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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NOT FOR PUBLICATION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. NC-10-1459-HPaJu
)	
FELIPE DABAO ZULUETA, JR.,)	Bk. No. 10-42479
)	
Debtor.)	
_____)	
)	
FELIPE DABAO ZULUETA, JR.,)	
)	
Appellant,)	M E M O R A N D U M¹
)	
v.)	
)	
MARTHA G. BRONITSKY, Chapter)	
13 Trustee; ONEWEST BANK, FSB,)	
)	
Appellees.)	
_____)	

Argued and Submitted on June 16, 2011
at San Francisco, California

Filed - August 23, 2011

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

Honorable Edward D. Jellen, Bankruptcy Judge, Presiding

Appearances: The Appellant argued pro se. Joshua Andrew del
Castillo of Allen, Matkins, Leck, Gamble, Mallory
& Natsis, LLP argued for the Appellee, One West
Bank FSB.

Before: HOLLOWELL, PAPPAS, and JURY, 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.

1 Felipe Zulueta, Jr. (the Debtor) challenges whether Deutsche
2 Bank National Trust Company, as Trustee of the IndyMac INDX
3 Mortgage Loan Trust 2006-AR14, Mortgage Pass-Through
4 Certificates, Series 2006-AR14 under the Pooling and Servicing
5 Agreement dated October 1, 2006 (Deutsche Bank), through its
6 purported servicing agent, OneWest Bank, FSB (OneWest) was the
7 real party in interest with standing to file a proof of secured
8 claim.

9 The bankruptcy court determined that Deutsche Bank
10 established it was the holder of the Debtor's note and,
11 therefore, had standing to file the proof of claim. For the
12 reasons stated below, we AFFIRM.

13 I. FACTS

14 The Debtor filed a chapter 13² bankruptcy petition on
15 March 8, 2010. On April 6, 2010, Deutsche Bank filed a proof of
16 secured claim (Claim) in the amount of \$686,250.87 for money
17 loaned on real property. The Claim listed Deutsche Bank as the
18 secured creditor and indicated payments should be made to
19 OneWest.

20 The history of the loan, which serves as the basis of the
21 Claim, is as follows. In 2006, the Debtor and Eloisa Maru
22 Zulueta, Trustees of the Zulueta Family Trust, executed a
23 promissory note in the amount of \$560,000 in favor of IndyMac
24 Bank FSB (IndyMac) (the Note). The Note has an endorsement-in-

26 ² Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 All "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

1 blank (the Endorsement). The Note is secured by a deed of trust
2 on the Debtor's house in Brentwood, California (the Deed of
3 Trust). Mortgage Electronic Registration Systems, Inc. (MERS) is
4 the beneficiary and nominee for IndyMac on the Deed of Trust.

5 On October 1, 2006, IndyMac entered into a Pooling and
6 Servicing Agreement (PSA) with Deutsche Bank, whereby IndyMac
7 transferred the Note to Deutsche Bank. Section 3.01 of the PSA
8 provided that IndyMac would service the Note. On April 30, 2008,
9 MERS, as nominee for IndyMac, assigned the Deed of Trust to
10 Deutsche Bank (the Assignment). Deutsche Bank recorded the
11 Assignment on June 6, 2008.

12 In support of the Claim, Deutsche Bank attached a document
13 listing the purported arrearages on the Note. Additionally,
14 Deutsche Bank attached copies of: (1) the Note, (2) the
15 Endorsement, which was undated and appeared as a separate
16 document, (3) the Deed of Trust, and (4) the Assignment. The
17 Debtor filed an objection to the Claim, contending that Deutsche
18 Bank was not the real party in interest to assert the Claim (the
19 Claim Objection).

20 In its response to the Claim Objection, Deutsche Bank
21 contended that IndyMac assigned it the Deed of Trust pursuant to
22 the PSA, and, because the Note included the Endorsement and
23 OneWest, as Deutsche Bank's agent, had physical possession of the
24 Note, Deutsche Bank was a holder of the Note under Cal. Comm.
25 Code § 3201(b). To substantiate its contention, Deutsche Bank
26 submitted a declaration by a OneWest employee, Champagne
27 Williams, that stated OneWest was the servicer and holder of the
28 Note (the Williams Declaration). A copy of the Assignment, Note,

1 and Endorsement was attached to the Williams Declaration.

2 The Debtor filed a reply. Among the issues raised by the
3 Debtor in his reply were:

- 4 (1) the documents provided in the Williams Declaration
required authentication;
- 5 (2) OneWest was not the real party in interest and needed
6 to submit proper documentation demonstrating its agency
relationship with Deutsche Bank;
- 7 (3) the validity of the Endorsement was questionable
because it had no identifying numbers and did not
reference the Note;
- 8 (4) there was no indication that the Note was included in
the PSA; and,
- 9 (5) an accounting was required since several months of
10 payments were not accounted for in Deutsche Bank's
arrearage calculation.

11 The bankruptcy court set an evidentiary hearing on the Claim
12 Objection for November 3, 2010 (the Hearing). On November 1,
13 2010, Deutsche Bank filed an Evidentiary Hearing Brief along with
14 a declaration from its counsel (the Chun Declaration). The Chun
15 Declaration stated that in an effort to resolve the Claim
16 Objection, the Debtor was provided with a copy of the PSA, as
17 well as the accounting and application of the Debtor's payments
18 on the Note. Furthermore, in response to the Debtor's concern
19 regarding a lack of documentation establishing OneWest's
20 relationship to Deutsche Bank, Chun stated he had emailed the
21 Debtor a letter (the Letter), which allegedly had been previously
22 sent to the Debtor in April 2009, that stated in part:

23 Effective on March 19, 2009, the servicing of your
24 mortgage loan, that is, the right to collect payments
25 from you, was assigned, sold or transferred from
IndyMac Federal Bank, FSB to IndyMac Mortgage Services,
a division of OneWest Bank, FSB.³

26
27 ³ The Letter itself is not included in the record on appeal,
28 nor is it included on the bankruptcy court docket as an

(continued...)

1 The Debtor and OneWest attended the Hearing. OneWest stated
2 its attendance at the Hearing was in its capacity as the
3 servicing agent for Deutsche Bank.⁴ OneWest presented to the
4 bankruptcy court⁵ the Note, the Deed of Trust, the PSA, the
5 Assignment, the Letter, and the Williams Declaration. See Hr'g
6 Tr. (Nov. 3, 2010) at 5-6.

7 The bankruptcy court issued a written decision on
8 November 9, 2010, overruling the Claim Objection. The bankruptcy
9 court determined that Deutsche Bank was a holder of the Note
10 because (1) the Deed of Trust and Note were assigned to Deutsche
11 Bank, (2) Deutsche Bank, through the PSA, had a servicing
12 arrangement with IndyMac, who subsequently transferred the
13 servicing of the Note to OneWest (as evidenced by the Letter),
14 and (3) Deutsche Bank (through its agent, OneWest) brought the
15 original Note and Deed of Trust to the hearing. Therefore, it
16

17 ³(...continued)
18 attachment to any of OneWest's pleadings or to the Chun
19 Declaration.

20 ⁴ Because Deutsche Bank and OneWest were represented by the
21 same attorney, the Debtor specifically asked at the Hearing
22 whether Mr. Chun had appeared on behalf of OneWest or Deutsche
23 Bank. Mr. Chun replied that he was representing OneWest, "the
24 servicing agent for Deutsche Bank." See Hr'g Tr. (Nov. 3, 2010)
25 at 4.

26 ⁵ We assume that the documents were admitted as evidence.
27 In its written decision, the bankruptcy court stated that
28 "Deutsche Bank made an offer of proof, which the court accepted
... ." An offer of proof may be used to persuade the court to
admit evidence; it consists of the evidence itself, an
explanation of the purpose for which it is offered, and an
argument supporting its admissibility. Black's Law Dictionary,
(9th ed.) 2009.

1 determined that Deutsche Bank was the holder of the Note with
2 standing to file the Claim. On November 23, 2010, the bankruptcy
3 court entered its Order Denying the Claim Objection. The Debtor
4 timely appealed.

5 On November 29, 2010, the bankruptcy court dismissed the
6 Debtor's bankruptcy case because the Debtor was unable to confirm
7 a feasible chapter 13 plan. The bankruptcy court also granted
8 the Debtor a stay pending appeal, staying the dismissal of the
9 case as long as the Debtor made monthly payments on the Note to
10 Deutsche Bank's counsel and made monthly payments sufficient to
11 fund a plan to the chapter 13 bankruptcy trustee.

12 II. JURISDICTION

13 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
14 § 157(b)(2)(B). We note that the bankruptcy court granted the
15 Debtor a stay of the dismissal of his chapter 13 case pending
16 appeal, and therefore, the appeal is not moot. Even if the
17 Debtor defaults on his monthly payments to Deutsche Bank's
18 counsel or the trustee, and the case is dismissed, we conclude
19 the appeal is still not moot. The Ninth Circuit has held that
20 "the allowance or disallowance of 'a claim in bankruptcy is
21 binding and conclusive on all parties or their privies, and being
22 in the nature of a final judgment, furnishes a basis for a plea
23 of res judicata.'" Bevan v. Social Commc'ns Sites, LLC (In re
24 Bevan), 327 F.3d 994, 997 (9th Cir. 2003) quoting Siegel v. Fed.
25 Home Loan Mortg. Corp., 143 F.3d 525, 529 (9th Cir. 1998).
26 Because the bankruptcy court, in a claim objection proceeding,
27 makes a substantive ruling that binds the parties in all other
28 proceedings and may finally adjudicate the parties' underlying

1 rights, an affirmance by us could have preclusive effect if the
2 Debtor subsequently challenged the validity of the Claim. Id.
3 As a result, if we were to reverse, we would be able to provide
4 the Debtor effective relief. See People of Village of Gambell v.
5 Babbitt, 999 F.2d 403, 406 (9th Cir. 1993) (if there is a present
6 controversy as to which effective relief can be granted, then the
7 appeal is not moot). Consequently, we have jurisdiction under
8 28 U.S.C. § 158.

9 **III. ISSUE**

10 Did the bankruptcy court err in overruling the Claim
11 Objection?

12 **IV. STANDARDS OF REVIEW**

13 We review de novo whether a party has standing. Dunmore v.
14 United States, 358 F.3d 1107, 1111 (9th Cir. 2004); Kronemyer v.
15 Am. Contrs. Indem. Co. (In re Kronemyer), 405 B.R. 915, 918 (9th
16 Cir. BAP 2009). De novo review requires that we consider a
17 matter anew, as if it had not been heard before, and as if no
18 decision had been rendered previously. United States v.
19 Silverman, 861 F.2d 571, 576 (9th Cir. 1988).

20 **V. DISCUSSION**

21 Throughout this case, Deutsche Bank and OneWest have acted
22 almost as one interchangeable entity in their pleadings regarding
23 the Claim. It is not surprising, therefore, that the Debtor was
24 confused by the relationship between the two. The same attorney
25 represented both entities. The Claim was filed by Deutsche Bank
26 but directed that payments be made to OneWest. Additionally, the
27 response to the Claim Objection was submitted by Deutsche Bank
28 but referred to the Claim as being held by "the Secured

1 Creditor," defined as "[Deutsche Bank] and the servicing agent
2 [OneWest]." It contended that "[OneWest] properly filed [the
3 Claim]" because OneWest was the holder of the Note.

4 The arguments that the Debtor made to the bankruptcy court
5 challenging the standing of either Deutsche Bank or OneWest to
6 file the Claim are, on appeal, focused almost exclusively on
7 OneWest, not only in its purported capacity as Deutsche Bank's
8 agent, but as the purported holder of the Note.

9 **A. Standing**

10 The issue of standing involves both "constitutional
11 limitations on federal court jurisdiction and prudential
12 limitations on its exercise." Warth v. Seldin, 422 U.S. 490, 498
13 (1975). Only prudential standing is at issue in this appeal.
14 Prudential standing requires the plaintiff to assert its own
15 claims rather than the claims of another. Dunmore v. United
16 States, 358 F.3d 1107, 1112 (9th Cir. 2004).

17 Claim objections are contested matters under Rule 9014.
18 Rule 9014(c) makes Fed. R. Civ. P. 17(a)(1) (Civil Rule 17(a)(1))
19 (incorporated by Rule 7017) applicable to contested matters.
20 Civil Rule 17(a)(1) provides that "[a]n action must be prosecuted
21 in the name of the real party in interest." To satisfy the
22 requirements of prudential standing and Civil Rule 17(a)(1), "the
23 action must be brought by the person who, according to the
24 governing substantive law, is entitled to enforce the right."
25 6A Wright, Miller, Kane & Marcus, Fed. Prac. & Proc. ¶ 1543 (3d
26 ed. 2010); Veal v. Am. Home Mortg. Serv., Inc. (In re Veal),
27 450 B.R. 897, 908 (9th Cir. BAP 2011). A party without the legal
28 right to enforce an obligation under substantive law is not a

1 real party in interest. See Simon v. Hartford Life, Inc.,
2 546 F.3d 661, 664 (9th Cir. 2008); In re Aniel, 427 B.R. 811, 815
3 (Bankr. N.D. Cal. 2010).

4 The requirement of prudential standing addresses the concern
5 that the maker of a note pays the correct party and will not have
6 to pay that amount again to another party. In re Veal, 450 B.R.
7 908-910. "The modern function of the rule . . . is simply to
8 protect the defendant against a subsequent action by the party
9 actually entitled to recover, and to insure generally that the
10 judgment will have its proper effect as res judicata." Id. at
11 908 (internal citations omitted).

12 **B. Right To Enforce The Note**

13 Because the Note is a negotiable instrument, its enforcement
14 is governed by Article 3 of California's version of the Uniform
15 Commercial Code, Cal. Comm. Code (CCC) § 1101-16104.⁶ Under
16 California law, a note may be enforced by:

- 17 (1) a holder of the instrument (CCC §§ 3301, 1201(b)(21));
18 (2) a person who is in possession of the instrument who has
19 the rights of a holder by subrogation or transfer (CCC
20 §§ 3301, 3302(a)); or,
21 (3) a person who previously had the ability to enforce the
note, but it was lost, destroyed, or stolen (CCC §§ 3301,
3309).

22 To qualify as a holder of the instrument, one must be in
23 possession of the instrument that is either properly endorsed or
24

25
26 ⁶ State law determines the validity of creditors' claims in
27 bankruptcy. Grogan v. Garner, 498 U.S. 279, 283 (1991). In
28 California, § 3301 of the Commercial Code governs who is entitled
to enforce a note. In re Aniel, 427 B.R. at 815.

1 payable to the person in possession of it.⁷ CCC § 1201(b)(21),
2 (b)(5). Accordingly, in order to be entitled to enforce the Note
3 for purposes of defeating the Debtor's objection to its Claim,
4 Deutsche Bank had the burden of proving that (1) it (or its
5 agent) had possession of the Note; and (2) the Note was validly
6 endorsed. See Summers v. Earth Island Inst., 555 U.S. 488 (2009)
7 (the movant bears the burden of showing that he has standing for
8 each type of relief sought); Hasso v. Mazsqai (In re La Sierra
9 Fin. Servs., Inc.), 290 B.R. 718, 726 (9th Cir. BAP 2002) (same).

10 The bankruptcy court found that Deutsche Bank was the holder
11 of the Note. That finding was entwined with a finding that
12 OneWest was Deutsche Bank's agent and the servicer of the Note
13 under the PSA. On appeal, the Debtor argues that OneWest does
14 not have prudential standing even though it possessed the Note
15 because the Endorsement was invalid, OneWest never demonstrated
16 it was authorized to act on behalf of Deutsche Bank, and OneWest
17 did not provide documentation of how it came to possess the Note.

18 After reviewing the evidence in the record, we agree with
19 the Debtor that OneWest did not prove it was Deutsche Bank's
20 agent. However, for the reasons explained below, we nevertheless
21

22 ⁷ CCC § 1201(b)(21): "Holder," means:

23 (A) the person in possession of a negotiable instrument
24 that is payable either to bearer or, to an identified person that
25 is the person in possession; or

26 (B) the person in possession of a document of title if
27 the goods are deliverable either to bearer or to the order of the
28 person in possession.

CCC § 1201(b)(5): "Bearer" means a person in possession of a
negotiable instrument, document of title, or certificated
security that is payable to bearer or endorsed in blank.

1 conclude that the requirement of prudential standing was
2 satisfied.

3 1. Possession

4 OneWest appeared at the Hearing as "the servicing agent for
5 Deutsche Bank." Hr'g Tr. (Nov. 3, 2010) at 4:14-15. To evidence
6 its agency relationship with Deutsche Bank, OneWest presented
7 Section 3.01 of the PSA, which provided that IndyMac would
8 service the Note for Deutsche Bank, the Letter, and the Williams
9 Declaration.

10 The Letter that referred to the transfer of the servicing
11 role from IndyMac to OneWest was not included in the record.
12 Without the Letter, we cannot determine by whom it was sent or
13 what information regarding the purported transfer of servicing
14 rights was provided with the Letter. At most, the Letter was
15 notice to the Debtor of a change in servicers. Standing alone,
16 it does not constitute admissible evidence of an agency
17 relationship between OneWest and Deutsche Bank.

18 Furthermore, as a general rule, the fact of agency cannot be
19 proved by the declaration of the agent alone. Kast v. Miller &
20 Lux, 159 Cal. 723, 727-28 (1911). While the declarations of a
21 principal are admissible to prove the agency relationship,
22 declarations of an agent are not admissible to prove the fact of
23 his agency or the extent of his powers of agency. Howell v.
24 Courtesy Chevrolet, Inc., 16 Cal.App.3d 391, 401 (Cal. Ct. App.
25 1971). There must be either some other competent evidence
26 establishing the fact of agency, or, the agent's testimony as a
27 witness in order to prove his authorization. Stewart v.
28 Workmen's Comp. Appeals Bd., 264 Cal.App.2d 947, 952 (Ct. App.

1 1968).

2 OneWest did not present a servicing agreement between it and
3 Deutsche Bank. There was no declaration or testimony from
4 Deutsche Bank that confirmed OneWest was authorized to act as the
5 servicing agent for Deutsche Bank with respect to the Note.
6 There was no declaration, testimony or documentation from IndyMac
7 establishing its relationship with OneWest. OneWest did not
8 provide witness testimony regarding its role as the servicer for
9 Deutsche Bank. As a result, the agency relationship between
10 OneWest and Deutsche Bank was not established.

11 Nevertheless, because OneWest appeared at the Hearing with
12 the original Note in its possession, endorsed-in-blank, it was
13 the holder of the Note under CCC § 1201(b). The Debtor asserts,
14 however, that the Endorsement was invalid, which precluded
15 OneWest from being a holder entitled to enforce the Note under
16 CCC § 3301.

17 2. Endorsement

18 An endorsement is a signature made on an instrument for the
19 purpose of negotiating the instrument. CCC § 3204(a). An
20 endorsement-in-blank is an endorsement that is not payable to an
21 identified person. CCC § 3205(b). Thus, an instrument endorsed-
22 in-blank becomes payable to bearer and any person who possesses
23 the instrument becomes its holder. In re Aniel, 427 B.R. at 815-
24 16.

25 The Debtor argues that the Endorsement is invalid because
26 the Endorsement appeared on a separate paper, or allonge, that
27 did not reference the Note. The Debtor asserts that the use of
28 an allonge is appropriate only when there is no longer room on

1 the negotiable instrument itself to write an endorsement. See
2 Pribus v. Bush, 118 Cal.App.3d 1003, 1008 (Ct. App. 1981). At
3 oral argument before the Panel, OneWest explained that the
4 Endorsement was on the back of the Note; however, because only
5 one-sided documents may be uploaded onto the electronic docketing
6 system, it appeared in the record as being on a separate page.
7 An endorsement on an allonge is valid even though there is
8 sufficient space on the instrument for an endorsement as long as
9 the allonge is affixed or attached to the note such that it
10 becomes part of the instrument. CCC § 3204 cmt. 1; § 3204(a).
11 Because the Endorsement was on the Note itself, it was valid.

12 A party in physical possession of an endorsed-in-blank note
13 qualifies as a holder of a note under CCC § 1201(b). Because
14 OneWest appeared at the Hearing with possession of the endorsed-
15 in-blank Note, it was a holder of the Note entitled to enforce
16 it.

17 As we noted above, the reason behind the prudential standing
18 requirement is to ensure that "if a maker makes a payment to a
19 'person entitled to enforce,' the obligation is satisfied on a
20 dollar for dollar basis, and the maker never has to pay that
21 amount again." In re Veal, 450 B.R. at 910. It is immaterial
22 that there was insufficient evidence in the record to establish
23 the agency relationship between OneWest and Deutsche Bank because
24 the Debtor's payments to OneWest (as directed by the Claim)
25 discharge his obligation to Deutsche Bank under the Note. See
26 id. at 910, 912. Therefore, "so long as the maker's obligation
27 is discharged by payment, the maker should be indifferent as to
28 whether the 'person entitled to enforce' the note satisfies his

1 obligations, under the law of agency, to the ultimate owners of
2 the note." Id. at 912 n.27.

3 At oral argument on appeal, the Debtor stated he was making
4 any arrearage payments on the Note to the trustee and was paying
5 OneWest monthly payments under the Note. He stated that the
6 basis of his Claim Objection was a matter of wanting to know to
7 whom he should make payments. Indeed, the purpose of a
8 prudential standing challenge is to ensure that a debtor pays the
9 right party. In this case, the Debtor may rely on OneWest's
10 status as a holder of the Note.

11 **VI. CONCLUSION**

12 For the reasons given above, we AFFIRM.