

OCT 12 2010

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No. MT-10-1134-JuPaD
)	BAP No. MT-10-1135-JuPaD
7	PROVIDENT FINANCIAL, INC.,)	(related appeals)
)	
8	Debtor.)	Bk. No. 09-61756
)	
9	GREG NESSELRODE,)	Adv. No. 10-00001
)	
10	Appellant,)	
)	
11	v.)	M E M O R A N D U M ¹
)	
12	PROVIDENT FINANCIAL, INC.,)	
)	
13	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.

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.

1 These appeals are the latest chapter in the long-running
2 saga of litigation and endless appeals in both state and federal
3 courts commenced by appellant Greg Nesselrode ("Nesselrode")
4 against appellee-debtor Provident Financial, Inc. ("Provident" or
5 "Debtor") in connection with Provident's foreclosure of
6 Nesselrode's property. Nesslerode now appeals the bankruptcy
7 court's (1) Order Granting Motion For Final Decree in Debtor's
8 chapter 11 bankruptcy case² (BAP No. 10-1134) and (2) Judgment
9 dismissing Nesselrode's adversary complaint (BAP No. 10-1135).

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

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

21
22 ² Unless otherwise indicated, all chapter, section and
23 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
24 1532, and to the Federal Rules of Bankruptcy Procedure, Rules
25 1001-9037.

26 ³ We use the term "claim preclusion" which has
27 "supplanted the term 'res judicata' that was traditionally used
28 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).

1 I. FACTS

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

11 On April 10, 2002, Provident made a construction loan for
12 \$161,755.90 to Nesselrode who was building a home in Whitefish,
13 Montana. Nesselrode had arranged for a third party to pay off
14 the construction loan from Provident. However, when Nesselrode
15 lost his job, the third-party lender withdrew its commitment. On
16 December 27, 2002, Provident entered into a Construction Loan
17 Agreement Addendum (the "Addendum") with Nesselrode and agreed to
18 fund another loan for \$171,844.10. On the same date, Provident
19 and Nesselrode converted the loan agreement, including the
20 Addendum, to a "spec home loan." Since Nesselrode could not
21 afford to keep the residence after it was completed, the parties
22 agreed that the property would be sold to repay the loans. The
23 maturity date for the two loans was June 27, 2003.

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

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

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

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

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

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

8 On January 11, 2005, the foreclosure sale occurred.

9 **A. The State Court Lawsuit - Nesselrode I**

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

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

3 The state court entered judgment for Provident on March 7,
4 2006, dismissed Nesselrode's complaint with prejudice and awarded
5 Provident \$6,250 in attorneys' fees.⁷

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

10 Nesselrode petitioned for certiorari to the United States
11 Supreme Court. On April 16, 2007, the court denied Nesselrode's
12 petition in Nesselrode v. Provident Fin., Inc., 549 U.S. 1350
13 (2007).

14 **B. The Federal Lawsuit - Nesselrode II**

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

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

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

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

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

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

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

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

26 ⁸ Defendant Tia Robbins was dropped as a defendant in the
27 Second Amended Complaint.

1 Nesselrode, Walterskirchen, and Provident were all
2 parties to Nesselrode I. The subject matter of this
3 action is the same as that of Nesselrode I. As in the
4 state court case, Nesselrode alleges Walterskirchen and
5 Provident are liable in this case for their conduct in
6 collecting on the promissory note and foreclosing on
7 the Deed of Trust, all with respect to the loan secured
8 by the property [in] . . . Whitefish, Montana.

9 Additionally, the issues in this case and Nesselrode I
10 are the same. In both cases Nesselrode alleges
11 Defendants violated various federal and state laws with
12 respect to the loan and foreclosure transactions.

13 Finally, the capacities of the parties are the same in
14 both cases. As in the state court case, Nesselrode, in
15 his individual capacity, brings this suit against
16 Provident in its capacity as the lender in the subject
17 loan and foreclosure transactions, and against
18 Walterskirchen in his capacity as Provident's employee.

19 Based on the foregoing, and to the extent Nesselrode
20 seeks to relitigate legal claims previously resolved in
21 Nesselrode I, he is barred by [the doctrine of claim
22 preclusion] from presenting those same claims in this
23 case. Furthermore, . . . Nesselrode is also barred
24 from litigating additional causes of action in this
25 case that he could have litigated in Nesselrode I.

26 In considering each of Nesselrode's claims separately, Judge
27 Lynch found that in the majority of instances, Nesselrode failed
28 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.

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

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

7 **C. Provident's Bankruptcy Filing**

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

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

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

22 **1. The Adversary Proceeding - Nesselrode III**

23 On January 4, 2010, Nesselrode filed an adversary complaint
24 against Provident alleging claims for fraud, abuse of process,
25 injunctive relief, and consequential damages. On February 16,
26 2010, Nesselrode filed a second amended complaint for fraud,

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

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

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

24
25
26 _____
27 ⁹ Debtor's objection to Nesselrode's claim was
28 consolidated with the hearing on Debtor's Motion to Dismiss.

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

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

7 **2. The Entry Of The Final Decree**

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

21 On April 9, 2010, Debtor filed a Motion For Final Decree In
22 Chapter 11 Case. Debtor stated that the order confirming the
23 plan had become final, that deposits and transfers required by
24 the plan had been made or occurred and that payments under the
25 plan had commenced. Debtor also represented that "[a]ll motions,
26
27

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

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

8 Nesselrode timely appealed the order.

9 II. JURISDICTION

10 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
11 §§ 1334 and 157(b)(2)(A) and (B). We have jurisdiction under 28
12 U.S.C. § 158.

13 III. ISSUES

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

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

19 IV. STANDARDS OF REVIEW

20 We review the preclusive effect of a prior judgment de novo.
21 FDIC v. Jenson (In re Jenson), 980 F.2d 1254, 1256 (9th Cir.
22 1992).

23 We review the bankruptcy court's order granting entry of a
24 final decree for an abuse of discretion. Shotkoski v. Fokkena
25 (In re Shotkoski), 420 B.R. 479, 481 (8th Cir. BAP 2009). We
26 follow a two-part test to determine objectively whether the
27

1 bankruptcy court abused its discretion: (1) we determine de novo
2 whether the bankruptcy court identified the correct legal rule to
3 apply to the relief requested and (2), if it did, we examine the
4 bankruptcy court's factual findings under the clearly erroneous
5 standard. United States v. Hinkson, 585 F.3d 1247, 1261-62
6 (9th Cir. 2009). We affirm the court's factual findings unless
7 those findings are "(1) 'illogical,' (2) 'implausible,' or (3)
8 without 'support in inferences that may be drawn from the facts
9 in the record.'" Id. at 1262.

10 V. DISCUSSION

11 A. The Bankruptcy Court Did Not Err In Dismissing Nesselrode's 12 Adversary Complaint - BAP No. 10-1135

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

1 To decide whether a prior state court action bars a
2 subsequent federal action, the federal courts look to the claim
3 preclusion principles of the state court in which the judgment
4 was entered. Spoklie v. Montana, 411 F.3d 1051, 1055-56
5 (9th Cir. 2005). Under Montana law, the doctrine of claim
6 preclusion requires: "(1) the parties or their privies are the
7 same; (2) the subject matter of the present and past actions is
8 the same; (3) the issues are the same and relate to the same
9 subject matter; and (4) the capacities of the persons are the
10 same in reference to the subject matter and to the issues between
11 them." Watkins, 92 P.3d at 626. In contrast, "[t]he preclusive
12 effect of a federal-court judgment is determined by federal
13 common law." Taylor, 552 U.S. at 891. Under federal law, the
14 doctrine of claim preclusion requires: (1) the identity of
15 claims, (2) a final judgment on the merits, and (3) privity
16 between the parties. Tahoe-Sierra Pres. Council, Inc. v. Tahoe
17 Reg'l Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003). We
18 conclude that regardless of which law is applied, the result is
19 the same under the circumstances presented here.

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

25 Nesselrode's main contention is that there is a difference
26 in the nature of his claims in the former actions versus the
27

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

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

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

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

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

12 Further, to the extent Nesselrode argues that he lacked a
13 fair opportunity to litigate his issues in the previous actions
14 due to his pro se status, we are unpersuaded. "[S]pecial
15 circumstances - 'such as reason to doubt the quality,
16 extensiveness, or fairness of procedures followed in prior
17 litigation' - may 'warrant an exception to the normal rules of
18 preclusion . . . the parties must have had a full and fair
19 opportunity to litigate.'" Durkin v. Shea & Gould, 92 F.3d 1510,
20 1515 (9th Cir. 1996). However, on this record we perceive no
21 unfairness or inadequacy in the state or federal court
22 proceedings which Nesselrode voluntarily initiated and in which
23

24 ¹⁰ Nesselrode also filed an additional pleading containing
25 supplemental authorities on September 2, 2010, which cited
26 various cases involving bankruptcy fraud. The citations relate
27 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.

1 he voluntarily participated.¹¹ Moreover, the fact that
2 Nesselrode appeared pro se in the prior litigation does not
3 lessen the preclusive effect of the state or federal court
4 judgments. See Nelson v. Tsamasfyros (In re Tsamasfyros),
5 114 B.R. 721, 722 (D. Colo. 1990) (citing Klemens v. Wallace,
6 62 B.R. 91, 92 (D. N.M. 1986), aff'd, 840 F.2d 762 (10th Cir.
7 1988)).

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

22 ¹¹ At the hearing on this matter, Nesselrode argued that
23 the procedure in state court was unfair because the court never
24 held a trial on the issues raised in his complaint. However,
25 there was nothing in the record that suggested the procedure used
26 was inadequate or unfair. In fact, Nesselrode himself sought
27 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.

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

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

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

13 Entry of a final decree closing a chapter 11 case
14 should not be delayed solely because the payments
15 required by the plan have not been completed. Factors
16 that the [bankruptcy] court should consider in
17 determining whether the estate has been fully
18 administered include (1) whether the order confirming
19 the plan has become final, (2) whether deposits
20 required by the plan have been distributed, (3) whether
21 the property proposed by the plan to be transferred has
22 been transferred, (4) whether the debtor or the
23 successor of the debtor under the plan has assumed the
24 business or the management of the property dealt with
25 by the plan, (5) whether payments under the plan have
26 commenced, and (6) whether all motions, contested
27 matters, and adversary proceedings have been finally
28 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

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

6 Moreover, even if Nesselrode’s argument had merit, not all
7 of the factors set forth in the Advisory Committee Note need to
8 be present to establish that a case is fully administered for
9 final decree purposes. Graves v. Rebel Rents, Inc. (In re Rebel
10 Rents, Inc.), 326 B.R. 791, 804 (Bankr. C.D. Cal. 2005) (citing
11 In re Mold Makers, Inc., 124 B.R. 766, 768 (Bankr. N.D. Ill.
12 1990)). Rather, bankruptcy courts have flexibility in
13 determining whether an estate is fully administered by
14 considering the factors set forth in Rule 3022, along with any
15 other relevant factors. See In re Jay Bee Enters., Inc., 207
16 B.R. 536, 539 (Bankr. E.D. Ky. 1997). Such determinations are
17 made on a case-by-case basis. Shotkoski, 420 B.R. at 483.

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

1 be hard pressed to conclude that the continuation of Nesselrode's
2 adversary proceeding on appeal implicates the administration of
3 Debtor's bankruptcy case. See In re Union Home and Indus., Inc.,
4 375 B.R. 912, 918 (10th Cir. BAP 2007) ("The continuation of an
5 adversary proceeding . . . is insufficient by itself to keep a
6 case from being considered 'fully administered.'"); In re
7 JMP-Newcor Int'l, 225 B.R. 462, 465 (Bankr. N.D. Ill. 1998)
8 (pending adversary proceeding did not warrant keeping bankruptcy
9 case open).

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

12 VI. CONCLUSION

13 For the reasons stated above, we AFFIRM.