WRITTEN DECISION -- NOT FOR PUBLICATION

ENTERED 6/9/08
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CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY 604 DEPUTY

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re LARRY D. URDAHL and ROSE L. URDAHL, Debtors.	Case No. 07-07227-PB7 RS No. KSH-1
DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for WaMu Series 2007-HE1 Trust, its assignees and/or successors, Movant, v. LARRY D. URDAHL and ROSE L. URDAHL, Debtors; and GERALD H. DAVIS, Chapter 7 Trustee, Respondents.	ORDER ON MOTION FOR RELIEF FROM STAY

Deutsche Bank National Trust Company (Deutsche Bank), as Trustee for WaMu Series 2007-HE1 Trust, its assignees and/or successors (HE1 Trust), moved for relief from the automatic stay to proceed with foreclosure proceedings on

Debtors' residence (Property). It is undisputed that the claim asserted by Deutsche Bank on behalf of HE1 Trust exceeds the fair market value of the Property. The Debtors filed no opposition and have indicated an intention to surrender the Property. The Trustee opposed the motion on the grounds that Deutsche Bank lacks standing in that Deutsche Bank had failed to establish that it or HE1 Trust, the party represented thereby, held a perfected security interest in the Property.

Because the Court finds that Deutsche Bank has failed to provide evidence that it, let alone HE1 Trust, has a security interest in the Property, the Court denies the motion for relief from stay without prejudice.

This Court has subject matter jurisdiction over the proceeding pursuant to 28 U.S.C. § 1334 and General Order No. 312-D of the United States District Court for the Southern District of California. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) & (G).

BACKGROUND

On or about November 8, 2006, Debtors borrowed money from WAMU and executed a promissory note in favor of WAMU of the same date (Note). Debtors also executed a deed of trust granting WAMU a security interest in the Property (Deed of Trust). On December 17, 2007 Debtors filed a petition commencing this bankruptcy case. According to Debtors' schedules, the value of

the Property ($863,931.00) was less than the amount owed on the Note and secured by the Deed of Trust ($998,016.00). Debtors' schedules list WAMU as the secured creditor on the Property. Debtors indicated their intention to surrender the Property.

On January 25, 2008, Deutsche Bank, "as Trustee for" HE1 Trust, moved for relief from stay to proceed with foreclosure on the Property. In support of the motion Deutsche Bank submitted a declaration of Lori Brecheen - an officer of WAMU "as Servicing Agent for Movant." The declaration included a copy of the Deed of Trust and the Note. The Deed of Trust lists WAMU as the beneficiary and "California Reconveyance Company" as the "Trustee." The Promissory Note lists WAMU as the Lender and payee.

As noted, the Debtors did not oppose the motion, but the Trustee did on the ground that Deutsche Bank failed to establish that it had standing to bring the motion because it had failed to prove that it had a perfected lien against the Property.

In the Reply to the Trustee's opposition, Deutsche Bank asserts that it is the "current beneficiary of a promissory note and deed of trust by way of assignment..." In a subsequent declaration, Ms. Brecheen declared that WAMU "transferred the NOTE and DEED OF TRUST to DEUTSCHE BANK." She went on to explain that since transferring the Note and Deed of Trust, WAMU has acted as servicing agent for Deutsche Bank on the loan. As agent for Deutsche Bank, WAMU was in possession of the Note, as endorsed to Deutsche Bank. Attached to the supplemental

declaration was a copy of the Note with an added page with what Ms. Brecheen contends is the endorsement. As discussed below, it is simply a stamp signed by a vice president of WAMU reading "Pay to the order of _____" - the space for payees is left blank.

The Court held a hearing on the matter and took it under submission.

DISCUSSION

It is undisputed that the subject Property is, as the saying goes, underwater. All parties seem to agree that the claim secured by the Property exceeds the value of the Property. The Debtors are prepared to abandon the Property. The only issue before the Court is whether Deutsche Bank is in a position to seek relief from the stay.

Bankruptcy Code section 362(d) provides for relief from stay on request of a "party in interest." Party in interest for the purposes of a motion for relief from stay is not defined. However, the Court agrees with the court in In re Maisel, that "[a] party seeking relief from the automatic stay to exercise rights as to property must demonstrate at least a colorable claim to the property." 378 B.R. 19, 21 (Bankr.D.Mass. 2007)(citing In re Huggins, 357 B.R. 180, 185 (Bankr.D.Mass. 2006). That is, since Deutsche Bank seeks relief from stay to proceed against the Property, it must establish that it, or more accurately the party it represents, HE1 Trust, has a security interest in such property. As movant, Deutsche Bank has the responsibility to

convince the Court that the party seeking relief from the stay with respect to the Property has an interest in the Property. Deutsche Bank has failed to do so.

In support of the motion, Deutsche Bank has provided the copies of the original Note and Deed of Trust. However, both the Note and the Deed of Trust run in favor of WAMU. Though it is undisputed that WAMU held a security interest in the Property by virtue of the Deed of Trust, Deutsche Bank has provided no evidence at all that any interest in the Deed of Trust was ever assigned from WAMU to Deutsche Bank, or to anyone else for that matter. In her supplemental declaration Ms. Brecheen declares that the Deed of Trust was "transferred" to Deutsche Bank. However, Deutsche Bank has provided no authority (and the Court is aware of none) for the apparent proposition that transfer of the Deed of Trust without assignment, let alone recordation, is sufficient to give Deutsche Bank or HE1 Trust a security interest in the Property. As it stands on the record before the Court, the Deed of Trust remains in the name (and possession) of WAMU.[1] Nothing in the Deed of Trust as written or in the way in which it has been handled gives any indication that Deutsche Bank or HE1 Trust has a security interest in the Property. Not surprisingly therefor, Deutsche Bank focuses the Court's attention on the Note.

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[1] Ms. Brecheen declares that while the Deed of Trust was "transferred" to Deutsche Bank, WAMU retains possession of the Note and Deed of Trust as agent for Deutsche Bank.

The Note too runs solely in favor of WAMU. The copy of the Note produced in connection with the Motion gave no indication that anyone but WAMU had an interest therein. In response to the Trustee's opposition, Deutsche Bank eventually produced a copy of the Note with an additional, unnumbered, undated page attached, which appears to be an endorsement by WAMU. However, the "Pay to the order of" line of the endorsement is blank. There is no indication from the face of the Note as endorsed that it was endorsed to Deutsche Bank and/or HE1 Trust.

The sole evidence that Deutsche Bank provides which would indicate to the Court that Deutsche Bank might have any interest at all in the Property, is the supplemental declaration of Ms. Brecheen that the Note had been transferred to Deutsche Bank. Assuming for the sake of argument that this "transfer" amounts to an "assignment," such an assignment of the Note appears to be sufficient under California to give Deutsche Bank a security interest in the Property.

California Civil Code § 2932.5 provides:

> Where a power to sell real property is given to a mortgagee, or other encumbrancer, in an instrument intended to secure the payment of money, the power is part of the security and vests in any person who by assignment becomes entitled to payment of the money secured by the instrument. The power of sale may be exercised by the assignee if the assignment is duly acknowledged and recorded.

The Court is aware of no California case law interpreting this section. However, it appears to indicate that a security interest runs with the obligation - in terms of the case at hand,

that is, an assignment of the Note amounts to an assignment of the Deed of Trust.[2] However, as indicated, Deutsche Bank has provided no convincing evidence that the Note was ever assigned to Deutsche Bank. Furthermore, even if the Note was assigned to Deutsche Bank, Deutsche Bank is not the party asserting a security interest in the Property. Rather, the motion is brought by Deutsche Bank as Trustee for HE1 Trust. The record is devoid of any further assignment to HE1 Trust.

In summary, the only question before this Court is whether Deutsche Bank and/or HE1 Trust has an interest in the Property. The Court holds that Deutsche Bank has failed to provide evidence that it, let alone HE1 Trust, has a security interest in the Property.[3] Accordingly, the motion is denied.

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[2] The Trustee argues that based upon the last line of § 2932.5 Deutsche Bank may not foreclose on the Property because the assignment was not recorded. That may well be. However, that is an issue the Trustee can raise with the state court if relief from stay is ultimately granted.

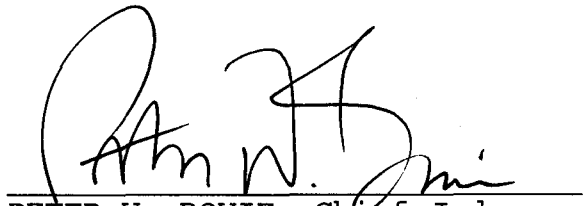
[3] Both parties allotted much ink and paper to the issue of whether Deutsche Bank has a perfected security interest in the Note. The Court finds this discussion beyond the scope of the motion before it. Deutsche Bank has moved for relief from stay to proceed against the Property. Whether or not it holds a security interest in the Note is irrelevant. Since we are not concerned with a security interest in the Note, all talk of a "perfected lien" on the Note is beside the point.

CONCLUSION

For the reasons set forth above Deutsche Bank's motion for relief from stay is denied without prejudice.

IT IS SO ORDERED.

DATE: JUN -9 2008



PETER W. BOWIE, Chief Judge
United States Bankruptcy Court