

**FILED**

**IN THE UNITED STATES BANKRUPTCY COURT**

**FOR THE DISTRICT OF ARIZONA**

**NOV 08 2004**

U.S. BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

In re: )  
EDWARD KILE, )  
\_\_\_\_\_  
Debtor. )

Chapter 11 )  
No. 4-04-bk-02237-JMM )  
Adv. No. 4-04-ap-00061-JMM )

EDWARD KILE, )  
Plaintiff, )

**MEMORANDUM DECISION**

vs. )  
STATEWIDE GROUP, INC., dba )  
STATEWIDE FORECLOSURE SERVICES; )  
MARK G. CAMPBELL and CAROL A. )  
CAMPBELL, husband and wife; WELLS )  
FARGO HOME MORTGAGE, INC.; EMC )  
MORTGAGE CORPORATION; M. KENNETH )  
MUDGE and LEORA MUDGE, TRUSTEE OF )  
THE MUDGE TRUST DATED MAY 29, 2002, )  
AS TO AN UNDIVIDED 48.6322% INTEREST; )  
LINCOLN TRUST COMPANY, TRUSTEE )  
FBO M. KENNETH MUDGE AS TO AN )  
UNDIVIDED 21.2766%; and FEDERAL HOME )  
LOANS CORPORATION AS TO AN )  
UNDIVIDED 30.0912% INTEREST; ISLA )  
VERDE ASSOCIATION, INC.; STATE OF )  
CALIFORNIA FRANCHISE TAX BOARD; )  
SAN DIEGO COUNTY TAX COLLECTOR; )  
EDWARD C. DOMBO; AND AMERICAN )  
EXPRESS CENTURION BANK, )  
\_\_\_\_\_  
Defendants. )

The court heard evidence in this matter on November 3, 2004. After taking the matter under advisement, and having reviewed the written and oral evidence, as well as the law and the briefs of the parties, the court now rules. The following represents the court's findings of fact and conclusions of law.

1 **FACTS**

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3 The Debtor and his non-debtor wife, Robyn Kile (collectively, "Kiles"), between 1998 and  
4 2000, became indebted to both San Diego Funding (\$493,400) and Federal Home Loans Corporation  
5 (\$164,500).<sup>1</sup> (Ex. 2, 3, 6.) Both the Debtor and his wife agreed with each lender to "due on sale" clauses.  
6 (Ex. 2,3.)

7 The property standing as collateral for the loans was a single family residence located in  
8 Solana Beach, California, where the Kiles reside.

9 By February 26, 2003, the Kiles had fallen onto financial hard times and became in default  
10 to FHL. As a consequence, FHL noticed the default pursuant to the California Deed of Trust statutes,  
11 and recorded it on February 26, 2003. (Ex. 8.)

12 Unknown to anyone but the Kiles, the Kiles had purported to convey their respective  
13 interests in the Solana Beach home to the Kiles' wholly-owned limited liability company, Ribsy  
14 Productions ("Ribsy")<sup>2</sup> (Ex. 65, 66). The Kiles never recorded these documents, and indeed, they were  
15 not in recordable form, lacking notarizations. Therefore, said unrecorded transfers, which also violated  
16 the "due on sale" provisions of the written agreements, were known only to the Kiles. Mr. Kile's  
17 testimony that the putative transfer instruments were signed, as dated "as of January 1, 2002," was not  
18 credible. Moreover, there was also no evidence that there was any valid consideration for the transfer.

19 The FHL foreclosure process continued apace, with the trustee under the Deed of Trust  
20 being Statewide Group, Inc. ("Statewide"). (Ex. 4.) Pursuant to California law, Statewide posted,  
21 published, and sent out the required mailings. (Ex. 30, 31, 32, 20, 21.) Eventually, on May 30, 2003,  
22 the Notice of Trustee's Sale was recorded. (Ex. 13.)

23  
24 <sup>1</sup> The Federal Home Loan promissory note was a participation between FHL  
25 (39.2097%), the Mudges (36.4742%), and Applegate (24.3161%). Collectively, these parties will  
be referred to as "FHL."

26 <sup>2</sup> Ribsy had been formed in 1998. (Ex. 28.)

1           The sale was set for June 27, 2003. (Ex. 13.)

2           On May 29, 2003, in an effort to stave off the foreclosure sale, Ribsby filed a Chapter 11  
3 proceeding in the Southern District of California, in San Diego. (Ex. 10, 19.) Ribsby noted, in its  
4 schedules, that it had no income and expenses, but listed an "equitable ownership" in the Solana Beach  
5 property.

6           Ribsby's attorney, Jeffrey Vanderveen, notified FHL and Statewide that Ribsby "owned" the  
7 residence and maintained that the automatic stay prevented foreclosure. (Ex. 11, 12.) Statewide  
8 immediately notified Vanderveen that the entity known as Ribsby was nowhere to be found in the chain  
9 of title, and that the record owners were still "Edward and Robyn Kile," husband and wife. (Ex. 33.)

10           Thereafter, the Kiles allegedly had the earlier deed notarized on June 6, 2003-- nine days  
11 after Ribsby filed Chapter 11-- and recorded the now-completed Quitclaim Deed three days later on June 9,  
12 2003. (Ex. 7, 37.) However, Kile's testimony is not credible on that point, and the court finds that the  
13 deeds were not prepared until June 6, 2003.

14           Due to these manipulations, Statewide announced that its sale date of June 27, 2003,  
15 would be postponed "until we have a relief order, the case has been closed or the default has been cured."  
16 (Ex. 14.)

17           By June 9, 2003, Statewide had finished all necessary and statutory steps to publicize the  
18 trustee's sale. (Ex. 38.) All it did thereafter, until the Ribsby Chapter 11 was dismissed, was to continue  
19 its final sale date from time to time. (Ex. 15, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54,  
20 55, 56, 57, 58, 60, 61, 62.)

21           Between May 29, 2003 and the ultimate dismissal of Ribsby's bankruptcy case on  
22 March 17, 2004, Ribsby lingered in Chapter 11. It filed a Plan and Disclosure Statement (Ex. 29), which  
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1 the San Diego bankruptcy court found to be "facially unconfirmable." (Ex. 24 at 2:1.) The court also  
2 pointed out that "record title to the (Debtor's) property was not in the debtor on the date this case was  
3 filed." (Ex. 24 at 2:6-7.)<sup>3</sup>

4 On December 29, 2003, the United States Trustee moved to convert the case to Chapter 7,  
5 or for dismissal. (Ex. 24.)

6 On March 17, 2004, the bankruptcy court dismissed the case, with an 180-day bar to  
7 refiling. (Ex. 26.) Notice of the dismissal was sent to the few creditors and parties in interest on  
8 March 18, 2004. (Ex. 27.)

9 On or "effective as of" March 19, 2004, Ribsy purportedly executed a Quitclaim Deed  
10 back to the Kiles. (Ex. 16.) As with the earlier documents, that "deed" was neither notarized nor  
11 recorded. (Ex. 16.) As with the earlier transfer to Ribsy, there was no evidence provided that there was  
12 any consideration in connection with this transfer.

13 The foreclosure sale, which had been postponed so many times, went forward on  
14 March 29, 2004, and the property was sold to third-party bidders, Mark and Carol Campbell  
15 ("Campbells"). (Ex. 63, 1.) The Campbell were *bona fide* purchasers, without notice of any defects or  
16 problems. No evidence was presented to the contrary.

17 On March 30, 2004, eviction proceedings began against the Kiles, whose interests had  
18 been foreclosed the day before. (Ex. 17.)

19 On April 14, 2004, Mr. Kile, now acting without an attorney, wrote a letter to Statewide  
20 alleging a parade of injuries and seeking \$2,000,000 in damages. (Ex. 64.) At trial, Mr. Kile was unable  
21 to provide any credible evidence that he suffered any actual damages.

22 Statewide ignored Mr. Kile's demand, so Edward Kile (without Robyn Kile joining), filed  
23 a new Chapter 11 case, this time in the District of Arizona.

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26 <sup>3</sup> Ribsy's Plan and Disclosure Statement were objected to by FHL (Mudge).



1 Corporations Code Section 20999.25(a); *Abraham & Sons Enterprises v. Equilon Enterprises, LLC*, 292  
2 F.3d 958, 962 (9th Cir. 2002). Under California law, the actions of a corporation or LLC are deemed  
3 independent of the acts of its members. WEST'S ANN.CAL.CORP.CODE § 17003.

4           The automatic stay applies only to property owned as of the commencement of the case.  
5 11 U.S.C. § 362(a). The automatic stay applies to "property of the estate," which includes all of debtor's  
6 legal and equitable interests in property as of the commencement of the bankruptcy. 11 U.S.C.  
7 §§ 362(a)(3); 541(a). As important, the automatic stay is inapplicable to acts done postpetition with  
8 postpetition property of the estate. *In re Plexus Enterprise, Inc.*, 289 B.R. 778 (M.D. Fla. 2002).

9           The interest which Mr. Kile claims that Ribsy held-- an unrecorded, non-notarized transfer  
10 deed to real property--does not rise to a level sufficient to support the invocation of the automatic stay  
11 as to third parties. Property rights are governed by state law. *Butner v. U.S.*, 440 U.S. 48 (1979).  
12 Under California law, an unrecorded real property instrument is only valid as between the parties thereto  
13 and those who have notice thereof. WEST'S ANN.CAL.CORP.CODE § 1217. Conversely, such a document  
14 is ineffective and invalid to create restrictions upon those not privy to such secret transfers. Under  
15 bankruptcy law, these secret actions transfer no "equitable" rights sufficient to trigger the automatic stay.  
16 Under California law, every conveyance of real property must be recorded to be valid against a  
17 subsequent purchaser of the property, but an unrecorded instrument is valid only as between parties  
18 thereto and those who have notice of it. *In re Weisman*, 5 F.3d 417 (9th Cir. 1993). CAL. CIV. CODE §  
19 1216. Here, no one but the Kiles knew of any "transfer" prior to June 9, 2003. And the Kiles, who also  
20 own 100% of Ribsy, took no steps to advise anyone of that alleged "transfer."

21           Ribsy acquired no interest in the Solana Beach property until the deed to it was recorded,  
22 two weeks postpetition. The automatic stay in Ribsy's case, therefore, protected no interest in the Solana  
23 Beach property as of the date of the filing, because Ribsy did not own it on the date that it filed  
24 Chapter 11. Indeed, the Kiles resided in the property before and since the "transfer" to Ribsy; there were  
25 no written "rental agreements" placed into evidence by Mr. Kile (indeed there were no documents of any  
26 sort--other than the deed); and Ribsy never became liable on any of the underlying debt.

1           Thus, there were no stay violations in the Ribsy case, even if Mr. Kile (the Debtor herein)  
2 had standing to assert it.

3           However, Mr. Kile lacks standing to urge a violation of the Ribsy automatic stay. "A party  
4 seeking relief under the automatic stay provision must have standing in two respects: constitutional  
5 standing and standing under the Bankruptcy Code. *City of Farmers Branch v. Pointer (In re Pointer)*,  
6 952 F.2d 82, 85 (5th Cir.), *cert. denied sub nom. Pointer v. Carrollton-Farmers Branch Indep. School*  
7 *Dist.*, 505 U.S. 1222, 112 S.Ct. 3035 (1992)." Mr. Kile was not listed as a creditor in the Ribsy case and,  
8 therefore, lacks standing, then and now, to pursue stay violation remedies on behalf of Ribsy. *In re*  
9 *Fondiller*, 707 F.2d 441 (9th Cir. 1983) (party must have pecuniary interest to be afforded standing).

10           Under the Bankruptcy Code, only a party that Congress has designated as a beneficiary  
11 of the stay has standing to bring an action to declare a violation of the stay to be void. *James v.*  
12 *Washington Mut. Sav. Bank (In re Brooks)*, 871 F.2d 89, 90 (9th Cir. 1989). The Ninth Circuit has clearly  
13 held that the only legal beneficiaries of the stay are the debtor and the trustee. *Tilley v. Vucurevich (In*  
14 *re Pecan Groves of Arizona)*, 951 F.2d 242, 245 (9th Cir. 1991).<sup>4</sup> Mr. Kile qualifies as neither.

15           Thus, Edward Kile has not shown the required standing to assert a stay violation in the  
16 now-closed Ribsy case.

17           Additionally, any stay violations which could be asserted by Ribsy have been waived. Its  
18 case was dismissed and that dismissal order is final. Dismissal essentially returns parties to the *status*  
19 *quo*. 11 U.S.C. § 349. Ribsy never complained to the San Diego bankruptcy court about any alleged stay  
20 violation, and has not sought to reopen its case. Indeed, to avoid the San Diego bankruptcy court's  
21 mandate that Ribsy could not re-file for 180 days, an order designed to prevent continued delay relative  
22 to secured creditors' attempts to complete foreclosure, Ribsy simply attempted to transfer the property

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24           <sup>4</sup> The Ninth Circuit BAP, in a reference to a Ninth Circuit case, *In re Goodman*, 991  
25 F.2d 613 (9th Cir. 1993), noted that an argument might be crafted to allow a creditor to bring a  
26 stay violation action. *In re Spaulding Composites Company, Inc.*, 207 B.R. 899 (9th Cir. BAP  
1997). However, these cases need not be discussed here, since Edward Kile was never listed in  
Ribsy's schedules as a creditor. (Ex. 19.)

1 to the Kiles, and then only Mr. Kile filed this new bankruptcy--within the 180-day prohibited period and  
2 one state over from where the property is located. Such an action is a blatant bad faith attempt to harass  
3 and delay creditors with valid lien interests in the Solana Beach residence, as well as a fraudulent  
4 conveyance. To the extent that any Kile stay applies, it will be terminated and annulled. *In re Duvar*  
5 *Apt., Inc.*, 205 B.R. 196 (9th Cir. BAP 1996); 11 U.S.C. §362(d)(1) (cause).

## 7 **2. Trustee's Sale Validity Issues**

8  
9 The trustee's sale to the Campbells, third-party purchasers, occurred on March 29, 2004.  
10 The trustee's deed to the Campbells was recorded on March 30, 2004. The recordation creates a  
11 conclusive presumption of validity as to all of the procedures associated with the sale. WEST'S ANN. CAL.  
12 CORP.CODE § 2924.

13 Had the Kiles or Ribsy, or whomever else they contend owned the property, wished to stop  
14 the foreclosure, their remedy was to proceed before the California Superior Court, state their specific  
15 grievances, and obtain injunctive relief. Instead, they chose to rely on the "quick fix" of the Bankruptcy  
16 Code and its automatic stay, as a substitute for a Superior Court proceeding. By doing so, they waived  
17 their claims to assert, pre-sale, that the sale was improperly conducted, and the defendants in this case  
18 are entitled to the protection of the conclusory presumption that the foreclosure procedures were correctly  
19 followed.

20 Nor was the stay violated by Statewide's procedure, during the Ribsy bankruptcy case, by  
21 the acts of orally postponing the sale date throughout Ribsy's Chapter 11 dismissal date. The Ninth  
22 Circuit clearly addressed that issue in *In re Roach*, 660 F.2d 1316 (9th Cir. 1981), when it held that such  
23 postponements merely hold the foreclosure process in *status quo*, and that doing so is not a stay violation.

24 Mr. Kile's testimony that he and Mrs. Kile executed deeds to Ribsy "as of January 1, 2002"  
25 is not credible. Had a transfer been executed on that date, it should have and would have been recorded.  
26 Mr. Kile is a law school graduate, although never licensed as a practicing lawyer. He also holds another

1 advanced law degree, an LLM. Mr. Kile is sophisticated enough, with law school training, to realize that  
2 non-notarized, unrecorded real property instruments have no legal effect as to those who have no  
3 knowledge of such documents. A glimpse at the California statutes would have revealed as much.

4           There was no credible evidence to suggest that such deed was created prior to June 6,  
5 2003, when it was notarized. The unrecorded, non-notarized document, even if created prior to June 6,  
6 2003, was ineffective and did not transfer any rights in real property, "equitable" or otherwise. The court  
7 finds, from the evidence, that the transfer deed from the Kiles to Ribsby occurred upon its notarization on  
8 June 6, 2003, too late to invoke the Bankruptcy Code's automatic stay provisions.

9           The same is true of the other, putative transfer deed, this one from Ribsby to the Kiles two  
10 days after Ribsby's bankruptcy case was dismissed. (Ex. 6.) Apparently not learning from earlier  
11 mistakes, that document was also never notarized and recorded. Therefore, on this record, on the date  
12 of Mr. Kile's Arizona Chapter 11, ironically, Ribsby remained the only record owner. Thus, Mr. Kile,  
13 individually, had nothing to protect by filing Chapter 11, relying, once again, on unnotarized, unrecorded,  
14 and secret transfer documents. He was, in the words of William Shakespeare, "(h)oist with his own  
15 petard." *Hamlet*, Act iii, Sc. 4.

16           In his pleadings, the Debtor asserts that Statewide, on behalf of the trust beneficiaries,  
17 violated the California procedures, which are a prerequisite to conducting a valid trustee's sale.

18           However, the defending parties submitted the recording, posting, publication, and mailing  
19 documents that preceded the sale of the Solana Beach residence. These documents complied with  
20 California law.

21           Additionally, the execution and recordation of a Trustee's Deed upon sale creates "*prima*  
22 *facie* evidence of compliance with the statutory requirements "and conclusive evidence thereof in favor  
23 of *bona fide* purchasers . . . for value and without notice." WEST'S ANN.CAL.CORP.CODE § 2924.

24           The Debtor presented nothing to rebut either the conclusive presumption favoring the  
25 Campbells, nor any evidence contrary to the *prima facie* validity to be accorded to Statewide's procedural  
26 responsibilities.

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The California statute set forth above states:

A recital in the [trustee's] deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute *prima facie* evidence of compliance with these requirements and conclusive evidence thereof in favor of *bona fide* purchasers and encumbrancers for value and without notice.

The Trustee's Deed (Ex. 1), contains clear statements concerning the necessary publication, posting, recording, and mailing, which satisfy the "recital" required by the statute.

In short, the sale and its procedures were conducted pursuant to law, without defect.

**3. Bad Faith Filing Issues.**

Raised by one of more of the defending parties in their Answers, it is apparent that the instant Chapter 11 case is a bad faith filing, designed only to manipulate the bankruptcy process and delay and harass creditors. Accordingly, the court finds that cause exists to annul, terminate, and dissolve any and all stays in this case that arguably relate or may relate to any interest that the Debtor holds, or asserts that he holds, in the Solana Beach property. 11 U.S.C. § 362(d)(1) (cause to grant stay relief).

**RULING**

The Debtor failed to meet his burden of proof with respect to any of the appearing parties, and his case against them will be dismissed with prejudice.

The Debtor also presented no case or cause of action against defendants Edward C. Combo, Isla Verde Association, the San Diego Tax Collector, Wells Fargo Home Mortgage, or EMC

1 Mortgage Corp.<sup>5</sup> Accordingly, any and all of Debtor's claims against such parties shall likewise be  
2 dismissed, with prejudice.

3           The Debtor failed to prove his case, against any defendant or served party, by the  
4 necessary preponderance of the evidence. Moreover, if the Debtor, Robyn Kile (his wife), or any entity  
5 related to the Kiles shall file a new bankruptcy proceeding asserting any claims whatsoever to the Solana  
6 Beach property, that action, if filed in the District of Arizona, shall be assigned to the undersigned judge.  
7 If such filing occurs in any district other than the District of Arizona, that bankruptcy case shall be  
8 transferred to the District of Arizona and assigned to the undersigned judge, who will consider whether  
9 to retain it or transfer the case to the San Diego bankruptcy court.

10           Additionally, all stays, pursuant to the Bankruptcy Code, will be dissolved, terminated,  
11 and annulled.

12           Taxable costs shall be awarded to all of the appearing defendants herein who or which  
13 may be entitled to the same pursuant to California law. Therefore, since many of these matters arise out  
14 of contracts wherein the Debtor agreed to pay attorneys' fees, each defendant asserting entitlement to fees  
15 shall file an affidavit of actual attorneys' fees incurred and state the grounds therefor, and after a ten-day  
16 responsive period, the court will decide whether to award judgment therefor against the plaintiff, Edward  
17 Kile, and the community consisting of Edward Kile and Robyn Kile, his wife. If objections to the  
18 attorneys' fees requests are made, the court will consider the objections and rule without further hearing.

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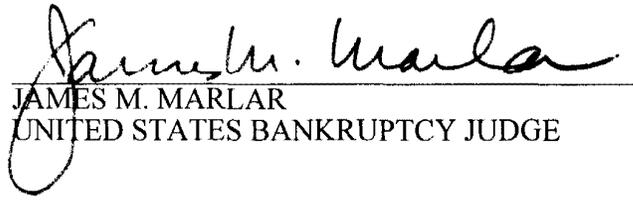
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25           <sup>5</sup> If such latter two entities are the successors to San Diego Funding's first lien  
26 interest, no argument was made or law presented to indicate that any liability or legal theory  
against them is viable.

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Thereafter, the court will ask the prevailing parties to lodge a proposed form of judgment.  
The court will not consider motions for reconsideration made by Mr. Kile. His sole remedy shall be by  
appeal.

DATED: November 8th, 2004.

  
JAMES M. MARLAR  
UNITED STATES BANKRUPTCY JUDGE

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