

BANKRUPTCY/REAL PROPERTY CASELAW UPDATE¹

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Kanamu-Kalehuanani Kekauoha-Alisa v. Ameriquest Mortg. Co. (In re Kanamu-Kalehuanani Kekauoha-Alisa), 674 F.3d 1083 (9th Cir. 2012): The Ninth Circuit affirmed the Bankruptcy Court, reversing the BAP, on a foreclosure sale avoidance, but remanded to the Bankruptcy Court for a further calculation of fees. In Hawaii, the non-judicial foreclosure statutes require that, whenever a scheduled sale is postponed, there must be a "public announcement" of the postponement. Three days prior to a scheduled foreclosure, the debtor-homeowner filed for chapter 13, imposing the automatic stay. The lender's law firm properly postponed the foreclosure three times. In attempting a fourth foreclosure, however, the law firm sent an inexperienced legal secretary, who did not tell anyone of the postponement, did not otherwise vocally proclaim the postponement, and did not physically post any information regarding the postponement. The BAP found the secretary's actions consistent with the spirit and purpose of a public announcement. The Circuit Court, however, found the term "public announcement" is clear on its face and it was inappropriate to look at the term's "spirit and purpose." The Circuit Court determined the secretary's actions were not a public announcement, and the subsequent sale violated the nonjudicial foreclosure statute. The Circuit Court found the Bankruptcy Court implemented the proper statutory remedy, avoidance of the foreclosure sale. In addition, the mortgage contract required compliance with Hawaii's statutes; when the lender failed to comply with the statutes it breached the contract. Hawaii also has a statute authorizing damages in cases of deceptive or unfair practices in connection with trade or commerce. The Bankruptcy Court found the failure to make a public announcement was likely to mislead consumers, and damages under the statute were appropriate. However, the Bankruptcy Court did not correctly calculate damages because it did not find the failure to publicly announce caused the debtor's damages. The Circuit Court remanded for further fee determinations.

Cedano v. Aurora Loan Servs., LLC (In re Cedano), 470 B.R. 522 (9th Cir. BAP 2012): Affirming the Bankruptcy Court's dismissal of a debtor's adversary proceeding pursuant to Civil Rule 12(b)(6). The debtor, having lost his home to foreclosure, initiated an adversary proceeding alleging the foreclosure was wrongful, slander of title, professional negligence by the foreclosing trustee, and seeking that the trustee's deed upon sale should be cancelled. The deed of trust in question named MERS as the beneficiary and nominee, and, per its language, allowed MERS to exercise the rights granted to the lender, including the right to foreclose, and allowed MERS to appoint a successor trustee. The accompanying note was endorsed in blank. The note was assigned and securitized, and MERS executed a substitution of the trustee naming a new trustee under the deed of trust. The new trustee executed and recorded a notice of default and election to sell. Notice was sent to the debtor, directing him to contact MERS via the new trustee to find out the payoff amount or to make arrangements to stop the foreclosure. The new trustee

¹ CAVEAT/CREDIT-WHERE-CREDIT'S-DUE: The bulk of these case summaries were previously prepared by Suzanne J. Hickock and Brent R. Wilson, two of the current law clerks to Idaho's two bankruptcy judges, Terry L. Myers and Jim D. Pappas. They have been reproduced here with the law clerks' gracious permission.

recorded a notice of trustee's sale. A loan modification was attempted, but was terminated after a trial period, and the foreclosure occurred. Two days later the debtor filed for chapter 13 protection, and the foreclosure sale purchaser obtained retroactive stay relief to validate the recording of the deed of sale. After reviewing California foreclosure law, the BAP determined dismissal of the wrongful foreclosure cause of action was justified. Also, the new trustee had authorization to foreclose on the property. Several of the debtor's causes of action hinged on his assertion that the foreclosing parties were not authorized to foreclose on the property. Those causes of action were also properly dismissed. Also, the BAP determined a deed of trust trustee does not owe non-statutory fiduciary duties, and, as long as the trustee satisfies those statutory obligations, he has not committed professional negligence.

Arkison v. Griffin (In re Griffin), 719 F.3d 1126 (9th Cir. 2013): Affirming the BAP, which affirmed the bankruptcy court, the panel held that a "second-generation copy" of a promissory note (*i.e.* a duplicate of a duplicate of the original promissory note) is sufficient to establish a creditor's standing to seek relief from the automatic stay under § 362. The trustee argued a copy of a copy was insufficient to establish prudential standing to bring the motion. The Ninth Circuit disagreed and sided with the First Circuit in *United States v. Carroll*, 860 F.2d 500, 507 (1st Cir. 1998), that a duplicate of a duplicate is a "duplicate" for purposes of Federal Rule of Evidence 1003. The Ninth Circuit stated, "given the limited nature of the relief obtained through this proceeding and because final adjudication of the parties' rights and liabilities is yet to occur, a party seeking stay relief need only establish that it has a colorable claim to the property at issue."

Gasprom, Inc. v. Fateh (In re Gasprom, Inc.), 500 B.R. 598 (9th Cir. BAP 2013): Vacating the order of the bankruptcy court and remanding for further proceedings. The BAP held that the bankruptcy court erred in holding an abandonment under § 554 by a chapter 7 trustee removed the automatic stay under § 362. The debtor corporation, which owed a gas station, had initially filed its case as a chapter 11 but the case was promptly converted to chapter 7. The chapter 7 trustee appointed to the case moved to abandon the gas station because it was fully encumbered and had contamination issues. The first priority creditor on the gas station supported the trustee's motion to abandon and argued the automatic stay would terminate upon the abandonment. The bankruptcy court agreed with the trustee and granted the motion to abandon. In addition, the bankruptcy court held that the stay terminated upon abandonment and thus blessed a foreclosure sale. The BAP held that the bankruptcy court erred as a matter of law because the trustee's abandonment of the property of the estate only terminated one aspect of the automatic stay, the stay as to property of the estate. However, the abandonment caused the property to revert to the debtor and § 362(a)(5) protects "property of the debtor," so the stay was in effect in that regard. The BAP also found the bankruptcy court erred by annulling the automatic stay *sua sponte* to "validate the foreclosure" sale that had already taken place because the bankruptcy court was required to weigh the equities in determining whether to annul the stay and failed to do so.

Fadel v. DCB United, LLC (In re Fadel), 492 B.R. 1 (9th Cir. BAP 2013): Affirming the bankruptcy court's determinations that the debtor did not have an ownership interest in real property, that a foreclosure sale of the property was not void, and that the purchaser at the

foreclosure sale should be given relief from the automatic stay to proceed with an unlawful detainer action against the debtor. In 2001, the debtor transferred any interest she may have had in certain real property to her husband. She filed her bankruptcy case in 2011 and listed the property in her schedules. Despite having notice of the debtor's bankruptcy, the lender went ahead with a foreclosure sale on the property. After that sale, the debtor proposed and confirmed a plan that purported to pay lender over the foreclosure purchaser's objection. The purchaser then sought stay relief. The BAP concluded the bankruptcy court correctly determined the foreclosure sale was not void because the legal title presumption trumps the community property presumption. As the debtor was not on the title to the property, it was not part of her bankruptcy estate to receive the benefit of the automatic stay. In addition, the purchaser was not bound by the confirmed chapter 13 plan because the purchaser was the bona fide purchaser of the real property and not a creditor of the debtor. The BAP also concluded the bankruptcy court did not err by granting relief from the automatic stay to allow the purchaser to pursue an unlawful detainer action because the debtor had no legal interest in the property.

Pierce v. Carson (In re Rader), 488 B.R. 406 (9th Cir. BAP 2013): Affirming the bankruptcy court's decision to overrule the chapter 7 trustee's objection to a proof of claim filed by a deed of trust creditor. The chapter 7 trustee objected to the proof of claim because the creditor failed to follow the procedures to obtain a deficiency judgment as provided by Arizona law. The state statute, A.R.S. § 33-814, provides a creditor a means to obtain a deficiency judgment against its debtor after a non-judicial foreclosure. The BAP held the Bankruptcy Code preempts A.R.S. § 33-814 and thus the bankruptcy court correctly overruled the trustee's objection. The BAP reasoned that the Arizona statute was preempted because it was impossible for the creditor to comply with both the statute and the Bankruptcy Code. The Arizona statute required the creditor to file a state court action against the debtor, which would violate the automatic stay and the discharge injunction. Thus the creditor was correct to file its claim in the bankruptcy case.

Jefferies v. Carlson (In re Jefferies), 468 B.R. 373 (9th Cir. BAP 2012): Affirming the Bankruptcy Court's sustaining of the chapter 7 trustee's objection to the debtor's homestead exemption claim. Prior to filing his bankruptcy, the debtor and his ex-wife divorced. As part of that process, the debtor's ex-wife was awarded the couple's home, while the debtor was awarded an equalization payment of \$40,800. The divorce decree judgment was based on a consensual property settlement agreement between the couple. In filing his bankruptcy, the debtor claimed \$47,000 as exempt "Proceeds from sale of homestead" under Washington State's homestead exemption statutes. One of the criteria to properly claim an exemption in proceeds of the sale of a homestead in Washington is that the sale must have been voluntary. Per Washington Supreme Court precedent, whether a sale is voluntary or not depends on whether the seller is compelled to sell the homestead based on purely non-economic reasons. Where a sale is based upon legal, and not economic, factors, it is viewed as a forced, non-voluntary sale. Where the debtor transferred his interest in the couple's home as part of a state court dissolution process and allocation of marital property, and not for economic reasons, the transfer from the debtor to his ex-wife was made with an element of legal, and not purely economic, compulsion. It was not a voluntary sale, and the Washington homestead exemption statute did not apply.

In re Davis, 11-40242-JDP, 12.1 IBCR 23 (Bankr. D. Idaho 2012): Chapter 7 trustee challenged the debtors' homestead exemption in non-principal residence property. The Court reviewed Idaho Code § 55-1004 and the mechanisms for creating and extinguishing homestead exemptions in Idaho. Here, the debtors filed a homestead declaration for the property they sought to exempt. That declaration, however, was not properly acknowledged. Also, the debtors did not file a declaration of abandonment for the home they were living in at the time. Because they did not meet these two statutory requirements, the debtors did not establish a homestead exemption in their non-primary residence property.

In re Halinga, 13-00925-TLM, 13.4 IBCR 101 (Bankr. D. Idaho 2013): The chapter 7 trustee attempted to reduce the value of a homestead exemption claimed by the debtors pursuant to § 522(0). Section 522(0) allows for a reduction in the homestead exemption if it is proven that: (1) the value of the debtor's homestead exemption increased; (2) the increase can be attributed to debtor's sale of nonexempt assets; (3) the debtor sold the nonexempt assets to hinder, delay, or defraud a creditor; and (4) the debtor sold the nonexempt property within 10 years of the bankruptcy. In this case, the debtors sold a liquor license and paid approximately \$100,000 on their mortgage a little more than a year before filing their petition. The only issue for the bankruptcy court to resolve was whether the debtors did so to hinder, delay, or defraud their creditors. The court found that the trustee failed to prove the debtors made this transfer to hinder, delay, or defraud their creditors because he did not establish the debtors knew the effect of the homestead exemption statute would be to exempt the funds paid on their home and because the debtors provided a reasonable explanation for their payment.

In re Thomason, 12-41121-JDP, 13.1 IBCR 16 (Bankr. D. Idaho 2013): The bankruptcy court considered whether debtors established a valid homestead exemption in property in which they had a fee simple remainder interest following a life estate. The court concluded that such was sufficient ownership for purposes of Idaho's homestead exemption statute, I.C. § 55-1001. The court next considered whether debtors' lack of a current possessory interest was a bar to their homestead exemption claim and found it was not. Pursuant to I.C. § 55-1004, the debtors had recorded a proper declaration of abandonment on their current home and a declaration of homestead on the home bearing their future interest. They had also taken acts toward ultimately living in the home. Finally, the debtors testified they would be living in their declared homestead very soon, as the life tenant, the debtors' mother, had deteriorating health. The court found these facts sufficient to support a homestead exemption and overruled trustee's objection.

In re Ashton, 12-02025-JDP, 13.1 IBCR 5 (Bankr. D. Idaho 2013): The debtor claimed a homestead exemption in a fifth wheel trailer located in northern Nevada. He worked for a drilling company and lived 20 days per month in the trailer while working, and spent the remaining time in a rented apartment in Boise with his wife and child. He attempted to file a declaration of homestead prepetition, but was unsuccessful. Thus he had to prove the trailer was his principal residence in order to invoke the protections of the automatic homestead exemption under I.C. § 55-1004. The court considered the facts presented, e.g., that he paid taxes, voted,

received all his mail, and registered and titled the trailer in Idaho, and in all ways considered Idaho to be home. He admitted he went to Nevada only for work. Thus the court determined that his principal residence was in Boise, and thus the trailer was not exempt as a homestead.

In re Johns, 12-20828-TLM, (Bankr. D. Idaho, 2014) (available at: http://www.id.uscourts.gov/decisions-bk/Johns_ExemptionDec.pdf): Homestead exemption claim covering three separate contiguous parcels. Debtor had previously granted Deed of Trust to lender on one parcel – lender got a default judgment and recorded against all parcels. Debtor resided on one parcel, and used the other two to stable horses and other animals. Debtor claimed homestead exemption in all three parcels, to which creditor objected. Court reviewed the Idaho homestead exemption statute, which only limits the amount of exemption claimed – but not the size or number of parcels. Exemption claim upheld.

Newman v. Schwartzer (In re Newman), 487 B.R. 193 (9th Cir. BAP 2013): Affirming the bankruptcy court's order granting the chapter 7 trustee's motion to compel turnover of the debtor's tax refund. The debtor was married but filed an individual chapter 7 petition in December 2011. The debtor did not list his 2011 tax refund in his schedules and did not claim it as exempt in his schedule C. In March 2012, the debtor obtained a discharge. In May 2012, the trustee sent the debtor a letter requesting a copy of his tax returns, and the debtor complied. The tax return showed a refund to the debtor and his wife in the amount of \$5,135. The trustee demanded \$4,727 of the tax refund from the debtor but also advised the debtor he could claim an exemption in the tax refund if he filed an amended schedule C. No amended schedule C was filed, however, until August 2012. By that time, the trustee had moved for turnover of the tax refund as property of the estate, and the court had granted the motion. The debtor then filed a timely notice of appeal to the BAP, claiming the bankruptcy court erred in granting the motion for turnover. First, the BAP noted that the debtor did not exempt the tax refund before the bankruptcy court entered the order for turnover. Next, the BAP held that the tax refund was property of the estate pursuant to § 541. The BAP then held the bankruptcy court properly entered the turnover order pursuant to § 542 even in the face of the debtor's argument that he had spent most of the tax refund. The BAP sided with the majority of courts that addressed the issue under § 542, holding that the debtor need not have current possession of the estate asset at the time the turnover order is entered.