

JUL 10 2015

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	AZ-14-1496-JuKiPa
)		
7	CARRIE MARGARET NEIDORF,)	Bk. No.	2:08-bk-08600-MCW
)		
8	Debtor.)		
)		
9	_____)		
)		
10	ROBERT A. MacKENZIE, Chapter)		
	7 Trustee,)		
)		
11	Appellant,)		
)		
12	v.)	O P I N I O N	
)		
13	CARRIE MARGARET NEIDORF,)		
)		
14	Appellee.)		
)		
15	_____)		

Argued and Submitted on June 19, 2015
at Phoenix, Arizona

Filed - July 10, 2015

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Madeleine C. Wanslee, Bankruptcy Judge, Presiding

Appearances: Michael Paul Lane, Lane & Nash, P.C. argued for
appellant Robert A. MacKenzie; Kenneth L. Neeley,
Neeley Law Firm, PLC, argued for appellee Carrie
Margaret Neidorf.

Before: JURY, KIRSCHER, and PAPPAS, Bankruptcy Judges.

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1 JURY, Bankruptcy Judge:
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3 Chapter 7¹ debtor Carrie Margaret Neidorf (Debtor)
4 scheduled her real property (Residence) as an asset of her
5 estate. There was no equity in the property. Postpetition, the
6 lender obtained an unopposed relief from stay order and
7 foreclosed on the property. Years after the foreclosure, but
8 while her bankruptcy case was still open, Debtor received a
9 postpetition payment in the amount of \$31,250 (Foreclosure
10 Payment). The payment was made to Debtor pursuant to a national
11 settlement between banking regulators and certain financial
12 institutions, including Bank of America (B of A). Debtor
13 disclosed her receipt of the Foreclosure Payment to Robert A.
14 MacKenzie, the chapter 7 trustee (Trustee). Trustee then filed
15 a Motion to Compel Debtor to Turnover Estate Property (Turnover
16 Motion), asserting that the Foreclosure Payment was property of
17 the estate under § 541(a)(7). The bankruptcy court denied his
18 motion, and this appeal followed. For the reasons discussed
19 below, we AFFIRM.

20 **I. FACTS**

21 The underlying facts are undisputed. Debtor filed her
22 chapter 7 petition on July 12, 2008. In Schedule A, Debtor
23 listed her Residence located in Phoenix with a value of
24 \$350,000, subject to liens totaling \$454,200. In Schedule C,
25

26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532 and
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

1 Debtor claimed an exemption in the property for \$150,000 under
2 Ariz. Rev. Stat. § 33-1101(A). In Schedule D, Debtor showed the
3 property was encumbered by three liens, including a first
4 position deed of trust in favor of Countrywide Home Loans, Inc.
5 (Countrywide).

6 Countrywide obtained an unopposed order granting relief
7 from the automatic stay with respect to the Residence on
8 September 29, 2008. Countrywide's interest in the deed of trust
9 was assigned to B of A sometime in 2008 as part of a
10 merger/acquisition.

11 Debtor received a § 727 discharge on October 21, 2008.

12 Debtor's Residence was sold at a foreclosure sale on
13 July 14, 2009.

14 Trustee filed a Notice of Trustee's Final Report and
15 Application for Compensation on November 14, 2013. The
16 bankruptcy court entered an order approving payment for
17 administrative fees and expenses on December 19, 2013, but the
18 case was never closed.²

19 Almost six years after her case was filed, Debtor disclosed
20 to Trustee that she had received the Foreclosure Payment. On
21 April 15, 2014, Trustee filed the Turnover Motion contending
22 that the payment was property of the estate under § 541(a)(7).

23 At the May 13, 2014 hearing, the bankruptcy court took the
24 matter under submission. On September 30, 2014, the bankruptcy
25 court issued its findings of fact and conclusions of law and
26 entered the order denying Trustee's Turnover Motion. Trustee

27 ² Trustee kept the estate open while he was collecting on
28 an unsecured note.

1 timely appealed from that order.

2 **II. JURISDICTION**

3 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
4 §§ 1334 and 157(b)(2)(E). We have jurisdiction under 28 U.S.C.
5 § 158.

6 **III. ISSUE**

7 Did the bankruptcy court err by determining that the
8 Foreclosure Payment was not property of Debtor's estate?

9 **IV. STANDARDS OF REVIEW**

10 Whether property is included in a bankruptcy estate is a
11 question of law subject to de novo review. Cisneros v. Kim
12 (In re Kim), 257 B.R. 680, 684 (9th Cir. BAP 2000).

13 We may affirm the bankruptcy court's decision on any ground
14 supported by the record. Olsen v. Zerbetz (In re Olsen), 36
15 F.3d 71, 73 (9th Cir. 1994).

16 **V. DISCUSSION**

17 Section 541(a)(7) makes property of the estate any interest
18 in property that the estate (not the debtor) acquires after the
19 petition date. "Congress enacted § 541(a)(7) to clarify its
20 intention that § 541 be an all-embracing definition and to
21 ensure that property interests created with or by property of
22 the estate are themselves property of the estate." TMT
23 Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement
24 Corp.), 764 F.3d 512, 524-25 (5th Cir. 2014); H.R. REP. 95-595,
25 549, reprinted in 1978 U.S.C.C.A.N. 5963, 6455 & 6523-24.
26 Stated differently, for the after-acquired interest to be
27 considered property of the estate under § 541(a)(7), the
28 interest (1) must be created with or by property of the estate;

1 (2) acquired in the estate's normal course of business; or (3)
2 otherwise be traceable to or arise out of any prepetition
3 interest included in the bankruptcy estate. See Id. at 525.
4 The party seeking to include property in the estate bears the
5 burden of showing that the item is property of the estate.
6 Seaver v. Klein-Swanson (In re Klein-Swanson), 488 B.R. 628, 633
7 (8th Cir. BAP 2013).

8 Here, Trustee has not shown how the bankruptcy estate
9 acquired an interest in the postpetition Foreclosure Payment.
10 The payment was neither created with or by property of the
11 estate nor can it be said that the payment is traceable to or
12 arose out of any prepetition interest included in the bankruptcy
13 estate. The fact that Debtor's Residence became property of the
14 estate, in and of itself, does not support the inclusion of the
15 Foreclosure Payment as after-acquired property under
16 § 541(a)(7). Rather, Debtor became entitled to the payment only
17 as a result of qualifying events occurring after her bankruptcy
18 filing.

19 Debtor's legal right to, or interest in, the Foreclosure
20 Payment was as a "borrower," and did not arise until April 13,
21 2011, when B of A, acting through its Board of Directors, and
22 the Comptroller of the Currency (Comptroller) entered into a
23 consent order (2011 Consent Order).³ The Comptroller and B of A

24
25 ³ Attached to Debtor's response to Trustee's Turnover
26 Motion was a letter which included her payment check. That
27 letter said that B of A had entered into the agreement described
28 above and gave a website address where additional information
apparently went to the website identified in the letter to
(continued...)

1 entered into an Amendment to the Consent Order dated
2 February 28, 2013 (2013 ACO), which required B of A to make a
3 \$1,127,453.261 cash payment to a Qualified Settlement Fund
4 (QSF). Under the 2013 ACO, only borrowers who had a pending or
5 completed foreclosure on their primary residence any time from
6 January 1, 2009, to December 31, 2010, were eligible to receive
7 distributions from the QSF. In other words, it was the
8 postpetition 2011 Consent Order and 2013 ACO which created the
9 rights and remedies for the specified class of borrowers.

10 Seen in this light, that the estate had an interest in
11 Debtor's Residence is not enough. Nowhere has Trustee shown how
12 the estate obtained an interest in the Foreclosure Payment
13 itself when the qualifying events giving rise to Debtor's legal
14 rights to the payment all occurred postpetition and were held
15 solely by the borrowers. See Drewes v. Vote (In re Vote), 276
16 F.3d 1024 (8th Cir. 2002). The payment is thus not an after-
17 acquired interest of the estate. Therefore, we agree with the
18 bankruptcy court's legal conclusion that the postpetition
19 Foreclosure Payment received by Debtor was not property of her
20 estate.

21 **VI. CONCLUSION**

22 Having found no error, we AFFIRM.

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24 _____

³ (...continued)

25 obtain additional information about the national settlement and
26 the terms of the Consent Order. Although the Consent Order was
27 not part of the record in the bankruptcy court, the parties
28 verified at oral argument that they had no objection to the
bankruptcy court's sua sponte examination of the Consent Order
or its amendment. Like the bankruptcy court, we have also
reviewed them.