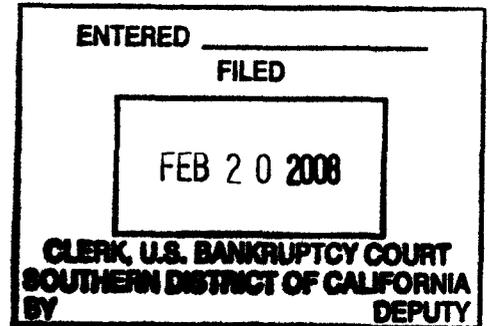


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WRITTEN DECISION - NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re

William Scott Andrews and Amy
Spencer Andrews,

Debtors.

Bankruptcy No. 07-07578-LT7

RS No. PD-1

MEMORANDUM DECISION

Movant Bank of New York as Trustee for BS ALT A 2005-9, its successors and/or assigns ("Movant") filed its motion for relief from automatic stay on January 17, 2008 (the "Stay Motion"). A timely objection to the Stay Motion was filed by chapter 7 Trustee Gerald A. Davis ("Trustee"). An untimely "joinder" was filed on behalf of Debtors William and Amy Andrews ("Debtors"). A hearing on this matter was held on February 14, 2008. Appearances and non-appearances at the hearing are set forth in this Court's Minute Order. When the matter was called, the parties suggested a continuance of the hearing in order to resolve unspecified issues apparently related to Debtors'

1 untimely joinder. The Court declined this request as it had fully
2 prepared for the hearing, had determined that the Debtors' joinder
3 should be stricken, and was prepared to rule. The purpose of this
4 Memorandum Decision is to summarize the detailed ruling made on the
5 record and to make clear the limitations of that ruling.

6 Facts.

7 The facts underlying the Stay Motion are not in significant
8 dispute. The Debtors' schedules and the Stay Motion agree that the
9 value of the real property at issue (the "Property") is \$1,050,000.00.
10 The Debtors' schedules establish that they have no equity in the
11 Property, as they list claims secured by trust deeds against the
12 Property in the amount of \$1,212,758.74. The Debtors' schedules
13 indicate that American Servicing Company ("ASC") is owed \$960,000.00.
14 The Declaration of Teresa J. Williams in support of the Stay Motion
15 ("Williams Declaration") establishes that ASC is servicer for Movant.
16 The Stay Motion and the Williams Declaration provide additional detail
17 regarding the amounts owed to Movant. They establish that the
18 principal amount owed is more precisely \$958,943.86. They also detail
19 the amount of interest, late charges, escrow advances, and other fees
20 and establish that the approximate total amount owed to Movant as of
21 January 1, 2008 was \$1,003,754.22. Neither Trustee nor Debtors
22 dispute this evidence. It is also undisputed that Debtors have not
23 made any payment to Movant since July 1, 2007, and that, as a result
24 of these defaults, Movant recorded a Notice of Default on December 5,
25 2007, thus initiating foreclosure under California Civil Code
26 Section 2924c.

27 Neither the Trustee nor the Debtors advance arguments suggesting
28 that the debt is not owed or that the default does not exist.

1 Instead, they suggest that this Court should decline to grant relief
2 from stay due to an alleged failure by Movant to establish that it has
3 standing and due to the Trustee's alleged ability to utilize the
4 strong arm powers of section 544 of the Bankruptcy Code to set aside
5 the Movant's trust deed if Movant failed to "perfect" its interest
6 therein and in the underlying note in connection with Movant's
7 acquisition of debt from Debtors' original lender ("Initial Lender").
8 Because the Court finds that these arguments lack merit and because
9 this Court takes seriously Congress' mandate that "a bankruptcy court
10 shall" grant relief from stay under certain circumstances, the Court
11 makes the following determinations.

12 1. The Debtors' Opposition Will Not Be Considered.

13 The Debtors filed what they called a "joinder" on February 11,
14 2008. The joinder exceeded the length of the Trustee's original
15 objection by approximately 20 pages and contained significant
16 argument, alleged evidence, and citations to case law not contained
17 in the Trustee's timely opposition. Local Bankruptcy Rule 9006-1(d)
18 provides that: "a joinder asserting additional grounds must be filed
19 and served in the same period as required ... for the underlying
20 motion or opposition." In accordance with this rule, the joinder was
21 due on January 31, 2008.

22 When a party needs additional time for response, that party
23 should file a motion under Rule 9006 of the Federal Rules of
24 Bankruptcy Procedure seeking additional time. Such a motion should
25 be supported by evidence justifying the party's delay. Debtors failed
26 to make any attempt to justify the tardy filing of their joinder.
27 Indeed, the pleading was filed without reference to the relief from
28 stay number and without any notice to the Court. It was discovered

1 by the Court only by inadvertence. Nonetheless, the Court carefully
2 reviewed the joinder prior to the hearing.

3 The Court can discern from the joinder no reason justifying
4 acceptance of this pleading given the delay in its filing and no
5 reason to justify any continuance of the hearing in connection
6 therewith. Ironically, the main thrust of the joinder is a demand
7 that the Court require hyper-technical compliance with alleged rules
8 and standards and then impose Draconian consequences for
9 non-compliance. The Court will not as a rule adopt the doctrinaire
10 approach that Debtors request. However, it is not unreasonable for
11 consequences to follow a delay that is totally unexplained, apparently
12 unjustified, and almost two-weeks long. As a result, the Debtors'
13 joinder was and is stricken.

14 2. Standing.

15 The Court finds that Movant has standing to bring the Stay
16 Motion. The Movant's evidence establishes that the Movant received
17 an assignment of the trust deed at issue (the "Trust Deed") and the
18 underlying note (the "Note") from Initial Lender by assignment dated
19 October 24, 2007 ("Assignment"). See Williams Declaration at
20 Exhibit B. The Assignment was recorded in the Official Records of the
21 San Diego County Recorder on October 29, 2007, as Document
22 No. 2007-0688664. *Id.* This evidence establishes that the Movant has
23 an interest in the Trust Deed as to which it seeks stay relief. It
24 also establishes that the Note was transferred in connection with the
25 Trust Deed's assignment. Thus, the Trust Deed was not transferred
26 separate and apart from the debt which it secures.

27 The Trustee requests that this Court decline stay relief unless
28 the Movant also provides a copy of the Note. The Debtors go farther,

1 suggesting that the Court consider procedures adopted in another court
2 where "wet ink" original documents must be presented to the Court
3 prior to stay relief. The Court declines to adopt a rule that either
4 the original document or a copy of the original document be provided
5 in all cases. The Court agrees that this is the better practice and
6 that it is preferable that a stay relief motion include a copy of the
7 note in question. However, the critical document for purposes of the
8 Court's inquiry in this case is the Assignment which evidences rights
9 under the Trust Deed and an ownership interest in the underlying debt.
10 The Court finds the Assignment sufficient to establish Movant's
11 standing in this case.

12 The Court also finds support for standing in the fact that the
13 Debtors' own schedules list ASC, servicer for the Movant. This
14 evidences that the Debtors previously received information advising
15 them that payments on the Note should be made to ASC, presumably in
16 its servicing capacity.

17 The Court emphasizes that it has on previous occasions and will
18 in future cases refrain from granting stay relief, even if a motion
19 is unopposed, where the Movant appears to be a stranger to the
20 transaction. In those cases, the Court will require evidence showing
21 that the Movant has rights under the trust deed and note in question.
22 The Court also requires precision in pleading and has in the past and
23 will in the future decline to grant stay relief where the movant's
24 evidence is obviously erroneous.

25 The evidence provided in this case was sufficient to establish
26 Movant's standing to bring a stay relief motion. The Trustee's
27 objection requesting that the Court find that standing does not exist
28

1 is overruled.¹

2 3. The Ability to Use Section 544 to Set Aside the Transfer.

3 The Trustee's objection also requests denial of the Stay Motion
4 due to an alleged ability of the Trustee to utilize 11 U.S.C. § 544
5 for the benefit of the estate to, presumably, set aside the Trust Deed
6 based on possible irregularities in the transfer of the Note. The
7 Trustee alleges that this would constitute a failure of perfection,
8 allowing the Trustee to utilize his strong arm powers. The Court does
9 not believe that this argument has merit.

10 An infirmity in the transfer from Original Lender to Movant would
11 not allow the Trustee to utilize his strong arm powers to set aside
12 the Trust Deed in this case. First, 11 U.S.C. § 544 only allows the
13 Trustee to set aside transfers of the Debtors' property. The transfer
14 from Initial Lender to Movant did not involve a transfer of any
15 interest of the Debtors. Instead, Initial Lender transferred its own
16 interests in the Note and the Trust Deed. As there was no transfer
17 of Debtors' assets, Section 544 is totally inapplicable.

18 Similarly, there is no ability for the Trustee to obtain
19 hypothetical lien creditor, judgment creditor, or bona fide purchaser
20 for value status. At all times, the Trust Deed was properly filed in
21 the records of the San Diego County Recorder. Within mere days of the
22 transfer from Initial Lender, and well prior to bankruptcy, Movant

23

24 ¹ The Debtors' attempted joinder also raised standing issues.
25 Debtors' standing is somewhat questionable where the Debtors lack any
26 equity in the property and have evidenced an intent to surrender in
27 their own schedules. However, the Court will generally assume that
28 debtors have at least a possessory interest in their own home and
recognizes the obligation of the Court to allow debtors a voice prior
to relief from stay enabling a family home foreclosure. Had the
Debtors' opposition been timely, the Court would have agreed that the
Debtors had standing to be heard.

1 recorded a Notice of Assignment also in the County Recorder records.
2 Any party buying the property in question or obtaining a lien against
3 the Debtors' assets under any theory, would have constructive if not
4 actual knowledge of the existence of the Trust Deed in question. In
5 short, the Court can envision no scenario where Section 544 could be
6 utilized by the Trustee to set aside this lien for the benefit of
7 other creditors of the estate. As a result, the Trustee's arguments
8 in this regard fail to form any basis for denying the Stay Motion.²

9 4. Stay Relief is Otherwise Mandated.

10 11 U.S.C. § 362(d) provides that "...the court shall grant relief
11 from the [automatic stay] ... (1) for cause, including the lack of
12 adequate protection of an interest in property of such party in
13 interest; (2) with respect to its property under sub-section (a) of
14 this section if (A) the debtor does not have an equity in such
15 property; and (B) such property is not necessary to an effective
16 reorganization; ..." (emphasis added). The automatic stay provides
17 debtors with a powerful tool in their reorganization and orderly
18 liquidation efforts. However, Congress' use of the term "shall" in
19 Section 362(d) well evidences its understanding that under certain
20 circumstances the balance shifts and the rights of creditors to
21 proceed to exercise rights and remedies obtain paramount importance.
22 In this case, no party argues that Movant has not established a *prima*
23 *facie* case under both sections 362(d)(1) and (d)(2).

24
25 ² Trustee supplied no case law support for his argument. The
26 cases supplied by Debtors offer no additional support and, if
27 anything, support the Court's determination as they involve facts
28 which clearly are distinguishable from those in the case at hand. In
particular, the joinder's authority suggests that a debtor in the
position of Initial Lender could assert section 544 claims as a result
of any infirmity of perfection after its sale of the Note - not the
Debtors.

1 The Debtors' own schedules establish that they possess no equity
2 in the Property. Consistent with this acknowledgment, the Debtors'
3 statement of intention states their intent to "surrender" the Property
4 to their lenders. Further, the Debtors filed a chapter 7 case
5 indicating that liquidation, not reorganization, is the only
6 appropriate option. As a result, the Debtors' schedules and petition,
7 in and of themselves, establish that section 362(d)(2) relief is
8 appropriate. Stay relief is granted on that basis.

9 Similarly, the Debtors' schedules, as supplemented by the
10 Williams Declaration, establish that the Debtors lack realizable
11 equity in the Property. While a slim equity cushion may exist, the
12 Movants' evidence indicates that this equity cushion will rapidly
13 erode as interest continues to accrue and the Debtors, who intend to
14 surrender the Property, fail to make future payments to Movant.³ The
15 Court does not find that the Movants' estimate of 8% costs of sale
16 is accurate, but notes that costs of sale even in the amount of 3%,
17 or possibly even less, would cause the Debtors to reach under-secured
18 status at approximately the first available date for foreclosure. In
19 short, the minimal equity cushion available to the Movant at the time
20 of the bankruptcy filing, even if costs of sale are totally
21 disregarded, is wholly insufficient to ensure that this creditor's
22 secured status as of the date of filing is preserved. As a result,
23 stay relief is appropriate under section 362(d)(1) and relief from the
24 automatic stay also is granted on that basis.

25 5. Waiver of the 10 Day Period Under Fed. R. Bankr. P. 4001(a)(3).

26 The Movant requested that the Court enter an order waiving the

27
28 ³ Understandably, neither Debtors nor the Trustee offer to re-
commence payments.

1 ten day rule under Fed. R. Bankr. P. 4001(a)(3). The Court declines
2 to provide this waiver. The Stay Motion was actively and
3 appropriately opposed by the Trustee and actively, if inappropriately,
4 opposed by the Debtors. The 10 day stay of Rule 4001(a)(3) is
5 intended to provide such parties with an opportunity to seek a stay
6 pending appeal in order to stop a foreclosure sale. The Court
7 declines to enter an order which fails to provide such an opportunity
8 in this case.

9 6. Limitations on Ruling.

10 The Court notes that this decision is strictly limited to the
11 matter before the Court i.e. whether stay relief is appropriate. To
12 the extent the Debtors or any other party in interest are entitled
13 under state law to a review of the Note in connection with foreclosure
14 or otherwise, their rights in this regard remain. The Court does not
15 find that such review is appropriate, but emphasizes that while
16 presentation of the Note was not necessary to confer standing for a
17 relief from stay motion or relevant to review under Section 544 in
18 this case, it may be relevant at other points in time and this
19 decision should not be used by any party to suggest to the contrary.

20 The Movant should submit an Order consistent with this Memorandum
21 Decision.

22
23 DATED: February 20, 2008

24 
25 LAURA S. TAYLOR, JUDGE
26 United States Bankruptcy Court
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