

JUN 24 2015

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	CC-14-1343-TaKuD
6	CRAIG HART,)	Bk. No.	2:13-bk-17412-BR
7	Debtor.)	Adv. No.	2:13-ap-01427-BR
8	_____)		
9	CRAIG HART,)		
10	Appellant,)		
11	v.)	MEMORANDUM*	
12	BANK OF AMERICA HOME LOANS;)		
13	BANK OF AMERICA CORPORATION;)		
14	COUNTRYWIDE FINANCIAL)		
15	CORPORATION; BANK OF NEW YORK)		
16	MELLON; CWALT, INC.;)		
17	RECONTRUST COMPANY; RECONTRUST)		
18	N.A.; MORTGAGE ELECTRONIC)		
19	REGISTRATION; LANDSAFE;)		
20	COUNTRYWIDE HOME LOANS,)		
21	Appellees.**)		
22	_____)		

* 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 8024-1(c)(2).

** On December 1, 2014, the BAP Clerk issued a conditional order of waiver advising appellees that they had until December 15, 2014 to file a brief. They did not, and they have not otherwise appeared in this appeal. As a result, the appellees waived their right to file a brief or appear at oral argument.

Submitted Without Oral Argument***
on June 18, 2015

Filed - June 24, 2015

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

Honorable Barry Russell, Bankruptcy Judge, Presiding

Appearances: Appellant Craig Hart, pro se, on brief.

Before: TAYLOR, DUNN, and KURTZ, Bankruptcy Judges.

INTRODUCTION

The bankruptcy court dismissed chapter 7¹ debtor Craig Hart's first amended adversary complaint for lack of standing. The Debtor appealed. We AFFIRM the bankruptcy court.

FACTS²

In 2006, Carole Pinkey-Hart, the Debtor's wife, obtained a loan that allowed her to purchase residential real property in Los Angeles, California (the "Property"). The obligation to

*** After examination of the briefs and record, and after notice to the Debtor, in an order entered January 28, 2015, the Panel unanimously determined that oral argument was not needed for this appeal. See Fed. R. Bankr. P. 8019(b); 9th Cir. BAP Rule 8019-1.

¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All "Rule" references are to the Federal Rules of Bankruptcy Procedure and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

² We exercise our discretion to take judicial notice of documents electronically filed in the adversary proceeding and in the underlying bankruptcy case. See Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 repay the loan was evidenced by a promissory note in favor of
2 Countrywide Bank, N.A. and secured by a deed of trust against
3 the Property. The deed of trust identified Mrs. Pinkey-Hart as
4 the borrower, "a married woman [holding title to the Property]
5 as her sole and separate property." The Debtor
6 contemporaneously executed and recorded a quitclaim deed, in
7 which he "remise[d], release[d] and quitclaim[ed]" any interest
8 in the Property to Mrs. Pinkey-Hart.

9 Mrs. Pinkey-Hart eventually defaulted on the loan, and a
10 non-judicial foreclosure followed. Bank of America, N.A., as
11 successor by merger to BAC Home Loans Servicing, LP fka
12 Countrywide Home Loans Servicing LP ("BOFA") acquired title
13 pursuant to a trustee's deed upon sale recorded in September of
14 2011.

15 BOFA then initiated an unlawful detainer action against
16 Mrs. Pinkey-Hart in California state court. Almost a year and a
17 half later, in March 2013, it obtained a judgment for
18 restitution and possession of the Property. It later acquired a
19 writ of possession.

20 Just four days after entry of the unlawful detainer
21 judgment, the Debtor, pro se, filed a chapter 13 petition.
22 Mrs. Pinkey-Hart was not a joint debtor. In addition to credit
23 card debt, the Debtor scheduled the Property with a current
24 value of \$97,000 as an asset and listed Bank of America as a
25 creditor, with a claim secured by the Property in an amount
26 "TBD." Soon thereafter, the Debtor voluntarily converted to
27
28

1 chapter 7.³

2 The Debtor then commenced an adversary proceeding against
3 BOFA, the substituted trustee, and other banks and mortgage
4 industry entities (collectively, the "Defendants"). An amended
5 adversary complaint ("FAC") alleged fraud and forgery in
6 relation to the assignment of the deed of trust and, thus,
7 alleged that the foreclosure was invalid.

8 The Defendants moved to dismiss the FAC pursuant to Civil
9 Rule 12(b)(6). Among other things, they argued that dismissal
10 with prejudice was warranted based on the Debtor's lack of
11 standing to bring the claims in the adversary proceeding as he
12 had no ownership interest in the Property and was not a party to
13 the loan secured by the deed of trust and as such claims could
14 only be asserted by the chapter 7 trustee.

15 The Debtor opposed, arguing that his claims were properly
16 pled and reiterating his arguments of fraud and forgery. He,
17 however, never addressed BOFA's standing argument; his only
18 reference to standing focused on BOFA as he stated that it had
19 "refused to establish, and in fact obfuscate [sic] who really
20 ha[d] the legal standing to foreclose."

21 After a hearing on the motion, the bankruptcy court agreed
22 with the Defendants and entered an order dismissing the FAC with
23 prejudice. The Debtor timely appealed.⁴

25
26 ³ In the bankruptcy case, BOFA later moved for and obtained
a stay relief order based on its unlawful detainer judgment.

27
28 ⁴ While this appeal was pending, the Debtor received his
chapter 7 discharge on September 3, 2013.

1 **JURISDICTION**

2 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
3 §§ 1334 and 157(b) (2). We have jurisdiction under 28 U.S.C.
4 § 158.

5 **ISSUE**

6 Whether the bankruptcy court erred by dismissing the FAC.

7 **STANDARD OF REVIEW**

8 We review de novo the bankruptcy court's dismissal under
9 Civil Rule 12(b) (6). Barnes v. Belice (In re Belice), 461 B.R.
10 564, 572 (9th Cir. BAP 2011).

11 **DISCUSSION**

12 Under Civil Rule 12(b) (6), made applicable in adversary
13 proceedings by Rule 7012, the bankruptcy court may dismiss an
14 adversary complaint for "failure to state a claim upon which
15 relief can be granted." It may rely on judicially noticed facts
16 to establish that an adversary complaint does not state a claim
17 for relief. See Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d
18 1005, 1016 n.9 (9th Cir. 2012). And, it may consider the
19 existence and content of documents referenced in the complaint
20 when authenticity is uncontested and the plaintiff necessarily
21 relied upon such documents in his complaint. See United States
22 v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003); Lee v. City of
23 L.A., 250 F.3d 668, 688 (9th Cir. 2001).

24 On appeal, the Debtor again fails to address **his** lack of
25 standing to pursue the claims in the adversary proceeding.
26 Instead, he argues the merits of the litigation. As a result,
27 he waived the ability to contest the bankruptcy court's
28 determination that he lacked standing. See Padgett v. Wright,

1 587 F.3d 983, 985 n.2 (9th Cir. 2009) (per curiam) (arguments
2 "not specifically and distinctly raised and argued in
3 appellant's opening brief" are deemed waived). As this was the
4 only issue legitimately before us on appeal, we must affirm.

5 But, based upon our review the record, we conclude that the
6 bankruptcy court did not err when it dismissed the FAC. The
7 record confirms that at the time of the loan, the creation and
8 assignment of the related trust deed, and the foreclosure under
9 that trust deed, the Debtor was not a borrower of loan proceeds,
10 a trustor of the trust deed, or an owner of the Property. Upon
11 purchase in 2006, Mrs. Pinkey-Hart took legal title to the
12 Property as her sole and separate property, and the Debtor
13 contemporaneously executed and recorded a quitclaim deed, in
14 which he disclaimed any interest in the Property. The Debtor,
15 thus, had no legal interest in the Property. See Cal. Evid.
16 Code § 662; see also Wolfe v. Jacobson (In re Jacobson),
17 676 F.3d 1193, 1201 (9th Cir. 2012).

18 To the extent that the Debtor had a possessory interest in
19 the Property,⁵ any such interest was insufficient to confer
20 standing in a dispute which challenged the loan, loan documents,
21 and foreclosure under the trust deed securing Mrs. Pinkey-Hart's
22 obligation to repay the loan. Standing exists only for those
23 parties who demonstrate that the conduct complained of caused an
24 "injury in fact" to them and that a favorable judgment would
25

26 ⁵ The record does not establish that the Debtor had such a
27 possessory interest at the time that this appeal was initiated
28 or continues to be in possession as of the date of this
Memorandum.

1 redress this injury. Lujan v. Defenders of Wildlife, 504 U.S.
2 555, 560-61 (1992). Here, the only rights and injuries at
3 issue, if any, in the adversary proceeding and on appeal
4 appropriately belonged to Mrs. Pinkey-Hart.

5 And finally, if the Debtor's ephemeral relation to the loan
6 and resultant foreclosure actually created legitimate claims,
7 those claims belonged to his chapter 7 estate, and only the
8 chapter 7 trustee was entitled to pursue them. While this
9 appeal was pending, the Debtor received his chapter 7 discharge;
10 but, the bankruptcy case remains open and the trustee has never
11 abandoned these unscheduled claims.

12 **CONCLUSION**

13 Based on the foregoing, we AFFIRM.