UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DANIEL L. JUNK, et al.,
Appellants, Case No. 2:14-cv-1428

v.

CITIMORTGAGE, INC., et al.,
Appellees.
CHIEF JUDGE EDMUND A. SARGUS, JR.

IN RE: DANIEL L. JUNK, et al.

Case No. 2:15-cv-377
CHIEF JUDGE EDMUND A. SARGUS, JR.

OPINION & ORDER

Daniel and Christine Junk appeal two decisions from the United States Bankruptcy Court for the Southern District of Ohio, Eastern Division. For several years, the Junks have engaged in litigation in South Carolina's courts relating to a house they purchased there after they stopped making payments on their mortgage note. They attempted to quiet title in the property in themselves and have defended against a foreclosure action. After moving to Ohio, and while the South Carolina litigation remains pending, the Junks commenced this Chapter 11 bankruptcy case and adversary proceeding, contending, as they have in state court, that CitiMortgage (the plaintiff in the state court foreclosure action) cannot enforce the Note and has no enforceable mortgage on their real property. CitiMortgage moved the bankruptcy court to grant it relief from the automatic stay that took hold upon the Junks' filing their bankruptcy petition and abstain from hearing the adversary proceeding.

The first bankruptcy court decision, dated July 2, 2014, granted both requests, finding "cause" existed under 11 U.S.C. § 362(d)(l) in their main case (No. 13-55139) warranting relief from the automatic stay to allow pending South Carolina litigation to proceed to finality. Then, the bankruptcy court decided to abstain from considering the Junks' adversary proceeding (Adv. Proc. No. 13-02390) in light of the pending South Carolina litigation that had been ongoing since 2009.

After this decision, the bankruptcy court issued a show cause order directing the Junks to explain why a Chapter 11 trustee should not be appointed, or why the case should not be dismissed or converted to Chapter 7. (ECF No. 13-3.) At the show cause hearing on January 9, 2015, the court found "cause" existed to convert the case to Chapter 7, and that it was in the best interests of the creditors to do so. (See ECF No. 13-42.)

The Junks appeal the July 2, 2014 and January 9, 2015 decisions in separately filed cases in this Court.

For the reasons that follow, both decisions are **AFFIRMED**.

I. Appeal of July 2, 2014 Order (Case No. 2:14-cv-1428)

In November 2006, the Junks executed a $1.2 million Note in favor of American Home Mortgage and signed a mortgage that month identifying MERS as the mortgagee as nominee of American Home Mortgage. In March 2009, the Junks stopped making payments on the loan. (July 2, 2014 Opn. & Order at 9; ECF No. 5-54.) After this, they sent a written request for documents to American Home Mortgage, warning that no response would confer upon the Junks the power of attorney to work on the mortgage company's behalf. Daniel also sent a notice to CitiMortgage, the servicer of the loan, purporting to rescind the Note and Mortgage. (July 2 Opn. & Order at 7.) In April 2009, Daniel, purportedly acting as an agent of American Home Mortgage, signed and filed documents with the record of Beaufort County, South Carolina, stating that the mortgage was released and satisfied and that the entire debt secured by the Mortgage was paid in full. (*Id.* at 12.)

In September 2009, the Junks initiated a quite title action in Beaufort County Court of Common Pleas, Fourteen Judicial Circuit, South Carolina. A month later, Bayview Loan Servicing, LLC, the servicer of the subject mortgage loan at the time, initiated a foreclosure action against the Junks in the Beaufort County Court of Common Pleas, Fourteenth Judicial Circuit, South Carolina. The Judicial Officer presiding over the quiet title action and the foreclosure action – the Beaufort County Master-in-Equity – dismissed the quiet title action without prejudice to the Junks asserting claims in the foreclosure action and substituted CitiMortgage as the plaintiff in the foreclosure action in place of Bayview. (July 2 Opn. & Order at 8.) Later, the Master-in-Equity dismissed a third-party complaint the Junks filed in the foreclosure action against more than 20 defendants and dismissed with prejudice each of the counterclaims the Junks filed against CitiMortgage in the foreclosure action. (*Id.* at 8.)

This "state court litigation took five hearings, several orders, and approximately two years, leaving only the counts asserted in the foreclosure complaint and the defenses asserted by the Junks to be decided by the Master-in-Equity." (July 2 Opn. & Order at 8.) Undeterred, the Junks filed multiple appeals, including an appeal of an order the appellate court previously found to be not appealable, delaying the adjudication of CitiMortgage's foreclosure action. (*Id.*) Some of the appeals were dismissed and others remained pending when the Junks filed their bankruptcy petition. (*Id.*) Then, the Junks commenced this adversary proceeding, where they rehash the same arguments made m South Carolina- that the Note and Mortgage are unenforceable. (*Id.*)

In its July 2, 2014 Order, the Bankruptcy Court granted CitiMortgage's motion for relief from automatic stay. Then, the court elected to abstain from deciding the issues in the Junks' adversary proceeding. The Junks appeal these decisions.

a. Relief from Automatic Stay

The Junks appeal the bankruptcy court's decision to lift the automatic stay "for cause" under § 362(d)(1) as to the South Carolina property. [1] The Court reviews this equitable determination for an abuse of discretion. *See In re Nichols*, 440 F.3d 850, 856 (6th Cir. 2006); *In re Federated Dep't Stores, Inc.*, 328 F.3d 829, 836 (6th Cir. 2003).

Upon filing a petition in bankruptcy, an "automatic stay" under 11 U.S.C. § 362(a) takes hold and stops creditors from pursuing collections against the debtor, with exceptions. It also halts actions against property in which the debtor has an interest.

According to the Junks, CitiMortgage lacks the necessary standing to seek relief from the stay. Under 11 U.S.C. § 362(d)(1), the request to lift the stay must come from a "party in interest." A "creditor" of the debtor is a party in interest in a Chapter 11 case. See 11 U.S.C. § 1109(b). The term "creditor" includes an "entity that has a claim against the debtor[,]" 11 U.S.C. § 101(10), and a "'claim against the debtor'" includes claim against

[1] The Junks moved for an order staying this appeal (ECF No. 17) until the bankruptcy court weighs in on their Fed. R. Civ. P. 60 motion to vacate its July 2, 2014 opinion. The bankruptcy court denied this motion on March 2, 2015 (Case No. 13-ap-02390; ECF No. 330), and the Junks' motion (ECF No. 17) is therefore **DENIED**.

property of the debtor[,]" 11 U.S.C. § 102(2), regardless of whether the claim is disputed, 11 U.S.C. § 101(5)(A). A claim includes the "right to payment" and the "right to an equitable remedy for breach of performance if such breach gives right to a right of payment," regardless of whether such right is disputed or undisputed. 11 U.S.C. § 101(5)(A) and (B). The "right to foreclose on the mortgage can be viewed as a ' right to an equitable remedy ' for the debtor's default on the underlying obligation." *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991).

Here, CitiMortgage qualifies as a "creditor" because it holds the Note and Mortgage and pursued the foreclosure action in South Carolina before the Junks filed their bankruptcy petition. Though the Junks object to CitiMortgage's right to foreclose, a party in interest's "claim" includes a right to payment or a right to an equitable remedy regardless of any dispute as to such right. *See Johnston v. JEM Dev. Co. (In re Johnston)*, 149 B.R. 158, 161 (B.A.P. 9th Cir. 1991) (finding holder of a right to payment qualified as "creditor" even though the right was in dispute).

The Junks insist that CitiMortgage lacks standing because it is not the "owner" of the Note. (Appellant Br. at 18; ECF No. 7.) But this argument misses the relevant standard. "In order to have standing to seek relief from stay under § 362(d)(l) to continue the foreclosure action, CitiMortgage need only have a colorable, or plausible, interest in the Note and the [South Carolina] property." (July 2, 2014 Opn. & Order at 37 (citing *In re Rice*, 462 B.R. 651, 656-57

(B.A.P. 6th Cir. 2011).) *See also In re Castro*, 503 F. App' x 612,615 (10th Cir. 2012) (holding that assignee was a "party in interest" with standing under § 362(d) where it had "a colorable claim of a lien on property of the estate"); *In re Lira*, No. 6:12-35965, 2015 WL 4641600, at *6 (B.A.P. 9th Cir. Aug. 4, 2015) ("Wells Fargo had a 'colorable claim' to foreclose on the Property, which made it a party in interest under § 362(d)."). Based on the documents evidencing an indorsement of the Note to CitiMortgage and an assignment of the Mortgage to CitiMortgage, the bankruptcy court correctly concluded that CitiMortgage has at least a colorable interest in the Note and Mortgage on the South Carolina property. Bolstering this conclusion, the South Carolina Master-in-Equity substituted CitiMortgage as the plaintiff in the foreclosure action based on the assignment of the Mortgage from Bayview to CitiMortgage and CitiMortgage's possession of the original Note bearing an indorsement to CitiMortgage. State courts will determine any ownership issues; for present purposes, it is enough to conclude that not owning the note would not extinguish CitiMortgage's colorable claim. See S.C. Code Ann. § 36-3-301 ("A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.").

The Junks press that a mortgage is not a negotiable instrument governed by the UCC. But a "promissory note secured by a real estate mortgage" IS "a negotiable instrument." *Swindler v.*

Swindler, 584 S.E.2d 438, 439, 440 (S.C. Ct. App. 2003). Still, the Junks protest "only the terms of the mortgage were sued upon in state court;" the "terms of the note are not sued upon." (Appellant Br. at 17.) This misses the situation here: CitiMortgage is suing for the debt that is evidenced by the Note. If a borrower defaults on the obligation to pay as evidenced by the Note, then the lender may proceed against the collateral as secured by the Mortgage in a foreclosure action. See *Bank of Am., NA. v. Draper*, 746 S.E.2d 478, 481 (S.C. Ct. App. 2013) ("[T]he party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt.") (internal quotation marks omitted).

Nevertheless, the Junks assert that CitiMortgage waived its right to enforce the Note when it elected in the foreclosure action to waive its right to any deficiency judgment. Not so. "A mortgagee who chooses to forego a deficiency judgment simply elects to rely solely on the mortgage security for satisfaction of his debt; in other words, he relinquishes only his right to pursue assets of the mortgagor over and above those covered by the mortgage." *Sellars v. First Colonial Corp.*, 280 S.E.2d 805, 806 (S.C. 1981). CitiMortgage sought to establish default under the Note and never waived the right to its enforcement.

The Junks maintain that CitiMortgage is judicially estopped from acting as a holder, and not owner, of the Note because CitiMortgage was successfully substituted into the foreclosure action as "owner of the note." (Appellant Br. at 20; ECF No. 7.) But the Junks forfeited this argument by not making it to the bankruptcy court. *Greco v. Livingston Cnty.*, 774 F.3d 1061, 1064 (6th Cir. 2014). ("This new argument trips over the forfeiture rule, which tells us to correct errors raised and addressed below, not to entertain new claims raised for the first time on appeal."). Though the Junks mentioned "judicial estoppel" in their Objection to CitiMortgage's Motion for Relief from the Automatic Stay, it was not in the context they argue now. (See Objection at 5 n.4; ECF No. 2-83.) And even if this argument was not forfeited, the Court would nevertheless find in its discretion judicial estoppel inappropriate here. *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) ("[J]udicial estoppel is an equitable doctrine invoked by a court at its discretion.") (internal quotation marks omitted); *Eckstein v. Cincinnati Ins. Co.*, 469 F. Supp. 2d 455, 463 (W.D. Ky. 2007) ("Judicial estoppel is an extraordinary remedy to be invoked when a party' s inconsistent behavior will otherwise result in a miscarriage of justice."). CitiMortgage's allegations in South Carolina that it is the "owner and holder" of the Note is not "clearly inconsistent" with its assertion here to be the "holder" of the Note, particularly when a "holder" can enforce the Note. *See Lorillard Tobacco Co. v. Chester, Willcox & Saxbe*, 546 F.3d 752, 757 (6th Cir. 2008) ("[I]t is well-established that at a minimum, a party's later position must be clearly inconsistent with its earlier position[] for judicial estoppel to apply.") (internal quotation marks omitted). The bankruptcy court needed to determine only whether CitiMortgage had a "colorable" interest in the Note and Property, which it found existed.

Last, the Court notes that the Junks appear to decline any challenge that may be levelled against the bankruptcy court's determination that the relevant factors made relief from the automatic stay appropriate. To the extent that they do push any such challenge, however, the Court discerns no error in the bankruptcy court's analysis.

b. Abstention

The Junks assert that the bankruptcy court erred in abstaining from the issues raised in the adversary proceeding. Like the decision to lift the stay, the Court reviews the decision to abstain for an abuse of discretion. *Antioch Co. Litig. Trust v. Hardman*, 438 B.R. 598, 603 (S.D. Ohio 2010). The basis for permissive abstention lies in 28 U.S.C. § 1334(c)(l), which provides:

> Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

In deciding whether to exercise permissive abstention, courts analyze several factors. *Meritage Homes Corp. v. JPMorgan Chase Bank, N A.*, 474

B.R. 526, 573 (Bankr. S.D. Ohio 2012) (listing factors). The Junks zero in on two that they allege the bankruptcy court misapplied.

First, the Junks claim that unsettled state-law claims do not predominate over bankruptcy issues. (Appellant Br. at 26.) The Court disagrees. The claims at the heart of the adversary proceeding – the enforceability of the Note and Mortgage – hinge on issues of South Carolina law, not bankruptcy law. Moreover, those issues implicate strong state interests. *See Blake v. Wells Fargo Bank, NA*, 917 F. Supp. 2d 732, 738 (S.D. Ohio 2013) ("[A] state foreclosure matter implicates important state interests."). And, South Carolina has not yet resolved some of the issues raised by the Junks. *See Lindsey v. Dow Chem. Co. (In re Dow Corning Corp.)*, 113 F.3d 565, 571 (6th Cir. 1997) ("[T]he primary determinant for the exercise of discretionary abstention is whether there exist[] unsettled questions of state law.") (internal quotation marks omitted). For example, the Junks argue that the Mortgage is invalid because American Home Mortgage was never a member of the MERS electronic mortgage registration system. But this Court, the bankruptcy court, and apparently the parties, are unaware of any South Carolina decisions or statutes on this point. And though the Junks argue that the securitization process rendered the Note and Mortgage unenforceable, this too has not been addressed by a South Carolina court.

Second, the Junks assert that the bankruptcy court erred in concluding that they were forum shopping. The Court agrees with the bankruptcy court' s finding that "[t]he evidence that the Junks were forum shopping when they commenced this adversary proceeding appears overwhelming". (July 2 Opn. & Order at 64; ECF No. 5-54.) The Junks raised the same claims in South Carolina in their quiet title action, and after dismissal of that case, raised them anew in their answer and counterclaim in the foreclosure action. Then, the Junks pursued appeals in South Carolina, where they received more unfavorable rulings before filing their bankruptcy petition and commenced the adversary proceeding. (*Id.* at 65.) In the adversary proceeding, the Junks are taking positions that are inconsistent with orders entered by the Master-in-Equity in South Carolina. (Id. at 66.) These actions bear the mark of forum shopping. The factors identified by the bankruptcy court weigh in favor of abstention in light of the pending state-court litigation.

The Junks' numerous other arguments deserve quick mention. They appear to argue that the Bankruptcy Court erred in not ruling on their claims objection and allowing CitiMortgage's Proof of Claim because the Note was first indorsed in blank and then specially endorsed to CitiMortgage. But for the reasons detailed above and by the bankruptcy court, the more appropriate route is for the state court to decide whether this renders the Note unenforceable. Same with the Junks' position that that the Note's indorsement on behalf of American Home Mortgage was forged. As for the argument that the bankruptcy court should not have allowed Proof of Claim 6-3 because it did not include an escrow statement under Bank. R. 3001(c)(2), that rule does not apply here because the property at issue is not the Junks principal residence.

The Junks' last argument (in this appeal) is that the bankruptcy court abused its discretion in concluding that Daniel Junk can practice law as an unlicensed attorney in the South Carolina litigation and represent the bankruptcy estate' s interest, including co-debtor Christine Junk. (Appellant Br. at 28.) That is not what the bankruptcy court said, however. The Junks argued to that court that Daniel could not participate in the state-court appeal because he became "Daniel L. Junk, as Debtor-in-Possession," and so was no longer a proper party to the pending appeal, "rendering abstention a legal impossibility." (July 2, 2014 Opn. & Order at 72-73.) The bankruptcy court observed that the Junks were debtors in possession, and as such, "have all the rights, other than the right to compensation under section 330 of this title, and powers ... of a trustee serving in a case under this chapter." 11 U.S.C. § 1107(a). A trustee has the right and power to defend against litigation occurring outside the bankruptcy court when relief from stay is granted. Thus, the bankruptcy court noted that the Junks are authorized to participate in the litigation in South Carolina. (See July 2, 2014 Opn. & Order at 74; see also *id.* at 53 ("Mr. Brunner incorrectly argued that Mr. Junk, as debtor in possession, is precluded from continuing to *represent himself* in the South Carolina litigation because he is unlicensed to practice law. As explained further below, as a debtor in possession, Mr. Junk has the rights and powers of a trustee. Trustees may represent themselves in Chapter 11 cases ... as well as under other chapters of the Bankruptcy Code. Because they are representing themselves, they may do so even if they are not attorneys. Thus, Mr. Junk would not be prohibited from representing himself merely because he is not a licensed attorney.") (emphasis added and internal citation omitted). No error occurred here.

The Court **AFFIRMS** the bankruptcy court's July 2, 2014 order.

II. Appeal of January 13, 2015 Order (Case No. 2:15-cv-377)

Next, the Junks appeal the bankruptcy court's order converting their Chapter 11 case to Chapter 7. (*See* Jan. 13, 2015 Opn. & Order; ECF No. 13-42.) Section 1112(b) of the Bankruptcy Code provides that once "cause" is established, the court must dismiss the Chapter 11 proceeding or convert it to Chapter 7 in light of the best interests of creditors and the estate. I 1 U.S.C. § 1 l 12(b).

CitiMortgage, arguing that such "cause" existed, moved the bankruptcy court to dismiss or convert the Junks' case pursuant to§ 1112(b). (Show Cause Order at l; ECF No. 13-3.) At a status conference on this motion, the Junks conceded that they had not been insuring their interest in the property and had not been paying real estate taxes. (Case No. 2:13-bk-55139; Proceeding Memo, ECF Entry Dated Oct. 21, 2014.) The bankruptcy court then sua sponte issued a show cause order, providing additional grounds to dismiss or convert the case under § 1112(b). (Show Cause Order at 2.)

After issuing this show cause order, the bankruptcy court converted the Junk's case to Chapter 7. The bankruptcy court grounded this decision on several points, finding that the Junks: oversaw a "substantial or continuing loss to the estate " with "an absence of reasonable likelihood of rehabilitation," failed to maintain appropriate insurance, filed inaccurate operating reports with the bankruptcy court, did not pay post-petition taxes on the property and statutory fees to the United States Trustee, disobeyed the Bankruptcy Code by selling jewelry and borrowing money without securing requisite court authority, and showed a "lack of candor." (Jan. 13, 2015 Opn. & Order at 5-12; ECF No. 13-42.) In sum, the bankruptcy court found that:

> This case is one of the most egregious instances I've seen of debtors seeking the protections afforded by the Bankruptcy Code, most importantly, the automatic stay, without coming remotely close to living up to the fiduciary obligations that come along with those protections, including the duty to make full disclosure and to be candid with the bankruptcy court. The Junks clearly failed to file true and accurate operating reports, despite signing the reports under the penalty of perjury. So, in sum, I think there are ample grounds to dismiss or convert this case.

(Opn. & Order at 12; ECF No. 13-42.) After weighing the interests of the creditors and the estate, the bankruptcy court determined that conversion was warranted.

The Junks now appeal that order, though they decline to challenge any of the bankruptcy court's factual findings of "cause" under § 1112(b). Indeed, they acknowledge that "cause" existed for conversion or dismissal of their Chapter 11 case. (See Appellant Br. at 22; ECF No. 15 ("The bankruptcy court began the hearing with the Motion. Joint Appellants did not object to the Motion and conceded cause existed for dismissal or conversion.").) And, they refrain from challenging the bankruptcy court's decision to convert rather than dismiss their case. Instead, the Junks assert that CitiMortgage lacked standing to bring its motion to dismiss and that the bankruptcy court violated their due process rights by denying them counsel at the show cause hearing and sequestering Christine Junk from the courtroom during Daniel's testimony. As detailed below, these arguments fail.[2]

[2] CitiMortgage filed a Motion to Dismiss Appeal (ECF No. 16), arguing that the Junks lacked appellate standing in this bankruptcy case, which is "more limited than Article III standing or the prudential requirements associated therewith. " *In re Troutman Enterprises, Inc.*, 286 F.3d 359, 364 (6th Cir. 2002). The Court assumes that that the Junks have appellate standing in this bankruptcy case. Though the Supreme Court disfavors "hypothetical jurisdiction" in the Article III context, *see Steel Co. v. Citizens for a Better Env 't* , 523 U.S. 83, 94-97 (1998), the bankruptcy appellate standards is a prudential, non-statutory requirement, *In re Godon, Inc.*, 275 B.R. 555,

a. Standing

Like their first appeal, the Junks argue that CitiMortgage lacked standing to bring a motion to dismiss because it was not a "party in interest." Section 1112(b)(1) of Title 11 provides:

> on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

But the bankruptcy court did not need a motion by a "party in interest" to order conversion. Under 11 U.S.C. § 105(a) – as acknowledged by the Junks – the bankruptcy court has independent authority to consider the matters at hand and sua sponte order conversion or dismissal upon notice to the parties in

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565 (Bankr. E.D. Cal. 2002), and "[u]nlike certain other statutory or constitutional jurisdictional questions, the resolution of a sticky prudential standing question may be bypassed in favor of deciding the case on the merits when it's clear that the appellant will lose there anyway," *In re Krause*, 637 F.3d 1160, 1168 (10th Cir. 2011). Thus, CitiMortgage's Motion to Dismiss Appeal (ECF No. 16) is **DENIED WITHOUT PREJUDICE**. *See In re Solomon*, 129 F.3d 608, 1997 WL 680934, at *6 n.10 (5th Cir. 1997) (per curiam) (table) (assuming Chapter 7 debtor had standing to appeal because debtor's substantive argument failed).

interest. (Opn. & Order at 4; ECF No. 13-42 (collecting authority).) And "[t]he Show Cause Order set forth grounds for the Court to dismiss or convert the Junks' case under § 1112(b) ... that [we]re not asserted in the CitiMortgage Motion." (Opn. & Order at 1; ECF No. 13-42.) The bankruptcy court converted the Junks' case not only upon CitiMortgage's Motion to Dismiss but also its Show Cause Order that raised additional grounds for conversion or dismissal under § 1112(b).

Nevertheless, the Junks stress that the conversion was based in part on CitiMortgage's Motion to Dismiss, rendering the order void. (Reply at 3; ECF No. 23.) But this does not negate the bankruptcy court's independent authority to convert or dismiss the case. And, its show cause order and hearing raised matters not addressed by CitiMortgage's motion. Specifically, the bankruptcy court pointed the Junks' "failure to maintain appropriate insurance," which, "standing alone, constitute[d] independent cause for conversion." (Opn. & Order at 6; ECF No. 13-42.) Also not raised by CitiMortgage but addressed by the bankruptcy court: the Junks' "unexcused failure to satisfy timely any filing or reporting requirement," which "also constitute[d] cause for dismissal or conversion." (*Id.* at 7.) Moreover, cause was found based on the Junks' "failure to pay any fees or charges" owed to the United States Trustee, another ground not raised in the motion to dismiss. The bankruptcy court also independently found that the Junks' non-compliance with the bankruptcy code and rules constituted cause, another "independent basis for dismissal or conversion" not raised by CitiMortgage. (*Id.* at 8-9.) And, the bankruptcy court sua sponte addressed the "Junks' lack of candor" – which "r[o]se to the level of fraud upon the Court" – that further constituted cause. (*Id.* at 9-12; *cf* Mot. Dismiss at 12-13; ECF No. 12-135 (listing reasons for conversion as the diminution of the estate with no reasonable likelihood of rehabilitation and the gross mismanagement of the estate).) "Proof of any one factor is sufficient to justify conversion." *Fishell v. U.S. Tr.*, 19 F.3d 18, 1994 WL 64718, at *1 (6th Cir. 1994) (per curiam) (table). Here, the bankruptcy court sua sponte established several factors. And, the Junks acknowledge that "cause" existed for conversion or dismissal (Appellant Br. at 22), and do not challenge the decision to convert their case rather than dismiss it. No abuse of discretion occurred. *See In re Milan*, 573 F.3d 237, 248 (6th Cir. 2009) (reviewing decision to convert for abuse of discretion).

In any event, as addressed above, CitiMortgage is a "party in interest." (*See surpra* Section I.a.) *Cf. In re Lee*, 467 B.R. 906, 916 (B.A.P. 6th Cir. 2012) ("As used in § 362, 'party in interest' is not as broad as it is in § 1112(b).") To briefly recap, a creditor of the debtor is a party in interest in a Chapter 11 case, see 11 U.S.C. § 1109(b), and CitiMortgage qualifies as a creditor because it has a colorable claim against the debtor, *see* 11 U.S.C. § 101(10).

Last, the Court notes that Junks repeatedly press that the Note and Mortgage are unenforceable because the Junks purportedly rescinded the subject refinancing transaction pursuant to the Truth in Lending Act. But, for the reasons stated above, the bankruptcy court correctly left the enforceability of the Note and Mortgage for the South Carolina courts to decide.

b. Due Process

The Junks next allege that the bankruptcy court violated their right to due process when it denied them counsel at the show cause hearing and then sequestered Christine Junk from that hearing while Daniel Junk testified. "The fundamental elements of procedural due process are notice and an opportunity to be heard." *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992). Because the bankruptcy court afforded these safeguards, neither of the Junks' arguments provides a reason to disturb the decision below.

First, no due process violation occurred in denying the Junks' request to have attorneys. As debtors-in-possession, the Junks needed court approval to employ attorneys. 11 U.S.C. § 327; Fed. R. Bankr. P. 2014(a). The day before the show cause hearing, the Junks had two attorneys file notices of appearance that stated "[t]his appearance is not made on behalf of the Debtors as debtors in possession." (ECF Nos. 13-133 & 13-134.) The Junks wished for their attorneys to represent them solely in their individual capacity as debtors. Denying this request, the bankruptcy court noted that such a position runs counter to the courts that have weighed in on the subject. (Hearing at 13-14 (*citing, e.g., Cle-Ware*

Indus. v. Sokolsky, 493 F.2d 863 (6th Cir. 1974).) The Junks offer no authority suggesting that attorneys should be allowed to represent a party as a debtor but not as debtors in possession.

The Junks apparently blame the bankruptcy court for the character of their request, stating that its "denial of a continuance" 12 days before the scheduled hearing left the Junks' counsel "no choice but to appear as counsel for debtor because complying with Rule 327 was impossible." (Reply at 5; ECF No. 22.) But complying with § 327 was possible. The Junks had ample time to secure counsel between the Order to Show Cause (October 23, 2014) and the Show Cause Hearing (January 9, 2015). The Junks appeared at the show cause hearing and were provided an opportunity to testify and respond to the bankruptcy court's show cause order. Thus, they received an opportunity to be heard for purposes of due process. *See In re Colon Martinez*, 472 B.R. 137, 143 (B.A.P. 1st Cir. 2012) (affirming dismissal of bankruptcy case where debtor had ample time to secure counsel and noting that no right to counsel exists in civil cases).

Moreover, the Junks have not argued or shown that that the hearing would have yielded a different outcome had counsel represented them. Indeed, one of the attorneys that they sought to have represent them conceded before the bankruptcy court that "cause" existed for conversion or dismissal under 11 U.S.C. § 1112(b). (Hearing at 11; ECF No. 13-44). *See In re Rosen*, 545 F.3d 764, 777 (9th Cir. 2008) (affirming conversion to Chapter 7 where debtor "was not prejudiced by any procedural deficiency"); see also Fed. R. Bankr. P. 9005 (incorporating Fed. R. Civ. P. 61, which instructs the courts to "disregard all errors and defects that do not affect any party's substantial rights").

Second, the Junks' argument that the bankruptcy court erred in sequestering Christine from Daniel's testimony similarly offers no reason to disturb the bankruptcy court. To the extent any procedural irregularities occurred, the Junks did not preserve this issue for appeal. The Junks never objected to Christine's sequester, and at no point did Daniel request to question Christine, nor did Christine request to question Daniel. And once more, the Junks have shown no prejudice from the bankruptcy court's decision to remove Christine from the courtroom during Daniel's testimony. For example, they point to no inconsistent statements between the two, or any new infom1ation that would have been brought forward had they been allowed to cross-examine one another. The Court therefore finds no reversible error. *See Simone v. Worcester Cnty. Inst. for Sav.*, 52 F.3d 309, 1995 WL 234250, at *5 (1st Cir. 1995) (per curiam) (table) (affirming bankruptcy court where the court sequestered a co-debtor wife from proceeding because the debtors "waived the issue" by failing to object and did not "demonstrate any prejudice").

The Court **AFFIRMS** the bankruptcy court's January 13, 2015 order.

III. CONCLUSION

In Case No. 2:14-cv-1428, the Court **DENIES** the Junks' Motion for Stay and Remand for Determination of Civ. R. 60(b) Motion (ECF No. 17) and **AFFIRMS** the bankruptcy court's July 2, 2014 order. In Case No. 2:15-cv-377, the Court **DENIES WITHOUT PREJUDICE** CitiMortgage's Motion to Dismiss Appeal (ECF No. 16) and **AFFIRMS** the bankruptcy court ' s January 13, 2015.

IT IS SO ORDERED.

8-28-2015 /s/
DATE **EDMUND A. SARGUS, JR.**
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
Eastern Division

DANIEL L. JUNK, et al.,
Appellants,

v.

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JUDGMENT IN A CIVIL CASE

CASE NO. 2:14-CV-1428
CHIEF JUDGE EDMUND A. SARGUS, JR.

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** A decision has been rendered by the Court without a hearing or trial.

Pursuant to the OPINION AND ORDER filed August 28, 2015, JUDGMENT is hereby entered DISMISSING this case.

Date: September 2, 2015

RICHARD W. NAGEL, CLERK

App. 25

/S/ Andy F. Quisumbing
(By) Andy F. Quisumbing
Courtroom Deputy Clerk