

FILED

APR 15 2005

UNITED STATES BANKRUPTCY COURT

U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

DISTRICT OF ARIZONA

In re:

DIANE M. CALKINS,

Debtor.

Chapter 13

Case No. 4-05-00048-JMM

DEUTSCHE BANK NATIONAL TRUST
COMPANY f/n/a BANKERS TRUST
COMPANY OF CALIFORNIA, N.A., AS
TRUSTEE FOR LONG BEACH MORTGAGE
LOAN TRUST 2001-2, its assigns and/or
successors-in-interest,

Movant,

v.

DIANE M. CALKINS, DIANNE C. KERNS,
Trustee,

Respondents.

MEMORANDUM DECISION

A final hearing on creditor Deutsche Bank National Trust Company's ("Bank") Motion for Relief from the Automatic Stay was held on April 11, 2005. The parties' appearances were noted on the record. After taking the matter under advisement, the court now rules.

PROCEDURE

This court has jurisdiction pursuant to 28 U.S.C. §§ 157; 1334. The instant matter is a "core" proceeding. 28 U.S.C. § 157(b)(2)(G).

1 **FACTS**

2 The Debtor filed a voluntary Chapter 13 petition on January 6, 2005. In her schedules,
3 she listed herself as the owner of real property located at 10322 E. La Palma Ave., Gold
4 Canyon (Apache Junction), AZ 85219. She valued the land as having a value of \$350,000
5 (Dkt. 36). She valued the lienholder's claim as "unknown" in amount, and checked the
6 "disputed" box. (Dkt. 36, Sch. D). She obtained the property by quitclaim deed on March 12,
7 2003. (Ex. "A" to Dkt. 32).
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9 Bank filed a Motion for Relief from the Automatic Stay on January 28, 2005. In the
10 Motion, Bank noted that it had completed a non-judicial foreclosure of a deed of trust on
11 September 23, 2003, fifteen months prior to the current bankruptcy, and six months after the
12 Debtor acquired title. Bank then credit bid its outstanding debt at the sale, and acquired title
13 to the land on September 23, 2003 (See, Ex. "C" to Motion).
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18 **THE LAW**

19 The automatic stay applies only to creditor action against either the Debtor or property
20 of the Debtor. 11 U.S.C. § 362. Here, the Bank alleged, and its attached documents reflect,
21 that the Debtor has no legal title or interest in the La Palma property. Therefore, that property
22 is not "property of the estate," as that term has been applied to 11 U.S.C. § 541(a). Any
23 interest of the Debtor herself, is simply that of a tenant at will or at sufferance.
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25 In that regard, the Bank seeks stay relief in order to continue prosecuting its action
26 against the Debtor for forcible entry and detainer (eviction).
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1 The Debtor responded by challenging the creditor on several grounds:

- 2 1. The creditor is attempting to collect a debt illegally;
- 3 2. The creditor cannot foreclose because it has failed to present the original
- 4 promissory note;
- 5 3. The foreclosure sale was either a “sham” or a “fraud”;
- 6 4. Bank is not the original mortgagee;
- 7 5. Bank has no standing to urge stay relief.

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10 (See, Objection, Dkt. 20). The court will now address these various issues.

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13 **§ 541(a)**

14 When the Bank completed its Trustee’s Sale, pursuant to Ariz. Rev. Stat. §§ 33-801 et.
15 seq., that action extinguished the title of the Debtor and her predecessors in interest. Ariz.
16 Rev. Stat. § 33-811(c); Mid Kansas Fed’l. Sav. & Loan Ass’n v. Dynamic Dev. Corp., 167 Ariz.
17 122, 804 P.2d 1310 (1991). Bank became the new owner (Ex. “C” to Motion). A debtor’s
18 property rights are determined by State law. Butner v. U.S., 440 U.S. 48 (1979). The Debtor
19 thus had no property right in the La Palma property on the date of filing. 11 U.S.C. § 541(a).

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23 **Illegal Debt Collection**

24 Bank is the owner of the property pursuant to a Trustee’s Deed Upon Sale issued and
25 recorded in September 2003. That deed “shall constitute conclusive evidence” of the meeting
26 of all statutory requirements surrounding the deed of trust sale. Ariz. Rev. Stat. § 33-811(B).

1 Thus, as owner of the property since September 23, 2003, the Fair Debt Collection Practices
2 Act simply is inapplicable. It does not apply to two-party disputes not involving debt collection
3 agencies which are attempting to collect another's debt (15 U.S.C. § 1692a(6) (creditors are
4 not debt collectors and are statutorily exempt from liability under the FDCPA)) nor to
5 attorneys acting directly on a party's behalf in court proceedings. 15 U.S.C. § 1692a(6). (See
6 Green v. Hocking, 792 F. Supp. 1064 (E.D. Mich. 1992) (an attorney who files a legal action
7 for the purpose of collecting debts on behalf of a client is not a "debt collector" within the
8 meaning of the FDCPA)).
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13 **Failure to Present Promissory Note**

14 Whatever the Debtor's contention is with regard to this issue, it became moot once the
15 trustee's deed was issued, and the foreclosure sale was not stayed by an injunction. The
16 issuance of the deed presumes compliance with all statutory procedures. See, Ariz. Rev. Stat.
17 § 33-811. Moreover, the note merged into the title to the property once the sale occurred, and
18 was legally "paid" by the credit bid made by the creditor. The note no longer exists in any
19 enforceable way. The Debtor's argument in this regard is without merit.
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These arguments should have been made before the trustee's sale took place, not afterward. For the reasons set forth above, this contention is likewise without merit. The issuance of the trustee's deed on September 23, 2003 cut off the rights of the debtor or her successors or predecessors to retain title to the property. If any rights remain, they may be in the area of money damages, but such is not the issue in this proceeding.

Bank Not the Original Mortgagee

This argument lacks legal authority or basis. The Bank held a valid assignment of the Deed of Trust, paid consideration therefore, and thus became a holder in due course of the Note and Deed of Trust originally held by Long Beach Mortgage, the original mortgagee/beneficiary. See Ex. "B" to Motion. A holder in due course is entitled to enforce an instrument according to its terms. It is irrelevant to the Debtor as to who may be the current owner of the note; it was still, up to the time of sale, a viable debt which must be paid; if not paid, the collateral could be, and was, foreclosed.

Standing

As the current owner of the former trust property, having acquired the real property at the foreclosure sale, Bank has a pecuniary interest in the disposition of the property, and is legally entitled to enforce its rights in a court proceeding. This pecuniary interest confers standing to be heard. See, e.g. *In re Fondiller*, 707 F.2d 441 (9th Cir. 1983).

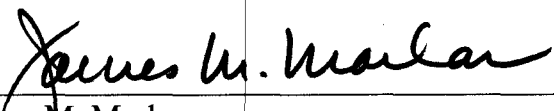
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3 CONCLUSION

4 The Bank has proven ownership of the real property, which it acquired over a year prior
5 to the Debtor's bankruptcy filing. The Debtor has not shown a legal interest which is superior
6 to that of the Bank. Because the Debtor, therefore, has no equity interest in the property, she
7 has no ability to use it in her reorganization case. 11 U.S.C. § 362(d)(2).
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9 The automatic stay of 11 U.S.C. § 362(a) will, therefore, be lifted and dissolved to
10 allow Bank to complete all legal steps to evict the Debtor and those claiming by or through her.
11 The order shall be in rem and shall apply in this and any future bankruptcy cases which may be
12 filed by the Debtor or those claiming by or through her.
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14 A separate Order will issue. Fed. R. Bankr. P. 9021.

15 Dated this 15th day of April, 2005.
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19 _____
20 James M. Marlar
U.S. Bankruptcy Judge

21 Copy of the foregoing mailed
22 this 15 day of April, 2005, to:

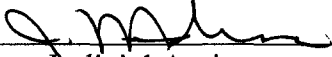
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