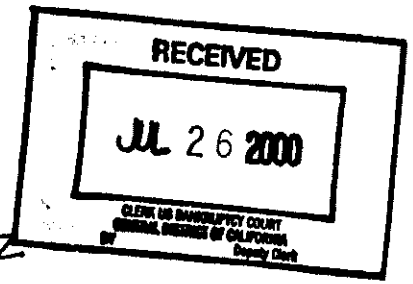


UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

BAP NO. CC-99-1610 KMaJ

BK NO. LA 96-35486 LF

Adv 98-02562 VZ



In re: CARLOS FLORES; In re: BERTHA FLORES

Debtor

CARLOS FLORES; BERTHA FLORES

Appellant

v.

OCWEN FEDERAL BANK; WOLF & RICHARDS

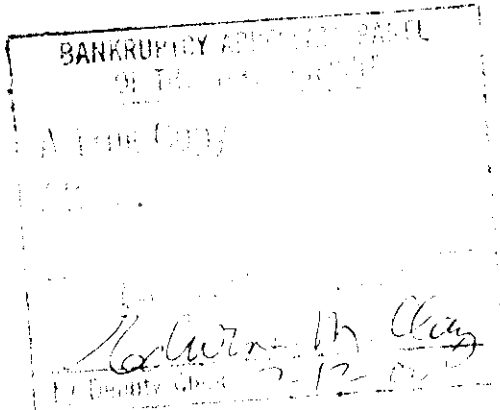
Appellee

JUDGMENT

ON APPEAL from the United States Bankruptcy Court for
the Central District of California

THIS CAUSE came on to be heard on the record from the
above court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by
this Panel that the judgment of the Bankruptcy Court is REVERSED AND
REMANDED. Judge Jaroslovsky files a separate concurrence.



FOR THE PANEL,

Nancy B. Dickerson,
BAP Clerk

By: Vicky Jackson-Walker

7/6/00

CASE NAME: CARLOS FLORES and BERTHA FLORES

BAP NO: CC-99-1610-KMaJ

Bk. NO: LA 96-35486 LF

Adv. NO: 98-02562

PROOF OF SERVICE MANDATE

A certified copy of the attached judgment was sent to:

CLERK

U.S. BANKRUPTCY COURT

at Roybal Federal Building
255 E. Temple Street

Los Angeles, CA 90012

on 7/17/00

By: Edwina Clay
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

1
2
3
4
5 In re)
6 CARLOS FLORES and BERTHA FLORES,) BAP No. CC-99-1610-KMaJ
7 Debtors.) Bk. No. LA 96-35486 LF
8) Adv. No. LA 98-02562 LF
9 CARLOS FLORES and BERTHA FLORES,)
10 Appellants,)
11 v.)
12 OCWEN FEDERAL BANK, FSB, and)
13 WOLF & RICHARDS,)
14 Appellees.)

MEMORANDUM¹

FILED

JUN 26 2000

NANCY H. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

15 Argued and Submitted on May 17, 2000
16 at Pasadena, California

17 Filed - June 26, 2000

18 Appeal from the United States Bankruptcy Court
19 for the Central District of California

20 Honorable Lisa Hill Fenning, Bankruptcy Judge, Presiding.

21 Before: KLEIN, MARLAR and JAROSLOVSKY,² Bankruptcy Judges.
22
23

24
25 ¹ This disposition is not appropriate for publication and may not
26 be cited except when relevant under the doctrines of law of the case,
27 res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1
28 and 9th Cir. Rule 36-3.

²Hon. Alan Jaroslovsky, Bankruptcy Judge for Northern District
California, sitting by designation.

1 Carlos and Bertha Flores filed an adversary proceeding against
2 Ocwen Federal Bank ("Ocwen") and Wolf & Richards, for wrongful
3 foreclosure of the Floreses' home. The bankruptcy court granted the
4 defendants' motions for summary judgment. The Floreses appeal. We
5 REVERSE and REMAND.

6
7 **FACTS**

8 Ocwen held the Note and Deed of Trust to the Floreses' home.
9 Wolf & Richards, a law corporation, was the trustee under the Deed of
10 Trust.

11 The Floreses were Chapter 13 debtors. In February, 1997, the
12 bankruptcy court entered a stipulated adequate protection order
13 because the Floreses were \$9,433.67 post-petition delinquent. The
14 order required the Floreses to make regular payments to Ocwen, and
15 allowed Ocwen to lodge an order terminating the automatic stay if the
16 Floreses failed to make payments.

17 The Floreses breached the adequate protection order by failing to
18 make required payments totaling \$3,742.33.

19 On October 1, 1997, the bankruptcy court entered an order
20 terminating the automatic stay ("October Order"). On November 12,
21 1997, defendants recorded a Notice of Trustee Sale with the county
22 recorder. Ocwen subsequently agreed to include some post-petition
23 arrearages in the Chapter 13 plan, and write off \$1,415.89, to bring
24 the Floreses post-petition current as of December 1, 1997. Ocwen
25 filed an amended proof of claim asserting arrearages of \$11,972.21,
26 and postponed the trustee's sale. The trustee's sale was periodically
27 postponed thereafter.

28 On June 19, 1998, the bankruptcy court entered an order, drafted

1 by Ocwen, that vacated the October Order.

2 In July 1998, Ocwen filed a declaration that the Floreses had
3 breached the adequate protection order by failing to make their May
4 and June 1998 payments. On July 15, 1998, the bankruptcy court again
5 entered an order terminating the automatic stay.

6 The Floreses' home was sold by foreclosure sale on July 21, 1998.
7 The property was sold to third party bidders, with a recital in the
8 deed that the foreclosure sale had complied with all relevant
9 statutory requirements.

10 In August 1998, the Floreses filed an adversary proceeding to set
11 aside the sale. In October, Ocwen sent a letter to the Floreses'
12 attorney, agreeing to accept \$27,698.62 to reinstate the loan. Carlos
13 Flores suffered a massive stroke the same day the Floreses received
14 the reinstatement figure.

15 The Floreses amended their complaint to seek damages for wrongful
16 foreclosure, rather than rescission of the sale. The amended
17 complaint alleges that the foreclosure sale was wrongful because it
18 was conducted without republishing the November 12, 1997 Notice of
19 Sale, and did not comply with the seven day waiting period required by
20 Cal. Civil Code § 2924g(d).

21 The Floreses also filed a declaration by Carol Goetze, their
22 daughter, stating that she was ready, willing and able to lend them
23 the amounts necessary to reinstate the loan.

24 In April 1999, the Floreses were granted a hardship discharge in
25 their Chapter 13 case.

26 Ocwen and Wolf & Richards each moved for summary judgment. Both
27 motions were granted.

28 This appeal ensued.

1 **ISSUE**

2 Whether the bankruptcy court erred in granting summary judgment
3 to the defendants.
4

5 **STANDARD OF REVIEW**

6 Orders granting summary judgment are reviewed de novo. Yarbrow
7 v. FDIC (In re Yarbrow), 150 B.R. 233, 236 (9th Cir. BAP 1993).
8 Summary judgment should be granted when there is no issue of material
9 fact and the movant is entitled to judgment as a matter of law. Fed.
10 R. Civ. P. 56; Fed. R. Bankr. P. 7056.
11

12 **JURISDICTION**

13 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334(b).
14 We have jurisdiction under 28 U.S.C. § 158.
15

16 **DISCUSSION**

17 I

18 The defendants argue that the July 15, 1998, relief from stay
19 order is res judicata and precludes this action for wrongful
20 foreclosure. The defendants misconstrue the effect of the relief from
21 stay order. The order allowed defendants to proceed to foreclosure
22 according to non-bankruptcy law. The order did not immunize them from
23 any subsequent actions that were not in accordance with non-bankruptcy
24 law.

25 In this case, the defendants proceeded to sale without a valid
26 Notice of Sale, which is contrary to the requirements of California
27 law. Additionally, the defendants held the sale one day earlier than
28 allowed by California Civil Code § 2924g(d).

1 The sale was made pursuant to a Notice of Sale that was published
2 November 12, 1997. That Notice was published between the October 1,
3 1997, relief from stay order and the June 17, 1998, order vacating the
4 October Order.

5 The language in the June order merely vacated the October Order
6 and reinstated the Adequate Protection Order. When an order is
7 vacated, the law treats it as if it had never existed, unless the
8 court's contrary intent is clear. The June order did not, on its
9 face, validate any actions taken in reliance on the October Order.
10 The bankruptcy court did not, in any subsequent order, indicate an
11 intention to validate the November Notice of Sale or treat the October
12 Order as anything other than wholly vacated. To the contrary, in
13 Ocwen's Statement of Undisputed Facts, which were adopted in
14 substantial part, the court struck out various proffered conclusions,
15 including a determination that the November Notice of Sale was valid.

16 Additionally, the June order vacating the relief from stay was
17 prepared by counsel for Ocwen. Any ambiguities in the order will be
18 construed against the drafter.

19 The November Notice of Sale was published in violation of the
20 automatic stay. Actions taken in violation of the automatic stay are
21 void. Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571
22 (9th Cir. 1992). Hence, the recordation of the Notice of Sale was
23 invalid.

24
25 II

26 In California, a valid non-judicial foreclosure sale requires
27 publication of a valid Notice of Default, publication of a valid
28

1 Notice of Sale, not less than three months after the Notice of
2 Default, and a Sale, held not less than twenty days after the Notice
3 of Sale. A deficiency in any step, including the time requirements,
4 makes the sale invalid and either voidable or void, depending on the
5 type and severity of the deficiency.

6 Typically, a plaintiff whose property was sold at an invalid sale
7 files an equitable action to rescind the sale and recover their
8 property. Where rescission is not possible, a plaintiff may maintain
9 a tort action for damages. Munger v. Moore, 11 Cal. App. 3d 1, 6
10 (1970).

11 The sale of the Floreses' home cannot be rescinded. The home was
12 sold to third party purchasers, who received a deed stating that the
13 sale complied with all statutory requirements. That statement in the
14 deed operates as a conclusive presumption of regularity in notice and
15 sale procedures for purposes of precluding any action against the
16 third party purchasers. Cal. Civ. Code § 2924; Moeller v. Lien, 25
17 Cal. App. 4th 822, 831-32 (Cal. App. 1994). Thus, the Floreses cannot
18 regain title to their property.

19 The presumption, however, is not conclusive as against the
20 creditor or trustee; it is merely prima facie evidence of compliance
21 with the statutory requirements. Moeller, 25 Cal. App. 4th at 831-32.
22 Thus, the Floreses can maintain an action for damages against the
23 defendants in this case. Id. at 832; Munger, 11 Cal. App. 3d at 9,
24 11.

25
26 A

27 The defendants argue that summary judgment was proper because the
28 Floreses were required to tender all amounts delinquent under the loan

1 to maintain any action, and they did not do so. We are not persuaded.

2 "The rationale behind this rule is that if plaintiffs could not
3 have redeemed the property had the sale procedures been proper, any
4 irregularities in the sale did not result in damages to the
5 plaintiffs." FPCI RE-HAB 01 v. E & G Investments, Ltd., 207 Cal. App.
6 3d 1018, 1022 (Cal. App. 1989).

7 To the extent the tender requirement is separate from the damages
8 issue, the Floreses have sufficiently complied. The tender offer may
9 be made prior to the sale, or in the complaint. 4 Miller & Starr
10 Calif. Real Estate 2d, Deeds of Trust and Mortgages § 9:154, p.508,
11 citing Foge v. Schmidt, 101 Cal. App. 2d 681, 683 (Cal. App. 1951).

12 The Floreses did not explicitly offer to tender their arrearages.
13 They did, however, sue for damages rather than rescission of the sale.
14 Damages are calculated by subtracting all encumbrances on the property
15 from its fair market value at the time of the wrongful foreclosure.
16 Munger 11 Cal. App. 3d at 11. All arrearages and sale expenses that
17 would be tendered are included in the encumbrances part of the
18 calculation. Thus, a complaint for damages contains the functional
19 equivalent of a tender offer. Debtors need not offer to separately
20 pay the arrearages.

21
22 B

23 The Floreses still must prove that they were damaged by the
24 deficiencies in the foreclosure procedure. To prove actionable harm,
25 the Floreses must prove that they could have tendered the arrearages
26 within the time granted to them by California's statutory scheme. In
27 other words, if the Floreses would not have been able to prevent
28 foreclosure if the sale had been properly conducted, they were not

1 harmed by the deficiencies in the sale process.

2 The bankruptcy court found that the Floreses had neither tendered
3 the arrearages nor asked for additional time to do so prior to the
4 July 15, 1998, order terminating the automatic stay. The court
5 further found that they would have been unable to do so by the day
6 after the sale, when the 7 day waiting period required by Cal. Civ.
7 Code § 2924g(d) actually expired.

8 The bankruptcy court, however, used the wrong time frame in
9 determining the Floreses ability to cure their default. Ocwen had not
10 published a valid Notice of Sale. Assuming that Ocwen could have
11 published a new Notice of Sale on the day after the order granting
12 relief from stay was entered, the Floreses would have had 20 days to
13 arrange the tender, rather than the 6 days they were actually allowed.

14 The Floreses' daughter, Carol Goetze, has declared that she was
15 willing and able to lend her parents the money to cure their
16 arrearages. This declaration raises a genuine issue of material fact
17 about whether the Floreses could have paid within the 20 days.
18 Accordingly, summary judgment was inappropriate.

19
20 **CONCLUSION**

21 Ocwen and Wolf & Richards conducted the foreclosure sale of the
22 Floreses' home without a valid Notice of Sale, which made the
23 foreclosure wrongful.

24 The Floreses need not explicitly offer to tender the amounts in
25 arrears to maintain an action for damages for wrongful foreclosure.

26 The Declaration of Carol Goetze raised a genuine issue of
27 material fact regarding whether the Floreses could have reinstated
28

1 their loan prior to the foreclosure sale if the sale had been
2 conducted according to California statutory requirements.

3 We REVERSE and REMAND.
4
5

6 JAROSLOVSKY, concurring.
7

8 I concur in the result and in most of the reasoning of my
9 brethren. Specifically, I agree that the stipulation to vacate the
10 order for relief which allowed the Notice of Sale to be recorded
11 rendered the Notice of Sale invalid.

12 However, I disagree with the statements that the sale was
13 conducted one day early in violation of Cal. Civil Code § 2924(g).
14 The sale was conducted on July 21, 1998. It is true that the order
15 for relief from the stay was entered on July 15, but it was signed on
16 July 14. An oral ruling is sufficient to lift the automatic stay.
17 Noli v. C.I.R., 860 F.2d 1521 (9th Cir. 1988). A written ruling
18 should be just as effective.

19 Under the rules as they existed at the time, most orders were
20 subject to a stay of enforcement for 10 days after entry (FRCP 62 via
21 FRBP 7062 via FRBP 9014). Therefore, entry was necessary before most
22 orders could be enforced. However, orders modifying the automatic
23 stay were specifically exempt from stay by Rule 7062. I therefore
24 believe that the order was effective when the judge signed it, not
25 when it was entered.
26
27
28

U.S. Bankruptcy Appellate Panel
of the Ninth Circuit
125 South Grand Avenue, Pasadena, California 91105
Appeals from Central California (626) 229-7220
Appeals from all other Districts (626) 229-7225

NOTICE OF ENTRY OF JUDGMENT

BAP No. CC-99-1610 KMaJ

RE: CARLOS FLORES AND BERTHA FLORES

A separate Judgment was entered in this case on June 26, 2000.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken.
9th Cir. BAP Rule 8014-1

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the \$105 filing fee and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

The undersigned, deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document on which this stamp appears was mailed this date to all parties in interest as designated by the Appellant in the Notice of Appeal.

By: Vicky Jackson-Walker

Deputy Clerk: June 26, 2000