UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

April 6, 2017, at 11:00 a.m.

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1. **16-21305-E-7** **RODERICK/ROSEMARIE TAPNIO** **CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT**
16-2155 **10-20-16 [29]**
TAPNIO ET AL V. PARTNERS FOR PAYMENT RELIEF DE II, LLC'S ET

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Plaintiff's Atty: Peter Macaluso
Defendant's Atty:
Michelle R. Ghidotti-Gonsalves
Dhruv M. Sharma [Wells Fargo Bank, N.A.] Party dismissed on 9/13/16

Adv. Filed: 8/1/16
Answer: None
1st Amd Complaint filed: 8/1/16
Answer: None
2nd Amd Complaint filed: 10/20/16
Answer: None

Nature of Action:
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

The Status Conference is ~~concluded, the Complaint having been dismissed~~.

Notes:

Continued from 2/22/17 to allow the Chapter 7 Trustee in Plaintiff-Debtors' bankruptcy case to substitute in or otherwise address this Adversary Proceeding.

APRIL 6, 2017 STATUS CONFERENCE

Roderick and Rosemarie Tapnio, as the then Chapter 13 Debtors, (Plaintiff-Debtors) filed the Amended Complaint in this Adversary Proceeding on October 20, 2016. Dckt. 29. The Defendants named in the Amended Complaint are: Mortgage Electronic Registration Services, Inc., as Nominee for GMAC Mortgage Corp. DBA Ditech .com, Partners for Payment Relief DE II, LLC. *Id.* However, in Paragraph 11, 11 (there are two paragraphs "11"), 12, and 13, Plaintiff-Debtors identify the non-plaintiff parties in the Amended Complaint to be GMAC Mortgage Corp., Partners for Payment Relief DE II, LLC, FCI Lenders Service, and California TD Services. *Id.*

The basic factual allegations in the Amended Complaint are:

A. On July 27, 2015, a notice of default and election to sell was recorded by First American Mortgage Solutions for the debt secured by Plaintiff-Debtor's property.

B. A notice of trustee's sale was record on January 11, 2016, by GMAC.

C. The trustee's sale was scheduled for February 3, 2016.

D. Plaintiff-Debtor commenced the Chapter 13 case on March 2, 2016.

E. The Chapter 13 case was dismissed due to Plaintiff-Debtor failing to file the necessary schedules and statement of financial affairs documents on March 31, 2016.

F. The trustee's non-judicial foreclosure sale was conducted on April 4, 2016.

G. The court vacated the dismissal of Plaintiff-Debtor's Chapter 13 case on April 5,2016.

H. The trustee's deed from the non-judicial foreclosure sale was recorded on April 6, 2016.

I. Partners for Payment Relief DE II, LLC caused a notice to quit to be served on April 8, 2016.

J. In their Chapter 13 Plan, Debtor-Plaintiffs intended to have the GMAC secured claim valued at $0.00, complete their plan, and then have the deed of trust determined void as a matter of California and federal law (there being a $0.00 obligation left to be secured by the deed of trust).

K. It is asserted that recording the trustee's deed on April 6, 2016, the day after the April 5, 2016 order vacating the dismissal of Plaintiff-Debtor's case, that was one day after the April 4, 2016 non-judicial foreclosure sale was a void act (the recording of the trustee's deed being in violation of the automatic stay that arose on April 5, 2016).

The nub of this complaint is the recording of the trustee's deed the day after the bankruptcy case was filed is void, notwithstanding the foreclosure sale having been conducted two days earlier when there was not an automatic stay in effect.

Partners for Payment Relief DE II, LLC, FCI Lenders Services, and California TD Specialists have filed a motion to have the complaint dismissed. Dckt. 66.

Front and center in addressing this dispute is California Civil Code § 2924h(c), which provides:

> "(c) In the event the trustee accepts a check drawn by a credit union or a savings and loan association pursuant to this subdivision or a cash equivalent designated in the notice of sale, the trustee may withhold the issuance of the trustee's deed to the successful bidder submitting the check drawn by a state or federal credit union or savings and loan association or the cash equivalent until funds become available to the payee or endorsee as a matter of right.
>
> For the purposes of this subdivision**, the trustee's sale shall be deemed final upon the acceptance of the last and highest bid, and shall be deemed perfected as of 8 a.m. on the actual date of sale if the trustee's deed is recorded within 15 calendar days after the sale**, or the next business day following the 15th day if the county recorder in which the property is located is closed on the 15th day. However, the sale is subject to an automatic rescission for a failure of consideration in the event the funds are not "available for withdrawal" as defined in Section 12413.1 of the Insurance Code. The trustee shall send a notice of rescission for a failure of consideration to the last and highest bidder submitting the check or alternative instrument, if the address of the last and highest bidder is known to the trustee.
>
> If a sale results in an automatic right of rescission for failure of consideration pursuant to this subdivision, the interest of any lienholder shall be reinstated in the same priority as if the previous sale had not occurred."

As addressed by the District Court in *Quality Loan Serv. Corp. v. Gonzalez (In re Gonzalez)*, No. EDCV 11-1736 R, 2012 U.S. Dist. LEXIS 188105, 2012 WL 8262445 (C.D. Cal. June 14, 2012), Cal. Civ. § 2924h(c) brings in 11 U.S.C. § 362(b)(3), which states:

> "(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay–
>
> (3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;. . . ."

The Plaintiff-Debtor's bankruptcy case was converted to one under Chapter 7 on February 7, 2017. The court continued the hearing on the motion to dismiss this Complaint to afford the Trustee the opportunity to substitute in if she wanted to take over this litigation rather than having it dismissed.

~~**The court having ordered that the Complaint be dismissed, the Status Conference is removed from the calendar.**~~

2. **16-21305-E-7 RODERICK/ROSEMARIE TAPNIO** **CONTINUED MOTION TO DISMISS**
16-2155 MRG-2 **ADVERSARY PROCEEDING**
TAPNIO ET AL V. PARTNERS FOR **1-17-17 [66]**
PAYMENT RELIEF DE II, LLC'S ET

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff and Plaintiff's Attorney on January 17, 2017. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss is granted, the Complaint is dismissed without prejudice, and this Adversary Proceeding is closed.

Partners for Payment Relief DE II, LLC, FCI Lenders Services, and California TD Specialists ("Defendants") move for the court to dismiss counts one through five of Roderick Tapnio and Rosemarie Tapnio's ("Debtor") Amended Complaint (Dckt. 29) and therefore dismiss this adversary proceeding.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on February 1, 2017. Dckt. 72. Debtor states the following as support for opposing the Motion:

A. "Legal Standard Applicable to Motion to Dismiss Under FRCP Rule 12(b)(6).

B. The Required thirty (30) day Increments From Original Sale Date of 2/3/16 Results In Dates of 3/4/16, 3/31/14, and 4/29/16 Not 4/4/16.

C. The Automatic Stay Was In Effect At the Time of the Foreclosure Sale.

D. The Automatic Stay Was In Effect When Recording."

In substance, the Opposition is just four short conclusions without providing the court with any analysis about how those conclusions apply and what effect it has on the grounds asserted in the Motion.

FEBRUARY 16, 2017 HEARING

At the hearing, the court continued the hearing on the matter to 11:00 a.m. on April 6, 2017, to allow the Chapter 7 Trustee to investigate this litigation, determine if these claims are property of the estate to be prosecuted by the Trustee, and if so, whether the Trustee will prosecute such claims or abandon them to Debtor. Dckt. 77.

NEED FOR SUBSTITUTION OF REAL PARTY IN INTEREST

When a Chapter 7 case is filed, the debtor is not the real party in interest in pre-petition claims or in asserting claims of the bankruptcy estate, being replaced by the Chapter 7 Trustee. *V'Guara, Inc. v. Dec*, No. 2:13-cv-0076-JAD-NJK, 2016 U.S. Dist. LEXIS 4059, at *3–6 (D. Nev. Jan. 12, 2016) (ordering plaintiff to substitute Chapter 7 Trustee in as real party in interest in Adversary Proceeding within thirty days or show good cause why case should not be dismissed); *see also Religious Tech. Ctr. v. Lucas (In re Henson)*, No. 03-5131, 2006 Bankr. LEXIS 3722, at *19 (Bankr. C.D. Cal. Apr. 21, 2006) ("Debtor could have sued . . . before bankruptcy . . . . The Trustee inherits that cause of action and acts on behalf of the estate in bringing it.").

"The Bankruptcy Code provides that the trustee of a bankruptcy estate is the representative of the estate" and who has "the exclusive right to sue on behalf of the estate." *V'Guara, Inc.* at *4 (citing *Estate of Spirtos v. One San Bernardino Cty. Superior Court Case Numbered SPR 02211*, 443 F.3d 1172, 1175–76 (9th Cir. 2006)); *see* 11 U.S.C. §§ 323 & 704.

When the debtor is no longer the real party in interest in an adversary proceeding, "the proper procedure . . . is typically for [debtor] to file a motion to substitute or join its Chapter 7 trustee as a party under [Federal Rule of Civil Procedure] 25(c)." *V'Guara, Inc.* at *4–5 (citing *Runaj v. Wells Fargo Bank*, 667 F. Supp. 2d 1199, 1206 (S.D. Cal. 2009) ("A Chapter 7 debtor may not prosecute a cause of action belonging to the bankruptcy estate absent showing [its] claims were exempt from the bankruptcy estate or abandoned by the trustee.")); *see also Hicks v. Citigroup, Inc.*, No. C11-1984-JCC, 2012 U.S. Dist. LEXIS 193044, at *5–6 (W.D. Wash. Oct. 16, 2012) ("Because the trustee becomes the real party in interest, substitution under Rule 25(c) is proper where the trustee seeks to continue forward with the lawsuit." (citing *Adels v. Bierbach*, No. 1:09-CV-2363, 2011 U.S. Dist. LEXIS 41238, at *11–12 (M.D. Pa. Apr. 15, 2011)

("Transfers of property to a Chapter 7 Trustee following the bankruptcy of a party are included among these transfers of interest that courts have found support substitution.")).

Review of Complaint

In the First Amended Complaint ("FAC"), Dckt. 29, Debtor has asserted claims that sound as follows:

A. In the First Cause of Action Debtor seeks a declaration rights and obligations, stating:

> "An actual controversy now exists between Plaintiffs and Defendants in that **there is a dispute** as to the **resolution, cease of harassment of Plaintiffs by Partners, the stopping of GMAC and/or Partners' continued to engagement in unlawful conduct, having caused and continue to cause harm, and separate injuries** each and every time P**artners imposes threats of foreclosure on Plaintiffs, or when GMAC and/or Partners engages in false, unfair, deceptive and unconscionable conduct to perpetrate or conceal his unlaw**ful conduct as contended that Defendant as set forth below, **has committed the violations set forth below."**

FAC ¶ 70. It appears questionable whether there is a basis for declaratory relief. Instead, it appears that the conduct has occurred the rights fixes, and the Debtor needed to assert its claims arising for the alleged damages done.

Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims for damages or injunction have arisen. *See* Declaratory Relief Act, 28 U.S.C. § 2201. FN.1. "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The party seeking declaratory relief must show (1) an actual controversy and (2) a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). There is an implicit requirement that the actual controversy relate to a claim upon which relief can be granted. *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982).

FN.1. 28 U.S.C. § 2201,

> § 2201. Creation of remedy
>
> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court

> of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> (b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

The court may only grant declaratory relief where there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937). However, it is a controversy in which the litigation may not yet require the award of damages. *Id.*

B. In the Second Cause of Action Debtor alleges that "the bankruptcy estate had an automatic stay" arising from the court vacating the order dismissing this bankruptcy case. FAC ¶ 42 (which is on page 9 of the First Amended Complaint, after ¶ 70).

It is asserted that the recording of a trustee's deed after the order vacating the dismissal of the case was entered violates the automatic stay that existed for the bankruptcy estate. FAC ¶ 43.

Various claims for damages are asserted for the alleged violation of the automatic stay held by the bankruptcy estate.

This claim sounds in the nature of property of the bankruptcy estate, which is now under the control of the Chapter 7 Trustee.

C. In the Third Cause of Action, it is asserted that the trustee's deed recorded after the order dismissing the bankruptcy case was vacated "slanders the title" of the property of the bankruptcy estate.

This Cause of Action does not clearly specify what damages flow from the conduct that "slanders the title" of the property of the bankruptcy estate.

D. Based on the alleged violation of the automatic stay protecting property of the bankruptcy estate, Debtor requests injunctive relief in the form of:

1. "91. Plaintiffs seek equitable cancellation of the above discussed trustee sale as unauthorized by 11 U.S.C. 362(a)." FAC ¶ 91;

2. "92. Plaintiffs seek the foreclosure be deemed void as this is unique real property and money is an inadequate remedy." FAC ¶ 92;

The Cause of Action is not clear how the court determining that the trustee's deed is void is "injunctive relief."

Notwithstanding what questions may exist for the Causes of Action as framed, they all appear to be causes of action that are property of the bankruptcy estate, which claims are now under the control of the Chapter 7 Trustee, not Debtor.

With the conversion of the underlying bankruptcy case, an order purporting to dismiss the Second Amended Complaint as to the Debtor fails to provide any effective relief—as the Debtor is no longer a party in interest in this Adversary Proceeding.

REVIEW OF THE MOTION TO DISMISS

The court having invested the time reviewing the Motion to Dismiss, and both Defendants and Debtor having spent time in raising and addressing the issues, the court includes in this ruling the tentative analysis of the Motion for the benefit of Defendants and the Chapter 7 Trustee who must now investigate and act on these asserted rights of the bankruptcy estate.

No further pleadings have been filed since the February 16, 2017 hearing.

APPLICABLE LAW

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that a complaint have a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. Fed. R. Civ. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.*, citing to 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action").

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether a motion to dismiss is to be granted should be resolved in favor of the pleader. *Pond v. General Electric Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal, 129* S. CT. 1937, 1954 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 127 S. CT. 1955, 1964–66 (2007). ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment]' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

In ruling on a 12(b)(6) motion to dismiss, the Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court required to "accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory, or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

REVIEW OF MOTION MINIMUM PLEADING REQUIREMENTS

Federal Rule of Civil Procedure 7(b), which is incorporated in its entirety by Federal Rule of Bankruptcy Procedure 7007, states,

> "(b) Motions and Other Papers
>
> (1) In General. A request for a court order must be made by motion. The motion must:
>
> (A) be in writing unless made during a hearing or trial;
>
> (B) **state with particularity the grounds for seeking the order**; and
>
> (C) state the relief sought."

Fed. R. Civ. P. 7(b) (emphasis added). The same "state with particularity" requirement is included in Federal Rule of Bankruptcy Procedure 9013 for all motions in the bankruptcy case itself.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Federal Rule of Civil Procedure 7(a)(2)), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678–79. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is

plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plan statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

REVIEW OF MOTION

Defendants assert that each cause of action in Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendant asserts the following:

> A. "Plaintiffs' First Cause of Action for Declaratory Relief fails to state a claim upon which relief can be granted, pursuant to FRCP Rule 12(b)(6), because there is no actual controversy between the parties; the post-sale recording of a trustee's deed upon sale was privileged and did not violate the automatic stay; the sale was perfected as of the date of the sale, pursuant to California Civil Code § 2924h(c), and there was no automatic stay in effect at the time of the sale."

Motion to Dismiss, p. 2:16–27; Dckt. 66. The "grounds stated with particularity" in the Motion that the First Cause of Action fails to state a claim appear to be: (1) the post-sale recording of a trustee's deed upon sale was privileged and did not violate the automatic stay; and (2) the sale was perfected as of the date of the sale, pursuant to California Civil Code § 2924h(c), and there was no automatic stay in effect at the time of the sale.

> B. "Plaintiffs' Second Cause of Action for Violation of 11 U.S.C. 362(a) & (k) fails to state a claim upon which relief can be granted, pursuant to FRCP Rule 12(b)(6), because the post-sale recording of a trustee's deed upon sale was privileged and did not violate the automatic stay; the sale was perfected as of the date of the sale, pursuant to California Civil Code § 2924h(c), and there was no automatic stay in effect at the time of the sale."

Id., p. 3:1–10. The "grounds stated with particularity" in the Motion that the First Cause of Action fails to state a claim appear to be: (1) "the post-sale recording of a trustee's deed upon sale was privileged and did

not violate the automatic stay" and (2) "the sale was perfected as of the date of the sale, pursuant to California Civil Code § 2924h(c), and there was no automatic stay in effect at the time of the sale."

C. "Plaintiffs' Third Cause of Action for Slander of Title fails to state a claim upon which relief can be granted, pursuant to FRCP Rule 12(b)(6), because the post-sale recording of a trustee's deed upon sale was privileged and did not violate the automatic stay; the sale was perfected as of the date of the sale, pursuant to California Civil Code § 2924h(c), and there was no automatic stay in effect at the time of the sale."

Id., p. 3:13–22. The "grounds stated with particularity" in the Motion that the First Cause of Action fails to state a claim appear to be: (1) "the post-sale recording of a trustee's deed upon sale was privileged and did not violate the automatic stay" and (2) the sale was perfected as of the date of the sale, pursuant to California Civil Code § 2924h(c), and there was no automatic stay in effect at the time of the sale."

D. "Plaintiffs' Request for a Preliminary Injunction and Attorney's Fees and Costs are not Causes of Action but are types of relief that may be requested and therefore fail to state a claim upon which relief can be granted, pursuant to FRCP Rule 12(b)(6). Moreover, Plaintiffs fail to allege an underlying claim upon which said relief can be granted, because the post-sale recording of a trustee's deed upon sale was privileged and did not violate the automatic stay; the sale was perfected as of the date of the sale, pursuant to California Civil Code § 2924h(c), and there was no automatic stay in effect at the time of the sale."

Id., p. 3:26–27, 4:1–10. The "grounds stated with particularity" in the Motion that the First Cause of Action fails to state a claim appear to be: (1) the "claims" stated in the Fourth Cause of Action "are types of relief that may be requested and therefore fail to state a claim upon which relief can be granted;" (2) "Plaintiffs fail to allege an underlying claim upon which said relief can be granted, because the post-sale recording of a trustee's deed upon sale was privileged and did not violate the automatic stay;" and (3) "the sale was perfected as of the date of the sale, pursuant to California Civil Code § 2924h(c), and there was no automatic stay in effect at the time of the sale."

DISCUSSION

Plaintiff's bankruptcy case (No. 16-21305) was filed on March 2, 2016. An order dismissing the case for failure to timely file documents was entered on March 31, 2016. *Order*, Dckt. 18, Case No. 16-21305. That dismissal was vacated on April 5, 2016. *Order*, Dckt. 27, Case No. 16-21305.

Defendants have provided evidence that Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for GMAC Mortgage Corporation dba Ditech.com assigned its deed of trust to Defendant Partners for Payment Relief DE II, LLC on January 23, 2015. Exhibit 1, Dckt. 70. Notice of substitution of trustee from Partners for Payment Relief DE II, LLC to California TD Specialists was executed on July 10, 2015 (as noted by an exhibit filed by MERS relating to its Motion to Dismiss in this adversary proceeding). Exhibit C, Dckt. 51. California TD Specialists entered a Notice of Default on July 21, 2015, and entered a Notice of Trustee's Sale on January 7, 2016. Exhibits 2 & 3, Dckt. 70. That sale was

conducted on April 4, 2016. Exhibit 5, Dckt. 70. The Trustee's Deed Upon Sale states that California TD Specialists, as Trustee, granted and conveyed to Partners for Payment Relief DE II, LLC.

All five claims in this adversary proceeding will be resolved by determining whether recording the Trustee's Deed Upon Sale on April 6, 2016, violated the automatic stay.

As supporting authority for Defendants' position that the recording was not a violation of the automatic stay, Defendants direct the court to relevant decisions in their Memorandum of Points and Authorities. Dckt. 68. First, Defendants demonstrate that the recording date is retroactive to the Trustee's sale date as long as recordation of the deed occurred within fifteen days of the sale. *Davisson v. Engles (In re Engles)*, 193 B.R. 23, 27 (Bankr S.D. Cal. 1996). Second, recording a foreclosure sale deed within those fifteen days does not violate the automatic stay. *In re Stork*, 212 B.R. 970, 971 (Bankr. N.D. Cal. 1997). That non-stay-violating concept has been reaffirmed on multiple occasions. *See Shirazi v. Bank of Am. (In re Shirazi)*, No. CV 12-6597 CAS, 2013 WL 3070996, at *2 (C.D. Cal. June 18, 2013) ("Several decisions have considered the validity of a pre-petition trustee's sale where recordation of the [Trustee's Deed Upon Sale] occurs post-petition, and have overwhelmingly affirmed the validity of the sales. These decisions reason that . . . no violation of the automatic stay occurs due to the 'relation back' doctrine found in California Civil Code § 2924h(c).").

In the First Amended Complaint it is alleged:

1. The Chapter 13 Case was filed on March 2, 2016. FAC ¶ 31.

2. The Chapter 13 case was dismissed on March 31, 2016. FAC ¶ 34.

3. The nonjudicial foreclosure sale was conducted on April 4, 2016. FAC ¶ 36.

4. The court vacated the order dismissing the Chapter 13 case on April 5, 2016. FAC ¶ 37.

5. The trustee's deed for the nonjudicial foreclosure sale was recorded on April 6, 2016. FAC ¶ 38.

In support of the argument that the automatic stay was in effect when the Trustee's Deed Upon Sale was recorded, Plaintiff points to *In re Gonzalez*, 456 B.R. 429 (Bankr. C.D. Cal. 2011). Interestingly, not only does Debtor fail to give a citation to the *Gonzalez* decision, other that an apparent case number (6:11-BK-15665-mw) and not providing the research data base (such as West Law or LEXIS) or even the court for a PACER search, Debtor does not advise the court that the authority he cites **HAS BEEN REVERSED.** *See Quality Loan Serv. Corp. v. Gonzalez (In re Gonzalez)*, No. EDCV 11-1736 R, 2012 U.S. Dist. LEXIS 188105, 2012 WL 8262445 (C.D. Cal. June 14, 2012), holding (emphasis added):

> "After full consideration of the parties' briefs and the arguments of counsel, and for the reasons stated on the record at the hearing, the Court hereby REVERSES the Bankruptcy Court's order.

> The Bankruptcy Court erred in finding that the Trustee's Deed Upon Sale violated the automatic stay. The **post-petition issuance and recording of the Trustee's Deed did not violate the automatic stay**, because it related back to 8:00 a.m. on February 22, 2011, before Debtor's bankruptcy petition was filed**. See 11 U.S.C. § 362(b)(3); Cal. Civil Code § 2924h(c)**. The order of the Bankruptcy Court is therefore REVERSED.

Plaintiff also cites (incompletely) to *Frank v. Gulf States Fin. Co. (In re Frank)*, a Texas District case which Debtor ties to California Civil Code § 2924h governing bidding rules for a nonjudicial foreclosure sale. When one reads the *Frank* decision, it is clear that it has nothing to do with § 2924h or California foreclosure law. In addition to stating well established law that an order dismissing a bankruptcy case is effective upon issuance, the bankruptcy court in Texas further states:

> "Second, Debtor argues that even if the preceding reasons were not sufficient, the order of dismissal was vacated. Debtor argues that when the order of dismissal was vacated, all of its consequences (including termination of the automatic stay) were terminated. Therefore, Debtor argues the stay remained in effect because the vehicle remained as property of the estate.
>
> The Court also rejects this argument. **Once the stay has terminated, it is not reimposed by reinstating a case, at least not with respect to foreclosure sales that have occurred prior to the reinstatement.** See the cases cited above as authority for the proposition that the stay terminates immediately upon dismissal. See also *In re Nagel*, 245 B.R. 657 (D. Ariz. 1999).
>
> There are cases, such as *In re Nail*, 195 B.R. 922 (Bankr. N.D. Al. 1996) which hold that an order reinstating a case also reinstates the automatic stay with respect to creditor conduct that occurs subsequent to the reinstatement. The Court specifically declines to consider that issue here, and holds merely that **even if a case is reinstated, the automatic stay is not retroactively reinstated with respect to creditor conduct that occurred between the dismissal and the reinstatement.**

In re Frank, 254 B.R. at 374 (emphasis added).

In Debtor's bankruptcy case the court granted Defendant Payment Relief DE II, LLC's Motion for Relief on July 19, 2016, the court found that 11 U.S.C. § 549(c) indicates that the automatic stay was not in effect after dismissal of the case. 16-21305; Order, Dckt. 96, Civil Minutes, Dckt. 91. Therefore, the court ruled that the automatic stay "was terminated by operation of law" on March 31, 2016, with the property being abandoned to Debtor. *Id.* (citing *Aheong v. Mellon Mortg. Co. (In re Aheong)*, 276 B.R. 233 (9th Cir. 2002)). The court further ordered that the stay was vacated to allow Defendant Relief DE II, LLC to take such actions as appropriate to obtain possession of the Property.

Viewing the issues in a light most favorable to Plaintiff, Plaintiff has not established that the automatic stay was in effect when the Trustee's Deed Upon Sale was recorded on April 6, 2016. Defendants, on the other hand, have provided supporting facts and case law to show that the automatic stay

was not in effect when the deed was recorded. The Motion to Dismiss is warranted because Defendants have shown—pursuant to Federal Rule of Civil Procedure 12(b)(6)—that Plaintiff has failed to state a claim upon which relief could be granted.

Lack of Standing by Plaintiff-Debtor,
Dismissal Without Prejudice

Though the merits of Plaintiff-Debtor's contentions are in the Amended Complaint, they are not parties in interest, their bankruptcy case having been converted to one under Chapter 7. They lack the standing to prosecute this Complaint and Adversary Proceeding.

The federal courts are not a forum for the theoretical or one in which parties who do not have rights attempt to litigate on behalf of others who are not before the court (with limited exceptions to this rule, such as class action and other special representative proceedings authorized by Congress). Standing must be determined to exist before the court can proceed with the case. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771 (9th Cir. 2006).

One of the first things that a law student learns about American Jurisprudence is that the law does not condone the "officious intermeddler." One is not allowed to assert claims or rights in which he or she has no interest. In the federal courts, this is the Constitutional requirement of "standing."

> Article III of the Constitution confines federal courts to decisions of "Cases" or "Controversies." Standing to sue or defend is an aspect of the case-or-controversy requirement. (Citations omitted.) To qualify as a party with standing to litigate, a person must show, first and foremost, "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent.' (Citations omitted.)...Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess 'a direct state in the outcome.' (Citations omitted.)

Arizonans for Official English v. Arizona, 520 U.S. 43, 64, 117 S.Ct. 1055 (1997).

Though neither the Plaintiff-Debtor nor Defendants have identified the issue of standing, the court may raise it *sua sponte*, Rule 12(h)(3), Federal Rules of Civil Procedure[1]. A person must have a legally protected interest, for which there is a direct stake in the outcome. *Arizonans for Official English*, 520 U.S. at 64. The Supreme Court provided a detailed explanation of the Constitutional case in controversy requirement in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 663, 113 S.Ct. 2297 (1993). The party seeking to invoke federal court jurisdiction must demonstrate (1) injury in fact, not merely conjectural or hypothetical injury, (2) a causal relationship between the injury and the challenged conduct, and (3) that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative. *Id*. In determining whether the plaintiff has

[1] As made applicable to this Adversary Proceeding by Rule 7012, Federal Rules of Bankruptcy Procedure.

the requisite standing and the court has jurisdiction, the court may consider extrinsic evidence. *Roberts v. Corrothers*, 812 F.2d, 1173, 1177 (9th Cir. 1987).

The standing requirement is not merely a "procedural issue," but a fundamental requirement arising under the Constitution.

Plaintiff-Debtor does not have standing to assert alleged violations of the automatic stay as to the asserted property of the bankruptcy estate. The court has allowed for the real party in interest, Susan Smith, the Chapter 7 Trustee, to substitute in as the real party in interest. Fed. R. Civ. P. 17(a)(3), Fed. R. Bankr. P. 7017. No substitution has been made by the Trustee.

There being no real party in interest to adjudicate the rights and interests concerning what is asserted to be property of the bankruptcy estate, the dismissal is without prejudice.

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Adversary Proceeding filed by Defendants having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion to Dismiss is granted, and the First Amended Complaint and Adversary Proceeding are dismissed without prejudice.

All other defendants having been previously dismissed, the Clerk of the Court shall close the file for this Adversary Proceeding.

3. **15-90811-E-7** **ASSN., GOLD STRIKE** **CONTINUED PRE-TRIAL**
15-9061 **HEIGHTS HOMEOWNERS** **CONFERENCE RE: NOTICE OF REMOVAL**

INDIAN VILLAGE ESTATES, LLC V. GOLD STRIKE HEIGHTS

11-18-15 [1]

Final Ruling: No appearance at the April 6, 2017 Pretrial Conference is required.

Plaintiff's Atty: James L. Brunello
Defendant's Atty: Amanda Griffins; Peter G. Macaluso
Trustee's Atty: Clifford W. Stevens

Adv. Filed: 11/18/15
Answer: none

Nature of Action:
Determination of removed claim or cause

The Pre-Trial Conference is continued to 2:00 p.m. on April 27, 2017.

Notes:
Continued from 2/23/17 by request of Parties [specially set in Sacramento, CA]

Defendant Community Assessment Recovery Services' Pretrial Conference Statement filed 2/13/17 [Dckt 98]

[ELG-2] Defendant's Ex Parte Application for Continuance of Date and Location of Pretrial Conference filed 2/15/17 [Dckt 102]; Order granting filed 2/16/17 [Dckt 106], set for 4/6/17 at 11:00 a.m. in the court in Sacramento, California.

4. **15-90811-E-7** **ASSN., GOLD STRIKE** **CONTINUED STATUS CONFERENCE**
16-9002 **HEIGHTS HOMEOWNERS** **RE: COMPLAINT**
FARRAR V. MASSELLA ET AL **1-13-16 [1]**

Final Ruling: No appearance at the April 6, 2017 Status Conference is required.

Plaintiff's Atty: Clifford W. Stevens
Defendant's Atty: James L. Brunello

Adv. Filed: 1/13/16
Answer: 2/23/16 [Robinson Enterprises Profit Sharing Plan]
2/23/16 [Johnny Massella; Mary Massella]

Counterclaim Filed: 2/23/16 [Robinson Enterprises Profit Sharing Plan]
Answer: None
Counterclaim Dismissed 5/2/16

Counterclaim Filed: 2/23/16 [Johnny Massella; Mary Massella]
Answer: None
Counterclaim Dismissed 5/2/16

Nature of Action:
Validity, priority or extent of lien or other interest in property

The Pre-Trial Conference is continued to 2:00 p.m. on April 27, 2017, to be conducted in conjunction with the pretrial conference in Adv. Pro. No. 15-9061.

Notes:
Continued from 2/23/17 to be conducted in conjunction with the continued Pre-Trial Conference in Adversary Proceeding 15-9061 [specially set in Sacramento, CA].