NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-10-1363-MkPaD
THI HO,	Bk. No. LA-10-42200-RN
Debtor.	
THI HO,	
Appellant,	
v.	**MEMORANDUM**[*]
BANK OF AMERICA, N.A.,	
Appellee.	

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

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

Before: MARKELL, PAPPAS and DUNN, Bankruptcy Judges.

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

INTRODUCTION

Debtor and Appellant Thi Ho ("Ho") appeals the bankruptcy court's order granting relief from stay to Appellee Bank of America, N.A. ("Bank of America"). We AFFIRM.

FACTS

On August 2, 2010, Ho filed a voluntary chapter 7 bankruptcy petition.[1] Within days, Bank of America filed a motion for relief from the automatic stay with respect to Ho's residence in Downey, California (the "Property").[2]

Bank of America sought termination of the stay under § 362(d)(1), asserting that such relief was warranted for cause, and under § 362(d)(2), further asserting that Ho had no equity in the Property, and the Property was unnecessary to an effective reorganization.

In support of its motion, Bank of America attached a copy of a post-foreclosure Trustee's Deed Upon Sale dated January 12, 2010 ("Trustee's Deed"). The Trustee's Deed identifies Regional

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[1]Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and 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.

[2]Ho provided us with a copy of Bank of America's motion for relief from stay in her excerpts of record. However, that copy omits the exhibits to the motion, and Bank of America has not provided us with any supplemental excerpts of record. Nonetheless, we have obtained a complete copy of the relief from stay motion, including exhibits, from the bankruptcy court's electronic docket for case no. LA-10-42200-RN. We hereby take judicial notice of the filing and contents of this document. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989); Atwood v. Chase Manhattan Mrtg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

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

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

The Notice to Vacate and Unlawful Detainer Action do not expressly name Ho; instead, these documents are directed at or name Yvelises Orta and Javier Romero as defendants. According to the Trustee's Deed, Orta and Romero were the prior original trustors with respect to the Property, whose interests were terminated by the Foreclosure Sale and Trustee's Deed. Ho admits that she never held legal title to the Property, but rather claims to be successor-in-interest to Orta and Romero through

[3]The Trustee's Deed Upon Sale bears Los Angeles County Recorder's Office Instrument Number 2010-0055703.

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

On August 30, 2010, Ho filed a response to Bank of America's motion for relief from stay. In her response, Ho asserted that the Property was unencumbered and was worth $600,000. Accordingly, Ho argued she had equity in the Property of $600,000. Ho also asserted that the Property was necessary for her reorganization.[4] In support of her response, Ho further argued:

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

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

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[4]This allegation was odd. Ho filed her case under chapter 7, which contemplates liquidation rather than reorganization.

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

[6]That case is denominated VC056667 in the Superior Court of the State of California, Los Angeles County.

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

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

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

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

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[7]That case is denominated B225605, arising from case VC056667 in the Superior Court.

[8]The U.S. Bankruptcy Court for the Central District of California posts the matter calendar for its cases on its website, and in some cases, provides a tentative ruling prior to 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.

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

Nonetheless, on September 16, 2010, Bank of America submitted an Order Granting Motion for Relief from Stay, which the court entered the same day (the "Relief from Stay Order"). Ho timely filed her appeal.[9]

JURISDICTION

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

ISSUE

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

STANDARDS OF REVIEW

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

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[9]On September 16, 2010, Ho filed a motion for rehearing on the order granting Bank of America relief from stay. However, 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.

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

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

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

DISCUSSION

A. Bank of America's Standing

We first address Ho's argument that Bank of America lacked standing. 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); see also Thomas v. Mundell, 572 F.3d 756, 760 (9th Cir. 2009); In re Veal, 2011 WL 2652328, at *4. Although standing has both constitutional and prudential dimensions, Ho challenges only the prudential standing of Bank of America.[10]

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

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[10]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.

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

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

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

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[11]Rule 7017 makes Civil Rule 17 applicable to adversary proceedings, and Rule 9014(c) makes Rule 7017 applicable to contested matters such as motions under § 362.

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

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

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[12]Although Bank of America has a sufficiently colorable claim to give it standing under Veal, that standing only allows it to proceed with its request for stay relief. If allowed under

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

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

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

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

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

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

B. Cause for Relief from Stay

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

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

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

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

> . . . the Court grants the Motion for the following reasons:
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> 1. Movant acquired title to the premises by foreclosure sale prepetition and recorded the deed within the period provided by state law for perfection.
>
> 2. An Unlawful Detainer proceeding was commenced; a Judgment in favor of Movant obtained; and a Writ of Possession for the Property issued, pre-petition. This Court will not entertain a collateral attack against that litigation and the parties should be freed from the injunctive provisions of § 362 to prosecute that litigation.
>
> 3. According to that judgment, Debtor no longer owns 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

relief from stay.[13]

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

C. The Adversary Proceeding

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

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

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[13]This case is distinguishable from cases such as In re Salazar. In Salazar, the bank moving for relief from stay obtained title to the subject property prior to the debtor's bankruptcy filing through a non-judicial foreclosure sale. 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.

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

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

[14]We decline to reach the issue of whether stay relief might also have been appropriate under § 362(d)(2).

CONCLUSION

For all of the reasons set forth above, the bankruptcy court's order granting relief from stay is AFFIRMED.[15]

[15]In this appeal, Bank of America moved this panel to take judicial notice of certain documents in support of its response 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.