Still Standing: A North Carolina Bankruptcy Perspective

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Throughout the challenging ambit surrounding the mortgage servicing industry in the past five years many prevalent issues have been resolved, standards have become universal, and awareness and transparency is preached around every corner; however a few issues will not go away.

On top of that list is the issue of standing. Fortunately for North Carolina creditors' attorneys we have finally been awarded some tangible guidance and explanation in what appeared to be a never-ending standing conundrum.

Taken from a collection of similar Chapter 7 cases, the Western District of North Carolina produced a bankruptcy decision that is both timely and on point regarding who has standing to file a motion for relief. "In each case, the debtor is in default on the mortgage note. Payments are not being made, and the secured claim is not being adequately protected." *In re Sears*, 12-32315, 2013 WL 2147803, 1 (Bankr. W.D.N.C. May 16, 2013). These cases would have been granted relief without delay, albeit the filing of a common objection from a few Chapter 7 trustees

Nonetheless, with the expectancy and redundancy of a broken record, and in an attempt to create precedent, two Chapter 7 trustees objected to several creditors' motion for relief on the grounds that the party seeking relief did not have legal standing to assert the motion. *Id*. Specifically the trustees stated the Movants were not the recorded assignees and, therefore, not entitled to foreclose.

Amusingly, the court questioned the motive of the trustees and examined what the trustees and bankruptcy estate would gain from their objection. The court appeared to find the trustees' objections unusual because "in each case exists a valid, enforceable note and recorded deed of trust encumbering the property, which is not being adequately protected. " Id at 2.

Seemingly, the trustees' approach was misguided because the question before the court was not whether the secured creditor could proceed with foreclosure but rather they were entitled to relief; two separate questions. The trustees' objection were rejected by the court, which held , "[t]he North Carolina Legislature codified the principle that an assignment of deed of trust is unnecessary for the enforcement of a promissory note if it has been transferred from the original beneficiary to another party. "*Id* at 9. Thus, the court's opinion left us with some useful precedent.

The court held that "a creditor need only show that it has a colorable claim to the property to seek relief from stay" and in order to have a colorable claim a creditor must be a party in interest. *Id* at 7. The court continued by establishing three plausible ways in which a party can be a party

in interest; (1) the party is the holder of the negotiable instrument, (2) the party is the loan servicer, or (3) the party is a successor entity. *Id* at 8.

The court decisively held that the holder of a promissory note does not have to produce the original note in order to have standing to seek relief from stay. *Id* at 8. In intense fashion the court went on to provide that, "[the] constant demands by the borrowers, trustees, or even courts for the production of original promissory note are burdensome to the a creditor and usually unnecessary in a relief from stay context." *Id* at 9. The court is precise in holding that the unprovoked and superfluous demand for the original note is unwarranted, "unless there is direct contrary evidence that the photocopy of a note is not the exact copy of the original note, the creditor does not need to present the original." *Id* at 9. Undoubtedly, this is a step in the right direction and holdings such as these will be useful in other contested bankruptcy matters.

In conclusion, not only is this a great win for North Carolina creditors' attorney, but it also provides some needed guidance from the court. With any luck this decision will lead to a smoother motion for relief process in North Carolina.