

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

| | | | |
|----|-------------------------------|---|---|
| 6 | In re: |) | BAP No. CC-09-1396-HPDu |
| 7 | FAWN RIDGE PARTNERS, LP, |) | Bk. No. 09-15088-TD |
| 8 | Debtor. |) | |
| 9 | _____ |) | |
| 10 | FAWN RIDGE PARTNERS, LP, |) | |
| 11 | Appellant, |) | |
| 12 | v. |) | M E M O R A N D U M ¹ |
| 13 | BAC HOME LOANS SERVICING, LP, |) | |
| 14 | Appellee. |) | |
| 15 | _____ |) | |

Submitted on March 18, 2010
at Pasadena, California

Filed - March 29, 2010

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding.

Before: HOLLOWELL, DUNN and PERRIS², Bankruptcy Judges

The debtor in this case challenged the right of BAC Home
Loans Servicing, LP (BAC) to seek relief from stay to foreclose

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.

² Hon. Elizabeth L. Perris, Chief Bankruptcy Judge for the
United States Bankruptcy Court for the District of Oregon,
sitting by designation.

1 on the debtor's real property secured by deeds of trust naming
2 Countrywide Home Loans, Inc. (Countrywide) as beneficiary. The
3 bankruptcy court determined that the debtor waived any challenge
4 to BAC's standing to seek relief from the automatic stay and,
5 because it found cause existed under § 362(d)(1) and (d)(2),
6 granted BAC relief from stay. The debtor appeals the bankruptcy
7 court's determination that BAC had standing to bring the stay
8 relief motion. We REVERSE because BAC did not establish its
9 standing to seek stay relief.

10 I. FACTS

11 Fawn Ridge Partners, LP (the Debtor) is in the business of
12 real estate investment and development. The Debtor filed a
13 chapter 11 bankruptcy petition on March 5, 2009, and continued
14 its business as the debtor in possession. According to the
15 Debtor's disclosure statement, the Debtor's general partner is
16 Fawn Ridge, LLC, and its sole limited partner is the Darling
17 Family Trust.³ The Debtor's principal is Richard L. Darling
18 (Darling), the managing member of Fawn Ridge, LLC and co-trustee
19 of the Darling Family Trust.

20 In June 2000, Darling and his wife acquired real property, a
21 single family residence in Thousand Oaks, California (the
22 Rainfield Property). The Darlings transferred the Rainfield
23 Property to the Darling Family Trust in 2007, and in February
24 2009, the Darling Family Trust conveyed the Rainfield Property to

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26 ³ The Debtor's Disclosure Statement and Chapter 11 Plan were
27 not included in the record on appeal. However, we may take
28 judicial notice of the underlying bankruptcy records. See
O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.),
887 F.2d 955, 957-58 (9th Cir. 1989).

1 the Debtor.⁴

2 The Debtor's bankruptcy schedules show the Rainfield
3 Property is fully encumbered. The Rainfield Property is valued
4 at \$1,550,000. Countrywide is listed on the Debtor's Schedule D
5 as a creditor holding an adjustable rate promissory note secured
6 by a deed of trust⁵ on the Rainfield Property in the amount of
7 \$1,760,000 (the Note and Deed of Trust), and as a creditor on a
8 home equity line of credit for \$220,000, secured by a second deed
9 of trust on the Rainfield Property.

10 On July 23, 2009, BAC filed a notice and motion for relief
11 from the automatic stay (the Stay Relief Motion) as to the
12 Rainfield Property under the Note and Deed of Trust.⁶ BAC
13 identified itself as "BAC Home Loans Servicing, L.P., fka
14 Countrywide Home Loans Servicing, L.P., fka Countrywide Home
15 Loans, Inc." Included in the Stay Relief Motion was a form
16 declaration⁷ by a bankruptcy specialist at BAC stating that she

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18 ⁴ The Debtor's Disclosure Statement states that the
19 conveyance occurred in February 2009; however, its Reply Brief on
20 appeal asserts the transfer was made in December 2009, under an
21 equity sharing agreement. BAC alleges that the transfer occurred
on the eve of bankruptcy, which it asserts was evidence of a bad
faith filing, if not a fraudulent transfer.

22 ⁵ Mortgage Electronic Registration Systems, Inc. ("MERS") is
23 named as Countrywide's nominee and beneficiary.

24 ⁶ Although BAC listed both the Note and Deed of Trust, as
25 well as the equity loan and second deed of trust, in its Stay
26 Relief Motion, only the Note and Deed of Trust were attached to
the Stay Relief Motion. The parties' discussion about
modification of the loan seems to reference only the Note.

27 ⁷ Under the Local Bankruptcy Rules for the Central District
28 of California, a movant must use local form 4001-1M.R.P. for its

(continued...)

1 was a custodian of BAC's records and files. A box on the
2 declaration form used in the Central District of California for
3 stay relief motions was marked indicating that BAC "holds a deed
4 of trust." The exhibits attached to the declaration to evidence
5 this contention were only the Note and Deed of Trust in the name
6 of Countrywide (the note for the equity loan and second deed of
7 trust were not included). No documentation regarding an
8 indorsement, assignment, transfer, sale of the Note and Deed of
9 Trust, or servicing agreement, was included with the Stay Relief
10 Motion.

11 In its Stay Relief Motion, BAC listed the Deed of Trust as
12 securing a claim in the amount of \$1,846,749.⁸ BAC alleged that
13 cause existed under § 362(d) to lift the stay because there was
14 no equity in the Rainfield Property and it was not necessary for
15 an effective reorganization. Furthermore, BAC alleged that the
16 Debtor filed its bankruptcy case in bad faith on the basis that
17 the Debtor was not the original obligor on the Note.

18 On August 5, 2009, the Debtor filed an Opposition to the
19 Stay Relief Motion. The Debtor argued the Rainfield Property was
20 necessary for an effective reorganization. It contended there
21 was no cause for stay relief because its proposal to modify the
22 loan securing the Rainfield Property to fair market value, along
23

24 ⁷(...continued)
25 relief from stay motion. Local Rule 1002-1(d)(9) ("Motions for
26 relief from stay shall be made using those forms designated for
27 mandatory use in the F 4001-1 series of the court-approved
forms.").

28 ⁸ This amount included \$47,666 in prepetition arrearages and
\$39,083 in postpetition arrearages.

1 with the payment of adequate protection payments to BAC, would
2 offer BAC better treatment than if BAC foreclosed its security
3 interest.

4 On August 18, 2009, the Debtor and BAC entered into a
5 Stipulation for Interim Adequate Protection (the Adequate
6 Protection Agreement) to allow the parties time to negotiate
7 modifications on the Note. The bankruptcy court entered an order
8 approving the Adequate Protection Agreement the same day. Under
9 the terms of that agreement, the parties agreed to continue the
10 hearing on the Stay Relief Motion, meanwhile the Debtor would
11 make adequate protection payments to BAC in the amount of \$5,500
12 per month for September, October, and November 2009.

13 The Debtor's loan modification proposal was to reduce the
14 amount of the Note by more than \$400,000 and to lower the
15 interest rate from 6.5% to 5%. BAC rejected the Debtor's
16 proposed loan modification on September 25, 2009, and later
17 objected to the same treatment as stated in the Debtor's
18 Disclosure Statement and chapter 11 Plan.⁹

19 On November 4, 2009, the Debtor filed a Supplemental
20 Opposition to the Stay Relief Motion. The Supplemental
21 Opposition challenged BAC's right to seek stay relief because
22 (1) BAC had failed to join the owner of the Note; and (2) BAC had
23 "failed to demonstrate that it [was] the holder of the [N]ote,
24 the owner of the [N]ote, or any party with standing to enforce
25 the [N]ote." The Debtor again argued that no cause existed for
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27 ⁹ BAC contends that the hearing on the Stay Relief Motion
28 was also a hearing on its objection to the Debtor's Disclosure
Statement. However, the order on appeal specifies that it only
determines the stay relief issues.

1 stay relief because the Rainfield Property was necessary to an
2 effective reorganization and loan modifications would benefit
3 BAC, providing it with "greater economic recovery than if BAC
4 foreclosed."

5 BAC responded on November 12, 2009, requesting that the
6 bankruptcy court take judicial notice that "Bank of America
7 Corporation purchased Countrywide Financial Corporation" in order
8 to find that BAC had standing to bring the Stay Relief Motion.
9 BAC also relied on correspondence by the Darlings to Bank of
10 America on October 30, 2009, as evidence of its standing,
11 contending that the correspondence constituted an admission by
12 the Debtor that BAC was entitled to enforce the Note.

13 Furthermore, BAC argued that the Darlings' transfer of the
14 Rainfield Property to the Debtor was a fraudulent transfer and
15 that the Debtor, through the transfer, was attempting in bad
16 faith to circumvent § 1123(b)(5), which disallows modification of
17 an obligation secured by an individual debtor's principal
18 residence. BAC produced no additional documentation to evidence
19 its interest in the Note and Deed of Trust.

20 On November 18, 2009, the bankruptcy court held a hearing on
21 the Stay Relief Motion. At the hearing, the bankruptcy court
22 addressed the Debtor's objection to BAC's standing by taking
23 judicial notice that:

24 Bank of America owns Countrywide and that all the
25 activity that I have seen with respect to Countrywide
26 since that time . . . has been absorbed by Bank of
27 America. Bank of America has chosen to operate under a
28 number of subsidiaries in a variety of ways but it's
one company . . . it's all Bank of America.

Hr'g Tr. 6:1-6.

1 On December 7, 2009, the bankruptcy court subsequently
2 entered a Supplemental Memorandum regarding BAC's Stay Relief
3 Motion. In its Supplemental Memorandum, the bankruptcy court
4 found that the Debtor's challenge to BAC's standing was not
5 "timely or valid" and was suggestive of bad faith. It entered an
6 order on December 7, 2009, granting BAC relief under § 362(d)(1)
7 and (d)(2). The Debtor timely appealed.¹⁰

8 **II. JURISDICTION**

9 The bankruptcy court had jurisdiction under 28 U.S.C.
10 § 157(b)(1) and (b)(2)(G). We have jurisdiction under 28 U.S.C.
11 § 158.

12 **III. ISSUE**

13 Did the bankruptcy court err in determining that BAC had
14 standing to seek relief from the automatic stay?

15 **IV. STANDARDS OF REVIEW**

16 A bankruptcy court's decision to grant relief from the
17 automatic stay is generally reviewed for an abuse of discretion.
18 Delaney-Morin v. Day (In re Delaney-Morin), 304 B.R. 365, 368
19 (9th Cir. BAP 2003). However, we review de novo whether a party
20 has a sufficient stake in a controversy to establish standing.
21 Pershing Park Villas Homeowners Assoc. v. Unified Pac. Ins. Co.,
22 219 F.3d 895, 900 (9th Cir. 2000). De novo review requires that
23 we consider a matter anew, as if no decision had been previously
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26 ¹⁰ The Debtor filed with the Bankruptcy Appellate Panel an
27 emergency motion for a stay pending appeal on December 17, 2009.
28 Consideration of the motion was deferred to this Panel because
the parties agreed that no foreclosure would take place prior to
April 8, 2009. This memorandum decision disposes of that motion.

1 rendered. United States v. Silverman, 861 F.2d 571, 576
2 (9th Cir. 1988).

3 V. DISCUSSION

4 Relief from stay hearings are limited in scope to
5 determining the adequacy of protection, equity, and the necessity
6 of property to an effective reorganization. 11 U.S.C. § 362(d).
7 The validity of the underlying claim is not litigated.

8 In re Emrich, 2009 WL 3816174 *1 (Bankr. N.D. Cal. 2009)

9 (citations omitted). As limited as the issues are in a stay
10 relief proceeding, the party seeking stay relief must establish
11 standing and be a party in interest. 11 U.S.C. § 362(d);

12 In re Wilhelm, 407 B.R. 392, 398 (Bankr. D. Idaho 2009). The
13 Debtor argues BAC had no standing to seek relief from the
14 automatic stay because BAC produced no evidence establishing it
15 held any interest in the Note and Deed of Trust securing the
16 Rainfield Property, and had no entitlement to enforce the
17 obligation.

18 A. Standing

19 The issue of standing involves both "constitutional
20 limitations on federal court jurisdiction and prudential
21 limitations on its exercise." Warth v. Seldin, 422 U.S. 490, 498
22 (1975). Constitutional standing concerns whether the plaintiff's
23 personal stake in the lawsuit is sufficient to have a "case or
24 controversy" to which the federal judicial power may extend under
25 the Constitution's Article III. Id. at 498-99; Pershing Park
26 Villas, 219 F.3d at 899; Lujan v. Defenders of Wildlife, 504 U.S.
27 555, 559-60 (1992).

1 Additionally, the prudential doctrine of standing “is
2 comprised of both judicially-created limitations, such as the
3 prohibition on third-party standing . . . and statutorily-imposed
4 limitations, such as the [Fed. Rule Civ. P.] Rule 17(a)
5 requirement” that suits be maintained by the real party in
6 interest. Gilmartin v. City of Tucson, 2006 WL 5917165 *4
7 (D. Ariz. 2006), citing Lee v. Deloitte & Touche LLP,
8 428 F.Supp.2d 825, 831 (N.D. Ill. 2006).

9 **B. Constitutional Standing**

10 The “irreducible constitutional minimum of standing”
11 requires a showing that the plaintiff has suffered an actual,
12 concrete and particularized injury in fact, caused by the
13 defendant’s conduct, which a favorable judgment will likely
14 redress. Lujan v. Defenders of Wildlife, 504 U.S. at 560.

15 BAC argues that its standing was confirmed by the terms of
16 the order approving the Adequate Protection Agreement, and is now
17 the law of the case.¹¹ Under the law of the case doctrine, an
18 issue of law once decided should govern the same issues in
19 subsequent stages of the same litigation. Christianson v. Colt
20 Indus. Operating Corp., 486 U.S. 800, 815-16 (1988);
21 In re Ellett, 300 B.R. 768, 772 (Bankr. E.D. Cal. 2003). The

23 ¹¹ See, e.g., Reusser v. Wachovia Bank, N.A., 525 F.3d 855,
24 861 (9th Cir. 2008). In that case, Wachovia was the holder of a
25 deed of trust on the debtor’s property. Its loan servicer,
26 Washington Mutual, sought relief from stay to foreclose on the
27 property. The order granted relief as to enforcement of the deed
28 of trust and to the property. Finding that the order was a final
order binding as to the res or property, the Ninth Circuit held
that the debtor could not later collaterally attack the
bankruptcy court’s jurisdiction on the basis that Washington
Mutual lacked standing to seek relief from the automatic stay.

1 doctrine does not apply here. First, the bankruptcy court did
2 not, through the order approving the Adequate Protection
3 Agreement, finally decide an issue of law with respect to BAC's
4 standing. See Quern v. Jordan, 440 U.S. 332, 347 n.18 (1979)
5 ("The doctrine of law of the case comes into play only with
6 respect to issues previously determined.").

7 More importantly, the order approving the Adequate
8 Protection Agreement was entered after the Stay Relief Motion was
9 filed. Constitutional standing is a "threshold jurisdictional
10 requirement, and cannot be waived." Pershing Park Villas,
11 219 F.3d at 899-900; Warth v. Seldin, 422 U.S. at 498-99;
12 In re Jacobson, 402 B.R. 359, 366-67 (Bankr. W.D. Wash. 2009).
13 Thus, BAC cannot rely on the order approving the Adequate
14 Protection Agreement to provide it with standing.

15 BAC contends it has standing because it submitted a
16 declaration with its Stay Relief Motion indicating that BAC
17 "holds a deed of trust" securing the Rainfield Property.
18 However, BAC is not the payee on the Note securing the Deed of
19 Trust nor a beneficiary under the Deed of Trust.

20 Mere possession of the Note does not make BAC a "holder" of
21 the Note. Under California law,¹² to qualify as a holder, one
22 must be in possession of the instrument, and the instrument must
23 be properly endorsed. Cal. Comm. Code ("CComC") § 1201(21);
24 In re Hwang, 396 B.R. at 762. Although the payee of an
25 instrument may negotiate it, the payee must indorse it as well as

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27 ¹² In the absence of bankruptcy law providing for the
28 enforcement of a promissory note, state law governs. See
In re Hwang, 396 B.R. 757, 762 (Bankr. C.D. Cal. 2008).

1 deliver it to another person, who then can become its holder.
2 CComC § 3201, 1201(21)(A). There is no evidence in the record
3 that Countrywide indorsed the Note and transferred it to BAC (or
4 to Bank of America). Thus, mere possession of the Note and Deed
5 of Trust does not provide BAC with standing.

6 Furthermore, while BAC's title indicates it is a loan
7 servicer, this by itself is insufficient to establish BAC's
8 standing. A loan servicer may have constitutional standing
9 because it has a right to payment pursuant to its duties as a
10 servicer on a loan. See, e.g., In re Conde-Dedonato,
11 391 B.R. 247, 250 (Bankr. E.D.N.Y. 2008) (collecting cases). The
12 loan servicer's interest in the note is "by virtue of its
13 servicing activities for which it receives compensation."
14 In re Viencek, 273 B.R. 354, 357-58 (Bankr. N.D.N.Y. 2002).
15 Thus, a loan servicer may be injured by a debtor when it loses
16 its servicing fees as a result of the debtor's nonpayment on the
17 loan. But, in this case, BAC did not provide evidence, such as
18 an affidavit or other documentation, establishing the terms of
19 its agreement to service the loan for Countrywide or Bank of
20 America.

21 Thus, BAC failed to present the evidence necessary to
22 demonstrate that it was either the holder of the Note, the
23 transferee or assignee of the Note, or the servicer of the Note.
24 The bankruptcy court's taking of judicial notice that Bank of
25 America Corporation purchased Countrywide Financial Corporation
26 does not cure BAC's standing issues because BAC offered no
27 evidence to establish the nature of its relationship to Bank of
28 America or Countrywide. Therefore, BAC did not demonstrate that

1 it had been injured by the Debtor's default on the loan. As a
2 result, it did not have constitutional standing to file the Stay
3 Relief Motion.

4 **C. Prudential Standing**

5 Prudential standing requires the plaintiff to assert its own
6 claims rather than the claims of another. *Dunmore v. United*
7 *States*, 358 F.3d 1107, 1112 (9th Cir. 2004); *In re Hwang*,
8 396 B.R. at 766. Unlike constitutional standing, prudential
9 standing does not derive from the Constitution and may be waived
10 by a defendant if not properly or timely raised. *Pershing Park*
11 *Villas*, 219 F.3d at 899; *Lee v. Deloitte & Touche LLP*,
12 428 F.Supp.2d at 831 (Rule 17 objection waived when not raised
13 timely).

14 The bankruptcy court determined that the Debtor's challenge
15 to BAC as the real party in interest was waived. However, we
16 need not reach the prudential standing issues raised by the
17 Debtor in this appeal since BAC failed to demonstrate it had
18 constitutional standing to seek relief from the automatic stay.

19 **VI. CONCLUSION**

20 For the foregoing reasons, we REVERSE the bankruptcy court's
21 order granting stay relief to BAC. BAC is free to file a new
22 motion for relief from stay if it can properly demonstrate its
23 standing.¹³

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27 ¹³ On March 8, 2010, the Debtor filed a motion requesting
28 this Panel to take judicial notice of corporate documentation
regarding Countrywide and Bank of America. The Panel issued an
order on March 11, 2010, deferring ruling on the motion until
after oral argument. We decline to take judicial notice of the
Debtor's documentation and deny the motion.