
2 equitable relief; and (4) for declaratory judgment. The
3 allegations all concerned the alleged illegality and invalidity
4 of the foreclosure and the Eviction Litigation. For instance,
5 the complaint alleged that Fidelity and the other defendants
6 pursued an unlawful foreclosure and an illegal eviction by filing
7 fraudulent instruments like the TDUS.

8 On December 15, 2010, the court held a hearing on Fidelity's
9 relief from stay motion. Fidelity appeared through counsel, and
10 Budd appeared pro se. At the hearing, Budd admitted that the
11 foreclosure sale had occurred prepetition, as had the
12 commencement of the Eviction Litigation. Budd argued, however,
13 that the court should keep the stay in place until his adversary
14 proceeding could be resolved. But the bankruptcy court declined
15 to do so. The court pointed out that the alleged illegality and
16 invalidity of the foreclosure proceedings and the Eviction
17 Litigation could have been and should have been brought up in the
18 state court. Indeed, Budd further admitted that he had raised
19 these same issues in the Eviction Litigation. Based on the
20 narrow issue before the court - whether the stay should be lifted
21 for cause - and the fact that Budd could raise and had raised in
22 the Eviction Litigation the same arguments he sought to make in
23 the adversary proceeding, the court granted Fidelity's relief
24 from stay motion.³

25
26 ³On February 23, 2011, the bankruptcy court entered an order
27 dismissing Budd's adversary proceeding without prejudice. The
28 order stated that the claims Budd raised in the adversary
proceeding are property of the bankruptcy estate and may not be

(continued...)

1 The court entered its order granting relief from stay on
2 January 4, 2011, and Budd timely appealed.

3 **JURISDICTION**

4 The bankruptcy court had jurisdiction under 28 U.S.C.
5 §§ 1334 and 157(b)(2)(G). We have jurisdiction under 28 U.S.C.
6 § 158.

7 **ISSUE**

8 Did the bankruptcy court abuse its discretion in granting
9 Fidelity's relief from stay motion?

10 **STANDARDS OF REVIEW**

11 We review an order granting relief from stay for abuse of
12 discretion. Veal v. Am. Home Mortg. Serv., Inc. (In re Veal),
13 ___ B.R. ___, ___; 2011 WL 2304200, at *12 (9th Cir. BAP 2011);
14 Kronemyer v. Am. Contr. Indem. Co. (In re Kronemyer), 405 B.R.
15 915, 919 (9th Cir. BAP 2009). Under the abuse of discretion
16 standard, we apply a two-part test. First, we consider de novo
17 whether the bankruptcy court identified the correct law to
18 consider in light of the relief requested. United States v.
19 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). Second,
20 we review the bankruptcy court's factual findings, and its
21 application of those findings to the relevant law, to determine
22 whether they were either "(1) 'illogical,' (2) 'implausible,' or
23 (3) without 'support in inferences that may be drawn from the
24 facts in the record.'" Id. (quoting Anderson v. City of Bessemer
25 City, N.C., 470 U.S. 564, 577 (1985)).

26 _____
27 ³(...continued)
28 asserted by Budd unless the chapter 7 trustee has abandoned the
claims or has consented to Budd's prosecution of the claims.

1 presented a colorable claim to the property at stake. In re
2 Veal, ___ B.R. at ___; 2011 WL 2304200, at *11; In re Luz Int'l,
3 219 B.R. at 842.⁴

4 Simply put, motions for relief from stay are summary
5 proceedings. Id.; see also Grella v. Salem Five Cent Sav. Bank,
6 42 F.3d 26, 33 (1st Cir. 1994) ("We find that a hearing on a
7 motion for relief from stay is merely a summary proceeding of
8 limited effect, and . . . a court hearing a motion for relief
9 from stay should seek only to determine whether the party seeking
10 relief has a colorable claim to property of the estate.");
11 Johnson v. Righetti (In re Johnson), 756 F.2d 738, 740-41 (9th
12 Cir. 1985) ("Hearings on relief from the automatic stay are thus
13 handled in a summary fashion. The validity of the claim or
14 contract underlying the claim is not litigated during the
15 hearing."). Consistent with their summary nature, § 362(e)
16 requires the bankruptcy court to hold a preliminary relief from
17 stay hearing within thirty days from the date the motion is
18 filed, or the stay is deemed terminated. In re Luz Int'l, 219
19 B.R. at 841. In addition, the bankruptcy court must hold a final
20 hearing on the motion for relief from stay within thirty days
21 following the preliminary hearing. In re Luz Int'l, 219 B.R. at
22 841; see also Grella, 42 F.3d at 31.

23 Consequently, a hearing on a motion for relief from stay is
24 "analogous to a preliminary injunction hearing, requiring a
25

26 ⁴A colorable claim is one "that is legitimate and that may
27 reasonably be asserted, given the facts presented and the current
28 law (or a reasonable and logical extension or modification of the
current law)." Black's Law Dictionary (9th ed. 2009).

1 speedy and necessarily cursory determination of the reasonable
2 likelihood that a creditor has a legitimate claim or lien as to a
3 debtor's property." Id. at 34; see also In re Veal, ___ B.R. at
4 ___; 2011 WL 2304200, at *11.

5 Here, Fidelity submitted a copy of the TDUS, which tended to
6 show that Fidelity obtained title to the Property upon the
7 completion of a nonjudicial foreclosure sale. Under California
8 law, "[t]he purchaser at the foreclosure sale receives title free
9 and clear of any right, title, or interest of the trustor or any
10 grantee or successor of the trustor," and "[a] properly conducted
11 nonjudicial foreclosure sale constitutes a final adjudication of
12 the rights of the borrower and lender and the trustor has no
13 further rights of redemption." 4 Harry D. Miller and Marvin B.
14 Starr, CAL. REAL ESTATE ("CAL. REAL ESTATE") § 10:208 (3d ed. 2009)
15 (emphasis added). The TDUS was sufficient to establish a
16 colorable claim for purposes of relief from stay.

17 Budd argued in his response to the relief from stay motion
18 that Fidelity lacked standing. But based on the reasoning set
19 forth above, the TDUS was sufficient to establish that Fidelity
20 had standing and was a "party in interest" for purposes of
21 seeking relief from stay. As set forth above, § 362(d) provides
22 that a "party in interest" may request relief from stay, but the
23 Bankruptcy Code does not define the term "party in interest." In
24 re Veal, ___ B.R. at ___; 2011 WL 2304200, at *10; In re
25 Kronemyer, 405 B.R. at 919. Status as "a party in interest"
26 under § 362(d) is determined on a case-by-case basis by
27 considering the interest asserted and how that interest has been
28 affected by the stay. Id. Here, Fidelity claimed ownership of

1 the Property by virtue of the TDUS, but the stay was preventing
2 Fidelity from taking steps to obtain possession of the Property.
3 Simply put, the stay's effect on Fidelity's asserted ownership of
4 the Property was sufficient to establish Fidelity's standing.

5 According to Budd, Fidelity lacked standing because the
6 foreclosure proceedings and the Eviction Litigation were illegal
7 and invalid, but resolution of these contentions would have
8 required the adjudication of the parties' underlying substantive
9 rights, which was beyond the scope of Fidelity's relief from stay
10 motion. See In re Veal, ___ B.R. at ___; 2011 WL 2304200, at
11 *11; In re Luz Int'l, 219 B.R. at 842; Grella, 42 F.3d at 33-34.
12 In short, for purposes of the relief from stay motion, Budd's
13 contentions regarding Fidelity's underlying substantive rights
14 did not undermine or defeat Fidelity's status as the holder of a
15 colorable claim.

16 **2. Cause for relief from stay**

17 What constitutes "cause" for relief from stay under
18 § 362(d)(1) is determined on a case-by-case basis. In re
19 Kronemyer, 405 B.R. at 921. When, under state law, foreclosure
20 proceedings have been completed prepetition, courts often find
21 cause to grant relief from stay to allow the purchaser at the
22 foreclosure sale to proceed with state-court remedies to obtain
23 possession of the foreclosed property. See, e.g., Bebensee-Wong
24 v. Fed. Nat'l Mortg. Ass'n (In re Bebensee-Wong), 248 B.R. 820,
25 821 (9th Cir. BAP 2000); LR Partners, L.L.C. v. Steiner (In re
26 Steiner), 251 B.R. 137, 143 (Bankr. D. Ariz. 2000); Davisson v.
27 Engles (In re Engles), 193 B.R. 23, 25 (Bankr. S.D. Cal. 1996);
28 In re Crime Free, Inc., 196 B.R. 116, 119 (Bankr. E.D. Ark.

1 1996); Leggett v. Morgan (In re Morgan), 115 B.R. 399, 401-02
2 (Bankr. M.D. Ga. 1990); In re Boyd, 107 B.R. 541, 543 (Bankr.
3 N.D. Miss. 1989).

4 As stated by one California treatise:

5 Where a real property nonjudicial foreclosure was
6 completed and the deed recorded prepetition, the debtor
7 has neither equitable nor legal title to the property
8 at the time the bankruptcy petition is filed. Although
9 the debtor may still be in possession of the premises,
his or her status is essentially that of a "squatter."
The mortgagee (or purchaser at the foreclosure sale) is
entitled to the property and thus relief from the stay
should be granted.

10 Kathleen R. March and Alan M. Ahart, CALIFORNIA PRACTICE GUIDE:
11 BANKRUPTCY ¶ 8:1195 (2009).

12 Furthermore, the bankruptcy court's grant of relief from
13 stay, here, is consistent with the grants of relief from stay
14 affirmed in Piombo Corp. v. Castlerock Props. (In re Castlerock
15 Props.), 781 F.2d 159, 163 (9th Cir. 1986), and in In re
16 Kronemyer, 405 B.R. at 921-22. Both Castlerock and Kronemyer
17 affirmed grants of relief from stay that allowed the parties to
18 pursue their state law claims and defenses in pending state court
19 proceedings. In essence, that is what the bankruptcy court did
20 here. The bankruptcy court granted Fidelity's relief from stay
21 motion so that Fidelity and Budd could continue to assert their
22 state law claims and defenses in the context of the Eviction
23 Litigation.

24 Budd claims that the bankruptcy court should have denied
25 relief from stay until after the court addressed and resolved
26 Budd's adversary proceeding. The gravamen of Budd's complaint
27 was that the foreclosure proceedings and the Eviction Litigation
28 were improper, fraudulent, illegal and invalid. The adversary

1 proceeding implicated the same state law claims and defenses that
2 Budd admitted he was asserting in the Eviction Litigation. The
3 bankruptcy court was well within its discretion when it decided
4 that the state court was best situated to address Budd's state
5 law claims and defenses, in the context of the Eviction
6 Litigation. See In re Castlerock Props., 781 F.2d at 163
7 (granting relief from stay to allow state court litigation to
8 move forward); In re Kronemyer, 405 B.R. at 921-22 (same);
9 In re Robbins, 310 B.R. at 630 (stating that bankruptcy court had
10 discretion to decide whether or not to grant relief from stay to
11 allow state court action to move forward while adversary
12 proceeding concerning same subject matter was pending).

13 Budd's claim that he acquired ownership of the property by
14 operation of adverse possession does not change our analysis. By
15 way of his adverse possession claim, Budd argued that he was the
16 successor to the original owner of the Property. But Budd has
17 conceded that the original owner executed a deed of trust
18 encumbering the Property, which ultimately led to the foreclosure
19 sale and the execution and recording of the TDUS. As we
20 previously stated, the completion of a nonjudicial foreclosure
21 sale extinguishes all rights in the Property of the trustor and
22 any rights of the trustor's successors. See CAL. REAL ESTATE,
23 supra, at § 10:208. In other words, even if we were to assume
24 the validity of Budd's adverse possession claim, Budd could not
25 have acquired any better interest in the property than his
26 predecessor held. Thus, Budd took his alleged interest in the
27 Property subject to the encumbrance created when the original
28 owner executed the deed of trust, and Budd's interest was

1 extinguished when Fidelity acquired the Property at the
2 foreclosure sale, in the same manner that any remaining interest
3 of the original owner was extinguished thereby. In any event,
4 Budd remains free to assert his adverse possession claim in the
5 state court Eviction Litigation.

6 In sum, the record supports the bankruptcy court's decision
7 to grant relief from stay for cause under § 362(d)(1), and the
8 bankruptcy court did not abuse its discretion in doing so.

9 **CONCLUSION**

10 For all of the reasons set forth above, the bankruptcy
11 court's order granting relief from stay is AFFIRMED.