

AUG 09 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NOT FOR PUBLICATION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

1 In re: ) BAP No. CC-10-1363-MkPaD  
2 )  
3 THI HO, ) Bk. No. LA-10-42200-RN  
4 )  
5 Debtor. )  
6 )  
7 )  
8 )  
9 THI HO, )  
10 )  
11 Appellant, )  
12 )  
13 v. ) **MEMORANDUM\***  
14 )  
15 BANK OF AMERICA, N.A., )  
16 )  
17 Appellee. )  
18 )  
19 )

Submitted Without Oral Argument  
on March 17, 2011\*\*

Filed - August 9, 2011

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

Honorable Richard M. Neiter, Bankruptcy Judge, Presiding

19 Appearances: Appellant Thi Ho, pro se, on brief; Chaise R.  
20 Bivin of Severson & Werson on brief for Appellee  
21 Bank of America, N.A.

22 Before: MARKELL, PAPPAS and DUNN, Bankruptcy Judges.

23  
24 \*This disposition is not appropriate for publication.  
25 Although it may be cited for whatever persuasive value it may  
26 have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8013-1.

27 \*\*This matter originally was calendared for oral argument on  
28 March 17, 2011. This panel subsequently granted the appellant's  
motion to submit on the briefs, by order entered on March 3,  
2011.



1 Service Corporation ("Regional") as trustee and grantor, and Bank  
2 of America as grantee. On its face, the Trustee's Deed appears  
3 to convey title to the Property to Bank of America based on the  
4 completion of a non-judicial foreclosure sale at which Bank of  
5 America was the successful bidder ("Foreclosure Sale"). On  
6 January 14, 2010, Bank of America recorded the Trustee's Deed in  
7 Los Angeles County.<sup>3</sup>

8 Bank of America attached additional documents to its motion  
9 for relief from stay relating to the Trustee's Deed, including:  
10 (1) a Notice to Vacate Property, dated April 27, 2010; (2) a copy  
11 of a summons and complaint for unlawful detainer filed in  
12 Superior Court of the State of California, Los Angeles County  
13 ("State Court"), dated May 10, 2010 ("Unlawful Detainer Action");  
14 (3) a State Court Notice of Entry of Judgment in the Unlawful  
15 Detainer Action, providing that judgment was granted in favor of  
16 Bank of America on July 14, 2010 ("Unlawful Detainer Judgment");  
17 and (4) a Writ of Possession issued on July 22, 2010.

18 The Notice to Vacate and Unlawful Detainer Action do not  
19 expressly name Ho; instead, these documents are directed at or  
20 name Yvelises Orta and Javier Romero as defendants. According to  
21 the Trustee's Deed, Orta and Romero were the prior original  
22 trustors with respect to the Property, whose interests were  
23 terminated by the Foreclosure Sale and Trustee's Deed. Ho admits  
24 that she never held legal title to the Property, but rather  
25 claims to be successor-in-interest to Orta and Romero through  
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27 <sup>3</sup>The Trustee's Deed Upon Sale bears Los Angeles County  
28 Recorder's Office Instrument Number 2010-0055703.

1 adverse possession. Notwithstanding Ho's alleged claim to the  
2 Property, the Unlawful Detainer Judgment and Writ of Possession  
3 in fact expressly name Ho. Ho filed an appeal of the Unlawful  
4 Detainer Judgment, which is still pending.

5 On August 30, 2010, Ho filed a response to Bank of America's  
6 motion for relief from stay. In her response, Ho asserted that  
7 the Property was unencumbered and was worth \$600,000.

8 Accordingly, Ho argued she had equity in the Property of  
9 \$600,000. Ho also asserted that the Property was necessary for  
10 her reorganization.<sup>4</sup> In support of her response, Ho further  
11 argued:

12 Debtor has pending litigation in State court case no.  
13 VC056667; case no. VC056003 and appellate court case  
14 no. B225605; and Unlawful Detainer judgment appeal  
15 filed on August 13, 2010. Debtor will be filing an  
16 Adversary Proceeding against [Bank of America] as  
17 well.<sup>5</sup>

18 Other than a proof of insurance form, Ho attached the  
19 following documents in support of her response: (1) a summons and  
20 first page of the complaint against Bank of America and Regional  
21 in State Court;<sup>6</sup> (2) a civil case information statement, in an

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21 <sup>4</sup>This allegation was odd. Ho filed her case under  
22 chapter 7, which contemplates liquidation rather than  
23 reorganization.

24 <sup>5</sup>The bankruptcy court's docket indicates that Bank of  
25 America filed a reply in support of its relief from stay motion  
26 on September 3, 2010, but neither party has provided us with a  
27 copy, as part of the excerpts of record. We presume that neither  
28 party believes that the reply would be helpful to our analysis  
and disposition of this appeal.

<sup>6</sup>That case is denominated VC056667 in the Superior Court of  
the State of California, Los Angeles County.

1 appeal to the California Second District Court of Appeal;<sup>7</sup> and  
2 (3) a notice of appeal of the Unlawful Detainer Judgment  
3 (collectively, the "State Court Appeals"). While it is not  
4 entirely clear from the State Court Appeals documents, Ho's brief  
5 on appeal before this panel indicates that the State Court  
6 Appeals are focused on invalidating the foreclosure, the  
7 Trustee's Deed, the Unlawful Detainer Judgment and the Writ of  
8 Possession.

9 Although referenced in her response to the motion for relief  
10 from stay, Ho did not file her adversary proceeding complaint  
11 against Bank of America until September 13, 2010, the day before  
12 the hearing on the motion for relief from stay.

13 On the day before the hearing, the court posted its  
14 tentative ruling on Bank of America's motion ("Tentative  
15 Ruling"). The Tentative Ruling, provided in the court's calendar  
16 for its September 14th hearings, included findings of fact and  
17 conclusions of law, and granted Bank of America's motion.<sup>8</sup>

18 On September 14, 2010, the bankruptcy court heard Bank of  
19 America's motion for relief from stay. Bank of America appeared  
20 through counsel, and Ho appeared pro se. After the parties made  
21 their appearances, the court asked Ho whether she had the

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22  
23 <sup>7</sup>That case is denominated B225605, arising from case  
24 VC056667 in the Superior Court.

25 <sup>8</sup>The U.S. Bankruptcy Court for the Central District of  
26 California posts the matter calendar for its cases on its  
27 website, and in some cases, provides a tentative ruling prior to  
28 the hearing, on the day before the hearing. See <http://ecf-ciao.cacb.uscourts.gov/CiaoPosted/> (last visited June 6, 2011). This matter calendar (and in some cases tentative rulings) are also posted outside the courtroom on the day of the hearing.

1 opportunity to read its Tentative Ruling, to which Ho responded  
2 in the negative. Upon further inquiry by the court, Ho requested  
3 a continuance in order to read the court's Tentative Ruling, and  
4 possibly dispute it. With no objection from Bank of America's  
5 counsel, the court granted the continuance and concluded the  
6 hearing. Although the transcript indicates that the court would  
7 hear the motion for relief from stay at a later point in time  
8 that day, it does not appear that the hearing was called again,  
9 on September 14th or on any other day.

10 Nonetheless, on September 16, 2010, Bank of America  
11 submitted an Order Granting Motion for Relief from Stay, which  
12 the court entered the same day (the "Relief from Stay Order").  
13 Ho timely filed her appeal.<sup>9</sup>

#### 14 JURISDICTION

15 The bankruptcy court had jurisdiction under 28 U.S.C.  
16 §§ 1334 and 157(b)(2)(A) and (G), and we have jurisdiction under  
17 28 U.S.C. § 158.

#### 18 ISSUE

19 Did the bankruptcy court abuse its discretion in granting  
20 Bank of America's motion for relief from the automatic stay?

#### 21 STANDARDS OF REVIEW

22 We review an order granting relief from stay for abuse of  
23 discretion. Veal v. Am. Home Mortg. Servicing, Inc. (In re  
24 Veal), --- B.R. ----, 2011 WL 2652328, at \*12 (9th Cir. BAP,

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25  
26 <sup>9</sup>On September 16, 2010, Ho filed a motion for rehearing on  
27 the order granting Bank of America relief from stay. However,  
28 the docket in the bankruptcy case reflects an order that the  
court entered on January 11, 2011, which grants Ho's voluntary  
request to withdraw her motion for rehearing.

1 June 10, 2011); Kronemyer v. Am. Contractors Indem. Co. (In re  
2 Kronemyer), 405 B.R. 915, 919 (9th Cir. BAP 2009). As noted in  
3 Veal, this standard has two parts:

4 The abuse of discretion test involves two distinct  
5 determinations: first, whether the court applied the  
6 correct legal standard; and second, whether the factual  
7 findings supporting the legal analysis were clearly  
8 erroneous. United States v. Hinkson, 585 F.3d 1247,  
9 1261-63 (9th Cir. 2009) (en banc). If the court failed  
10 to apply the correct legal standard, then it has  
11 "necessarily abuse[d] its discretion." Cooter & Gell  
12 v. Hartmarx Corp., 496 U.S. 384, 405, 110 S.Ct. 2447,  
13 110 L.Ed.2d 359 (1990). This prong of the  
14 determination is considered de novo. Hinkson, 585 F.3d  
15 at 1261-62.

16 In re Veal, 2011 WL 2652328, at \*12.

## 17 DISCUSSION

### 18 A. Bank of America's Standing

19 We first address Ho's argument that Bank of America lacked  
20 standing. Standing is a "threshold question in every federal  
21 case, determining the power of the court to entertain the suit."  
22 Warth v. Seldin, 422 U.S. 490, 498 (1975); see also Thomas v.  
23 Mundell, 572 F.3d 756, 760 (9th Cir. 2009); In re Veal, 2011 WL  
24 2652328, at \*4. Although standing has both constitutional and  
25 prudential dimensions, Ho challenges only the prudential standing  
26 of Bank of America.<sup>10</sup>

27 Prudential standing imposes limitations on the exercise of  
28 federal jurisdiction. Elk Grove Unified School Dist. v. Newdow,

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<sup>10</sup>Constitutional standing requires "an injury in fact, which is caused by or fairly traceable to some conduct or some statutory prohibition, and which the requested relief will likely redress." In re Veal, 2011 WL 2652328, at \*4. Constitutional standing is rarely lacking when a creditor seeks relief from the automatic stay, as the stay directly affects a creditor's ability to exercise or vindicate its nonbankruptcy rights.

1 542 U.S. 1, 11 (2004). One aspect of prudential standing is that  
2 a movant must assert its own legal rights, and may not assert the  
3 legal rights of others. See id. at 12; see also Chapman v. Pier  
4 1 Imports (U.S.) Inc., 631 F.3d 939, 960 (9th Cir. 2011); In re  
5 Veal, 2011 WL 2652328, at \*5. In this context, prudential  
6 standing essentially melds with the concept of "real party in  
7 interest" under Civil Rule 17.<sup>11</sup> In re Veal, 2011 WL 2652328, at  
8 \*6. Among other policy considerations, the real party in  
9 interest requirement "ensures that the party bringing the action  
10 owns or has rights that can be vindicated by proving the elements  
11 of the claim for relief asserted." Id. at 16.

12 Section 362(d) allows a party to bring a motion for relief  
13 from stay if it establishes that it is a "party in interest."  
14 While the Code does not define the term "party in interest," this  
15 status is "determined on a case-by-case basis, with reference to  
16 the interest asserted and how [that] interest is affected by the  
17 automatic stay." In re Kronemyer, 405 B.R. at 919 (quoting In re  
18 Woodberry, 383 B.R. 373, 378 (Bankr. D.S.C. 2008)).

19 This panel has previously held that "a party seeking stay  
20 relief need only establish that it has a colorable claim to  
21 enforce a right against property of the estate." In re Veal,  
22 2011 WL 2652328, at \*11; Biggs v. Stovin (In re Luz Int'l, Ltd.),  
23 219 B.R. 837, 842 (9th Cir. BAP 1998); see also First Federal  
24 Bank of Cal. v. Robbins (In re Robbins), 310 B.R. 626, 631 (9th  
25 Cir. BAP 2004).

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26  
27 <sup>11</sup>Rule 7017 makes Civil Rule 17 applicable to adversary  
28 proceedings, and Rule 9014(c) makes Rule 7017 applicable to  
contested matters such as motions under § 362.



1        Veal essentially recognizes that a movant has a colorable  
2 claim sufficient to bestow upon it standing to prosecute a motion  
3 under § 362 if it either: (a) owns or has another form of  
4 property interest in a note secured by the debtor's (or the  
5 estate's) property; or (b) is a "person entitled to enforce"  
6 ("PETE") such a note under applicable state law. Id. at \*10.  
7 When standing is challenged, applicable nonbankruptcy law  
8 provides the tests to establish a property interest or PETE  
9 status. As Veal indicates, property interests are typically  
10 established by showing compliance with local law, usually the  
11 relevant provisions of Article 9 of the Uniform Commercial Code  
12 ("UCC"), while PETE status is shown by reference to the  
13 applicable provisions of UCC Article 3. Id. at \*\*6-10.

14        The issue here is not, as it was in Veal, whether Bank of  
15 America has an ownership or other property interest in the  
16 debtor's secured note. Indeed, due to the foreclosure, the  
17 debtor's note has been satisfied by Bank of America's credit bid.  
18 Rather the issue here is the simpler one of whether Bank of  
19 America's recorded Trustee's Deed demonstrates that Bank of  
20 America has some property interest in the Property. As shown  
21 below, under applicable California law, the recorded Trustee's  
22 Deed establishes that Bank of America is the presumptive current  
23 title owner. As a result, there can be no doubt that Bank of  
24 America has a sufficient "colorable" claim required for  
25 standing.<sup>12</sup>

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26  
27        <sup>12</sup>Although Bank of America has a sufficiently colorable  
28 claim to give it standing under Veal, that standing only allows  
it to proceed with its request for stay relief. If allowed under

1 Ho, however, argues that Bank of America is not the proper  
2 party to move for relief from stay because the trustee on her  
3 Deed of Trust was an entity referred to as PRLAP, INC. ;  
4 therefore, the entity that actually conducted the foreclosure,  
5 Regional Service Corporation, lacked the authority to sell the  
6 Property at the Foreclosure Sale held on January 6, 2010. That  
7 contention is baseless on this record and under applicable  
8 California law.

9 The duly-recorded Trustee's Deed provides that Bank of  
10 America is the presumptive current record owner with respect to  
11 the Property. See, e.g., In re Salazar, 448 B.R. 814, 819  
12 (Bankr. S.D. Cal. 2011) (bank moving for relief from stay  
13 established a prima facie case of standing as it was the title  
14 holder on the subject property under a recorded Trustee's Deed  
15 Upon Sale). Pursuant to its title to the Property, Bank of  
16 America acquired additional rights and remedies when it  
17 subsequently obtained the Unlawful Detainer Judgment and Writ of  
18 Possession to the Property. Bank of America possessed these  
19 interests and rights before Ho filed her bankruptcy petition, and  
20 at the time it moved for relief from stay.

21 Moreover, under California law, Bank of America took title  
22 free and clear to the Property upon completion of the Foreclosure  
23 Sale. See 4 Harry D. Miller and Marvin B. Starr, Cal. Real  
24 Estate § 10:208 (3d ed. 2009) (under California law, "[t]he  
25 purchaser at the foreclosure sale receives title free and clear

26 \_\_\_\_\_  
27 applicable nonbankruptcy law, the debtor may still challenge the  
28 foreclosure in state court, or if there is jurisdiction, by  
initiating an adversary proceeding in bankruptcy court.

1 of any right, title, or interest of the trustor or any grantee or  
2 successor of the trustor." ).

3 Under these facts, we find that Bank of America satisfied  
4 the threshold showing of a colorable claim to an ownership  
5 interest in the Property, as well as enforceable rights to the  
6 Property thereunder. In turn, this establishes Bank of America's  
7 status as a real party in interest, as it is clear that Bank of  
8 America is asserting its own legal rights. Therefore, Bank of  
9 America had standing to seek relief from the automatic stay.

#### 10 **B. Cause for Relief from Stay**

11 We now turn to the merits. Section 362(d)(1) provides that,  
12 "[o]n request of a party in interest and after notice and a  
13 hearing, the court shall grant relief from the stay . . . (1) for  
14 cause, including the lack of adequate protection of an interest  
15 in property of such party in interest." § 362(d)(1). Although  
16 the Bankruptcy Code does not expressly define this term, "cause"  
17 for relief from stay under § 362(d)(1) is determined on a case-  
18 by-case basis. In re Kronemyer, 405 B.R. at 921.

19 As briefly mentioned above, in California, once a  
20 foreclosure sale concludes and the purchaser records the deed in  
21 accordance with applicable law, the original trustor or borrower  
22 no longer has an interest or right in the subject real property.  
23 Bebensee-Wong v. Fed. Nat'l Mortgage Ass'n (In re Bebensee-Wong),  
24 248 B.R. 820, 822-23 (9th Cir. BAP 2000)(construing Cal. Civ.  
25 Code § 2924h(c)); see also Kathleen P. March and Hon. Alan M.  
26 Ahart, California Practice Guide: Bankruptcy, ¶ 8:1196 (2010),  
27 available at Westlaw CABANKR ("[w]here a real property  
28 nonjudicial foreclosure was completed *and the deed recorded*

1 prepetition, the debtor has neither equitable nor legal title to  
2 the property at the time the bankruptcy petition is filed.")  
3 (emphasis in original). Accordingly, upon the original trustor's  
4 subsequent bankruptcy filing, "there is no reason not to allow  
5 the creditor to repossess because filing a bankruptcy petition  
6 after loss of ownership cannot reinstate the debtor's title."  
7 Id. at ¶ 8:1195 (citing § 541(a)). Instead, the debtor is  
8 essentially a "squatter," and thus cause for relief from stay is  
9 established. Id. at ¶ 8:1196.

10 In this matter, the bankruptcy court found that cause  
11 existed based on the pre-petition Foreclosure Sale, and the  
12 subsequent Unlawful Detainer Judgment and Writ of Possession. In  
13 essence, the bankruptcy court adopted its tentative ruling which  
14 stated in relevant part:

15 . . . the Court grants the Motion for the following  
16 reasons:

17 1. Movant acquired title to the premises by foreclosure  
18 sale prepetition and recorded the deed within the  
19 period provided by state law for perfection.

20 2. An Unlawful Detainer proceeding was commenced; a  
21 Judgment in favor of Movant obtained; and a Writ of  
22 Possession for the Property issued, pre-petition. This  
23 Court will not entertain a collateral attack against  
24 that litigation and the parties should be freed from  
25 the injunctive provisions of § 362 to prosecute that  
26 litigation.

27 3. According to that judgment, Debtor no longer owns  
28 the Property. As such, Debtor has no equity in the  
Property; and the Property is not necessary for an  
effective reorganization.

September 13, 2010, Tentative Ruling, at p. 2. Simply put, the  
court properly found that Ho no longer had an interest in the  
Property and that Bank of America had established cause for

1 relief from stay.<sup>13</sup>

2 In sum, based on our review of Bank of America's rights as a  
3 purchaser at a foreclosure sale, we conclude that the bankruptcy  
4 court's factual findings were not clearly erroneous. Therefore,  
5 the court did not abuse its discretion in granting Bank of  
6 America relief from the automatic stay.

7 **C. The Adversary Proceeding**

8 Ho further claims that the bankruptcy court erred in  
9 granting relief from stay when she commenced an adversary  
10 proceeding against Bank of America. The crux of Ho's complaint  
11 was that the Foreclosure Sale, Unlawful Detainer Action,  
12 subsequent Unlawful Detainer Judgment and Writ of Possession were  
13 improper, fraudulent, illegal and invalid.

14 As a preliminary matter, it is not clear to us that the  
15 adversary proceeding complaint was before the court at the  
16 September 14 hearing. Ho filed her complaint on September 13,  
17 the day before the relief from stay hearing. There is no  
18 evidence that Ho actually presented a copy of her complaint to  
19 the court at the hearing. It also does not appear from either  
20 the hearing transcript or the Relief from Stay Order that the  
21 court was aware or had knowledge of the adversary proceeding  
22 prior to its ruling.

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24 <sup>13</sup>This case is distinguishable from cases such as In re  
25 Salazar. In Salazar, the bank moving for relief from stay  
26 obtained title to the subject property prior to the debtor's  
27 bankruptcy filing through a non-judicial foreclosure sale.  
28 448 B.R. at 818. However, the bank sought relief from stay to  
*continue* its unlawful detainer action commenced in state court  
prior to debtor's bankruptcy. Id. Thus, in Salazar, there was  
no prepetition state court judgment.

1 Even if the court could have assumed that Ho had filed an  
2 adversary complaint, it would not change our analysis. The  
3 bankruptcy court generally has broad discretion in granting  
4 relief from stay for cause under § 362(d). Groshong v. Sapp (In  
5 re Mila, Inc.), 423 B.R. 537, 544 (9th Cir. BAP 2010). This  
6 includes granting relief from stay to enforce a prepetition state  
7 court judgment, in spite of whether the debtor has initiated a  
8 related adversary proceeding. See generally In re Robbins, 310  
9 B.R. at 630 (granting or denying relief from stay while adversary  
10 proceeding is pending is within the sound discretion of the  
11 bankruptcy court); In re Kronemyer, 405 B.R. at 921-22 (court did  
12 not abuse discretion in granting creditor relief from stay to  
13 continue state court litigation despite a pending adversary  
14 proceeding).

15 Ho's complaint, much like her argument before this panel,  
16 seemingly advanced the same state law claims, rights and defenses  
17 that she asserted (or should have been asserting) in the State  
18 Court. As set forth above, the bankruptcy court had broad  
19 discretion to grant relief from stay to allow the parties to  
20 continue to assert their claims, right and defenses in the State  
21 Court and in the State Court Appeals. Accordingly, based on  
22 these circumstances, we hold that the bankruptcy court did not  
23 abuse its discretion in granting Bank of America relief from the  
24 automatic stay under § 362(d)(1).<sup>14</sup>

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27 <sup>14</sup>We decline to reach the issue of whether stay relief might  
28 also have been appropriate under § 362(d)(2).

1 **CONCLUSION**

2 For all of the reasons set forth above, the bankruptcy  
3 court's order granting relief from stay is AFFIRMED.<sup>15</sup>  
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26 <sup>15</sup>In this appeal, Bank of America moved this panel to take  
27 judicial notice of certain documents in support of its response  
28 brief. We deny Bank of America's Request for Judicial Notice  
because these documents are not relevant or necessary to the  
analysis and disposition of this appeal.