NINTH CIRCUIT COURT OF APPEALS

Case No. 15-56123

In Re: REGINALD ESCOBAR SILVA & CARLITA MARIE SILVA Debtors. CARLITA MARIE SILVA Appellant v. MBB PROPERTIES, LLC Appellee(s)	DISTRICT COURT CASE NUMBER **2:15-cv-02061-AB** BANKRUPTCY COURT CASE NUMBER. **9:10-bk-14135-PC** ADVERSARY CASE NUMBER **9:15-ap-01014-PC** (Related Case)

OPENING BRIEF

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MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

1. This Appeal Is From An Order Granting Relief From The Automatic Stay In A Bankruptcy Case. Appellant and Debtor herein Carlita Silva (hereinafter "Silva") appeals the decision of the bankruptcy court dated March 10, 2015 granting relief from the automatic stay found at 11 U.S.C § 362[2] to MBB Properties, LLC (hereinafter "MBB"). The subject matter of the motion for relief from the automatic stay is Silva's home located at 1100 North 3rd Street, Lompoc California 93436. The order granting relief allows Appellee MBB Properties, LLC (hereinafter "MBB") to "foreclose upon and obtain possession of the Property in accordance with applicable nonbankruptcy law . . .."[3]

Silva contends the order was erroneously entered for the following reasons: (A) MBB's predecessor in interest violated the automatic stay by recording their Trustee's Deed Upon Sale more than four years after the bankruptcy was filed; (B) That as a result of that automatic stay violation MBB received nothing by way of the quitclaim deed its predecessors gave it; and (C) there are no applicable exceptions to the automatic stay. Silva also contends that the bankruptcy court abused its discretion in not tolling the trustee avoiding powers found at 11 U.S.C § 544(a)(3) based on latches and the misconduct of MBB and its predecessors.[4]

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[2]ER Vol. 1, pages 56 - 78, Order Granting Relief From the Automatic Stay including the memorandum incorporated by reference.

[3]ER Vol. 1, page 57, paragraph 5 of the Order granting relief from the automatic stay.

[4]All references are to Title 11 unless otherwise noted.

The District Court affirmed the decision of the bankruptcy court finding an exception to the automatic stay in Section 362(b)(24).

II

JURISDICTION

1. This Court Has Jurisdiction to Hear This Appeal. The Bankruptcy Court had jurisdiction to enter the order granting relief from the automatic stay pursuant to 28 U.S.C. § 158(a). An order of the bankruptcy court granting relief from the automatic stay found at 11 U.S.C. § 362 is an immediately appealable order, *Cimarron Investors v WYD Properties (In re Cimarron)*, 848 F.2d 974, 975 (9th Cir. 1988). The district court had jurisdiction to hear the appeal from the bankruptcy court pursuant to 28 U.S.C. §§ 158(a)(1) 1334(a) and (b), and 1291.

III

STANDARD OF REVIEW

1. Standard of Review Of The Order Granting Relief From Stay. Whether or not the automatic Stay has been violated is reviewed *de novo*, *Sternberg v Johnson*, 595, F3d 937, 943 (9th Cir. 2003). The reviewing court independently reviews the bankruptcy court's decisions, *In re Dyer*, 322 F.3d 1178, 1186 (9th Cir. 2003), *In re Su*, 290 F.3d 1140, 1142 (9th. Cir. 2002). "Whether the automatic stay provisions of 11 U.S.C. § 362(a) have been violated is a question of law reviewed de novo." *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210, 1213 (9th Cir.2002).

The district court found that the bankruptcy court erred, but it came up with an alternative ground for finding the bankruptcy court order valid. It determined that an exception to the automatic stay existed under 11 U.S.C. 362(b)(24).[5] The district court's decision on an appeal from a bankruptcy court is also subject to de

[5]ER Vol. 1, page 8, lines 3 to 21.

novo review. *Mcarthy Johnson & Miller v North Bay Plumb*., 217 F. 3d 1072, 1077 (9th Cir. 2000), citing *Del Mission Ltd. v. Traxel*, 98 F.3d 1147, 1150 (9th Cir. 1996).

2. Standard Of Review Denying Equitable Relief. The application of latches, tolling and other equitable relief is limited to review for "abuse of discretion," *In re Beaty*, 306 F.3d 914, 921 (9th Cir. 2002). "The abuse of discretion test involves two distinct determinations: first, whether the court applied the correct legal standard; and second, whether the factual findings supporting the legal analysis were clearly erroneous. *United States v. Hinkson*, 585 F.3d 1247, 1261–63 (9th Cir.2009) (en banc)." *In re Edwards*, 454 B.R. 100, 103 (B.A.P. 9th Cir. 2011)

IV

STATEMENT OF THE FACTS

There are no disputes about the facts. The bankruptcy court made findings of fact that neither party challenges except for the omission of three facts found in Silva's declarations.[6] The first omitted fact is found in Silva's declaration dated January 19, 2015 where she states that no one made any effort to take possession of her home for the over five year period post foreclosure sale.[7] In the second declaration she states that she never heard from anyone again after Todd Lyle told her on September 1, 2009 that she did not own the property.[8] In the third declaration she states she would have left had she known she did not own the

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[6]There was no live testimony at the bankruptcy court level. All facts were determined by declaration.

[7]ER Vol. 5, page 709, paragraph 12, declaration dated January 19, 2015.

[8]ER Vol. 6, declaration dated February 6, 2015 at page 941.

property anymore.[9] Bear in mind that Todd Lyle never claimed to have re-contacted Silva after September 1, 2009, nor did he ever claim to have given her any contact information. The facts below are the ones found by the bankruptcy court.[10]

1. "On January 1, 2008, Silva and her husband, Reginald E. Silva, owned the Subject Property. They had owned and occupied the Subject Property since 1988. The Subject Property was encumbered by two deeds of trust: (1) a first deed of trust lien recorded on May 19, 2004, securing payment of a note in the original principal sum of $125,000, executed by Carlita M. Silva and Reginald Silva and payable to World Savings Bank, FSB dated May 13, 2004; and (2) a second deed of trust lien recorded on April 27, 2005, securing payment of a note in the original principal sum of $30,000 executed by Carlita M. Silva and Reginald Silva and payable to World Savings Bank, FSB dated April 22, 2005."

2. "On September 3, 2008, a Notice of Default and Election to Sell Under Deed of Trust was recorded as to the second deed of trust. A Notice of Trustee's Sale was thereafter recorded on January 29, 2009. On August 12, 2009, a Trustee's Deed Upon Sale ("Trustee's Deed") was executed following a foreclosure sale conducted on August 10, 2009, at which the Subject Property was purchased by the Bollags for the sale price of $34,127.49. The Trustee's Deed conveyed title to the Subject Property to The Bollag Family Trust and Michael Bollag, subject to the first deed of trust lien securing payment of the $125,000 note. Silva claims

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[9]ER Vol. 4, page 541, paragraph 9, March 12, 2015 declaration made is support of motion for a stay pending appeal.

[10] ER Vol 1, pages 56-78, including the memorandum incorporated by reference. The facts are copies verbatim from pages 66 to 69. All facts were determined by declaration. There was no testimony.

that, at the time, she was not aware of the foreclosure sale nor execution of the Trustee's Deed."

3. "On September 1, 2009, Todd Lyle ("Lyle"), an employee of MBB, met with Silva "and informed her that the [Subject Property] had been sold pursuant to a properly noticed foreclosure sale held on August 10, 2009, and that The Bollag Family Trust and Michael Bollag were the new owners of the [Subject Property]." Silva testified that:

> "I do recall a man coming to my house at about the time Todd Lyle says he did, September 1, 2009. This man told me I did not "own the property." I did not believe him. I was in the process of trying to negotiate a loan modification with the first mortgage, which was the same entity that held the second mortgage at the time. The person I was working with on the loan modification told me not to worry about what this man said. I believed her when she told me he did not own my house"."

4. "On July 21, 2010, Wells Fargo Bank, N.A. ("Wells Fargo"), as successor in interest to World Savings Bank, FSB, caused a Notice of Trustee's Sale to be recorded as to the first deed of trust. On August 10, 2010, Silva and her husband filed a voluntary petition under Chapter 13, in part, to stop the foreclosure by Wells Fargo. In their schedules, the Silvas disclosed in Schedule A that they owned the Subject Property valued at $195,000 in "Fee Simple." Neither the Bollags or MBB[11] are listed in the list of creditors, mailing matrix, schedules or statements nor is the foreclosure sale conducted pursuant to the second deed of trust lien disclosed in response to Question # 5 of the Statement of Financial

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[11]MBB is owned and operated by Michael Bollag and the Bollag Family Trust.

Affairs."

5. "On November 10, 2010, an order was entered confirming the Silva's Chapter 13 Plan ("Plan"). The Plan provided for post-petition mortgage payments to be made directly to Wells Fargo on the $125,000 note, with arrears to be cured over a period of 60 months. Reginald E. Silva died in 2012. Silva is current on Plan payments, with about 7 payments remaining until completion of the Plan."

6. "On October 16, 2014, the Trustee's Deed was recorded in the Santa Barbara County Recorder's Office – over 5 years after the Trustee's Deed was executed and delivered to the Bollags. According to Lyle's testimony:

> "Michael Bollag and The Bollag Family Trust did not immediately record their Trustee's Deed Upon Sale because they inadvertently believed that they had purchased the [Subject Property] at a foreclosure sale conducted by the first trust deed holder, not the second. When they discovered their error, they attempted to contact the owners of the first trust deed to ascertain the loan payoff amount. However, the first trust deed holder would not discuss this with Michael Bollag, The Bollag Family Trust, and MBB Properties, LLC ("the "Bollag Entities").

The Bollag Entities were disinclined to become the record owners of the [Subject Property] because there was likely little, or no, equity in the [Subject Property] above what was owed to the first trust deed holder, and they did not want to risk have [sic] their credit sullied by getting foreclosed out by the first trust deed holder. Instead, Michael Bollag and The Bollag Family Trust decided not to become record owners, to allow Ms. Silva to live on the [Subject Property] without paying rent to them, and to see if the [Subject Property] increased in value over time to make it worthwhile for them to become record owners."

7. "On October 17, 2014, the Bollags executed a Quitclaim Deed, conveying the Subject Property to MBB. The Quitclaim Deed was recorded the same day. When the Trustee's Deed and Quitclaim Deed were recorded, there was no notice of Silva's bankruptcy in the chain of title; and, according to Lyle's testimony, the Bollags and MBB did not have any knowledge of Silva's bankruptcy. On October 24, 2014, the Bollags and MBB served Silva with a Notice of New Ownership. Silva, through counsel, informed the Bollags and MBB that Silva had filed a Chapter 13 petition on August 10, 2010. Lyle testified that "[t]his was the Bollag Entities' first and sole notification that Silva had filed Chapter 13 bankruptcy."

8. "The Bollags and MBB never took possession of the Subject Property. Silva remained in possession of the Subject Property continuously between the foreclosure sale on August 10, 2009 and the recordation of the Trustee's Deed on October 16, 2014. During this period, Silva made all payments to Wells Fargo on the $125,000 note secured by the Subject Property, and paid the insurance and property taxes due on the Subject Property (with one crucial exception)."[12]

9. "On December 15, 2014, MBB filed a motion seeking relief from the automatic stay under §§ 362(d)(1) and (d)(2) ("Stay Motion") to exercise its rights with respect to the Subject Property, including an annulment of the stay to validate the post-petition recordation of the Trustee's Deed and Quitclaim Deed. Silva filed a response in opposition to the Stay Motion. A hearing on the Stay Motion was commenced on February 3, 2015, and continued to March 10, 2015."

10. "In the meantime, Silva filed a complaint in this adversary proceeding against the Bollags and MBB on January 27, 2015, for alleged violation of the automatic stay, avoidance of transfer under §§ 544 and 549, adverse possession,

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[12]This "exception" relates to the adverse possession claim.

quiet title, fraud, and declaratory relief. On February 9, 2015, Silva filed an amended complaint, together with the Motion seeking a preliminary injunction to prevent the Bollags and MBB from transferring any interest in the Subject Property pending a final judgment in this adversary proceeding. The Bollags and MBB filed written opposition to the Motion on February 19, 2015, to which Silva replied on February 23, 2015."

V

THE AUTOMATIC STAY WAS VIOLATED AND THERE ARE NO APPLICABLE EXCEPTIONS

Silva argues that the bankruptcy court and the district court erred in determining that the admitted stay violation was subject to certain exemptions which would validate a post petition recording of a Trustee's Deed Upon Sale. The bankruptcy court found that 11 U.S.C. 549(c) was an exception to the automatic stay, therefore relief was granted pursuant to 11 U.S.C. 362(d)(2) and (d)(3).[13] The district court erred in finding that 11 U.S.C. 362(b)(24) was an exception to the automatic stay.

1. The Automatic Stay Was Violated When The Bollags Recorded Post Petition. There is no question that the automatic stay was violated. Acts which violate the automatic stay are void, *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992). Silva was in bankruptcy when the Bollags recorded their Trustee's Deed Upon Sale (hereinafter "the deed") on October 16, 2014. The bankruptcy court correctly found that Silva had a legal title in the property and a possessory interest in the property citing *Davidson v. Engles (In re Engles)*, 193 B.R. 23, 25 (Bankr. S.D. Cal. 1996 and *Hunt v. TTC Properties, Inc. (In re Hunt)*, 160 B.R. 131, 135 (9th Cir. BAP 1993). At the time the deed was recorded because she had been in

[13]ER Vol. 1, page 61, first paragraph; page 57 paragraph 3, (a) and (b).

bankruptcy for over four years.[14] A debtor's legal and equitable interests are property of the estate, *Butner v United States*, 440 U.S. 48, 54-55 (1979, and 11 U.S.C. 541.

Given the fundamental purpose of the automatic stay as enunciated in *In re Schwartz*, there was a clear violation of the automatic stay. Silva had a protectable interest in the property. She was in bankruptcy. At this step of the analysis the recording by the Bollags is void. The recording by the Bollags was an act to gain possession of the property. The next question is was there an applicable exception to the automatic stay based on the facts in this case? The answer to that is clearly "no."

A. Section 11 U.S.C. § 549(c) Does Not Apply As An Exception To Section 362(d)(3) and (d)(2). The bankruptcy court found that Section 549(c) was an exception to the automatic stay and therefore granted relief under section 362(d)(3) and 362(d)(2). This cannot be a true statement of the law.

(1) Section 549 Does Not Apply to Stay Violations. The purchase by the Bollags at the foreclosure sale was a "prepetition purchase. The recording of the Trustee's Deed Upon Sale by the Bollags was not a "transaction."[15] It was an attempt to complete the sale that happened August 10, 2009. A case that is directly on point is *True Value v Mitchell (In re Mitchell*), 279 B.R. 839, (9th Cir. B.A.P. 2002). There the court held that Section 549 "applies to transfers of property which are not voided by the stay." *Mitchell* at 842. Since we start here

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[14] Fact four.

[15]"a business deal : an occurrence in which goods, services, or money are passed from one person, account, etc., to another: the act or process of doing business with another person, company, etc. : the act or process of transacting business," *Merriam-Webster.com/dictionary/trnsaction.*

with a clear violation of the stay, Section 549 cannot possibly apply.

(2) Ninth Circuit Authority Has Foreclosed Any Argument That 11 U.S.C. 549 Applies To Anything Other Than Debtor Initiated Transactions. Section 549(c) is not an exception to the automatic stay as it only applies to debtor initiated transactions. At page 842 the court in *In re Mitchell* wrote, "Section 549(c) exists as a protection for creditors against unauthorized debtor transactions"[16] See also *In re Tippett*, 338 B.R. 82 (B.A.P. 9th Cir. 2006) at page 87, "We have interpreted *Schwartz* to mean that 549(c) 'does not apply to creditor-initiated transactions that violate the automatic stay, but only to debtor-initiated transactions that do not violate the automatic stay.'"[17] In accord, *In Re Samaniejo*, 224 B.R. 154 (Bankr. E.D. Wash. 1998). See also California Practice Guide, Bankruptcy[18] at ¶ 21:1323.

In *40235 Washington Street Corp. v. Lusardi,* 329 3d. 1076 (9th Cir. 2003).[19] the Ninth Circuit at page 1081 agreed with the holdings in *True T Sales, Inc v. Mitchell (In re Mitchell).* Ninth Circuit authority has foreclosed any argument that 11 U.S.C. 549 applies to anything other than creditor initiated transactions. Pages 1082-1083 made it quite clear, § 549(c) is not an exception to the automatic stay. At pages 1082 -1084 it explained other cases that seemed to be in conflict with the

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[16]Although the court alluded to the possibility of a fact pattern not involving the debtor, it was clear when it stated that "Section 549 applies to unauthorized transfers of estate property which are not otherwise prohibited by the Code." *Mitchell* at 842. Acts in violation of the stay are prohibited, 11 U.S.C. 362. The district court did not cite any facts that would possibly involve such a situation. ER Vol. 1 page19, lines 1 - 20.

[17]*In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992)

[18]Kathleen P. March, Judge Alan M. Ahart, Judge Leskie Tchakovsky

[19]Cert denied, 540 U.S. 983 (2003).

current holding. See also *In re Fjeldsted*, 293 B.R. 12, 25 (B.A.P. 9th Cir. 2003),

> " . . .549 protects the estate from unauthorized transfers by the debtor. Congress saw fit to protect BFPs in § 549 but not in §362, presumably expressing its intent to afford greater protection to BFPs who purchase from debtors than those purchasing at sales violating the automatic stay."

The district court erred in relying on authority from other jurisdictions to reach a contrary result when Ninth Circuit authority has ruled directly on the issue. *40235 Washington Street Corp* at 1081,

> "As subsection (a) and (d) make clear, section 549 concerns avoidance actions by the trustee, not transfers that are already void under the automatic stay. Subsection (c), which Lusardi invokes, prevents such avoidance actions from succeeding against certain bona fide purchasers. By its terms, subsection (c) creates an exception only to subsection (a). 11 U.S.C. § 549(c) (describing transfers that "trustee may not avoid under subsection (a) of this section"). Thus, as the Mitchell court noted, the language and the structure of both section 362 and section 549 support the view that section 549(c) does not create an exception to the automatic stay provision."

The law then is clear. Ninth Circuit authority has foreclosed any argument that 11 U.S.C. 549 applies to anything other than debtor initiated transactions. The argument that Silva cannot prevail because she did not record the bankruptcy petition is a red herring. That argument only makes sense if one concludes Section 549(c) applies.

B. California Civil Code Section 2924h(c) Does Not Apply. The Trustee's Deed Upon Sale obtained by the Bollags was recorded more than fifteen days after the foreclosure sale so California Civil Code Section 2924h(c) does not apply. Both courts and Silva agree with this conclusion.

C. Section 549(c) Is Not A Substitute For California Civil Code Section 2924h(c). The bankruptcy court therefore erred in relying on *In re Stork*, 212 B.R. 970, 971 (Bankr. N.D. Cal. 1997) finding that a recording more than five years after the foreclosure sale qualified as an exception under Section 549(c), *Stork* at 972. The statement that "Section 549(c) protects a purchaser regardless of the number of days after the sale the purchaser records the deed as long as the deed is recorded before notice of the bankruptcy filing is recorded." is not only wrong, but overturned by the holding in *40235 Washington Street Corp. v. Lusardi*. *Stork* is just a district court opinion. As stated above there is not an exception to an automatic stay violation under 11 U.S.C. 549. Since the recording by the Bollags, more than four years after the filing of the petition, MBB received nothing by its quit claim deed. See *In re Smith*, 224 B.R. 44, 37 (Bankr. E.D. Mich. 1998) the court found that when a foreclosure sale is void, nothing is transferred. Here there was a valid foreclosure sale, but the recording of the Trustee's Deed Upon Sale was a post petition event that violated Section 362(a)(3). It was therefore an error for the bankruptcy court to find that MBB had a "colorable" claim to the property.

2. The District Court Failed To Make A Conclusive Decision On The Issue Of The 11 U.S.C. 549(c). Instead of outright finding that the bankruptcy court erred, the district court found an alternate ground to affirm the judgement

citing *In Re Yochum*, 89 F.3d. 661, 670 (9th Cir. 1996).[20] This was a new issue not briefed initially by either party.[21] This section was enacted with the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). This is not the first time BAPCPA has been criticized for its poor grammar and constriction.[22] It only makes sense when you put the two subsections together.

> "362(b) The filing of a petition under section 301, 302, or 303 of this title, or an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, *does not operate as a stay* -
> (24) under subsection (a), *of any transfer that is not avoidable under section 544* and *that is not avoidable under section 549."* (Emphasis added).

It is basic grammar that two negative equal a positive.[23] Read correctly the bankruptcy code reads, "There is no stay of a transfer that is avoidable under sections 544 and section 549." See *McKay v U.S.* 957, F2d 689, 693 (C.A.9(Cal.) 1982) where the court held that certain IRS obligations were dischargeable as the result of the statute using a double negative.

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[20]"A district court may affirm the bankruptcy court on any grounds supported by the record, even if the bankruptcy court "reached its decision on erroneous grounds". ER Vo. 1, pages 8, 10, 18, and 32. Also Page 6, lines 21-23 [In Chambers] Order Denying Appellant's Motion For Stay Pending Appeal And Waiver of Bond, Docket No. 24.

[21]The district court criticized Appellant for not briefing it in its decision denying her motion for reconsideration, Exhibit E, page 6, line 24 to page 7, line 14

[22]*In re Dumont,* 581 F.3d 1104, 1110 (9th Cir. 2009).

[23]Oxforddictionaries.com/words/double-negatives.

This is not the first case to deal with this. For example in *In re Striblin,* 49 B.R. 301 (Bankr. M.D. Fla. 2006) at page 303 the court posed the question, "In order to determine whether § 362(b)(24) applies to the sale, the Court must determine whether the sale was a transfer that was not avoidable under section 549. Section 549 only applies to debtor initiated transfers."[24] The court answered this question at page 304. "Because the sale is not a transfer to which § 549 applies in the first instance, it is not "not avoidable under section 549" and is therefore not an exception to the automatic stay as set forth in § 362(b)(24). That case involved a post petition foreclosure. *In re Ducker,* 2007 WL 1119640 involved another attempted foreclosure sale after the petition was filed. The court agreed with the reasoning in *In re Stubin*.

As Judge Papas wrote in *In re Ellis*, 441 B.R. 656 (Bankr. Idaho 2010) at page 663, " . . . because transfers that are "not avoidable under § 549" includes those made to good faith purchasers meeting the requirements of § 549, the addition of § 362(b)(24) provides an explicit § 362(b) exception for § 549(c) transfers." He went on to write, " . . . the new rule can be summarized simply: when a debtor makes a post-petition transfer of an interest in real property to a good faith purchaser without knowledge of a bankruptcy case for fair equivalent value, the transfer is neither avoidable by the trustee, nor void as a violation of the automatic stay." It is as simple as that. In *In re Howard* 391 B.R. 516 517 (Bankr. N.D. Ga 2008) the court found that a post petition tax sale was not a voluntary transfer so 362(b)(24) did not apply.

Here the transfer to MBB Properties is not subject to avoidance under § 549 because the transfer does not meet the requirements of § 549.

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[24]The court in *Striblin* relied on *40235 Washington Street Corp. v Lusardi*, 329 F.3d 1076, 1081 (9th Cir. 2003) in coming to its conclusions.

a. it was not a debtor initiated transaction as required in this jurisdiction;

b. no value was paid by MBB

c. The purported transfer was not voluntarily made by Silva;

d. the Bollag recording was void; and

e. what the Bollags paid was paid pre-petition.[25]

Based on these simple facts MBB is not entitled to relief from stay. MBB lacked standing to bring the motion for relief.[26]

3. Section 544(a)(3) Simply Does Not Apply To The Facts Of This Case. By its clear terms this section requires a bona fide purchaser for value, *from the debtor*. The facts clearly show this did not happen. It was an error to grant relief from the automatic stay under this section.

VI

MBB LACKED STANDING

MBB Lacked Standing To Bring The Motion For Relief**.** Section 362(d)(1) provides that the court "shall" grant relief from the automatic stay "for cause, including the lack of adequate protection of an interest in property of such party in interest. The record is undisputed that MBB took nothing from the Bollags because their recording was void, *In re Schwartz* at 571. Only real parties in interest may bring actions in their name, *Dorn v 7 Eleven, Inc.*, 524 F.3d 1034,

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[25]ER Vol. 6, page 868, line 6, page 931, line 8, and 934, line 3.

[26]Quoting from *In re Edwards* at 107, "See also Kathleen P. March and Hon. Alan M. Ahart, California Practice Guide: Bankruptcy, ¶ 8:1196 (2010), available at Westlaw CABANKR ("Where a real property nonjudicial foreclosure was completed *and the deed recorded prepetition,* the debtor has neither equitable nor legal title to the property at the time the bankruptcy petition is filed."). Emphasis in the original.

1044 (2008). Standing is lacking if the claimant can not establish "rudimentary elements of its claim," *In Re Salazar,* 448 B.R 814,818 (Bankr. S.D. Cal 2011). A quitclaim only transfers the interest the transferor has, if any. In this case that was nothing.

VII

SILVA IS ENTITLED TO EQUITABLE RELIEF

If the court were to find that MBB had standing to bring the motion, it does not have a "colorable claim" because Silva has statutory avoiding powers, 544(a)(3) despite the fact that the two year statute of limitations has run.[27] The district court properly found that Silva potentially had the avoiding powers of trustee under Section 544(a).[28] The district court relied on *In re Deuel*, 594 F.3d 1073, 1076 (9th. Cir. 2010) and *In re Cohen*, 305 B.R. 886, 899 (9th Cir. B.A.P. 2004) in reaching its conclusion.

As stated in *In re Dyer*, 322 F.3d 1178 1188 (9th Cir. 2003), in reference to the relationship between 544 and 362, "Normally, the Trustee of a bankruptcy estate is entitled to avoid such unrecorded (and therefore unperfected) security interests. See, e.g., § 544(a)(3)". The ability then to set aside a transfer is a defense to a motion for relief from the automatic stay. Such a defense negates the idea that the movant has a "colorable claim. The Ninth Circuit has held that a party is entitled to equitable tolling under the right set of facts, *In re United Ins. Management, Inc*, 14 F.3d 1380, 1384 (C.A. 9 (Hawaii) 1994).[29]

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[27]Silva also contends her avoiding powers are good as against the Bollags as well.

[28]ER Vol. 1, page 32, line 13 to page 33, line 7.

[29]In *In re Kim*, 161 B.R. 831 835 (B.A.P. 9th Cir. 1993) the court explained the relationship between California law on the subject of notice and the Section

The bankruptcy court cited *Roberts v Marshall*, 627 F.3d 768, 771 (9th Cir. 2010) for the proposition that a party seeking equitable tolling must show "(l) that he has been pursuing his rights diligently; and (2) some extra ordinary circumstances stood in his way".[30] Another aspect of equitable tolling is "equitable estoppel" which is based on the acts of the defendant, *Johnson v Henderson*, 314 F.3d 409, 414 (9th Cir. 2002).

The bankruptcy did not find that equitable tolling applied because it is used "sparingly," "disfavored" and "rarely applied."[31] While those things may be true, it appears that both lower courts did not weigh the facts "good and bad" on both sides to come to their conclusions.

1. Actual Notice Is Missing. Although both lower courts found that the fact that Todd Lyle "informed" Silva that she did not own the property anymore, was insufficient to let her know "who" actually owned it.[32] A name is meaningless information without an address to go with it. The district court wrote "a cursory review of the property records would have confirmed significant portion of Mr. Lyle's story because the lender recorded both the notice of default and the notice of foreclosure sale on the property."[33] What both lower courts failed to consider is

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544. *Kim* also references a footnote *In re Probasco v Eads (In re Probasco)*, 839 F.2d 1352 (9th Cir. 1988) wherein the Ninth Circuit indicated the phrase "without knowledge" applies to debtors in possession as well as trustees.

[30]ER Vol. 1, page 74, lines 6 to 12.

[31]ER Vol. 1, page 73, lines 13-19.

[32]ER. Vol. 1, page 34, lines 21 to page 35, line 9; ER Vol. 1 page 74, lines 13-20.

[33]ER Vol. 1, 34, line 28 to page 35, line 3.

that had Silva gone to the county records office she would *not* have learned *who* purchased the second deed of trust because the Bollags made a conscious decision to not record the Trustee's Deed Upon Sale because they did not want to become the record owners. The sentence, " . . . and they did not want to risk have [sic] their credit sullied by getting foreclosed out by the first trust deed holder" [34] tells the tale. California Civil Code Section 18 reads:

"Notice is:

1. Actual--which consists in express information of a fact; or,

2. Constructive--which is imputed by law."

Here the "express information of fact" is lacking. Fraud can occur by omission of certain facts, or the giving of incomplete information, *Warner Const. Corp.* v *LA* (1970) 2 Cal.3d 285, 294, "Fraudulent concealment often composes the basis for an action in tort."[35] Todd Lyle gave Silva insufficient information, information that was so insufficient she would not have been able to determine who had in fact purchased the property at the foreclosure sale.[36] How would she have determined the address? What information did she have to put on her "Schedule D" (list of secured creditors).[37]

California Civil Code Section 19 reads: "Every person who has *actual notice of circumstances sufficient* to put a prudent man upon inquiry as to a

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[34]Fact 6.

[35]ER Vol. 4, page 459, line 3-5.

[36] There is no "constructive notice" because of the lack of recording by the Bollags, which was intentional.

[37] Federal Rule of Bankruptcy Procedure 1007(a)(1) '. . . the debtor shall file with the petition a list containing the name and address of each entity included or to be included on Schedules D, E. F, G, and H . . ."

particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he *might have learned such fact*." (Emphasis added). Where would Silva have learned of the missing details? The Bollags intentionally left Silva in the property, to make the payments on the first mortgage to preserve the property for their benefit because the property was underwater. There is no evidence they informed her of this plan. Her declaration dated March 15, 2015 states she would have left had she known the truth.[38]

Conspicuously missing from the Lyle declarations is any mention of any facts indicating that he gave Silva any paper work, an address or a business card. Coupled with the facts the bankruptcy court omitted from its findings, that no one made any effort to take possession of her home for the over five year period post foreclosure sale[39] and that she never heard from anyone again after Todd Lyle told her on September 1, 2009 that she did not own the property, it is clear Silva was left in the dark.[40]

These are "extra ordinary circumstances." Who reasonablely waits over five years to record a Trustee's Deed Upon Sale? Who reasonablely waits over five years to move to evict the previous owner? It is apparent that Todd Lyle only gave Silva a small portion of the information she needed because that suited the Bollags purposes.

2. Equitable Estoppel. The conduct on the part of the Bollags amounts to "equitable estoppel." Equitable Estoppel focuses primarily on the actions of the defendant which prevents the plaintiff from filing suit. There are three factors: (1)

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[38]ER Vol. 5, pages 539-540, paragraphs 7, 1, 2, and 3.

[39]ER Vol. 5, page 709, paragraph 12.

[40]ER Vol. 6, declaration dated February 6, 2015 at page 941.

actual reliance on the defendant's conduct or representations, (2) evidence of improper purpose on the part of the defendant, or the defendant's actual or constructive knowledge of the deceptive nature of his conduct, and (3) the extent to which the purposes of the limitations period has been satisfied, *Johnson v Henderson* at 415, and *Lukovsky v City and County of San Francisco*, 535 F. 3d 1044-1051 (9th Cir. 2008).

(a) Actual Reliance. It settled that " . . . the party claiming the estoppel must have relied on its adversary's conduct "in such a manner as to change his position for the worse." That reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading."[41]

How would Silva have known she needed to bring an action against the Bollags? They failed for over five years to give Silva any *real evidence* that they actually owned the property. They made a conscious decision not to record the Trustees Deed Upon Sale. That was not an accident. And, why would she believe Todd Lyle? She never heard from anyone again after the September 1, 2009 conversation. In her ignorance she remained in the property for over five years post foreclosure making the mortgage payments which are impounded for taxes and insurance. She also paid 53 months of Chapter 13 payments to cure the arrears on the first mortgage.

(b) Evidence of Improper Purpose. The Todd Lyle declaration is replete with evidence of improper purpose. Upon discovering what Todd Lyle claims was

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[41] *Heckler v Community Health Services of Crawford County, Inc*., 467 U.S. 51, 58 (1984).

a "mistake" they do not contact Silva.[42] Because there was no equity in the property they decide not to become record owners. Instead, rather than risk their credit, they tell Silva nothing until they decide it becomes "worthwhile" to become the record owners.[43] Worse yet, apparently they had a scheme to leave her there and attempt to defeat any claim she had to the property by adverse possession by paying the first quarter of the 2014 real property taxes on October 17, 2014.[44] If they had claimed the property when they foreclosed they would have had to have made the 62 months of mortgage payments to keep the first from foreclosing on them or they would have had to pay that loan off.

(c) The Purpose Of The Statute. The purpose of all limiting statues is to prevent the litigation of stale claims. The purpose of the statute, 544(b)(3) is to "cut off secret and undisclosed claims against the debtor's property". *See In re Great Plains Western Ranch Co. Inc.* 38 6 B.R. 899, 904-905 (CD. Cal 1984). The fact however that the two year period has expired is not outcome determinative. The Supreme Court has held that ". . . where the plaintiff has refrained from commencing suit during the period of limitation because of inducement by the defendant, or because of fraudulent concealment, "the court will not hesitated to find the statutory period tolled or suspended by the conduct of the defendant.

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[42]The Bollags have not explained how they mistakenly purchased the second deed of trust of trust for $34,127.49 when the first deed of trust was recorded on May 19, 2004 in the principal sum of $125,000. Facts 1 and 2. Both the first and the second were recorded documents which should have imparted notice to them. The first mortgage is recording number 2004-0053346 (ER Vol. 5 page 675). The second mortgage is numbered 2005-0038533 (ER Vol. 5 page 622).

[43]Fact 6.

[44]ER Vol. 5 Page 696, paragraph 1.

(internal citations omitted).[45] If the foregoing is insufficient to convince the court that the Bollags motive was based on deceit, look at the fact that they swooped in when they believed that by paying the real property taxes for 2014 they would defeat Silva's claim of adverse possession.

2. The Adverse Possession Issue. Silva contends she owns the property by adverse possession, thereby defeating the contention that MBB or the Bollags had a colorable claim. The issue is simply this:

- the taxes were levied and assessed prior to August 10, 2009 for the 2009 tax year.
- Silva paid the 2009 taxes when they came due, which was after August 10, 2009.
- Silva also paid the taxes for 2010, 2011, 2012 and 2013.
- On October 17, 2014 MBB paid the first quarter of the 2014 taxes before they notified Silva on October 24, 2014 that they were going to evict her.
- MBB contends Silva did not perfect adverse possession by the ruling in *Smith v Byer* (1960) 179 Cal. App. 2d 118 which holds that the fiscal year and the period of adverse possession must align because they paid the first half of the 2014 taxes.
- Silva contends she owns the property as of August 10, 2014 by the reasoning in *Hagman v Meher Mount Corp* (2013) 215 Cal. App. 4th 82 which cited *Allen v Allen*, (1911) 159 Cal. 197 200 "if no taxes are levied or assessed, adverse possessor need not pay taxes." She also relies on *Brown v Clark*, (1891) 89 Cal. 196, 202, "There is nothing in the statute which

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[45] *American Pipe and Construction Co. v Utah*, 414 U.S. 538, 559 (1974), and *Bailey v Glover*, 88 U.S. 342 347-348 (1874).

computes these five years upon the basis of fiscal years."

- Silva's argument is either (1) the taxes for 2009 were not levied or assessed for 2009, so she was not required by the statute to pay them or (2) she paid the 2009 taxes that were levied and assessed when they came due. Note that the statute, Cal. Civ. Code of Procedure uses the phrase, "have been" when describing what must be paid, which is a past tense phrase. This supports Silva's argument.[46]

This is relevant here to demonstrate that the Bollags thought they knew exactly what they were doing when they tricked Silva into making 62 mortgage payments. They came forward when they did with the intent of defeating the adverse possession claim. Note that the Bollag recording, the MBB quitclaim deed, and the paying of the first quarter of the 2014 taxes occurred prior to notifying Silva that she was going to be evicted on October 24, 2014.[47]

VIII

ACTIONS SUBSEQUENT TO THE ORDER GRANTING RELIEF FROM THE AUTOMATIC STAY

As stated in the motion filed by Silva for a stay pending appeal, MBB filed an unlawful detainer action against her in state court. As supported by the

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[46]See the attached chart. California Civil Code Section 325(b) "In no case shall adverse possession be considered established under the provision of any section of this code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, *have timely paid* all state, county, or municipal taxes *that have been levied and assessed* upon the land for the period of five years during which the land has been occupied and claimed. Payment of those taxes by the party or persons, their predecessors and grantors shall be established by certified records of the county tax collector." (Emphasis added).

[47]Fact 7.

documents in Silva's request for judicial notice (which was granted) the decision of the trial court is on appeal at the Santa Barbara Superior Court. Silva did not argue the adverse possession claim at the district court because of the state court action, Santa Barbara Superior Court Appellate Division, Case No. 15C01040 was pending.

Despite the fact that the bankruptcy court granted relief from the automatic stay to MBB, on September 23, 2015 it granted summary judgement to the Bollags and MBB on the adverse possession claim. That decision is on appeal at the district court, Case No. 2:15-cv-07732-SJO. The grounds for that appeal in part are:

I Silva's defenses were surrendered to state court when the bankruptcy court granted relief from the automatic stay to MBB Properties, LLC;[48] and

ii. The bankruptcy court did not have jurisdiction to hear the summary judgment motion, *Wellness Int'l Network Ltd. v Sharif*, 575 U.S. ___ May __ 2015.

The briefing schedule has been set. Opening brief due November 5, 2015.

IX

CONCLUSION

Recording a deed over four years postpetition is an automatic stay violation for which there is no exception under the facts of this case. The quitclaim deed to MBB transferred nothing to MBB, so it did not have standing to bring a motion for relief from stay. The actions of the Bollags demonstrate a clear case of deceitful conduct and latches. As a result of the Bollags conduct Silva's rights

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[48] A proposition the bankruptcy court agreed with in the tentative filed with the order grating relief from stay, Vol. 1, page 45, lines 19-15.

under 544(a)(3) are entitled to tolling. This is that "rare" case where the creditors conduct warrants a finding of equitable tolling and equitable estoppel.

Even if one were to assume the Bollags made a mistake, why should the consequences of the mistake fall on Silva?

Dated: October 29, 2015

s/Janet A. Lawson___
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The Taxes Were Paid For Five Years by Silva. Paying the taxes "*timely*" for five years is all that is currently required. RTC Section 2701 provides that half of the real property taxes are due November 1. Section 2702 provides that the *second half* are due February first. RTC 2192 provides that tax liens attach as of 12:01 on the first of January *preceding* the fiscal year for which the taxes levied. The fiscal year runs from July 1 to June 30, RTC 75.6.

Based on the foregoing, as the chart demonstrates, Debtor paid the taxes timely for the requisite five 5 years:

	Attached	Fiscal year	Occupancy	1st Installment Due	2nd Installment Due [1]	Paid By	Tax year paid
1	1/1/ 2009	7/1/2009	9/1/2009	11/1/2009 of 2009 taxes	2/1/2010	Silva	2009
2	1/1/ 2010	7/1/2010	9/1/2010	11/1/2010 of 2010 taxes	2/1/2011	Silva	2010
3	1/1/201 1	7/1/2011	9/1/2011	11/1/2011 of 2011 taxes	2/1/2012	Silva	2011
4	1/1/201 2	7/1/2012	9/1/2012	11/1/2012 of 2012 taxes	2/1/2013	Silva	2012
5	1/1/201 3	7/1/2013	9/1/2013	11/1/2013 of 2013 taxes	2/1/2014	Silva	2013

[1]Using the date most beneficial to MBB.

6	1/1/2014	7/1/2014	9/1/2014	11/1/2014 of 2014 taxes paid by MBB	2/1/2015 not yet due or paid	MBB	2014

It is apparent then that debtor paid all of the 2009, 2010, 2011, 2012 and 2013 taxes. The 2009 taxes were assessed and became a lien on January 1, 2009, RTC 117, 118 and 2192. Those taxes were payable on November 1, 2009 and February 1, 2010, RTC 2701 and 2702. Thus, 2009 counts as a year paid, as does 2010, 2011, 2012 and 2013 makes the fifth year.

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Attorney for Carlita Silva, Appellant

Date 11/3/2015

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

11/03/2015	JANET LAWSON	s/Janet A. Lawson
Date	*Printed Name*	*Signature*