UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Appellant,

v.

WILLIAM JAY ZEIGLER and DAWN M. ZEIGLER,

Appellees.

Case No. 2:09-CV-0676-RLH-RJJ

ORDER

Presently before the Court is Appellant's Appeal under 28 U.S.C. § 158(a) from the Bankruptcy Court's Order Denying Motion to Lift Stay entered in the Adversary Proceeding No. BK-S-08-17344-MKN, docket no. 45, April 6, 2009. Having considered the briefs and the record on appeal, including the arguments of parties at the consolidated hearing on November 10, 2009, the Court affirms the Order of the Bankruptcy Court.

I. Procedural History and Facts

On April 16, 2009, Appellant Mortgage Electronic Registration Systems, Inc. ("MERS") filed Notice of Appeal (#1) appealing the Bankruptcy Court's order denying its motion for relief from stay. This appeal is one of approximately eighteen (18) similar cases on appeal in the District of Nevada in which the Bankruptcy Court ruled that MERS lacked standing to bring the motion.

In the underlying bankruptcy action, MERS filed its Motion for Relief from Stay pursuant to Federal Rule of Bankruptcy Practice ("Rule") 4001 on July 15, 2008 seeking to have the automatic stay lifted so that MERS could conduct a non-judicial foreclosure sale on Appellees William and Dawn Zeigler's property. (Appellant's Appendix ("Appx.") Doc. No. 12, p. 1127–1153). MERS sought relief from stay "solely as nominee for America's Servicing Company its successors and/or assigns." (Appx. 1127). MERS also identified itself as the "Beneficiary" of the Deed and "America's Servicing Company its successors and/or assigns" as "the current payee" of the Note. (Appx. 1128). The attached Deed identified "Meridias Capital, Inc." ("Meridias") as the Lender and MERS as the Beneficiary. (Appx. 1131). Prior to the time MERS moved for relief from stay, however, Meridias sold its beneficial ownership interest in the Zeigler note, transferred this interest by endorsement and delivery, and disavowed any interest in the property in question. (*In re Mitchell*, 07-16226.)

Due to the similar issues raised regarding motions for relief from stay in approximately twenty-seven (27) cases involving MERS, the Bankruptcy Court set a joint hearing for all twenty-seven cases. (Appx. 113–18). The Bankruptcy Court also ordered consolidated briefing for all cases to be filed in Case No. 07-16226-LBR, *In re Mitchell*, the "lead case". *Id.* In ten (10) of the cases now on appeal, not including the present case, Appellant attempted to withdraw the Motion but was procedurally unable to do so because the Trustee would not consent. (Appx. 1383, 1902–1904, 1907–1909). In five (5) of the remaining cases, including the present appeal, no motion to withdraw was filed.

A final hearing was held on August 19, 2008. (Appx. 650–729). On March 31, 2009, the Bankruptcy Court issued Memorandum Opinions and Orders denying MERS' motions for relief from stay in *Mitchell* and two other cases. (Appx. 740–54, 1581–95, 1959–72). In the remaining cases, including the present case, the Bankruptcy Court denied the motions for relief from stay without prejudice by incorporating the reasoning from the *Mitchell* Memorandum Opinion. (Appx. 1158).

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The Bankruptcy Court held that MERS lacked standing for two reasons. First, MERS lacked standing because it was not a real party in interest as required by the Rules. (Appx. 740–54). Specifically, the court found that "[w]hile MERS may have standing to prosecute the motion in the name of its Member as nominee, there is no evidence that the named nominee is entitled to enforce the note or that MERS is the agent of the note's holder." (Appx. 753). The court further held that MERS' asserted interest as beneficiary under the contract terms did not confer standing because MERS had no actual beneficial interest in the note and, therefore, was not a beneficiary. (Appx. 745–48). Second, the Bankruptcy Court denied MERS' motion for relief from stay because it determined that MERS was not the true holder of the note in question. Although MERS claimed to have possession of the note, it could not enforce the instrument because, Meridias, the true noteholder, had transferred its interest in the note prior to the time MERS sought relief from stay. In coming to this decision, the court also excluded from evidence the note, deed of trust, and two affidavits from MERS employees regarding possession of the note.

II. Standard of Review

This Court has jurisdiction pursuant to 28 U.S.C. § 158(a) and reviews the Bankruptcy Court's findings under the same standard that the court of appeals would review a district court's findings in a civil matter. 28 U.S.C. § 158(c)(2). Therefore, the Court reviews the Bankruptcy Court's factual findings under a clearly erroneous standard, and conclusions of law *de novo*. *See In re Healthcentral.com*, 504 F.3d 775, 783 (9th Cir. 2007); *In re First Magnus Fin. Corp.*, 403 B.R. 659, 663 (D. Ariz. 2009).

III. Analysis

MERS asserted at oral argument that it has standing to seek relief from stay in this case because it is a beneficiary under the deed of trust and because it was in possession of the deed of trust and promissory note when it filed its motion. The Court will address both the beneficiary issue and possession-of-the-note issue.

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A. Beneficiary

In holding that MERS did not have standing as the real party in interest to bring the motion for relief from stay, the Bankruptcy Court determined that MERS was not a beneficiary in spite of language that designated MERS as such in the Deed of Trust at issue. MERS seeks to overturn the Bankruptcy Court's determination that it is not a beneficiary. However, the Court must affirm the Bankruptcy Court's order on this issue because MERS failed to present sufficient evidence demonstrating that it is a real party in interest.

A motion for relief from stay is a contested matter under the Bankruptcy Code. *See* Fed. R. Bankr. P. 4001(a); 9014(c). Bankruptcy Rule 7017 applies in contested matters. Rule 7017 incorporates Federal Rule of Civil Procedure 17(a)(1) which requires that "[a]n action must be prosecuted in the name of the real party in interest." *See also*, *In re Jacobson*, 402 B.R. 359, 365-66 (Bankr. W.D. Wash. 2009); *In re Hwang*, 396 B.R. 757, 766-67 (Bankr. C.D. Cal. 2008). Thus, while MERS argues the bankruptcy court erred when it determined that MERS was not a beneficiary under the deeds of trust, MERS only has standing under the Rules if it is real party in interest. *See* Fed. R. Bankr. P. 7017.

Since MERS admits it does not actually receive or forfeit money when borrowers fail to make their payments, MERS must at least provide evidence of its alleged agency relationship with the real party in interest in order to have standing to seek relief from stay. *See Jacobson*, 402 B.R. at 366, n.7 (quoting *Hwang*, 396 B.R. at 767 ("the right to enforce a note on behalf of a noteholder does not convert the noteholder's agent into a real party in interest")). An agent for the purpose of bringing suit is "viewed as a nominal rather than a real party in interest and will be required to litigate in the name of his principal rather than his own name." *Hwang*, 396 B.R. at 767. This is particularly important in the District of Nevada where the Local Rules of Bankruptcy Practice require parties to communicate in good faith regarding resolution of a motion for relief from stay before it is filed. LR 4001(a)(3). The parties cannot come to a resolution if those with a beneficial interest in the note have not been identified and engaged in the communication.

In the context of a motion for relief from stay, the movant, MERS in this case, bears the burden of proving it is a real party in interest. *In re Wilhelm*, 407 B.R. 392, 400 (Bankr. D. Idaho 2009)(citing *In re Hayes*, 393 B.R. 259, 267 (Bankr. D.Mass. 2008)("To have standing to seek relief from the automatic stay, [movant] was required to establish that it is a party in interest and that its rights are not those of another entity")). Initially, a movant seeking relief from stay may rely upon its motion. *Id.* However, if a trustee or debtor objects based upon standing, the movant must come forward with evidence of standing. *Id.*; *Jacobson*, 402 B.R. at 367 (requiring movant at least demonstrate who presently holds the note at issue or the source of movant's authority).

The only evidence presented to the Bankruptcy Court that it acted on behalf of the current owner(s) of the beneficial interest in the note was MERS' assertion that the current note owner is a MERS member, because "the loan at issue is registered to a MERS member." (Appx. 425). MERS asserts that if the note is sold to a party that is not a member of MERS then the loan is "deactivated from the MERS system." (Appx. 426). MERS thus argued to the Bankruptcy Court that since a loan has not been deactivated, it must remain in the hands of a MERS member that it has agency to act for. (Appx. 424–33; 717–19). However, given the admitted failure of MERS to follow its policies in the cases that were withdrawn, relying heavily on its policy of deactivating loans now in the hands of non-members to establish agency carries little weight.

The only direct documentary evidence provided by MERS was a declaration that MERS had been identified as a beneficiary in the deed of trust and that it had been named nominee for the original lender. (Appx. 1127–31). Since MERS provided no evidence that it was the agent or nominee for the current owner of the beneficial interest in the note, other than the fact that the loan had not been deactivated from the MERS system, it has failed to meet its burden of establishing that it is a real party in interest with standing. Accordingly, the Bankruptcy Court did not err when it concluded that MERS lacked standing to seek relief from stay.

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B. Possession of the Note

According to MERS, the Bankruptcy Court erred in two ways when it held that MERS was not a true noteholder under NRS 104.3301. First, MERS argues the court erred when it excluded the promissory note, the deed of trust, and two affidavits from evidence. Second, MERS argues the court incorrectly concluded that MERS lost holder status when Meridias, the lender, transferred the promissory note to another party.

1. Evidentiary issues

MERS argues that the bankruptcy court erred (1) when it refused to admit the promissory note and deeds of trust into evidence, and (2) when it refused to admit affidavit testimony from two MERS employees.

MERS' first argument—that the court should have admitted the promissory note and deed of trust—has merit. The Bankruptcy Court excluded these documents, holding that they are hearsay and therefore inadmissible business records under Rule 803 of the Federal Rules of Evidence. This was error. It is well-established in the law that notes and deeds of trust are contracts and therefore considered "facts of legal significance" that do not come under the hearsay rule. *United States v. Karr*, 1991 U.S. App. LEXIS 4887, at *2–3 (9th Cir. 1991); *Remington Invs. v. Berg Prod. Design, Inc.*, 1999 U.S. App. LEXIS 3654, at *2–3 (9th Cir. 1999). As such, the Bankruptcy Court should have admitted these documents into evidence. Nonetheless, the court's failure to do so was harmless error in this case because the contents of the note and deed of trust are not relevant to the issues raised in this appeal. No one disputes that these documents list Meridias as the lender and MERS as the nominee. Thus, the relevant issue in this appeal—whether MERS was in possession of the promissory note at the time it sought relief from stay in the bankruptcy court—turns not on what the documents say, but on who had possession of them. Thus, although the Bankruptcy Court should have received the note and deed of trust into evidence, it did not commit reversible error because the documents do not indicate who possessed them at the relevant time.

The court also refused to admit affidavit testimony from two MERS employees regarding possession of the promissory note. The court held that MERS failed to provide any evidence that the affiants had personal knowledge regarding who had possession of the note at the time MERS filed for relief from stay. Each MERS employee testifies as follows:

> I have been appointed as Assistant Secretary of Mortgage Electronic Registration Systems ("MERS") under a Corporate Resolution that was executed on [date]. I make this affidavit in support of Movant. I have reviewed the loan file relating to the above-referenced matter, and if called upon to testify as to the facts set forth in this Affidavit, I could and would testify competently based upon my review. (*In re Mitchell*, 07-16226.)

Following this statement, each employee sets forth the history of the negotiation and transfer of the note and testifies that MERS possessed the note when it moved for relief from stay.

The court correctly excluded this evidence because MERS neither produced evidence nor stated facts to indicate that the employees had personal knowledge regarding the subject of their testimony. Rule 602 of the Federal Rules of Civil Procedure establishes that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The fact that the MERS employees "reviewed the loan file[s]" and testified that the file indicates MERS was in possession of the note is not sufficient to justify the conclusion that the employees themselves had personal knowledge regarding possession of the note. Because MERS has not shown that its employees had personal knowledge as required by Rule 602, this Court affirms the Bankruptcy Court's decision not to admit this testimony.

2. Noteholder Status

Even if the above evidence should have been admitted, MERS still lacks standing because Meridias, the beneficial owner of the promissory note, sold its interest in the note to a third party prior to the time MERS moved for relief from stay. Thus, when MERS moved for relief from stay, it no longer was the true holder of the note. According to MERS, however, the bankruptcy court denied its motion simply because MERS brought its motion as a nominee and not as the real party in interest. MERS argues that it doing so the bankruptcy court improperly "elevate[d] form over

substance" because as a holder in possession of the note, MERS is clearly a real party in interest and therefore entitled to prudential standing. (Dkt. #13, Brief 28.)

MERS misunderstands the bankruptcy court's ruling. The court did not find that MERS lacked standing simply because it brought its motion as a nominee rather than as a real party in interest. In fact, the court specifically recognized that note holders are considered parties in interest under the law and that MERS claims to be a holder. Although the court noted the inconsistency in MERS' contention that it is both a nominee and a beneficiary, it denied MERS' motion for stay not because it filed its claim as a nominee, but because it brought its motion "as nominee of an entity that no longer has any ownership interest in the note." (*In re Mitchell*, 07-16226.) As noted by the bankruptcy court, "the beneficial ownership interest in the Zeigler note was sold by Meridias [Inc.] and ownership was transferred by endorsement and delivery." (*Id.*) The court also noted that German Florez, the president of Meridias, had previously "disavowed 'any interest in the note and deed of trust regarding the subject property.'" (*Id.*) Thus, based on the evidence, the court concluded that MERS lacked standing because it did not hold the promissory note on behalf of the beneficial owner at the time it sought relief from stay.

The Bankruptcy Court's decision is correct. Although holders of negotiable instruments in Nevada are entitled to enforce the instruments (NRS 104.3301), MERS, even if it did have possession of the promissory note, is not a holder under the statute. First, there is no disputing that MERS obtained the note as a nominee on behalf of Meridias. Thus, while MERS may have physically possessed the note, true (or beneficial) ownership of the note surely remained with Meridias. Second, Meridias transferred its interest in the note to another party, which negated MERS' right to enforce the instrument, since MERS' actual possession was based simply on its status as a nominee. Although Nevada law does not specifically address this issue, the purpose behind NRS 104.3301 would be frustrated if a party with bare possession of the note could seek relief from stay as the nominee of a lender that had since transferred its rights to a third party. Thus, while MERS relies on the strict wording of the statute and its alleged possession of the note, the fact

remains that MERS cannot enforce the note because it is no longer the nominee of Meridias, the original noteholder. For this reason, the bankruptcy court correctly held that MERS lacked standing to seek relief from stay.

IV. Conclusion

This holding is limited to the specific facts and procedural posture of the instant case. Since the Bankruptcy Court denied the Motion without prejudice, nothing prevents Appellant from refiling the Motion in Bankruptcy Court providing the evidence it admits should be readily available in its system. The Court is not finding that MERS would not be able to seek relief from stay as the agent of a real party in interest if it identifies the holder of the note or provides sufficient evidence of the source of its authority.

Accordingly, **IT IS HEREBY ORDERED** that the Order of the Bankruptcy Court entered April 6, 2009 is **AFFIRMED**.

DATED this 4th day of December 2009.

Roger L. Hunt
Chief United States District Judge