

Ronald Ryan
Attorney for Debtors and Appellants
1413 E Hedrick Dr
Tucson AZ 85719
phone: (520)298-3333 fax: (520)743-1020
ronryanlaw@cox.net
AZ Bar #018140 Pima Cty #65325

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT
ON APPEAL TO THE NINTH CIRCUIT COURT OF APPEALS**

In re: BARRY WEISBAND, DEBTOR, RESPONDENT, APPELLANT	BAP AZ-10-1239 Bky. Case No. 4:09-bk-05175-EWH
V. FIRST HORIZON HOME LOANS A DIVISION OF FIRST TENNESSEE BANK NATIONAL ASSOCIATION, MOVANT, APPELLEE	STATEMENT OF ISSUES ON APPEAL OF BAP DECISION TO 9TH CIRCUIT COURT OF APPEALS RENTAL DUPLEX 2774 FAIR OAKS Chapter 13

Barry Weisband, Debtor and Appellant, hereby files the Statement of Issues on Appeal. For the purposes herein, "Note" refers to the Promissory Note that Debtor executed at the closing of the mortgage loan transaction for Debtor's Rental Duplex, located at 2774 Fair Oaks ("Property"). The DOT is that Debtor executed at the closing of the mortgage loan transaction that originally secured payment of the Note by the Property. The original Lender as named in the Note and DOT ("Originator"), was First Horizon Home Loan Corporation ("FHHLC"). The Order that is the subject of this appeal, lifted the automatic stay in favor of First Horizon Home Loans a Division of First Tennessee Bank National Association ("FHHL"), on Debtor's Rental Duplex, located at 2774 Fair Oaks, in Tucson AZ, over Debtor's objection. The Bankruptcy Appellate Panel for the 9th Circuit ("BAP") affirmed. Attached to FHHL's Motion for Relief from Stay was a merger agreement FHHLC and First

1 Tennessee Bank National Association ("FTBNA"). FHHL filed the Motion for Relief from
2 Stay in its own name, as a division of FTBNA. FHHL claimed it had the right to enforce the
3 Note, Loan and DOT rights in the Property and claimed the right to file a Motion for Relief
4 from Stay to pursue foreclosure. Debtor claimed that FHHL did not have the right to do
5 either. Debtor informed the Bankruptcy Court (herein, "Court" as the trial court) that it had
6 expert testimony to support Debtor's challenge to the Motion, and informed the Court that
7 the evidence in the record contained certain indicators that also supported Debtor's
8 challenge. Primarily Debtor contends that the Loan, Note and Deed of Trust ("DOT") were
9 intended for Securitization into a Mortgage Backed Security ("MBS") Trust, and that
10 Appellee was not, either at the time the bankruptcy case was filed, nor at the time the
11 motion for relief from stay was filed: the real Article 3 Holder of the Note; nor the owner of
12 the Loan; nor the party possessed of the DOT rights, including the security interest in the
13 Property. Debtor alleged that the merger agreement was irrelevant. Debtor alleged that the
14 Loan, Note and DOT rights had been sold or otherwise transferred to a completely separate
15 entity, within weeks after the original loan closed, to a completely separate entity from either
16 FHHLC, FTBNA and FHHL. The Bankruptcy Court summarily granted stay relief, without
17 prior notice that the hearing at which the ruling was made was to be a summary judgment
18 hearing. The Court did not hold a single evidentiary hearing. It did not require a single
19 piece of evidence or testimony to be admitted in a legal proceeding, subject to cross
20 examination and the right to present controverting evidence. The Court did not require that
21 the evidence and the purport of said evidence met even the standard of summary judgment
22 evidence. Debtor was not afforded an opportunity to perform reasonable discovery, despite
23 the fact that Debtor informed the Court that they intended to immediately serve written
24 discovery requests. All these actions were performed despite Debtor's Objections thereto.
25
26
27

1 1. Did the Court err in finding that FHHL proved itself to have Constitutional
2 Standing and Real Party in Interest status ("RPI") (Prudential Standing), without having to
3 present any evidence in an admissible form, over Debtor's objection? A narrower wording
4 of the issue would be, did the Court err in finding that the fact that Debtor did not dispute
5 that there had been a merger between FHHLC and FTBNA constitute conclusive proof that
6 FHHL had Constitutional Standing and Real Party in Interest status? Otherwise stated, was
7 it a denial of due process, or otherwise reversible error not to provide Debtor a hearing on
8 the relevant issues as requested, so that FHHL would have to present its evidence in
9 admissible form, such as by sworn testimony by persons with personal knowledge and to
10 allow Debtor to contest the truth of said evidence by cross examination and controverting
11 evidence of its own? These questions are within the context of allegations by Debtor that
12 the Loan, Note and DOT had, to a high degree of probability, been sold or otherwise
13 transferred to another party, and that the appearance created by the Note and DOT
14 attached to FHHL's motion, and the allegations in its motion were misleading.
15

17 2. Even if FHHL had established a prima facie case that it had Constitutional
18 Standing and Prudential Standing, was it a denial of due process, or in contravention of
19 statutory law or the applicable rules of procedure to deny Debtor an evidentiary hearing?
20 These questions are within the context of allegations by Debtor that the Loan, Note and
21 DOT had, to a high degree of probability, been sold or otherwise transferred to another
22 party, and that the appearance created by the Note and DOT attached to FHHL's motion,
23 and the allegations in its motion were misleading.
24

25 3. Did Debtor fail to request an evidentiary hearing? This issue was raised in
26 the BAP Memorandum Opinion.

27 4. In a motion for relief from stay proceeding pertaining to residential property,

1 where the Debtor seriously contests that the Movant has Constitutional and prudential
2 standing and seriously contests that Movant has the right to proceed to non-judicial
3 foreclosure, does the Debtor have the right to a reasonable amount of discovery within a
4 reasonable time? Alternatively, was it error to deny Debtor the right to a reasonable amount
5 of discovery within a reasonable period of time in this case?
6

7 5. What evidence is necessary to prove Constitutional Standing and Prudential
8 Standing in the context of a Motion for Relief from Stay in Bankruptcy Court on residential
9 real estate? Other ways of framing these issues are contained in the following sub-
10 questions:

- 11 a. Did the Court err in failing to require evidence that FHHL or its
12 predecessors had not negotiated and transferred the Note to another
13 non-party, particularly given the fact that this is what Debtor alleged
14 in response to the stay relief motion?
- 15 b. Did the Court err in failing to require FHHL to present evidence that it
16 paid true value of its own for ownership of the Loan, and that even if
17 it had, that it had not sold the Loan to another non-party, particularly
18 since Debtor specifically pled that FHHL did not own the Loan?
- 19 c. Did the Court err in failing to require FHHL to present evidence that it
20 had a security interest in the Property at the time the bankruptcy case
21 was filed, meaning that it was still possessed of the DOT rights,
22 particularly given the fact that Debtor denied that it still had such an
23 interest.
- 24 d. Was it error to rely on statements of FHHL's Attorney as to the fact
25 that the appearance of the documents attached to its motion
26 constituted a true and complete representation of the actual facts of
27 the case, particularly since Debtor objected to this and pled that it
good and reasonable cause to allege that the facts that would be
revealed at trial would be that the apparent picture created by these
documents would be dispelled in cross-examination and controverting
evidence.

26 6. What effect should the established lack of credibility on the part of financial
27 institutions related to residential mortgage loan servicing and foreclosure processing have
upon residential mortgage stay relief procedures, in cases of pertinent mortgage loan debt,

1 particularly when such motions are challenged by the homeowner? This is within the
2 context that, admittedly, in prior years such motions had been routine, such that when
3 Debtor had not made the monthly mortgage payments, stay relief was proper, absent a plan
4 for Debtor to cure the arrearage. Because of the unsafe, unsound and fraudulent practices
5 related to residential mortgage loan servicing and foreclosure processing for mortgages,
6 primarily dated between 2001-2008. This lack of credibility has been established, because
7 it has been made part of the official public record, and because of the astonishing and
8 overwhelming findings made through official investigations, private legal and expert inquiries
9 and investigative journalism.

10
11 Dated: August 9, 2011

12
13 Respectfully submitted,
14 /S/ Ronald Ryan
Ronald Ryan, Debtor's Counsel

15 The names of all parties to the Order appealed from and the names, addresses, and
16 telephone numbers of their respective attorneys are as follows and the undersigned does
certify to have emailed a copy hereof to each of the same on this date:

17 Barry Weisband, Debtor, Respondent, Appellant, 17528 32nd Ave NE, Lake Forest Park
18 WA 98155, barryweisband@yahoo.com, by and through attorney of record, Ronald Ryan,
19 1413 E Hedrick Dr, Tucson AZ 85719, (520)298-3333, fax 520-743-1020,
ronryanlaw@cox.net.

20 First Horizon Home Loans a Division of First Tennessee Bank National Association, by and
21 through attorney of record, Matthew A. Silverman, matthew.silverman@azbar.org (018919),
22 Jessica R. Kenney Jkenney@mhlevine.com (026615), McCarthy, Holthus, Levine, 3636
North Central Avenue, Suite 1050, Phoenix, AZ 85012, (602) 230-8726.

23 In addition, the Chapter 13 in this case is:

24 Dianne Kerns Chapter 13 Trustee 7320 La Cholla #154, PMB 413 Tucson AZ 85741-2305
25 Mail@dcktrustee.com.
26
27

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing.

U. S. Bankruptcy Appellate Panel for the Ninth Circuit

Notice of Docket Activity

The following transaction was entered on 08/09/2011 at 9:21:37 AM PDT and filed on 08/09/2011

Case Name: Barry Weisband v. First Horizon Home Loans

Case Number: [10-1239](#)

Document(s): [Document\(s\)](#)

Docket Text:

Designation of Record and/or Statement of Issues (ECF) filed for Court of Appeals by Attorney Ronald Ryan for Appellant Barry Weisband in 10-1239; served on 08/09/2011 served by: email - Attorney for Appellees: Kenney, Silverman, Kerns. [10-1239, 10-1267] (RR)

The following document(s) are associated with this transaction:

Document Description: STATEMENT OF ISSUES ON APPEAL

Original Filename: STATEMENT OF ISSUES ON APPEAL 10-1239.pdf

Electronic Document Stamp:

[STAMP acecfStamp_ID=1106763461 [Date=08/09/2011] [FileNumber=421359-0]

[127fab4d385cadf8172a965b8d865440710eae9870ffc731b2f676950df4fba48ff82c047856d2c154ab6add0caa2a7d0cbee2ef2ce99e92b265ea2e0fa65880]]

Notice will be electronically mailed to:

Ryan, Ronald, Attorney

Mr. Silverman, Matthew A., Attorney

Ms. Kenney, Jessica R., Attorney

Kerns, Dianne Crandell