FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
February 27, 2012
Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE GEORGE ARMANDO CASTRO, formerly doing business as Boxing To The Bone, formerly doing business as Castro By Design Real Estate & Inv, also known as George Castro Soria, and MARIA CONCEPCION CASTRO, also known as Maria C. Cabral, Debtors.	BAP No. CO-11-040
GEORGE ARMANDO CASTRO, MARIA CONCEPCION CASTRO, and SHERRON L. LEWIS, JR., Appellants, v. KONDAUR CAPITAL CORPORATION, Appellee.	Bankr. No. 11-24287 Chapter 7 OPINION*

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

Before THURMAN, Chief Judge, CORNISH, and KARLIN, Bankruptcy Judges.

KARLIN, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

would not materially assist in the determination of this appeal.[1] The case is therefore ordered submitted without oral argument.

This appeal is from a bankruptcy court order granting a motion by Kondaur Capital Corp. ("Kondaur") for relief from stay, pursuant to 11 U.S.C. § 362(d),[2] and allowing it to continue to litigate a foreclosure action in state court concerning real property (the "Property") partially owned by debtor George Castro. The Debtors, George and Maria Castro, along with Sherron Lewis, who also claims to have an ownership interest in the Property, jointly appealed. Appellants contend that Kondaur holds no interest in the Property and, therefore, had no standing to request relief. Appellants further claim that Lewis' interest in the Property is superior to any claim that Kondaur might assert, and that the Bankruptcy Court denied Lewis due process in connection with the motion hearing. We affirm the order lifting the stay because there is no record before this Court that demonstrates the Bankruptcy Court abused its discretion in granting stay relief.

I. BACKGROUND

The Court gleans the following from the record submitted on appeal, such as it is. In September 2006, Luis Castro (who is not a party to this appeal) obtained a loan from National City Bank ("National") to build a home on the Property. George Castro, by power of attorney given to him by Luis Castro, executed a Promissory Note and a Deed of Trust from Luis Castro to National. Although the Trust Deed was recorded shortly thereafter, it contained two errors: 1) the Property street number was listed as 138**6**6 although the correct street number was 138**3**6; and 2) George Castro had signed both documents on behalf of

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[1] Fed. R. Bankr. P. 8012.

[2] Unless otherwise specified, all further statutory references in this decision will be to the Bankruptcy Code, which is Title 11 of the United States Code.

Luis Castro but had failed to also sign the Trust Deed on his own behalf, as a co-owner of the Property. In November 2008, National assigned its interest in the Note and Trust Deed to Kondaur.

In December 2010, after a state court hearing where George Castro testified that both errors in the Trust Deed were the result of mutual mistake, the deed was reformed, back to the date of its signing in September 2006, to correct the errors. Also at that hearing, the state court took judicial notice of a decision by another state court issued in August 2010, requiring Lewis to reconvey any and all of his interest in the Property to George and Luis Castro.[3] Based on the August 2010 order, the state court held that Lewis' interest in the Property, if any, was subordinate to Kondaur's.

No payments were ever made on the Note. In February 2011, Kondaur filed a state court foreclosure action against the Property. One week prior to the Property's scheduled foreclosure date, debtors George and Maria Castro filed their petition for Chapter 7 relief in the Bankruptcy Court. Shortly thereafter, Kondaur filed a motion for relief from stay, pursuant to § 362(d). Kondaur's motion was based entirely on George Castro's ownership interest in the Property, and specified that neither of the debtors was indebted to Kondaur pursuant to the defaulted loan to Luis Castro. In its motion, Kondaur relied on the value of the Property stated by the Castros in their own sworn bankruptcy schedules—

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[3] For the resolution of this appeal we need not determine the method Lewis used to purportedly acquire an interest in the Property. We do note, however, that Appellants included in the record on appeal a copy of two State of Colorado District Court orders, one a preliminary injunction dated August 16, 2010, and the other a permanent injunction dated January 3, 2011. The second order entered judgment against Lewis in the amount of $181,266 for violation of certain Colorado consumer protection statutes, and enjoined him from providing services, advice, consultation, etc. with regard to legal proceedings, including foreclosure notices or proceedings. The preliminary injunction also ordered Lewis to immediately release any interest he had acquired in the Property and to repay Luis Castro $24,000, suggesting Luis Castro may have paid Lewis and given Lewis some interest in the Property in exchange for Lewis assisting in resisting a foreclosure of the Property. *See* Appellee's Appendix at 91-102.

$639,000—but stated that the amount of its lien on the Property was well in excess of the Property's value, at more than $1.15 million. The Castros and Lewis filed essentially identical *pro se* objections to Kondaur's motion, asserting that: 1) Kondaur had no standing to file the motion; 2) the Trust Deed did not encumber the Property because of the errors the state court had already corrected several months earlier; and 3) there were issues relating to Lewis' interest in the Property that needed to be resolved.

According to the Bankruptcy Court's Order Granting Relief from Stay, Kondaur, through its counsel, and Lewis, *pro se*, appeared at the hearing on the motion for relief. Although George and Maria Castro had filed a *pro se* written opposition to the motion several days before the hearing, they did not appear to oppose the motion, as required by Local Rule. The Bankruptcy Court's Order notes that it determined that Lewis was without standing to oppose the motion, and Lewis then left the hearing and did not further participate. The Bankruptcy Court's Order further notes that at the hearing Kondaur offered documentary exhibits and made offers of proof, but neither the admitted exhibits nor the transcript of the hearing have been provided to this Court as part of the record on appeal. Based on the evidence received, the Bankruptcy Court held that Kondaur was entitled to relief from the automatic stay. Both George and Maria Castro and Lewis appealed.

II. JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit unless one of the parties elects to have the district court hear the appeal.[4] In this case, the appellants timely filed a notice of appeal from the bankruptcy court's

[4] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

order granting relief from stay, which is a final order for purposes of appeal.[5] Neither party has elected to have the district court hear this appeal, and this Court therefore has appellate jurisdiction. The standard of review applicable to an order granting relief from the automatic stay is abuse of discretion.[6] 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."[7]

III. DISCUSSION

As appellants, the Debtors and Lewis have the burden of "providing the appellate court with an adequate record for review."[8] Pursuant to both the Federal Rules of Bankruptcy Procedure and the Local Rules of this Court, the record on appeal must include all transcripts necessary for this Court's review.[9] The Federal Rules of Appellate Procedure require the same.[10] Without a transcript, "this Court cannot conduct a meaningful review" of the Bankruptcy Court's findings and conclusions on the motion for relief and may summarily affirm the Bankruptcy Court's decision.[11]

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[5] *Eddleman v. U. S. Dep't of Labor*, 923 F.2d 782, 784 (10th Cir. 1991) (orders granting or denying relief from 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).

[6] *Pursifull v. Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987).

[7] *In re Busch*, 294 B.R. 137, 140 (10th Cir. BAP 2003) (internal quotation marks omitted).

[8] *In re Rambo*, 209 B.R. 527, 530 (10th Cir. BAP), *aff'd*, 132 F.3d 43 (10th Cir. 1997).

[9] Fed. R. Bankr. P. 8009(b)(9); 10th Cir. BAP L.R. 8009-3(f).

[10] Fed. R. App. P. 10(b)(2).

[11] *In re Kleinhans*, CO-09-028, 2010 WL 1050583, at *3 (10th Cir. BAP Mar.

(continued...)

Kondaur sought stay relief pursuant to § 362(d), which allows a "party in interest" to request relief from stay either: (1) for cause, including the lack of adequate protection of its interest in the property, **or** (2) on the basis that there is no equity in the property and the property is not necessary for an effective reorganization. The Bankruptcy Court's order states that Kondaur established a right to relief under both the "for cause" provision, § 362(d)(1), and the lack of equity/necessity for reorganization provision, § 362(d)(2), and granted the requested stay relief.

In this appeal, Debtors and Lewis challenge the Bankruptcy Court's finding that Kondaur is a "party in interest." They broadly contend that Kondaur lacked standing to obtain the requested relief based on their assertion that Kondaur holds no interest in the Property. The Tenth Circuit Court of Appeals has recently addressed the issue of standing under § 362(d), noting that the term "party in interest" is not defined by the Bankruptcy Code.[12] Following the lead of other courts, the court determined that, in order to be a party in interest with standing to seek relief under § 362(d), one must be either a debtor or a creditor of the bankruptcy estate.[13] To determine whether a party seeking relief from stay is a creditor, the Court turned to § 101(10)(A), which defines a "creditor" as an "entity that has a claim against the debtor." In addition, § 102(2) provides that the term "'claim against the debtor' includes [a] claim against property of the debtor."[14]

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[11] (...continued)
23, 2010) (citing *Burnett v. Sw. Bell Tel., L.P.*, 555 F.3d 906, 908 (10th Cir. 2009) and *Lopez v. Long (In re Long)*, 255 B.R. 241, 245 (10th Cir. BAP 2000)).

[12] *In re Miller*, 666 F.3d 1255, 1261 (10th Cir. 2012).

[13] *Id.*

[14] *See also Johnson v. Home State Bank*, 501 U.S. 78, 85 (1991) (a "claim . . . may consist of nothing more than an obligation enforceable against the (continued...)

In this case, Kondaur claims that it has an interest in the property partially owned by one of the Debtors, George Castro. In its brief, Kondaur argues that this claim is proven by the evidence it presented at the hearing, which it says showed that it held both the Note and Trust Deed that were assigned to it in November 2008. Appellants, however, did not provide this Court with a transcript of the hearing on Kondaur's motion, or with the documents that were admitted into evidence by the Bankruptcy Court for its consideration at that hearing. In its minute entry entered on the date of the hearing, which is included in the record, the Bankruptcy Court stated that it had made oral findings and conclusions on the record at the hearing. In its written order, the Bankruptcy Court simply noted that the appellants' objections to the Kondaur motion had been "overruled." The Bankruptcy Court conducted a hearing on this issue, but only the outcome, not the findings made at that hearing, are in the record. As noted above, it is appellants' burden to provide an adequate record for this Court's consideration. Appellants herein have not carried this burden. Based on this failing, the Bankruptcy Court's order lifting stay is affirmed.

Appellants also argue that Lewis had standing to oppose Kondaur's motion for relief from stay, and was denied due process at the motion hearing. From the very limited record before us, it appears that the Bankruptcy Court simply ruled that Lewis had no standing to oppose Kondaur's motion. Again, based on the limited record provided, this ruling was correct. The automatic stay protects only the debtor,[15] property of the debtor,[16] and the estate,[17] and others who claim an

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[14] (...continued)
debtor's property").

[15] *See, e.g.*, § 362(a)(1), (a)(2), (a)(6)–(a)(8).

[16] *See, e.g.*, § 362(a)(5).

[17] *See, e.g.*, § 362(a)(2)–(a)(4).

interest in the property at issue do not ordinarily have standing to contest a motion for relief.[18] Lewis makes no attempt to show why this general rule does not apply to him, and there is no basis to conclude that the Bankruptcy Court abused its discretion in this regard.

Finally, appellants argue that any interest Kondaur might claim in the Property is inferior to Lewis' interest, and stay relief should have been denied on that basis. An order granting relief from stay is not a final adjudication of the parties' various rights and interests in the subject property, however.[19] Instead, it is only a determination that the party seeking relief has at least a colorable claim, has established its burden under § 362(d), and that the state court is an appropriate forum in which to litigate claims to the property at issue.[20] Again, the appellants have not carried their burden to show that the Bankruptcy Court abused its discretion in this regard.

IV. CONCLUSION

The Bankruptcy Court did not abuse its discretion when it granted the motion for relief from stay. We therefore affirm.

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[18] *See In re Teleservs. Group, Inc.*, 463 B.R. 28, 31 (Bankr. W.D. Mich. 2012).

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

[20] *In re Evans*, CO-10-031, 2011 WL 62121, at *2 (10th Cir. BAP Jan. 4, 2011).