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NOT FOR PUBLICATION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

In re:)	BAP No.	CC-15-1273-TaKuF
)		
CHONGHEE JANE KIM,)	Bk. No.	2:13-bk-25661-BB
)		
Debtor.)	Adv. No.	2:14-ap-01456-BB
)		
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BENJAMIN HOOSHIM; ALEXANDRE)		
OH,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM*	
)		
EDWARD M. WOLKOWITZ, CHAPTER)		
7 TRUSTEE,)		
)		
Appellee.)		
)		
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Argued and Submitted on February 19, 2016
at Pasadena, California

Filed - May 2, 2016

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

Honorable Sheri Bluebond, Bankruptcy Judge, Presiding

Appearances: Andrew Edward Smyth argued for appellants;
Matthew Abbasi argued for appellee.

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

* 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).

1 **INTRODUCTION**

2 Benjamin Hooshim and Alexandre Oh appeal from the
3 bankruptcy court's entry of a default judgment against them and
4 in favor of the chapter 7¹ trustee. The default judgment
5 avoided their liens against real property pursuant to
6 § 544(b) (1) and California Civil Code § 3439.04 and provided for
7 the Trustee's recovery of the liens and the related notes under
8 §§ 550 and 551. The default judgment, however, also denied the
9 Trustee's request for a recovery of title to and possession of
10 the real property itself given that the Trustee previously sold
11 it subject to the liens. The Trustee did not cross-appeal from
12 this determination.

13 Once the bankruptcy court determined that the Trustee was
14 not entitled to recover the real property, the only other relief
15 the Trustee sought in his complaint - set aside of the liens -
16 could not benefit the estate. We, thus, hold that the Trustee
17 lacked standing to seek such relief. As a result, we VACATE the
18 default judgment and DISMISS this appeal.

19 **FACTS**

20 **Pre-petition Transfers and Litigation**

21 Chapter 7 debtor Chonghee Jane Kim owned real property
22 located in or around Los Angeles, California, including
23 investment property in Sylmar (the "Property").

24 In 2010, Finnegan & Diba, a law corporation, sued Kim in
25 state court and obtained a judgment against her in the principal
26

27 ¹ Unless otherwise indicated, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 amount of \$109,843.89. Unbeknownst to the law firm, during the
2 course of this litigation, Kim transferred all of her real
3 property to two wholly-owned limited liability companies for no
4 consideration. As relevant to this appeal, Kim transferred the
5 Property to E & E Global, LLC (the "LLC").

6 Kim later caused the LLC to encumber the Property with two
7 deeds of trust, each securing a promissory note payable to one
8 of the Appellants.² Appellants had previously loaned money to
9 Kim - not to the LLC - in the amounts set forth in the notes.
10 The LLC executed its notes and recorded the trust deeds several
11 months later, and the timing of execution and recordation was
12 far from random; they were executed and recorded just one week
13 before entry of the judgment against Kim in the state court
14 action. Appellants, however, did not participate in the LLC
15 transactions,³ and they learned about the notes and trust deeds
16 at a later, unknown point in time.

17 After its discovery of these transfers, Finnegan & Diba
18 commenced a second state court action against Kim. Among other
19 things, the complaint sought to set aside the transfers as
20 fraudulent. Within days, Kim caused the LLC to transfer the
21 Property back to her via quitclaim deed. She then filed a
22 chapter 7 petition; that case was dismissed almost a year later,
23

24 ² One note referenced a \$50,000 debt owed to Hooshim; the
25 other note referenced a \$100,000 debt owed to Oh.

26 ³ While Appellants may not have initially known about the
27 LLC's notes and trust deeds, they were close associates of Kim.
28 Hooshim was married to Kim's sister. Oh was a longtime friend
and client of Kim's bookkeeping and accounting services.

1 complaint asserted the following claims and sought the following
2 relief:

3 • First Claim for Relief (§ 544 / Cal. Civ. Code ("CC")
4 § 3439). Avoidance of title transfer and lien transfers and
5 recovery of the Property.

6 • Fourth Claim for Relief (Quiet Title). 100% title to
7 and possession of the Property free and clear of the liens.

8 • Prayer:

9 • Avoidance of transfer of title and liens under
10 §§ 544 and CC § 3439.

11 • A declaration that the Property was property of
12 the estate free and clear of liens.

13 • Vesting of legal title to the Property in the
14 estate.

15 • Recovery of the Property under § 550.

16 • The usual "other relief" catch all and costs.

17 Appellants did not initially defend the avoidance
18 proceeding, and, when they did enter the fray, they did not
19 timely comply with the bankruptcy court's directive to
20 participate in a mediation. As a result, the bankruptcy court
21 struck Appellants' answer to the complaint and entered defaults
22 against them.

23 In moving for default judgment, the Trustee argued that
24 judgment was warranted by the evidence that Kim transferred and
25 encumbered the Property with actual intent to hinder, delay, or

26 _____

27 ⁵(...continued)
28 bankruptcy court ultimately determined that these claims were
time-barred. No cross-appeal was taken from this determination.

1 defraud. Appellants opposed and focused on the effect of the
2 sale of the Property to Kim. They asserted that the Trustee
3 quitclaimed to Kim any and all interest the estate had in the
4 Property and, thus, that he lacked standing to pursue the
5 avoidance and recovery claims.

6 Following a hearing, the bankruptcy court entered an order
7 granting in part and denying in part the Trustee's motion for
8 default judgment. It determined that the Trustee had standing
9 to avoid Kim's fraudulent transfers of her interests in the
10 Property. And it concluded that the notes and trust deeds "were
11 created solely for the purpose of **intentionally** hindering,
12 defrauding and delaying Creditor, Finnegan & Diba . . . and for
13 no other purpose." Emphasis in original. The bankruptcy court,
14 thus, avoided the trust deeds as fraudulent transfers under
15 § 544 and CC § 3439.04 and provided that all rights, title, and
16 interests in the trust deeds were transferred to the Trustee and
17 preserved for the benefit of the estate pursuant to §§ 550 and
18 551. The bankruptcy court also ruled that as the "holder in due
19 course" of the notes and trust deeds, the Trustee was "entitled
20 to fully and completely enforce the terms of the assumed
21 encumbrances."

22 The bankruptcy court, however, denied the Trustee's
23 requests for recovery, title, and possession in relation to the
24 Property given the Trustee's prior sale of the Property.

25 Appellants timely appealed.

26 While this appeal was pending - at oral argument, in fact -
27 the Trustee informed the Panel that he had exercised the power
28 of sale under the trust deeds and foreclosed on the Property.

1 This information prompted the Panel to re-visit and grant
2 Appellants' motion for a temporary stay, which prevents the
3 Trustee's disbursement of any proceeds from the sale pending
4 final disposition of this appeal.

5 **ISSUE**

6 Whether the Trustee had standing to assert the avoidance
7 and recovery claims against Appellants.

8 **DISCUSSION⁶**

9 On appeal, Appellants continue to challenge the Trustee's
10 standing to assert the avoidance and recovery claims.⁷ They
11 also maintain that the claims either were sold to Kim by the
12 Trustee or extinguished by the quitclaim deed. We agree with
13 the bankruptcy court that the Trustee did not sell avoidance
14 claims to Kim and that the quitclaim deed did not extinguish the
15 claims; in the absence of a sale expressly so providing, only
16 the Trustee could assert the estate's fraudulent transfer
17 claims. But the sale did affect the estate's remedies on
18 account of such claims.

19 In short, after the sale of the Property subject to the
20

21 ⁶ Appellants request that the Panel take judicial notice
22 of an adversary complaint filed by Kim against the Trustee while
23 this appeal was pending; the complaint asserts claims for quiet
24 title and declaratory relief. We grant the request, solely for
25 the fact that it was filed and not for the truth of the matters
asserted in the complaint.

26 ⁷ Although Appellants do not frame their arguments as a
27 constitutional standing issue, we have an independent duty to
28 examine issues of jurisdiction and justiciability, even sua
sponte. See Am. Civ. Liberties Union of Nev. v. Lomax, 471 F.3d
1010, 1015 (9th Cir. 2006).

1 liens, the estate's injury was no longer redressable through a
2 lien avoidance action. If this was unclear when the Trustee
3 filed the adversary complaint which requested recovery of the
4 Property, it became clear when the bankruptcy court denied
5 recovery of title by the estate.

6 **Standing exists only when an injury can be redressed**
7 **through favorable judicial decision.** The judicial power of the
8 federal courts, including the bankruptcy courts, is both
9 supplied and limited by the Constitution of the United States.
10 One limitation is standing, which involves the question of
11 "whether the litigant is entitled to have the court decide the
12 merits of the dispute or of particular issues." Warth v.
13 Seldin, 422 U.S. 490, 498 (1975). Thus, "standing imports
14 justiciability: whether the plaintiff has made out a 'case or
15 controversy' between himself and the defendant within the
16 meaning of Art. III. This is the threshold question in every
17 federal case, determining the power of the court to entertain
18 the suit." Id. (citation omitted).

19 To establish standing, "[t]he plaintiff must have suffered
20 or be imminently threatened with a concrete and particularized
21 'injury in fact' that is fairly traceable to the challenged
22 action of the defendant and likely to be redressed by a
23 favorable judicial decision." Lexmark Int'l, Inc. v. Static
24 Control Components, Inc., 134 S. Ct. 1377, 1386 (2014) (citation
25 omitted). "[R]edressability analyzes the connection between the
26 alleged injury and requested judicial relief. [It] does not
27 require certainty, but only a substantial likelihood that the
28 injury will be redressed by a favorable judicial decision."

1 Nw. Requirements Utilities v. FERC, 798 F.3d 796, 806 (9th Cir.
2 2015) (internal quotation marks and citation omitted).

3 Here, there is no dispute that Kim transferred the Property
4 to the LLC. The resulting injury was remedied in part when,
5 pre-petition, Kim caused the LLC to reconvey the Property. But
6 while the Property was in the hands of the LLC, Kim caused the
7 LLC to grant liens on the Property in favor of Appellants. We
8 see no error in the bankruptcy court's determination that Kim
9 caused the LLC to encumber the Property with the actual intent
10 to hinder, delay, or defraud Finnegan & Diba.⁸ The reconveyance
11 of the Property did not extinguish the liens. Consequently, the
12 Trustee's sale of the Property did not entirely redress the
13 injury to the estate caused by Kim's pre-petition fraudulent
14 transfers. No doubt, the existence of Appellants' liens reduced
15 the sale price received for the Property. We, thus, agree that
16 the trust deed transfers were actually fraudulent and that there
17 was injury to the estate.

18 The Trustee had options for addressing this injury. He
19 could have moved to avoid the trust deeds prior to sale of the
20 Property. Or, he could have sold the Property, free and clear

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22 ⁸ We acknowledge that CC § 3439.05(a) applies only when
23 there is a transfer "by the debtor" and recognize that, here,
24 the LLC transferred the trust deeds. At oral argument before
25 the Panel, the Trustee responded to this concern by asserting
26 that there was substantial evidence in the record supporting
27 that the LLC was the alter ego of Kim; we cannot find any direct
28 discussion of this topic - nor is there an express finding by
the bankruptcy court in this regard. But the bankruptcy court's
implicit conclusion that the LLC's transfer of the trust deeds
was the equivalent of a transfer by Kim is not disputed by
Appellants and can be inferred on the record we do have.

1 of the trust deed liens. In such a case, he could then move to
2 avoid the liens on the sale proceeds. In both cases, he could
3 have achieved full value through sale. The Trustee, however,
4 chose neither of these options. Prior to the time he filed the
5 adversary complaint, he sold the Property subject to Appellants'
6 liens.

7 Once the Trustee sold the Property subject to Appellants'
8 liens, any injury to the estate was no longer redressable by
9 avoiding the trust deeds. Set aside of the trust deeds after
10 the sale benefitted only Kim. Despite this fact, the only
11 relief both requested by the Trustee in the adversary complaint
12 and before the Panel on appeal was lien set aside. Again, had
13 the Trustee possessed a meritorious claim to reacquire title to
14 the Property after the sale, then his request for lien set aside
15 was a remedy that addressed the continuing injury.
16 Unfortunately, he did not possess such a right to reacquire
17 title, and - even if he did - he did not preserve this claim on
18 appeal.

19 **The Trustee neither requested nor preserved a claim for a**
20 **money judgment under § 550.** We acknowledge that in a case
21 involving fraudulent conveyance of a trust deed, § 550 allows a
22 trustee to file a complaint seeking either set aside of the
23 liens or recovery of their value. The Trustee, however, never
24 sought recovery of the value of the liens through a money
25 judgment. At this post-judgment point in time, the historical
26 possibility of a claim for a money judgment (equal to the value
27 of the lien rights in the Property transferred) against
28 Appellants pursuant to § 550(a) does not cure the standing

1 problem. Again, the Trustee did not seek this relief, and the
2 time for doing so has passed. See 11 U.S.C. § 546(a).⁹

3 **Rights to enforce the notes do not follow from recovery of**
4 **the trust deeds or otherwise.** We also acknowledge the relief
5 accorded in connection with the notes but conclude that the
6 standing problem remains. The adversary complaint did not
7 assert that the LLC's execution of the notes was fraudulent.¹⁰

8
9 ⁹ We assume that the Trustee recognized the significant
10 hurdles to such a recovery. The Ninth Circuit has made
11 clear that in the context of a § 550 lien recovery award, a
12 money judgment is available only where the lien can be
13 appropriately valued. See USAA Fed. Sav. Bank v. Thacker
14 (In re Taylor), 599 F.3d 880, 892 (9th Cir. 2010). Nothing in
15 this record suggests an attempt by the Trustee to value
16 Appellants' liens. This makes sense, as the record is unclear
17 as to if and when the notes were ever delivered to Appellants
18 and there is no evidence that Appellants provided consideration
19 to the LLC. Valuation of a trust deed where there are serious
20 barriers to foreclosure could be difficult.

21 ¹⁰ We recognize that California law permits the avoidance,
22 not only of transfers made by a debtor, but also of "obligations
23 incurred by a debtor" if actual or constructive fraud exists.
24 Cal. Civ. Code §§ 3439.04(a), 3439.05(a). For example, if a
25 debtor executes a promissory note in favor of a friend
26 evidencing a fictitious debt, for the purpose of diverting some
27 of the debtor's assets to the friend rather than to legitimate
28 creditors, the obligation is avoidable. This provision does not
help the Trustee, however, for several reasons.

First, the record indicates that Kim owed legitimate debts
to Appellants. Therefore, signing the notes did not create a
fraudulent obligation that could be avoided.

Second, even if the notes were avoidable, the statute would
not authorize the Trustee to recover the notes and become the
holder of them. If a transfer is avoided, the statute permits
the trustee to recover either the property or its value. Id.
§ 3439.08(b)(1). By its terms, however, the statute does not
permit "recovery" of an avoidable obligation. There is a good
reason for this difference. Avoidance of a fraudulent

(continued...)

1 The bankruptcy court made no such finding. Indeed, the
2 bankruptcy court's determination that Appellants loaned money to
3 Kim in the amounts included in the LLC notes is inconsistent
4 with such a conclusion; the notes, even in an alter ego
5 situation, merely evidence a legitimate debt. On this record,
6 the relief as to the notes follows, if at all, only from the
7 recovery of the trust deeds. Thus, our conclusion that the
8 Trustee lacks standing to recover the trust deeds makes recovery
9 of the notes and the exercise of rights thereunder impossible.

10 Our conclusion in this regard is supported by other
11 considerations. First, to the extent the bankruptcy court
12 granted recovery as to the notes other than as following from
13 recovery of the trust deeds, it erred. The adversary complaint
14 did not seek this relief. Given that the Trustee recovered
15 judgment through a default prove-up, the bankruptcy court could
16 not grant relief beyond that pled in the complaint. See Fed. R.
17 Civ. P. 54(c) ("A default judgment must not differ in kind from,
18 or exceed in amount, what is demanded in the pleadings."),
19 incorporated into adversary proceedings by Fed. R. Bankr.
20 P. 7054; see also McDonald v. Checks-N-Advance, Inc.
21 (In re Ferrell), 539 F.3d 1186, 1192-93 (9th Cir. 2008); Sec. &
22 Exch. Comm'n v. Wencke, 577 F.2d 619, 623 (9th Cir. 1978).

23 Second, even if the trust deeds were recoverable, the
24 record does not support the bankruptcy court's determination

25 ¹⁰(...continued)
26 obligation - i.e., eliminating that obligation - restores the
27 creditors to the status quo that existed before the fraudulent
28 obligation was incurred. No further remedy is needed to provide
complete relief to the affected parties.

1 that the Trustee was the holder in due course of the notes and,
2 therefore, was entitled to exercise the power of sale under the
3 trust deeds.

4 In California, it is well-established that a deed of trust
5 follows the debt, whether evidenced by a promissory note or
6 otherwise; the converse is not true. See Willis v. Farley,
7 24 Cal. 490, 497-98 (1864) ("The doctrine that a mortgage is a
8 mere incident of the debt which it is executed to secure, and
9 follows the same in whosoever hands it may come by transfer or
10 assignment . . . may be regarded as the settled law of this
11 State."); see also W. Loan & Bldg. Co. v. Scheib, 218 Cal. 386,
12 393 (1933) ("A mortgage is merely security for a debt, and if
13 there is no debt there is no mortgage."). Only a party with
14 rights to enforce the note can properly authorize a foreclosure.
15 See Yvanova v. New Century Mortg. Corp., 62 Cal. 4th 919, 927
16 (2016).

17 No provision of the Bankruptcy Code converts a note payable
18 by third parties to a non-debtor (or to a debtor, for that
19 matter) into an obligation that can be enforced by a trustee
20 pursuant to a fraudulent conveyance action that attacks the
21 security for the note. Even where a trustee successfully avoids
22 a trust deed, there is no resultant right to collect debt owed
23 to the trust deed transferee by a third party or a debtor.

24 Further, the record does not establish that the Trustee was
25 the holder in due course of the notes. A holder can enforce a
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1 note.¹¹ Cal. Com. Code § 3301. One, however, must have more
2 than possession to be a holder; one also must be named as the
3 payee in the note or the note must be bearer paper. Cal. Com.
4 Code § 1201(a)(21)(A). Here, the record establishes that the
5 notes named Appellants as payees and there is no evidence that
6 the notes were endorsed in blank or to the Trustee.

7 Given our determination, the Trustee's foreclosure may be
8 problematic. As stated, the Panel ordered a stay pending final
9 disposition of this appeal. Once the mandate issues, the
10 bankruptcy court will need to address the repercussions of the
11 foreclosure sale.

12 **CONCLUSION**

13 Based on the foregoing, we VACATE the judgment and DISMISS
14 the appeal.

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26 ¹¹ There are two other mechanisms by which a non-holder may
27 enforce a note. See Cal. Com. Code § 3301. Here, the
28 bankruptcy court solely determined holder in due course status;
it did not discuss the other mechanisms nor does the record
suggest their applicability under these facts.