FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
May 12, 2011
Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE MARK STANLEY MILLER, also known as A Moment To Remember Photo & Video, also known as Illusion Studioz, and JAMILEH MILLER, Debtors.	BAP No. CO-10-073
MARK STANLEY MILLER and JAMILEH MILLER, Appellants, v. DEUTSCHE BANK NATIONAL TRUST COMPANY, Appellee.	Bankr. No. 10-25453 Chapter 13 OPINION*

Appeal from the United States Bankruptcy Court
for the District of Colorado

Before CORNISH, Chief Judge, NUGENT, and SOMERS, Bankruptcy Judges.

NUGENT, Bankruptcy Judge.

Mark S. Miller and Jamileh Miller (the "Debtors") appeal an order of the United States Bankruptcy Court for the District of Colorado granting Deutsche Bank National Trust Company's ("Deutsche Bank's") motion for relief from stay

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

to foreclose its deed of trust on their home. We AFFIRM.[1]

I. Jurisdiction and Standard of Review

Because an order granting relief from stay is a final order for purposes of appeal, the Debtors' appeal is timely, and neither party elected to have the appeal heard by the United States District Court for the District of Colorado, we have appellate jurisdiction.[2]

We review a bankruptcy court's decision whether to grant relief from stay for abuse of discretion.[3] "Under the abuse of discretion standard: 'a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'"[4] An abuse of discretion occurs when a ruling is premised on an erroneous conclusion of law or on clearly erroneous fact findings.[5]

II. Background

On April 20, 2006, the Debtors executed and delivered a promissory note to IndyMac Bank, F.S.B. in the amount of $216,236.00 (the "Note"). The Note was

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[1] The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

[2] 28 U.S.C. §§ 158(a)(1) & (c)(1); Fed. R. Bankr. P. 8001(a) & 8002(a); 10th Cir. BAP L.R. 8001-3; *Eddleman v. U.S. Dep't of Labor*, 923 F.2d 782, 784-85 (10th Cir. 1991) (citing numerous cases for the rule that orders granting or denying motions for relief from the automatic stay are final for purposes of appeal), *overruled in part on other grounds, Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson*, 968 F.2d 1003 (10th Cir. 1992).

[3] *Franklin Savs. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1023 (10th Cir. 1994).

[4] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553–54 (10th Cir. 1991)).

[5] *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1165 (10th Cir. 1998).

secured by a Deed of Trust covering the Debtors' principal residence located in Centennial, Colorado (the "Property"). Paragraph 20 of the Deed of Trust provides that the Note may be sold one or more times without notice to the borrowers.[6] In addition, the Note provided that IndyMac may transfer it.[7]

After the Debtors executed the instruments, they were assigned to Deutsche Bank.[8] As part of its offer of proof, Deutsche Bank offered a copy of the Note that was described by counsel as bearing an executed endorsement by IndyMac in blank. Unfortunately, the endorsed note is not part of the record on appeal.[9] After the Debtors defaulted on their payment obligations, Deutsche Bank filed a foreclosure action on February 18, 2010 in Colorado state court, seeking an order authorizing sale pursuant to Colorado Rule of Civil Procedure 120 and Colorado Revised Statute § 38-38-105 (the "State Court Action").[10] The Debtors objected to the entry of the Rule 120 order and sought dismissal of Deutsche Bank's foreclosure action, arguing that Deutsche Bank had failed to allege how it became the holder of the Note and the Deed of Trust and therefore lacked standing to pursue the action. The Debtors also filed a motion challenging the state court's jurisdiction based upon Deutsche Bank's supposed lack of standing to bring the action. The state court conducted a Rule 120 hearing on May 6, 2010 and issued an order of sale of the Property. The state court also denied the Debtors' motion

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6 *Deed of Trust* at 11, *in* Appellants' Appendix of Exhibits ("App.") at 25.

7 *Note* at 1, ¶ 1, *in* App. at 8.

8 The details surrounding the assignment to Deutsche Bank are not part of the record on appeal.

9 The endorsed Note appears to have been admitted into evidence (*see Nov. 3, 2010, Hearing Transcript* ("*Tr.*") at 3, *ll.* 3-4, *in* App. at 98); the Debtors bear the burden of supplying this Panel with a copy of exhibits that are relevant to their appeal.

10 A summary of Colorado real estate foreclosure procedure follows in the analysis section.

to dismiss the foreclosure action for lack of standing. The Debtors filed a second motion challenging jurisdiction, but that motion was denied on June 13, 2010 by another state court judge.[11]

The Debtors filed their Chapter 13 petition on June 22, 2010. The Debtors listed the current market value of their residence at $195,000 on their Schedules A and D.[12] On July 29, 2010, Deutsche Bank filed a proof of claim, asserting a secured claim in the amount of $238,676.53.[13] On August 23, 2010, the Debtors objected to Deutsche Bank's proof of claim and filed a motion to disallow it.[14] No copies of the proof of claim or of the Debtors' objections to it were included in the record on appeal.

On October 7, 2010, Deutsche Bank filed its motion for relief from the stay.[15] On October 18, 2010, the Debtors filed an adversary proceeding against Deutsche Bank alleging a variety of claims, including one for fraudulent foreclosure. The Debtors claimed that Deutsche Bank masqueraded as the "Holder in Due Course" of the Note and filed a fraudulent foreclosure against

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[11] None of the state court pleadings or orders were provided to this Court. They were, however, provided to the bankruptcy court. *See Tr.* at 15-16, *ll.* 14-25, 1-8, *in* App. at 110-111 ("[B]efore the Court [are] . . . .[s]everal pleadings certified from an action in Arapahoe County relating to the foreclosure . . . .There's an order authorizing sale, which is Exhibit G-1, issued by Charles Pratt, the district court judge in Arapahoe County, granting the Rule 120 request. There are pleadings for a second motion on the hearing of jurisdiction . . . .That motion for a hearing on jurisdiction was [] denied [by Judge Christopher Cross, a different district court judge in Arapahoe County]. So, we have two district court judges in Arapahoe County already making a determination on the standing issue.").

[12] *Schedule A, in* App. at 46, *Schedule D, in* App. at 47.

[13] Response Br. of Appellee Deutsche Bank at 7.

[14] *Bankruptcy Docket No. 30, in* App. at 3.

[15] *Motion for Relief From Automatic Stay, in* App. at 54-58.

their residence.[16] The Debtors requested over $10,000,000.00 in damages and a declaration that Deutsche Bank's lien was fraudulent and unenforceable and that Deutsche Bank had no right to assert any claims or legal action in their bankruptcy case.

On October 26, 2010, the Debtors objected to Deutsche Bank's motion for relief from stay and incorporated a motion to disqualify Deutsche Bank's attorneys (the "Law Firm").[17] They again attacked Deutsche Bank's standing and urged the bankruptcy court to deny Deutsche Bank relief from stay and "allow the matter to proceed within the Adversary Proceeding."[18] They also claimed that because Deutsche Bank's counsel of record would be a witness in the adversary, she should be disqualified for conflict of interest.

On November 3, 2010, the bankruptcy court heard Deutsche Bank's stay relief motion and, at the end of the hearing, ruled from the bench that sufficient grounds existed under 11 U.S.C. §§ 362(d)(1) and (d)(2)[19] to grant Deutsche Bank relief from stay.[20] That same day, the bankruptcy court entered a written order granting Deutsche Bank's motion for relief from stay (the "Appealed Order").[21] This appeal followed.

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[16] The Debtors' *Original Complaint for Recovery of Money & Property, Fraud, Fraudulent Transfer, & Unlawful Foreclosure* ("*Adversary Complaint*"), *in* App. at 61-75.

[17] The Debtors' *Objections and Response to Relief from Automatic Stay & Motion to Disqualify Attorney Susan Hendricks & The Lawfirm (sic) of Aronowitz & Mecklenburg, LLP* ("The Debtors' *Response to RFS Motion*"), in App. at 76-85.

[18] *Id.* at 4, *in* App at 79.

[19] All future references to "Section" or "§" refer to the Bankruptcy Code, Title 11 of the United States Code, unless otherwise noted.

[20] *Tr.*, *in* App. at 96-114.

[21] The Appealed Order was a proposed order submitted by Deutsche Bank which the bankruptcy court approved with some minor revisions.

III. Discussion

The Debtors argue seven specifications of error. Each of them alleges a different basis for us to conclude that granting the stay relief motion was an abuse of discretion. The specifications may be boiled down to three issues on appeal: whether the bankruptcy judge made the appropriate findings and conclusions required by Federal Rule Bankruptcy Procedure 7052; whether there was sufficient evidence to support Deutsche Bank's standing; and whether Deutsche Bank's counsel should have been disqualified.

A. Federal Rule of Civil Procedure 52

The Debtors argue that the Appealed Order should be vacated because it lacks sufficient findings of fact and conclusions of law in violation of Federal Rule of Civil Procedure 52 which is made applicable to bankruptcy by Federal Rule of Bankruptcy Procedure 7052.[22] Because this is a contested matter under Bankruptcy Rule 9014, this rule applies. While the Debtors are correct that Rule 52(a) requires that a court make findings of fact and conclusions of law in matters tried without a jury, the rule also provides that "the findings and conclusions of law may be stated on the record after the close of the evidence."[23] After the introduction of Deutsche Bank's exhibits and oral argument, the bankruptcy judge ruled from the bench and made detailed findings of fact and conclusions of law. The transcript of the bankruptcy court's findings and conclusions is approximately five pages long. The bankruptcy court explained the nature and scope of a relief from stay hearing, discussed the evidence presented, made

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[22] All future references to "Rule" shall refer to the Federal Rules of Civil Procedure, unless otherwise noted.

[23] Fed. R. Civ. P. 52(a); *Hawkins v. Ohio Bell Tel. Co.*, 93 F.R.D. 547, 553 (S.D. Ohio 1982), *aff'd*, 785 F.2d 308 (6th Cir. 1986) (Oral transcripts of a decision rendered from the bench satisfy requirement that a court find the facts specially and state separately its conclusions of law thereon if the transcript conveys the facts and conclusions of law on which the decision was reached).

specific fact findings, and concluded that sufficient grounds existed under § 362(d)(1) to grant relief from stay. The bankruptcy court satisfied the requirements of Rule 52(a).

B. Scope of Relief From Stay Hearing

Section 362(d) provides that "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay– (1) for cause, including the lack of adequate protection of an interest in property of such party in interest." Section 362(d)(2) provides an alternative remedy for secured creditors. Relief shall be granted under this subsection if the debtor lacks equity in the property in issue and the property is not necessary for an effective reorganization. Section 362(g) places the burden of proof on the issue of equity on the movant while the debtor bears the burden on all other issues. Section 362(e) provides that a bankruptcy court must hold a preliminary hearing on a motion to lift the stay within thirty days from the date the motion is filed, or the stay will be considered lifted. A final hearing must be commenced within thirty days after the preliminary hearing.[24]

> Because the statute requires bankruptcy courts to rule quickly on stay motions, a relief from stay proceeding is by its nature a cursory or summary proceeding. It does not replace the need for filing an adversary proceeding in order to obtain a final determination as to the validity, extent or priority of a creditor's lien... At a stay hearing, the court merely determines whether the movant has a colorable claim, *i.e.*, a facially valid security interest.[25]

Colorado Foreclosure Process

Before addressing whether the bankruptcy court abused its discretion in granting Deutsche Bank's motion, we consider and briefly summarize the Colorado foreclosure process. In Colorado, real estate borrowers grant their

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[24] 11 U.S.C. § 362(e)(1).

[25] *In re Utah Aircraft Alliance*, 342 B.R. 327, 332 (10th Cir. 2006).

lenders deeds of trust to secure repayment of their mortgage notes. A deed of trust serves the same purpose as a traditional mortgage, but operates in a different fashion. Instead of granting the lender a lien in the real property, the borrower conveys the real property to a public trustee for the benefit of the lender and grants the trustee the power to sell the property if the borrower defaults on any of its obligations to the lender. The deed of trust the Debtors signed requires that the lender provide the borrower not less than 30 days' notice to cure. If the borrower fails to achieve a timely cure, the lender may accelerate and collect the note or realize upon its security by invoking the power of sale. Doing so requires the lender to give written notice to the trustee and provide the borrower a copy of same. Thereafter, the trustee records the notice of default and publishes a notice of sale. The property is then sold at public auction.[26]

Colorado law provides for some judicial oversight of this process by requiring that the state courts review the lender's request for an order of sale and to confirm the sale.[27] When a borrower defaults, the lender must seek a "Rule 120 Order" from the state court. The lender files a verified motion under Colorado Rule of Civil Procedure 120 for authority to invoke the sale power. The rule requires that the borrower and other interested persons be given notice and an opportunity to object to the sale and a hearing must be set "not less than 20 nor more than 30 days after the filing of the motion."[28] The borrowers and "[a]ny interested person who disputes, on grounds within the scope of the hearing provided for in section (d), the moving party's entitlement to an order authorizing

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[26] *See generally Deed of Trust* at 12, ¶¶ 22-23, *in* App. at 26.

[27] *Beeler Props., LLC v. Lowe Enters. Residential Investors, LLC*, No. 07-cv-00149, 2007 WL 1346591, at *3 (D. Colo. May 7, 2007).

[28] *See* Colo. R. Civ. P. 120(a) (2010).

sale may file and serve a response to the motion."[29] Subsection (d) provides, inter alia, as follows:

> The scope of inquiry at such hearing shall not extend beyond the existence of a default or other circumstances authorizing, under the terms of the instrument described in the motion, exercise of a power of sale contained therein, and such other issues required by the Service Member Civil Relief Act (SCRA), 50 U.S.C. § 520, as amended. The court shall determine whether there is a reasonable probability that such default or other circumstance has occurred, and whether an order authorizing sale is otherwise proper under said Service Member Civil Relief Act, and shall summarily grant or deny the motion in accordance with such determination.[30]

Thus, at the hearing, the state court determines whether a default has occurred and whether the power of sale may be invoked. After hearing, the court must "summarily" either grant or deny the motion. If the court determines that a default has occurred, an order of sale is issued to the trustee who then posts the property for sale.[31] Courts have described this latter step of conducting the sale as largely administrative.[32]

Responding to the Debtors' standing arguments, the bankruptcy court concluded that it was bound by the previous rulings by two state courts that Deutsche Bank was entitled to seek and obtain an order of sale. The Debtors

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[29] Colo. R. Civ. P. 120(c) (2010).

[30] Colo. R. Civ. P. 120(d) (2010).

[31] Once a sale is authorized, the public trustee advertises and conducts the sale. The property is sold to the highest bidder who receives a Certificate of Purchase. Often, the purchaser is the holder of the deed of trust who bids all or part of the debt owed by the borrower. Prior to sale, the borrower may cure the default. After sale, the borrower and any junior lienholders may redeem the title to the property by paying, to the holder of the Certificate of Purchase, the sum for which the property was sold with interest from the date of sale, together with any taxes paid or other proper charges. Redemption thus annuls the sale. If the redemption period passes, the holder of the Certificate of Purchase may seek an order confirming the sale and obtain a Trustee's Deed. *See* Colo. Rev. Stat. § 38-38-101 *et seq.*

[32] *Beeler*, 2010 WL 1346591, at *2 (the process of conducting the sale and parties' rights in such process are largely administrative); *Indymac Venture LLC v. Levinger*, No. 10-cv-02056, 2010 WL 3431646 (D. Colo. Aug. 30, 2010).

object to the bankruptcy court's deferring to the state courts' several determinations that Deutsche Bank had standing to seek an order of sale.

Deutsche Bank's Standing and the Rooker-Feldman Doctrine[33]

Much of the Debtors' brief (as well as their presentation to the bankruptcy court) is devoted to attacking the state court's conclusion that Deutsche Bank was an "interested person" and had standing to pursue a foreclosure action against their home.[34] The Debtors have raised the issue of Deutsche Bank's standing to the bankruptcy court four times: first, in their motion to strike Deutsche Bank's objection to the Debtors' Chapter 13 Plan;[35] second, in seeking to disallow Deutsche Bank's proof of claim;[36] third, in objecting to Deutsche Bank's stay relief motion;[37] and, finally, in their adversary complaint against Deutsche Bank for "fraudulent foreclosure."[38]

The Debtors complain that there was no competent evidence admitted to suggest that Deutsche Bank was a real party in interest. They argue that the bankruptcy court should have required Deutsche Bank to present the original Note and Deed of Trust to prove that it holds the original Note. They question whether the bankruptcy court abused its discretion in accepting Deutsche Bank's proffer

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[33] The *Rooker-Feldman* doctrine is drawn from the decisions in *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Whether the *Rooker–Feldman* doctrine applies is a legal question that we review *de novo*. *Abboud v. Abboud (In re Abboud)*, 237 B.R. 777, 779 (10th Cir. BAP 1999).

[34] The Debtors identified seven point of errors on appeal. Points 1, 4, 5, and 7 all involve standing.

[35] The Debtors' *Motion to Strike Objection to Chapter 13 Plan Pursuant to Rule 12(f), in* App. at 49-51.

[36] *Bankruptcy Docket No. 30, in* App. at 3.

[37] The Debtors' *Response to RFS Motion, in* App. at 76-85.

[38] *Adversary Complaint, in* App. at 61-73.

that the original Note was "on the way to [counsel's] office."[39]

Deutsche Bank counters that the bankruptcy court properly refused to hear the issue of standing and followed the well-established *Rooker-Feldman* doctrine, which provides that state court losers may not use federal courts to appeal state court decisions.[40] We note that the bankruptcy judge did not specifically allude to *Rooker-Feldman* in his oral ruling, but he did specifically refer to the two prior state court orders which held that Deutsche Bank was entitled to Rule 120 relief and recognized those rulings. The Debtors argue that because they never initiated an action in state court, they cannot be classified as "state court losers." Relying on an out-of-context quotation from the United States District Court's remand order on their attempted removal of Deutsche Bank's foreclosure action to federal district court, they argue that a Colorado Rule 120 foreclosure hearing is merely an administrative procedure, the outcome of which is not an actual judgment.

These arguments misconstrue the *Rooker-Feldman* doctrine. It precludes "a party losing in state court . . . from seeking what in substance would be appellate review of [a] state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights."[41] The doctrine "prohibits a lower federal court from considering [both] claims actually decided by a state court and claims 'inextricably intertwined' with a prior state-court judgment."[42] The Debtors participated in the Rule 120 proceeding and claimed that Deutsche Bank lacked standing. The state court twice rejected that

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[39] Appellants' Br. at 10.

[40] Response Br. of Appellee Deutsche Bank at 8-9.

[41] *Johnson v. De Grandy*, 512 U.S. 997, 1005–06 (1994).

[42] *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 473 (10th Cir. 2002), *overruled in part on other grounds by Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), *as recognized in Erlandson v. Northglenn Mun. Court*, 528 F.3d 785, 790 (10th Cir. 2008) (citation omitted).

claim and granted the relief that Deutsche Bank requested. The Debtors lost in state court.

Some courts have questioned whether a Rule 120 order is a state court judgment that is entitled deference by federal courts.[43] In *District of Columbia Court of Appeals v. Feldman*, the United States Supreme Court decided what authority federal courts have to review state court decisions in bar admission matters. Its answer depended on whether the proceedings before the state court were judicial in nature.[44] "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist."[45] The nature of a proceeding depends not upon the character of the adjudicative body but upon the character of the proceedings. Inferior federal courts have no authority to review final judgments of a state court in judicial proceedings.[46] That power is reserved to the United States Supreme Court alone. In a Rule 120 hearing, the state court is charged with determining whether the borrower defaulted on the obligation secured by the deed of trust and whether the note holder may invoke its contractual remedy. Thus, a state court conducting that proceeding "investigates, declares and enforces liabilities" on present facts.

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[43] There is some question as to whether a state court determination at a Rule 120 hearing has preclusive effect. *See Goldenhersh v. Aurora Loan Servs.*, LLC, 10-cv-01936, 2010 WL 3245166, at *2 (D. Colo. Aug. 16, 2010) (noting the absence of clear precedent regarding whether a state court determination at a rule 120 hearing has preclusive effect, and comparing *Rousseau v. Bank of New York*, No. 08-cv-00205, 2009 WL 3162153 (D. Colo. Sept.29, 2009) (federal suit challenging Rule 120 determination by state court not subject to doctrines of abstention or preclusion, as Rule 120 hearing does not result in a judgment that can be given preclusive effect) with *Beeler Props., LLC v. Lowe Enters. Residential Investors, LLC*, No. 07-cv-00149, 2007 WL 1346591 (D. Colo. May 7, 2007) (federal suit challenging Rule 120 determinations by state court subject to abstention under either *Rooker-Feldman* or *Younger* principles)).

[44] 460 U.S. 462, 476 (1983).

[45] *Id.* (quoting *Prentis v. Atl. Coast Line*, 211 U.S. 210, 226 (1908)).

[46] *Id.* at 482.

Doing so implicates a substantive inquiry as opposed to a perfunctory or ministerial function. We therefore conclude a state court determination at a Rule 120 hearing is a judgment subject to the *Rooker-Feldman* doctrine.[47]

Whether Deutsche Bank was the proper party in interest to bring the foreclosure action was the question twice asked and answered by the state court. A ruling on the merits of the Debtors' objections on standing by the bankruptcy court would have amounted to impermissible appellate review of the state court's decision. Because inferior federal courts lack the power to review valid state court judgments, the bankruptcy court properly declined to revisit the state court's decision that Deutsche Bank was an "interested person" entitled to a Rule 120 order of sale.[48]

Cause for Stay Relief and Lack of Equity

The Debtors nowhere deny that they are in significant payment default on the Note. The state court concluded as much when it entered the Rule 120 Order. That default would be sufficient to support a bankruptcy court's conclusion that Deutsche Bank lacked adequate protection and that cause existed to grant stay relief under § 362(d)(1). The Debtors seek relief under Chapter 13 and purport to intend to retain their home. They lack the right to modify the rights of the

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[47] *Abboud v. Abboud (In re Abboud)*, 237 B.R. 777 (10th Cir. BAP 1999) (bankruptcy court did not err in concluding that the *Rooker-Feldman* doctrine was applicable and precluded it from appellate review of the state court's decision in foreclosure action); *In re Lewis*, 342 B.R. 384, 2006 WL 1308352, at *13 (10th Cir. BAP May 4, 2006), *aff'd*, 247 F. App'x 998 (10th Cir. 2007) (*Rooker-Feldman* doctrine is applicable to the issue of whether bank was the proper party in interest to bring the foreclosure action.).

[48] Res judicata and the *Younger* doctrine may also apply to allow the bankruptcy court to defer to the State Court's standing decision. *See Younger v. Harris*, 401 U.S. 37 (1971) (federal court must abstain if there is an ongoing state proceeding, the state court provides an adequate forum for determining the claims asserted in the federal action, and the state proceedings involve important state interests which traditionally look to state law for their resolution or implicate separately articulated state policies). Because the *Rooker-Feldman* doctrine applies, we need not determine whether res judicata or the *Younger* doctrine of abstention applies.

lienholder in their principal residence.[49]

The bankruptcy court's finding that the Debtors lack equity in their home is also entirely supportable. In their schedules, the Debtors valued the Property at $195,000. There is an outstanding indebtedness of approximately $290,000 against it. The bankruptcy court concluded that the Debtors had no equity in the Property. The Debtors claim they had at least $100,000 of equity considering "three (3) years of payments made, capital improvements, and other factors[.]"[50] That the Debtors lack equity in the Property is adequately supported by the record and is not clearly erroneous.[51] The Debtor's plan apparently provides for a monthly payment of less than $300 and does not address Deutsche Bank's pre-petition arrearage. This makes the likelihood of an effective reorganization slim at best. The Debtors had the burden of proof on that element (as they did on cause) and offered no evidence to show that they had equity in their home and could effectively reorganize.[52] The bankruptcy court did not abuse its discretion in granting Deutsche Bank relief from stay under § 362(d)(2).

Disqualification of Counsel

Shortly after the Bank filed its stay relief motion, the Debtors filed their adversary proceeding charging the Bank with "fraudulent foreclosure" and challenging its ownership of the Note. Then, in response to the Bank's motion, they demanded that Bank's counsel be disqualified from participating in the hearing because counsel was "expected to testify" in the adversary proceeding.

Rule 3.7 of the Colorado Rules of Professional Conduct ("CRPC") requires

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[49] 11 U.S.C. § 1322(b)(2).

[50] The Debtors' *Response to RFS Motion* at 5, *in* App. at 80.

[51] *In re O'Connor*, 808 F.2d 1393, 1397 (10th Cir. 1987) (Since "value" is the linchpin of adequate protection, and since value is a function of many factual variables, it logically follows that adequate protection is a question of fact.).

[52] 11 U.S.C. § 362(d)(2), (g).

that a lawyer "shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness," with exceptions not applicable here.[53] This rule is primarily intended to protect the interests of clients, for "a lawyer who intermingles the functions of advocate and witness diminishes his effectiveness in both cases."[54] Additionally, combining these two roles can both interfere with the tribunal and prejudice the opposing party.[55]

As these Debtors appear to be doing here, litigants often use motions to disqualify opposing counsel as dilatory or tactical devices.[56] Consequently, allegations that opposing counsel is a "necessary witness" for purposes of Rule 3.7 cannot rest on the mere naming of the attorney.[57] A court's determination of whether a moving party has properly demonstrated that opposing counsel is "likely to be a necessary witness" involves "a consideration of the nature of the case, with emphasis on the subject of the lawyer's testimony, the weight the testimony might have in resolving disputed issues, and the availability of other witnesses or documentary evidence which might independently establish the relevant issues."[58]

The Debtors claim they will call Deutsche Bank's counsel to testify in the adversary proceeding concerning the original Note. Undoubtedly there are other witnesses who can supply the same information to the court. Accordingly, it is

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53 CRPC 3.7(a).

54 *Fognani v. Young*, 115 P.3d 1268, 1272 (Colo. 2005) (en banc) (quoting *Williams v. Dist. Court, El Paso County*, 700 P.2d 549, 553 (1985) (en banc)).

55 *See* CRPC 3.7 cmt. 1; *Fognani*, 115 P.3d at 1272.

56 *Fognani*, 115 P.3d at 1272. We note here the extensive pattern of filings in this case, commencing with the Debtors' removal of their state court foreclosure case to the District Court and culminating in the motion to disqualify.

57 *Id.* at 1273.

58 *Id.* at 1274.

far from likely that this lawyer will be a necessary witness. The Debtors made no attempt to show that this lawyer's anticipated testimony would be seminal to their case.[59] The bankruptcy court did not abuse its discretion in allowing Deutsche Bank counsel to act as counsel for Deutsche Bank during the relief from stay hearing.[60]

IV. Conclusion

Because the bankruptcy court did not abuse its discretion in granting Deutsche Bank relief from stay, we AFFIRM the Appealed Order.

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[59] Even if the Debtors had met their burden of proving that Deutsche Bank's counsel was a necessary witness, it remains within the bankruptcy court's discretion to allow counsel to participate at a relief from stay hearing. *Fognani*, at 1277 (disqualification does not prevent participation in pretrial litigation activities such as strategy sessions, pretrial hearings, mediation conferences, motions practice and written discovery). The bankruptcy court declined to rule on the motion to disqualify and allowed counsel to proceed for Deutsche Bank at the stay relief hearing.

[60] It is unnecessary for us to reach the balance of the Debtors' specifications of error. We do note that the Debtors' claim that Deutsche Bank was permitted to to submit evidence that was not timely provided to them as required by the local rules and Federal Rules of Bankruptcy Procedure is without basis. Deutsche Bank submitted the evidence five days before the hearing. The bankruptcy court's local rules provide that "[p]arties intending to introduce evidence at any contested hearing must file a list of witnesses and exhibits no later than three (3) court days prior to the hearing." Bankr. D. Colo. L.B.R. 9070-1(a)(1)(A). Deutsche Bank's submission of its exhibits was timely.