

FILED

DEC 15 2016

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: REGINALD ESCOBAR SILVA;
CARLITA MARIE SILVA,

Debtors,

CARLITA MARIE SILVA,

Appellant,

v.

MBB PROPERTIES, LLC,

Appellee.

No. 15-56123

D.C. No. 2:15-cv-02061-AB

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Andre Birotte, Jr., District Judge, Presiding

Argued and Submitted May 5, 2016
Pasadena, California

Before: BYBEE and N.R. SMITH, Circuit Judges, and STEIN,** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Sidney H. Stein, United States District Judge for the Southern District of New York, sitting by designation.

The issue on appeal is whether the exception to the automatic stay at 11 U.S.C. § 362(b)(24) exempts a good faith purchaser's recording of a trustee's deed from the statutory automatic stay of proceedings against a person who has already filed for bankruptcy protection.¹ 11 U.S.C. § 362(a)(3) provides that the filing of a bankruptcy petition operates as a stay of "any act to obtain possession of property of the [bankruptcy] estate . . . or to exercise control over property of the estate." 11 U.S.C. § 362(b)(24) provides that the filing of a petition in bankruptcy does not operate as a stay "under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549."

1. The transfer to the Bollags is not avoidable by the trustee under section 549 because section 549(c) provides that "a transfer of an interest in real property to a good faith purchaser" who does not have knowledge of the bankruptcy and who purchases for "present fair equivalent value" is not a voidable transfer "unless a copy or notice of the petition was filed."

The bankruptcy court found that the Bollags were indeed good faith purchasers who purchased the home for present fair equivalent value; they knew

¹ The bankruptcy court determined that the recordation of the Trustee's Deed was exempt from the automatic stay pursuant to section 362(b)(3). Because we conclude that the Trustee's Deed was exempt pursuant to section 362(b)(24), we need not decide whether the exception in section 362(b)(3) also applies.

nothing of the bankruptcy when they purchased the property; and they lacked actual or constructive notice of Silva's bankruptcy when the Trustee's Deed was recorded. The property's chain of title contained no notice of Silva's bankruptcy, and the Bollags and MBB only learned of Silva's bankruptcy days after they recorded their interest in the home. Therefore, the bankruptcy court did not err in concluding that the Bollags qualified for the exception in section 549(c) that prohibited the trustee from avoiding the property transfer to the Bollags.

Silva would have this Court impose a paradoxical condition precedent to the exception at 11 U.S.C. § 362(b)(24): In order for a transfer to be "not avoidable under section 549," as set forth in section 362(b)(24), it must be subject to section 549 in the first instance. Silva argues that section 362(b)(24)'s incorporation of section 549 is limited to debtor-initiated transfers and therefore does not apply to the post-petition recording of the Trustee's Deed by the Bollags, who are creditors.

We have previously held that the automatic stay imposed by section 362(a) does not apply to debtor-initiated transfers. *In re Tippet*, 542 F.3d 684, 691–92 (9th Cir. 2008); *In re Schwartz*, 954 F.2d 569, 574 (9th Cir. 1992). Adopting Silva's argument would render section 362(b)(24)'s incorporation of section 549 meaningless. If section 549 were determined to operate only to avoid debtor-initiated transfers, and if transfers that are "not avoidable under section 549" are

similarly limited to debtor-initiated transfers, then this portion of section 362(b)(24) would never apply because the stay does not apply to debtor-initiated transfers. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” (citations omitted)).

We reject the theory advanced by Silva and hold that the applicability of section 362(b)(24) is not limited to transfers that could have been avoidable under section 549. Rather, the relevant inquiry for this portion of section 362(b)(24) is simply whether the transfer is *not* avoidable under section 549. This category captures transfers that fall outside the scope of section 549(a); transfers that fall within an exception to section 549(a) as set forth in subsections (b) and (c); and transfers that are barred by section 549’s two-year statute of limitations, 11 U.S.C. § 549(d).

2. The transfer to the Bollags would potentially be avoidable by the trustee pursuant to 11 U.S.C. § 544, but the statute of limitations has expired. The relevant portion of that statute provides as follows:

(a) The trustee . . . may avoid any transfer of property of the debtor . . . that is voidable by--

. . .

(3) a bona fide purchaser of real property . . . from the debtor . . . that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

In other words, the trustee may avoid a transfer as a hypothetical good faith purchaser who has perfected a transfer of the property from the debtor at the time the bankruptcy case commenced. California is a race-notice jurisdiction requiring “every conveyance of real property to be recorded in order to be valid against a subsequent purchaser of the same property.” *Robertson v. Peters (In re Weisman)*, 5 F.3d 417, 420 (9th Cir. 1993). The trustee could have potentially avoided the August 2009 purchase of the property by the Bollags—and the resultant post-petition recording of the Trustee’s Deed—because the conveyance was not recorded until October 2014 and was potentially invalid against a subsequent hypothetical good faith purchaser who had perfected a transfer in August 2010, which is when Silva filed the Chapter 13 bankruptcy petition.

Here, however, there is a two-year statute of limitations which limited the time period in which the trustee could take action to avoid any transfer based on section 544. That period commenced in August 2010 when the order of relief was

entered in Silva's bankruptcy case, *see* 11 U.S.C. §§ 301(b), 546(a)(1)(A), and expired in August 2012 by which time Silva had not acted.

Silva contends that equitable tolling of the limitations period is appropriate here. We do not agree. A party seeking equitable tolling must establish (1) "that [s]he has been pursuing [her] rights diligently," and (2) "that some extraordinary circumstances stood in [her] way." *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1052 (9th Cir. 2013). Silva failed to act with reasonable diligence in pursuing her section 544 claim because she had actual and inquiry notice that the Bollags purchased the home as early as September 2009. Having concluded that Silva failed to diligently pursue her section 544 rights, the bankruptcy court did not err in declining to equitably toll the two-year limitations period. The transfer is therefore not avoidable under section 544.

3. Because the transfer is not avoidable under section 544 and section 549 pursuant to 11 U.S.C. § 362(b)(24), the filing of the bankruptcy petition does not operate as a stay. We therefore conclude that in this case the recording of the Trustee's Deed is exempt from the statutory automatic stay of proceedings.

AFFIRMED.

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Silva v. MBB Properties, No. 15-56123 (Pasadena – May 5, 2016)

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N.R. Smith, Circuit Judge, concurring in the judgment:

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I agree with the result reached by the majority, but I respectfully disagree with how the majority reached that result. The Bollags and MBB argue that the Bollags' recordation of the trustee's deed was exempt from the stay under 11 U.S.C. § 362(b)(3) and that MBB (as the holder of full title to the property) was entitled to relief. The bankruptcy court agreed, and so do I.¹

A bankruptcy petition does not operate as a stay of any act by a lienholder to perfect an interest in property to the extent that, under state law, the lienholder, upon perfection, would obtain priority over a hypothetical entity that acquires rights in the property before the lienholder perfects its interest. 11 U.S.C. §§ 362(b)(3), 546(b). "Under California law, when a person purchases property from a trustee in a non-judicial foreclosure proceeding, the purchaser's interest 'relates back' to the time the original deed of trust was recorded." *United States v.*

¹ I question whether Silva retained any interest in the property that could become part of the bankruptcy estate and receive protection from the automatic stay. Under California law, a valid foreclosure sale terminates *all* of the debtor's interests, both legal and equitable, in the property. *See Perkins v. Center*, 35 Cal. 713, 719 (1868). However, the parties do not argue that the property is excluded from the bankruptcy estate. Thus, without deciding the issue, we assume that Silva retained an ownership interest in the property and that the Bollags held a lien on the property, which was subject to the automatic stay. The question, then, is whether the Bollags and MBB were exempt from the stay or entitled to relief.

Real Property at 2659 Roundhill Dr., Alamo, Cal., 194 F.3d 1020, 1026 (9th Cir. 1999) (citing *Hohn v. Riverside Cty. Flood Control & Water Conservation Dist.*, 39 Cal. Rptr. 647 (Cal. Ct. App. 1964); *see also Streiff v. Darlington*, 68 P.2d 728, 729 (Cal. 1937); *Carpenter v. Smallpage*, 29 P.2d 841, 842 (Cal. 1934).

The deed of trust that Silva granted her lender on the second-position loan was recorded on April 27, 2005. Thus, when the Bollags purchased the home, they took title to it effective as of April 27, 2005, and effective against any interest in the property acquired after that date. Even though the Bollags did not record their trustee's deed until after Silva had filed for bankruptcy, their priority remained greater than any hypothetical entity who might have obtained an interest in the property after the foreclosure sale. Therefore, the recordation of the trustee's deed after Silva filed for bankruptcy was exempt from the automatic stay triggered by the filing of the bankruptcy petition. The bankruptcy court properly determined that MBB was entitled to relief from the automatic stay to permit MBB to take possession of the property from Silva under 11 U.S.C. § 362(d)(1) and (d)(2).

I concur in the judgment.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Opening Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
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TOTAL:				\$ <input type="text"/>	TOTAL: \$ <input type="text"/>			

* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By:

, Deputy Clerk