

**Mario Kenny** <sup>TM</sup>

Foreclosure offence and defense

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**CATEGORY ARCHIVES: FORECLOSURE FRAUD FIGHTERS-  
NEW BANKRUPTCY OPINION FROM MIDDLE DISTRICT OF  
FLORIDA**

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## **Foreclosure Fraud Fighters- New Bankruptcy Opinion from Middle District of Florida**

Posted on [March 30, 2010](#)

Foreclosure Fraud Fighters- New Bankruptcy  
Opinion from Middle District of Florida  
March 29th, 2010 · No Comments · Foreclosure

UNITED STATES BANKRUPTCY COURT MIDDLE  
DISTRICT OF FLORIDA ORLANDO DIVISION

In re:

JORGE CANELLAS, Case No. 6:09-bk-12240-ABB

Chapter 7

Debtor.

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ORDER

This matter came before the Court on the Motion  
for Relief from Stay (Doc. No.22) (“Motion”) filed  
by U.S. Bank National Association, as Trustee of the  
LehmanBrothers Small Balance Commercial  
Mortgage Pass-Through Certificates

November 23, 2009, December 7, 2009, December 21, 2009, and January 4, 2010 at which the Trustee, her counsel, counsel for Movant, and counsel for the Debtor Jorge Canellas (“Debtor”) appeared.

### Trustee’s Objection

The Trustee opposes Movant’s Motion on the grounds Movant lacks standing to obtain stay relief and it failed to perfect its security interest prior to the Petition Date.

Her opposition is grounded on the contention the Assignment is invalid. She has presented various legal theories in support of her position:

1. Aurora Bank FSB f/k/a Lehman Brothers Bank did not own the Mortgage and Promissory Note on the date of execution of the Assignment and had no authority to assign them to Movant.
2. By the terms of the two securitized trusts for Lehman Brothers designated 2006-3 registered with the U.S. Securities and Exchange Commission, no assignment occurred.
3. The Assignment was executed and recorded post-petition and may constitute a violation of the automatic stay pursuant to 11 U.S.C. Section 362(a)(4).
4. Movant has not established that on the Petition Date it had physical possession of the original

Promissory Note properly endorsed in its favor.

5. Lehman Brothers' ability to enforce the Promissory Note or Mortgage was extinguished in 2006 when it was paid by the Trust for the pool of mortgages which form the Trust's corpus.

6. Title between the Promissory Note and Mortgage were bifurcated, thereby rendering the Mortgage unenforceable.

The Trustee asserts Movant is an unsecured creditor and she has authority to sell the Property free and clear of encumbrances for the benefit of the estate.

Movant asserts the Note and Mortgage are owned by the Lehman Brothers Small Balance Commercial Mortgage Pass-Through Certificates, 2006-3, a private securitized trust, and Movant, as the asserted owner and holder of the Note and Mortgage, has authority to enforce the security interest. Movant presented with its post-hearing brief an Allonge to Promissory Note ("Allonge") purportedly dated August 1, 2006 and executed by Jennifer Henninger as the Special Assets Administrative Assistant of Aurora Bank FSB directing: Pay to the Order of U.S. Bank National Association, as Trustee (the "Trustee") under the Trust Agreement dated as of October 31, 2006, among Structured Asset Securities Corporation, as Depositor, Lehman Brothers Bank, FSB, as Servicer, and the Trustee relating to Lehman Brothers Small Balance

Commercial Mortgage Pass-Through Certificates,  
Series 2006-3, without recourse.

Doc. No. 46 (emphasis added).

The Debtor filed an Affidavit (Doc. No. 47) stating he had no prepetition communications with Movant, was not aware Movant had a security interest in the Property, and, if the Assignment is deemed invalid, desires to purchase the Property from the Trustee.

### Analysis

The evidence presented establishes the Property is encumbered by the Mortgage, which secures the Debtor's performance of the Note. The Mortgage was properly perfected pre-petition through its recordation in the Official Records Book for Orange County, Florida. The Mortgage and Note have not been bifurcated. The Mortgage has not been satisfied. The Debtor had actual knowledge of the unsatisfied Mortgage and the Trustee, through the recordation of the original Mortgage, had constructive, if not actual, knowledge of the unsatisfied Mortgage. *Kapila v. Atlantic Mortgage and Inv. Corp. (In re Halabi)*, 184 F.3d 1335, 1339 (11th Cir. 1999).

The purported assignment of the Note and Mortgage to Movant does not affect perfection or

constitute a transfer of property of the estate or the Debtor. Id. at 1337.

“[A] subsequent assignment of the mortgagee’s interest – whether recorded or not – does not change the nature of the interest of the mortgagor or someone claiming under him.”

Id. at 1338. Recordation of an assignment post-petition does not constitute a violation of the automatic stay. Id. at 1337; Rogan v. Bank One, N.A. (In re Cook), 457 F.3d 561, 568 (6th Cir. 2006) (affirming the analysis of In re Halabi).

It is uncontroverted the Note has been in default since approximately May 2009 and a balance of approximately \$300,662.84 is due and owing. The Debtor, who is a property appraiser, values the Property at \$250,000.00 and Movant values the Property at \$178,000.00. The Debtor is not making adequate protection payments to Movant. There is no equity in the Property and it is not necessary to an effective reorganization given this is a Chapter 7 proceeding and the disclosures made by the Debtor regarding the Property in his bankruptcy papers. Grounds exist for relief from the automatic stay pursuant to 11 U.S.C. Sections 362(d)(1) and (d)(2).

Movant’s Motion, however, is due to be denied because Movant has failed to establish it has standing to seek stay relief. A motion for relief from the automatic stay must be prosecuted in the name of the real party in interest. 11 U.S.C. § 362(d);

FED. R. 7

CIV. P. 17(a)(1); FED. R. BANKR. P. 7017. “The real party in interest in relief from stay is whoever is entitled to enforce the obligation sought to be enforced.” *In re Jacobson*, 402 B.R. 359, 366 (Bankr. W.D. Wash. 2009). Only the holder of the Note and Mortgage, or its authorized agent, has standing to bring the Motion. *Id.* at 367.

Movant asserts in its Motion it is the “owner and holder” of the Note and Mortgage, but has presented no evidence substantiating that assertion. The copies of the Note presented do not contain an endorsement evidencing an assignment of the Note.

The Affidavit executed by Movant’s loan servicer makes no mention of the location of the original Note or who has possession of it. Movant proffered no business records or testimony tracing ownership of the Note and establishing Movant is the present holder of the Note.

The veracity of the Allonge and Assignment is questionable. The dates contained in the Allonge are chronologically impossible. The Allonge is dated August 1, 2006, but references a trust that came into existence on October 31, 2006. The signature of Jennifer Henninger is undated and not notarized. The Allonge was not referenced in or filed with Movant’s Motion in October 2009, but was presented three months later as an attachment

to its post-hearing brief.

The Assignment was executed and recorded post-petition approximately two weeks prior to Movant's filing of the Motion for Relief. It was prepared by Jennifer Henninger, who executed the Allonge, and was recorded by the law firm that is representing Movant in this proceeding. Jack Jacob's execution of the Assignment was notarized by Jennifer Henninger and witnessed by Louis Zaffino, the affiant of Movant's Affidavit. It appears the Allonge and the Assignment were created post-petition for the purpose of the relief from stay proceeding. Movant did not establish Jennifer Henninger and Jack Jacob had authority to execute the Allonge and Assignment.

Movant's submissions are insufficient to establish it is the owner and holder of the Note and Mortgage or is authorized to act for whoever holds these documents. *In re Relka*, No. 09-20806, 2009 WL 5149262, at \*5 (Bankr. D. Wyo. Dec. 22, 2009) (granting stay relief where movant established possession of note through testimony of witness who personally retrieved note from movant's vault); *In re Jacobson*, 402 B.R. at 370 (denying movant's stay relief motion due to movant's failure to establish it was holder of note); *In re Hayes*, 393 B.R. 259, 270 (Bankr. D. Mass. 2008) (denying movant's stay relief motion and sustaining debtor's claim objection due to movant's failure to establish it was holder of note). Movant has not established it

has standing to bring the Motion and the Motion is due to be denied.

Accordingly, it is

**ORDERED, ADJUDGED AND DECREED** that the Property located at 830 Hoffner Avenue, Orlando, Florida 32809 and more particularly described as:

Lot 7, SUNDAY BLOCK, according to the plat thereof, recorded in Plat Book O, Page 27, of the Public Records of Orange County, Florida is encumbered by the Mortgage executed by the Debtor on August 1, 2006 and recorded in the Official Records Book for Orange County, Florida on August 15, 2006 as Instrument 20060534342 at Book 08805, Page 4292, which Mortgage constitutes a valid properly perfected lien, and which secures the Promissory Note executed by the Debtor on August 1, 2006 in the principal amount of \$274,500.00 and designated as Loan Number 00207199; and it is further **ORDERED, ADJUDGED AND DECREED** that the amount of the Mortgage lien encumbering the Property exceeds the Property's value and there is no equity in the Property; and it is further **ORDERED, ADJUDGED AND DECREED** that the Movant's Motion for Relief from Stay (Doc. No. 22) is hereby **DENIED** due to Movant's failure to establish it has standing to bring the Motion; and it is further



ORDERED, ADJUDGED AND DECREED that the Trustee, within twenty-one days of the entry of this Order, is hereby directed, pursuant to 11 U.S.C. Section 704(a) and Federal Rule of Civil Procedure 5009, to file with the Court a Report of No Distribution or to designate this case as an asset case.

Dated this 9th day of February, 2010.

/s/ Arthur B. Briskman

ARTHUR B. BRISKMAN  
United States Bankruptcy Judge

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