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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP Nos.	ID-06-1326-MoHB
)		ID-06-1365-MoHB
GREG V. THOMASON and)		
DIANA THOMASON,)	Bk. No.	03-42400
)		
Debtors.)	Adv. No.	04-06134

THOMASON FARMS, INC.; BYRON
T. THOMASON; MARILYNN T.
THOMASON; NICHOLAS THOMASON;
SANDRA THOMASON,
Appellants,

v.

M E M O R A N D U M¹

GREG V. THOMASON; DIANA
THOMASON; WILLIAM FORSBERG;
JANE DOE FORSBERG;
NEW BRITAIN INVESTORS;
R. SAM HOPKINS, Trustee,
Appellees.

Argued and Submitted on June 20, 2007
at Pasadena, California

Filed - August 7, 2007

Appeal from the United States Bankruptcy Court
for the District of Idaho

Hon. Jim D. Pappas, Bankruptcy Judge, Presiding.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1) it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Before: MONTALI, HOLLOWELL,² and BRANDT, Bankruptcy Judges.

2 Greg and Diana Thomason ("Debtors") had a bitter falling out
3 with Greg's brothers and their wives, Byron and Marilyn a/k/a
4 Lynn Thomason and Nicholas and Sandra Thomason (the "Siblings").³
5 The Siblings, acting for themselves and the family business
6 entity, Thomason Farms Incorporated ("TFI") (collectively,
7 "Appellants"), claim that Debtors and others who take through
8 them have no interest in several farm properties and the
9 corporate stock of TFI. Competing claimants include Debtors, who
10 seek to protect their interests in what may be a solvent estate,
11 their Chapter 7⁴ trustee R. Sam Hopkins ("Trustee"), and their
12 former attorney William Forsberg, who received some property from
13 them in payment of his fees ("Forsberg").

14 Appellants challenge the bankruptcy court's interpretation
15 of conflicting evidence regarding title and its awards of
16 attorneys fees and costs to secured creditor New Britain
17 Investors ("New Britain") and costs to Trustee and Forsberg. We
18 AFFIRM.

19
20 ² Hon. Eileen W. Hollowell, Bankruptcy Judge for the
21 District of Arizona, sitting by designation.

22 ³ Like the bankruptcy court, we will sometimes refer to the
23 various Thomason parties by their first names for clarity. No
disrespect is intended.

24 ⁴ Unless otherwise indicated, all chapter, section and rule
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
27 enacted and promulgated prior to the effective date of The
28 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, 119 Stat. 23, because the case from which this
appeal arises was filed before its effective date (generally
October 17, 2005).

1 was dissolved. On March 23, 1998, a Chapter 12 bankruptcy
2 petition was filed for TFI, signed by Byron and Nicholas (Case
3 No. 98-40278). In 2000 and 2001 the Siblings attempted to
4 foreclose on Greg's interest in his shares of TFI stock based on
5 Greg's alleged debts to TFI. Meanwhile, in February of 1999, the
6 Siblings commenced an adversary proceeding against Greg and Diana
7 in the TFI Chapter 12 case based upon Marilyn's review of the
8 books (Adv. No. 99-6036). In 2002, after a long trial, the
9 bankruptcy court determined that Greg owed TFI \$86,439.47.
10 According to the bankruptcy court this "surely disappointed
11 Greg's brothers who, based upon what the Court determined to be
12 the terribly flawed review conducted by Marilyn, alleged [that]
13 Greg owed TFI over \$1 million." TFI's Chapter 12 case was
14 dismissed on December 18, 2003.

15 Because of the protracted adversary proceeding in the TFI
16 bankruptcy case Greg and Diana owed their attorney Forsberg about
17 \$70,000 in fees. They lacked cash so they deeded their interests
18 in Agren and Farmstead to Forsberg in March of 2002. The
19 Siblings claim that Debtors had no interest in Agren or Farmstead
20 to convey to Forsberg, because these properties and Teton
21 Pastures allegedly were owned by BNG or TFI and not by Greg and
22 his brothers individually.

23 Greg and Diana filed their voluntary Chapter 7 petition on
24 November 7, 2003 (Case No. 03-42400). Appellants commenced this
25 adversary proceeding (Adv. No. 04-6134) to quiet title to real
26 and personal property. Other parties filed counter- and cross-
27 claims and among other things Trustee sought authority to sell
28 Agren and Teton Pastures free and clear of other interests and

1 claims, with interests and liens to attach to the proceeds.

2 Appellants originally disputed the enforceability of New
3 Britain's lien on Teton Pastures, primarily on statute of
4 limitations grounds. At the start of trial they stipulated that
5 New Britain's mortgage interest in Teton Pastures was valid,
6 enforceable, and superior to their interests but they continued
7 to dispute whether New Britain was bound by an earlier judgment
8 it had obtained against Debtors. They also disputed New
9 Britain's rate of interest and its claim for attorneys' fees and
10 costs.

11 After a five day trial the bankruptcy court issued its
12 Memorandum of Decision on the merits (the "Merits Decision").
13 Later it issued an order awarding New Britain \$75,091.35 in
14 attorneys' fees and \$2,853.01 in costs, supported by another
15 Memorandum of Decision. The bankruptcy court issued a Final
16 Judgment (the "Final Judgment")⁶ quieting title, authorizing a
17 sale of Agren and Teton Pastures, and reiterating the dollar
18 amounts owed to New Britain for attorneys' fees and costs as well
19 as principal and interest. The bankruptcy court later issued a
20 Summary Order clarifying the Merits Decision, on New Britain's
21 motion to amend (filed within ten days of the Final Judgment and
22 therefore extending the time to appeal under Rule 8002(b)), and
23 also issued orders awarding Forsberg and Trustee \$2,243.36 and
24

25
26 ⁶ A final judgment was possible, despite the fact that the
27 Merits Decision contemplates a Phase Two trial on Appellants'
28 nondischargeability claims against Debtors, because by
stipulation of the relevant parties the bankruptcy court had
earlier issued an order dismissing those claims.

1 \$3,806.03⁷ in costs, respectively, and denying them any
2 attorneys' fees, together with supporting Memoranda of Decision.
3 Appellants filed timely notices of appeal.

4 **II. ISSUES**

5 A. Did the bankruptcy court misinterpret the conflicting
6 evidence regarding the parties' interests in real property and
7 TFI's stock?

8 B. Did the bankruptcy court err in its awards of attorneys'
9 fees and costs to New Britain and costs to Trustee and Forsberg?

10 **III. STANDARDS OF REVIEW**

11 "We review the bankruptcy court's conclusions of law and
12 questions of statutory interpretation de novo, and factual
13 findings for clear error." Village Nurseries v. Gould (In re
14 Baldwin Builders), 232 B.R. 406, 410 (9th Cir. BAP 1999)
15 (citations omitted). A factual finding is clearly erroneous if
16 the appellate court, after reviewing the record, has a firm and
17 definite conviction that a mistake has been committed. Wall
18 Street Plaza, LLC v. JSJF Corp. (In re JSJF Corp.), 344 B.R. 94,
19 99 (9th Cir. BAP 2006).

20 **IV. DISCUSSION**

21 The bankruptcy judge was presented with conflicting
22 evidence. The Merits Decision states that many documents were
23 drafted by family members without any legal advice, and until
24

25 ⁷ The bankruptcy court's order awarding costs to Trustee
26 states that he is awarded "\$3,8060.03" [sic] and Appellants'
27 Opening Brief (BAP No. ID-07-1365) misinterprets this
28 typographical error to mean that Trustee is awarded \$38,060.03.
The bankruptcy court's calculations show that the actual award is
\$3,806.03.

1 disputes arose the family "treated the various parcels as if
2 owned by the family as a whole, regardless of whose name may
3 appear on a deed." It adds:

4 At times during the trial, emotions ran high
5 and hard feelings were evident. In the Court's
6 opinion, the emotional entanglements between the
7 siblings clearly colored the family members'
8 testimony and their perception of critical events.

9 On this appeal we are acutely aware that the Thomason family
10 has suffered financially and personally. They have lost the
11 family farm and their family relationships have been torn apart.

12 We also recognize that our role is limited. The parties
13 have already had a five day trial and, as the Supreme Court has
14 explained, it would not be fair or efficient for us to retry the
15 case. "[T]he parties to a case on appeal have already been
16 forced to concentrate their energies and resources on persuading
17 the trial judge that their account of the facts is the correct
18 one; requiring them to persuade three more judges at the
19 appellate level is requiring too much." Anderson v. Bessemer
20 City, 470 U.S. 564, 575; 105 S.Ct. 1504, 1512 (1985).

21 The applicable rule provides:

22 Findings of fact, whether based on oral or
23 documentary evidence, shall not be set aside
24 unless clearly erroneous, and due regard shall be
25 given to the opportunity of the trial court to
26 judge the credibility of the witnesses.

27 Fed. R. Civ. P. 52(a) (emphasis added) (incorporated by Fed. R.
28 Bankr. P. 7052).

29 Under this rule we may not reverse the trial judge if his
30 interpretation of conflicting evidence is "plausible in light of
31 the record viewed in its entirety." Anderson v. Bessemer City,
32 105 S.Ct. 1504, 1511. "Where there are two permissible views of

1 the evidence, the factfinder's choice between them cannot be
2 clearly erroneous." Id., 105 S.Ct. at 1511 (citations omitted).

3 A. Interests in the real property and TFI stock

4 1. Agren

5 Appellants cite evidence suggesting that Agren was held by
6 BNG rather than by the brothers individually as co-owners. As
7 shown by the following table, the bankruptcy court relied on
8 considerable evidence to the contrary.

9 Appellants' evidence 10 and arguments that 11 BNG owned Agren	Contrary evidence/arguments accepted by 12 bankruptcy court
13 (a) BNG funds, 14 including checks 15 drawn on Greg's BNG 16 account, were used to 17 make at least some of 18 the payments to 19 purchase Agren. 20 (b) Property 21 acquired with 22 partnership funds is 23 generally presumed to 24 be partnership 25 property. 26 (c) In 1994 Greg 27 signed a Farm Credit 28 Services loan application balance sheet indicating that Agren was BNG property.	13 (a) "[P]roperty acquired with 14 partnership funds is partnership 15 property <u>unless</u> a contrary intent is 16 shown." <u>Lettunich v. Lettunich</u> , 111 17 P.3d 110, 115 (Idaho 2005) (emphasis 18 added). [*] (Merits Decision p. 36) 19 (b) The deed from the previous 20 owners, recorded 5/1/90 (Ex.519), shows 21 that Agren was originally acquired by 22 Byron, Nicholas, and Greg <u>as</u> 23 <u>individuals</u> . (Merits Decision pp. 32, 24 35) 25 (c) "'Idaho law presumes that the 26 holder of title to property is the legal 27 owner of that property.'" <u>Luce v.</u> 28 <u>Marble</u> , 127 P.3d 167, 173 (Idaho 2005) . . . [and] [o]ne who would claim [the contrary] must establish such claim by evidence that is clear, satisfactory and convincing.'" [<u>Id.</u>] at 173 [citation omitted]." (Merits Decision pp. 32-33) (d) "While BNG may have been in existence in 1990 when the brothers acquired [Agren], they did not begin operating under the BNG name until 1991 at the earliest." (Merits Decision p. 37) (e) In 1997 Byron signed a loan application (Ex.317) representing that Agren was owned by the individual Thomason brothers, not BNG. (Merits Decision p. 35)

* The bankruptcy court noted that Lettunich cites Idaho Code
§ 53-308, which was repealed in 2001, but since the property was
acquired prior to the repeal of that statute it applies in this
instance. See Lettunich, 111 P.3d 110, 115.

1 On this record of conflicting evidence we cannot say that
2 the bankruptcy court erred. We must accept its finding that BNG
3 did not own Agren.

4 Appellants argue in the alternative that the Thomason
5 brothers agreed to transfer Agren (and Teton Pastures) to TFI in
6 exchange for TFI assuming BNG's debts. Again the evidence is
7 conflicting.

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Appellants' evidence and arguments that TFI owned Agren	Contrary evidence/arguments accepted by bankruptcy court
<p>(a) Minutes of a TFI shareholders' meeting on March 18, 1997, indicate that BNG would be formally dissolved and debts of BNG would be assumed by TFI. A corporate resolution to that effect was signed by Byron and Nicholas.</p> <p>(b) Document dated March 27, 1997 (the "Property Transfer Agreement") states that in consideration for TFI assuming BNG's debts "we, Byron T. Thomason, Nicholas A. Thomason <u>and Greg V. Thomason</u>, do also <u>irrevocably transfer</u> all proper and legal deeds of the following properties, including all known and unknown minerals and water shares: <u>Agren</u> Property . . . [and] Teton Pasture . . ." (Plaintiffs' Ex. 3, emphasis added, legal descriptions omitted). The transferee is not named but appears to be TFI.</p> <p>(c) Quitclaim deed, recorded Aug. 5, 2003, purports to transfer Agren to TFI. Although the deed is not signed by Debtors, a copy of the Property Transfer Agreement is attached.</p>	<p>(a) Greg testified that he did not sign the Property Transfer Agreement and never would have signed such an agreement, suggesting that his signature was forged. Transcript of Trial Testimony of Greg Thomason (undated) p. 140:11-19. (i) Byron and his wife Marilyn testified that Greg did sign the document, but the Merits Decision states that they "are by no means unbiased." (ii) Marilyn signed the Property Transfer Agreement as a witness, but as noted in the Merits Decision the corporate minutes of that date do not show her in attendance (and other corporate minutes in the excerpts of record specifically list all parties who are present).</p> <p>(b) Although TFI's corporate resolution mentions assumption of BNG's debt it says nothing about TFI acquiring Agren in return, which is a surprising omission if that were truly the brothers' agreement.</p> <p>(c) Although TFI's minutes reflect a discussion of either selling or leasing Agren they say nothing about transferring Agren from the brothers or BNG to TFI.</p> <p>(d) In 1998, when Byron and Nicholas filed a voluntary Chapter 12 petition for TFI, they did not list Agren (or Teton Pastures) as TFI's real property (Ex.317). (Merits Decision p. 36)</p> <p>(e) If the Property Transfer Agreement had been effective then BNG would have owned Agren as of March 27, 1997, but when the Siblings purported to transfer Agren to TFI on August 5, 2003, they signed the deed as individuals, not on behalf of BNG. (Merits Decision p. 36.)</p>

For all of these reasons the bankruptcy court was not persuaded that Greg ever signed the Property Transfer Agreement

1 or ever agreed to transfer Agren to TFI. (Merits Decision pp.12-
2 14 and 38.) Appellants have not established that these findings
3 are clearly erroneous.

4 The bankruptcy court ruled in the alternative that the
5 Property Transfer Agreement did not actually transfer anything.

6 First of all, the document is not a deed, nor
7 does it clearly provide that any real
8 property is to be transferred to TFI. But
9 even if the agreement is read to do so, it
10 does not constitute an effective instrument
11 of conveyance. The document was not recorded
12 until it was attached to an August 2003 deed,
13 nor did it contain the required address of
14 the grantee. Idaho Code § 55-601. The
15 signatures on the agreement were never
16 acknowledged as required prior to its
17 recording. Idaho Code § 55-701 et seq; § 55-
18 805. The Court concludes that the [Property
19 Transfer Agreement] did not effectuate any
20 transfer of real property. (Merits Decision
21 pp. 37-38)

22 Appellants argue that they should be excused from the
23 requirement that the grantee's address be listed because all the
24 parties to the transaction knew Greg's address and a quiet title
25 action is equitable in nature. But see Idaho Code § 55-601
26 (conveyance of real property must be in writing, subscribed by
27 party disposing of same or agent, and the "name of the grantee
28 and his complete mailing address must appear on such
instrument"). Assuming for the sake of argument that Appellants
could be excused from the statutory requirement to list TFI's
address, they offer no response to the other defects noted by the
bankruptcy court.

Appellants argue in the alternative that the bankruptcy
court was bound by issue preclusion to hold that TFI owns Agren,
and that Debtors and Forsberg are judicially estopped to claim

1 otherwise, because the bankruptcy court's findings in earlier
2 litigation. In TFI's Chapter 12 case the bankruptcy court stated
3 that "During a family meeting on March 18, 1997, . . . [t]he
4 decision was then made that BNG be dissolved and that [TFI]
5 assume all its assets and just debts." Memorandum of Decision,
6 filed Feb. 12, 2002, at p. 9 (Adv. No. 99-6036) (emphasis added).
7 But BNG's assets did not include Agren, according to the
8 bankruptcy court's findings which we have already held we must
9 follow. Therefore TFI could not acquire Agren from BNG. Issue
10 preclusion and judicial estoppel are inapplicable.

11 Appellants argue that Debtors and Forsberg have admitted
12 that at least some of Agren was conveyed to TFI. Appellants are
13 arguing a non-issue. The Final Judgment itself states that TFI
14 owns an undivided two-thirds interest in Agren pursuant to the
15 2003 deed. That deed was effective to transfer the Siblings' own
16 undivided two-thirds interest to TFI, even though it was not
17 signed nor agreed to by Debtors and therefore was ineffective as
18 to them.

19 In sum, the Merits Decision rejects Appellants' claims that
20 Debtors owned none of Agren. Appellants have not shown any clear
21 error in this conclusion.⁸

23 ⁸ Under the Merits Decision Debtors had ownership of Agren
24 and could transfer it to Forsberg. They did so, but then in
25 October of 2002 Forsberg executed a quitclaim deed transferring
26 part of his interest in Agren back to Greg and Diana, allegedly
to correct some legal descriptions. Forsberg retained the rest
-- what the parties refer to as the Southwest quarter of Agren.

27 In keeping with these transfers to and from Forsberg the
28 Merits Decision rules that Debtors (and through them their
bankruptcy estate) hold an undivided one-third interest in Agren

(continued...)

1 As a last resort Appellants rely on a purported post-
2 petition mortgage on Agren granted by TFI and a lis pendens
3 recorded in June of 2003 in Madison County and describing Agren
4 (and Farmstead, and a similar instrument recorded in Teton
5 County). (Exs.52, 53.) The bankruptcy court held that the
6 mortgage is ineffective because TFI had no interest in Agren to
7 convey, and the lis pendens are ineffective because they were
8 filed to give notice of adversary proceedings that have since
9 been dismissed, citing inter alia Jerry J. Joseph C.L.U. Ins.
10 Assoc., Inc. v. Vaught, 789 P.2d 1146, 1148-49 (Idaho App. 1990).
11 Appellants have cited no authority to the contrary.

12 For all of these reasons we reject Appellants' challenges to
13 the bankruptcy court's Final Judgment quieting title to Agren.
14 Appellants have not shown that they are entitled to any greater
15 interest in Agren than the undivided two-thirds that TFI owns by

16
17 ⁸(...continued)
18 except for the Southwest quarter, and Forsberg holds a one-third
19 interest in the Southwest quarter. Before the Final Judgment
20 Forsberg apparently quitclaimed his interest in the Southwest
21 quarter to Trustee (pursuant to a compromise approved by the
22 bankruptcy court in which Trustee agreed not to challenge
23 Forsberg's interest in Farmstead). The Final Judgment therefore
24 rules that Trustee owns a one-third undivided fee simple interest
25 in all of Agren (partly through Debtors and partly through
26 Forsberg) and the remaining two-thirds of Agren is owned by TFI.

27 Based on this complicated history Appellants challenge not
28 only Trustee's chain of title through Debtors (as discussed in
the text) but also his title through Forsberg. Appellants'
arguments are difficult to follow, but they appear to claim that
Forsberg was not a bona fide purchaser of Agren.

Even if Appellants succeeded in their apparent goal of
avoiding the transfers to and from Forsberg, that would leave
title with Forsberg's predecessors in title, not Appellants. The
bankruptcy court found that Forsberg's predecessors in title were
Debtors, not BNG or TFI. Therefore, Appellants' arguments are
unpersuasive.

1 virtue of the August 2003 deed from the Siblings. Appellants
2 have not shown clear error.

3 2. Teton Pastures

4 Apart from repeating the same arguments applicable to Agren,
5 Appellants rely on a deed from Charles and Doralee dated February
6 24, 1976, that purports to convey Teton Pastures to TFI. (Ex.11)
7 That deed was erroneously recorded in Madison County on August
8 26, 1977. The deed appears to have been kept in the custody of
9 Charles' and Doralee's attorney. It was apparently never
10 delivered to the Thomason brothers and they seem to have been
11 unaware of its existence until 2003. On June 16, 2003, the deed
12 was finally recorded in Teton County. Meanwhile several more
13 deeds were executed, all purporting to convey Teton Pastures to
14 the Thomason brothers individually or to them and their wives.

15 The bankruptcy court held that the 1976 deed was not
16 controlling. It treated Greg (and his brothers) as good faith
17 purchasers against whom the 1976 deed was void under Idaho Code
18 § 55-812 and 55-818.⁹ (Merits Decision pp. 43-44.) Presumably
19 (although no party has raised this issue) it treated Greg and his
20 brothers as purchasers because they invested their labor and
21 personal funds from 1976 through 2003 in reliance on the transfer
22 of Teton Pastures to them, and because they agreed to be

24 ⁹ Idaho Code § 55-812 provides that "Every conveyance of
25 real property other than a lease for a term not exceeding one (1)
26 year, is void as against any subsequent purchaser or mortgagee of
27 the same property, or any part thereof, in good faith and for a
28 valuable consideration, whose conveyance is first duly recorded."
Idaho Code § 55-808 provides that the conveyance "must be
recorded by the county recorder of the county in which the real
property affected thereby is situated."

1 personally liable on the loan from Mr. Erikson in reliance on the
2 belief that they had the power to convey a mortgage on Teton
3 Pastures to him to protect themselves from personal liability.
4 In any event Appellants have not argued on this appeal that the
5 bankruptcy court erred by treating Greg and his brothers as
6 purchasers. Rather they argue that Greg knew or should have
7 known that TFI owned Teton Pastures and therefore he cannot be a
8 good faith transferee.

9 Appellants claim that Greg must have been aware that TFI was
10 to acquire Teton Pastures shortly after it was formed because
11 that acquisition was important to the corporation and was
12 discussed at shareholder meetings. The bankruptcy court was
13 persuaded by the evidence to the contrary. It noted that in 1993
14 the mortgage to Mr. Erikson was granted by the Thomason brothers
15 individually, not as TFI's shareholders. In 1997 Byron and
16 Nicholas executed the Property Transfer Agreement purporting to
17 transfer Teton Pastures from them individually to TFI in 1997,
18 which would have been unnecessary if TFI already owned Teton
19 Pastures. In 1998 Byron and Nicholas did not list Teton Pastures
20 on TFI's original bankruptcy schedules. Most recently on August
21 5, 2003, the Siblings recorded a quitclaim deed purporting to
22 transfer Agren to TFI. Meanwhile Doralee repeatedly executed
23 deeds conveying Teton Pastures to the Thomason brothers (and
24 their spouses), not to TFI.

25 The bankruptcy court concluded that any attempt by Charles
26 and Doralee to convey Teton to TFI in 1976 failed and that it was
27 their intent "to ultimately pass on the family farm to [their]
28 three surviving sons in equal shares." The bankruptcy court

1 ruled that Debtors have an undivided one-third interest in Teton
2 Pastures, subject to the New Britain mortgage. Appellants have
3 not established that this was clear error.

4 3. Jurisdiction and preclusion issues regarding how
5 much Appellants owe New Britain

6 The bankruptcy court ruled that because the bankruptcy
7 estate holds an interest in Teton Pastures it is necessary to
8 resolve the status and extent of New Britain's claim in the
9 bankruptcy case. Appellants argue on this appeal that the
10 bankruptcy court erred "in granting judgments to New Britain []
11 individually against [Byron, Marilyn, Nicholas, and Sandra]."
12 This may be a challenge to the bankruptcy court's jurisdiction to
13 determine the dollar amounts owed from one set of non-debtors
14 (the Siblings) to another non-debtor (New Britain). The
15 bankruptcy court addressed this issue in its Merits Decision:

16 Normally, this Court would decline to
17 adjudicate the amount owed by the nondebtors on
18 this [promissory] note [held by New Britain].
19 However, since the Court has determined that
20 Debtors and their bankruptcy estate own an
21 interest in the property securing the note, and
22 presumably that interest will be liquidated and
the secured debt paid, there is ample
justification for the Court to adjudicate the
amount of the nondebtors' liability on this debt.
The [Appellants] and New Britain presumably agreed
with this approach, since they actively litigated
that issue in this action.

23 Jurisdictional issues can be raised at any time, and even if
24 they are not raised we have an independent duty to consider
25 jurisdiction. Beck v. Fort James Corp. (In re Crown Vantage,
26 Inc.), 421 F.3d 963, 971 n. 5 (9th Cir. 2005); WMX Technologies,
27 Inc. v. Miller, 104 F.3d 1133, 1135 (9th Cir. 1997). Therefore,
28 although Appellants may have actively litigated the amount that

1 they owe New Britain, they can still argue on this appeal that
2 the bankruptcy court lacked jurisdiction to determine the issue.
3 That said, we agree with the bankruptcy court's analysis.

4 Among the counter- and cross-claims in this adversary
5 proceeding is Trustee's request for permission to sell Teton
6 Pastures free and clear of liens and the interests of co-owners
7 under Section 363. See 11 U.S.C. § 363(b), (f) and (h). That
8 request necessarily involves determining how to distribute the
9 proceeds. The bankruptcy court had to determine how much of New
10 Britain's secured claim should be paid out to the various parties
11 claiming an interest in Teton Pastures, and that involves
12 determining how much of the debts to New Britain should be paid
13 by those parties. Among other things this depends on what the
14 Siblings owe, as well as what Debtors owe, because they are the
15 parties to the promissory note secured by the mortgage that New
16 Britain Holds. Therefore we are satisfied that the bankruptcy
17 court had to determine the dollar amounts owed by each of those
18 parties and we reject any jurisdictional challenge that
19 Appellants may be making.

20 Appellants argue in the alternative that the bankruptcy
21 court is precluded by earlier proceedings from awarding New
22 Britain damages above a certain dollar amount. On October 10,
23 2000, New Britain had obtained a default judgment in state court
24 against Debtors only, in a foreclosure action against all of the
25 Thomason brothers and their wives (Teton County, Case No. CV-

1 2000-054).¹⁰ That default judgment (Ex.312) was for \$123,147.95,
2 including \$99,459.96 in principal plus accrued interest,
3 \$5,000.00 of attorneys' fees, and \$182.00 in costs. New Britain
4 filed an abstract of that judgment in Teton County. The parties
5 assumed that the foreclosure action was stayed but the state
6 court eventually dismissed that action for lack of prosecution.

7 The bankruptcy court ruled that the default judgment against
8 Debtors liquidated the dollar amounts due, but only as against
9 Debtors:

10 Upon entry of that state court judgment, Debtors'
11 obligations under the promissory note were merged
12 and subsumed into the judgment. Allison v. John
13 M. Biggs, Inc., 826 P.2d 916, 917 (Idaho 1992).
14 Thereafter, Debtors were obliged to pay the amount
15 of the judgment debt, including accrued interest,
16 [and] attorney fees and costs awarded by the state
17 court, not the amount due on the note. And
18 interest accrued on the judgment at the state
19 legal rate, not the note rate. Id.

20 But the entry of the default judgment did not
21 liquidate the amount due on the note from the
22 other makers (Nicholas, Byron, Marilyn and
23 Sandra) for principal, interest, attorney fees or
24 costs. . . . [They cannot] claim any benefit from
25 the fixing of the amounts due under the judgment.
26 Instead, their liability continued to be measured
27 under the terms of the note and mortgage, not the
28 judgment.

Merits Decision p. 47.

¹⁰ The Merits Decision states: "Since New Britain elected to obtain a money judgment against [Debtors], rather than proceed to foreclose on their ownership interest in the mortgaged property, New Britain may have waived its rights under the mortgage. However, since Trustee does not contest New Britain's status as a secured creditor in Debtors' bankruptcy case, the court need not consider such issue." Merits Decision p. 49 n. 27 (citation omitted). That issue also is not before us on this appeal.

1 The bankruptcy court determined that Debtors only owe New
2 Britain \$5,000.00 in attorneys' fees, plus post-judgment interest
3 under Idaho Code § 28-22-104(2) (post-judgment interest at base
4 rate determined by state treasurer plus 5%). In contrast it held
5 that the Siblings owe New Britain \$75,091.35 in attorneys' fees
6 and \$2,853.01 in costs, mostly incurred in litigating with them
7 after its default judgment against Debtors, and that the rate of
8 interest is 12% and is not capped at the post-judgment rate or
9 the pre-maturity rate in the promissory note.¹¹ Applying this
10 rate of interest, the bankruptcy court calculated that in
11 addition to attorneys' fees and costs the Siblings owe New
12 Britain principal and interest of \$159,138.75 as of the date of
13 entry of the Merits Decision. On this appeal Appellants do not
14 challenge the interest rate ruling per se, but they argue that
15 the judgment against Debtors merged with the underlying
16 promissory note and mortgage and therefore caps their liability
17 as to both interest and attorneys' fees and costs. Appellants
18 cite Schlecht v. Alaska (In re Schlecht), 36 B.R. 236, 240-41
19 (Bankr. Alaska 1983) (citing Montana v. United States, 440 U.S.
20 147, 153-54; 99 S.Ct. 970, 973-74 (1979) (merger, bar, and res
21 judicata generally)).

22 Neither Schlecht nor Montana involved multiple defendants
23 and a judgment against only some of them. We are aware of no
24

25 ¹¹ The promissory note calls for interest at 11% per annum
26 before the note was due and payable, on July 28, 1998, but it
27 does not fix a post-maturity rate and the bankruptcy court held
28 that the statutory interest rate of 12 percent per annum applies,
citing inter alia Idaho Code § 28-22-104 and Camp v. Jiminez, 693
P.2d 1080, 1087 (Idaho Ct. App. 1984).

1 authority supporting Appellants' extended application of the
2 doctrine of merger. We agree with the bankruptcy court that the
3 judgment against Debtors did not cap the Siblings' liability.

4 In sum, Appellants have not shown that the bankruptcy court
5 exceeded its jurisdiction or that their liability is capped by
6 the default judgment against Debtors. We address Appellants'
7 challenges to the dollar amounts of attorneys' fees and costs
8 later in this discussion.

9 4. Farmstead

10 Charles and Doralee transferred Farmstead to Byron,
11 Nicholas, and Greg by a warranty deed dated August 26, 1991, and
12 recorded on July 8, 1992. Appellants nevertheless argue that
13 Debtors did not have the ability to transfer their interest in
14 Farmstead to Forsberg in 2001 and 2002 because the brothers'
15 right to convey the property is limited by a memorandum agreement
16 signed on August 25, 1991 (the "Restrictive Memo"). Appellants
17 argue that Forsberg had constructive notice of the Restrictive
18 Memo because at some point it was recorded.¹²

19 The Restrictive Memo states in relevant part:

20 This memorandum is to acknowledge a verbal
21 agreement entered into between Charles and Doralee
22 Thomason and their now surviving sons, Byron,
23 Nicholas, and Greg Thomason in December 1984, in
24 which it was agreed that Charles and Doralee would
25 transfer the following properties [including
26 Farmstead] and cattle to Byron, Nicholas, and Greg
27 Thomason. * * * The above property will remain
28 in the direct and equal ownership of Byron,
Nicholas, and Greg Thomason, as long as [they]

12 Forsberg presented evidence that the Restrictive Memo
does not appear in the chain of title and that he is a good faith
purchaser, having obtained a title report and title insurance.
The bankruptcy court did not reach these issues.

1 continue to farm. In the event of [their] death
2 or voluntary leaving the farm operations, their
3 individual payout will not exceed [\$20,000] and
 all rights and claims are cancelled for above said
 property. [Emphasis added.¹³]

4 The bankruptcy court cited authority that “[a] fee simple
5 title is presumed to be intended to pass by a grant of real
6 property unless it appears from the grant that a lesser estate
7 was intended” (Idaho Code § 55-604, emphasis added) and all
8 doubts as to a restriction are to be resolved in favor of the
9 free use of land. D&M Country Estates Homeowners Ass’n v.
10 Romriell, 59 P.3d 965, 969 (Idaho 2002) (citation omitted). We
11 cannot say that the bankruptcy court erred in determining that
12 the Restrictive Memo was ineffective in barring Debtors’ transfer
13 of their interest in Farmstead to Forsberg. Accordingly, as set
14 forth in the Final Judgment, Forsberg has an undivided one-third
15 fee simple interest in Farmstead, as do Byron and Nicholas,
16 subject to any community property interest of their respective
17 wives.

18 5. TFI stock

19 Appellants claim that Debtors no longer have any interest in
20 TFI because of Greg’s debts to TFI. The 1997 Amended Bylaws of
21 TFI provide (§ 6, p. 26) that the corporation will have a lien on
22 stock for shareholder debts. (Exs. 20-21.) The bylaws contain
23 no specific procedure for foreclosing this lien, but Appellants
24 claim to have mailed Greg several notices before foreclosing or

26 ¹³ There was evidence that Greg’s departure from farm
27 operations was not voluntary, including Greg’s testimony and a
28 letter from Appellants’ attorney directing him to cease
 harvesting crops. Greg also did not receive any payout. The
 bankruptcy court did not base its ruling on these matters.

1 repossessing his stock. Greg denies ever receiving such notices.

2 One notice was allegedly sent by both regular and certified
3 mail, return receipt requested, on January 10, 2000, notifying
4 Greg of a special stockholders and directors meeting. (Ex.22)
5 Greg did not sign any return receipt. The meeting was held on
6 February 26, 2000, and Byron and Nicholas adopted a corporate
7 resolution to begin a process to repossess Greg's stock.
8 (Exs.23, 24.)

9 A second notice was allegedly sent around October 1, 2000,
10 informing Greg of another special meeting to address "the payback
11 of funds missing and/or not accounted for as well as matching
12 capital accounts of Byron T. Thomason and Nicholas A. Thomason so
13 all stock are valued equally [sic]." (Ex.25.) The meeting was
14 held on November 1, 2000. Byron and Nicholas adopted a corporate
15 resolution purporting to forfeit Greg's stock, as of January 1,
16 2001, if he "fails to pay the missing monies/unaccounted monies
17 back to [TFI] before January 1, 2001 to [TFI's Chapter 12
18 trustee] in addition to bringing [his] capital account equal to
19 the capital accounts of [Byron and Nicholas]." (Ex.27.)

20 A third and final notice was allegedly sent in March of 2001
21 by regular and certified mail. Greg signed a receipt for this
22 letter (Ex.29) but he insists that the envelope contained only a
23 bill for rents due to TFI for his home, and no information about
24 any stock repossession.

25 The bankruptcy court made no findings whether Greg actually
26 received notice of the attempts to foreclose his TFI stock. We
27 assume for the sake of discussion that he did receive the three
28 notices that were allegedly sent to him.

1 The bankruptcy court concluded instead that even if the
2 notices were received they were inadequate. It reasoned that
3 because TFI's amended bylaws do not provide any express procedure
4 to enforce the lien on shareholders' stock, and because a
5 provision for outright forfeiture would be void under Idaho Code
6 § 45-110, the parties presumably intended that general Idaho law
7 apply to enforcement of that lien, citing Davis v. Prof. Bus.
8 Servs., Inc., 712 P.2d 511, 514 (Idaho 1985) (contract includes
9 "all such implied provisions as are necessary to effectuate the
10 intention of the parties, and as arise from the specific
11 circumstance under which the contract was made"). The bankruptcy
12 court also concluded that because TFI did not already have title
13 to Greg's stock it would need to enforce the lien by foreclosing
14 Greg's interest, and in the absence of any contractual or
15 statutory procedure a judicial foreclosure would be required.

16 The Idaho Court of Appeals has, in another similar
17 context, concluded that if there is no applicable
18 statutory procedure, "[a] court in equity may
19 determine the scope of the lien and how it will be
20 enforced in each case." Quintana v. Anthony, 712
P.2d 678, 681 (Idaho App. 1985) (deciding that a
judicial mortgage foreclosure proceeding may be
required by the court to foreclose a vendor's
lien).

21 None of the notices allegedly sent to Greg provided any
22 details as to the amount that Greg allegedly owed TFI or the
23 amount required to equalize his capital account. As Greg also
24 points out, no value has ever been placed on the stock nor has he
25 been given any credit as a result of the foreclosure against the
26 amounts he allegedly owes.

27 The bankruptcy court contrasted this with a judicial
28 foreclosure procedure, which would have assured that Greg

1 received adequate and timely notice of TFI's claims against him,
2 an opportunity to object, a fair and impartial means of
3 adjudicating the amount that Greg owed to TFI, and the value to
4 be placed on Greg's stock so that an appropriate credit could
5 have been made against any amounts that he owed. The bankruptcy
6 court also noted -- "[w]hile not suggesting that such a procedure
7 would have been legally adequate" -- that TFI did not follow the
8 requirements set out in its own bylaws for effectuating the
9 transfer of shares, including a right of first refusal and a
10 process for valuing shares. (Bylaws at 23-25.)

11 Appellants cite no authority contrary to the bankruptcy
12 court's analysis. They have not established that the procedures
13 they followed to foreclose Greg's stock were either agreed to by
14 the TFI shareholders or legally sufficient.

15 B. Attorneys' fees and costs

16 The bankruptcy court awarded New Britain \$75,091.35 in
17 attorneys' fees and \$2,853.01 in costs. Appellants do not
18 dispute that New Britain is entitled to attorneys' fees and costs
19 under the promissory note and mortgage and that it is oversecured
20 and therefore entitled to reasonable fees and costs under Section
21 506(b). See 11 U.S.C. § 506(b). Instead Appellants raise
22 several arguments to reduce or eliminate those fees and costs.

23 First, Appellants contend that New Britain is not entitled
24 to any fees for litigating issues of federal bankruptcy law. The
25 bankruptcy court agreed, applying what was then binding Ninth
26 Circuit authority. See Fobian v. W. Farm Credit Bank (In re
27 Fobian), 951 F.2d 1149, 1153 (9th Cir. 1991). See also, e.g.,
28 Ford v. Baroff (In re Baroff), 105 F.3d 439, 441-43 (9th Cir.

1 1997). Appellants argue that the bankruptcy court incorrectly
2 allocated fees between issues of state law and federal bankruptcy
3 law. That issue is now moot because the Supreme Court has
4 abrogated the Fobian line of cases. Travelers Cas. & Sur. Co. v.
5 Pac. Gas & Elec. Co., 127 S.Ct. 1199 (2007).

6 Appellants argue that New Britain's participation in the
7 trial was largely unnecessary because of their stipulation at the
8 start of trial that its interest is valid, enforceable, and
9 superior to their interests. But as noted above Appellants
10 continued to dispute New Britain's ability to collect anything
11 above the amount of the default judgment against Debtors, its
12 rate of interest, and its claim for attorneys' fees. As the
13 bankruptcy court observed, the issues at trial were complex and
14 intertwined. Appellants' excerpts of record contain only a few
15 pages of the trial transcripts and they have cited no specific
16 portions of trial that New Britain could have safely missed.
17 Appellants have not shown that New Britain's fees are
18 unreasonable.

19 Appellants also argue that no fees should be awarded for New
20 Britain's actions taken in TFI's Chapter 12 case because that
21 case was dismissed without any award of fees to New Britain. We
22 disagree. The promissory note provides:

23 If suit is instituted to collect this note or any
24 portion thereof, [illegible] to pay, in addition
25 to the costs and disbursements as are allowed by
law, such additional sums as the court may adjudge
reasonable as attorney's fees [illegible] suit.

26 The bankruptcy court found that "there has been a continuing
27 course of litigation between the parties spanning several years
28 in the state court action and two bankruptcy cases" and ruled

1 that therefore "all fees and costs incurred by New Britain in the
2 various legal proceedings to enforce its contract with
3 [Appellants] may be recovered under applicable state law" and it
4 is not limited to recovery of only those fees and costs incurred
5 in "the latest adversary proceeding." (Memorandum of Decision re
6 New Britain's fees and costs, pp. 9-10.) We agree.

7 Appellants argue that state law does not provide for fees in
8 this situation because a state court would not have awarded fees
9 for litigation in federal bankruptcy court, citing Rockstad v.
10 Erikson, 113 P.3d 1215, 1224-25 (Alaska 2005). Rockstad is
11 inapposite. That decision held that such fees might be
12 recoverable but "awarding fees is still part of the bankruptcy
13 procedure, and as such it is a decision for the bankruptcy court
14 to make." Id. at 1225 (footnote omitted). Assuming without
15 deciding that Rockstad was correctly decided, its procedural
16 deference to a federal bankruptcy court is inapplicable because
17 New Britain did seek and obtain an award of fees in the
18 bankruptcy court.

19 Appellants claim that because New Britain did not file a
20 proof of claim in TFI's Chapter 12 case it did not hold an
21 allowed claim and therefore was not entitled to any fees.
22 Appellants provide only a partial citation to a single case from
23 a local reporting service -- In re Tondee, 01.3 I.B.C.R. at 115.
24 They have not provided us with a copy of that case and computer
25 searches for a case of that title produced no results. Moreover,
26 the Chapter 12 case was dismissed before the extent of New
27 Britain's secured claim was addressed. New Britain was not
28 listed as a creditor of TFI or given notice of TFI's bankruptcy

1 case until TFI amended its schedules to claim ownership of Teton
2 Pastures and list the associated mortgage debt. Appellants have
3 not established that anything about the Chapter 12 case limits
4 New Britain's secured claim.

5 Appellants argue that New Britain mistakenly added
6 attorneys' fees and court costs to the principal balance of the
7 promissory note and then proceeded to charge interest thereon at
8 the contract rate. Appellants provide no cite to the excerpts of
9 record to support this allegation and we are not required to
10 scour the record for any such support. U.S. v. Rewald, 889 F.2d
11 836, 853 n. 7 (9th Cir. 1989), amended in other particulars by
12 902 F.2d 18 (1990); Cogliano v. Anderson (In re Cogliano), 355
13 B.R. 792, 803 (9th Cir. BAP 2006).

14 Similarly, although Appellants object generally to the costs
15 awarded to New Britain, Trustee, and Debtors they point to no
16 errors in the bankruptcy court's calculation and allowance of
17 those costs. We have been shown no basis to disturb the
18 bankruptcy court's awards.

19 **V. CONCLUSION**

20 The bankruptcy court was faced with conflicting and tangled
21 evidence as to ownership of the Agren, Teton Pastures, Farmstead
22 properties, and TFI stock. We cannot say that it erred in
23 sorting out the proper ownership. Nor are we persuaded that the
24 bankruptcy court erred in determining individual liability on the
25 promissory note held by New Britain or in awarding attorneys'
26 fees and costs to New Britain and costs to Trustee and Debtors.
27 The bankruptcy court's Final Judgment and its orders awarding
28 attorneys' fees and costs are therefore AFFIRMED.