

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:

Daniel Borsotti

Debtor(s).

Case No.: 2:17-bk-16088-BB

CHAPTER 7

**ORDER DENYING DEBTOR'S
"EMERGENCY" EX PARTE APPLICATION
FOR STAY OF ENFORCEMENT OF
JUDGMENT PENDING APPEAL [DOC. #52]**

(No hearing required)¹

The Court, having reviewed and considered the debtor's August 2, 2017 "'Emergency' Ex Parte Application for Stay of Enforcement of Judgment Pending Appeal; Points and Authorities in Support Thereof, Declaration of Daniel Borsotti" (the "Motion") [Docket No. 52], the debtor's August 2, 2017 memorandum in support of the Motion [Docket No. 53], and this Court's records and files in the above-entitled chapter 7 bankruptcy case, hereby makes the following findings of fact and conclusions of law:

¹ Although the caption page of debtor's emergency motion/ex parte application refers to a hearing date of August 4, 2017, debtor did not comply with the procedures set forth in this Court's local rules for obtaining a hearing date on an emergency motion. Therefore, no hearing was or will be conducted on August 4, 2017 with regard to this motion.

- 1 1. On July 12, 2017, this Court entered an order (the “Stay Order”) [Docket No.
2 34] granting Nationstar Mortgage LLC (“Nationstar”) relief from the automatic
3 stay to proceed with a foreclosure with regard to the real property located at
4 27508 Sycamore Creek Drive, Santa Clarita, CA 91354 (the “Property”).
- 5 2. On July 24, 2017, the debtor filed a motion for reconsideration of the Stay
6 Order [Docket No. 40].
- 7 3. The Court construed portions of the debtor’s motion for reconsideration as a
8 motion for a stay pending appeal of Stay Order. See Order Denying Debtor’s
9 Motion for Reconsideration for Want of Jurisdiction; Order Denying Debtor’s
10 Motion for Stay Pending Appeal (the “July 27 Order”) [Docket No. 46].
11 Accordingly, the Motion constitutes the debtor’s second request for a stay
12 pending appeal of the Stay Order from this Court.
- 13 4. Although the Motion seeks a stay of execution under sections of the California
14 Code of Civil Procedure that are inapplicable in a federal court, the Court has
15 evaluated the merits of the Motion as if it had been brought under the
16 applicable provisions of federal law.
- 17 5. As the Court explained in the July 27 Order, to obtain a stay pending appeal,
18 a movant must demonstrate that: (1) he has a strong likelihood of prevailing
19 on the merits of his appeal; (2) he will suffer irreparable injury if the stay is
20 denied; (3) issuance of the stay will not substantially injure the other party to
21 the appeal; and (4) issuance of the stay will not harm the public interest. See
22 Lair v. Bullock, 697 F.3d 1200 (9th Cir. 2012); In re Wymer, 5 B.R. 802, 806
23 (Bankr. 9th Cir. 1980).
- 24 6. The only comprehensible arguments that debtor advanced in his opposition to
25 Nationstar’s motion for relief from stay (the “Stay Motion”) [Docket No. 14]
26 were that (a) Nationstar lacked standing to proceed with its foreclosure and
27 (b) the debtor had not received adequate notice of the hearing on the Stay
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Motion. See Reponse to Motion Regarding the Automatic Stay and Declaration(s) in Support [Docket No. 20].

7. The Court found at the hearing on the Stay Motion, based on the evidence offered by Nationstar in support of that motion, that:

- a. debtor executed a promissory note (the “Note”) in favor of Washington Mutual Bank (“WaMu”);
- b. WaMu endorsed that promissory note in blank, making it a bearer instrument;
- c. debtor executed a deed of trust with regard to the Property in favor of WaMu (the “Deed of Trust”);
- d. the Federal Deposit Insurance Company (the “FDIC”) was appointed receiver for WaMu;
- e. the FDIC assigned the Deed of Trust to JP Morgan Chase Bank (“Chase”);
- f. Chase assigned the Deed of Trust to Nationstar; and
- g. Nationstar has possession of the Note.

8. By virtue of the foregoing, Nationstar established at the hearing on the Stay Motion that it had a colorable claim that it was the holder of the Note and Deed of Trust and therefore that it had prudential standing to proceed with the Stay Motion under the reasoning of the Ninth Circuit in Arkison v. Griffin (In re Griffin), 719 F.3d 1126 (9th Cir. 2013) (adopting with approval the holding of Veal v. American Home Mortgage Servicing (In re Veal), 450 B.R. 897 (Bankr. 9th Cir. 2011)).

9. The Court further found at the hearing on the Stay Motion (the “Hearing”) that any alleged failure to serve debtor with the Stay Motion in a timely manner²

² The proof of service attached to the Stay Motion reflects that Nationstar served its moving papers on the debtor on June 9, 2017 at the Property, which was the same address shown for the debtor on the debtor’s petition and the same address that the Court showed for the debtor in CM/ECF at that time. The debtor claimed that he never received this

1 was not prejudicial and did not deprive the debtor of due process because the
2 debtor acknowledged that he had obtained a copy of the Stay Motion, and
3 debtor had obtained that copy in time to submit a detailed, written opposition
4 to the Stay Motion and to appear at the Hearing

5 10. When asked by the Court at the Hearing to articulate what, if any, additional
6 arguments or evidence he would offer in opposition to the Stay Motion if the
7 Court were to continue the Hearing, the debtor was either not able or not
8 willing to explain what such an argument might be. For example, the debtor
9 refused to state whether he ever actually borrowed any money or obtained a
10 loan in any amount in connection with his purchase of the Property and
11 claimed not to understand what the Court meant by the complex legal
12 concept of getting a loan or borrowing money.

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14 11. By way of support for his contention that he is likely to prevail on the merits of
15 his appeal of the Stay Order, the debtor refers the Court to a "Forensic Audit
16 attached to Borsotti's Motion for Reconsideration, and all other evidence
17 based on fraud in the execution of the purported loan." Motion, p. 3, at lines
18 13 through 15. At no time has the debtor presented any evidence of any
19 fraud in the execution of the purported loan.

20 12. The "Forensic Audit" referenced in the foregoing paragraph was never offered
21 into evidence at or before the Hearing. However, had the debtor attempted to
22 offer that document in connection with consideration of the Stay Motion, it
23 would not have been admissible for the reasons set forth below.

24 13. The "Forensic Audit" is a report entitled, "Chain of Title Analysis & Mortgage
25 Fraud Investigation," prepared for the debtor by an individual whose name is
26 Joseph R. Esquivel, Jr. In that document, Mr. Esquivel opines that the Note
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service copy. On the same day that he filed his opposition to the Stay Motion (on June 27, 2017), he filed a change of address. On July 6, 2017, Nationstar filed an additional proof of service showing that it had served the debtor at this new address on July 6, 2017.

1 and Deed of Trust are unenforceable under various provisions of the United
2 States Code, the Uniform Commercial Code and California state law.

3 14. As United States Magistrate Judge Mark Lane explained in a report and
4 recommendation to the United States District Court for the Western District of
5 Texas with regard to a comparable report that the same Mr. Esquivel had
6 prepared for a different borrower:

7 Esquivel's proposed testimony concerns issues of chain of title, the
8 proposed strategy behind "loan modifications," and "common practices of
9 Banks to harm buyers." [Citations omitted.] In his report, Esquivel opines
10 that Defendants do not have standing to foreclose because Defendants do
11 not and cannot own the Note and the Deed of Trust was not properly
12 assigned, thereby rendering the lien void. [Citations omitted.]

13 * * * *

14 Even assuming, over Defendant's objections, that Esquivel's qualifications
15 are sufficient to form a reliance opinion on relevant issues in this case, the
16 undersigned finds that his testimony and report must be excluded as
17 improper legal conclusions. The Fifth Circuit has "consistently held that
18 legal opinions are not a proper subject of expert testimony because they
19 do not assist the trier of fact in understanding the evidence, instead merely
20 telling the trier of fact what result to reach." [Citations omitted.]

21 * * * *

22 Esquivel's relevant conclusions amount to his application of the facts to
23 Texas property law and local government codes. . . . Esquivel's opinions
24 represent impermissible legal conclusions.

25 King v. Deutsche Bank Nat'l Trust Co., 2016 U.S. Dist. LEXIS 79971 (W.D.
26 Tex. February 23, 2016). Judge Lane's recommendation on this issue was
27 adopted by United States District Court Judge Lee Yeakel in King v. Deutsche
28 Bank Nat'l Trust Co., 2016 U.S. Dist. LEXIS 79956 (W.D. Tex. April 12,
2016).

15. Although the Court in the King case was applying Fifth Circuit law, the same
principle applies in the Ninth Circuit. See Mukhtar v. California State Univ.,
299 F.3d 1053, 1066 n.10 ((9th Cir. 2002) ("an expert witness cannot give an
opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law.

E.g., McHugh v. United Serv. Auto. Ass'n, 164 F.3d 451, 454 (9th Cir. 1999);
United States v. Duncan, 42 F.3d 97, 101 (2d Cir. 1994)” (emphasis in
original)).

16. Mr. Esquivel’s report is the only support that debtor offers in the Motion for his
contention that he is likely to prevail on the merits of his appeal of the Stay
Order.

17. In the memorandum that debtor filed in support of the Motion [Docket No. 53],
debtor offers an additional argument (as well as various inspiring Biblical
quotations), at page 2, lines 2 through 4: “**BANKS MUST PRODUCE THE
ORIGINAL PROMISSORY NOTE.**” This is an inaccurate statement of the
law.

18. In Gomes v. Countrywide, 192 Cal. App. 4th 1149 (2011), the California Court
of Appeals held (in affirming the dismissal of causes of action alleging that a
lender’s servicing agent lacked authority to foreclose on the plaintiff’s real
property) that the argument that a lender or its agent may not foreclose until it
has produced the original of the note “has been uniformly rejected.”

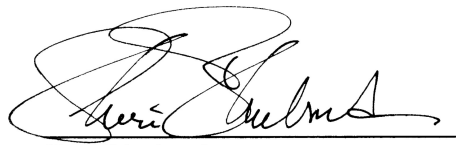
19. Debtor has failed to establish the required showing on the first of the
elements necessary to obtain a stay pending appeal – that there is a strong
(or even a substantial) likelihood that he will prevail on the merits of his
appeal.

20. The entirety of the debtor’s argument concerning the remaining elements
necessary to establish a right to a stay pending appeal is quoted here:
“Borsotti believes that NATIONSTAR will not be prejudiced by the delay of an
Appeal, nor will NATIONSTAR suffer the great irreparable harm that Borsotti
will.” Motion, p. 3, lines 20-23. There is no discussion in the Motion of the
element of public interest.

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2 In light of the foregoing, the Court finds that the debtor has failed to make the
3 showing necessary to warrant the issuance of a stay pending appeal, and, accordingly,
4 the Motion is **DENIED**.

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25 Date: August 3, 2017

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27 Sheri Bluebond
28 United States Bankruptcy Judge