

JUL 10 2013

NOT FOR PUBLICATION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. AZ-12-1308-JuTaAh
)	
6	GREER LESLIE WELLS and)	Bk. No. 11-12232-RTB
	MONTIE LEE WELLS,)	
7)	
	Debtors.)	
8	<hr/>)	
	GREER LESLIE WELLS;)	
9	MONTIE LEE WELLS,)	
)	
10	Appellants,)	
)	M E M O R A N D U M*
11	v.)	
)	
12	DEUTSCHE BANK NATIONAL TRUST)	
	CO.,)	
13)	
	Appellee.)	
14	<hr/>)	

Argued and Submitted on June 21, 2013
at Phoenix, Arizona

Filed - July 10, 2013

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

Honorable Redfield T. Baum, Bankruptcy Judge, Presiding

Appearances: Appellants Greer Leslie Wells and Montie Lee
Wells argued pro se; David Winthrop Cowles, Esq.,
of Tiffany and Bosco, P.A., argued for appellee
Deutsche Bank National Trust Co.

* 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: JURY, TAYLOR, and AHART**, Bankruptcy Judges.
2

3 Chapter 13¹ debtors, Greer Leslie Wells and Montie Lee
4 Wells, filed a series of motions seeking to dismiss or disallow
5 the proof of claim (POC) filed by Deutsche Bank National Trust
6 Co., Trustee (Bank) on the grounds that Bank lacked standing.
7 The bankruptcy court denied debtors' first series of motions on
8 February 28, 2012 (2/28/12 Order). The court later denied
9 debtors' motion and amended motion for reconsideration of its
10 2/28/12 ruling by order entered on March 30, 2012 (3/30/12
11 Order). Debtors did not appeal this order. Instead, they filed
12 a second series of motions, which were functionally the
13 equivalent of their prior motions relating to Bank's lack of
14 standing. The bankruptcy court denied these motions by order
15 entered on July 10, 2012 order (7/10/12 Order). Debtors appeal
16 from this order.

17 Debtors argue on appeal that Bank lacks standing to file a
18 POC in their case for many reasons. However, because the
19 3/30/12 Order was a final order, we do not have subject matter
20 jurisdiction to consider debtors' arguments further in this
21 appeal. Moreover, debtors' second series of motions filed after
22 entry of the 3/30/12 Order involved the same transactional
23

24 ** Hon. Alan M. Ahart, United States Bankruptcy Judge for
25 the Central District of California, sitting by designation.

26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure and "Civil Rule" references are to the Federal Rules of
Civil Procedure.

1 nucleus of facts as those asserted in their previous motions.
2 Therefore, their later motions were barred by claim preclusion.
3 Accordingly, we AFFIRM the 7/10/12 Order appealed from on this
4 ground.

5 I. FACTUAL AND PROCEDURAL HISTORY

6 A. Debtors' Mortgage, Assignment, and Default

7 In 2004, debtors moved into the property located on North
8 55th Avenue in Glendale, Arizona, owned by Greer's mother. At
9 some point, Greer's mother quit claimed the property to her.
10 Greer then refinanced the property.

11 On September 25, 2006, Greer obtained a loan in the amount
12 of \$164,000 from American Brokers Conduit (ABC). The note was
13 secured by a deed of trust (DOT) recorded against the property.
14 The DOT showed Greer as the borrower, Capital Title Agency, Inc.
15 as the trustee, and Mortgage Electronic Registration Systems
16 (MERS) as the beneficiary, acting solely as nominee for lender
17 ABC and its successors and assigns.

18 The note was subsequently transferred twice and contained
19 two indorsements: (1) from ABC to Impac Funding Corporation
20 (IFC), without recourse, signed by Daniel Lesterling, Assistant
21 Secretary for ABC and (2) a blank indorsement executed by
22 Jennifer Moua, an authorized signatory for IFC.

23 MERS assigned its beneficial interest under the DOT and its
24 rights, if any, under the note to Bank (Assignment), as Trustee
25 for the Certificateholders of ISAC 2006-5, Mortgage Pass-Through
26 Certificates, Series 2006-5 (Trust). Carmelia Boone, listed as
27 an assistant secretary of MERS, executed the DOT assignment.
28 Boone's signature was notarized on August 11, 2010, by Connie L.

1 Briscoe, a Texas notary.

2 In April 2010, debtors defaulted on the loan. Thereafter,
3 a foreclosure process was initiated.

4 **B. The Bankruptcy Proceedings**

5 On April 28, 2011, debtors filed a joint chapter 13
6 petition to stop the foreclosure. Debtors listed Bank as a
7 disputed secured creditor in their schedules. On July 14, 2011,
8 debtors filed amended schedules. They listed no secured
9 creditors in Schedule D and listed MERS as an unsecured creditor
10 in Schedule F with a claim in the amount of \$68,600 "subject to
11 setoff."

12 Also on July 14, 2011, debtors filed a first amended plan
13 which provided for monthly payments of \$50 to the chapter 13
14 trustee. Debtors' plan proposed to make the payments on their
15 property directly to MERS and stated that no arrearages were
16 due.

17 On September 27, 2011, the law firm of Tiffany & Bosco,
18 P.A. filed a notice of appearance and request for notice in the
19 case on behalf of Bank. The law firm filed a proof of claim
20 (POC) on behalf of Bank, Claim #10, asserting a secured claim
21 against debtors' property in the amount of \$160,069.27. The POC
22 listed Bank as the creditor, but indicated that notices and
23 payments should be sent to Bank of America, N.A. (BOA). The POC
24 also listed \$13,138.38 of arrearages due (monthly payments
25 4/1/10-4/1/11 @ \$995.26 per month). Attached to the POC was a
26 copy of the note signed by Greer, the DOT, and the Assignment.

27 On October 4, 2011, Bank objected to debtors' amended
28 chapter 13 plan because it did not provide for payment of

1 arrearages owed to Bank. Bank requested that the arrearages as
2 set forth in its POC be paid through the plan.

3 **Debtors' First Motion to Dismiss Claim #10**

4 On October 25, 2011, debtors filed a motion to dismiss
5 Claim #10 for failure to state a claim for which relief can be
6 granted.² Debtors' alleged that they did not have any documents
7 which verified that Bank had standing to file the POC in their
8 bankruptcy case.

9 On November 11, 2011, Bank responded, asserting that it had
10 standing to file the POC due to the Assignment of the DOT. Bank
11 further maintained that ABC endorsed the note to IFC and, in
12 turn, IFC then endorsed the note in blank which gave Bank
13 standing.

14 On November 29, 2011, debtors replied by contending: (1) a
15 copy of the note endorsed in "blank" was not proof of Bank's
16 standing; (2) they sent a letter to Bank at the address shown on
17 the notice of trustee's sale and Bank responded by stating that
18 it was unable to identify the property or the mortgagor
19 associated with it as a mortgage for which Bank was acting as
20 trustee or custodian; (3) BAC Home Loans Servicing also alleged
21 it was the "creditor" and "lender"; (4) MERS had no authority to
22 assign, appoint or substitute a trustee, or assign the
23 promissory note; and (5) a preliminary securitization audit
24 suggested that the note did not make it into the trust. Debtors

25
26 ² If Bank's proof of claim is analogized to a complaint then
27 debtors' objections are like motions to dismiss for failure to
28 state a claim on which relief can be granted. Heath v. Am.
Express Travel Related Servs. Co. (In re Heath), 331 B.R. 424,
435-36 (9th Cir. BAP 2005).

1 also requested verified documents that showed Bank was the
2 "holder in due course." Finally, they questioned whether the
3 Bank was aware of "this action or authorized this action by
4 delegating authority to Tiffany & Bosco, P.A."

5 Attached to debtors' reply were two letters: the letter
6 from debtors to Bank requesting various documents associated
7 with their mortgage and the response letter from Bank to debtors
8 stating that it could not identify the property or mortgagor
9 associated with it as a mortgage for which Bank was acting as
10 trustee.

11 On December 6, 2011, the bankruptcy court heard debtors'
12 motion and directed the parties to file documentation in support
13 or opposition to the POC. The court continued the hearing to
14 February 1, 2012.

15 On January 13, 2012, Bank submitted the declaration of
16 Duane Dumler, the Assistant Vice President for BOA, as servicer
17 for Bank. Dumler declared that he had personal knowledge of the
18 records pertaining to the loan including that MERS had assigned
19 the DOT to Bank and that the note was endorsed in blank which
20 gave Bank "standing" to file the POC. Dumler also mistakenly
21 stated that both debtors had executed the note secured by the
22 real property.

23 **Debtors' Second Motion to Dismiss Claim #10**

24 On January 13, 2012, before the court had ruled on the
25 first motion, debtors filed a second motion to dismiss
26 Claim #10. Debtors maintained that the court lacked subject
27 matter jurisdiction because Bank provided no "authoritative
28 evidence, electronic or otherwise that [Bank] is in possession

1 or is in control of a single, unique, identifiable, unalterable
2 copy of a note that identifies [Bank] as the secured creditor .
3 . . ."

4 Debtors also alleged that the closing date of the Trust was
5 December 21, 2006 and that the assignment from MERS to Bank
6 regarding the note was recorded approximately three and one-half
7 years later – too late to be included in the Trust.

8 **Debtors' Motion to Dismiss For**
9 **Lack of Subject Matter Jurisdiction**

10 On January 24, 2012, debtors filed a motion to dismiss
11 Claim #10 for lack of subject matter jurisdiction. Debtors
12 asserted that Bank failed to provide any authenticated evidence
13 or witnesses in support of its POC. On the same day, debtors
14 filed a point by point rebuttal to the declaration of Dumler.
15 Generally, debtors alleged that Dumler's statements were not
16 authenticated and that his statement that both debtors had
17 executed the note with respect to the property was false.
18 Debtors continued to maintain that Bank's claim was
19 unenforceable against them.

20 On January 27, 2012, Bank filed a motion to strike debtors'
21 second motion to dismiss and their motion to dismiss for lack of
22 subject matter jurisdiction. Bank argued that debtors had
23 already filed a motion to dismiss to which it had responded,
24 the points raised in debtors' subsequent pleadings should have
25 been raised in their first motion, and a hearing had already
26 been scheduled for February 1, 2012.

27 **The Bankruptcy Court's Ruling and 2/28/12 Order**

28 On February 1, 2012, the bankruptcy court heard debtors'

1 first motion to dismiss Claim #10 and took the matter under
2 advisement.

3 On February 14, 2012, the bankruptcy court issued a Minute
4 Entry/Order denying debtors' motion. The court found that based
5 upon the copy of the note, DOT, Assignment, and declaration of
6 Dumler, Bank established its right to enforce the debt and file
7 the POC. The court observed that debtors listed the disputed
8 secured lien holder in their schedules and also stated in their
9 chapter 13 plan that they would pay directly to the creditor the
10 payments owed on their residence.

11 On February 28, 2012, the bankruptcy court entered the
12 order denying debtors' motion to dismiss Claim #10, debtors'
13 second motion to dismiss Claim #10, and debtors' motion to
14 dismiss for lack of subject matter jurisdiction.

15 **Debtors' Motion for Reconsideration**

16 On February 22, 2012, prior to the bankruptcy court's entry
17 of an order on its February 14, 2012 ruling, debtors filed a
18 motion for reconsideration. Debtors continued to maintain that
19 there was no authenticated evidence that proved Bank's standing.

20 On February 27, 2012, Montie filed an affidavit which
21 stated that he did not sign the promissory note or DOT related
22 to the property.

23 **Debtors' Amended Motion for Reconsideration**

24 On March 12, 2012, debtors filed an amended motion to
25 reconsider. That motion essentially reiterated their previous
26 points.

27 On March 27, 2012, Bank filed a response to debtors'
28 amended motion for reconsideration. Bank argued that debtors'

1 motion set forth no grounds for reconsideration under Civil
2 Rules 59(e) or 60(b).

3 **Debtors' Motion to Disallow Claim**

4 On March 14, 2012, before the bankruptcy court had a chance
5 to rule on their motion for reconsideration, debtors filed a
6 motion to disallow Claim #10. Debtors alleged that Bank failed
7 to timely object to their amended plan and thus it was too late
8 to include Bank in their plan.

9 On March 27, 2012, Bank filed a motion to strike debtors'
10 motion to disallow Claim #10 based on Civil Rule 12(f). Bank
11 maintained that its failure to object to debtors' plan was not
12 grounds for disallowing a claim. Bank further requested the
13 bankruptcy court to enjoin debtors from filing any more
14 pleadings concerning Claim #10 and requested attorneys' fees.

15 **The 3/30/12 Order**

16 On March 30, 2012, the bankruptcy court issued a Minute
17 Entry/Order with respect to debtors' motion for reconsideration
18 and amended motion for reconsideration. The court found no
19 grounds to reconsider its February 14, 2012, Minute Entry/Order
20 or the 2/28/12 Order which denied debtors' motions at Dkt. ##54,
21 64, and 65.

22 In considering debtors' later filed motion to disallow
23 Bank's claim, the court pointed out that Bank, although not
24 required to file a POC, timely filed its POC on the claims bar
25 date. The court further observed that Bank's POC did not affect
26 its rights under the mortgage because Bank's lien passed through
27 the bankruptcy unaffected. Finally, the bankruptcy court found
28 that the deadline to file a plan objection was not

1 jurisdictional and the court was well within its powers to allow
2 a late-filed objection. The bankruptcy court denied, with
3 prejudice, debtors' objection to Bank's POC. (Emphasis added).

4 Debtors did not file a timely appeal from this order.

5 **Debtors' Motion for Order to Produce**

6 On April 12, 2012, debtors filed an objection to Bank's
7 motion to strike and a motion for order to produce. In their
8 motion for order to produce, debtors again requested the court
9 to determine who the "correct parties are" and set a hearing to
10 determine the standing of the "alleged secured creditors in
11 question."

12 On April 30, 2012, Bank responded to debtors' motion to
13 produce and again requested attorneys' fees for having to
14 respond to debtors' motion. Bank noticed a hearing on the
15 matters.

16 **Debtors' Emergency Motion to Dismiss**

17 On June 5, 2012, debtors filed an emergency motion to
18 dismiss for refusal to produce evidence. Attached to debtors'
19 motion were three letters: (1) a letter from Bank's attorneys
20 stating that they were in default with their postpetition
21 payments; (2) a response letter from debtors to Bank's attorneys
22 requesting various documents relating to the foreclosure of
23 their property and Bank's authority to conduct business in the
24 State of Arizona; and (3) a further response letter from Bank's
25 attorney stating that debtors already had documentation in the
26 foreclosure file or it was within the public records and that
27 the other information requested was protected by attorney-client
28 privilege, the work-product doctrine, or protections against

1 disclosure of proprietary or confidential information.

2 **The 7/10/12 Order and Debtors' Appeal**

3 On June 6, 2012, the bankruptcy court heard debtors'
4 objection to Bank's motion to strike, debtors' motion to
5 disallow claim, and the Bank's motion to quash and request for
6 attorneys' fees. The court denied debtors' motions and ruled
7 that the Bank did not need to respond to any further objections
8 filed by debtors unless directed otherwise by the court. The
9 bankruptcy court also authorized Bank to file an affidavit and
10 application with respect to their fee request. At the hearing,
11 the bankruptcy court informed debtors that they were free to
12 appeal.

13 On June 12, 2012, debtors filed a notice of appeal (NOA)
14 regarding the court's ruling on June 6, 2012.

15 On July 10, 2012, the bankruptcy court entered the order
16 with respect to the June 6, 2012 hearing. The 7/10/12 Order
17 reiterated some of what was contained in the bankruptcy court's
18 2/28/12 Order and 3/30/12 Order. Specifically, the order denied
19 the debtors' motion to dismiss claim #10, second motion to
20 dismiss claim #10, motion to dismiss for lack of subject matter
21 jurisdiction, motion for reconsideration, amended motion for
22 reconsideration, and motion to disallow claim #10. The order
23 denied debtors' motion to produce and emergency motion to
24 dismiss.

25 On July 16, 2012, debtors filed an amended NOA from the
26 7/10/12 Order.

27 **II. JURISDICTION**

28 The bankruptcy court had jurisdiction over this proceeding

1 under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (K). We have
2 jurisdiction under 28 U.S.C. § 158, subject to our discussion
3 set forth immediately below.

4 Debtors' series of motions which triggered the various
5 orders define the scope of what we decide in this appeal. Our
6 focus is on the 3/30/12 Order which was a final order disposing
7 of debtors' motions to dismiss or disallow Bank's POC and
8 motions for reconsideration (Dkt. ## 54, 64, 65, 72, 76, and
9 77). An order is final when it fully adjudicates the issues
10 raised and clearly manifests the court's intent to be its final
11 act in the matter. Brown v. Wilshire Credit Corp.
12 (In re Brown), 484 F.3d 1116, 1120 (9th Cir. 2007) (quoting
13 Slimick v. Silva (In re Slimick), 928 F.2d 304, 307 (9th Cir.
14 1990)).

15 The 3/30/12 Order on its face evidenced the judge's intent
16 that the order was final. Although no formal words of judgment
17 are necessary to convey finality, the Minute Entry/Order,
18 stated: "IT IS ORDERED denying the motion and amended motion to
19 reconsider and IT IS FURTHER ORDERED denying, with prejudice,
20 the objection to [Bank's] proof of claim." (Emphasis added).
21 This language amply demonstrates that a final disposition was
22 intended on issues relating to Bank's standing to file a POC in
23 debtors' case. See Slimick, 928 F.3d at 308.

24 Moreover, the 3/30/12 Order states that it was an order, it
25 was mailed to the parties and counsel, signed by the judge, and
26 entered on the docket. See Ingram v. ACandS, Inc., 977 F.2d
27 1332, 1338-39 (9th Cir. 1992). Indeed, debtors must have
28 recognized that the court's ruling on February 14, 2012 and its

1 subsequently filed motions.³

2 "Res judicata, also known as claim preclusion, prohibits
3 the litigation in a subsequent action of any claims that were
4 raised or could have been raised in the prior action." Cabrera
5 v. City of Huntington Park, 159 F.3d 374, 381 (9th Cir. 1998).
6 The bankruptcy court's 3/30/12 Order precluded debtors'
7 subsequently filed motions if the following three elements are
8 established: (1) the bankruptcy court's 3/30/12 Order denying
9 debtors' motions to dismiss Claim #10 was a final judgment;
10 (2) debtors' motions filed prior to the issuance of the 3/30/12
11 Order involved the same parties as debtors' subsequently filed
12 motions; and (3) there is an identity of claims between debtors'
13 motions filed prior to the 3/30/12 Order and those subsequently
14 filed. Id. All three elements are met in this case.

15 In Siegel v. Fed. Home Loan Mortg. Corp., 143 F.3d 525, 529
16 (9th Cir. 1998), the Ninth Circuit held that "the allowance or
17 disallowance of a claim in bankruptcy is binding and conclusive
18 on all parties or their privies, and being in the nature of a
19 final judgment, furnishes a basis for a plea of res judicata."
20 Here, as noted above, the bankruptcy court's 3/30/12 Order was a

22 ³ Although the bankruptcy court did not explicitly reach the
23 issue of claim preclusion, it implicitly applied the doctrine by
24 ordering that Bank did not need to respond to any further motions
25 filed by debtors unless directed otherwise by the court.
26 Moreover, "[w]e may affirm the bankruptcy court on any ground
27 supported by the record, even if the ground is not relied on by
28 the [bankruptcy] court." Tahoe-Sierra Pres. Council, Inc.,
322 F.3d at 1076-77; see also Olson v. Morris, 188 F.3d 1083,
1085 (9th Cir. 1999) ("We may affirm on any ground supported by
the record, and affirm the district court on the grounds of res
judicata.").

1 final order that allowed Bank's POC.

2 There is also no dispute that all of debtors' motions
3 involved a dispute between debtors and Bank.

4 Finally, an identity of claims exists between debtors'
5 motions filed prior to issuance of the 3/30/12 Order and those
6 subsequently filed. In Siegel, the Ninth Circuit employed a
7 four factor test to determine whether successive actions involve
8 the same claims: "(1) whether rights or interests established in
9 the prior judgment would be destroyed or impaired by prosecution
10 of the second action; (2) whether substantially the same
11 evidence is presented in the two actions; (3) whether the two
12 suits involve infringement of the same right; and (4) whether
13 the two suits arise out of the same transactional nucleus of
14 facts." 143 F.2d at 529. In Int'l Union of Operating
15 Eng'rs-Employers Constr. Indus. Pension, Welfare & Training
16 Trust Funds v. Karr, 994 F.2d 1426, 1429 (9th Cir. 1993), the
17 Ninth Circuit explained that the "last of these criteria is the
18 most important." The Karr court held that if both claims in the
19 different actions arose from the same "transactional nucleus of
20 facts" and the claims in the second action could have been
21 brought in the first, that alone would be sufficient to find
22 that the second action is barred by the first. 994 F.2d at
23 1430.

24 Debtors' motions all involved the same transactional
25 nucleus of facts. Debtors alleged Bank did not have standing to
26 file the POC because it failed to prove that it was the holder
27 of their note. As a result, debtors' second series of motions
28 required the bankruptcy court to undertake the same analysis as

1 required under their first series of motions which fully
2 litigated the standing issue and resulted in a final order which
3 was not timely appealed. To the extent debtors raised any new
4 grounds to challenge the Bank's POC in their second series of
5 motions, those additional grounds could have been raised in
6 their motions filed prior to entry of the 3/30/12 Order.

7 Because all the elements for claim preclusion have been met, we
8 conclude that the bankruptcy court's 3/30/12 Order precluded
9 debtors' second series of motions which addressed the same
10 subject matter.

11 The policies underlying claim preclusion support our
12 conclusion. Claim preclusion "is motivated primarily by the
13 interest in avoiding repetitive litigation, conserving judicial
14 resources, and preventing the moral force of court judgments
15 from being undermined." Haphey v. Linn Cnty., 924 F.2d 1512,
16 1518 (9th Cir. 1991), rev'd in part on other grounds, 953 F.2d
17 549 (9th Cir. 1992) (en banc). Debtors' serial filing of
18 motions concerning the same subject matter was the reason the
19 bankruptcy court ultimately ruled that Bank did not need to
20 respond to any further motions filed by debtors. Application of
21 the claim preclusion doctrine is appropriate under these
22 circumstances. To hold otherwise would allow debtors to
23 perpetually toll the time for filing a NOA and continue
24 litigation indefinitely by repeatedly filing virtually identical
25 motions without consequence.

26 Even if debtors' second series of motions filed after the
27 entry of the 3/30/12 Order could somehow be considered
28 independent of their previously filed motions embodied in that

1 order, debtors' briefs do not clearly articulate how the
2 bankruptcy court erred in denying debtors' later filed motions.
3 Under these circumstances, we cannot say it was an abuse of
4 discretion for the bankruptcy court to deny debtors'
5 subsequently filed motions which were an attempt to get yet
6 another bite at the apple.

7 **VI. CONCLUSION**

8 For the reasons stated, we AFFIRM.

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