The below described is SIGNED.

Dated: June 13, 2012

WILLIAM T. THURMAN
U.S. Bankruptcy Chief Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
IN THE CENTRAL DIVISION

In re:	
JAMES LEO FEHRENBACKER,	Bankruptcy Number 12-20883
Debtor.	Chapter 7
	Chief Judge William T. Thurman

ORDER ON THE BANK OF NEW YORK MELLON'S MOTION FOR RELIEF FROM STAY

The matter before the Court is the Bank of New York Mellon's (the "Creditor's") Motion for Relief from Stay (the "Motion") under § 362(d) of the Bankruptcy Code.[1] The Court commenced a preliminary hearing on the Motion on May 3, 2012, which was continued and concluded on May 24, 2012. Armand Howell appeared on behalf of the Creditor and Benjamin Ruesch appeared on behalf of James Leo Fehrenbacker (the "Debtor"). The parties made representations on the record and submitted oral arguments. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(b)(2) and 1334. Venue is appropriate under 28 U.S.C. §

[1] Unless otherwise stated, all subsequent chapter and section references herein are contained in title 11 of the United States Code.

1408(1). Notice for considering the Motion is appropriate in all respects.

FACTS AND BACKGROUND

The Debtor filed a chapter 7 bankruptcy petition on January 25, 2012. On Schedule A, the Debtor listed real property located at 171 South 250 West, La Verkin, Utah 84745 (the "Property"). The Chapter 7 Trustee filed a Report of No Distribution on March 19, 2012. The Creditor filed the Motion on March 22, 2012 seeking relief from the automatic stay with respect to the Property under § 362. The Creditor asserted that it was the current owner of the Note and Deed of Trust.

The Debtor filed an objection to the Motion on April 6, 2012 alleging that the Creditor did not have standing as a party in interest to bring the Motion because the Creditor could not provide evidence that it possessed a properly negotiated promissory note. The Court held a preliminary hearing on the Motion on May 3, 2012 at which the Creditor indicated that the original note was "in route" to the its counsel's office. Concerned about the Creditor's standing to bring the Motion, the Court continued the hearing on the record to May 24, 2012 for a final evidentiary hearing.

At the hearing on May 24, 2012, the counsel for the Creditor noted that he had not yet received the original note from his client and could not otherwise provide verification of his client's possession of the note. However, the Creditor stated that it believed the Motion to be moot under § 362(c)(2) because on May 17, 2012, in the interim between the preliminary and final evidentiary hearing, the Debtor received a discharge. The Debtor objected to the contention that the Motion was moot given the Debtor's recent discharge and argued that based upon the recent Tenth Circuit Court of Appeals decision, In re Miller, that the Creditor needed to provide

evidence of possession of the note. In re Miller, 666 F.3d 1255 (10th Cir. 2012).

DISCUSSION

MOTION FOR RELIEF STANDARD

Under § 362(d), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay" if the moving party shows cause for such relief. The Tenth Circuit Bankruptcy Appellate Panel (the "Tenth Circuit BAP") provides a two-step approach to stay hearings in In re Utah Aircraft Alliance:

> At a stay hearing, the court merely determines whether the movant has a colorable claim, i.e., a facially valid security interest. It then should consider whether the objector has raised a colorable defense that, not merely offsets the movant's claim, but actually would defeat the movant's claim. In this context, the bankruptcy court limits its consideration of defenses to those that strike at the heart of the creditor's lien or that bear on the debtor's equity in the property.

In re Utah Aircraft Alliance, 342 B.R. 327 (10th Cir. B.A.P. 2006). Thus, the movant in a motion for relief from stay action need only present a "colorable claim" for relief. A "colorable claim" to an ownership interest in property includes "a facially valid security interest." In re Utah Aircraft Alliance, 342 B.R. at 332. In a recent decision, the Tenth Circuit BAP held that a creditor did not establish standing to seek a contested motion for a § 362(j) comfort order where the creditor did not provide evidence of standing. In re Thomas, No. 10-17039, 2012 WL 1574418, at *1 (10th Cir. B.A.P. May 7, 2012). The Tenth Circuit BAP explained that while the original note is not required to be placed into evidence, "the bankruptcy court must make a cognizable determination of standing in a contested matter . . . which requires some review of the standing documents, whether they be admitted into evidence or proffered to the court without objection." In re Thomas, 2012 WL 1574418, at *5 n.32.

In this contested motion for relief, the Debtor objected on standing grounds and the Creditor made representations that the original note is on its way to its counsel's office. As of the hearing on May 24 however, the Creditor had not established possession of the original note through placing the note into evidence or otherwise. Thus the Motion cannot be granted.

SECTION 362(C)

In the alternative, the Creditor argued at the hearing on May 24, 2012 that regardless of whether the Creditor is entitled to relief from stay, that the discharge received by the Debtor on May 19, 2012 terminated the stay and rendered the Motion moot. Section 362(c) states that:

> (1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;
> (2) the stay of any other act under subsection (a) of this section continues until the earliest of-
>
> (A) the time the case is closed;
> (B) the time the case is dismissed; or
> (C) if the case is a case under chapter 7 of this title . . . the time a discharge is granted or denied.

Thus, according to § 362(c)(2)(C), when the debtor receives a discharge in a chapter 7 case the automatic stay is terminated as to any acts taken against the debtor personally; however, the automatic stay continues with respect to property of the estate under § 362(c)(1). See Miles v. Wells Fargo Bank,N.A., No. 09-cv-02973-CMA, 2010 WL 3894048, at *3 n.3 (D. Colo. Sept. 30, 2010). Here, while the Debtor received a discharge that terminated the stay as to any actions taken against him personally, the Creditor is seeking to take action against the Property which is property of the estate.

Although the Chapter 7 Trustee in this case has not filed a notice of abandonment with respect to the Property at issue, he did file a Report of No Distribution in this case on March 19,

2012. The Report of No Distribution is insufficient to remove the Debtor's real property from estate property. Section 554 governs the abandonment of property of the estate and provides that:

> (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
> (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
> (c) Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.
> (d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

As noted in the Tenth Circuit BAP decision In re Cook, neither a trustee's notice of abandonment nor a report of no distribution is "sufficient to effectuate an administrative abandonment" under § 554 and Bankruptcy Rule 6007. In re Cook, No. 04-17704, 2012 WL 1356490, at *6 (10th Cir. B.A.P. April 19, 2012). Thus, the Court concludes that the stay is not terminated as to actions taken against the Property.

The Creditor may argue that this analysis is superfluous given that the Trustee represents the estate in this case and has not objected to the Motion. The Court notes that the Trustee received notice of the Motion and accordingly, it may be appropriate to enter an order of default against the Trustee. This may alleviate the concerns of the Court, assuming the Creditor has appropriate standing.

CONCLUSION

At the final evidentiary hearing, Creditor's counsel indicated that despite his representations 20 days earlier, his client had not yet provided the original note to his office.

Thus, the Court finds that at this time that the Creditor has not provided sufficient evidence that it has standing as a party in interest to bring the Motion. Without such verification or evidence of standing, the Court does not grant the Motion. Although the Debtor filed an objection and not the Trustee as representative of the estate, the Court has an independent duty to examine all pleadings and court documents to test whether the relief requested is authorized by law.[2] Thus, the Court continues the Motion without date subject to a later hearing at the Creditor's request.

Based upon the foregoing, it is hereby **ORDERED** as follows**:**

1. The Motion for Relief from Stay is continued without date.

2. To the extent that any further hearing is necessary, the time is shortened to 10 days.

3. The stay remains in place pending further order of the Court.

End of Document

SERVICE LIST

[2] Bixler v. Foster, 596 F.3d 751, 762 (10th Cir. 2010) (holding that the court should "consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law") (citations omitted). Mercantile Bank v. Canovas, 237 B.R. 423, 427 (Bankr. D. Ill. 1998) (citing Peerless Industries, Inc. v. Herrin Illinois Café, Inc., 774 F.2d 1172 (8th Cir. 1985)). See Wells Fargo Bank v. Beltran (In re Beltran), 182 B.R. 820, 824 (9th Cir. B.A.P. 1995); Valley Oak Credit Union v. Villegas (In re Villegas), 132 B.R. 742, 746 (9th Cir. B.A.P. 1991) (holding that "[u]nder Fed. R. Bankr. P. 7055, courts have broad discretion to 'conduct such hearings . . . as it deems necessary and proper' to determine whether a default judgment should be entered").

Service of the foregoing **ORDER ON THE BANK OF NEW YORK MELLON'S MOTION FOR RELIEF FROM STAY** will be effected through the Bankruptcy Noticing Center to each party listed below.

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