

Dated: October 26, 2017



*Daniel P. Collins*

Daniel P. Collins, Chief Bankruptcy Judge

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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA**

**In re:** ) Chapter 12 Proceedings  
)  
**VA BENE TRIST, LLC,** ) Case No. 2:17-bk-00993-DPC  
)  
**Debtor.** )

**U.S. BANK NA, SUCCESSOR TRUSTEE  
TO BANK OF AMERICA, NA,  
SUCCESSOR IN INTEREST TO  
LASALLE BANK NA, AS TRUSTEE, ON  
BEHALF OF THE HOLDERS OF THE  
WASHINGTON MUTUAL MORTGAGE  
PASS-THROUGH CERTIFICATES,  
WMALT SERIES 2006-8,**

**UNDER ADVISEMENT RULING**

**[NOT FOR PUBLICATION]**

**Movant,**

**v.**

**VA BENE TRIST, LLC Debtor; and  
DAVID M. REAVES, Chapter 12 Trustee,**

**Respondents.**

Before the Court is a Motion for Relief from Automatic Stay (“Motion”) filed by U.S. Bank NA (“Movant”) regarding real property owned by Va Bene Trist, LLC (“Debtor”) located at 30019 N. 150th St., Scottsdale, Arizona 85262 (the “Property”) (DE 33).<sup>1</sup> The Court considered arguments made by the parties through written briefs and two oral arguments held on August 21 and September 20, 2017. The focus of these arguments was whether Arizona’s six-year statute of limitations bars Movant from

<sup>1</sup> DE refers to docket entries in the administrative file concerning this chapter 12 case.

1 foreclosing its lien against the Property. For the reasons stated below, the Court now  
2 concludes that the Arizona statute of limitations (A.R.S. § 12-548) was tolled during the  
3 pendency of the First Bankruptcy and, therefore the statute of limitations has not yet  
4 expired. Movant’s Motion is granted.

5  
6 **I. BACKGROUND**<sup>2</sup>

7 **A. The First Bankruptcy**

8 1. On June 19, 2006, David Menken (“Borrower”) executed a promissory note  
9 (“Note”) and deed of trust (“DOT”) in favor of Movant’s predecessor in interest, AHM  
10 Mortgage (“AHM”) (DE 33-2, Ex. A and B). The original DOT listed AHM as the  
11 beneficiary and Borrower as trustor. However, unbeknownst to AHM, before the DOT  
12 and Note were executed, equitable title to the Property had already been transferred from  
13 Borrower to Debtor.

14 2. Borrower stopped making payments on the Note in November 2006. On  
15 April 17, 2007, a notice of a private deed of trust sale was scheduled by AHM. The filing  
16 of the trustee’s sale accelerated the debt. Under A.R.S. §§ 12-548 and 33-816, the statute  
17 of limitations to foreclose on the Property was six years from the date of acceleration of  
18 the Note. On November 21, 2007, Debtor filed a voluntary petition under Chapter 12 of  
19 the Bankruptcy Code<sup>3</sup> (“First Bankruptcy”) (Case No. 2:07-bk-06227-GBN), which  
20 stayed the trustee’s sale.

21 3. In the First Bankruptcy, an adversary proceeding (Case No. 2:08-ap-00844-  
22 GBN) was commenced by Debtor challenging the validity of AHM’s lien on the Property.  
23 Debtor argued Borrower lacked an interest in the Property when Debtor signed the DOT  
24 and, therefore, AHM could not enforce the lien recorded against the Property. Bankruptcy  
25

26 <sup>2</sup> The parties agree that, for the purpose of this decision, the pertinent facts are not in dispute.

<sup>3</sup> 11 U.S.C. §§ 101-1532 refers to the U.S. Bankruptcy Code, hereinafter the “Code.”

1 Judge Nielsen applied the doctrine of equitable subrogation and determined that the DOT  
2 should be reformed to reflect Debtor as the trustor under the DOT (DE 33, Ex. A).  
3 Judge Nielsen found the lien held by AHM was enforceable against the Property.

4 4. Debtor appealed Judge Nielsen’s decision. On January 9, 2012, the U.S.  
5 District Court for the District of Arizona (“District Court”) affirmed Judge Nielsen’s  
6 decision (Case No. 2:11-cv-00977-NVW). *See In re Va Bene Trist, LLC*, No. 2:07-BK-  
7 6227-GBN, 2012 WL 37346, at \*1 (D. Ariz. Jan. 9, 2012), *aff’d sub nom. Va Bene Trist,*  
8 *LLC v. Washington Mut. Bank*, 556 F. App’x 647 (9th Cir. 2014)). Debtor appealed the  
9 District Court’s decision. On February 25, 2014, the Ninth Circuit Court of Appeals  
10 affirmed Judge Nielsen’s decision (Case No. 12-15169). *See Va Bene Trist, LLC v.*  
11 *Washington Mut. Bank*, 556 F. App’x 647 (9th Cir. 2014)).

12 5. On August 19, 2014, an assignment of the beneficial interest under the DOT  
13 from AHM to Movant was recorded with the Maricopa County Recorder.

14 6. Although AHM sought stay relief in the First Bankruptcy, the bankruptcy  
15 automatic stay remained in place throughout the First Bankruptcy until that case was  
16 dismissed on December 4, 2014.

17 **B. The Second Bankruptcy**

18 7. On October 27, 2016, nearly two years after the First Bankruptcy was  
19 dismissed, Movant noticed a trustee’s sale for January 26, 2017. On January 25, 2017,  
20 Debtor obtained an order from Judge Rayes of the District Court (Case No. 2:17-cv-  
21 00177-DLR) enjoining the scheduled foreclosure of the Property.<sup>4</sup> On February 2, 2017,  
22 Debtor commenced the instant Chapter 12 bankruptcy proceeding (“Second  
23 Bankruptcy”), which again stayed the scheduled private deed of trust sale.

24 8. On June 6, 2017, Movant filed its Motion pursuant to §§ 362(d)(1) and (2)  
25 of the Code in an attempt to move forward with its foreclosure sale (DE 33). Debtor filed

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<sup>4</sup> This District Court case was dismissed on February 8, 2017.

1 its objection (“Objection”) to the Motion on June 26, 2017, claiming that, under Arizona  
2 law, the Motion should be denied because the statute of limitations had passed so Movant  
3 could not foreclose its lien on the Property (DE 37).<sup>5</sup>

4 9. Movant filed its reply (“Reply”) to the Objection on July 11, 2017, arguing  
5 that either § 108(c)(1) of the Code or the doctrine of equitable tolling tolled the statute of  
6 limitations while the bankruptcy automatic stay was in place during the First Bankruptcy  
7 (DE 37).

8 10. On August 21, 2017, the Court held a preliminary hearing on Movant’s  
9 Motion. Additional briefs were filed by Movant (DE 43) and Debtor (DE 44). A  
10 subsequent hearing was held on September 20, 2017, after which the Court took the  
11 Motion under advisement.

12  
13 **II. JURISDICTION**

14 This Court has jurisdiction over these matters pursuant to 28 U.S.C. §§ 157(b) and  
15 1334.

16  
17 **III. ISSUE**

18 Whether Arizona’s statute of limitations on an accelerated written debt was tolled  
19 while the Debtor enjoyed the bankruptcy automatic stay during the First Bankruptcy?  
20

21 **III. ANALYSIS**

22 **A. 11 U.S.C. § 108(c)**

23 Section 108(c) of the Code provides:

24 [I]f applicable nonbankruptcy law . . . fixes a period for commencing or  
25 continuing a civil action in a court other than a bankruptcy court on a

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26 <sup>5</sup> Although the Motion was served upon the chapter 12 trustee, David Reaves (“Trustee”) (DE 35), the Trustee has not responded to the Motion.

1 claim against the debtor . . . and such period has not expired before the  
2 date of the filing of the petition, then such period does not expire until the  
later of

3 (1) the end of such period, including any suspension of such period  
occurring on or after the commencement of the case; or

4 (2) 30 days after notice of the termination or expiration of the stay under  
5 section 362 . . . .

6 Some state and federal courts differ in their interpretation on how to apply  
7 § 108(c)(1) when a statute of limitations runs before a bankruptcy stay is lifted. *Young v.*  
8 *U.S.*, 535 U.S. 43, 53 (2002). Some circuits recognize § 108(c)(1) as an independent  
9 tolling provision. *Garbe Iron Works, Inc. v. Priester*, 99 Ill. 2d 84, 88, 457 N.E.2d 422,  
10 425 (1983). This interpretation creates a day-for-day tolling accrual when an automatic  
11 stay is in place during a bankruptcy proceeding. *Id.* Other courts have determined  
12 § 108(c)(1) does not create an independent tolling provision. *See Aslanidis v. U.S. Lines,*  
13 *Inc.*, 7 F.3d 1067 (2d Cir. 1993) and *Rogers v. Corrosion Products, Inc.*, 42 F.3d 292, 297  
14 (C.A.5), *cert. denied*, 515 U.S. 1160, 115 S.Ct. 2614, 132 L.Ed.2d 857 (1995). Instead, a  
15 party must look to state or federal law outside of § 108(c) to find an applicable law that  
16 provides day-for-day tolling. *See e.g., U.S. v. Dos Cabezas Corp.*, 995 F.2d 1486, 1491  
17 (9th Cir. 1993); *Simon v. Navon*, 116 F.3d 1, 5 (1st Cir. 1997).

18 In the circuits that do not consider § 108(c)(1) as an independent tolling provision,  
19 § 108(c)(2) is used to give creditors a thirty-day “grace” period in the event they are  
20 prevented from enforcing a valid claim against a debtor because the statute of limitations  
21 on the claim expired while the bankruptcy stay was in place. *Aslanidis*, 7 F.3d at 1073.  
22 The Second Circuit has determined this provision serves as a shield to prevent debtors  
23 from claiming bankruptcy, prolonging the bankruptcy process so that the statute of  
24 limitations on a creditor’s claim runs out, and then seeking reprieve from the legal claim  
25 because the limitations time has run. *In re Morton*, 866 F.2d 561, 567 (2d Cir. 1989)  
26 (explaining that § 108(c) was intended to remedy the situation where a debtor filed

1 bankruptcy to allow the statute of limitations to run, and then used the statute of limitations  
2 as a complete defense).

3         The Ninth Circuit has aligned with the Second Circuit’s approach to § 108(c). In  
4 *In re Spirtos*, 221 F.3d 1079 (9th Cir. 2000), the court made clear that if a statute of  
5 limitations period runs while the bankruptcy automatic stay is in place and there is no  
6 other state or federal law tolling the limitations period, the limitations period for filing a  
7 claim does not expire until thirty days after the end of the automatic stay. *Id.* at 1080-81.  
8 The court reasoned that its decision was consistent with other circuit courts that  
9 determined § 108(c)(2) applied in situations where no federal or state law tolled the statute  
10 of limitations and the period expired during a bankruptcy automatic stay. *Id.* The court  
11 also noted that its previous decision in *In re Hunters Run Ltd. P’ship*, 875 F.2d 1425  
12 (9th Cir. 1989) was consistent with *Spirtos*. *Id.*

13         Following the Ninth Circuit’s interpretation of § 108(c), this Court now concludes  
14 that § 108(c)(1) in itself does not toll the statute of limitations pertinent to Arizona  
15 foreclosure claims.

16         Having determined that § 108(c) is not itself a tolling statute, this Court turns to the  
17 question of whether there exists other applicable state or federal law that does recognize  
18 a tolling of the statute of limitations in this matter.

### 19         **B. Tolling Under Arizona Law**

20         Movant argues that the Arizona Supreme Court case of *In re Smith*, 101 P.3d 637  
21 (Ariz. 2004) stands for the proposition that, under Arizona law, a bankruptcy stay tolls  
22 day-for-day all Arizona statutory limitations periods for enforcing actions against a  
23 debtor.<sup>6</sup> In *Smith*, the Arizona Supreme Court analogized the bankruptcy stay to that of a

24 \_\_\_\_\_  
25 <sup>6</sup> The *Smith* court made a distinction between ministerial actions and enforcement actions. The court held that  
26 ministerial actions with the primary purpose of putting parties on notice, such as affidavits renewing a judgment,  
were not subject to a bankruptcy stay and therefore were not tolled during a bankruptcy action. *Smith*, 101 P.3d at  
639. In contrast, the court held that the bankruptcy automatic stay did stay actions that “create, perfect or enforce  
liens or judgments.” *Id.*

1 supersedes bond. *Id.* at 639. The court explained that during the time a supersedes bond  
2 is in place, the time to enforce a judgment is tolled day-for-day to replace the time the  
3 creditor was precluded from enforcement of that judgment. *Id.* at 640. The Arizona  
4 Supreme Court agreed that this methodology applied to enforcement actions stayed by a  
5 bankruptcy proceeding. *Id.*

6 The District Court subsequently interpreted the *Smith* decision to apply to a deed  
7 of trust foreclosure sale of real property in Arizona. In *Mlynarczyk v. Wilmington Sav.*  
8 *Fund Soc’y FSB*, No. CV-15-08235-PCT-SPL, 2016 WL 3524329, at \*4-5 (D. Ariz. Apr.  
9 29, 2016), the debtors granted a lien against their land through execution of a note and  
10 deed of trust. When the debtors subsequently defaulted, a private deed of trust sale was  
11 commenced. The debtors then filed for bankruptcy. The automatic stay was lifted during  
12 the bankruptcy so the parties could engage in negotiations to modify the loan. *Id.*  
13 Negotiations ultimately failed. The creditor then recommenced its trustee’s sale once the  
14 bankruptcy was dismissed. The debtors sued the creditor in District Court arguing that  
15 the Arizona statute of limitations (A.R.S. § 12-548) had run on enforcement of the note  
16 and deed of trust. The creditor moved to dismiss the action arguing the statute of  
17 limitations had not yet run because it was tolled while the bankruptcy stay was in place  
18 during debtors’ bankruptcy. The District Court agreed. Judge Logan interpreted *Smith* to  
19 apply to all enforcement actions stayed by bankruptcy proceedings. *Id.* Using the Arizona  
20 Supreme Court’s reasoning, the District Court tolled the statute of limitations period from  
21 the filing of the debtors’ bankruptcy case until the bankruptcy stay was lifted.

22 In view of both the Arizona Supreme Court’s decision in *Smith* and the District  
23 Court’s decision in *Mlynarczyk*, this Court now finds that the Arizona limitations period,  
24 A.R.S. § 12-548, was tolled during the pendency of the bankruptcy stay during the First  
25 Bankruptcy. *Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 427 (9th Cir. 2011) (“When  
26 interpreting state law, federal courts are bound by decisions of the state’s highest court.”)

1 (internal citation omitted); *see also In re Stafford Pool & Fitness Cent.*, 252 B.R. 627, 631  
2 (Bankr. D. N.J. 2000) (stating bankruptcy courts should give substantial deference to  
3 decisions of the district court interpreting bankruptcy law). This Court’s decision is  
4 consistent with the Ninth Circuit’s analysis of § 108(c): the tolling of the enforcement  
5 action does not come from § 108(c)(1) itself. Tolling instead comes from the Arizona  
6 Supreme Court’s interpretation of its own statute of limitations.<sup>7</sup>

7 The statute of limitations began to run on April 17, 2007, when the initial trustee’s  
8 sale accelerated the debt. If the limitations period continued without interruption, the  
9 statute of limitations would have expired on April 17, 2013. The filing of the First  
10 Bankruptcy on November 21, 2007, stayed the limitations clock after it had run for seven  
11 months and four days. The bankruptcy stay was not lifted until the dismissal of the First  
12 Bankruptcy on December 4, 2014. Therefore, when the bankruptcy stay was lifted upon  
13 dismissal of the First Bankruptcy, Movant had just under five years and five months (sixty-  
14 five months) from December 4, 2014, to foreclose on the Property. A trustee’s sale was  
15 scheduled for October 27, 2016, well within the tolled limitations period. Nevertheless,  
16 the sale could not move forward because Debtor obtained an order from the District Court  
17 on January 25, 2017, enjoining Movant’s foreclosure. Debtor then filed its Second  
18 Bankruptcy on February 2, 2017, again staying Movant from foreclosing on the Property,  
19 further tolling the Arizona statute of limitations.

20 This Court now concludes that Movant may still foreclose on the Property because  
21 the statute of limitations was tolled from the filing of the First Bankruptcy on  
22 November 21, 2007 until the December 4, 2014 dismissal of the First Bankruptcy. Since  
23 this Court has determined that Arizona’s statute of limitations has not yet expired, it need  
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25 \_\_\_\_\_  
26 <sup>7</sup> Other circuits have also concluded that it is a state’s prerogative to toll a statute of limitations during a bankruptcy  
stay. *See Pettibone Corp. v. Easley*, 935 F.2d 120, 121 (7th Cir. 1991) (“Federal law assured the plaintiffs 30 days in  
which to pick up the baton; if states want to give plaintiffs additional time, that is their business.”).



1 not address Movant's contention that the Arizona statute of limitations was equitably  
2 tolled.

3 **C. Stay Relief**

4 Movant claims that, as of May 17, 2017, it was owed at least \$2,241,393.14 on the  
5 Note (DE 33). Movant points to Debtor's Schedule A filed in this bankruptcy (DE 10)  
6 which reflects the Property value as \$1,650,000. Debtor has been in default under the  
7 Note since 2006. No payments have apparently been made on the Note by Debtor for over  
8 ten years. Movant contends there is no equity in the Property, that Movant's interests are  
9 not being adequately protected, that Debtor has failed to confirm a plan of reorganization  
10 in either the First or Second Bankruptcy, that the Property is not necessary for an effective  
11 reorganization and cause exists to lift the bankruptcy automatic stay. Debtor's Opposition  
12 (DE 36) and Supplement (DE 44) do not contest any of these points. Rather, Debtor's  
13 resistance to the Motion focuses solely on its statute of limitations defenses. As noted  
14 above, the Court has rejected Debtor's limitation arguments. The Court now finds the  
15 Debtor has no equity in the Property, Movant's lien interests in the Property are not  
16 adequately protected, the Property is not necessary for an effective reorganization of the  
17 Debtor, and cause exists to terminate the bankruptcy automatic stay.

18 **V. CONCLUSION**

19 For the reasons stated above, the Court determines Movant, U.S. Bank NA, is  
20 entitled to relief from stay pursuant to 11 U.S.C. § 362(d). Accordingly,

21 **IT IS ORDERED** Movant's Motion is hereby granted in its entirety.

22  
23 **SO ORDERED.**