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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE CLARENCE THOMAS, Debtor.	BAP No. WO-13-029
CLARENCE THOMAS, Appellant, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, Appellee.	Bankr. No. 10-17039 Chapter 13 OPINION*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before KARLIN, ROMERO, and JACOBVITZ, Bankruptcy Judges.

KARLIN, Bankruptcy Judge.

The sole issue on appeal is whether the bankruptcy court's finding that the creditor presented sufficient evidence to establish it had a colorable claim to enforce a promissory note was clearly erroneous. Because the finding is fully supported by the evidence, we AFFIRM.[1]

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* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

[1] The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R.

(continued...)

I. Background

The Appellant, Clarence Thomas ("Debtor"), appeals the bankruptcy court's order finding that Appellee, Federal National Mortgage Association ("FNMA") had standing, as "a party in interest," to obtain an order under 11 U.S.C. § 362(j).[2] This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[3] Neither party elected to have this appeal heard by the district court, thus consenting to review by this Court.[4]

Debtor's current appeal follows lengthy litigation in both Oklahoma state court and the bankruptcy court, and it is Debtor's second appeal in this case. Our first order[5] supplies much of the necessary background. It essentially recites that in September 2007, Debtor executed a note and mortgage on a home. The lender and note payee was Freedom Mortgage Corp. ("Freedom") and the mortgagee was

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[1] (...continued)
Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

[2] When a debtor files bankruptcy, the automatic stay (11 U.S.C. § 362) stops most collection actions against the debtor and property of the estate unless and until a party in interest obtains relief from that stay. When Congress amended the Bankruptcy Code in 2005, it added a provision (11 U.S.C. § 362(j)) to require courts to issue comfort orders confirming the automatic stay had either terminated or never arose in certain instances when successive cases were commenced by repeat filers. "The orders are entered primarily for a third party's benefit, often to help a sister state court attempting to determine whether it can proceed with a pending action, such as a foreclosure." *In re Hill*, 364 B.R. 826, 828 (Bankr. M.D. Fla. 2007).

[3] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed R. Bankr. P. 8002.

[4] Debtor filed a motion for leave to appeal the March 28, 2013 order on April 11, 2013, 14 days after its entry, then filed an untimely notice of appeal on April 12, 2013, 15 days after the entry. This Court issued an order to show cause for timeliness, which was resolved by an order on May 29, 2013, construing the motion for leave as a timely notice of appeal, and denying the motion for leave as unnecessary.

[5] *In re Thomas*, 469 B.R. 915, 917-18 (10th Cir. BAP 2012).

MERS, acting as Freedom's nominee. Debtor defaulted on the loan after making only 11 payments on the note. Soon thereafter, Freedom endorsed the note in blank, making it a bearer instrument under Oklahoma law, and transferred possession to Chase Home Finance, LLC ("Chase"). In February 2009, Chase filed a state court foreclosure action against Debtor, resulting in a foreclosure judgment in June 2009. Debtor did not appeal that order. Before the sheriff's sale could be completed, however, Debtor filed a previous Chapter 13 petition in August 2009, but it was dismissed in August 2010.

Shortly after Debtor's first bankruptcy case was dismissed, Chase apparently transferred the original note and mortgage to FNMA. The assignment of the note and mortgage to FNMA, which indicates an effective date of August 21, 2010, was recorded on September 13, 2010 (but stated the assignment was from MERS to FNMA rather than from Chase to FNMA).

Debtor then filed the current Chapter 13 bankruptcy in November, 2010. FNMA filed a proof of claim in the second bankruptcy and attached to its claim copies of the note (without the endorsement by Freedom) and the recorded assignment of mortgage from MERS to FNMA. Debtor objected to the claim and also filed an adversary proceeding against Freedom, Chase, MERS, and FNMA, seeking a declaration that none of the defendants had any enforceable secured interest in the property.

Immediately after Debtor filed the adversary proceeding, FNMA sought a comfort order verifying that the automatic stay had expired. On the same day, the bankruptcy court entered the comfort order, "finding that [t]he stay imposed against [FNMA] with regard to its lien on the Property terminated by operation of law on December 22, 2010," as Debtor had filed no motion to extend the stay.[6]

Debtor appealed the comfort order, arguing that the bankruptcy court

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[6] *Id.* at 918 (internal quotation marks omitted).

erroneously granted relief to FNMA without first establishing FNMA had standing, and that FNMA, in fact, lacked standing to seek the comfort order. Another panel of this Court agreed that the bankruptcy court had failed to determine whether FNMA had standing before it issued the comfort order and remanded the matter to the bankruptcy court to determine FNMA's standing. In so doing, we held that a party must be "a party in interest" under § 362(j) in order to seek a comfort order.

Following remand, the bankruptcy court conducted an evidentiary hearing concerning FNMA's standing, both for the purposes of § 362(j) and with respect to a number of other pending matters between the parties. At the hearing, FNMA introduced into evidence the mortgage and the original note, blue ink signatures affixed, along with testimony regarding the note's admittedly convoluted chain of title. Debtor argued the note might not be authentic, suggesting color copy machines could churn out copies and maybe this was one of those. He refused to verify that the signature on the note admitted into evidence was his signature. By contrast, his wife testified the signatures on both the note and mortgage appeared to be hers and her husband's. In addition, the bankruptcy court required both Debtor and his wife to produce their driver's licenses for examination and, after comparing the signatures on the licenses with the signatures on the note and mortgage, concluded the signatures were "essentially identical."[7] The court also compared the Debtor's signature on pleadings he had filed in his bankruptcy case, confirming the signatures were the same.[8] Debtor produced no evidence to suggest anyone else had the "real" original. The bankruptcy court ultimately determined FNMA had physical possession of the original note, endorsed in blank, and had standing to seek the comfort order. It is that determination Debtor

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[7] Aplt. App. at 102.

[8] *Id.* at 103-04.

now appeals.

II. Issue and Standard of Review

In addressing Debtor's last appeal, we held FNMA "must prove that it has a colorable claim . . . in order to establish its standing to seek a § 362(j) comfort order. Proof of the existence of a colorable claim in this case necessarily requires [FNMA] to prove that it has a facially valid security interest under Oklahoma law."[9] Our prior opinion also makes clear FNMA would be required to show it had standing as of May 18, 2011, when it sought the comfort order.[10]

As the parties agree,[11] under Oklahoma's version of the Uniform Commercial Code a note endorsed in blank is a bearer instrument that may be enforced by its holder.[12] The parties also agree the note submitted into evidence at the evidentiary hearing was endorsed in blank and was held by FNMA. This appeal, then, turns on two factual questions: 1) was the note submitted by FNMA, which it claimed to be the original, authentic; and 2) did FNMA have possession of the original note when it filed its pleadings on May 18, 2011.

The bankruptcy court's factual findings underpinning a standing determination are reviewed for clear error.[13] Under the clearly erroneous standard, we "will reverse the district court's finding only if it is without factual

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[9] *In re Thomas,* 469 B.R. at 923 (internal quotation marks and footnote omitted).

[10] *Id.* at 920.

[11] Aplee. Br. at 9, Aplt. Reply Br. at 5.

[12] In Oklahoma, one who is in possession of a note endorsed in blank is a holder. *Deutsche Bank Nat'l Trust Co. v. Richardson*, 273 P.3d 50, 53 (Okla. 2012). *See also* Okla. Stat. tit. 12A, § 1-201(b)(21) (2006). The holder of a note or a non-holder in possession of the note is entitled to enforce a note. *MidFirst Bank v. Wilson*, 295 P.3d 1142, 1144 (Okla. Civ. App. 2012) (citing Okla. Stat. tit. 12A, § 3-301 (1992)).

[13] *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 363 F.3d 1072, 1074 (10th Cir. 2004) (holding jurisdictional findings of fact are reviewed for clear error).

support in the record or if, after reviewing all the evidence, we are left with a definite and firm conviction that a mistake has been made."[14]

III. Legal Analysis

Debtor's arguments essentially boil down to two. First, he argues the bankruptcy court erred when it determined the note was authentic because he claims FNMA did not adequately explain how it came to be in possession of the note, and because the note should not have been admitted into evidence as self-authenticating under Rule 902(9) of the Federal Rules of Evidence. He next argues that, absent any additional documentation from FNMA supporting its claim that the note presented to the Court was, in fact, the original, it might not be the one he actually signed, so FNMA should not be allowed to enforce it. Neither of his arguments have merit.[15]

Both of Debtor's arguments essentially address the sufficiency of the evidence received by the bankruptcy court. Although Debtor correctly notes FNMA did not offer additional documentary evidence beyond the note itself, the bankruptcy court's determinations that the note FNMA submitted was authentic and that FNMA had timely possession of it, are amply supported by the record. The record shows FNMA produced an apparently original note with blue ink signatures by Debtor and his wife. And Debtor never denies he signed a note that

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[14] *United States v. Madrid*, 713 F.3d 1251, 1256-57 (10th Cir. 2013).

[15] Debtor makes an additional argument that the bankruptcy court erred when it found appellee had standing even though neither the endorsed note nor the state court judgment was attached to the proof of claim. He seems to claim that because the documents attached to the proof of claim did not show FNMA owned the note when it filed the proof of claim, FNMA is thus prevented from later pursuing a comfort order. But this appeal concerns only whether FNMA had established a colorable claim of standing to enforce the note and mortgage at the time it sought the comfort order. That is all FNMA was required to prove to obtain its § 362(j) comfort order. Whether Debtor could ultimately prevail on his objection to that claim is simply immaterial to this analysis. In addition, this argument is basically just another version of the argument we have addressed and rejected–that the existence of a convoluted chain of title for this note somehow prevents FNMA from enforcing the bearer paper it clearly now possesses.

looked just like the one admitted into evidence, only that he would never be able to definitively agree that the exhibit is the one he actually signed because of "sophisticated" copiers. But the bankruptcy judge reviewed the note offered into evidence, and then carefully verified the signatures by comparing them with Debtor's and his wife's drivers' licenses and with other court documents. Based on his careful review, he determined to his own satisfaction that the note was in fact the original signed by Debtor.

The bankruptcy court's decision was buttressed by the testimony from an attorney (Michael George) who represented FNMA in some of its prior dealings on this note. He testified he was familiar with this case and he had personally received the original note from the custodian for Chase on or about July 16, 2010. This extrinsic evidence, taken as a whole, also supports the bankruptcy court's factual determination. Nothing in the record convinces us that any error has been made, let alone clear error.

Debtor argues the bankruptcy court erred by admitting the note into evidence as a self-authenticating document under Rule 902(9); this argument fails for two reasons. First, the note is a self-authenticating document. Under Rule 902(9), commercial paper, signatures on commercial paper, and related documents are self authenticating to the extent allowed by general commercial law.[16] The relevant portion of the Oklahoma version of the Uniform Commercial Code provides in pertinent part:

> In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the

[16] Fed. R. Evid. 902(9).

signature.[17]

The note is an instrument.[18] Here, Debtor cannot point to any denial of the authenticity of the signatures on the note in his pleadings, and so the authenticity of the signatures to the note are deemed admitted, rendering the note itself authentic. And second, even if the note were not self-authenticating, the record offers ample basis for its admission under Rule 901(a). As discussed above, FNMA"produce[d] evidence sufficient to support a finding that the item is what the proponent claims it is."[19] Accordingly, the bankruptcy court did not err in admitting the note.

Finally, Debtor argues the bankruptcy court's decision relies on a chain of title to the note that conflicted with FNMA's evidence and past filings. In particular, Debtor focuses on how Chase Bank fits into the evidence, contending FNMA asserted it took possession of the note in 2007, while a 2009 state court judgment determined Chase was the owner of the note at that time and an assignment of the note and mortgage recorded on September 13, 2010, states (apparently incorrectly)[20] that the assignment was from MERS to FNMA. Without a doubt, this history is convoluted, and, in some aspects, contradictory. But nothing about the chain of title convinces us the court erred when it determined the note admitted into evidence was the original and FNMA possessed the original note when it sought the comfort order. Debtor simply cannot explain how Chase's prior involvement detracts from the fact that FNMA now holds the original note and, as the holder of bearer paper, has the right to enforce the note.

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17 Okla. Stat. tit. 12A, § 3-308(a) (1992).

18 Okla. Stat. tit. 12A, § 3-104 (1992).

19 Fed. R. Evid. 901(a).

20 *In re Thomas*, 469 B.R. at 918 (stating the assignment listed MERS but should have listed Chase).

Under any of the various histories offered by FNMA, it was in possession of the original note by, at the latest, July 2010—eleven months before it sought the comfort order, and Debtor presented no evidence remotely suggesting any other potential note holders have made any claim to the note or demand upon him.[21] As the Tenth Circuit has recently confirmed, FNMA need only "satisf[y] the low threshold showing that it possessed a colorable claim of a lien on property of the estate,"[22] and the creditor's conflicting positions regarding the note's chain of title does not diminish the fact that FNMA is in possession of the facially valid original note.[23] Mere physical possession of the authentic note is all that is required for a colorable claim of standing to enforce the note and mortgage and all that is required to seek a § 362(j) comfort order. The ambiguities in the note's chain of title are simply immaterial in this context.

At their core, Debtor's arguments all assert that although the note produced by FNMA looks real and the signature looks like his signature, and he did in fact execute an identical note and mortgage with the same terms, and no one has sought to collect the note from him other than FNMA (and before it, Chase), the current note could be fake, or FNMA may have obtained it in such a way that it cannot enforce it. But these claims, weak as they are, are more appropriately raised in state court. As we stated in our prior decision, "stay proceedings only determine whether the party seeking relief has a colorable claim, which is then

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[21] Chase, the only party that might be in a position to argue for an interest, has specifically denied any current interest in the note and mortgage, stating it had transferred possession of those documents to FNMA between Debtor's 2009 and 2010 bankruptcy filings. Aplt. App at 113.

[22] *In re Castro*, 503 F. App'x 612, 615 (10th Cir. 2012) (internal quotation marks omitted).

[23] *Id.*

fully adjudicated in the state court."[24] Here, it is clear FNMA has established at least a colorable claim of standing.

IV. Conclusion

Based on the foregoing analysis, the bankruptcy court did not err in finding FNMA had standing to seek a comfort order. Accordingly, we AFFIRM.

[24] *In re Thomas*, 469 B.R. at 922-23 (internal quotation marks omitted).