



Signed and Filed: April 20, 2010

Dennis Montali

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
DENNIS MONTALI
U.S. Bankruptcy Judge

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In re) Bankruptcy Case
FERMIN SOLIS ANIEL and ERLINDA) No. 09-30452DM
ARIBAS ANIEL aka Erlinda Jose) Chapter 11
Abibas,)
Debtors.)

12 MEMORANDUM DECISION REGARDING ORDER DENYING EMERGENCY MOTION TO
13 RECONSIDER (PERSIA AVENUE PROPERTY)

14 In this chapter 11 case the pro se debtors have steadfastly
15 and repeatedly resisted motions for relief from stay, while at the
16 same time steadfastly and repeatedly refusing to make payments
17 pending resolution of their disputes about the standing of those
18 secured creditors to seek such relief.

19 The court is sympathetic with any debtor who finds it
20 difficult, if not sometimes seemingly impossible, to wade through
21 the maze of transferred notes, assigned deeds of trust, ethereal
22 beneficiaries, and information and belief allegations about what
23 some predecessor loan servicing agent did with the original note
24 and deed of trust. But it is equally unsympathetic with debtors
25 shedding crocodile tears about making adequate protection payments
26 while at the same time claiming all the benefits the bankruptcy
27 law provides them. If you want to gamble in the casino and hope
28 to hit the jackpot, you can't expect to win by using house money.

1 You've got to put a "little skin in the game"¹. Because these
2 debtors have refused to do so, relief from stay could hardly be
3 more appropriate.

4 On February 11, 2010, Fermin and Erlinda Aniel ("Debtors")
5 filed an "Opposition to Motion for Relief from Stay Supplements;
6 Emergency Motion for Reconsideration on the Order for Relief from
7 Automatic Stay; Objection to Claim" ("Emergency Motion for
8 Reconsideration") regarding the motion for relief from stay
9 ("MRS") filed by Deutsche Bank National Trust Company, as Trustee
10 for HarborView Mortgage Loan Trust Mortgage Loan Pass-Through
11 Certificates, Series 2007-5, its assignees and/or successors and
12 the servicing agent American Home Mortgage Servicing, Inc.
13 ("Creditor") as to certain rental property on Persia Avenue in San
14 Francisco (the "Property"). The court entered an order denying
15 the Emergency Motion for Reconsideration on February 17, 2010.
16 This memorandum decision explains the reasoning that led to the
17 February 17 order.

18 FACTS

19 I. Background Facts

20 On January 25, 2009, Debtors filed their chapter 11²
21 petition. According to their Amended Schedule A filed on August
22 31, 2009, Debtors hold an ownership interest in seven single
23 family residences in San Francisco County and San Mateo County.
24 One of these properties is Debtors' home; the remaining six are

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26 ¹See <http://www.investopedia.com/terms/s/skininthegame.asp>

27 ²Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 rental properties. Debtors have been collecting the rents on the
2 rental properties since the petition date but have not made any
3 postpetition payments on the debts secured by various deeds of
4 trust against the properties.³ According to various proofs of
5 claim and motions for relief from stay filed in this case, Debtors
6 owe significant prepetition arrearages on the various notes
7 secured by the properties.⁴

9 ³See, e.g., the declaration in support of motion for relief
10 from stay filed by Litton Loan Servicing, L.P., on July 10, 2009
11 (Docket No. 39-2) (Debtors have not made any payments since March
12 2008 on note secured by property located on Earl Avenue in San
13 Bruno); the declaration filed in support of motion for relief from
14 stay filed by BAC Home Loans Servicing, L.P., on July 10, 2009
15 (Docket No. 41-1) (Debtors have not made any payments since June
16 2008 on note secured by property located on Fairmont Drive in Daly
17 City); the declaration in support of motion for relief from stay
18 filed by Aurora Loan Services filed on December 15, 2009 (Docket
19 No. 106-1) (Debtors have not made any payments since July 2008 on
20 note secured by property located on Clearfield Drive in Millbrae);
21 the declaration in support of the motion for relief from stay
22 filed by Creditor on November 20, 2009 (Docket No. 94-1) (Debtors
23 have not made any payments since September, 2008, on the
24 Property).

25 ⁴The proof of claim filed with respect to the note secured by
26 the Tobin Clark Drive property in Hillsborough alleges that
27 Debtors owe \$131,866.18 in prepetition arrearages; the proofs of
28 claim filed with respect to the Clearfield Drive property in
Millbrae allege that Debtors owe \$68,452.89 in prepetition
arrearages on one note and \$22,633.38 in prepetition arrearages on
another note; the proofs of claim or motions for relief from stay
filed with respect to the Sycamore Drive property in Millbrae
allege that Debtors owe \$55,537.13 in prepetition arrearages on
one note and \$6,467.49 in prepetition arrearages on another note);
the proof of claim filed with respect to the note secured by the
Fairmont Drive property in Daly City alleges that Debtors owe
\$36,073.44 in prepetition arrearages; the proofs of claim or
motions for relief from stay filed with respect to the Property
allege that Debtors owe \$12,058.45 in prepetition arrearages on
one note and \$3,173.60 in prepetition arrearages on another note;
the proof of claim filed with respect to the note secured by the
Earl Avenue property in San Bruno alleges that Debtors owe
\$61,051.28 in prepetition arrearages; and the proof of claim filed
with respect to the note secured by the Foothill Avenue property
in San Mateo alleges that Debtors owe \$59,856.46 in prepetition
arrearages.

1 Ms. Aniel admitted at a chapter 11 status conference on
2 January 14, 2010, that Debtors have been using the rental proceeds
3 without obtaining authorization to use cash collateral; Debtors
4 have used the proceeds to, among other things, pay the costs of
5 litigation against many of the alleged deed of trust holders.
6 Debtors have opposed the motions for relief from stay and many of
7 the proofs of claims filed by these lenders for, among other
8 theories, lack of standing. Notwithstanding these objections and
9 oppositions, Ms. Aniel has admitted on the record that Debtors do
10 not dispute executing the various notes and deeds of trust. She
11 has also stated that Debtors do not intend to make any adequate
12 protection payments on these various notes.

13 II. History of the Emergency Motion for Reconsideration

14 On November 20, 2009, Creditor filed the MRS. Debtors
15 opposed the MRS on the grounds of standing and purported
16 violations of the Fair Debt Collections Act ("FDCA"), state
17 consumer protection laws, and the California Penal Code by
18 Creditor and Creditor's counsel in filing a proof of claim and the
19 MRS. The court held a hearing on the MRS on December 10, 2009,
20 and took the matter under submission. On December 16, 2009, the
21 court entered an order overruling the FDCA and California Penal
22 Code objections⁵ but permitting the automatic stay to remain in
23 effect as long as Debtors tendered adequate protection payments
24 pending resolution of the standing issue. The adequate protection

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26 ⁵The court noted that as set forth in B-Real, LLC v. Chaussee
27 (In re Chaussee), 399 B.R. 225 (9th Cir. BAP 2008), the Bankruptcy
28 Code and the claims allowance process set forth in it preclude
application of the FDCA and preempt state consumer protection
laws. The court further observed that it lacks authority to deal
with alleged violations of the California Penal Code.

1 payments were to be held by Creditor's counsel in an interest-
2 bearing trust account; if Debtors ultimately prevailed on their
3 standing defenses, the adequate protection payments plus accrued
4 interest would be returned to them.

5 On December 23, 2009, Debtors filed a motion to reconsider or
6 amend the December 16 order on the MRS. On December 31, 2009,
7 this court entered an order granting, in part, this motion for
8 reconsideration (the "December 31 Order"). The December 31 Order
9 provided:

10 Debtors have a right to assert their substantive
11 standing defense to the MRS, but they must provide
12 adequate protection of Creditor's asserted security
13 interest pending resolution of the issue, particularly
14 as no equity exists in this rental property and no
15 payments have been made for ten months postpetition. 11
16 U.S.C. §§ 361 and 362(d). . . . To continue the
17 automatic stay, however, the court requires Debtors to
18 make the regular monthly payments for December, 2009,
19 and January, 2010, in the total amount of \$4,865.04, no
20 later than January 11, 2010, and \$2,432.52 per month
21 thereafter, on the first business day of each month.
22 All payments must be made to Creditor's counsel, who
23 shall hold these payments in an interest-bearing trust
24 account pending further order of the court. If Debtors
25 ultimately prevail, these payments plus accrued interest
26 may be returned to them. If Debtors default in making
27 the January 11, 2010 payment and the monthly payments
28 thereafter, Creditor shall provide written notice to
Debtors of the nature of the default. If Debtors fail
to cure the default within ten days of the date of the
notice, Creditor may file an ex parte declaration of
default and upload an order granting it full relief from
the automatic stay. Upon receipt of any declaration of
default from Creditor, the court may grant full relief
from the stay without further hearing.

On February 2, 2010, Creditor filed a declaration of default
(at Docket No. 139) stating that Debtors did not make the January
11 payment, even after Creditor's counsel sent Debtors a notice of

1 default on January 13, 2010.⁶ Therefore, on February 4, the court
2 entered an order granting Creditor's MRS.

3 On February 11, 2010, Debtors filed their Emergency Motion
4 for Reconsideration because, inter alia, Creditor has not
5 established a chain of title showing that it is an assignee of the
6 underlying deed of trust. The December 31 Order directed Creditor
7 to file, no later than February 5, a supplement to its MRS to
8 demonstrate the chain of title. Creditor filed a supplement on
9 February 2, 2010, but that supplement does not show how and when
10 Creditor acquired its rights in the deed of trust.⁷

11 Nonetheless, because Debtors failed to make any effort to
12 tender the adequate protection payment on January 11, the court
13 entered the February 17 order denying the Emergency Motion for
14 Reconsideration. The February 17 order specifically states that
15 it does not preclude Debtors from challenging in state court the
16 Creditor's right to pursue remedies under the deed of trust and
17 note and that it does not preclude Debtors from filing a separate

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20 ⁶At the chapter 11 status conference on January 14, 2010, Ms.
21 Aniel stated on the record that Debtors had not made the January
22 11 adequate protection payment and would not be making any other
23 adequate protection payments as required by the December 31 Order.

24 ⁷In support of the MRS, an employee of American Home Mortgage
25 Servicing, Inc. (the servicing agent on behalf of the "Secured
26 Creditor") executed a declaration stating that the "Secured
27 Creditor holds the original Promissory Note dated 4/17/2007 in the
28 principal amount of \$676,000.00 which is secured by the Deed of
Trust of the same date." The note, however, was not attached as
an exhibit to the declaration or the MRS. The note is attached as
an exhibit to the February 2 supplement. The note is executed to
the order of Bayporte Enterprises, Inc. The last page of the
exhibit contains an endorsement from Bayporte Enterprises, Inc. to
American Home Mortgage Corporation, and a second endorsement in
blank by American Home Mortgage Corporation. Apart from the two
endorsements, the last page of the exhibit is blank.

1 objection to Creditor's proof of claim in this chapter 11 case.⁸

2 **DISCUSSION**

3 In the past year or two, several bankruptcy courts have
4 published decisions regarding the standing of creditors and
5 servicing agents acting on the creditors' behalf to prosecute
6 motions for relief from stay. See, e.g., In re Wilhelm, 407 B.R.
7 392 (Bankr. D. Id. 2009); In re Jacobson, 402 B.R. 359 (Bankr.
8 W.D. Wash. 2009); In re Hwang, 396 B.R. 757 (Bankr. C.D. Cal.
9 2008). In general, these cases apply Federal Rule of Civil
10 Procedure 17(a)(1) (incorporated by Rule 7017, which is in turn
11 made applicable to motions for relief from stay by Rules
12 4001(a)(1) and 9014), which provides that an action "must be
13 prosecuted in the name of the real property in interest." The
14 real property in interest in a relief from stay motion is a party
15 entitled to enforce the right being asserted under applicable law.
16 Jacobson, 402 B.R. at 366.

17 Addressing the principles of "real party in interest" and
18 standing in the context of motions for relief from the automatic
19 stay, the Wilhelm court held that movants must show that they have
20 "an interest in the relevant note" and they have been "injured by
21 debtor's conduct (presumably through a default on the note)."
22 Wilhelm, 407 B.R. at 398. "Beyond that, [m]ovants must also show
23 they have the right, under applicable substantive law, to enforce
24 the notes." Id. The court identified two threshold questions for
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26 ⁸In a state court action to restrain a foreclosure, Debtors
27 would not be required to make periodic mortgage payments but they
28 most likely would have to post a bond in an amount sufficient to
protect Creditor's interests pending resolution of the dispute
there.

1 establishing standing: (1) Has the movant established an interest
2 in the relevant promissory note? (2) Is the movant entitled to
3 enforce the notes? Id.

4 To resolve these threshold questions of standing, the courts
5 have looked to the state law governing negotiable instruments.
6 Hwang, 396 B.R. at 762. In California, section 3301 of the
7 Commercial Code governs who is entitled to enforce a note:

8 "Person entitled to enforce" an instrument means (a) the
9 holder of the instrument, (b) a nonholder in possession
10 of the instrument who has the rights of a holder, or (c)
11 a person not in possession of the instrument who is
12 entitled to enforce the instrument pursuant to Section
13 3309 or subdivision (d) of Section 3418. A person may
14 be a person entitled to enforce the instrument even
15 though the person is not the owner of the instrument or
16 is in wrongful possession of the instrument.

17 Cal. Comm. Code § 3301. A "holder" of a note is "the person in
18 possession of a negotiable instrument that is payable either to
19 bearer or, to an identified person that is the person in
20 possession." Cal. Comm. Code § 1201(B)(21)(a). When endorsed in
21 blank, an instrument becomes payable to bearer and may be
22 negotiated by transfer of possession alone. Cal. Comm. Code §
23 3205.⁹

24 In general, this court agrees with the principle that
25 creditors moving for relief from stay should establish a prima
26 facie case that they have standing to enforce the underlying note
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⁹As discussed in footnote 7, above, Creditor's motion is supported by a declaration stating that it is the holder of the relevant note here. Creditor has produced a copy of the note endorsed in blank. Debtors challenge the legitimacy of the endorsement, and demand that Creditor produce the original note.

1 or obligation.¹⁰

2 In this circuit, relief from stay hearings are "limited to
3 issues of the lack of adequate protection, the debtor's equity in
4 the property, and the necessity of the property to an effective
5 reorganization. Hearings on relief from the automatic stay are
6 thus handled in a summary fashion." Johnson v. Righetti (In re
7 Johnson), 756 F.2d 738, 740 (9th Cir. 1985) (overruled on other
8 grounds by Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co., 549
9 U.S. 443 (2007)). "The validity of the claim or contract
10 underlying the claim is not litigated during the hearing."
11 Johnson, 756 F.2d at 740 (emphasis added). As noted by the Ninth
12 Circuit BAP in First Fed. Bank of Cal. v. Robbins (In re Robbins),
13 310 B.R. 626, 631 (9th Cir. BAP 2004) (emphasis added):

14 Stay relief hearings do not involve a full adjudication
15 on the merits of claims, defenses, or counterclaims, but
16 simply a determination as to whether a creditor has a
17 colorable claim.

18 Here, Creditor has made a colorable claim that it has
19 standing by showing that it holds the note, endorsed in blank.

20 ¹⁰Recently, in a case arising from this court, the District
21 Court affirmed denial of a motion for relief from stay based upon
22 a contention by the trustee that the creditor had violated TILA.
23 In re Hubbel, 2010 WL 1222777, (N.D. Cal., March 24, 2010) In
24 doing so it acknowledged that standing needed to be established:

25 As to the second point, § 362(d) provides that the stay may
26 only be lifted as to a party in interest. Therefore, there
27 must be some preliminary determination as to whether the
28 moving party is, in fact, a party in interest. See 11 U.S.C.
§ 362(d) ("On the request of a party in interest"
(emphasis added)). Surely it cannot be sufficient for a party
to bring a motion for relief from the stay and obtain relief
without presenting prima facie evidence that he has an
interest of some sort. In such a situation, a bankruptcy
judge must have the discretion to deny relief until such time
as the moving party can present sufficient evidence.

2010 WL 1222777 at *7.

1 Debtors do not dispute that they executed the note and deed of
2 trust which are the subject of the MRS. If Debtors wish to
3 maintain the status quo pending resolution of matters that require
4 more plenary proceedings than relief from stay motions (e.g.,
5 adversary proceedings for declaratory relief to determine the
6 proper holder of a note; objections to the claim of the creditor;
7 confirmation of a Chapter 11 reorganization plan that restructures
8 the claim of the creditor, etc.), the conventional way to do so is
9 to make adequate protection payments in the meantime.¹¹

10 Because of Debtors' adamant refusal to make such payments the
11 court is less tolerant than the Wilhelm, Jacobson, and Hwang
12 courts in one material respect: whether debtors should provide
13 adequate protection payments to the Creditor until the standing
14 issues are fully adjudicated. They have not made any payment on
15 this note (or the notes secured by the six other properties in
16 which Debtors assert an ownership interest) in over a year while
17 they have been in bankruptcy. They failed to make at least five
18 prepetition payments on the note secured by the Property. They
19 have no equity in the Property. They have used cash collateral
20 without permission.

21 Under such circumstances, justice dictates that Debtors make
22 adequate protection payments pending resolution of the standing
23 issues. The court will not continue the stay with all of the risk

24 ¹¹As recently noted in Hubbel at *6:

25 ...the statute does indeed provide that the bankruptcy court
26 "shall" provide relief in certain circumstances, but the
27 relief available is by no means limited to an unequivocal
28 dissolution of the stay. On the contrary, the statute
provides that relief may include "terminating, annulling,
modifying, or conditioning such [a] stay." 11 U.S.C. 362(d).

1 being borne by the creditor. In circumstances where there is no
2 doubt that the Debtors signed the note that is the subject of the
3 motion, (and, frankly, not much doubt that ultimately Creditor
4 will be able to "connect the dots" by showing the chain of title
5 of the note and deed of trust), denial of relief from stay when
6 adequate protection payments could be made would be patently
7 unfair to Creditor and impose on it all of the risk of further
8 deterioration of its security without protection. Since Debtors
9 have no inclination to make payments, it is abundantly clear that
10 once the Creditor (and other similarly situated secured creditors
11 on other properties of Debtors) proves its standing, Debtors will
12 allow the Property to be foreclosed. There is simply no point in
13 delaying the inevitable.

14 Debtors were not unprotected or left without remedy if they
15 had made the adequate protection payments as ordered by the court.
16 As the December 31 order provides, the adequate protection
17 payments consist of the monthly payments due under the note
18 undisputedly executed by them, and Creditor's counsel was to hold
19 such payments in trust pending resolution of the standing
20 challenge. If Debtors had ultimately prevailed, the payments
21 (plus interest) would have been returned to Debtors. Moreover,
22 the order granting relief from the automatic stay does not
23 preclude Debtors from challenging in state court the legitimacy of
24 Creditor's right to foreclose.

25 Debtors chose not to comply with this court's December 31
26 order. They chose not to make the adequate protection payments.
27 They must accept the consequences of their decision. Under the
28 circumstances described in this memorandum decision, the court

1 questions whether the Debtors' challenges to standing are made in
2 good faith. The court therefore did not and will not vacate the
3 order granting relief from stay.

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