

OCT 04 2011

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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NOT FOR PUBLICATION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. CC-11-1038-DKiPa
)
 KAREN KAY ELSTNER-BAILEY,) Bk. No. LA 10-52653-ER
)
 Debtor.)
)
)
 KAREN KAY ELSTNER-BAILEY,)
)
 Appellant,)
)
 v.) **MEMORANDUM**¹
)
 FEDERAL NATIONAL MORTGAGE)
 ASSOCIATION; NANCY K. CURRY,)
 Chapter 13 Trustee,)
)
 Appellees.)
)

Argued and Submitted on September 23, 2011
at Pasadena, California

Filed - October 4, 2011

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

Honorable Ernest Robles, Bankruptcy Judge, Presiding

Appearances: Appellant Karen Kay Elstner-Bailey argued pro se;
 Melissa Robins Coutts of McCarthy & Holthus, LLP
 argued for Appellee Federal National Mortgage
 Association

Before: DUNN, KIRSCHER, and PAPPAS, 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.

1 Debtor Karen Kay Elstner-Bailey ("Debtor") appeals the
2 bankruptcy court's order annulling the automatic stay to allow
3 Appellee Federal National Mortgage Association ("FNMA") to
4 proceed with its state court unlawful detainer action. We
5 AFFIRM.

6
7 **I. FACTUAL BACKGROUND**

8 Since the record submitted in this appeal is very sparse, we
9 rely on that limited record, the facts stated in the Debtor's
10 brief and our independent review of relevant imaged documents
11 from the bankruptcy court's electronic docket in case no.
12 2:10-bk-52653-ER to provide the following factual narrative. See
13 O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d
14 955, 957-58 (9th Cir. 1989); Atwood v. Chase Manhattan Mortg. Co.
15 (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

16 On November 1, 2004, the Debtor signed a promissory note
17 ("Note") in the principal amount of \$333,700.00, secured by a
18 deed of trust ("Trust Deed") on real property located in
19 Los Angeles, California ("Property").

20 A foreclosure sale with respect to the Property was
21 conducted on June 3, 2010.² FNMA purchased the Property at the
22 foreclosure sale for a bid of \$356,379.70. A trustee's deed
23 ("Trustee's Deed") transferring title to the Property to FNMA was
24 recorded in Los Angeles County on June 10, 2010.

25 FNMA caused a Notice to Quit the Property to be served on
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28 ² According to the Debtor, she was in negotiations to
obtain a loan modification when the foreclosure took place.

1 the Debtor on June 10, 2010. FNMA filed an unlawful detainer
2 complaint ("Unlawful Detainer Action") against the Debtor in
3 California state court on June 23, 2010. On August 9, 2010, the
4 Debtor filed an Answer in the Unlawful Detainer Action, and the
5 action was set for trial. On September 28, 2010, the state court
6 heard pretrial motions in the Unlawful Detainer Action, and on
7 the following day, September 29, 2010, a jury trial took place.
8 The jury returned a verdict for judgment for possession in favor
9 of FNMA and against the Debtor. A judgment and writ of
10 possession were submitted by FNMA to the state court for
11 signature and entry, but prior to entry of the judgment, the
12 Debtor filed for bankruptcy protection.

13 The Debtor filed her chapter 13³ petition on October 5,
14 2010. On October 14, 2010, FNMA filed a motion for relief from
15 the automatic stay ("First RFS Motion"). The Debtor filed a
16 response, and the First RFS Motion was heard on November 15,
17 2010. The bankruptcy court denied the First RFS Motion,
18 apparently because the declaration filed in support of the motion
19 incorrectly stated that a default judgment was entered in FNMA's
20 favor in the Unlawful Detainer Action on August 11, 2010.

21 On December 15, 2010, FNMA filed a second motion for relief
22 from the automatic stay ("Second RFS Motion") to allow FNMA to
23 proceed with its remedies under California state law to remove
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26 ³ Unless otherwise specified, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. All "Civil Rule" references are to
the Federal Rules of Civil Procedure.

1 the Debtor from the Property. The Debtor filed a response to the
2 Second RFS Motion on December 23, 2010, claiming that for various
3 reasons, FNMA did not have standing to prosecute the Second RFS
4 Motion.

5 The bankruptcy court held a hearing ("Hearing") on the
6 Second RFS Motion on January 10, 2010. The bankruptcy court
7 issued a tentative ruling in advance of the Hearing stating its
8 inclination to grant the Second RFS Motion because FNMA had
9 submitted sufficient evidence to establish its interest in the
10 Property. The bankruptcy court further indicated that it was
11 inclined to annul the automatic stay retroactive to the petition
12 date, so that enforcement actions, if any, taken by FNMA prior to
13 receiving notice of the Debtor's bankruptcy filing would not be
14 void as in violation of the automatic stay.

15 At the Hearing, the Debtor pressed her standing arguments
16 against FNMA, but the bankruptcy court ultimately overruled them.
17 The bankruptcy court stated that it would grant the Second RFS
18 Motion on the bases stated in its tentative ruling. The
19 bankruptcy court further noted that the Debtor was raising issues
20 that would have to be determined by the state court. The
21 bankruptcy court entered an order in favor of FNMA annulling the
22 stay retroactive to the petition date and waiving the 14-day stay
23 of effectiveness of the order provided for in Rule 4001(a)(3) on
24 January 31, 2011.

25 The Debtor timely appealed.
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27 **II. JURISDICTION**

28 The bankruptcy court had jurisdiction under 28 U.S.C.

1 §§ 1334 and 157(b)(2)(A) and (G). We have jurisdiction under
2 28 U.S.C. § 158.

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4 **III. ISSUE**

5 Did the bankruptcy court abuse its discretion in granting
6 FNMA's motion for relief from the automatic stay?

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8 **IV. STANDARDS OF REVIEW**

9 Standing is a legal issue that we review de novo. Loyd v.
10 Paine Webber, Inc., 208 F.3d 755, 758 (9th Cir. 2000); Kronemyer
11 v. Am. Contractors Indem. Co. (In re Kronemyer), 405 B.R. 915,
12 919 (9th Cir. BAP 2009).

13 We review an order granting relief from stay for abuse of
14 discretion. Veal v. Am. Home Mortg. Servicing, Inc. (In re
15 Veal), 450 B.R. 897, 913 (9th Cir. BAP 2011); In re Kronemyer,
16 405 B.R. at 919. We apply a two-part test to determine whether
17 the bankruptcy court abused its discretion. United States v.
18 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).
19 First, we consider de novo whether the bankruptcy court applied
20 the correct legal standard to the relief requested. Id. Then,
21 we review the bankruptcy court's fact findings for clear error.
22 Id. at 1262 and n.20. We must affirm the bankruptcy court's fact
23 findings unless we conclude that they are "(1) 'illogical,'
24 (2) 'implausible,' or (3) without 'support in inferences that may
25 be drawn from the facts in the record.'" Id.

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V. DISCUSSION

I. The bankruptcy court did not err in concluding that FNMA had standing to prosecute the motion for relief from stay.

Debtor's argument that FNMA lacked standing to file and prosecute the Second RFS Motion ultimately is the sole issue raised by the Debtor in this appeal. Standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." Warth v. Seldin, 422 U.S. 490, 498 (1975). The party moving for relief from the automatic stay bears the burden of establishing that it has standing to prosecute the motion. See In re Wilhelm, 407 B.R. 392, 399-400 (Bankr. D. Idaho 2009), citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

A bankruptcy court, as with any federal court, may exercise jurisdiction over a party only when that party meets both constitutional and prudential standing requirements. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004); In re Veal, 450 B.R. at 906. To have constitutional standing in litigation, a party must have suffered an injury in fact, that is, a violation of a legally protected interest, caused by or "fairly traceable to" the actions of the opposing party, that likely will be redressed by a favorable decision in the subject proceeding. Arizona Christian Sch. Tuition Org. v. Winn, ___ U.S. ___, 131 S. Ct. 1436, 1442 (2011), quoting Lujan v. Defenders of Wildlife, 504 U.S. at 560-61 (1992).

In analyzing prudential standing requirements, the Supreme Court has held:

"[T]he plaintiff generally must assert his own legal

1 rights and interest, and cannot rest his claim to
2 relief on the legal rights or interests of third
parties." Warth v. Seldin, 422 U.S., at 499.

3 Valley Forge Christian College v. Americans United for Separation
4 of Church and State, Inc., 454 U.S. 464, 474 (1982). In other
5 words, the party moving for relief from the automatic stay before
6 the bankruptcy court must be the "real party in interest."

7 FNMA meets the requirements for constitutional standing in
8 this case. In fact, "[c]onstitutional standing is rarely lacking
9 when a creditor seeks relief from the automatic stay, as the stay
10 directly affects a creditor's ability to exercise or vindicate
11 its nonbankruptcy rights." Edwards v. Wells Fargo Bank, N.A. (In
12 re Edwards), 454 B.R. 100, 2011 WL 3211357 at *2 n.6 (9th Cir.
13 BAP July 12, 2011). In this case, injury in fact is demonstrated
14 by FNMA being prohibited by the automatic stay from proceeding to
15 obtain a judgment and writ of possession in the Unlawful Detainer
16 Action against the Debtor. Causation is established by the fact
17 that FNMA cannot exercise nonbankruptcy remedies against the
18 Debtor in the absence of relief from the stay. Finally, redress
19 through relief from the stay allows FNMA to proceed to seek its
20 nonbankruptcy remedies in state court.

21 The standards for prudential standing in relief from stay
22 proceedings in bankruptcy can present more complicated issues.
23 Motions for relief from the automatic stay are contested matters.
24 See Rules 4001(a) and 9014(a). Rule 9014(c) provides that
25 Rule 7017 is applicable in contested matters. Rule 7017, in
26 turn, incorporates Civil Rule 17. Civil Rule 17(a) provides that
27 "[a]n action must be prosecuted in the name of the real party in
28 interest. . . ."

1 Under § 362(d), a "party in interest" can request relief
2 from the automatic stay. Section 362(d)(1) authorizes relief
3 from stay "for cause, including the lack of adequate protection
4 of an interest in property of such party in interest." Because
5 the term "party in interest" is not defined in the Bankruptcy
6 Code, whether a moving party, such as FNMA, has the status of a
7 party in interest under § 362(d) is a fact dependent matter to be
8 determined on a case-by-case basis, taking the claimed interest
9 and the alleged impact of the stay on that interest into account.
10 In re Kronemyer, 405 B.R. at 919. A "party in interest" can
11 include any party that has a pecuniary interest in the matter,
12 that has a practical stake in the resolution of the matter, or
13 that is impacted by the automatic stay. Brown v. Sobczak
14 (In re Sobczak), 369 B.R. 512, 517-18 (9th Cir. BAP 2007).

15 Proceedings to decide motions for relief from the automatic
16 stay are very limited proceedings.

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

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

25 Cornell University Law School's Legal Information Institute
26 defines a "colorable claim" as:

27 A plausible legal claim. In other words, a claim
28 strong enough to have a reasonable chance of being
valid if the legal basis is generally correct and the

1 facts can be proven in court. The claim need not
2 actually result in a win.

3 [Http://topics.law.cornell.edu/wex/colorable claim](http://topics.law.cornell.edu/wex/colorable_claim) (emphasis
4 added).

5 This Panel recently considered standing issues under
6 circumstances very similar to this appeal in its published
7 decision in Edwards v. Wells Fargo Bank, N.A. (In re Edwards),
8 454 B.R. 100, 2011 WL 3211357 (9th Cir. BAP July 12, 2011). In
9 Edwards, the party that moved for relief from stay in the
10 debtor's bankruptcy case, Wells Fargo Bank, N.A. ("Wells Fargo"),
11 had purchased the debtor's residence property at a nonjudicial
12 foreclosure sale prepetition. The trustee's deed transferring
13 title to Wells Fargo likewise had been recorded in advance of the
14 debtor's bankruptcy filing, and Wells Fargo had filed an unlawful
15 detainer action against the debtor in state court. The only real
16 difference is that Wells Fargo had actually obtained a judgment
17 and a Writ of Possession in the unlawful detainer action before
18 the debtor filed for bankruptcy protection in Edwards.

19 The Edwards Panel concluded, based on the record before it,
20 that under applicable California law, Wells Fargo was the
21 presumptive current title owner of the subject property. Id. at
22 *3. Accordingly, there could "be no doubt" that Wells Fargo had
23 a sufficient "colorable" claim for standing purposes, as "[t]he
24 duly-recorded Trustee's Deed provides that Wells Fargo is the
25 presumptive current record owner with respect to the Property."
26 See In re Salazar, 448 B.R. 814, 819 (Bankr. S.D. Cal. 2011) (the
27 bank moving for relief from stay established standing as the
28 title holder of the subject property under a recorded Trustee's

1 Deed upon Sale).

2 The Debtor clasps the Note as a talisman, arguing that FNMA
3 did not provide any evidence of its standing as the owner of the
4 Note. See Appellant's Opening Brief at 4-5, 9 and 13.

5 Notwithstanding the fervor of Debtor's arguments, the fact
6 remains that FNMA's winning bid at the foreclosure sale of the
7 Property and the timely recording of the Trustee's Deed
8 superseded the Note and Trust Deed. See In re Edwards, 2011 WL
9 3211357 at *3 ("[D]ue to the foreclosure, the debtor's note has
10 been satisfied by Wells Fargo's credit bid."). Under California
11 law, FNMA took title free and clear to the Property on completion
12 of the foreclosure sale. See 4 Harry D. Miller and Marvin B.
13 Starr, Cal. Real Estate § 10:208 (3d ed. 2009) (Under California
14 law, "[t]he purchaser at the foreclosure sale receives title free
15 and clear of any right, title, or interest of the trustor or any
16 grantee or successor of the trustor."). As the title holder and
17 owner of the Property under the recorded Trustee's Deed, FNMA was
18 a real party in interest for purposes of moving for relief from
19 the automatic stay, and the bankruptcy court did not err in its
20 conclusion that FNMA had standing to file and prosecute the
21 Second RFS Motion.⁴

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23
24 ⁴ As noted by the bankruptcy court at the Hearing, its
25 determination that FNMA had standing to move for relief from the
26 stay had no effect with respect to resolving the Debtor's issues
27 in state court. In fact, the parties advised us at oral argument
28 that the Debtor had filed an adversary proceeding before the
bankruptcy court and an action in the United States District
Court to assert her claims with respect to the property, in
addition to any further proceedings in state court.

1 II. The bankruptcy court did not abuse its discretion in
2 annulling the stay.

3 While the Debtor's arguments on appeal do not extend beyond
4 challenging FNMA's standing to seek relief from the automatic
5 stay, we note that the bankruptcy court granted relief by
6 annulling the stay pursuant to § 362(d)(1) for "cause."

7 Under California law, once a foreclosure sale takes place,
8 and the trustee's deed transferring title to the subject property
9 is recorded, the original borrower/owner no longer has an
10 interest in the property. See *Bebensee-Wong v. Fed. Nat'l Mortg.*
11 *Ass'n (In re Bebensee-Wong)*, 248 B.R. 820, 822-23 (9th Cir. BAP
12 2000), construing Cal. Civil Code § 2924h(c); see also Kathleen
13 P. March and Hon. Alan M. Ahart, California Practice Guide:
14 Bankruptcy ¶ 8:1196 (2010), available at Westlaw CABANKR ("Where
15 a real property nonjudicial foreclosure was completed and the
16 deed recorded prepetition, the debtor has neither equitable nor
17 legal title to the property at the time the bankruptcy petition
18 is filed.") (emphasis in original). Upon the former owner's
19 subsequent bankruptcy filing, "there is no reason not to allow
20 the creditor to repossess because filing a bankruptcy petition
21 after loss of ownership cannot reinstate the debtor's title."
22 Id. at ¶ 8:1195. Accordingly, "cause" to grant relief from the
23 stay in such circumstances generally is a given.

24 In this case, FNMA acquired title to the Property through
25 submitting the prevailing bid at a foreclosure sale, with the
26 Trustee's Deed transferring title being recorded approximately
27 one week later, both well in advance of the Debtor's bankruptcy
28 filing. Based on the foregoing, and on our review of FNMA's

1 rights as a purchaser at a foreclosure sale under California law,
2 we find no abuse of discretion in the bankruptcy court's
3 decisions to annul the stay in favor of FNMA retroactive to the
4 petition date and to waive the fourteen-day stay of the effective
5 date of its order under Rule 4001(a)(3).

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7 **VI. CONCLUSION**

8 For the foregoing reasons, we AFFIRM.
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