NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. MT-10-1134-JuPaD
	BAP No. MT-10-1135-JuPaD
PROVIDENT FINANCIAL, INC.,	(related appeals)
Debtor.	Bk. No. 09-61756
GREG NESSELRODE,	Adv. No. 10-00001
Appellant,	
v.	M E M O R A N D U M[1]
PROVIDENT FINANCIAL, INC.,	
Appellee.	

Argued and Submitted on September 23, 2010
at Pasadena, California

Filed - October 12, 2010

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

Hon. Ralph B. Kirscher, Chief Bankruptcy Judge, Presiding

Appearances: Appellant Greg Nesselrode argued pro se
Brian J. Smith, Garlington, Lohn & Robinson, PLLP
and Harold V. Dye, Dye & Moe, PLLP argued for
Appellee Provident Financial, Inc.

Before: JURY, PAPPAS, and DUNN, 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.

These appeals are the latest chapter in the long-running saga of litigation and endless appeals in both state and federal courts commenced by appellant Greg Nesselrode ("Nesselrode") against appellee-debtor Provident Financial, Inc. ("Provident" or "Debtor") in connection with Provident's foreclosure of Nesselrode's property. Nesslerode now appeals the bankruptcy court's (1) Order Granting Motion For Final Decree in Debtor's chapter 11 bankruptcy case[2] (BAP No. 10-1134) and (2) Judgment dismissing Nesselrode's adversary complaint (BAP No. 10-1135).

Nesselrode argues that the bankruptcy court improperly entered a final decree closing Debtor's bankruptcy case in violation of § 350(a) and Rule 3022 because his adversary proceeding against Debtor was not fully resolved. He further challenges the bankruptcy court's dismissal of his adversary proceeding which was based on the doctrine of claim preclusion,[3] arguing that the claims asserted in his prior litigation were not the same as those alleged in the adversary proceeding.

After throughly reviewing the record, we discern no error in either of the bankruptcy court's rulings. Accordingly, we AFFIRM.

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[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

[3] We use the term "claim preclusion" which has "supplanted the term 'res judicata' that was traditionally used in a now-obsolete, non-generic sense . . . ." The Alary Corp. v. Sims (In re Associated Vintage Grp., Inc.), 283 B.R. 549, 555 (9th Cir. BAP 2002) (discussing res judicata terminology).

I. FACTS

On January 20, 1989, Provident was formed for the purpose of making short-term real estate loans and offering financing for insurance premiums, primarily in Montana. Its business model was to act as a "non-bank bank" by borrowing funds from investors and loaning these funds to persons or entities requiring short-term real estate loans for construction financing, bridge loans and the like. Provident also maintained a separate insurance premium finance division that provided short-term financing of insurance premiums.

On April 10, 2002, Provident made a construction loan for $161,755.90 to Nesselrode who was building a home in Whitefish, Montana. Nesselrode had arranged for a third party to pay off the construction loan from Provident. However, when Nesselrode lost his job, the third-party lender withdrew its commitment. On December 27, 2002, Provident entered into a Construction Loan Agreement Addendum (the "Addendum") with Nesselrode and agreed to fund another loan for $171,844.10. On the same date, Provident and Nesselrode converted the loan agreement, including the Addendum, to a "spec home loan." Since Nesselrode could not afford to keep the residence after it was completed, the parties agreed that the property would be sold to repay the loans. The maturity date for the two loans was June 27, 2003.

Under the new agreement, Provident provided additional funds to Nesselrode on an "as needed" basis and in accordance with a budget.

A dispute between the parties arose after Nesselrode received $3,518.57 from Provident in June 2003 for painting materials to stain the home. Provident advanced the amount based on a price quotation from the local Sherwin-Williams store. On June 19, 2003, the president of Provident, Brad Walterskirchen ("Walterskirchen"), wrote to Nesselrode stating that his loan was frozen and no further advances would be made.[4] The freeze occurred because Nesselrode had used only a portion of the funds for the painting materials, and Sherwin-Williams gave Nesselrode a credit by writing a check to him for $1,900. Provident, through Walterskirchen, requested Nesselrode to return the $1,900 or provide an explanation.

The extent of the communications, if any, between the parties after this letter is not fully explained in the record. In any event, Nesselrode's loans matured on June 27, 2003, and Provident sent Nesselrode payoff quotes for each loan. On July 1, 2003, Provident sent Nesselrode two letters declaring each loan in default. On August 13, 2003, Provident initiated a foreclosure proceeding on the property and scheduled a trustee's sale for December 22, 2003.

Meanwhile, Nesselrode filed a chapter 13 bankruptcy petition on December 18, 2003, in the District of Montana, In re Nesselrode, Case No. 03-63964-13. As a result, the foreclosure sale did not take place. Provident moved to modify the automatic

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[4] Nesselrode refers to this letter in his briefs and the record as the "default stain letter."

stay, submitting an appraisal showing that the fair market value of the property was $457,000. The bankruptcy court denied Provident's motion after a hearing on March 11, 2004, concluding that Provident was adequately protected by equity in the property at that time.

Nesselrode's chapter 13 plan provided for payments of $75 per month, but no payments would be made to Provident until the home was sold, which was to occur within two years. Nesselrode never moved to hire a real estate professional to market the property. The chapter 13 trustee and Provident objected to the confirmation of Nesselrode's plan. The court sustained the objections and dismissed Nesselrode's bankruptcy case by order entered on June 4, 2004.

On June 24, 2004, Provident again instituted a foreclosure sale proceeding on the property and scheduled the sale for October 29, 2004.

On September 28, 2004, Nesselrode filed a second Chapter 13 bankruptcy petition in the District of Montana, In re Nesselrode, Case No. 04-62971. On October 21, 2004, Provident moved to modify the stay, alleging Nesselrode had no equity in the property, and submitted an appraisal in support. The bankruptcy court accepted Provident's appraiser's opinion that the property was worth $457,000 and found Nesselrode's opinion on value not credible. The court also found that as of January 7, 2004, Provident was owed $433,142.81 due to the additional interest that had accrued on the loans. Based on the numbers, the court

observed that Provident's equity cushion had substantially eroded. Further, the liability insurance on the property had been cancelled, and Nesselrode's new proposed chapter 13 plan contained no provision to pay Provident or to sell the home. Accordingly, the bankruptcy court granted Provident's motion to modify the stay by order entered on January 7, 2005, effective immediately.

On January 11, 2005, the foreclosure sale occurred.

A. The State Court Lawsuit - Nesselrode I

During his second bankruptcy case and prior to the foreclosure sale, Nesselrode filed a complaint against Provident in the District Court of the Fourth Judicial District Missoula County, Montana on October 7, 2004. Nesselrode alleged breach of contract, negligent misrepresentations and wrongful foreclosure and contended he filed his bankruptcy case to save $329,000 equity in the residence. Nesselrode further maintained that he intended to use that equity to secure $15 million in commercial loans to develop a proposed forty-unit townhome complex in Whitefish, Montana. Finally, he alleged that Provident's appraisal submitted in support of its motion to modify the stay in Nesselrode's first chapter 13 bankruptcy case was inaccurate due to the fact that it did not include many items which would have increased the market value. He contended that the home was worth $658,652 rather than $457,000 as stated in the appraisal. Nesselrode sought $26 million in damages against Debtor.

The matter was transferred to the District Court of the Eleventh Judicial District Flathead County, Montana on December 28, 2004, and assigned Cause No. 04-854B.

On January 4, 2005, Nesselrode filed a motion for summary judgment in which he recited a list of alleged "torts" committed by Walterskirchen. Nesselrode asserted Walterskirchen testified falsely in Nesselrode's bankruptcy proceeding and that Provident provided an incorrect appraisal. Nesselrode also requested immediate relief in the form of clear title, and $250,000 "for expenditures."

On May 17, 2005, Nesselrode filed a second motion for summary judgment "with Punitive Damages and Motion for Audit." As observed by the state court, the thrust of this motion was that the foreclosure was illegal. Provident filed its cross-motion for summary judgment on each of Nesselrode's claims.[5]

On December 9, 2005, the state court issued an "Order And Rationale On Cross-Motions For Summary Judgment And On Motion For Protective Order." In addressing both of Nesselrode's motions for summary judgment, the court found there was no evidence that Walterskirchen had made any misrepresentation or false statements and found Provident had not acted negligently. The court further determined that the loan and promissory notes had a due date of June 27, 2003, that Nesselrode failed to pay the notes when due, and that Provident had the authority to begin foreclosure

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[5] Although it is somewhat unclear from the record, it appears the Montana District Court considered and decided both of Nesselrode's motions at the same time.

proceedings.[6] The court granted Provident's cross motion for summary judgment in full.

The state court entered judgment for Provident on March 7, 2006, dismissed Nesselrode's complaint with prejudice and awarded Provident $6,250 in attorneys' fees.[7]

Nesselrode appealed the judgment to the Montana Supreme Court. On December 27, 2006, the Montana Supreme Court issued an opinion affirming the trial court's decision in Nesselrode v. Provident Fin., Inc., 149 P.3d 915, 915 (Mont. 2006).

Nesselrode petitioned for certiorari to the United States Supreme Court. On April 16, 2007, the court denied Nesselrode's petition in Nesselrode v. Provident Fin., Inc., 549 U.S. 1350 (2007).

B. The Federal Lawsuit - Nesselrode II

Nesselrode also filed a lawsuit in the United States District Court for the District of Montana against the individual attorneys for Provident (Bruce A. Measure, Tia R. Robbin and Daniel R. Wilson) and Provident's law firm (Measure, Robbin & Wilson, P.C.), along with Walterskirchen and Provident. This matter was assigned Cause No. CV 07-49-M-DWM-JCL.

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[6] Despite the court's findings, Nesselrode argues in his briefs here that the loan was due when the house was sold per the Construction Loan Addendum.

[7] The attorneys' fee award for $6,250 was embodied in an earlier judgment entered on January 17, 2006. This judgment was later amended on October 19, 2007 to include additional fees and costs.

Nesselrode filed a thirty-four-page second amended complaint on September 7, 2007, alleging that the defendants had violated various state and federal laws, wrongfully foreclosed his property, and had no right to garnish his wages for payment of the attorneys' fees awarded in the state court. Other allegations related to violation of his constitutional rights.

Defendants Bruce Measure, Daniel Wilson, and Measure, Robbin & Wilson, P.C. filed a Motion for Summary Judgment.[8] Defendants Walterskirchen and Provident filed a Motion to Dismiss based on Fed. R. Civ. P. 12(b)(6).

Magistrate Judge Lynch issued his findings and recommendation on March 12, 2008 in a thirty-two-page decision. The judge granted summary judgment for defendants on numerous issues and found others subject to dismissal for failure to state a claim for relief. Additionally, the judge denied Nesselrode's motion for summary judgment and dismissed his complaint.

In the court's decision, the judge sua sponte considered whether portions of the federal action were subject to dismissal on claim preclusion grounds. Judge Lynch found that the litigation which Nesselrode sought to prosecute against Provident and Walterskirchen was barred by the doctrine of claim preclusion in light of his prior state court action in Nesselrode v. Provident Fin., Inc., Cause No. DV-04-854B. The judge found:

> The circumstances of this case satisfy the four elements of [claim preclusion] under Montana law.

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[8] Defendant Tia Robbins was dropped as a defendant in the Second Amended Complaint.

> Nesselrode, Walterskirchen, and Provident were all parties to Nesselrode I. The subject matter of this action is the same as that of Nesselrode I. As in the state court case, Nesselrode alleges Walterskirchen and Provident are liable in this case for their conduct in collecting on the promissory note and foreclosing on the Deed of Trust, all with respect to the loan secured by the property [in] . . . Whitefish, Montana.
>
> Additionally, the issues in this case and Nesselrode I are the same. In both cases Nesselrode alleges Defendants violated various federal and state laws with respect to the loan and foreclosure transactions.
>
> Finally, the capacities of the parties are the same in both cases. As in the state court case, Nesselrode, in his individual capacity, brings this suit against Provident in its capacity as the lender in the subject loan and foreclosure transactions, and against Walterskirchen in his capacity as Provident's employee.
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> Based on the foregoing, and to the extent Nesselrode seeks to relitigate legal claims previously resolved in Nesselrode I, he is barred by [the doctrine of claim preclusion] from presenting those same claims in this case. Furthermore, . . . Nesselrode is also barred from litigating additional causes of action in this case that he could have litigated in Nesselrode I.

In considering each of Nesselrode's claims separately, Judge Lynch found that in the majority of instances, Nesselrode failed to state a claim for relief.

Nesselrode filed an objection to Judge Lynch's findings on March 21, 2008. The United States District Court Judge Molloy adopted Magistrate Judge Lynch's findings, granted summary judgment in favor of Defendants Measure, Wilson, and Measure, Robbin & Wilson, PC; granted Walterskirchen's and Provident's Motion to Dismiss; denied Nesselrode's Motion for Summary Judgment; denied Nesselrode's Motions for Extension of Time to Object, Amend Complaint, and for Trial; and further ordered the action dismissed.

Nesselrode appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit summarily affirmed the district court's judgments.

Nesselrode petitioned for certiorari to the United States Supreme Court. On October 5, 2009, the court denied Nesselrode's petition in Nesselrode v. Measure, 130 S.Ct. 189 (2009).

C. Provident's Bankruptcy Filing

Provident's business began to deteriorate in 2007. Investors withdrew funds or did not renew their notes, the market for new loans shrank due to the collapse of the real estate markets in Montana and the default rate on loans increased. By the summer of 2009, Provident was concerned that it would eventually default on its obligations to investors. Consequently, on September 2, 2009, Provident filed a "preemptive" chapter 11 petition to propose an orderly liquidation of its assets.

On December 30, 2009, Nesselrode filed a proof of claim in Debtor's bankruptcy case for $55 million based on Debtor's wrongful taking of his property.

The bankruptcy court confirmed Provident's plan of reorganization by order entered on February 16, 2010.

1. The Adversary Proceeding - Nesselrode III

On January 4, 2010, Nesselrode filed an adversary complaint against Provident alleging claims for fraud, abuse of process, injunctive relief, and consequential damages. On February 16, 2010, Nesselrode filed a second amended complaint for fraud,

abuse of process, and injunctive relief and sought consequential damages in the amounts of $975,000 and $54,025,000. The claims for relief centered on Walterskirchen's alleged false affidavit submitted in the state court action and the alleged fraudulent appraisal submitted in support of Provident's motion to modify the stay in Nesselrode's bankruptcy cases. The ultimate relief requested by Nesselrode was to set aside the foreclosure.

Debtor moved to dismiss the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6) on the ground that Nesselrode's claims were barred by the doctrine of claim preclusion.[9] Debtor argued that Nesselrode had already litigated the various claims in both state and federal court and requested the court to take judicial notice of all of the documents of record, attached as exhibits to Debtor's motion, before the Montana state courts, the United States District Court for the District of Montana, and the Ninth Circuit Court of Appeals.

The bankruptcy court heard Debtor's Motion to Dismiss on April 8, 2010. The court orally granted Debtor's motion at the hearing and on April 12, 2010, entered an order and decision granting Debtor's motion and dismissed Nesselrode's adversary proceeding. The bankruptcy court found that Nesselrode's claims against Debtor in the adversary proceeding were barred by the doctrine of claim preclusion under Montana and federal law.

[9] Debtor's objection to Nesselrode's claim was consolidated with the hearing on Debtor's Motion to Dismiss.

Nesselrode timely appealed the order on April 16, 2010. Subsequently, he moved for a stay pending appeal, which the bankruptcy court denied by order entered on April 21, 2010. The BAP denied a similar motion by order entered on July 16, 2010.

The bankruptcy court entered a separate judgment granting Debtor's Motion to Dismiss on May 26, 2010.

2. The Entry Of The Final Decree

On March 11, 2010, Debtor filed a Motion to Close Case Retaining Jurisdiction Over Adversary Proceeding and Notice. In that motion, Debtor stated that the order confirming its plan was final and that the only pending matters were the Nesselrode claim objection and adversary proceeding. Debtor further stated that Nesselrode's claims were insured and, in the unlikely event of judgment in favor of Nesselrode, it would be paid by Debtor's insurance carrier. Nesselrode objected to Debtor's motion on March 25, 2010, on the ground that his adversary proceeding was not resolved. Accordingly, it was not appropriate to close the case. Debtor's counsel orally withdrew this motion at the April 8, 2010 hearing after the court granted Provident's Motion to Dismiss.

On April 9, 2010, Debtor filed a Motion For Final Decree In Chapter 11 Case. Debtor stated that the order confirming the plan had become final, that deposits and transfers required by the plan had been made or occurred and that payments under the plan had commenced. Debtor also represented that "[a]ll motions,

contested matters, and adversary proceedings have been finally resolved."

The bankruptcy court granted Debtor's Motion For Final Decree by order entered on April 12, 2010 — the same day on which it issued its Order Granting Debtor's Motion to Dismiss Nesselrode's adversary proceeding. Debtor's bankruptcy case was closed.

Nesselrode timely appealed the order.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (B). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUES

A. Whether the bankruptcy court erred in deciding that the doctrine of claim preclusion barred Nesselrode's claims against Debtor in the adversary proceeding; and

B. Whether the bankruptcy court erred in granting Debtor's Motion For Final Decree.

IV. STANDARDS OF REVIEW

We review the preclusive effect of a prior judgment de novo. FDIC v. Jenson (In re Jenson), 980 F.2d 1254, 1256 (9th Cir. 1992).

We review the bankruptcy court's order granting entry of a final decree for an abuse of discretion. Shotkoski v. Fokkena (In re Shotkoski), 420 B.R. 479, 481 (8th Cir. BAP 2009). We follow a two-part test to determine objectively whether the

bankruptcy court abused its discretion: (1) we determine de novo whether the bankruptcy court identified the correct legal rule to apply to the relief requested and (2), if it did, we examine the bankruptcy court's factual findings under the clearly erroneous standard. United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009). We affirm the court's factual findings unless those findings are "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" Id. at 1262.

V. DISCUSSION

A. The Bankruptcy Court Did Not Err In Dismissing Nesselrode's Adversary Complaint - BAP No. 10-1135

Nesselrode contends the court erred in dismissing his adversary proceeding based on the doctrine of claim preclusion. Under the doctrine of claim preclusion, "a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'" Taylor v. Sturgell, 553 U.S. 880, 892 (2008). The rationale for the rule is "to protect against 'the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.'" Id.; accord Stanley L. and Carolyn M. Watkins Trust v. Lacosta, 92 P.3d 620, 626 (Mont. 2004) (applying Montana law and noting that claim preclusion is "based on a judicial policy favoring a definite end to litigation.").

To decide whether a prior state court action bars a subsequent federal action, the federal courts look to the claim preclusion principles of the state court in which the judgment was entered. Spoklie v. Montana, 411 F.3d 1051, 1055-56 (9th Cir. 2005). Under Montana law, the doctrine of claim preclusion requires: "(1) the parties or their privies are the same; (2) the subject matter of the present and past actions is the same; (3) the issues are the same and relate to the same subject matter; and (4) the capacities of the persons are the same in reference to the subject matter and to the issues between them." Watkins, 92 P.3d at 626. In contrast, "[t]he preclusive effect of a federal-court judgment is determined by federal common law." Taylor, 552 U.S. at 891. Under federal law, the doctrine of claim preclusion requires: (1) the identity of claims, (2) a final judgment on the merits, and (3) privity between the parties. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003). We conclude that regardless of which law is applied, the result is the same under the circumstances presented here.

There is no genuine dispute that there was a final judgment on the merits regarding Nesselrode's claims against Debtor in the prior state and federal court actions since he exhausted all appeals. Further, Nesselrode was the plaintiff and Debtor a defendant in Nesselrode I, II and III.

Nesselrode's main contention is that there is a difference in the nature of his claims in the former actions versus the

adversary proceeding. In conclusory fashion, he argues that the issues between his "original" complaint filed in the state court and the adversary complaint "are not the same." He contends that he alleged in the adversary complaint "multiple state and federal laws" to protect him from financial abuse and predatory lending, while his state court complaint alleged Debtor could not declare his loan in default based on the default stain letter.

We disagree with Nesselrode's contentions. Here, the bankruptcy court properly concluded that Nesselrode's asserted claims in the prior state and federal court actions and the later filed adversary proceeding arose from Debtor's conduct in collecting and foreclosing on the loan secured by Nesselrode's property. At the hearing on this matter, Nesselrode conceded that the relief he sought in the state court and the adversary proceeding was to set aside the alleged wrongful foreclosure.

Moreover, our independent review of the complaints in Nesselrode I, II and III satisfies us that the subject matter of the past actions and the adversary proceeding was the same and that there was an identity of claims. All allegations arose out of the same transactional nucleus of facts — Provident's foreclosure on Nesselrode's property. See Frank v. United Airlines, Inc., 216 F.3d 845, 851 (9th Cir. 2000). Accordingly, Nesselrode's claims in the adversary proceeding are barred under the doctrine of claim preclusion even if he did not raise the exact same claims in his prior litigation. Clark v. Bear Stearns & Co., Inc., 966 F.2d 1318, 1320 (9th Cir. 1992) (claim

preclusion "bars all grounds for recovery that could have been asserted, whether they were or not, in a prior suit between the same parties on the same cause of action.").

Nesselrode improperly argues the merits of his various claims in his opening and reply briefs. The bankruptcy court did not consider the merits of his claims and we do not decide them for the first time in this appeal. Our review is limited to the bankruptcy court's decision to dismiss Nesselrode's adversary complaint and, if error occurred — which it did not — we would remand the matter to the bankruptcy court to consider the merits of his claims.[10]

Further, to the extent Nesselrode argues that he lacked a fair opportunity to litigate his issues in the previous actions due to his pro se status, we are unpersuaded. "[S]pecial circumstances - 'such as reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation' - may 'warrant an exception to the normal rules of preclusion . . . the parties must have had a full and fair opportunity to litigate.'" Durkin v. Shea & Gould, 92 F.3d 1510, 1515 (9th Cir. 1996). However, on this record we perceive no unfairness or inadequacy in the state or federal court proceedings which Nesselrode voluntarily initiated and in which

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[10] Nesselrode also filed an additional pleading containing supplemental authorities on September 2, 2010, which cited various cases involving bankruptcy fraud. The citations relate to the underlying merits of Nesselrode's claims and are irrelevant to any issues raised on appeal. Accordingly, it is unnecessary for us to consider this untimely filing.

he voluntarily participated.[11] Moreover, the fact that Nesselrode appeared pro se in the prior litigation does not lessen the preclusive effect of the state or federal court judgments. See Nelson v. Tsamasfyros (In re Tsamasfyros), 114 B.R. 721, 722 (D. Colo. 1990) (citing Klemens v. Wallace, 62 B.R. 91, 92 (D. N.M. 1986), aff'd, 840 F.2d 762 (10th Cir. 1988)).

Finally, Nesselrode requests this Panel to transfer this case to the United States District Court or the Montana District Court. There is no basis for his request because we clearly have jurisdiction over Nesselrode's appeal from the bankruptcy court, which had jurisdiction over the adversary and claim procedures initiated by Nesselrode against Provident, a chapter 11 debtor. Further, the state and federal courts in the prior litigation have already ruled against Nesselrode and those decisions are final because all appeals on the underlying claims have been exhausted. Thus, even if transfer were appropriate, no remedy exists on any of Nesselrode's claims in the state or federal courts, rendering his request moot.

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[11] At the hearing on this matter, Nesselrode argued that the procedure in state court was unfair because the court never held a trial on the issues raised in his complaint. However, there was nothing in the record that suggested the procedure used was inadequate or unfair. In fact, Nesselrode himself sought ultimate determinations based on two summary judgment motions, which by their nature preclude a trial. Nesselrode cannot now complain that he was denied a trial when he sought resolution without one.

Accordingly, for all these reasons, we affirm the bankruptcy court's decision dismissing Nesselrode's adversary complaint based on the doctrine of claim preclusion.

B. The Bankruptcy Court Did Not Err In Granting Debtor's Motion For Entry of Final Decree - BAP No. 10-1134

Section 350(a) provides for the closing of a case after an estate has been "fully administered." § 350(a). Rule 3022 states: "[a]fter an estate is fully administered in a chapter 11 reorganization case, the [bankruptcy] court, on its own motion or on a motion of a party in interest, shall enter a final decree closing the case." Rule 3022. The Advisory Committee Notes in connection with Rule 3022 provide, in relevant part:

> Entry of a final decree closing a chapter 11 case should not be delayed solely because the payments required by the plan have not been completed. Factors that the [bankruptcy] court should consider in determining whether the estate has been fully administered include (1) whether the order confirming the plan has become final, (2) whether deposits required by the plan have been distributed, (3) whether the property proposed by the plan to be transferred has been transferred, (4) whether the debtor or the successor of the debtor under the plan has assumed the business or the management of the property dealt with by the plan, (5) whether payments under the plan have commenced, and (6) whether all motions, contested matters, and adversary proceedings have been finally resolved.

Nesselrode argues that the last listed factor was not met and thus Debtor's case was not "fully administered" in violation of the rule. We disagree. The court's dismissal of Nesselrode's adversary proceeding was simultaneous with its entry of the final decree. Thus, although Nesselrode filed this appeal, his adversary proceeding was "finally resolved" in the bankruptcy

court. See Law Offices of Nicholas A. Franke v. Tiffany (In re Lewis), 113 F.3d 1040, 1043 (9th Cir. 1997) ("[B]ankruptcy court order is final and thus appealable 'where it 1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed.'").

Moreover, even if Nesselrode's argument had merit, not all of the factors set forth in the Advisory Committee Note need to be present to establish that a case is fully administered for final decree purposes. Graves v. Rebel Rents, Inc. (In re Rebel Rents, Inc.), 326 B.R. 791, 804 (Bankr. C.D. Cal. 2005) (citing In re Mold Makers, Inc., 124 B.R. 766, 768 (Bankr. N.D. Ill. 1990)). Rather, bankruptcy courts have flexibility in determining whether an estate is fully administered by considering the factors set forth in Rule 3022, along with any other relevant factors. See In re Jay Bee Enters., Inc., 207 B.R. 536, 539 (Bankr. E.D. Ky. 1997). Such determinations are made on a case-by-case basis. Shotkoski, 420 B.R. at 483.

Here, there is no evidence in the record that shows that the pendency of Nesselrode's appeal militates in favor of keeping Debtor's bankruptcy case open. Debtor's pleadings filed in connection with its motion to close the case showed that in the unlikely event any judgment was rendered in favor of Nesselrode, Debtor's insurance carrier would pay the claim. However, no court so far has ruled for Nesselrode and the necessity of a payment is unlikely since we agree that Nesselrode's claims against Debtor are barred. Under these circumstances, we would

be hard pressed to conclude that the continuation of Nesselrode's adversary proceeding on appeal implicates the administration of Debtor's bankruptcy case. See In re Union Home and Indus., Inc., 375 B.R. 912, 918 (10th Cir. BAP 2007) ("The continuation of an adversary proceeding . . . is insufficient by itself to keep a case from being considered 'fully administered.'"); In re JMP-Newcor Int'l, 225 B.R. 462, 465 (Bankr. N.D. Ill. 1998) (pending adversary proceeding did not warrant keeping bankruptcy case open).

Accordingly, we conclude the bankruptcy court did not abuse its discretion in granting Debtor's Motion For Final Decree.

VI. CONCLUSION

For the reasons stated above, we AFFIRM.