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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	EC-11-1669-MkJu
)		
6	CHARITY M. SEYMOUR,)	Bk. No.	11-35650
)		
7	Debtor.)	Adv. No.	11-02551
)		
8	_____)		
)		
9	CHARITY M. SEYMOUR,)		
)		
10	Appellant,)		
)		
11	v.)	MEMORANDUM*	
)		
12	BANK OF AMERICA, N.A.;)		
	STEPHEN CHARLES FERLMANN,)		
13	Chapter 7 Trustee,)		
)		
14	Appellees.)		
)		

Argued and Submitted on March 22, 2013
at Sacramento, California

Filed - April 23, 2013

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

Honorable Robert S. Bardwil, Bankruptcy Judge, Presiding

Appearances: Appellant Charity M. Seymour argued on her own
behalf; K. Lee Marshall of Bryan Cave LLP argued
for Appellee Bank of America, N.A.

Before: MARKELL, DUNN and JURY, Bankruptcy Judges.

*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 **INTRODUCTION**

2 Debtor Charity Seymour ("Seymour")¹ commenced an adversary
3 proceeding in her chapter 7² bankruptcy case seeking to enjoin
4 Bank of America, N.A. and BAC Home Loan Servicing (jointly, "Bank
5 of America") from foreclosing on her residence located in
6 Stockton, California ("Property"). Bank of America moved to
7 dismiss Seymour's adversary complaint under Civil Rule 12(b)(6).
8 The bankruptcy court granted that motion and dismissed the
9 adversary complaint without leave to amend. Seymour appealed the
10 bankruptcy court's dismissal order. We hereby MODIFY the
11 bankruptcy court's dismissal order to clarify that the adversary
12 proceeding is dismissed based on Seymour's lack of standing, and
13 we AFFIRM the dismissal order, as MODIFIED.

14 **FACTS**

15 In August 2006, Seymour borrowed \$582,250 ("Loan") from
16 Resmae Mortgage Corporation ("Resmae"). In exchange for the
17 Loan, Seymour executed an Adjustable Rate Note ("Note") and a
18 Deed of Trust ("Deed Of Trust") against the Property to secure
19 her Loan obligations. The Deed of Trust was recorded in the
20 Official Records of San Joaquin County on August 16, 2006.
21 (Doc. No. 2006-175477). The Deed of Trust identified Seymour as
22 the borrower, Resmae as the lender, Chicago Title Company as the
23

24 ¹Seymour also has been known as Charity Pantalion, but for
25 ease of reference, we will refer to her herein only as Seymour.

26 ²Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. All "Civil Rule" references are to
the Federal Rules of Civil Procedure.

1 trustee and Mortgage Electronic Registration Systems ("MERS") as
2 beneficiary (solely as the nominee for the lender and its
3 successor and assigns).

4 In June 2009, Quality Loan Service ("Quality") commenced
5 foreclosure proceedings under the Deed Of Trust by recording a
6 Notice of Default ("Notice Of Default") in the Official Records
7 of San Joaquin County (Doc. No. 2009-097418). The Notice Of
8 Default indicated that Seymour had defaulted on her Loan
9 obligations by not making her monthly Loan payments due on and
10 after April 1, 2008. Quality signed the Notice Of Default as the
11 agent for MERS as nominee for Resmae. Quality also recorded a
12 Notice of Sale (Doc. No. 2011-001426), but the parties have
13 indicated that the foreclosure sale has not yet occurred and that
14 no sale date currently is scheduled.

15 In August 2009, in response to the commencement of
16 foreclosure proceedings, Seymour filed a complaint ("District
17 Court Complaint") in the United States District Court for the
18 Eastern District of California ("District Court"). Seymour did
19 not dispute that she had borrowed \$582,250 from the original
20 lender Resmae or that she had defaulted on her Loan payments. In
21 fact, the District Court Complaint acknowledged Seymour's receipt
22 of the Loan proceeds and her execution of the Note and the Deed
23 Of Trust in exchange for the Loan. Nonetheless, Seymour alleged
24 a variety of misconduct related to the origination of the Loan,
25 its securitization, its servicing, and its enforcement.³

26
27 ³The District Court Complaint identified nine causes of
28 action: (1) violation of the Truth in Lending Act ("TILA"),
(continued...)

1 Seymour named, among many other defendants, Resmae, Wilshire
2 Credit Corp. ("Wilshire") (which apparently serviced the Loan at
3 the time), MERS, Merrill Lynch Mortgage Investors, Inc., and
4 Merrill Lynch Investors Trust Series 2006 RM5 ("Trust") (which
5 apparently claimed the Loan as part of a pool of mortgage backed
6 securities) (collectively, "Lender And Servicer Defendants").

7 While the allegations of misconduct are wide-ranging, we are
8 primarily concerned here with those against the Trust and its
9 representatives asserting that they were not persons entitled to
10 enforce the Note under California Comm'l Code § 3301.⁴ As stated
11 in the District Court Complaint:

12 On information and belief, Plaintiff alleges that
13 Defendants are not "person entitled to enforce" the
14 security interest under the Note and Deed of Trust as
15 defined in California Commercial Code § 3301.
16 Plaintiff alleges that Defendants sold their home loans
17 to other financial entities, which "pooled" large
18 numbers of loans, put them into trusts, and sold
19 securities based on them. Plaintiff alleges that the
20 Defendants do not own the loan that is the subject of

21 ³(...continued)

22 15 U.S.C. §§ 1601, et seq.; (2) violation of the Real Estate
23 Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2605;
24 (3) violation of California's Unfair Competition Law, Cal. Bus. &
25 Profs. Code § 17200, et seq.; (4) fraud; (5) breach of fiduciary
26 duty; (6) negligence; (7) violation of Cal. Civ. Code § 2923.6;
27 (8) violation of federal securities law; and (9) violation of the
28 Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code,
§§ 1788, et seq.

29 ⁴California Comm'l Code § 3301 specifies that a "Person
30 entitled to enforce" ("PETE") a negotiable instrument includes:
31 "(a) the holder of the instrument, (b) a nonholder in possession
32 of the instrument who has the rights of a holder, or (c)" certain
33 persons not in possession but nonetheless entitled to enforce the
34 instrument under other provisions of the California Comm'l Code.
35 See also Veal v. Am. Home Mortg. Serv., Inc. (In re Veal),
36 450 B.R. 897, 910-11 (9th Cir. BAP 2011)(discussing who generally
37 qualifies as a PETE under each of these categories).

1 this action and are not entitled to enforce the
2 security interest.

3 District Court Complaint (Aug. 17, 2002) at ¶ 27. The District
4 Court Complaint further alleged that the defendants attempted to
5 enforce the Note and Deed Of Trust by commencing foreclosure
6 proceedings against the Property, even though none of them
7 qualified as a PETE. As Seymour put it:

8 On information and belief, Plaintiff alleges that
9 Defendants, in committing the acts alleged in this
10 Complaint and in other cases, are engaging in a pattern
11 of unlawful and illegal activity. In pursuing the
12 non-judicial foreclosure, Defendants represented that
13 they have the right to payment under the note, payment
14 of which was secured by the deed of trust. Whereas, in
15 fact, the Defendants were not in possession of the note
16 and they were neither holders of the note nor
17 non-holders of the note entitled to payment, as those
18 terms are used in California commercial code section
19 3301 and 3309, and therefore they were proceeding to
20 foreclose without rights under the law. Further,
21 Defendants added costs and charges to the payoff amount
22 of the note that were not justified or proper under the
23 terms of the note or law.

24 Id. at ¶ 36; see also id. at ¶ 29.

25 The Lender And Servicer Defendants moved to dismiss the
26 District Court Complaint. Their motions were heard by a
27 magistrate, who issued Findings and Recommendations that
28 determined among other things: (1) that all of Seymour's federal
claims against the Lender And Servicer Defendants should be
dismissed with prejudice,⁵ and (2) that the District Court should

⁵The District Court summarized the magistrate's grounds for
dismissal as follows:

1) Plaintiff's service on all Defendants was defective,
thus Defendants were entitled to dismissal; 2) the
(continued...)

1 decline to exercise supplemental jurisdiction over Seymour's
2 state law claims. On June 23, 2010, the District Court issued an
3 order ("District Court Dismissal Order") adopting the
4 magistrate's Findings and Recommendations, granting the Lender
5 And Servicer Defendants' dismissal motions, and dismissing these
6 defendants with prejudice. On December 20, 2010, Seymour
7 stipulated to dismissal of the remaining defendants ("Dismissal
8 Stipulation"), which the District Court treated as a stipulation
9 to dismiss with prejudice the entire remaining action and which
10 it granted on that basis.

11 Seymour thereafter moved for relief from the dismissal of
12 her District Court lawsuit under Civil Rule 60(b), which motion
13 the District Court denied by order entered June 21, 2011 ("Order
14 Denying Motion For Relief").⁶

15
16 ⁵(...continued)
17 district court had no authority to issue an order
18 addressing any claims against Defendant ResMAE due to a
19 permanent injunction imposed by a Delaware Bankruptcy
20 Court prohibiting any claims against this Defendant
21 after June 15, 2007; 3) Plaintiff's original complaint
22 alleges RESPA violations against seven of the twelve
23 Defendants; however, she provided no facts other than
24 the conclusory allegation that Defendant Wilshire
25 "acknowledged TILA and RESPA violations;" 4) Plaintiff
26 alleged no facts related to any specific SEC
27 violations; and 5) Plaintiff's TILA claims were not
28 only filed beyond the TILA statute of limitations but
Plaintiff also did not tender repayment of the amount
advanced by the lender as required by TILA.

Order Denying Motion For Relief (Jun. 21, 2011) at 3:2-15.

⁶Seymour appealed the Order Denying Motion For Relief to the
Ninth Circuit Court of Appeals. While not part of the bankruptcy
court record, we note for background purposes only that the Court
(continued...)

1 On June 24, 2011, Seymour commenced her chapter 7 bankruptcy
2 case.⁷ Shortly thereafter, she filed her adversary complaint
3 against Bank of America. Seymour also filed a motion seeking a
4 temporary restraining order to prevent foreclosure of the
5 Property. Unlike her District Court Complaint, Seymour's
6 adversary complaint lacked detail. On its face, it requested no
7 damages and only sought to enjoin the foreclosure. It contained
8 no distinct claims for relief, but instead contained only a
9 handful of conclusory allegations referring to fraud, conspiracy
10 and criminal negligence. But it also asserted that the Deed Of
11 Trust was void based on the allegations set forth in the District
12 Court Complaint.

13 In October 2011, Bank of America moved to dismiss the
14 adversary complaint under Civil Rule 12(b)(6) (made applicable in
15 adversary proceedings by Rule 7012). In its motion to dismiss,
16 Bank of America in essence asserted that the Trust was the party
17 entitled to enforce the Note and to foreclose on the Property
18 under the Deed of Trust and that it was the successor servicing
19 agent for U.S. Bank, the current trustee under the Trust.

20
21 ⁶(...continued)
22 of Appeals summarily affirmed the District Court on November 14,
23 2011, holding that "the questions raised in this appeal are so
24 insubstantial as not to require further argument." See Ninth
Circuit Court of Appeals Dkt. No. 11-16770, Doc. No. 8.

25 ⁷As her chapter 7 petition indicates, Seymour had filed a
26 prior chapter 13 bankruptcy case on October 20, 2009 (E.D. Cal.
27 Case No. 09-42699), and a prior chapter 11 bankruptcy case on
28 January 25, 2011 (E.D. Cal. Case No. 11-21854). The dockets from
these two prior cases indicate that the chapter 13 case was
dismissed on March 4, 2010, and that the chapter 11 case was
dismissed on June 1, 2011.

1 Bank of America further asserted that dismissal with
2 prejudice was appropriate on the following grounds, among others:

3 • Based on principles of comity and finality of
4 judgments, this Court should dismiss the current action
5 because a previously-filed civil foreclosure action and
6 9th Circuit appeal are already pending, both of which
7 seek to litigate the same issues against substantially
8 the same defendants as are at issue in this action;

9 • Debtor seeks to challenge the foreclosure without
10 alleging tender of the unpaid debt;

11 • Debtor's claim for fraud fails because it is time
12 barred, it fails to allege a special or fiduciary
13 relationship between Debtor and Defendants, and Debtor
14 fails to allege the circumstances of the supposed fraud
15 with the requisite particularity under FRCP 9(b);

16 • Debtor's claim for "conspiracy" fails because the
17 allegations of conspiracy lack specificity and fail to
18 allege any acts against [Bank of America];

19 • Debtor's Adversary Complaint otherwise fails to
20 allege facts upon which relief can be granted.

21 Mem. Of Points & Authorities (Oct. 3, 2011) at 2:9-20.

22 In support of its dismissal motion, Bank of America filed a
23 request for judicial notice, which included the following
24 documents:

25 1. A copy of the Note, showing on its face an indorsement
26 of the Note by Resmae and made payable to "U.S. Bank National
27 Association, as Successor Trustee to Bank of America, National
28 Association, as successor by merger to LaSalle Bank, N.A. as
Trustee for the MLMI Trust Series 2006-RM5";

2. A copy of the Deed Of Trust;

3. A copy of an assignment of the Deed Of Trust from MERS
as nominee for Resmae to "U.S. Bank National Association, as
Successor Trustee to Bank of America, National Association, as
successor by merger to LaSalle Bank, N.A. as Trustee for the MLMI

1 Trust Series 2006-RM5”;

2 4. A copy of the Notice Of Default;

3 5. A copy of the Notice Of Sale;

4 6. A copy of the bankruptcy court’s minute entry explaining
5 its reasoning for denying Seymour’s motion to extend the
6 automatic stay pursuant to § 362(c)(3)(B) and (C);⁸

7 7. A copy of the District Court Dismissal Order;

8 8. A copy of the Order Denying Motion For Relief; and

9 9. A copy of the District Court Complaint.

10 Seymour filed a late response to the dismissal motion. In
11 it, she did not do much to oppose Bank of America’s asserted
12 grounds for dismissal. Seymour merely reiterated her belief that
13 the Note and Deed of Trust were void based on fraud, violations
14 of TILA “and by operation of law.” But she did indicate a desire
15 to file an amended adversary complaint in order to address the
16 alleged effect of her chapter 7 bankruptcy case on the Deed Of
17 Trust. Citing § 506(d), Seymour suggested that her discharge,
18 her scheduling Bank of America as an unsecured creditor and her
19 exemption claim relating to the Property all worked in concert to
20 invalidate the lien arising from the Deed Of Trust.

21 Without holding a hearing, the bankruptcy court granted Bank
22 of America’s dismissal motion without leave to amend. The court
23 issued a minute entry on November 9, 2011, setting forth its
24 reasoning. The bankruptcy court held that Seymour lacked

26 ⁸Debtor filed a motion to extend the automatic stay under
27 § 362(c)(3)(B) and (C) because the automatic stay in her
28 chapter 7 case automatically terminated pursuant to
§ 362(c)(3)(A) as a result of her prior chapter 11 case.

1 standing to prosecute the adversary complaint. As the bankruptcy
2 court explained it, the adversary complaint concerned claims that
3 arose prior to the filing of her bankruptcy case. Consequently,
4 those claims were property of her bankruptcy estate, and hence
5 they only could be pursued by her chapter 7 trustee.

6 The bankruptcy court further opined that it lacked subject
7 matter jurisdiction over the adversary complaint. According to
8 the court, the resolution of the claims stated in the adversary
9 complaint "could not conceivably have any effect" on the
10 administration of the bankruptcy estate because Seymour already
11 had received her discharge and the chapter 7 trustee already had
12 issued a report of no distribution.⁹

13 The bankruptcy court alternately held on the merits that, in
14 light of the District Court's disposition of the District Court
15 action, Seymour was barred by claim preclusion from prosecuting
16 her adversary complaint, which was based on alleged infringement
17 of the same rights as the District Court action, arose from the
18

19 ⁹We are perplexed by the bankruptcy court's ruling on
20 subject matter jurisdiction. The record reflects that Seymour
21 never scheduled the claims asserted in her adversary complaint as
22 assets of the bankruptcy estate, so these assets never were
23 administered. As such, and regardless of their value, they
24 remained property of the bankruptcy estate even after the
25 chapter 7 trustee issued his report of no distribution. See
26 Cusano v. Klein, 264 F.3d 936, 945-48 (9th Cir. 2001).
27 Additionally, there is nothing in the record indicating that the
28 chapter 7 trustee ever considered whether Seymour's claims had
any value to the estate. Thus, we have trouble discerning how
and why the bankruptcy court concluded that the claims were of no
consequence to Seymour's bankruptcy case. In any event, because
we are affirming the bankruptcy court's ruling based on Seymour's
lack of standing, we have no need to further discuss the issue of
subject matter jurisdiction.

1 same transaction or series of transactions concerning the Note
2 and the Deed Of Trust, and relied upon essentially the same
3 allegations of misconduct. The bankruptcy court further ruled
4 that the dismissal of the District Court action was a final
5 ruling on the merits and that the party against whom claim
6 preclusion was invoked - Seymour - was the same in both lawsuits,
7 and consequently all of the factors for application of claim
8 preclusion had been met.

9 Finally, the bankruptcy court concluded it should deny
10 Seymour leave to amend because any attempt at amendment would
11 have been futile. As the bankruptcy court put it:

12 Amendment of the complaint would be futile. The
13 principle of claim preclusion will apply regardless of
14 what other facts the plaintiff might allege with regard
15 to the circumstances of the making and servicing of the
16 loan. There is no set of circumstances the plaintiff
17 might allege that would support a claim that any of the
18 events in her underlying bankruptcy case affects the
19 validity or extent of the defendant's lien. Finally,
20 this court simply has no jurisdiction to consider the
21 plaintiff's claims against the defendant, and the
22 plaintiff has no standing to pursue them. Thus, any
23 amendment of the complaint would be futile, and the
24 court will grant the defendant's motion without leave
25 to amend.

26 Minute Entry (Nov. 9, 2011) at p. 3.

27 On November 14, 2011, the bankruptcy court entered its
28 minute order dismissing the adversary complaint without leave to
29 amend, and Seymour timely filed a notice of appeal on
30 November 28, 2011.

31 **JURISDICTION**

32 Subject to the standing discussion set forth below, the
33 bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334
34 and 157(b)(2)(A) and (K). We have jurisdiction under 28 U.S.C.

1 § 158.

2 **ISSUES**

3 1. Did the bankruptcy court err in concluding that Seymour
4 lacked standing to prosecute the adversary complaint?

5 2. Did the bankruptcy court err in denying Seymour leave to
6 amend?

7 **STANDARDS OF REVIEW**

8 The standing issue is subject to de novo review. See
9 Palmdale Hills Prop., LLC v. Lehman Commercial Paper, Inc.
10 (In re Palmdale Hills Prop., LLC), 654 F.3d 868, 873 (9th Cir.
11 2011); Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal),
12 450 B.R. 897, 906 (9th Cir. BAP 2011).

13 The bankruptcy court's dismissal without leave to amend also
14 is subject to de novo review. See Intri-Plex Techs., Inc. v.
15 Crest Group, Inc., 499 F.3d 1048, 1056 (9th Cir. 2007)
16 ("Dismissal without leave to amend is improper unless it is
17 clear, upon de novo review, that the complaint could not be saved
18 by any amendment.").

19 **DISCUSSION**

20 **A. Seymour's standing**

21 "Standing is a 'threshold question in every federal case,
22 determining the power of the court to entertain the suit.'" In re Veal,
23 450 B.R. at 906 (quoting Warth v. Seldin, 422 U.S.
24 490, 498 (1975)). Constitutional standing requires injury in
25 fact, causation, and redressability. Doubtlessly, Seymour met
26 the minimal standards for constitutional standing. Seymour
27 alleged that she was being injured by the foreclosure proceedings
28 and related conduct. In addition, the relief Seymour sought in

1 her adversary complaint - an injunction of the foreclosure
2 proceedings - would have remedied her alleged injuries. Cf.
3 In re Veal, 450 B.R. at 906.

4 However, the existence of constitutional standing does not
5 end our standing analysis. Seymour also needed to demonstrate
6 that she was asserting her own legal rights and not those
7 belonging to others. Id. at 907 (citing Sprint Commc'ns Co., LP
8 v. APCC Servs., Inc., 554 U.S. 269, 289 (2008)). This aspect of
9 standing is known as the doctrine of third party standing.
10 Strictly speaking, it is not jurisdictional but rather is a
11 judicially self-imposed prudential limitation on federal courts'
12 exercise of jurisdiction. See Los Angeles v. County of Kern,
13 581 F.3d 841, 845 (9th Cir. 2009).¹⁰

14 Here, Seymour's adversary complaint sought to assert claims
15 that arose before her chapter 7 bankruptcy filing. Even though
16 Seymour did not schedule her claims as assets of the bankruptcy
17 estate, her claims nonetheless became estate property. See
18 § 541(a); McGuire v. United States, 550 F.3d 903, 914 (9th Cir.

20
21 ¹⁰Another aspect of prudential standing doctrine is
22 bankruptcy appellate standing, which requires an appellant to
23 show that he or she has been "directly and adversely affected
24 pecuniarily" by the bankruptcy court's decision. See
25 In re Palmdale Hills Prop., LLC, 654 F.3d at 874. To satisfy
26 bankruptcy appellate standing, an appellant typically must show
27 that the order on appeal diminished its property, increased its
28 burdens, or detrimentally affected its rights. See Fondiller v.
Robertson (In re Fondiller), 707 F.2d 441, 442 (9th Cir. 1983).
On this record, Seymour's potential residual interest in the
estate's assets appears sufficient to establish that she was a
"person aggrieved" by the bankruptcy court's dismissal order.
Accordingly, we will not dispose of this appeal on bankruptcy
appellate standing grounds.

1 2008); Rosner v. Worcester (In re Worcester), 811 F.2d 1224, 1228
2 (9th Cir. 1987); see also Goodwin v. Mickey Thompson Entm't Grp.,
3 Inc. (In re Mickey Thompson Entm't Grp., Inc.), 292 B.R. 415, 421
4 (9th Cir. BAP 2003) (identifying trustee's settlement of debtor's
5 prepetition causes of action against third party as a sale of
6 estate property).

7 The Bankruptcy Code requires a chapter 7 trustee to "collect
8 and reduce to money" all property of the estate. § 704(a)(1).
9 Absent abandonment, this duty extends to pre-petition claims
10 against third parties. See id.; § 554(a). Furthermore, unless
11 and until a chapter 7 trustee abandons them, a debtor's
12 unscheduled claims continue to be property of the estate. See
13 § 554(c), (d); Cusano, 264 F.3d at 945-46. The Bankruptcy Code
14 designates the trustee as the estate's representative and
15 authorizes the trustee to sue and be sued in that capacity.
16 § 323; Spirtos v. One San Bernardino County Super. Ct. Case
17 (In re Spirtos), 443 F.3d 1172, 1175 (9th Cir. 2006). Thus,
18 generally speaking, only the trustee has standing to prosecute
19 claims for relief that are estate property. McGuire, 550 F.3d at
20 914; In re Spirtos, 443 F.3d at 1175-76; see also Commodity
21 Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 352-53 (1985).

22 Here, Seymour has not disputed that her claims arising from
23 the Loan are estate property. Instead, she attempts to
24 characterize her lack of standing as a "ministerial issue," and
25 she argues that she can "cure" her failure to schedule her claims
26 and seek chapter 7 trustee abandonment thereof at any time, so
27 her adversary complaint should not have been dismissed on
28 standing grounds. See Aplt. Opn. Brf. (Mar. 22, 2012) at

1 17:6-10. We disagree. Based on the analysis set forth above, we
2 hold that Seymour's standing was a foundational requirement she
3 failed to meet and that the bankruptcy court properly dismissed
4 Seymour's adversary complaint for lack of standing. See Hansen
5 v. Finn (In re Curry & Sorensen, Inc.), 57 B.R. 824, 828-29 & n.4
6 (9th Cir. BAP 1986) (dismissing complaint without prejudice based
7 on plaintiff's lack of standing).

8 **B. Leave to amend**

9 When reviewing the dismissal of a complaint like Seymour's -
10 a complaint based on unscheduled pre-petition claims - we often
11 limit our decision to an analysis of the standing issue. See,
12 e.g., Lopez v. JPMorgan Chase Bank, N.A (In re Lopez), 2012 WL
13 603675 (9th Cir. BAP 2012); Diaz v. Washington Mutual Bank
14 (In re Diaz), 2011 WL 5838568 (9th Cir. BAP 2011); Edwards v.
15 Wells Fargo Bank (In re Edwards), 2011 WL 4485560 (9th Cir. BAP
16 2011).

17 Here, however, Seymour in essence has argued that the
18 bankruptcy court should have allowed her to amend her complaint
19 to state a claim based on post-petition events. Seymour argues
20 that certain post-petition events rendered the Deed Of Trust
21 void. Seymour points to the fact that she scheduled the Loan as
22 an unsecured debt, the fact that no one filed a proof of secured
23 claim based on the Loan, and the fact that she has received a
24 chapter 7 discharge of her personal liability. According to
25 Seymour, these facts when considered together establish the
26 voidness of the Deed Of Trust. Citing § 506(d), Seymour
27 essentially contends that the claim secured by the Deed Of Trust
28 was disallowed (and hence the lien voided) because the claim was

1 administered in her bankruptcy case as an unsecured claim and
2 discharged.

3 Seymour misconstrues the applicability of § 506(d). She
4 conflates the effect of a discharge, which is governed by
5 § 727(b), with the effect of disallowance, which is governed by
6 § 506(d). Seymour also relies upon Dewsnup v. Timm, 502 U.S. 410
7 (1992), but Seymour's reliance on Dewsnup is misplaced. Dewsnup
8 actually discredits Seymour's argument. Dewsnup makes clear
9 that, unless grounds for disallowance of the secured creditor's
10 claim are established pursuant to § 502(b), a secured creditor's
11 lien generally passes through a chapter 7 debtor's bankruptcy
12 unaffected. See id. at 415-18. Other cases have confirmed this
13 point and have emphasized that secured creditors generally are
14 not required to assert their secured claim in the debtor's
15 bankruptcy case in order for their lien to ride through the
16 bankruptcy case unaffected. See, e.g., Brawders v. County of
17 Ventura (In re Brawders), 503 F.3d 856, 867-68 (9th Cir. 2007)
18 ("Absent some action by the representative of the bankruptcy
19 estate, liens ordinarily pass through bankruptcy unaffected,
20 regardless whether the creditor holding that lien ignores the
21 bankruptcy case, or files an unsecured claim when it meant to
22 file a secured claim, or files an untimely claim after the bar
23 date has passed."); Bisch v. United States (In re Bisch),
24 159 B.R. 546, 549-50 (9th Cir. BAP 1993).

25 Accordingly, we reject Seymour's argument that the
26 bankruptcy court should have granted her leave to amend her
27 adversary complaint so that she could allege that the Deed Of
28 Trust was rendered void based on post-petition events. The

1 bankruptcy court did not err in denying leave to amend for this
2 purpose because any such amendment would have been futile. See
3 Gardner v. Martino, 563 F.3d 981, 990 (9th Cir. 2009). Any claim
4 for relief based on such allegations would have been meritless.

5 In her opening appeal brief, Seymour further argues that the
6 bankruptcy court also should have granted her leave to amend so
7 that she could attempt to state a claim based on the alleged fact
8 that neither Bank of America nor the Trust were PETEs. Citing
9 In re Veal, she essentially contends that only PETEs are entitled
10 to enforce a Deed Of Trust securing a promissory note. We
11 generally note that Seymour's contention is not supported either
12 by In re Veal or by California law, which governs the enforcement
13 of the Deed Of Trust.¹¹ See In re Veal, 450 B.R. at 917 n.34;
14 Cal. Civ. Code § 2924(a)(1) (authorizing "[t]he trustee,
15 mortgagee, or beneficiary, or any of their authorized agents" to
16 commence foreclosure proceedings); § 2924b(b)(4) (stating that a
17 "'person authorized to record the notice of default or the notice
18 of sale' shall include an agent for the mortgagee or beneficiary,
19 an agent of the named trustee, any person designated in an
20 executed substitution of trustee, or an agent of that substituted
21 trustee.").

22 We decline to further discuss the PETE issue for two
23 reasons. First, it is unnecessary for us to reach the PETE issue
24 in light of our disposition of this appeal based on Seymour's
25

26 ¹¹The Deed Of Trust states that it is to be governed by
27 "federal law and the law of the jurisdiction in which the
28 Property is located." In this instance, the Property is located
in California.

1 lack of standing. And second, Seymour did not raise the PETE
2 issue either in her adversary complaint or in her opposition to
3 Bank of America's dismissal motion. Generally, we will not
4 consider issues raised for the first time on appeal. See Padgett
5 v. Wright, 587 F.3d 983, 986 n.2 (9th Cir. 2009); Scovis v.
6 Henrichsen (In re Scovis), 249 F.3d 975, 984 (9th Cir. 2001);
7 Golden v. Chicago Title Ins. Co. (In re Choo), 273 B.R. 608, 613
8 (9th Cir. BAP 2002).¹²

9 CONCLUSION

10 Based on the foregoing analysis, we hereby MODIFY the
11 bankruptcy court's dismissal order to clarify that the adversary
12 proceeding is dismissed based on Seymour's lack of standing, and
13 we AFFIRM the dismissal order, as MODIFIED.¹³

14 _____
15 ¹²In her opening appeal brief, Seymour repeatedly refers to
16 the PETE issue as a challenge to Bank of America's standing. We
17 disagree. Seymour commenced an adversary proceeding in the
18 bankruptcy court seeking to prevent Bank of America from
19 enforcing the Deed Of Trust. As Seymour directly sought relief
20 against Bank of America, it had standing to defend against
21 Seymour's adversary complaint. Put another way, Bank of
22 America's standing was not called into question by Seymour's
23 filing of her adversary complaint; the standing inquiry
24 ordinarily focuses on the plaintiff's standing to seek relief
25 from the court and not on the defendant's standing to oppose such
26 relief. See generally de la Salle v. U.S. Bank, N.A. (In re
27 de la Salle), 461 B.R. 593, 604 (9th Cir. BAP 2011) (holding that
28 debtors' filing of claim objection and adversary proceeding
against bank challenging bank's entitlement to enforce deed of
trust did not undermine the bank's standing to oppose debtors'
requested relief or to be heard on other issues in the debtors'
bankruptcy case).

¹³At various times during the course of this appeal, both
parties have requested that we consider additional authorities,
additional documents and additional issues they had not formerly
raised either in the bankruptcy court or on appeal. We hereby

(continued...)

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¹³(...continued)
DENY all such requests, both as untimely and as irrelevant to our
disposition of this appeal.