IT IS ORDERED as set forth below:

Date: September 11, 2009

W. H. Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBER**
	:	
ROBIN LYNETTE DARLINGTON	:	09-10691-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
DEBTOR.	:	BANKRUPTCY CODE

O R D E R

Before the Court is the Motion for Relief from Automatic Stay filed by Deutsche Bank National Trust Company, as Trustee for the Holders of Fremont Home Loan Trust 2002-1, Asset-Backed Certificates, 2002-1 (hereinafter "Movant"), and the Verified Emergency Motion to Set Aside Judgment, Cancel Sale and Dismiss Action for Failure of Jurisdiction and Lack of Standing filed by Robin Darlington (hereinafter the "Debtor"). These matters constitute a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(G)-(H); § 1334.

FINDINGS OF FACT AND PROCEDURAL HISTORY

On May 25, 2002, the Debtor borrowed $207,000 from Fremont Investment and Loan (hereinafter "Fremont") and executed a promissory note in favor of Fremont. *See* Movant's Exhibit 2. On that same date, the Debtor granted a security deed to Fremont, placing a first priority mortgage on real property known as 20 Woodridge Place, Newnan, Georgia (hereinafter the "Property"). *See* Movant's Exhibit 3. Fremont later assigned the promissory note and security deed to Movant, who then transferred the promissory note and security deed into a loan trust, over which it acted as the trustee for the benefit of purchasers of interests in the trust. *See* Movant's Exhibits 4 and 5. Movant contracted with Litton Loan Servicing to act as the servicer for the Debtor's loan.

The Debtor made her last regular payment on the loan in 2004. Since that time, she has made additional payments sporadically, with the last payment posting in April 2006, resulting in fifty-six missed payments at the time this matter was tried. At the time of trial, the loan balance, exclusive of costs and fees, was approximately $335,000. Movant has been attempting to exercise its right to foreclose this loan, but the Debtor has filed four bankruptcy petitions over the course of the last four years. Specifically, on January 31, 2005, the Debtor filed a voluntary Chapter 13 petition, case number 05-17031.[1] Movant

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[1] The Court takes judicial notice of the docket entries in the Debtor's prior cases. *See* FED. R. EVID. 201 (made applicable to bankruptcy proceedings by FED. R. BANKR. P. 9017; *see also In re Patton*, 2009 WL 136817 (Bankr. E.D. Pa. 2009) ("While a court may not take judicial notice *sua sponte* of facts contained in the debtor's file that are disputed, *In re Augenbaugh*, 125 F.2d 887 (3d Cir.1942), it may take judicial notice of adjudicative facts

filed a motion for relief from the automatic stay on May 2, 2005. Because the Debtor's plan was not confirmable, the case was dismissed following the confirmation hearing on June 2, 2005, prior to the entry of an order granting Movant's motion. Two months later, on August 1, 2005, the Debtor filed her second voluntary Chapter 13 petition, which was assigned case number 05-12544. The Debtor's Chapter 13 plan was confirmed on October 6, 2005. On March 1, 2006, Movant filed a motion for relief in which it alleged an absence of equity and a lack of adequate protection due to the Debtor's failure to maintain postpetition mortgage payments. The Chapter 13 Trustee then sought conversion of the case from Chapter 13 to Chapter 7 on the basis that the Property appeared to have $24,000 of nonexempt equity available for unsecured creditors. The Court granted the Trustee's motion and converted the case to Chapter 7 on April 25, 2006. On July 21, 2006, the Court entered a consent order resolving Movant's motion for relief by permitting the Chapter 7 trustee to market the Property for 180 days and, if no sale materialized, allowing Movant relief from the stay. The Trustee eventually reported that no assets were available for liquidation, and the Debtor received a discharge on August 31, 2006.

The Debtor filed a third petition under Chapter 13 on April 1, 2008 (08-10900). On that same date, Movant conducted a nonjudicial foreclosure sale of the Property. By motion, Movant sought an annulment of the automatic stay and the validation of the sale.

'not subject to reasonable dispute . . . [and] so long as it is not unfair to a party to do so and does not undermine the trial court's factfinding authority.'").

At a hearing held on September 11, 2008, the Court denied Movant's motion, finding that the Debtor had a reasonable likelihood of refinancing Movant's loan and proposing a confirmable Chapter 13 plan that would allow her to save her home. The Debtor, however, was unable to do so, and her third case was dismissed prior to confirmation on November 6, 2008.

The Debtor filed the instant case, her fourth, at 3:42 p.m. on Friday, February 27, 2009. Movant had scheduled a foreclosure sale for Tuesday, March 3, 2009. Movant filed an emergency motion seeking permission to go forward with the sale as scheduled. The Court granted this motion after a hearing held on March 3, 2009, notice of which Movant attempted to give the Debtor by leaving a recorded telephone message. Movant conducted the foreclosure sale on March 3, 2009 and purchased the Property for $129,200. Following the foreclosure sale, the Court held a hearing on April 28, 2009 to consider whether the Court should validate the foreclosure sale and allow Movant to record the deed. At this hearing, the Debtor objected to Movant's standing, and the Court continued the hearing to permit Movant to obtain the necessary evidence to establish that it is the proper party to seek relief from the automatic stay with regard to the Property.

The second hearing was held on June 11, 2009. At the time, the matter of confirmation of the Debtor's plan was also before the Court. The Chapter 13 Trustee reported that the Debtor's plan was not confirmable, most importantly because the Debtor had made no payments to the Chapter 13 Trustee, as required by her proposed plan. The

Debtor had also failed to provide the Trustee with the necessary copy of her most recent tax return.

CONCLUSIONS OF LAW

Section 362(a)(1) of the Bankruptcy Code provides that the filing of a bankruptcy petition operates as a stay as to the "commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(1). Additionally, under section 362(a)(3), any act to obtain possession of property of the estate or to exercise control over property of the estate is stayed by the filing of the petition. *Id.* § 362(a)(3). Under certain circumstances, the Court may "grant relief from the stay" by "terminating, annulling, modifying, or conditioning" the stay. *Id.* § 362(d).

Before the Court may consider whether relief from the stay is appropriate in this case, it must address the Debtor's argument that Movant lacks standing in this matter. During the course of the hearing, the Debtor objected to the fact that Movant presented a copy of the promissory note that she executed when this loan was made and to the fact that Movant appeared to prosecute the motion for relief, but produced as its sole witness Ms. Aracely Castillo, an employee of its servicer, Litton Loan Servicing, rather than an employee of

Movant.

With regard to the latter, it appears that Ms. Castillo testified from personal knowledge regarding the business records maintained by Litton in the course of its business as Movant's loan servicer and with regard to the loan balance. There is nothing improper about Movant's decision to introduce such testimony through this witness.

With regard to the former, the Court finds that Movant produced sufficient evidence to demonstrate that it is the proper party to seek relief from the stay to foreclose this loan. This Court has an independent duty to determine its jurisdiction over this matter. "For a federal court to have jurisdiction, the litigant must have constitutional standing, which requires an injury fairly traceable to the defendant's . . . conduct and likely to be redressed by the requested relief," as well as "prudential standing," which is generally found to be lacking if the party seeking relief from the stay lacks "the legal right under applicable substantive law to enforce the obligation at issue." *In re Jacobson*, 402 B.R. 359 (Bankr. W.D. Wash. 2009); *see also In re Hwang*, 396 B.R. 757 (Bankr. C.D. Cal. 2008) (court must consider whether the party seeking relief from the stay has the legal authority to enforce the promissory note under applicable state law).

Under Georgia law, the party entitled to enforce a promissory note is the "holder" of the note. *See* O.C.G.A. § 11-3-301; 11-3-308. "A 'holder' of an instrument 'means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession.'" *Salahat v.*

F.D.I.C., __ S.E.2d __, 2009 WL 1859165, *3 (Ga. App. June 30, 2009). In the absence of any evidence presented to the contrary, the testimony of a witness familiar with the creditor's business records that a copy of the note is a true and correct copy of a record maintained in the creditor's business records is sufficient to establish that the creditor is in possession of the note and is, therefore, a "holder" and is entitled to enforce the note. *See id*. at * 3-4.

In this case, the Debtor executed the note, which was payable to Fremont Investment and Loan. The Debtor testified that the signature on the copy of the note introduced into evidence is in fact her signature. Neither the Debtor nor the Debtor's husband, both of whom were present at the closing of the loan, testified that the Debtor did not sign the note. The Movant introduced into evidence certified copies of the assignment of the note from to Fremont Investment and Loan to Movant and from Movant to the trust, over which the Movant is the trustee.[2] Accordingly, the Movant has demonstrated that it received an assignment of the note from the person originally identified as the party payable in the note.

As to whether the Movant satisfied its burden of demonstrating that it is in possession of the note, Ms. Castillo testified that she is familiar with the business records maintained by the Movant and that the copy of the promissory note presented and admitted

[2] As the trustee of the trust holding the note and the mortgage, Movant is also the "real party in interest" with regard to this motion. *See In re Hwang*, 396 B.R. 757 (Bankr. C.D. Cal. 2008) ("If a loan has been securitized, the real party in interest is the trustee of the securitization trust, not the servicing agent.").

as Movant's Exhibit 2 is a true and correct copy of a note maintained in the Movant's business records. In the absence of any evidence to indicate that a question exists with regard to the fact that the Movant is in possession of the note, the Court finds that the Movant has established that it is a holder of the note and is entitled to enforce the note. Accordingly, the Court finds that Movant is the proper party to seek relief from the stay on behalf of the trust.

Having determined that the Movant has standing to seek relief from the automatic stay, the Court finds that the Movant has also demonstrated its entitlement to a further modification of the automatic stay to permit it to record its deed of sale. The Code states that "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay . . . , such as terminating, annulling, modifying, or conditioning such stay -- (1) for cause, including the lack of adequate protection of an interest in property of such party in interest," or (2) "with respect to a stay of an act against property . . . if -- (A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization. . . ." *Id*. § 362(d). In order for property to be necessary for an effective reorganization, reorganization must be within reasonable prospect. *In re Henderson*, 395 B.R. 893, 900-01 (Bankr. D.S.C. 2008) (citing *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd*., 484 U.S. 365 (1988)). Bankruptcy courts have long recognized that a lack of good faith on the Debtor's part also constitutes "adequate cause for both terminating the stay afforded by the filing of a petition as well as dismissing

the petition outright." *Matter of Grieshop*, 63 B.R. 657 (N.D. Ind. 1986); *see also Henderson*, 395 B.R. at 899.

Further, if the creditor seeking relief from the stay has a claim secured by an interest in real property, the creditor may seek a finding that the filing of the debtor's petition was "part of a scheme to delay, hinder, and defraud creditors that involved either-- (A) transfer of all or part ownership of . . . such real property without the consent of the secured creditor or court approval; or (B) multiple bankruptcy filings affecting such real property." *Id*. § 362(d)(4). If such a finding is made and the creditor records the order making this finding in the applicable real property records, the finding becomes binding in any subsequent case filed during the two-year period following the entry of the order. *Id*. "Due to the extraordinary impact of this remedy, a creditor requesting such relief has a substantial burden of proof." *In re Poissant*, 405 B.R. 267, 273 (Bankr. N.D. Ohio 2009). Under section 362(d)(4), the creditor must establish that: 1) "the debtor engaged in a scheme"; 2) the purpose of the scheme was to "delay, hinder and defraud the creditor," and 3) the scheme "involved either the transfer of property without the creditor's consent or court approval *or* multiple filings." *Id*. Establishing the existence of multiple bankruptcy filings, without more, such as making false representations to a creditor, will not generally result in a finding that the debtor acted with the intent to hinder, delay *and* defraud, as required by section 362(d)(4). *Id*.; *see also In re Lemma*, 394 B.R. 315 (Bankr. N.D.N.Y. 2008); *In re Smith*, 395 B.R. 711 (Bankr. D. Kan. 2008).

After consideration of all of the facts and circumstances regarding the Debtor and the Movant's interest in the Property, the Court finds that "cause" exists for further modification of the stay and validation of the foreclosure sale. The only testimony the Court received as to the value of the Property and the amount of the debt indicates that there is no equity in the Property.[3] Further, the Debtor has no reasonable prospect of reorganizing. She has made no payments to the Chapter 13 trustee since the filing of her petition. Further, she admittedly filed this bankruptcy petition for the sole purpose of preventing the Movant from exercising its rights with regard to its deed to secure debt. It is clear from the course of this case, as well as her prior cases, that the Debtor has no intention of curing and reinstating this mortgage. Accordingly, the Court finds "cause" to modify the stay.

That being said, having judged the Debtor's demeanor during her testimony as a witness in this case, the Court does not find that the Debtor acted with the intent to hinder, delay *and* defraud, as required by section 362(d)(4). Although the Debtor has filed several petitions and failed to prosecute the petition immediately preceding this petition, the Movant presented no other evidence, such as a transfer of real property from one party to another, that would indicate the existence of an intent to defraud the Movant. For this reason, the Court will deny the request that the automatic stay be modified pursuant to section 362(d)(4).

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[3] Ms. Castillo testified that Movant's most recent broker price opinion indicated a value of $190,000. Even the Debtor scheduled the value of the Property at $290,000, which is less than the amount of the debt.

Pursuant to section 1307(c)(1), (c)(4), and (c)(5), the Debtor's case is subject to being dismissed due to unreasonable delay by the Debtor that is prejudicial to creditors, the Debtor's failure to commence making timely payments, and her inability to propose a confirmable plan. *See* 11 U.S.C. § 1307(c). Due to the Debtor's prior filing and her failure to prosecute the prior case, the Standing Chapter 13 Trustee has requested dismissal of the case pursuant to section 109(g) of the Bankruptcy Code which would prevent the Debtor from filing another petition under Chapter 13 for a period of 180 days. Given the Debtor's failure to properly prosecute two Chapter 13 cases, combined with the fact that she has recently received a Chapter 7 discharge and would not be eligible to receive another Chapter 7 discharge in a case filed within the next 180 days, the Court finds that dismissal under section 109(g)(1) is appropriate in this case.

CONCLUSION

For the reasons state above, the Motion for Relief from Automatic Stay filed by Deutsche Bank National Trust Company, as Trustee for the Holders of Fremont Home Loan Trust 2002-1, Asset-Backed Certificates, 2002-1 is **GRANTED** in part and **DENIED** in part. In accordance with Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure, the instant order shall be stayed for ten (10) days after entry.

The Debtor's Verified Emergency Motion to Set Aside Judgment, Cancel Sale and Dismiss Action for Failure of Jurisdiction and Lack of Standing is **DENIED**.

The Debtor's bankruptcy case is **DISMISSED** pursuant to section 109(g)(1), such that the Debtor will not be eligible to be a debtor under any chapter of Title 11 for 180 days from the date of the entry of this Order.

The Clerk of Court is **DIRECTED** to serve this Order on the Debtor, Deutsche Bank National Trust Company, counsel for Deutsche Bank National Trust Company, the Chapter 13 Trustee, the United States Trustee, and all creditors.

END OF DOCUMENT