NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. CC-06-1123-MoDK CC-06-1242-MoDK
JOHN F. MACK, D.D.S.,	
Debtor.	Bk. No. RS 02-28995-DN
HARRY W. HUMPHREYS, D.D.S.,	Adv. No. RS 06-1160-DN
Appellant,	
v.	**M E M O R A N D U M**[1]
EMC MORTGAGE CORPORATION,	
Appellee.	

Argued and Submitted on February 22, 2007
at Pasadena, California

Filed - March 28, 2007

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable David N. Naugle, Bankruptcy Judge, Presiding.

Before: MONTALI, DUNN and KLEIN, Bankruptcy Judges.

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[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.

In these consolidated appeals, the creditor proponent of a confirmed liquidating chapter 11 plan sought to enforce a plan provision that purported to require a secured creditor to accept a replacement note and deed of trust that negatively impaired its rights. In connection with the plan confirmation, the plan proponent did not serve the secured creditor with the plan, disclosure statement, ballot, or notice of confirmation hearing. The secured creditor's successor in interest later rebuffed the plan proponent's request that it accept the replacement note and deed of trust, which precipitated the disputes now before us.

The plan proponent filed a motion for contempt and monetary sanctions, arguing that the successor in interest was violating the order confirming the liquidation plan. The successor in interest objected, noting that its predecessor in interest had not received sufficient notice of the plan and disclosure statement to satisfy due process concerns. The court denied the contempt motion and the plan proponent appealed (BAP No. CC-06-1123). We AFFIRM.

Subsequently, the plan proponent filed an adversary proceeding seeking an order compelling the successor in interest to "accept the replacement note and deed of trust upon the terms and conditions as set forth therein and pursuant to the [plan]." The successor in interest argued that the order denying the contempt motion precluded the plan proponent from prosecuting the adversary proceeding. The bankruptcy court agreed, and dismissed the adversary proceeding. The plan proponent appealed (BAP No. CC-06-1242) and we AFFIRM.

I. FACTS

On June 18, 2001, debtor John Mack ("Debtor") executed a promissory note ("Note") in favor of Pacific Horizon Bancorp, Inc. ("Pacific Horizon") in the amount of $385,000.00 at an interest rate of 8.75 percent over a thirty-year term. The Note was secured by a deed of trust (the "Deed of Trust") covering certain real property located in Newport Beach, California (the "Property"). Pacific Horizon assigned its interests in the Note and Deed of Trust to Indymac Bank ("Indymac") prior to Debtor's petition date.

Debtor filed for relief under Chapter 11 on November 22, 2002. He listed Indymac on the creditor mailing matrix. Indymac filed a proof of claim on January 13, 2003, using a different address. In addition, on April 1, 2003, Indymac filed a motion for relief from stay which identified its counsel's address.

On November 10, 2003, creditor and appellant Harry W. Humphreys, D.D.S. ("Proponent") filed a plan and disclosure statement and notice of hearing on approval of disclosure statement. Despite having at least three different addresses in the record for serving Indymac and even though the plan changed the terms of the Note and Deed of Trust,[2] Proponent did not serve

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[2]Under Proponent's plan, Indymac would receive a replacement note and deed of trust that lowered the interest rate from 8.75 percent to 5.25 percent with no points and costs. The Deed of Trust was modified significantly, although these modifications (including a deletion of an assignment of rents) were not discussed in the disclosure statement or plan.

Notwithstanding these substantial modifications to Indymac's Note and Deed of Trust, Proponent asserted at page 7, line 26 of the plan that Indymac's claim was not impaired. However, in the (continued...)

Indymac with the disclosure statement, plan or notice.

On December 19, 2003, the bankruptcy court entered an order approving Proponent's disclosure statement and fixing a time to accept or reject the plan. Proponent did not serve the order on Indymac or its counsel. Similarly, Proponent did not serve his notice of confirmation hearing on Indymac or its counsel.

The confirmation hearing was set for January 30, 2004. Proponent concedes that he failed to serve Indymac with the plan, disclosure statement, ballot, and notice of hearing. Nevertheless, the unsecured creditors' committee did serve Indymac with a notice of non-opposition to the plan on January 16, 2004. That non-opposition did not mention Indymac or its treatment under the plan. In addition, Debtor filed an opposition to the plan which noted that the plan would impair Indymac's rights. Debtor served his opposition on Indymac by

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[2](...continued)
previous paragraph (page 7, line 17) of the plan, Proponent acknowledged that Class 1 (the class containing Indymac) was impaired. Proponent filed a later version of his plan which contained the same modifications of Indymac's Note and Deed of Trust, and contained the identical contradictory language (at page 7, line 27 and page 8, line 8) regarding impairment. Neither version of the Plan was served on Indymac by Proponent. As a matter of law, the chapter 11 plan could not have been confirmed without a "cram-down" analysis focused on Indymac unless Indymac either actually accepted the plan or was unimpaired. 11 U.S.C. § 1129(a)(8) & (b).

The later version of the plan, which was confirmed, indicates that all other classes are unimpaired. If this is accurate, and Indymac did not cast an accepting vote as the sole impaired class, the plan confirmation requirements of section 1129(a)(10) may not have been satisfied. Neither of the defective confirmation issues nor the possibility of a judicial estoppel based on the plan proponent's representation that Indymac was unimpaired have been presented to us on appeal, however, so we do not address them.

mail on January 28, 2004, only two days prior to the confirmation hearing and the entry of the order confirming the plan. Unsurprisingly, the order confirming the plan was not served on Indymac.

Following confirmation of the plan, title to the Property was transferred to Proponent, who then transferred ownership to Kenneth J. Catanzarite ("Catanzarite"), Proponent's counsel of record. In April, May and August 2004, Catanzarite sent letters to counsel for Indymac requesting that Indymac execute the replacement note and deed of trust.

On January 31, 2005, Indymac sold its interests in the Note and Deed of Trust to appellee EMC Mortgage Corporation ("EMC"). EMC recorded a notice of sale on the Property, and Catanzarite sent a letter to EMC on April 22, 2005, requesting that it withdraw the notice of sale and execute the replacement note and deed of trust. After Catanzarite sent several other letters demanding execution of the replacement note and deed of trust, Proponent (not Catanzarite acting on his own behalf) filed a motion to hold EMC in contempt for disobeying the confirmation order. EMC opposed the motion and the bankruptcy court held a hearing on the contempt motion. The court entered an order denying the motion on March 22, 2006, and Proponent filed a timely notice of appeal on March 29, 2006.

Approximately one month later, Proponent filed an adversary proceeding seeking a judgment that "EMC accept the replacement note and deed of trust upon the terms and conditions as set forth

therein and pursuant to the [p]lan . . ."[3] EMC moved for dismissal of the adversary proceeding for failure to state a claim for which relief could be granted, inasmuch as the bankruptcy court had already determined that the plan was not binding on EMC because of lack of due process. Proponent opposed the motion to dismiss and filed an amended complaint adding a breach of contract claim. After a hearing, the bankruptcy court entered an order granting EMC's motion, dismissing with prejudice "the claims asserted by [Proponent] in the above referenced adversary proceeding." Proponent filed a timely notice of appeal.

II. ISSUES

1. Did the bankruptcy court err in denying Proponent's contempt motion and holding that Proponent's plan of liquidation was not binding on EMC because of lack of due process?

2. Did the bankruptcy court err in concluding that its denial of the contempt motion precluded Proponent from attempting to enforce the plan through the adversary proceeding?

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[3]At oral argument before this panel, counsel for Proponent stated that the bankruptcy court directed him to file the adversary proceeding. The record and transcripts do not support this contention. Rather, at the hearing on the contempt motion, the bankruptcy court cited Commercial W. Fin. Corp. v. Andrew (In re Commercial W. Fin. Corp.), 761 F.2d 1329 (9th Cir. 1985), for the proposition that an adversary proceeding is necessary to obtain a determination of the validity, extent and priority of liens in the context of plan confirmation. In other words, the court was questioning whether the plan itself could have modified the Note and Deed of Trust absent an adversary proceeding; the court did not say that an adversary proceeding was necessary to enforce the order confirming the plan.

III. STANDARD OF REVIEW

We review a bankruptcy court's dismissal for failure to state a claim under Federal Rule of Bankruptcy Procedure 7012 and Federal Rule of Civil Procedure 12(b)(6) de novo. N. Slope Borough v. Rogstad (In re Rogstad), 126 F.3d 1224, 1228 (9th Cir. 1997). We similarly review the bankruptcy court's conclusions regarding due process de novo. Molski v. Gleich, 318 F.3d 937, 951 (9th Cir. 2003) ("Whether notice of a proposed settlement in a class action satisfies due process is a question of law reviewed de novo."); see also United States v. Clifford Matley Family Trust, 354 F.3d 1154, 1161 n.6 (9th Cir. 2004).

"We review rulings regarding rules of res judicata, including claim and issue preclusion, de novo as mixed questions of law and fact in which legal questions predominate." Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 823 (9th Cir. BAP 2006), citing Alary Corp. v. Sims (In re Associated Vintage Group, Inc.), 283 B.R. 549, 554 (9th Cir. BAP 2002). "Once it is determined that preclusion doctrines are available to be applied, the actual decision to apply them is left to the trial court's discretion." Khaligh, 338 B.R. at 823.

IV. JURISDICTION

In the appeal of the court's order dismissing the adversary proceeding, Proponent argues that the order denying the contempt motion is not final. If Proponent is correct, we would not have jurisdiction to hear the appeal of the denial of the contempt motion unless we granted leave to hear an interlocutory appeal. See 28 U.S.C. § 158. We conclude, however, that the order denying the contempt is indeed final.

While an order granting or denying a motion to impose civil contempt is generally interlocutory and not appealable if it is entered in the course of ongoing litigation,[4] where a contempt order disposes of the only matter before the court, the order is appealable as a final judgment. Shuffler v. Heritage Bank, 720 F.2d 1141, 1145 (9th Cir. 1983) (order finding party in contempt of prior judgment is final); Hilao v. Estate of Marcos, 103 F.3d 762, 764 (9th Cir. 1996) (post-judgment orders of contempt are final and appealable). In this case, the contempt motion was a self-contained and self-standing contested matter[5] filed in the main chapter 11 case; it was not a motion in an ongoing adversary proceeding. The contempt motion pertained to a purported violation of a prior final order, the confirmation order. The order denying the motion ended the only pending litigation between the parties on the merits and left nothing for the court to do. Consequently, it was final. Catlin v. United States, 324 U.S. 229, 233 (1945) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.").

Similarly, the order dismissing the adversary proceeding is final. An order granting dismissal is final and appealable "if it (1) is a full adjudication of the issues, and (2) clearly

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[4]See Goldblum v. Nat'l Broad. Corp., 584 F.2d 904, 906 n.2 (9th Cir. 1978) ("The contempt citation, being civil in nature and having been issued against a party to the ongoing litigation, is unappealable."); Sims v. Falk, 877 F.2d 31, 31-32 (9th Cir. 1989) (order denying pretrial contempt motion is not final).

[5]Contempt is sought by motion under Federal Rule of Bankruptcy Procedure 9020; that rule provides that such a motion is governed by Federal Rule of Bankruptcy Procedure 9014, entitled "Contested Matters."

evidences the judge's intention that it be the court's final act in the matter." National Distribution Agency v. Nationwide Mut. Ins. Co., 117 F.3d 432, 433 (9th Cir. 1997). The order dismissing the adversary proceeding indicates that the entire adversary proceeding was to be dismissed, even though Proponent amended his complaint to add a breach of contract cause of action after EMC filed its motion to dismiss. Consequently, the order of dismissal was final.

Both orders on appeal being final, we have jurisdiction under 28 U.S.C. § 158.

V. DISCUSSION

A. The Contempt Motion

A party cannot be held in contempt for failure to comply with a court order if that order is not enforceable against it. "The validity of a contempt adjudication is based on the legitimacy of the underlying order." Kirkland v. Legion Ins. Co., 343 F.3d 1135 (9th Cir. 2003) (reversing entry of contempt because underlying order was entered in error). Thus, the bankruptcy court correctly declined to hold EMC in contempt if the confirmation order and the plan were not enforceable against it.

A judgment may be void or unenforceable against a party if it was entered or obtained "in a manner inconsistent with due process of law." Owens-Corning Fiberglass Corp. v. Ctr. Wholesale, Inc. (In re Ctr. Wholesale, Inc.), 759 F.2d 1440, 1448 (9th Cir. 1985). "If the notice is inadequate, then the order is void." GMAC Mortgage Corp. v. Salisbury (In re Loloee), 241 B.R. 655, 661 (9th Cir. BAP 1999).

The Supreme Court identified the due process requirements for notice in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance.

See also Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner"); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1978) ("[t]he purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing'").

"Parties are entitled to presume that the court will comply with applicable rules of procedure and that they will receive the notice that is usually required." Loloee, 241 B.R. at 662. The more a party deviates from the prescribed procedure, "the greater the quality and amount of notice needed to comply with due process." Id. Here, Proponent did not serve Indymac with the plan, disclosure statement, ballot, notice of hearing, or order confirming plan. Proponent admittedly did not comply with the statutory requirements for providing notice. See 11 U.S.C. § 1125(c) (requiring transmittal of disclosure statement to creditors); Fed. R. Bankr. P. 2002(b) (requiring 25 days' notice of, inter alia, deadlines for objecting to disclosure statement,

for objecting to plan, and for accepting or rejecting plan); Fed. R. Bankr. P. 3017(d) (requiring service of plan, disclosure statement, and notice of time for accepting or rejecting plan).

Proponent argues that because Indymac received an objection to the plan and a statement of non-opposition to the plan from other parties, Indymac must have known of the existence of the plan and, hence, received adequate notice to satisfy due process concerns. We disagree. The statement of non-opposition did not even refer to Indymac. The objection, which did mention Indymac, was served only two days prior to the hearing and after the deadline for accepting or rejecting the plan. Rule 2002 creates an expectation that a creditor will receive at least twenty-five days notice of a plan that affects its rights. Receipt of copies of other parties' responsive papers shortly before the confirmation hearing provides neither the quality nor the amount of notice needed to comply with due process. Loloee, 241 B.R. at 662.

The Bankruptcy Rules and Bankruptcy Code provide specific procedures for proposing and obtaining confirmation of a plan. Creditors, even those that have knowledge of a bankruptcy case, have a "'right to assume' that [they] will receive all of the notices required by statute" and have "no duty to inquire about further court action." Reliable Elec. Co., Inc. v. Olson Const. Co., 726 F.2d 620, 622 (10th Cir. 1984) (creditor possessing actual knowledge of bankruptcy case did not receive adequate notice of confirmation hearing; consequently, confirmed plan was not binding on creditor); see also City of New York v. New York, N.H. & H. R.R., 344 U.S. 293, 297 (1953) ("even creditors who

have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given to them before their claims are forever barred."); Fireman's Fund Mortgage Corp. v. Hobdy (In re Hobdy), 130 B.R. 318, 320-21 (9th Cir. BAP 1991) ("A creditor who is aware that a bankruptcy petition has been filed is not necessarily put on inquiry notice about every matter brought before the court . . . [and] should be able to assume that he will 'receive all of the notices required by statute before his claim is forever barred.'").

We agree with the Tenth Circuit's explanation of why constitutional due process concerns take precedence when a plan proponent is attempting to modify the property rights of a known creditor:

> A fundamental right guaranteed by the Constitution is the opportunity to be heard when a property interest is at stake. Specifically, the (chapter 11) reorganization process depends upon all creditors and interested parties being properly notified of all vital steps in the proceeding so they may have the opportunity to protect their interests.

Reliable Elec., 726 F.2d at 623. Here, Indymac was not properly notified of the vital steps in the confirmation process or of Proponent's intent to restructure and replace the Note and Deed of Trust; it did not have sufficient opportunity to protect its interests. Therefore, like the creditor in Reliable Electric who was not served with a plan and disclosure statement affecting its claim, Indymac (and thus EMC) is not bound by the terms of the plan and confirmation order. Hobdy, 130 B.R. at 320-21 (creditor was not bound by chapter 13 plan that reduced its claim "without the requisite notice and opportunity to be heard"); see also Dalton Dev. Project v. Unsecured Creditors Comm. (In re Unioil),

948 F.2d 678, 683 (10th Cir. 1991) (partnership was not bound by debtor's confirmed reorganization plan, since partnership had not been given formal notice of confirmation hearing or bar date); In re Parkwood Realty Corp., 157 B.R. 687, 691 (Bankr. W.D. Wash. 1993) (a creditor who had no notice of chapter 11 plan or the debtor's intention to reject its executory contract through a boilerplate clause in the plan was not bound by the terms of the plan, as the lack of notice violated due process).

Therefore, comparing the notice "that was actually given with the notice that would have been given if the rules of procedure had been followed" (Loloee, 241 B.R. at 662), we agree that Indymac did not receive notice reasonably calculated under all of the circumstances to apprise it that its Note and Deed of Trust were subject to modification by the plan. Id. at 661.

The Ninth Circuit's decision in Lawrence Tractor Co. v. Gregory (In re Gregory), 705 F.2d 1118 (9th Cir. 1983), does not require a different result. In Gregory, the unsecured creditor received a notice from the bankruptcy court that provided enough information to alert the creditor that it would not be paid anything under the debtor's chapter 13 plan. The creditor did not receive the plan, and the adequacy of the timing of the notice was not raised as an issue.

In rejecting the creditor's argument that it was denied due process, the Ninth Circuit noted that the Bankruptcy Code "does not require that the plan be sent to all creditors" although

> [i]t would clearly be preferable if each creditor of a debtor who has initiated a Chapter 13 proceeding received, in addition to notice of the confirmation hearing, a copy of the debtor's plan and an explicit statement of the plan's proposal regarding its claim.

> However, the Code does not require such detailed notice, and we hold that in the circumstances of this case, although the notice received by [the creditor] was not unambiguous, it was not constitutionally inadequate.

Id. at 1123. Therefore, the Ninth Circuit held that "[w]hen the holder of a large, unsecured claim such as Lawrence receives any notice from the bankruptcy court that its debtor has initiated bankruptcy proceedings, it is under constructive or inquiry notice that its claim may be affected, and it ignores the proceedings to which the notice refers at its peril. . . ." Id.

Here, unlike in Gregory's chapter 13 case, the Bankruptcy Code and Rules mandated service of Proponent's chapter 11 plan and disclosure statement on all creditors. And unlike the creditor in Gregory, Indymac did not receive a timely notice from the court referring to the treatment of its claim.

Several other pertinent differences affect the applicability of Gregory. First, the context is different because chapter 13, unlike chapter 11, does not require that impaired creditors either accept or reject the plan and does not provide a "cram-down" procedure for dealing with a rejecting class. Moreover, there is a fundamental difference between unsecured and secured creditors. Secured creditors are presumptively entitled to rely on their security, which is property for Fifth Amendment purposes.

The present circumstances implicate the Ninth Circuit's directive that creditors should not be "unfairly punishe[d] . . . [by] holding them to the highest standards of diligence in a situation caused by negligence of a debtor [or, here, Proponent]" since this would "reward[] the debtor . . . for negligent

filing." Manufacturers Hanover v. Dewalt (In re Dewalt), 961 F.2d 848, 850 (9th Cir. 1992).

Consequently, because Proponent's failure to provide reasonable notice of the plan and confirmation process constitutes a denial of due process to Indymac, the plan and confirmation order were not binding on Indymac or EMC. Id. at 662. The bankruptcy court did not err in denying Proponent's contempt motion.[6]

B. The Adversary Proceeding

After the bankruptcy court denied the contempt motion, Proponent filed his complaint seeking a judicial declaration that "EMC is subject to the Confirmation Order and Plan and must accept the replacement note and deed of trust upon the terms and conditions as set forth therein and pursuant to the Plan." EMC argued that the bankruptcy court's ruling on the contempt motion barred the adversary proceeding on grounds of "res judicata."[7]

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[6]Even if Indymac had received due process and was bound by the terms of the plan, it is unclear how it could have been held in contempt of an order that did not direct it to do anything. The order directs Debtor to execute whatever documents are necessary to effectuate the plan, but does not contain similar directives for Indymac or other creditors.

[7]The terms "res judicata" and "collateral estoppel" have been supplanted by the more accurate terms "claim preclusion" and "issue preclusion," respectively. These often-coupled, familiar phrases are more accurately expressed as issue preclusion and claim preclusion respectively. See Paine v. Griffin (In re Paine), 283 B.R. 33, 38 (9th Cir. BAP 2002) (noting that "issue preclusion" includes the doctrines of direct estoppel and collateral estoppel while "'claim preclusion' includes doctrines of merger and bar" and has "often been called 'res judicata' in a non-generic sense"), citing Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984). We use the accepted modern terminology.

The bankruptcy court agreed, and dismissed the adversary proceeding.

Both claim preclusion and issue preclusion apply in bankruptcy. Paine, 283 B.R. at 39, citing Brown v. Felsen, 442 U.S. 127, 134-39 (1979), and Grogan v. Garner, 498 U.S. 279, 285 (1991). We affirm on grounds of issue preclusion. In the course of resolving the contempt motion, the parties actually litigated, in circumstances that qualify for issue preclusion, the issue of whether Indymac received notice of the plan and of the confirmation hearing that sufficed for due process purposes.

Issue preclusion forecloses relitigation of matters that have already been decided in prior proceedings. Paine, 283 B.R. at 39; see also Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001), quoting Lucido v. Superior Court, 51 Cal.3d 335, 272 Cal.Rptr. 767, 795 P.2d 1223, 1225 (1990); Christopher Klein, et al., Principles of Preclusion & Estoppel in Bankruptcy Cases, 79 Am. Bankr. L.J. 839, 852 (2005).

Since issue preclusion is an affirmative defense, the party asserting issue preclusion has the burden of establishing the following requirements:

> First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

Harmon, 250 F.3d at 1225. All of these elements are present here.

First, the issue sought to precluded from relitigation is identical to that presented to the bankruptcy court in the context of the contempt motion: did the lack of formal notice of the plan and the confirmation process operate to deprive Indymac of due process, thereby overriding whatever binding effect the plan and confirmation order may have had on Indymac and its successors in interest, including EMC?

This issue was actually briefed and litigated by the parties in the context of the contempt motion. The bankruptcy court necessarily decided it in denying the contempt motion; the court's explanation of its ruling indicated that it believed the plan was not binding on EMC and did not present any other reason for the denial of the contempt motion. The parties in both matters were identical. Furthermore, as discussed in the jurisdiction section above, the order on the contempt motion is final. Therefore, the affirmative defense of issue preclusion applies and we affirm. Harmon, 250 F.3d at 1225.

Alternatively, we affirm on the grounds of claim preclusion. Claim preclusion requires (1) parties to be identical or in privity, (2) the existence of a judgment rendered by a court of competent jurisdiction, (3) a prior action concluded to final judgment on the merits, and (4) the same claim or causes of action to be involved in both matters. Paine, 283 B.R. at 39. The first three elements exist here: the parties are identical and a final order on the merits has been entered by a court of competent jurisdiction.

Proponent contends that the contempt motion and the adversary proceeding do not involve the same claim or cause of

action. We disagree. Under the Restatement's broad transactional test for determining whether the same "claim" existed in both the contempt motion and the adversary proceeding (see Restatement (Second) of Judgments § 24), both matters arise out of the same set of facts and ultimately seek the same relief, viz., enforcement of the confirmation order, and are thus the "same" claim for the purposes of claim preclusion. In both matters, Proponent sought to enforce the confirmation order and have EMC execute the replacement note and deed of trust. The material facts are the same in both actions. Proponent argues that the "facts" may be different because discovery may disclose that Indymac had actual or constructive notice of the plan and confirmation order. These "facts," however, could and should have been discovered in the context of the contested contempt matter. The full panoply of discovery in adversary proceedings is equally available to parties to contested matters. See Fed. R. Bankr. P. 9014(c).

We therefore conclude that the adversary proceeding is barred by claim preclusion and that the bankruptcy court did not err in dismissing it.[8]

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[8]Even if claim and issue preclusion did not apply, we could affirm simply because Proponent cannot establish an essential element of his claim for relief. We can affirm on any basis presented by the record, even if the bankruptcy court did not rely on that reason. Woolsey v. Edwards (In re Woolsey), 117 B.R. 524, 530 (9th Cir. BAP 1990).

Proponent's adversary proceeding seeks to enforce the plan and confirmation order but neither the plan nor the confirmation order is enforceable against EMC on due process grounds. While Proponent argues that he wants to conduct additional discovery to determine Indymac's actual or constructive knowledge of the plan,
(continued...)

VI. CONCLUSION

For the foregoing reasons, we AFFIRM the bankruptcy court's order denying the contempt motion and its order dismissing Proponent's adversary proceeding.

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[8](...continued)
such evidence is irrelevant because the record shows that Proponent did not comply with basic statutory and rule requirements in notifying Indymac of a plan and confirmation order that substantially modified its property interests. Any actual or constructive notice given to Indymac by the opposition and non-opposition is simply insufficient to overcome the extreme lapse in formal notice. Loloee, 241 B.R. at 662.

Thus, the relief Proponent seeks in the adversary proceeding cannot be granted, and dismissal is appropriate under Rule 7012 (incorporating Federal Rule of Civil Procedure 12(b)) for failure to state a claim upon which relief can be granted. See Pyle v. Hatley, 239 F.Supp.2d 970, 982 (C.D. Cal. 2002) ("'A trial court may act on its own initiative to note the inadequacy of a complaint and dismiss it for failure to state a claim . . .' A complaint should be dismissed when it is clear the plaintiff can prove no set of facts in support of the claim that would entitle him to relief."), quoting Sparling v. Hoffman Constr. Co., 864 F.2d 635, 638 (9th Cir. 1988) (quoting other cases).