



WALK SOFTLY BUT CARRY A BIG STICK: UNDERSTANDING THE IMPACT OF *IN RE PERL*

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INTRODUCTION

It is often said that property ownership rights may be represented by a bundle of sticks. Each stick represents an individual right with respect to the property, and each owner, lienholder, or creditor may possess a certain number of those sticks, depending on the nature and breadth of the property interest. For example, a homeowner who holds title to a piece of property holds most of the rights related to that property and therefore holds most of the sticks. These sticks might represent the right of possession, the right to sell, the right to lease, the right to subdivide, and so on. However, the homeowner may not hold all the sticks as third parties may also have certain rights to his property. The homeowner's mortgage lender for example also holds certain sticks giving it the right to foreclose on the property should there be a default on the loan. Should this homeowner fail to pay his mortgage, and the lender forecloses on the property, the homeowner will be divested of title ownership. However, this is not the end of the story as even after loss of title ownership, the former homeowner still retains pos-

session of some of his sticks. What are these sticks, and are they a recognized property interest protected by bankruptcy law? This is the central question before the Bankruptcy Appellate Panel in *In re Perl*, BAP CC-13-1328, 2014 WL 2446317 (B.A.P. 9th Cir. May 30, 2014).

THE TRIAL COURT

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The ruling in Perl clearly establishes that under California law a foreclosed homeowner has a recognized legal interest in the possession of the foreclosed property, even after an eviction judgment has been rendered and a writ of possession has been issued.

”

Debtor-appellee Perl and a joint tenant (the “Perls”) owned real property in Los Angeles and took out a 2005 refinancing loan. *Perl*, 2014 WL, at *1. After they went into default, the bank sold the property at foreclosure in March 2013 to third-party purchaser and appellant, Eden Place. *Id.* After the Perls failed to vacate the property after being served with notices to quit, Eden Place filed an eviction complaint and the court entered judgment in their favor. *Id.* A writ of possession issued and the sheriff posted a lockout notice on the property. *Id.* After the lockout notice was posted, but before the Perls were evicted, Perl filed a *pro se* “skeletal” chapter 13 bankruptcy petition, and their counsel faxed Eden Place’s counsel notice of the bankruptcy.

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Id. Perl then removed the unlawful detainer action and concomitant wrongful foreclosure actions from the state court to the bankruptcy court and Eden Place filed a motion for relief from the automatic stay. *Id.* at *2. With the motion for relief pending, the sheriff proceeded with the lockout of the Perls and evicted them. *Id.* Perl then filed a motion to set aside the eviction and for an order for contempt of court, arguing that the eviction violated the automatic bankruptcy stay. *Id.* Eden Place argued that Perl no longer had a legal or equitable interest in the property protected by the automatic stay at the time of the eviction, and that he was merely a squatter or trespasser. *Id.*

The bankruptcy trial court agreed with Perl. “[T]he bare possessory interest, coupled with the possibility of some sort of relief, may be sufficient to give the bankruptcy estate a protected interest that is subject to the automatic stay.” *Id.* at *3. “[I]t may be that the automatic stay still applies even to the more limited bundle of rights that still exists. It may not even be a bundle. It might just be the opportunity to seek some relief.” *Id.* In other words the court held that even though the Perls had lost their bundle of sticks in the foreclosure, they still held some sticks in the form of a bare possessory interest in the property and the possibility of some future relief. *Id.* These sticks were in fact legally recognized property rights protected by the bankruptcy stay. *Id.* As such the court held that the eviction was in violation of the automatic stay and void. *Id.* at *4; see also *Griffin v. Wardrobe (In re Wardrobe)*, 559 F.3d 932, 934 (9th Cir. 2009) (any action taken in violation of automatic stay is void).

THE APPEAL

The B.A.P. affirmed this ruling. Since the sole issue on appeal was whether the eviction was a violation of the automatic bankruptcy stay, disposition of the case turned on whether Perl, at the time of filing the bankruptcy petition, had any remaining legal interest in the property under California law (did he have any sticks left?). *Perl*, 2014 WL, at *5. After all, he had already lost the property to foreclosure (the title ownership stick) and a judgment for eviction was already rendered against him (the right of possession stick), so what remaining interest was there to invoke the protection of the bankruptcy stay?

The court noted that it previously had held a foreclosed homeowner’s mere physical possession of the premises after a

writ of possession had been issued in an eviction action, was an equitable interest in the property protected by the automatic stay. *Id.* at *7, citing *In re Williams*, 323 B.R. 691, 699 (B.A.P. 9th Cir. 2005) *aff’d* 204 F.App’x 582 (9th Cir. 2006); see also *In re Butler*, 271 B.R. at 867 (Bankr. C.D. Cal. 2002); *In re Di Giorgio*, 200 B.R. 664, 671-73 (C.D. Cal. 1996) (holding that under California law mere possession of real property, even after a writ of possession has issued, creates a protected equitable interest subject to the automatic stay), vacated on mootness grounds, 134 F.3d 971 (9th Cir. 1998). Based on the *Williams* and *Butler* holdings, the court concluded that “Perl’s physical occupation of the Residence conferred a possessory interest that was protected by the automatic stay.” *Perl*, 2014 WL at *9. Therefore the eviction was an intentional violation of the automatic stay and void. *Id.* In reaching this conclusion the court was in effect holding that even after foreclosure and an eviction judgment, a former owner in possession still retains at least one stick sufficient to invoke the protections of the bankruptcy stay.

IMPACT

The decision in *Perl* clarified many lingering issues in the context of how a bankruptcy stay impacts an eviction action under California law. In its appeal, Eden Place cited to *In re Smith* as a basis for their argument that the Perls lacked any interest in the property sufficient to trigger the protections of the bankruptcy stay. *Id.* at 7. There a landlord who had obtained an unlawful detainer judgment against a residential tenant sought to enforce that judgment and evict the tenant. *In re Smith*, 105 B.R. 50, 51 (Bankr. C.D. Cal. 1989). Prior to completing the eviction and regaining possession however, the tenant filed a Chapter 7 bankruptcy and sought the protections of the automatic stay to prevent eviction. *Id.* The Court held that the bankruptcy estate of the tenant had no property interest in his rental agreement or residential tenancy, and therefore the bankruptcy stay would *not* enjoin the landlord from regaining possession of the apartment. *Id.* at 54 (emphasis added). Specifically, “Debtor’s retention of physical possession of the Apartment is not a property interest recognized by law.” *Id.* Therefore was not necessary for the landlord to obtain relief from stay in order to regain possession of the apartment. *Id.*

This ruling in *In re Smith* resulted in some confusion in the world of California evictions as it runs contrary to *In re Williams*,



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and *In re Butler*, the other two leading decisions on point. This confusion was further exacerbated by the implementation of California Code of Civil Procedure § 715.050 in 1994 which stated “a writ of possession issued pursuant to a judgment for possession in an unlawful detainer action shall be enforced pursuant to this chapter without delay, *notwithstanding receipt of notice of the filing by the defendant of a bankruptcy proceeding*. Cal. Civ. Proc. Code § 715.050 (West) (emphasis added). This statute added to the confusion by providing a statutory basis for eviction plaintiff’s to ignore notice of a bankruptcy filing once a writ of possession had been issued.

Thankfully, *Perl* has clarified the applicability of both *In re Smith* and Procedure Code § 715.050. The court in *Perl* declined to follow *Smith* and instead found *In re Williams* and *In re Butler* to be controlling. *Perl*, 2014 WL at *8. This line of cases holds that the mere possession of real property, even after a writ of possession has issued, creates a protectable equitable interest subject to the automatic stay. *Id.* at *7. The *Perl* court also noted that this finding is not limited in scope and applies to both debtor-former owner defendants in a post foreclosure context as well as debtor-tenants under a residential lease.¹ As for Procedure Code § 715.050, the *Perl* court adopted the reasoning of *In re Butler* and *In re Di Giorgio*, which both held that § 715.050 was preempted by federal bankruptcy law and therefore unconstitutional. *Id.* at *8.

CONCLUSION

The ruling in *Perl* clearly establishes that under California law a foreclosed homeowner has a recognized legal interest in the possession of the foreclosed property, even after an eviction judgment has been rendered and a writ of possession has been issued. What’s more, this interest is one that is recognized and protected under § 362 of the bankruptcy code as part of the bankruptcy estate. Therefore, property owners seeking to evict foreclosed homeowners should be cautious any time they receive a notice of bankruptcy filing no matter what stage of the eviction process they are in. The best course of action for these property owners would be to retain experienced bankruptcy counsel to ensure that the proper legal steps are taken to obtain relief from stay prior to proceeding with the eviction action.



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¹ It should be noted however that much of the protection afforded debtor-tenants under this line of cases has been mitigated by the addition of 11 U.S.C. 362(b)(22) to the bankruptcy code. This code section states that the automatic stay does not apply to cases in which the debtor resides as a tenant under a lease or rental agreement where the landlord has obtained a final judgment for possession prior to the debtor filing bankruptcy. *Id.* at *8.