



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
November 07, 2023

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:)	Case No.: 22-11197-MKN
)	Chapter 11
T-SHACK, INC.,)	
)	
Debtor.)	Date: July 12, 2023
)	Time: 9:30 a.m.
)	

ORDER REGARDING OBJECTION TO PROOF OF CLAIM #5-1¹

On July 12, 2023, a hearing was conducted on the above-captioned Debtor’s objection to a proof of claim filed in this Chapter 11 proceeding (“Claim Objection”). After arguments were presented, the matter was taken under submission.

BACKGROUND²

On April 5, 2022, a voluntary “skeleton” Chapter 11 petition for reorganization was filed by T-Shack, Inc. (“Debtor”). (ECF No. 1). The petition designated the Debtor as a “small

¹ In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. Where the court refers to documents filed in other bankruptcy cases, the same reference format is used and preceded by the particular debtor’s surname. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “NRS” are to the Nevada Revised Statutes.

² Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the docket in the above-captioned Bankruptcy Case as well as other cases filed in this court. See Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) (“The Court may consider the records in this case, the underlying bankruptcy case and public records.”).

1 business debtor” under Section 101(51D). A deadline of August 3, 2022, was set for creditors to
2 file proofs of claim. (ECF No. 4).

3 On April 6, 2022, a status hearing in this bankruptcy proceeding was scheduled to be
4 heard on May 11, 2022. (ECF No. 7).

5 On May 4, 2022, Debtor filed its schedules of assets and liabilities (“Schedules”) and
6 statement of financial affairs. (ECF Nos. 16 and 18). On its Schedule “A/B,” Debtor lists an
7 interest in eight (8) residential properties, one of which is a fee simple interest in the residential
8 real property located at 3400 Cabana Drive #2027, Las Vegas, Nevada 89122 (“Cabana
9 Property”) having an “unknown” value. Debtor also listed a fee simple interest in a residential
10 real property located at 5155 W. Tropicana Avenue, Unit 2010, Las Vegas, Nevada 89103 (“Unit
11 2010”). On its Schedule “D,” the only two secured creditors listed are Prestige Default Service,
12 LLC, and Quality Loan Service Corporation, for which the Debtor provides no description of the
13 property securing the claims and no amount owed.

14 On May 17, 2022, NewRez LLC d/b/a Shellpoint Mortgage Servicing (“Shellpoint”) filed
15 a proof of claim (“POC 1-1”) asserting a claim in the amount of \$186,091.47 secured by an
16 interest in Unit 2010.

17 On August 16, 2022, Debtor filed an objection to POC 1-1 (“POC 1-1 Objection”). (ECF
18 No. 52).

19 On August 29, 2022, Debtor filed amended schedules of assets and liabilities. (ECF No.
20 60). On its amended Schedule “A/B,” the Cabana Property is still listed as “Fee simple” with an
21 “Unknown” value. On its amended Schedule “D,” Debtor shows secured creditor “Prestige
22 Default Services” with a real property description listing the Cabana Property and having a claim
23 in the amount of \$114,207.83.

24 On September 21, 2022, the POC 1-1 Objection was heard and overruled because the
25 Debtor failed to provide sufficient evidence to overcome the prima facie validity of the proof of
26 claim.

27 On September 27, 2022, an order was entered overruling the POC 1-1 Objection. (“POC
28 1-1 Order”). (ECF No. 75).

1 On October 11, 2022, Debtor appealed the POC 1-1 Order to the Bankruptcy Appellate
2 Panels of the Ninth Circuit (“BAP”). (ECF No. 79).

3 On March 15, 2023, The Bank of New York Mellon fka The Bank of New York, as
4 Trustee for the Certificate Holders of CWALT, Inc., Alternative Loan Trust 2004-36CB,
5 Mortgage Pass-Through Certificates, Series 2004-36CB, filed a proof of claim (“POC 5-1”)
6 through its loan servicer, Shellpoint. Attached to POC 5-1 are a variety of documents in support
7 of the claim. One of the documents is a Mortgage Proof of Claim Attachment: Addendum that
8 itemizes various fees and costs charged on the loan, various disbursements and advances, and a
9 running balance of payments due and payments received. In addition, the attachments to POC 5-
10 1 includes a copy of a promissory note executed by Hanna T. Abdo, dated November 8, 2004, in
11 the original principal amount of \$123,200.00 (“Note”), along with a deed of trust against the
12 Cabana Property (“Deed of Trust”) recorded on November 15, 2004.

13 On April 14, 2023, Debtor filed an amended voluntary petition that eliminated the “small
14 business debtor” designation. (ECF No. 109).

15 On May 3, 2023, Debtor filed the instant Claim Objection.³ (ECF No. 113). Attached to
16 the Claim Objection is a copy of a Chapter 7 discharge of an individual named Hanna Tanios
17 Abdo (“Abdo Discharge Order”)⁴ as well as a copy of POC 5-1, without the attachments that
18 were provided with POC 5-1.⁵ The documents were offered as exhibits to overcome the prima
19

20
21 ³ Debtor indicates in its Claim Objection that the debt in question found in POC 5-1, was
22 “actually borrowed by an individual of the name Hannah Tenaos Abdo.” See Claim Objection at
23 1:22-24.

24 ⁴ On July 29, 2011, Hanna T. Abdo (“Abdo”) filed a voluntary Chapter 7 petition
25 denominated Case No. 11-22115-mkn. (Abdo ECF No. 1). The petition showed his residence as
26 3400 Cabana Drive #2027, Las Vegas, Nevada 89122, i.e., the same Cabana Property. On his
27 real property Schedule “A,” Abdo listed the same residence as being the subject of a pending
28 foreclosure. On his exemption Schedule “C,” Abdo did not claim the Cabana Property as
exempt. On February 9, 2012, Abdo received his Chapter 7 discharge. (Abdo ECF No. 16). On
February 18, 2014, the Chapter 7 case was closed.

⁵ One of the missing attachments is the copy of the Deed of Trust that secured the subject
loan.

1 facie validity of the claim. The Claim Objection was noticed to be heard on June 7, 2023. (ECF
2 No. 114).

3 On May 23, 2023, a stipulated order was entered continuing the Claim Objection hearing
4 to July 12, 2023, and also extended the response deadline to June 28, 2023, and any reply to July
5 5, 2023. (ECF No. 126).

6 On June 27, 2023, Shellpoint filed a response to the instant Claim Objection
7 (“Response”). (ECF No. 136). Attached to the Response are five separate documents offered as
8 exhibits. Exhibit “1” is a copy of a “Foreclosure Deed” evidencing completion of a foreclosure
9 initiated by Blackhorse Condominium Homeowner’s Association (“HOA”) and recorded against
10 the Cabana Property on November 26, 2013. Exhibit “2” is a copy of an Order (1) Granting
11 Plaintiff’s Motion for Summary Judgment, (2) Dismissing as Moot Plaintiff’s Damages Claims,
12 (3) Denying Defendants’ Motions for Summary Judgment; and (4) Declining to Exercise
13 Supplemental Jurisdiction Over Remaining Claims (“Summary Judgment Order”), dated January
14 13, 2020, recorded against the Cabana Property on January 15, 2020, originating from a lawsuit
15 filed on November 15, 2015, by Shellpoint against the HOA and the Debtor in the United States
16 District Court for the District of Nevada, Case No. 2:15-cv-02241-APG-BNW (“Federal
17 Lawsuit”).⁶ Exhibit “3” is a copy of a Mandate and a Memorandum (“Circuit Memorandum”)
18 and recorded against the Cabana Property on December 17, 2020, arising from an appeal filed
19 with the U.S. Court of Appeals for the Ninth Circuit, assigned Case No. 20-15228, regarding the
20 Summary Judgment Order. The Circuit Memorandum was entered on November 24, 2020, and
21 affirmed the Summary Judgment Order. Exhibit “4” is a copy of a Notice of Breach and Default
22 and of Election to Cause Sell of Real Property Under Deed of Trust (“Notice of Breach”)
23 recorded against the Cabana Property on March 18, 2022. Exhibit “5” is a copy of a letter from
24 Shellpoint’s counsel to Debtor’s counsel dated April 6, 2023, advising of Shellpoint’s intention
25 to seek relief from the automatic stay regarding the Cabana Property. Exhibit “6” is a copy of an
26 unpublished decision entered by Nevada Supreme Court on June 16, 2023, in Case No. 84122,

27 ⁶ The Summary Judgment Order held that the Deed of Trust remained a valid
28 encumbrance on the Cabana Property despite the HOA’s foreclosure sale. The Summary
Judgment Order has never been vacated on appeal and remains in effect.

1 entitled West Coast Servicing, Inv. v. Kassler, 2023 WL 4057073 (Nev. June 16, 2023). (“West
2 Coast Decision”).

3 Debtor did not file a reply in support of its Claim Objection.

4 DISCUSSION

5 POC 5-1 is signed under penalty of perjury and constitutes prima facie evidence of the
6 validity and amount of Shellpoint’s claim. See FED. R. BANKR. P. 3001(f). Under Section
7 502(a), a claim evidenced by a proof of claim is deemed allowed unless a party in interest
8 objects. To overcome the prima facie validity afforded to a properly filed POC, an objecting
9 party must submit evidence to overcome its presumption of validity or amount. See Lundell v.
10 Anchor Constr. Specialists, Inc. (In re Lundell), 223 F.3d 1035, 1039 (9th Cir. 2000). An
11 objecting party must overcome the presumption of validity by presenting sufficient evidence of
12 probative force equal to the allegations of the proof of claim. See Burke v. Reno-Sparks Indian
13 Colony (In re Affordable Patios & Sunrooms), 2022 WL 1115413, at *3 (B.A.P. 9th Cir. Apr.
14 22, 2022); Reger v. Essex Bank (In re Landes), 626 B.R. 531, 545 (Bankr. E.D. Cal.2021).
15 Section 502(b) sets forth nine grounds for which an objection may be sustained to disallow a
16 claim entirely, the most common of which is that “such claim is unenforceable against the debtor
17 and property of the debtor, under any agreement or applicable law...” 11 U.S.C. §502(b)(1).

18 In its Claim Objection, Debtor relies solely on the Abdo Discharge Order that was
19 entered on February 9, 2012. Because Abdo obtained a Chapter 7 discharge on that date of his
20 personal liability for the amounts owed on the Note, Debtor maintains that Shellpoint is barred
21 under NRS 106.240 from enforcing the note and deed of trust.⁷ Debtor argues that the Note
22 became wholly due when Abdo received his discharge on February 9, 2012, and cannot be
23 enforced after 10 years. Alternatively, Debtor argues that even if the Note is enforceable, the
24

25
26 ⁷ NRS 106.240 provides in relevant part that the “lien...created by any mortgage or deed
27 of trust upon any real property, appearing of record, and not otherwise satisfied and discharged
28 of record, shall at the expiration of 10 years after the debt secured by the mortgage or deed of
trust...become wholly due, terminate, and it shall be conclusively presumed that the debt has
been regularly satisfied and the lien discharged.” (Emphasis added.)

1 assessment of any late fees accruing after Abdo received his discharge would violate the
2 discharge injunction under Section 524(a)(2).⁸

3 In response, Shellpoint correctly argues that after the Claim Objection was filed, the
4 Nevada Supreme Court issued the West Coast Decision addressing the impact of a borrower's
5 bankruptcy discharge on the application of NRS 106.240. See West Coast Servicing, Inc. v.
6 Kassler, 531 P.3d 81 (Nev. 2023).⁹ Bankruptcy has long recognized that prepetition liens pass
7 through bankruptcy unaffected by the discharge. See generally Long v. Bullard, 117 U.S. 617
8 (1886). For that reason, a deed of trust or other lien remains enforceable unless otherwise
9 provided by the language of the document, or the lien is avoided under bankruptcy law. Because
10 the subject deed of trust in West Coast Servicing contained no language rendering the obligation
11 "wholly due" upon the borrower's bankruptcy discharge, the Nevada Supreme Court concluded
12 that NRS 106.240 did not apply. 531 P.3d at *1-2.¹⁰

13 In the instant case, Debtor identifies no language in the Deed of Trust rendering the Note
14 wholly due as a result of Abdo's bankruptcy discharge. Moreover, Debtor identifies no order or
15 judgment entered in the Abdo bankruptcy proceeding that avoided or otherwise invalidated, or
16 satisfied the lien created by the Deed of Trust.¹¹ In other words, Debtor has failed its burden of
17 proof and persuasion that the Note became wholly due more than 10 years before Shellpoint

18
19 ⁸ Because the discharge in the Abdo proceeding applied only to his personal liability for
20 the debts that were discharged, it is unclear why the Debtor believes it could object to any late
21 fees accruing on the subject Note. There is nothing in the record suggesting that Shellpoint is
22 attempting to collect late fees from Abdo as a personal liability.

23 ⁹ The Nevada Supreme Court's decision is not officially published but is cited for its
24 persuasive value. See NEV.R.APP.P. 36(c)(3).

25 ¹⁰ Under Section 524(a), the effect of a bankruptcy discharge is to bar enforcement of the
26 subject prepetition obligation as a personal liability of the debtor rather than to make the
27 obligation wholly due. This is consistent with the principle that a lien passes through bankruptcy
28 while the personal liability of the bankruptcy petitioner does not.

¹¹ Section 22 of the Uniform Covenants of the Deed of Trust is entitled "Acceleration;
Remedies." Prior Section 19 is entitled "Borrower's Right to Reinstate After Acceleration."
Language rendering the Note obligation "wholly due" upon the borrower's bankruptcy, if at all,
likely would appear in these Parts. The language is not there.

1 commenced efforts to enforce the Deed of Trust or filing POC 5-1.¹² The bar to enforcement
2 arising under NRS 106.240 does not arise in this case.

3 Moreover, the express language of the Foreclosure Deed suggests an independent basis
4 for concluding that the Debtor has failed to meet its burden. The Foreclosure Deed recorded on
5 November 26, 2013 states, in pertinent part, as follows:

6 Nevada Association Services, Inc...was the duly appointed agent under that
7 certain Notice of Delinquent Assessment Lien, recorded December 3,
8 2010...The previous owner as reflected on said lien is Hanna T Abdo.
9 Nevada Association Services, Inc. as agent for Blackhorse Condominiums
10 does hereby grant and convey, but without warranty expressed or implied to:
11 T-Shack, Inc. (herein called grantee),...all of its right, title and interest in and
12 to that certain property legally described as: Blackhorse Condo, Plat Book
13 97, Page 39, Unit 2027, Bldg 11 Clark County

14 Default occurred as set forth in a Notice of Default and Election to Sell,
15 recorded on 2/3/2011...which was recorded in the office of the
16 recorder...Said property was sold by said agent, on behalf of Blackhorse
17 Condominiums at public auction on 11/15/2013, at the place indicated on the
18 Notice of Sale. Grantee being the highest bidder at such sale, became the
19 purchaser of said property and paid therefore to said agent the amount bid
20 \$10,116.00 in lawful money of the United States, or by satisfaction, pro tanto,
21 of the obligations then secured by the Delinquent Assessment Lien.

22 Dated: November 15, 2013.

23 Foreclosure Deed at 1 (emphasis added).

24 There is no dispute that the HOA recorded its notice of delinquent assessment lien on
25 December 3, 2010, prior to commencement of Abdo's bankruptcy proceeding on July 29, 2011.
26 There is no dispute that the Cabana Property was property of the Abdo bankruptcy estate. The
27 parties to this Claim Objection apparently agree that the Debtor acquired title to the Cabana
28 Property on or about November 15, 2013, by bidding at a foreclosure sale conducted for the
homeowner's association ("HOA") encompassing the real property. There is no apparent dispute
that the Foreclosure Deed was recorded on November 26, 2013. There is no dispute that the
Chapter 7 case did not close until February 18, 2014. Assuming this timeline is correct, it clearly

¹² As mentioned above, the court previously overruled the POC 1-1 Objection based on
the Debtor's failure to overcome the prima facie validity of the subject proof of claim. Debtor's
appeal of the POC 1-1 Order remains pending.

1 appears that the Cabana Property was still property of the Abdo bankruptcy estate when the
2 HOA foreclosure sale took place.

3 Under Section 362(c)(1), the automatic stay of “an act against property of the estate
4 under [362(a)] continues until such property is no longer property of the estate.” Under Section
5 362(c)(2)(C), the automatic stay of “any other act under subsection [362(a)] of this section
6 continues until the earliest of (A) the time the case is closed; (B) the time the case is dismissed;
7 or (C) if the case is a case under chapter 7 of this title concerning an individual,...the time a
8 discharge is granted or denied.” Under Section 362(a)(4), the automatic stay applies to “any act
9 to...enforce any lien against property of the estate.” Nothing in the docket of the Abdo
10 proceeding indicates that the HOA ever sought relief from stay under Section 362(d) to conduct
11 its foreclosure sale. Relief from stay was required because Abdo never claimed the property as
12 exempt, nor had the estate’s interest in the property ever been abandoned. The Abdo case was
13 not closed until February 18, 2014, well after the HOA foreclosure sale took place. Until the
14 Abdo case was closed, however, the Cabana Property remained property of the Chapter 7 estate.

15 As a result, it appears that the HOA foreclosure sale that took place on November 15,
16 2013, was in violation of the automatic stay that was still in effect in the Abdo proceeding. As a
17 further result, the HOA foreclosure sale was void ab initio, and the foreclosure deed obtained by
18 the Debtor also is void. See 40235 Washington Street Corp. v. Lusardi (In re 40235 Washington
19 Street Corp.), 329 F.3d 1076, 1080 (9th Cir. 2003). For this independent reason, the Claim
20 Objection must be denied.

21 Based on the foregoing, the court concludes that the Debtor has failed to provide
22 sufficient evidence to overcome the prima facie validity and amount of POC 5-1. For the
23 reasons discussed, the court also concludes that the Debtor has failed to establish that it has an
24 enforceable legal interest in the Cabana Property.

25 **IT IS THEREFORE ORDERED** that the Objection to Proof of Claim #5-1 of New Rez
26 LLC, d/b/a/ Shellpoint Servicing, brought by T-Shack, Inc., Docket No. 113, be, and the same
27 hereby is, **OVERRULED**.

28 Copies sent via CM/ECF ELECTRONIC FILING

1 Copies sent via BNC to:
2 T-SHACK, INC
3 ATTN: OFFICER OR MANAGING AGENT
4 405 COUNTY RD 25
5 MANTADOR, ND 58058-4026

6 # # #
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28