FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit

May 30, 2013

Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DIANNA KAY STEINBERG,

Debtor.

BAP No. WY-12-082

DIANNA KAY STEINBERG,

Appellant,

v.

BANK OF AMERICA, N.A., Successor by Merger to BAC Home Loans Servicing, LP,

Appellee.

Bankr. No. 12-20554
Chapter 7

OPINION[*]

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

Before NUGENT, KARLIN, and SOMERS, Bankruptcy Judges.

NUGENT, Bankruptcy Judge.

A mortgage creditor may seek stay relief to pursue its nonbankruptcy law remedies in enforcing its mortgage on a debtor's home. But, as in any other civil proceeding, that creditor must demonstrate standing to invoke the court's jurisdiction and the bankruptcy court has an affirmative obligation to determine whether its jurisdiction has been properly invoked. Here, the debtor, Dianna Kay Steinberg ("Debtor"), challenged the bank's standing by questioning whether it

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[*] This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

had the right to enforce the note. The bankruptcy court granted the motion without providing an opportunity for a hearing on that very important threshold issue. Debtor appeals the bankruptcy court's order granting Bank of America, N.A.'s ("BOA") motion for relief from the automatic stay to foreclose on its interest on her home. We REVERSE the order of the bankruptcy court and REMAND the motion for a determination whether the creditor holds the note or may enforce the note on some other legal basis.[1]

I. Factual Background

Debtor purchased a home in Casper, Wyoming (the "Property") in 2005.[2] To fund the purchase, she borrowed money from Major Mortgage, executing a promissory note to Major Mortgage (the "Note") and a mortgage to Mortgage Electronic Registration Systems, Inc. ("MERS"), acting solely as nominee for Major Mortgage, as the mortgagee (the "Mortgage").[3] Major Mortgage then assigned the Note in blank. Debtor defaulted on the note by failing to make the scheduled payments beginning in June 2009.[4]

On October 14, 2009, the Mortgage was assigned by MERS to BAC Home Loan Servicing, L.P.[5] BAC Home Loan Servicing, L.P. merged into BOA on or

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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] The record suggests that she purchased the home with a former spouse, but provides no explanation for how she ended up in sole possession of the Property.

[3] Note, *in* Appendix to Appellant's Brief ("App.") at 17; Mortgage, *in* App. at 20.

[4] *See* Motion for Relief From Automatic Stay (Real Property) and Notice of Time to Object (the "Stay Relief Motion"), ¶9, *in* App. at 13.

[5] Corporate Assignment of Real Estate Mortgage, *in* App. at 35.

about June 28, 2011.[6]

Debtor filed this Chapter 7 petition on June 1, 2012.[7] She listed the Property on Schedule A and valued it at $261,670.[8] She listed BOA's secured claim on Schedule D, stating that BOA held a first mortgage on the Property in the amount of $211,651. On the Statement of Intention, she indicated an intent to surrender the Property to BOA.[9]

BOA filed a motion for relief from stay to foreclose its mortgage against the Property. Debtor objected, arguing BOA lacked standing to bring the motion because (1) BOA did not allege that it actually possessed the Note on the petition date; (2) the mortgage assignment from MERS to BOA was invalid as there was no specific written direction from Major Mortgage to MERS to execute the assignment; and (3) even if BOA possessed the Note and the assignment was valid, BOA was not entitled to enforce the Note because it was not a negotiable instrument. After reviewing the pleadings, but without conducting a hearing, the bankruptcy court issued an order granting BOA relief from stay (the "Stay Relief Order").[10] The bankruptcy court concluded that the MERS mortgage assignment was valid, providing BOA with a "colorable claim" that entitled it to stay relief. The court dismissed Debtor's concerns about BOA's rights to enforce the Note

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6 Certificate of Merger, *in* App. at 36.

7 Debtor previously filed for Chapter 7 protection with her former husband on October 5, 2009. They subsequently separated and have since divorced. Their case was bifurcated and eventually, Debtor's case was dismissed on March 14, 2011 under § 707(b)(3). *See* Order Granting Motion Or Relief From Automatic Stay (Real Property), *in* App. 47-48.

8 Schedule D, *in* App. at 10.

9 Chapter 7 Individual Debtor's Statement of Intention, *in* Appellee's Supplemental Appendix ("Supp.App.") at 2.

10 Debtor received her discharge on August 30, 2012, approximately one month before the issuance of the Stay Relief Order. *See* Discharge of Debtor, *in* Supp.App. at 4.

and concluded those were matters for the state court to decide. Moreover, because Debtor had stated her intent to surrender the Property in her petition, the bankruptcy court saw no reason to delay the process further.

II. Appellate Jurisdiction

This Court has jurisdiction to hear timely filed appeals from final orders, final collateral orders, and, with leave of court, interlocutory orders of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[11] Debtor timely filed her notice of appeal from the bankruptcy court's final order and the parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the District of Wyoming.[12] But, even when a timely appeal of a final order is made to this Court, we lack jurisdiction to review it if the appellant lacks standing to bring the appeal.[13]

BOA suggests that Debtor lacks standing to appeal the Stay Relief Order because she was not aggrieved by it, arguing first that because the Property was property of the estate, not Debtor's, only the trustee was aggrieved by the Stay Relief Order. Second, BOA suggests that because Debtor intended to surrender the Property to BOA anyway, she essentially acquiesced in the Stay Relief Order. But, Debtor reminds us that she claimed the Property as her exempt homestead and thereby retains standing to appeal from the Order. We agree.

Only "persons aggrieved" by a bankruptcy court's order have standing to

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[11] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

[12] *See 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).

[13] *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994) ("Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation.").

appeal.[14] A Chapter 7 debtor qualifies as a "person aggrieved" for purposes of appellate standing if she can demonstrate the appealed order diminishes her property, increases her burdens, or impairs her rights.[15] The appellant bears the burden of establishing standing to appeal, and if there is no dispute as to relevant facts, an appellate court may decide the issue of standing without remanding the case for further proceedings.[16]

Stating one's intention to surrender property on the schedules is not the equivalent of an effective legal surrender of real property. Section 521(a)(2)(A) of the Bankruptcy Code requires Chapter 7 debtors to inform secured creditors as to whether they will retain or surrender encumbered collateral.[17] Section 521(a)(2)(B) requires the debtor to perform such intention within a certain time frame. It also, however, provides that subparagraphs (A) and (B) do not alter a debtor's or a trustee's rights with regard to the property.[18] We view § 521(a)(2)

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[14] *In re Lacy*, 335 B.R. 729, 736-37 (10th Cir. BAP 2006).

[15] *Id.* at 737.

[16] *In re Am. Ready Mix, Inc.*, 14 F.3d 1497, 1500 (10th Cir. 1994).

[17] All future references to "Code," "Section," and "§ " are to title 11, United States Code, unless otherwise specified.

[18] Section 521(a)(2) provides:

> if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate –
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> (A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property; and
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> (B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for

(continued...)

as principally a notice statute, and not as one that alters the nonbankruptcy law rights of either the debtor or the lienholder.[19] As Debtor hadn't yet physically surrendered the Property at the time the order was entered, mere notice of her intent to do that does not divest her of standing to appeal.

BOA's argument that Debtor lacks standing because the Property is property of the estate simply ignores her homestead exemption. The effect of a valid exemption is to take the property claimed exempt and remove it from the bankruptcy estate, thereby placing it beyond the reach of creditors. When no one objected to her homestead exemption, whatever interest she had in the Property revested in her.[20] Her rights to occupy the homestead and to redeem it from foreclosure sale are, like her other legal and equitable interests in the Property, exempt. Debtor remains in possession and retains the right to redeem the Property.[21] Thus, the Debtor has standing to appeal the Stay Relief Order because it affects her rights in her exempt homestead.

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18 (...continued)

> cause, within such 30-day period fixes, perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph;
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> except that ***nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title***, except as provided in section 362(h)[.]

§ 521(a)(2) (emphasis added).

19 *In re Theobald*, 218 B.R. 133, 136 (10th Cir. BAP 1998) (collecting cases stating § 521(a)(2) is primarily a notice statute).

20 *See In re Brayshaw*, 912 F.2d 1255, 1256 (10th Cir. 1990) ("Under [11 U.S.C. § 522(1)], property claimed as exempt automatically becomes exempt [upon expiration of the objection period] unless a party objects."); *In re Scrivner*, 535 F.3d 1258, 1264 (10th Cir. 2008) ("Generally, if the debtor claims property as exempt and 'a party in interest' does not object, that property is exempt from property of the estate.").

21 Wyo. Stat. Ann. § 1-18-103(a) provides a right of redemption for 3 months after the sale whether from a power of sale or a judicial sale.

III. Standards of Review

We review the bankruptcy court's order granting relief from the automatic stay for abuse of discretion.[22] BOA's standing, however, is a legal issue requiring *de novo* review.[23]

IV. Discussion

The Bankruptcy Code provides that "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay" if the party in interest has made the appropriate showing to obtain such relief.[24] The Bankruptcy Code does not define the term "party in interest" for purposes of this subsection. In *In re Miller*, the Tenth Circuit stated that to invoke the court's power to award relief under §362(d), a party must be either a creditor or a debtor of the bankruptcy estate.[25] To be a creditor, a party must prove it has a right to payment against the debtor under state law.[26]

A. The Note is a negotiable instrument.

BOA claims it has a right to payment from the debtor because it is entitled to enforce the Note as a holder.[27] In her objection to the Stay Relief Motion, Debtor denied that the Note was a negotiable instrument. The bankruptcy court declined to decide this issue, stating: "This appears to be an issue under

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

[23] *See In re Veal*, 450 B.R. 897, 906 (9th Cir. BAP 2011) (debtor challenged mortgage assignee's standing to seek relief from stay and its servicing agent's standing to file proof of claim; standing is a legal issue); *In re Kaiser Steel Corp.*, 998 F.2d 783, 788 (10th Cir. 1993).

[24] 11 U.S.C. § 362(d).

[25] 666 F.3d 1255, 1261 (10th Cir. 2012).

[26] *Id.* at 1262.

[27] *See* Stay Relief Motion, ¶¶ 2 and 5, *in* App. at 11-12.

Wyoming law and can be raised in the state court."[28] While appellate courts generally do not consider issues that have not been passed upon by the trial court,[29] we will consider this issue because BOA's ability to enforce the Note depends on whether Wyoming Statute § 34.1-3-104(a)(iii) applies – a pure question of law.[30]

Wyoming has adopted Article 3 of the Uniform Commercial Code. According to § 3-104(e) of the UCC, an instrument is a "note" if it is a promise to pay as opposed to a "draft," or order.[31] This instrument is a promise: in it, the Debtor promised to pay $224,000 "to the order of the Lender [] Major Mortgage."[32] Wyo. Stat. Ann. § 34.1-3-104(a) defines a "negotiable instrument" as:

> an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:
>
> (i) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
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> (ii) Is payable on demand or at a definite time; and
>
> (iii) *Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money*, but the promise or order may contain (1) an undertaking or power to give, maintain, or protect collateral to secure payment, (2) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (3) a waiver of the benefit of any law intended for the advantage or protection of an

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28 Stay Relief Order at 4, *in* App. at 50.

29 *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

30 *Geddes v. United Staffing Alliance Emp. Med. Plan*, 469 F.3d 919, 931 (10th Cir. 2006) (holding that an issue not raised below may be considered if the argument is purely a matter of law).

31 Wyo. Stat. Ann. §34.1-3-104(e).

32 Note, *in* App. at 17.

obligor.[33]

Debtor claims paragraph 4 of the Note, which requires written notice to the noteholder in the event of a prepayment of principal, constitutes an "additional undertaking or instruction" that disqualifies the Note of its status as a negotiable instrument. Debtor cites two law review articles, but no reported cases, in support of this argument.

In the absence of any Wyoming authority on this point, we must predict how the Wyoming Supreme Court would interpret Wyoming Statute § 34.1-3-104(a)(iii) under these facts. Most courts have rejected the "other undertaking" argument, reasoning that a "prepayment notice requirement" isn't one because (1) prepaying principal is voluntary, not required; (2) the prepayment notification requirement imposes no additional liability on the debtor and is not an additional condition placed on the debtor's promise to pay; and (3) there is no penalty for failing to notify of prepayments.[34] Their analysis is persuasive and we conclude the Note is a negotiable instrument under Wyoming Statute §34.1-3-104(a).

B. The bankruptcy court abused its discretion in granting relief from stay because it failed to conduct an inquiry into the threshold issue of whether creditor had possession of the original note.

In granting stay relief, the bankruptcy court assumed that BOA had standing to enforce the *Note* once it concluded that BOA had a "colorable claim" based upon the MERS *mortgage* assignment being valid.[35] But BOA's standing depends on its possession of the Note or other legal basis for enforcing it, not

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[33] Wyo. Stat. Ann. §34.1-3-104(a) (emphasis added).

[34] *See In re Walker*, 466 B.R. 271, 283 (Bankr. E.D. Pa. 2012); *Picatinny Fed. Credit Union v. Fed. Nat'l Mortg. Ass'n*, 09-1295, 2011 WL 1337507, at *7 (D. N.J. Apr. 7, 2011); *Edwards v. Deutsche Bank Nat'l Trust, Trustee (In re Edwards)*, 11-2505, 2011 WL 6754073, at *5 (Bankr. E.D. Wis. Dec. 23, 2011); *HSBC Bank USA, N.A. v. Gouda*, F-20201-07, 2010 WL 5128666, at *2-3 (N.J. Super. App. Div. Dec. 17, 2010), *cert. denied*, 132 S.Ct. 1019 (2012).

[35] Stay Relief Order at 3-4, *in* App. at 49-50.

whether its mortgage assignment is valid.

Section 3-301 of the Wyoming UCC states that the "'[p]erson entitled to enforce' an instrument [is] (1) the holder of the instrument, (2) a nonholder in possession of the instrument who has the rights of a holder, or (3) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 34.1-3-309 or 34.1-3-418(d)."[36] Physical possession of an instrument is essential to asserting a claim based on that document.[37] While BOA attached a copy of the Note to the Stay Relief Motion and claimed it was the current "noteholder," BOA did nothing to prove that it had in fact obtained physical possession of the original Note from Major Mortgage.

BOA argues that the Debtor offered no good faith basis for asserting that BOA did not possess the note.[38] But this places the burden on the debtor to prove BOA lacked standing. BOA, as the movant, bears the burden to establish that it is a "party in interest" entitled to relief from stay.[39]

BOA also argues that when Debtor signed her schedules under penalty of perjury and listed BOA as a secured creditor, she admitted that BOA was the entity to whom the debt was owed, thereby conceding that BOA had standing to obtain relief from stay.[40] Essentially, BOA argues that the Debtor is estopped from denying that BOA is a creditor because she listed BOA on the schedules. Section 521(a) requires the debtor to file a "list of creditors." Rule 1007(b) requires that list to be "prepared as prescribed by the appropriate Official Forms."

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[36] Wyo. Stat. Ann. § 34.1–3–301.

[37] *Hay v. Hudson*, 224 P. 840, 842-43 (Wyo. 1924) (plaintiff entitled to maintain action to enforce note by proving he had possession of the note).

[38] Appellee BOA's Br. at 6.

[39] *In re Miller*, 666 F.3d 1255, 1261 n.4 (10th Cir. 2012) (concluding creditor bears the burden of proving its statutory standing as a "party in interest").

[40] Appellee BOA's Br. at 5-6.

Schedule D's instructions require the listing of "all entities holding claims secured by property of the debtor." "Claim" is defined in § 101(5) as a "right to payment," whether disputed or not. Thus, listing a creditor is not the same as conceding that creditor's right to enforce its claim.[41] Once the issue of BOA's standing to enforce the Note was raised, the bankruptcy court was required to resolve it on the merits.

Indeed, the Tenth Circuit has previously said as much in *In re Miller*.[42] There, the Tenth Circuit held that a secured creditor must demonstrate that it has a "right to payment" by adducing evidence that it possesses the note.[43] And in *In re Thomas*,[44] we held that if a secured creditor's possession of the note is challenged, the bankruptcy court has a "duty to ensure that debtors are not subjected to legal challenges by those without standing to do so" by conducting an evidentiary hearing at which the creditor must demonstrate either its possession of the note or some other legal basis for being able to enforce it.[45] Here, the bankruptcy court granted BOA's motion without conducting any inquiry into that important threshold issue. Because the bankruptcy court had an affirmative obligation to determine whether BOA has standing, it abused its

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[41] We note that the Debtor should have checked the "disputed" box on Schedule D, but we cannot say that her failure to do so amounts to a concession or an admission that BOA can enforce the Note.

[42] 666 F.3d 1255.

[43] *Id.* at 1263 (holding that the oral representation by mortgage creditor's attorney that the original of the note, indorsed in blank, was "on the way" to the attorney's firm was insufficient to constitute proof that creditor was the current holder of the note, and thus a party in interest).

[44] 469 B.R. 915 (10th Cir. BAP 2012) (holding that even when mortgage creditor's counsel offered to enter the original note into the record at a hearing to determine the stay had been terminated, which offer was declined by the court, that failure to conduct such an evidentiary determination before granting a "comfort order" was error).

[45] *Id.* at 920.

discretion in granting relief from stay when it failed to conduct an inquiry into whether BOA had possession of the original note.[46] We therefore reverse the order of the bankruptcy court and remand the motion for a determination whether BOA holds the Note or may enforce the Note on some other legal basis.

V. Conclusion

When a creditor's standing to seek relief from stay is challenged, the bankruptcy court must require a demonstration that the movant has the right under applicable state law to enforce the Note. Accordingly, we reverse and remand the motion for a determination whether the creditor holds the Note or may enforce the Note on some other legal basis.

[46] *Dennis Garberg & Assocs., Inc. v. Pack-Tech Int'l Corp.*, 115 F.3d 767, 772-73 (10th Cir. 1997) (court has affirmative duty to look into its jurisdiction).