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)

REPLY BRIEF

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I

INTRODUCTION

First, the Answering Brief refers to "appellants." There is only one appellant in this appeal, MBB Properties, LLC ("MBB"). Relief from the automatic stay was granted to MBB.[1] The Notice of Appeal from that order designates MBB as the appellant.[2] The transcript of the hearing on March 10, 2015 makes it perfectly clear that the court was only considering MBB as the movant and not the Bollags.[3]

Second, on the merits, appellant MBB attacks the arguments set forth in the Opening Brief on the grounds that (1) Silva cannot qualify as trustee because she has "actual" or "constructive" knowledge,[4] and (2) in a related argument that 362(b)(3) applies by virtue of 546(b), 544 and 549.[5] The Answering Brief concludes that the post petition recordation of the Bollags Trustee's Deed Upon Sale "falls squarely within the automatic stay exception set forth in section 362(b)(3) without identifying any applicable relation back or continuing statute.

II

SILVA QUALIFIES AS A TRUSTEE ENTITLED TO STRONG ARM POWERS

1. Silva Qualifies As A "Trustee" Within The Meaning of Section

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[1]Order granting relief, ER. Vol. 1, page 56.

[2]Notice of Appeal, ER. Vol. 2, page 84.

[3]ER. Vol. 2, page 103

[4]This argument is a little confusing. It is not really clear if MBB is arguing actual or constructive notice.

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

544(a)(3). The language of the statute is clear and unambiguous. It reads in part " . . . and without regard to any knowledge of the trustee or any creditor. . .." It does not say or create any exception for instances where the debtor is acting as the trustee. When the language is clear the court only has one option, enforce it as it is written, *United States v. Ron Pair Enters., Inc*., 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989). Case law supports this reasoning. See *In re Marino*, 813 F. 2d 1562, 1565 (9th Cir. 1987) "actual knowledge is irrelevant." In accord *In re Tleel*, 876 F.2d 769, 771-772 (9th Cir. 1989). Citing *In re Tleel* is *In re Williams,* 124 B.R. 311, 316 (Bankr. C.D. Cal., 1989), "The test is *not* whether the Debtor qualifies as a Bona Fide Purchaser under Section 544 and 549, but rather whether the *trustee* does.[6]

Following the *Marino* decision the Ninth Circuit issued the opinion in *In re Probasco*, 839 F.2d 1352 (9th Cir. 1988). That case involved two partners who filed Chapter 11 petitions one month apart. The decision is confusing. In the text at pages 1354-55 the court charged Eads, (the partner who filed first) with constructive notice of the condition of the property. In footnote 2 it acknowledges that the majority view was "that a debtor in possession . . . assumes the same idealized status as the bankruptcy trustee without regard to any knowledge . . ." It also stated in the footnote that "For purposes of this opinion, we assume without deciding, that Judge Winter's position is correct and Ead's actual knowledge is irrelevant." In reality the *Probasco* decision is about deed reformation. The court seems to have simply used 544 as means to get there.

Following the *Probasco* decision came *In re Weisman*, 4 F.3 417 (9th Cir. 1993) which ironically cited *In re Tleel* at page 420. The court once again found that inquiry notice arose when the "visible state of affairs is inconsistent" with the

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[6]Emphasis in the original.

record title.[7] None of these cases which found "inquiry" notice seem to have looked at the facts thru the eye of the decision in *United States v. Ron Pair Enters., Inc*. What is ambiguous or unclear about the phrase " . . . and without regard to any knowledge of the trustee or any creditor. . ..?"

Based on *Probasco* and *Weisman*, Silva was the party living unmolested in the property at the time she filed for bankruptcy protection.

2. Any "Notice Silva Had Was Certainty Stale. If one assumes for the moment that the decision in *In re Zubenko*, 528 B.R. 784 (E.D. CA 2015) is correct, the facts in this case demonstrate that Silva is a trustee who qualifies as one who takes without notice. *Zubenko* cites *Walker v California Mortgage Service (In re Walker),* 861 F.2d 597 (9th Cir. 1988) and *In re Williams*, 124 B.R. 311 (Bankr. C.D. 1991) for the proposition that stale ambiguous recording documents do not impart sufficient notice to defeat a 544(a)(3) trustee. In this case the Notice of Default was filed on September 3, 2009.[8] The Notice of Sale was filed on January 29, 2009 and the sale date was set for February 17, 2009.[9] The sale was on August 10, 2009. There is no evidence in the record that Silva was informed of any of the continued sale dates.[10] On September 1, 2009 (some six and a half months after the noticed sale date), Todd Lyle, using his word

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[7]Page 422.

[8]ER Vol. 6, pages 992-993.

[9]ER Vol. 6, pages 996-997. At page 9 of the Answering Brief MBB claims the Notice of Sale was recorded on June 9, 2009. This is an error. The second page is date January 16, 2009. (See MBB's cite to the record ER. Vol. 4, pages 570-571).

[10]*In re Fjeldsted*, 292 B.R. 12, 20 (9th Cir. B.A.P.). Notice of continued sale dates not required other than the oral notice given at the sale (prior law).

"informed" Silva she did not own the property anymore and that the Bollags now owned it. He does not state that he gave her any other additional information.[11] Twelve months later Silva files for bankruptcy protection. So it was a full 18 months from the date of the Notice of Sale to the filing of the bankruptcy. Moreover, as noted above, if "who" is occupying the property is an event to put one on inquiry notice, as for example as in *Probasco*, Silva was occupying the property. During that entire time period no one was asking her for a payment nor was anyone attempting to kick her out of the house. That was the state of affairs when Silva filed her Chapter 13 case.

3. The Answering Brief Fails to Identify What Actions Silva Could Have Taken To Discover Who Bought Her Property. At page 10 of its brief MBB argues in a conclusive manner that Silva could have learned who purchased her property. There is no evidence that there is a recorded document that would have disclosed that fact. There is no evidence that there is a recorded document that would even have disclosed that the sale had occurred. There is no evidence of a recorded document, letter, memo, business card or other document that Silva could have located which would have told her not only who had purchased the property, but would have given her address information. There is no evidence that the seller would have been able to give her address information. In looking at these missing facts one cannot forget that the Bollags admittedly did not want to "sullie" their credit by becoming record owners. They had a clear vested interest in keeping her ignorant of the true facts.

Also at page 10 of the Answering Brief MBB argues that Silva should have

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[11]The *Zubenko* decision cites *In Re Cruz,* 516 B.R. 594 (9th Cir. B.A.P.). In that case the evidence included a document entitled "Trustee Sale Results" which was not recorded. No such document was entered into evidence in this case. If the Bollags had such a document why wasn't a copy given to Silva?

inquired why after the *sale date* Silva did not notice that the second trustee deed holder had stopped requesting payments. From the Notice of Default it appears the last payment was August 27, 2008. There is no evidence in the record of any payments after that date, which was almost a full year before the foreclosure sale.[12] So no payment had been made on the second for a good two years when Silva filed for Chapter 13. She had not made a payment for 13 for months when Todd Lyle "informed" her she did not own the property.

III

APPELLANT'S STATUTORY ARGUMENT IS A DIFFICULT READ

Candidly, portions of the statutory arguments are difficult to follow.

1. MBB's Argument E. First, 549(c) simply does not apply for the reasons set forth in the Opening Brief. As for 549(a) Silva may avoid the transfer to MBB as that transfer occurred well within the statutory period. She still has about 10 months to that.

The recording or not recording of the bankruptcy petition by Silva is just simply a red herring. As for the citation to *Walker v California Mortgage Service (In re Walker)* at page 600, that certainly does support Silva's position. Neither MBB or the Bollags perfected their interest prepetition by recording the Trustee's Deed Upon Sale. An examination of the recorded documents would disclose nothing to her except that there was a Notice of Default and a Notice of Sale. There is no evidence of a recorded document indicating the sale ever occurred or who purchased the property.

2. MBB's Argument F. Argument F goes on to admit that Silva is correct, 549(c) has no application to the facts of this case. "It is true that section 549(c)

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[12]ER. Vol. 6, page 992.

applies only to debtor initiated property transfers."[13] That being true, *In Re Stork*, 212 B.R. 970 (Bankr. N.D. Cal. 1997) has no application to the facts of this case. It was an error therefor for the bankruptcy court to rely on this case to grant relief from the automatic stay.

Section 362(b)(3) refers only to 546(b) and 547(e)(2)(A). Section 547(e)(2)(A) gives a creditor 30 days to perfect their secured status from the date of the transaction. That never happened in this case so Section 547(e)(2)(A) does not apply. Section 546(b) allows a creditor to maintain a perfected security interest without violating the automatic stay. MBB has not identified a relation back statute that permits perfection of a foreclosure sale five years later. Nor has it demonstrated a perfect security interest that it is permitted to continue and maintain.

IV
CONCLUSION

MBB is correct, this is a case about violating the automatic stay. The heart of her argument is that MBB did not have a "colorable claim" to the subject property because it took nothing from the Bollags because they violated the automatic stay by recording their Trustee's Deed Upon Sale some four years after the bankruptcy case was filed. She further argues that: (1) there is not an applicable "relation back" statute to rectify the stay violation; (2) There is not a state statute which authorizes "maintenance and continuation" of a secured interest in the property;[14] (3) the reasons for failing to record are not justified; and (4) based on the conduct of the Bollags she is entitled to equitable tolling of the

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[13]Page 10 of the Answering Brief.

[14]*In re Bogan* 251 B.R. 95, 100 (9th Cir. Bap 2000).

statute of limitations under 544(b)(3).

All of this was "willful behavior" within the meaning of *Pioneer Investment Services Company,* 507 U.S. 380, 395 (1993).[15] Although the facts are different, in that case the court identified four equitable guidelines to apply in cases of delay.

(A) The danger of prejudice to the debtor. Here Silva has been paying the mortgage, taxes, insurance, and plan payments for 57 months to keep a home MBB now claims she does not own. While they delayed, the Bollags and MBB now charge her with a failure to act on time;

(B) The length of delay and its potential impact on judicial proceedings. Not coming forward until late in the Chapter 13 process, more than five years after the foreclosure sale has a caused significant investment in judicial resources. The record speaks to that. Silva's attorneys fees and costs at this point are significant;

(C) The reason for the delay, which in this case was either selfish at best or fraudulent at the other end of the spectrum. It admittedly was intentional;

(D) Whether or not the delay was in the reasonable control of movant. It was obviously entirely up to the Bollags and MBB to decide when to come forward; and

(E) Whether the movant acted in good faith. Note here MBB and the Bollags only came forward in time to attempt to prevent Silva from prevailing by adverse possession.[16] Why else would payment of the 2014 taxes before they were due make sense? Todd Lyle's explanation is that the Bollags waited until it

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[15]This was a case about failing to file a proof of claim on time. See also *Pincay v Andrews* 389 F.3d 853, 855 (9th Cir. 2004), failure to file a notice of appeal on time.

[16]A fact they failed at based on the law and based on the fact that the payment of the taxes in 2014 violated the automatic stay.

became "worthwhile" to them to become the record owner. Neither scenario is a indicator of good faith.

This court should find in favor of Carlita Silva. The law supports her position and the equities demand it.

Dated: December 4, 2015

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