

DEC 14 2012

NOT FOR PUBLICATION

SUSAN M SPRAY, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. SC-12-1062-JuMkPa
)
 PASCAL JEAN-FRANCOIS BESSET,) Bk. No. 10-17726
)
 Debtor.)
)
 _____)
 PAULA BESSET,)
)
 Appellant,)
)
 v.) M E M O R A N D U M *
)
 RONALD STADTMUELLER, Chapter 7)
 Trustee; R. DEAN JOHNSON; PYLE)
 SIMS DUNCAN & STEVENSON APC,)
)
 Appellees.)
 _____)

Submitted Without Oral Argument on November 15, 2012**

Filed - December 14, 2012

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

Honorable Louise DeCarl Adler, Bankruptcy Judge, Presiding

Appearances: Appellant Paula A. Besset on brief pro se;
 Michael Y. MacKinnon, Esq. and Kathleen A.
 Cashman-Kramer, Esq. of Pyle Sims Duncan &
 Stevenson APC on brief for appellees Ronald
 E. Stadtmueller, Chapter 7 Trustee, Pyle Sims
 Duncan & Stevenson APC, and R. Dean Johnson.

* 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.

** Pursuant to Rule 8012, after notice to the parties, the Panel unanimously determined that oral argument was not needed by order entered on October 3, 2012.

1 Before: JURY, MARKELL, and PAPPAS Bankruptcy Judges.
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3 Appellant, Paula A. Besset, appeals from the bankruptcy
4 court's orders approving the final fee applications of
5 appellees: (1) Ronald E. Stadtmueller, chapter 7¹ trustee;
6 (2) Pyle Sims Duncan & Stevenson APC (PSDS), the trustee's
7 counsel; and (3) R. Dean Johnson (Johnson), accountant to the
8 trustee.² We AFFIRM.

9 **I. FACTS**

10 Appellant and Pascal Besset commenced proceedings for the
11 dissolution of their marriage in the Superior Court of
12 California, County of San Diego in 2007. On September 28, 2010,
13 the California family court entered a judgment of dissolution
14 terminating the marriage. An attachment to the dissolution
15 judgment gave appellant the right to purchase Pascal's equity in
16 the family home by a date in September 2010, or the property was
17 to be sold. If the property was listed for sale, appellant, who
18 was living in the home with the couple's two children, was
19 responsible for all delinquent mortgage payments. Appellant
20 never purchased Pascal's equity or made any mortgage payments on
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22 ¹ Unless otherwise indicated, all chapter and section
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
24 "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

25 ² Appellant filed one Notice of Appeal (NOA) for the three
26 separate orders. Under Rules 8001(a) and 8002(a), a separate NOA
27 is normally required for the appeal of each distinct order. The
28 Panel exercised its discretion to disregard this procedural error
and consider the appeal of the three orders as one appeal because
the issues on all three orders are identical and the parties have
briefed them jointly.

1 the home.

2 On October 1, 2010, Pascal filed his chapter 7 petition and
3 Stadmueller was appointed trustee. In December 2010, the
4 bankruptcy court approved PSDS's employment as trustee's
5 counsel. In July 2011, the bankruptcy court approved Johnson's
6 employment as accountant for the trustee.

7 The primary asset of the estate was the family home. In
8 Schedule D, debtor valued the home at \$960,000, encumbered by a
9 first lien for \$673,000 in favor of Deutsche Bank (Bank), four
10 liens totaling over \$200,000 which were recorded against the
11 property by attorneys who had represented debtor or appellant in
12 their marital dissolution proceeding, and a lien for \$3,105.35
13 filed by the State of California Employment Development
14 Department.

15 On November 30, 2010, the Bank filed a motion for relief
16 from the automatic stay (RFS) to foreclose on the property.
17 With the possibility of their liens being wiped out in a
18 foreclosure sale, the attorney lien creditors approached the
19 trustee to have him conduct a sale of the property. On
20 December 10, 2010, the trustee and the Bank agreed to extend the
21 time for the trustee to file an opposition to the motion for
22 RFS.

23 On December 17, 2010, the bankruptcy court entered an order
24 granting the Bank's motion for RFS after the Bank inadvertently
25 submitted the order in contravention of the agreement it had
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1 reached with the trustee.³

2 Meanwhile, the trustee and attorney lien creditors
3 negotiated a settlement for payment of the attorney liens in
4 contemplation of selling the property to a third party for
5 \$850,000. The trustee estimated that after paying the Bank,
6 costs of sale and taxes, there would be approximately \$56,000
7 remaining from the sales price. Under the terms of the
8 settlement, the attorney lien creditors would receive the sum of
9 \$20,000 to be divided equally among them in exchange for
10 subordinating the balance of their secured claims to all costs
11 of administration of the bankruptcy estate and claims of
12 unsecured creditors.

13 On June 16, 2011, the trustee filed a motion to sell the
14 property for \$850,000 free and clear of liens under § 363(f).
15 The trustee opined that the sale of the property free and clear
16 of appellant's interest was proper because there was no equity
17 in the property for appellant to receive.

18 On the same date, the trustee filed a motion for approval
19 of the stipulation between the trustee and the attorney lien
20 creditors under Rule 9019 which reflected the payment of \$20,000
21 to the lien creditors and their agreement to carve out proceeds
22 for the payment of administrative fees.

23 Appellant opposed the proposed sale and settlement,
24 arguing, among other things, that due to the dissolution
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26 ³ Although it is not entirely clear from the record, it
27 appears that, despite inadvertently obtaining an order
28 terminating the stay, the Bank honored its agreement and did not
immediately foreclose.

1 judgment, her interest in the property was one as a co-tenant,
2 making the sale subject to § 363(h). On this basis, she
3 contended not only was an adversary proceeding needed, but also
4 the carve out for the payment of administrative fees contained
5 in the settlement agreement between the attorney lien creditors
6 and the trustee was contrary to § 363(j). Appellant further
7 asserted that an adversary proceeding would only cause further
8 delay and urged the bankruptcy court to order the trustee to
9 abandon the property so that she could go back into state court
10 to assert her rights to the property before a foreclosure sale
11 took place. At the July 14, 2011 hearing on the trustee's
12 motions, the bankruptcy court approved the sale of the property
13 and the settlement over appellant's objections.

14 During the course of the proceedings, the trustee learned
15 that during the foreclosure process, appellant twice attempted
16 to convey her interest in the property to the Paula Aileen
17 Besset Revocable Trust (Trust) – to herself as a co-trustee of
18 the Trust and to other individuals as co-trustees of the Trust.
19 The other individuals had filed chapter 13 petitions in several
20 different divisions of the United States Bankruptcy Court for
21 the Central District of California and had never met appellant,
22 obtained a copy of the Trust nor agreed to be co-trustees.
23 These transfers may have delayed the Bank's foreclosure sale.

24 On July 16, 2011, the trustee commenced an adversary
25 proceeding against appellant and the transferees seeking the
26 avoidance and recovery of fraudulent transfers and to sell the
27 property under § 363(h). On September 23, 2011, the bankruptcy
28 court entered a default judgment against all defendants.

1 On July 22, 2011, the bankruptcy court entered the order
2 approving the sale of the property. On July 29, 2011, the court
3 entered the order approving the settlement. Appellant did not
4 appeal these orders.

5 The record shows that appellant did all she could to
6 prevent the sale of the property. She thwarted the real estate
7 agent's efforts to show the property. When appellant allowed
8 the real estate agent to show the property, she stayed on the
9 premises and pointed out the defects in the home to the
10 prospective purchasers. She also failed to maintain the
11 property. Then, when the trustee was ready to close escrow,
12 appellant refused to cooperate by vacating the property. As a
13 consequence, the trustee sought and obtained an emergency order
14 from the bankruptcy court to aid in the sale⁴ and a writ of
15 possession. Eventually, a U.S. Marshal forcibly removed
16 appellant from the property. Escrow closed on August 5, 2011.

17 On December 12, 2011, Johnson filed his first and final fee
18 application, requesting \$1,132 in fees and \$104.85 in costs.

19 On December 16, 2011, the trustee filed his first and final
20 fee application, requesting \$20,000 in fees and \$242.66 in
21 costs. The trustee voluntarily reduced his fees from \$22,355 to
22 \$20,000.

23 On December 20, 2011, PSDS filed its first and final fee
24 application, requesting \$30,000 in fees and \$479 in costs. PSDS
25 voluntarily reduced its fees from \$48,029.50 to \$30,000.

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28 ⁴ Appellant moved to reconsider that order. The bankruptcy
court denied her request on August 1, 2011.

1 On January 18, 2012, the bankruptcy court issued its
2 tentative ruling, approving the fees and costs in full for all
3 applicants and excusing their appearances at the scheduled
4 hearing because the applications were unopposed. On the same
5 day, appellant filed a declaration in opposition to the fee
6 applications. Appellant requested an extension to oppose the
7 fee applications because she needed to hire a new attorney after
8 her prior attorney filed an application to withdraw. She also
9 opposed the fee applications on the ground that she was losing
10 her right to obtain the funds due to her from the equity in her
11 home.

12 On January 19, 2012, the bankruptcy court held a hearing on
13 the fee applications. Although appellant's opposition was
14 untimely, the court allowed her to present her arguments.
15 Apparently PSDS received appellant's late opposition because it
16 attended the hearing. PSDS reiterated that appellant had no
17 equity in the property. The bankruptcy court overruled
18 appellant's objections on the grounds that her opposition was
19 late, her actions increased the costs of administering the
20 estate, and there was no equity in the property for her to
21 receive. The court noted that the attorney lien creditors
22 agreed that the trustee and his professionals could be paid from
23 their part of the sales proceeds. Finally, the court pointed
24 out to appellant that she would owe \$10,000 more to her attorney
25 creditors but for the settlement. The bankruptcy court approved
26 the fees for appellees in the amounts requested by orders
27 entered on February 1, 2012. Appellant timely appealed the
28 orders.

1 award the fees and hence does not qualify as a "person
2 aggrieved". Duckor Spradling & Metzger v. Baum Trust
3 (In re P.R.T.C., Inc.), 177 F.3d 774, 777 (9th Cir. 1999).
4 Accordingly, appellant's appeal of the orders should be
5 dismissed.

6 Even assuming appellant does have standing to appeal the
7 fee orders, we affirm on the merits. In essence, appellant is
8 unhappy that the carve out⁵ from the attorney lien creditors'
9 share of the sale proceeds was paid to the trustee and his
10 professionals rather than to her even though there was no equity
11 in the property. Appellant raises six issues on appeal which
12 all relate, in one way or another, to the bankruptcy court's
13 approval of the sale and settlement agreement. However, her
14 arguments regarding the propriety of the sale and the legality
15 of the carve out have already been adjudicated.

16 At the hearing on the trustee's motion to approve the sale
17 and the settlement agreement, appellant appeared and argued
18 then, as she does now, that: (1) the carve out for payment of
19 administrative fees in the settlement agreement violated the
20 distribution scheme under §§ 363 and 726; (2) as co-owner of the
21 property she was entitled to the excess proceeds from the
22 "equity" of the property; and (3) the bankruptcy court should
23 have ordered the trustee to abandon the property so that she
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25 ⁵ "[A] 'carve-out agreement' is generally understood to be
26 'an agreement by a party secured by all or some of the assets of
27 the estate to allow some portion of its lien proceeds to be paid
28 to others, i.e., to carve out of its lien position.'" See
In re U.S. Flow Corp., 332 B.R. 792, 796 (Bankr. W.D. Mich.
2005).

1 could pursue her remedies in the state court. The bankruptcy
2 court rejected these arguments and later entered orders
3 approving the sale and settlement.

4 Appellant did not appeal the sale and settlement orders.
5 Therefore, those orders became final and we do not have
6 jurisdiction to review them in this appeal. See Wiersma v. Bank
7 of the W. (In re Wiersma), 483 F.3d 933, 938 (9th Cir. 2007)
8 (stating that the provisions for timely filing of an appeal
9 under Rule 8002 are jurisdictional).

10 The doctrine of issue preclusion also bars appellant from
11 questioning the validity of the sale and settlement orders in
12 this appeal. See Thomas v. Namba (In re Thomas), 2007 WL
13 7751299 (9th Cir. BAP 2009) aff'd 474 Fed. Appx. 500 (9th Cir.
14 2012).⁶ Under this doctrine, "when an issue of ultimate fact
15 has once been determined by a valid and final judgment, that
16 issue cannot again be litigated between the same parties in any
17 future lawsuit." U.S. v. Bhatia, 545 F.3d 757, 759 (9th Cir.
18 2008) (quoting Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct.
19 1189, 25 L.Ed.2d 469 (1970)). "A party invoking issue
20 preclusion must show: (1) the issue at stake is identical to an

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22 ⁶ In Thomas, the debtor challenged the bankruptcy court's
23 award of fees to the trustee and his attorney on the basis that
24 the sale of her property was unnecessary. Because the sale order
25 was final, the bankruptcy court reasoned that Thomas could not
26 again raise issues about the sale as a basis for objecting to the
27 fees. This Panel interpreted the bankruptcy court's ruling to be
28 based on issue preclusion and found all elements for the doctrine
were met. In re Thomas, 2007 WL 7751299, at *8-9. The Ninth
Circuit affirmed, finding that issue preclusion barred Thomas
from relitigating the propriety of the sale order under the guise
of challenging the bankruptcy court's allowance of fees related
to the sale. 474 Fed. Appx. at 502-03.

1 issue raised in the prior litigation; (2) the issue was actually
2 litigated in the prior litigation; and (3) the determination of
3 the issue in the prior litigation must have been a critical and
4 necessary part of the judgment in the earlier action."

5 Littlejohn v. United States, 321 F.3d 915, 923 (9th Cir. 2003).

6 Appellees have shown that these elements are satisfied
7 here. Appellant's challenges to the fee orders in this appeal
8 are directly related to, or the same as, the issues she raised
9 in opposition to the trustee's sale and settlement motions.
10 Those issues were actually litigated and a critical and
11 necessary part of the orders approving the sale and the
12 settlement. Further, appellant had a full and fair opportunity
13 to litigate the issues at the July 14, 2011 hearing on those
14 matters. There is no question that the parties are the same.
15 Accordingly, we exercise our discretion to apply the doctrine in
16 this appeal.⁷

17 In short, appellant is bound by the bankruptcy court's
18 earlier findings of fact and conclusions of law with respect to
19 the sale and settlement orders. Appellant assigns no other
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21 ⁷ Appellees also assert that because appellant did not
22 appeal the sale or settlement orders, the bankruptcy court's
23 findings and conclusions with respect to those orders constitute
24 the "law of the case" as between appellant and appellees and
25 should not be reopened in this appeal. Under the "law of the
26 case doctrine," a court is ordinarily precluded from reexamining
27 an issue previously decided by the same court, or a higher court,
28 in the same case. In re Wiersma, 483 F.3d at 941. Although the
sale and settlement orders may constitute the "law of the case"
as between the parties and at the bankruptcy court, the doctrine
is inapplicable in this appeal. We have not previously decided
any issue in this appeal nor has a higher court, so the law of
the case does not apply to the Panel.

1 errors to the bankruptcy court's decision to approve the fee
2 orders in her opening brief. Issues which are not argued
3 specifically and distinctly in a party's opening brief are
4 waived. City of Emeryville v. Robinson, 621 F.3d 1251, 1261
5 (9th Cir. 2010).

6 **VI. CONCLUSION**

7 For the reasons stated, we AFFIRM.
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