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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. CC-10-1054 PaDNo
)	
EDGART F. GONZALEZ,)	Bk. No. 08-16921-ER
)	
Debtor.)	Adv. No. 08-01756-ER
_____)	
)	
EDGART F. GONZALEZ,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
HSBC BANK USA NATIONAL ASSOCIATION,)	
as Trustee for Home Equity Loan)	
Trust Series Ace 2005-HE7; AURORA)	
LOAN SERVICES; NATIONAL CITY BANK;)	
Homecomings FINANCIAL, f/k/a)	
Homecomings Financial Network,)	
Inc.; EMC MORTGAGE CORPORATION;)	
WELLS FARGO HOME MORTGAGE, A)	
Division of Wells Fargo Bank,)	
N.A., d/b/a AMERICA'S SERVICING)	
COMPANY; U.S. BANCORP, A Division)	
of U.S. Bank, N.A., as Trustee)	
for BSABS 2006-IM1; FIRST AMERICAN)	
LOANSTAR TRUSTEE SERVICES; QUALITY)	
LOAN SERVICE CORPORATION;)	
RESIDENTIAL SERVICES VALIDATED)	
PUBLICATIONS; MORTGAGE ELECTRONIC)	
REGISTRATION SYSTEMS, INC.; HOME)	
CAPITAL FUNDING; MANDALAY)	
MORTGAGE; ETS SERVICES,)	
)	
Appellees.)	
_____)	

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

Filed - October 20, 2010

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 Appeal from the United States Bankruptcy Court
2 for the Central District of California

3 Hon. Ernest M. Robles, U.S. Bankruptcy Judge, Presiding

4
5 Appearances: John Lynner Palmer, Bucher & Palmer, L.L.P. argued
6 for Appellant Edgart F. Gonzalez

7 Jonathan M. Zak, Wright, Finaly & Zak, LLP argued
8 for Appellees First American Loanstar Trustee
9 Services LLC and Residential Services Validated
10 Publications

11 Chaise R. Biven, Severson & Werson argued for
12 Appellees Homecomings Financial, LLC and FICA
13 Homecomings Financial Network, Inc.

14 Sun-Min Christopher Yoo, Adorno Yoss Alvarado &
15 Smith argued for Appellees EMC Mortgage Corporation
16 and Mortgage Electronic Registration Systems, Inc.

17 Steven M. Dailey, Kutak Rock, LLP argued for
18 Appellee HSBC Bank USA National Association as
19 Trustee for Home Equity Loan Trust Series Ace 2005-
20 HE7

21 Brain Paino, Pite Duncan, LLP argued for Appellee
22 Aurora Loan Services, LLC

23
24 Before: PAPPAS, DUNN and NOVACK,² Bankruptcy Judges³

25 Chapter 7 debtor Edgart F. Gonzalez ("Debtor") appeals the
26 decisions of the bankruptcy court dismissing all defendants as
27 principals and agents from an adversary proceeding prosecuted by
28 Debtor challenging the secured claims of those defendants. We
AFFIRM.

29
30 ² The Honorable Charles D. Novack, United States Bankruptcy
31 Judge for the Northern District of California, sitting by
32 designation.

33
34 ³ Unless otherwise indicated, all chapter, section and rule
35 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
36 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
37 The Federal Rules of Civil Procedure are referred to as Civil
38 Rules.

1 **FACTS**

2 This appeal involves three parcels of real estate acquired by
3 Debtor prepetition: the "Greenbriar" property, the "Terra Vista"
4 property, and the "Wave" property.

5 On or about August 10, 2005, Debtor obtained two loans from
6 Home Capital Funding and secured them with first and second deeds
7 of trust on Terra Vista. Mortgage Electronic Registration
8 Systems, Inc. ("MERS") was designated as beneficiary and Nominee.
9 EMC Mortgage Corporation ("EMC") would succeed as holder of the
10 first trust deed and U.S. Bank as holder of the second trust deed.

11 On or about August 12, 2005, Debtor obtained two loans from
12 Mandalay Mortgage, LLC ("Mandalay"), and secured the loans with
13 deeds of trust on Greenbriar. The first trust deed identified
14 Mandalay as the Lender and MERS as beneficiary and Nominee. HSBC
15 Bank USA National Association, as trustee for Home Equity Loan
16 Trust Series ACE 2005-HE7, succeeded as holder of the two deeds of
17 trust.

18 On or about March 21, 2006, Debtor obtained a loan from
19 Homecomings Financial ("Homecomings") and secured this loan with a
20 first deed of trust on Wave. MERS is the designated beneficiary
21 and Nominee. At some point not clear in the record, but before
22 the filing of the bankruptcy petition, Debtor obtained a loan from
23 National City Bank and secured that loan with a second deed of
24 trust on Wave.

25 On May 14 and 16, 2008, Debtor sent notices of rescission
26 concerning the notes and deeds of trust to Mandalay, HSBC and
27 associated parties regarding Greenbriar; to EMC, U.S. Bank and
28 associated parties regarding Terra Vista; and to Homecomings,

1 National City Bank and associated parties regarding Wave. In all
2 three sets of notices, Debtor asserted a right to rescind the
3 loans under the Truth in Lending Act, 15 U.S.C. § 1635, and
4 Regulation Z § 226.33. The notices demanded return within twenty
5 days of all payments made by Debtor to the various lenders on all
6 of the notes so that Debtor could determine the exact amount
7 needed for tender.

8 Debtor filed his chapter 7 petition, acting pro se,⁴ on
9 May 19, 2008. On his Schedule A, he listed his ownership of
10 Greenbriar, Terre Vista and Wave. He did not indicate there was
11 any equity in any of the three properties.

12 The Stay Relief Motions

13 On June 3, 2008, MERS, as Nominee of EMC, filed for relief
14 from stay to allow MERS to foreclose on Terra Vista, alleging that
15 Debtor had defaulted on payments under the first deed of trust as
16 of February 13, 2008. HSBC filed for relief from stay on June 5,
17 2008, to allow HSBC to foreclose on Greenbriar, alleging that
18 Debtor had defaulted on payments due under the first deed of trust
19 as of January 30, 2008. On July 22, 2008, Aurora Loan Services
20 LLC, as servicing agent for MERS, filed for relief from stay to
21 allow it to foreclose on Wave, alleging that Debtor had defaulted
22 on payments under the first deed of trust as of June 1, 2008.

23 On June 24, 2008, apparently anticipating a motion for stay
24 relief as to the Wave property, Debtor filed an opposition to the
25 three motions for relief from stay, arguing that the parties were
26

27
28 ⁴ Jerome Edelman would substitute in as attorney in the
bankruptcy case on July 24, 2008.

1 engaged in discovery related to preparation for an adversary
2 proceeding and that the properties were his only source of income.

3 The bankruptcy court held a hearing on the MERS motion
4 regarding Terre Vista on July 8, 2008, and granted relief as to
5 both Terre Vista and Greenbriar by orders entered on July 21,
6 2008. During that hearing, Debtor first asserted his intent to
7 file an adversary proceeding against the lenders to oppose their
8 secured claims on the three properties based on his rights under
9 TILA. Debtor's motion to reconsider was denied by the bankruptcy
10 court on July 31, 2008. However, in the Memorandum issued
11 regarding the reconsideration motion, the court noted that
12 granting relief was without prejudice to the right of Debtor to
13 assert his TILA claims in an adversary proceeding. The court
14 granted Aurora's motion for relief as to Wave on October 3, 2008.

15 Debtor had attempted to appeal these three orders in the
16 current appeal. After Debtor complied with the Panel's order to
17 submit separate appeals of each order, the Panel dismissed these
18 appeals as untimely on May 12, 2010. BAP Nos. 10-1075/1076/1079.

19 The Adversary Proceeding and Motions to Dismiss

20 On September 16, 2008, Debtor, still acting pro se,⁵ filed a
21 Verified Complaint Objecting to Secured Claims against all the
22 lenders listed in this appeal as appellees (except MERS, which was
23 added in the First Amended Complaint). The complaint was amended
24 on January 21, 2009. In the First Amended Complaint, Debtor

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27 ⁵ Although Edelman had substituted in as Debtor's attorney
28 in the main bankruptcy case, he did not appear as his counsel in
this adversary proceeding until April 2, 2009.

1 asserts a variety of claims against the lenders⁶ for:

2 (1) misrepresentation; (2) breach of contract; (3) violation of
3 California law; (4-5) failure to timely provide the TILA
4 disclosure statements and notices of right to rescind; (6) failure
5 to disclose broker fees as finance charges; (7) failure to
6 disclose appraisal fee as finance charges; (8) unreasonable and
7 non-bonafide document preparation charges; (9-10) unreasonable and
8 non-bonafide recording and title charges; (11-12) lenders
9 inaccurate material disclosures; (13) failure to honor Debtor's
10 rescission notice; (14-17) fraud for standing and/or subject-
11 matter jurisdiction on: relief from the automatic stay, the
12 foreclosure, the trustee sale and eviction proceedings;
13 (18) preclusion of trustee sale.

14 On October 24, 2008, several of the defendants moved to
15 dismiss the complaint and adversary proceeding. In these motions,
16 Homecomings argued that Debtor did not have standing, that the
17 bankruptcy court did not have subject matter jurisdiction on
18 several claims, that Debtor failed to state a claim as required by
19 Civil Rule 12(b)(6), and that service of process was insufficient.
20 National City Bank and Aurora also moved to dismiss on the same
21 grounds as Homecomings.

22 HSBC and Wells Fargo Home Mortgage d/b/a America's Servicing
23 Company ("ASC") moved to dismiss on October 24, arguing that
24 Debtor lacked standing; that Debtor lacked the ability to tender
25 the funds he borrowed back to the lenders, which they alleged, is
26 a complete bar to his TILA claims; that Debtor's TILA claims were

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28 ⁶ Not all claims were asserted against all defendants.

1 time-barred by the three-year statute of limitations; and that
2 Debtor's "holder of the note" claims failed because lenders under
3 California law are not required to produce the note before
4 foreclosing on a deed of trust. U.S. Bank filed its motion to
5 dismiss on November 12, 2008, based on the same grounds as HSBC.

6 Debtor responded to all these motions to dismiss on
7 December 8, 2008. In his response, Debtor requested a 30-day
8 leave to amend the complaint so he could attempt to cure certain
9 deficiencies in his complaint as suggested in the motions to
10 dismiss, including pleading with particularity his bases for his
11 standing.

12 Residential Services Validation Publication ("RSVP") answered
13 the original complaint on December 15, 2008, and moved to dismiss
14 on January 16, 2009, asserting that it was only included in the
15 complaint because it was the agent conducting the foreclosure sale
16 for Loanstar Services; no monetary relief was sought against RSVP.
17 The bankruptcy court granted RSVP's motion to shorten time to
18 allow its motion to be heard with the other dismissal motions on
19 January 21, 2009.

20 On or about January 14, 2009, Debtor filed an amended
21 Schedule C in his bankruptcy case in which he asserted an
22 exemption as to any recovery for the claims in the Complaint in
23 the amount of \$1,000.00.

24 The bankruptcy court held a hearing in the adversary
25 proceeding on all motions to dismiss filed to that date on January
26 21, 2009. Counsel for HSBC, Homecomings and RSVP were present,
27 and Debtor appeared pro se. After hearing from the parties, the
28 bankruptcy court took the issues under submission. Although it is

1 not clear in the hearing transcript, it appears that the court
2 invited supplemental briefing on the question of Debtor's
3 standing. On February 20, 2009, Homecomings, National City and
4 Aurora filed a supplemental brief, generally arguing that the
5 chapter 7 trustee, and not Debtor, had standing to assert the
6 claims in the complaint. HSBC, U.S. Bank and ASC also filed a
7 supplemental brief on that day, arguing the same. Debtor
8 responded that his amended schedule C filed in the bankruptcy case
9 had cured the standing issue, in that he now held a personal
10 interest in any recovery on the claims.

11 On June 3, 2009, the bankruptcy court entered its memorandum
12 decision regarding Debtor's standing to bring the adversary
13 proceeding. The court concluded that, by amending schedule C to
14 include an exemption of \$1,000 for any proceeds of this adversary
15 proceeding, Debtor had standing to pursue recovery against the
16 defendants in the adversary proceeding. No party appealed this
17 decision.

18 The bankruptcy court addressed the motions to dismiss in two
19 Memoranda, both filed on June 3, 2009. The first addressed the
20 motion to dismiss of HSBC, U.S. Bank and ASC, together with the
21 motion of RSVP. These parties are all interested in Greenbriar.
22 The court made these rulings and conclusions:

23 - None of Debtor's claims were asserted against ASC, so it
24 was dismissed as a defendant pursuant to Civil Rule 12(b)(6).

25 - Count 13 asserts that HSBC and U.S. Bank failed to honor
26 Debtor's rescission notice in violation of TILA and California
27 law. The bankruptcy court determined that all TILA claims failed
28

1 because Debtor had not shown he was able to tender the monies
2 loaned to the lenders.

3 - Counts 14-17 were dismissed as to HSBC, because the court
4 concluded that HSBC was a holder in due course based on an
5 assignment of the deed of trust in the evidence.

6 - Count 18 generally attempts to preclude sales of the
7 property by the lenders, and eviction proceedings against Debtor.
8 The bankruptcy court dismissed these claims as to HSBC because the
9 court had previously granted stay relief in its favor and, in that
10 process, had found that HSBC had made the requisite showing
11 regarding its interest in Greenbriar. It dismissed as to U.S.
12 Bank because U.S. Bank had never taken any action against Debtor,
13 and there was thus no sale or eviction to preclude.

14 - The bankruptcy court concluded that Debtor's original
15 complaint had not asserted any wrongdoing by RSVP. Because RSVP
16 had answered the complaint, Debtor could not amend the complaint
17 with respect to RSVP without leave of the court, which Debtor
18 never requested. Consequently, the court dismissed the claims
19 against RSVP in the amended complaint.

20 In short, in its first Memorandum, the bankruptcy court
21 decided that the motions to dismiss of HSBC, U.S. Bank, ASC and
22 RSVP should all be granted.

23 The second Memorandum dealt with the motions to dismiss of
24 Homecomings, Aurora and National City Bank. These three lenders
25 were all interested in the Wave property. The bankruptcy court
26 made these rulings and conclusions:

27 - Dismissal of Debtor's claims against these parties was
28 warranted because of insufficient service of process. Debtor had

1 not served the complaint or amended complaint on the defendants'
2 respective officers or agents designated for service of process,
3 and had not demonstrated good cause for this failure. The
4 bankruptcy court thus dismissed the complaint under Civil Rule
5 4(h)(1) and (m).

6 - Even if Debtor had properly served the defendants,
7 dismissal would still have been warranted for failure to state a
8 claim upon which relief can be granted because:

9 - as to Claim 1 for misrepresentation, Debtor failed to
10 plead fraud with particularity, as required by Civil Rule 9(b).
11 Debtor also failed to prove that any misrepresentations were made
12 by these defendants with knowledge of falsity, or that he
13 justifiably relied on any representations.

14 - as to Claim 2 for breach of contract, Debtor failed to
15 address the required elements for breach of contract under
16 California law.

17 - as to Claim 3 for violation of California law, Debtor
18 failed to cite which California law the defendants had allegedly
19 violated.

20 - as to Claims 4-13, alleging TILA violations, since
21 TILA only applies to a a loan on the borrower's principal
22 dwelling, and because Debtor never established Wave was his
23 principal dwelling, Debtor's TILA claims failed.

24 - as to Claims 14-17 for fraud, this claim was only
25 asserted against Aurora, and Debtor had not established that
26 Aurora committed fraud because it was authorized to act on behalf
27 of Homecomings. There also was no allegation that Aurora ever
28 held itself out as a holder in due course.

1 - at to Claim 18 for preclusion of sale, since Debtor
2 could not prevail on the TILA claims, and Aurora was authorized to
3 act on behalf of Homecomings, there was no basis to preclude the
4 lender's sale of the property.

5 In summary, in the second Memorandum, the bankruptcy court
6 concluded that Debtor's complaint as to Homecomings, National City
7 and Aurora should be dismissed.

8 Debtor filed a motion for default judgment on June 30, 2009
9 against EMC, MERS and Home Capital Funding. Clerk's defaults were
10 entered on July 13, 2009. But before entering default judgments,
11 the bankruptcy court directed Debtor to submit a brief in support
12 of his motion. He did, and in the brief, Debtor argued that TILA
13 violations occurred in respect to Greenbriar, Terre Vista and
14 Wave. Specifically, under TILA, Debtor argued he had rescinded
15 the loans, and he explained, he was entitled to recover damages
16 from these lenders equal to all payments made on the loans, a
17 refund of all finance charges, plus RICO and emotional distress
18 damages.

19 At some point in time, and for reasons not clear in the
20 record, Mandalay and ETS Services obtained an Order to Show Cause
21 from the bankruptcy court directing Debtor to show cause why they
22 should not be dismissed from the adversary proceedings pursuant to
23 Civil Rule 4(m). On August 18, 2009, the bankruptcy court held a
24 hearing on the OSC. The court dismissed Mandalay and ETS.

25 The bankruptcy court conducted a "prove-up" hearing on
26 Debtor's motions for default judgment on October 21, 2009. The
27 court took the motions under submission, and on November 12, 2009,
28 it entered a Memorandum Decision denying the motions for default

1 judgment. Since the court had determined that Debtor's TILA
2 claims against the various appearing defendants were without
3 merit, the bankruptcy court concluded it would be incongruous and
4 unfair to allow Debtor to prevail against the non-appearing,
5 defaulting defendants on a legal theory already rejected by the
6 court in the same action. The court decided to dismiss the
7 complaint with respect to MERS, EMC and Home Capital Funding.

8 The other defendants also filed motions to dismiss.
9 Loanstar's motion, filed on October 12, 2009, alleged that it was
10 merely a foreclosure trustee, and that no claims had been asserted
11 by Debtor against it independently of RSVP and HSBC. The
12 bankruptcy court agreed that since Loanstar could only have
13 derivative liability based upon its relationship with HSBC or
14 RSVP, and the issues related to the liability of those parties had
15 already been decided against Debtor, the court dismissed Loanstar
16 from the adversary proceeding on December 18, 2009. Similarly,
17 Quality Loan Service Corporation ("QLS") moved to dismiss the
18 complaint because it only acted as foreclosure agent on Terre
19 Vista. Again, ruling that QLS's liability, if any, was derivative
20 of EMC's, and since EMC had been dismissed, the bankruptcy court
21 also dismissed claims against QLS.

22 With this last decision regarding QLS on January 28, 2010,
23 all defendants listed in Debtor's amended complaint had been
24 dismissed. Debtor filed a timely appeal of the various orders to
25 dismiss, and the interlocutory orders which merged into the final
26 judgment, on February 11, 2010.

1 illogical, implausible, or without support in inferences that may
2 be drawn from the facts in the record, then the bankruptcy court
3 has abused its discretion. Id.

4 5 DISCUSSION

6 I.

7 Debtor's claims based on a right to 8 rescission under TILA are meritless.

9 Debtor's claims against several of the defendants were
10 dismissed by the bankruptcy court under Civil Rule 12(b)(6), which
11 provides for dismissal for "failure to state a claim upon which
12 relief can be granted." The Ninth Circuit has instructed that, in
13 determining a Civil Rule 12(b)(6) dismissal, the allegations in
14 the complaint are construed in the light most favorable to the
15 plaintiff." Blyler v. Hemmeter (In re Hemmeter), 242 F.3d 1186,
16 1189 (9th Cir. 2001). The Supreme Court has spoken several times
17 recently to the effect that a claim survives Civil Rule 12(b)(6)
18 challenge when it is "plausible." See, e.g., Bell Atlantic Corp.
19 v. Twombly, 550 U.S. 544 (2007). We take it as axiomatic that a
20 claim cannot be plausible when it has no legal basis. A dismissal
21 under Civil Rule 12(b)(6) may be based on the lack of a cognizable
22 legal theory or on the absence of sufficient facts alleged under a
23 cognizable legal theory. Johnson v. Riverside Healthcare Sys.,
24 534 F.3d 1116, 1121 (9th Cir. 2008).

25 Debtor based the claims he asserted in this adversary
26 proceeding against his lenders, either directly or indirectly, on
27 his alleged rights to rescind the loan agreements under the Truth
28 in Lending Act, 15 U.S.C. § 1635, which provides:

1 a) Disclosure of obligor's right to rescind. Except as
2 otherwise provided in this section, in the case of any
3 consumer credit transaction . . .in which a security
4 interest, including any such interest arising by
5 operation of law, is or will be retained or acquired in
6 any property which is used as the principal dwelling of
7 the person to whom credit is extended, the obligor shall
8 have the right to rescind the transaction until midnight
9 of the third business day following the consummation of
10 the transaction or the delivery of the information and
11 rescission forms required under this section together
12 with a statement containing the material disclosures
13 required under this title [15 USCS §§ 1601 et seq.],
14 whichever is later, by notifying the creditor, in
15 accordance with regulations of the Board, of his
16 intention to do so.

17 (Emphasis added.)

18 Code of Federal Regulations 12 C.F.R. § 226.23 (Regulation Z)
19 implements the statutory right of rescission:

20 Right of rescission. (a) Consumer's right to rescind.
21 (1) In a credit transaction in which a security interest
22 is or will be retained or acquired in a consumer's
23 principal dwelling, each consumer whose ownership
24 interest is or will be subject to the security interest
25 shall have the right to rescind the transaction, except
26 for transactions described in paragraph (f) of this
27 section.

28 (Emphasis added.)

As a threshold matter, then, to assert a claim for a
violation of his right to rescission of the loans made to him by
the lenders under TILA, Debtor must establish that those loans are
secured by a security interest in his principal dwelling. The
bankruptcy court noted that Debtor had not alleged that any of the
three properties involved in this action were Debtor's principal
dwelling. Quite to the contrary,

[T]he court has only expressly found that the Greenbriar
Property is not Debtor's principal dwelling. Memorandum
of Decision re Motions to Dismiss Filed by Homecomings,
Aurora and National City Bank at 9. The same finding
would apply to the other two properties as well, since
the Debtor also did not allege in the Complaint that
either property is Debtor's principal dwelling and did

1 not list either of them as his address in his bankruptcy
2 petition.

3 Memorandum of Decision Re: Motions for Default Judgments at 6 n.4.
4 The court also referenced Debtor's bankruptcy petition, in which
5 he listed his address as 1602 W. 6th St., Los Angeles, California
6 (which is not the address of any of the three properties in this
7 appeal), and his Statement of Financial Affairs, where Debtor did
8 not list any other addresses at which he had resided other than
9 the 6th Street Property. In addition, as the bankruptcy court
10 observed, neither Debtor's complaint nor amended complaint alleged
11 that any of the three properties was a principal residence. Id.
12 In short, based upon the statements and pleadings filed by Debtor
13 in the bankruptcy court, the bankruptcy court ruled that none of
14 the three properties involved in this litigation was his principal
15 dwelling, and consequently, the bankruptcy court "agrees with
16 [appellees] that Debtor's TILA claims must fall."

17 To support his claims, Debtor states in his brief that
18 Greenbriar is his principal residence. Debtor's Op. Br. at 21.
19 Of course, one necessary implication of this statement is that
20 Debtor concedes that Terre Vista and Wave are not his principal
21 residence and, consequently, that the loans secured by those two
22 properties are not subject to rescission under TILA. In addition,
23 we note that Debtor made this assertion that Greenbriar was his
24 principal residence in passing, and did not challenge in his brief
25 that the bankruptcy court had ruled that none of the three
26 properties in this appeal was his principal residence.⁷

27 ⁷ After oral argument before the Panel and submission, on
28 (continued...)

1 But even as to Greenbriar, Debtor may not now assert that it
2 is his principal residence, because he did not plead that alleged
3 fact in his complaint, and he did not make that argument before
4 the bankruptcy court. Indeed, Debtor had multiple opportunities
5 to raise the issue and demonstrate that he lived at Greenbriar.
6 The bankruptcy court's statement that none of the properties was a
7 principal residence was contained in the Memorandum of Decision re
8 Motions for Default Judgment, entered November 12, 2009. Debtor
9 filed four separate motions for reconsideration of that memorandum
10 order and submitted over 120 pages of argument. At no time,
11

12 ⁷(...continued)

13 September 27, 2010, counsel for Debtor filed a self-described
14 "post-argument letter brief" with the Panel. The brief asserts
15 that on December 7, 2009, Debtor filed an Amended Statement of
16 Financial Affairs with the bankruptcy court in which he "stated
17 that the Greenbriar Property was his primary dwelling from
18 July 20, 2001, up to or around January 20, 2009, at which time
19 Appellee, HSBC, evicted Appellant and his family. Accordingly,
20 TILA would apply to this property."

21 First, additional briefs may not be filed except with leave
22 of the Panel, which Debtor has not requested and we have not
23 granted. Rule 8009(a)(3); FED. R. APP. P. 28(c). Second, the
24 Amended SOFA is not in the excerpts of record, and the Panel is
25 not obligated to consider any document not presented in the
26 excerpts. In re Kritt, 190 B.R. 382, 386-87 (9th Cir. BAP 1995).
27 Third, this argument was, as noted above, not raised in the
28 bankruptcy court, even though Debtor filed four motions to
reconsider the order in which the court ruled that none of the
properties were primary dwellings of Debtor, and Debtor never
challenged the court's ruling in those four motions or at any time
thereafter. O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert,
Inc.), 887 F.2d 955, 957 (9th Cir. 1989)(appellate panel will not
consider arguments not properly presented in the trial court).
Fourth, Debtor did not raise this argument in his opening brief in
this appeal (or, in fact, at any time before submission after
hearing). Martinez-Serrano v. INS, 94 F.3d 1256, 1259 (9th Cir.
1996) (issues not briefed and not purely questions of law are
waived).

For all these reasons, we will not disturb the bankruptcy
court's ruling that, because the record does not show that the
loans in question are secured by Debtor's principal dwelling, his
TILA claims for rescission necessarily fail as a matter of law.

1 however, did Debtor challenge in any of these motions the
2 bankruptcy court's conclusion that none of the properties was
3 Debtor's principal dwelling as required for a claim under TILA.
4 Having failed to raise such argument before the bankruptcy court,
5 we are under no obligation to review this aspect of the court's
6 decision. In re E.R. Fegert, Inc.), 887 F.2d at 957 ("The rule in
7 this circuit is that appellate courts will not consider arguments
8 that are not 'properly raise[d]' in the trial courts."). We
9 therefore agree with the bankruptcy court that, because the record
10 does not show that the loans in question are secured by Debtor's
11 principal dwelling, his TILA claims for rescission necessarily
12 fail as a matter of law, and were properly dismissed under Civil
13 Rule 12(b)(6).

14 Moreover, even were we to consider Debtor's TILA rescission
15 claims, we conclude that the bankruptcy court correctly dismissed
16 the claims because Debtor did not show he could tender the
17 proceeds of the loans made to him to the lenders as required under
18 the statute.

19 In the Ninth Circuit, a claim for rescission may be dismissed
20 whenever it is clear that a borrower is unable to effectuate a
21 rescission by returning the loan proceeds to the lender. Yamamoto
22 v. Bank of New York, 329 F.3d 1167 (9th Cir. 2003). As the
23 bankruptcy court noted, in Yamamoto, the court instructs:

24 As a rescission under § 1635(b) is an ongoing process
25 consisting of a number of steps, there is no reason why
26 a court that may alter the sequence of procedures after
27 deciding that rescission is warranted, may not do so
28 before deciding that rescission is warranted when it
finds that . . . rescission still could not be enforced
because the borrower cannot comply with the borrower's
rescission obligations no matter what.

1 Id. at 1173; see also Am. Mortg. Network Inc. v. Shelton, 486 F.3d
2 815, 821 (4th Cir. 2007) (denial of rescission affirmed as proper
3 in a case where borrowers showed no ability to tender the loan
4 proceeds, and borrowers had made no payments of principal or
5 accrued interest on the loan for some time); Garza v. Am. Home
6 Mortg., 2009 WL 188604 *5 (E.D. Cal. 2009) ("Rescission is an
7 empty remedy without [borrower's] ability to pay back what she has
8 received."); Guerrero v. Citi Residential Lending, Inc., 2009 WL
9 9269973 *8 (E.D. Cal. 2009) ("The absence of . . . a tender of
10 loan proceeds dooms plaintiff's TILA rescission claim to warrant
11 its dismissal.").

12 In this appeal, Debtor claims, without offering any proof of
13 the basis for his position, that he had the ability to tender the
14 loan proceeds he had received when he sent his "rescission
15 notices" to the lenders, and had offered to tender them. Debtor's
16 Open. Br. at 26. However, this allegation is inconsistent with
17 the record, in that Debtor's rescission letters sent to the
18 lenders made no offer of tender, but instead merely indicated that
19 Debtor was prepared to discuss a tender after the loan was
20 rescinded and then only "should it arise."

21 In assessing his suggestion that he could make a timely
22 tender to the lenders, the bankruptcy court examined Debtor's
23 schedules, which indicate that, at the time of his bankruptcy,
24 Debtor's liabilities exceeded his assets by more than \$800,000;
25 his real estate was fully encumbered; his cash on hand was \$765
26 [three days after he sent the rescission letters], and his monthly
27 expenses exceeded his income by over \$3,000. Debtor's allegation
28 that he could tender is even more tenuous when the Panel considers

1 that the total funds advanced by lenders for the three properties
2 exceeded \$2 million!

3 In short, Debtor presented no evidence to the bankruptcy
4 court to support his argument that he had the funds, or even ready
5 access to the funds, necessary to satisfy his TILA obligation to
6 tender the loan proceeds to the lenders. The bankruptcy court
7 concluded that, based on the record before it, Debtor could not
8 tender the funds borrowed and his TILA claims fail, and we find no
9 error in that conclusion. In short, because he could not show the
10 ability to tender, Debtor failed to state a claim against the
11 lenders under Civil Rule 12(b)(6).

12 Besides the HSBC group and Homecomings group, the bankruptcy
13 court later dismissed the complaint under Civil Rule 12(b)(6) as
14 to EMC, MERS, and Home Capital Funding. Debtor sought entry of
15 default judgments against them on July 13, 2009, and clerk's
16 defaults were entered on July 13, 2009. On August 21, 2009, the
17 court set a hearing and ordered Debtor to provide a prove-up brief
18 setting forth the law supporting entry of default judgment.

19 Debtor's prove-up sought a default judgment that he is
20 entitled to damages "given that [Debtor] has rescinded the loans
21 based on TILA violations referenced above." Therefore, his
22 default judgment motion is based on his TILA rescission claims,
23 which the bankruptcy court had already rejected.

24 It is, of course, black letter law that entry of default does
25 not entitle a plaintiff to entry of default judgment. Civil
26 Rule 55(b)(2), incorporated by Rules 7055 and 9014. Default
27 judgment is a matter of discretion in which the court is entitled
28 to consider, inter alia, "the merits of the substantive claim

1 [and] the sufficiency of the complaint." All Points Capital Corp.
2 v. Meyer (In re Meyer), 373 B.R. 84, 88 (9th Cir. BAP 2007). If
3 the plaintiff is not entitled to the relief requested, the court
4 should not enter default judgment and "may even enter judgment in
5 favor of the defaulted defendant." Id. at 89.

6 Here, the bankruptcy court had already rejected Debtor's TILA
7 rescission claims, upon which he based his default judgment
8 motion. Consequently, the court did not abuse its discretion in
9 denying entry of a default judgment.

10 But the court went further and dismissed under Civil Rule
11 12(b)(6). The court reached this decision based on the theory of
12 similarly situated defendants. The Ninth Circuit has held that in
13 the case of multiple defendants, it would be "incongruous and
14 unfair" to allow a plaintiff to prevail against defaulting
15 defendants "on a legal theory rejected by the bankruptcy court
16 with respect to the Answering Defendants in the same action."
17 In re First T.D. & Investment, Inc., 253 F.3d 520, 532 (9th Cir.
18 2001) (citing Frow v. de la Vega, 82 U.S. 552 (1872)). According
19 to the First T.D. court, "it follows that if an action against the
20 answering defendants is decided in their favor, then the action
21 should be dismissed against both answering and defaulting
22 defendants." In re First TD, 253 F.3d at 532.

23 Debtor asserted the TILA rescission claims against HSBC group
24 and Household group, and the court rejected them and dismissed
25 them under Civil Rule 12(b)(6). He asserted the same claims
26 against EMC, MERS and Home Capital Funding, and those claims too
27 must fall. Under the case law of this circuit and the theory of
28

1 similarly situated defendants, the bankruptcy court did not err in
2 dismissing them under Civil Rule 12(b)(6).

3 II.

4 **Debtor's argument that the lenders did not**
5 **have the right to enforce the notes and deeds**
6 **of trust lacks merit.**

7 In his brief, Debtor states that "the [bankruptcy] court
8 erred in granting the motions for relief from stay because the
9 Movants did not have standing to enforce the note and deed of
10 trust, they failed to join the real parties in interest, and they
11 either failed to produce or authenticate the notes. Therefore,
12 even though the appellate panel has declined to hear an appeal of
13 the motions, it should reinstate Debtor's complaint against the
14 moving lenders and remand to the bankruptcy court for further
15 proceedings. Debtor's Open. Br. at 16-17. Debtor's argument
16 fails for at least two reasons.

17 First, by its terms, Debtor's contention constitutes an
18 improper collateral attack on the BAP's orders dismissing Debtor's
19 appeals from the three stay relief orders entered in the
20 bankruptcy court. Debtor did not seek rehearing by the Panel
21 concerning dismissal of those appeals, nor did he appeal the
22 orders to the Ninth Circuit. Consequently, our decisions
23 dismissing those appeals constitute the law of the case in this
24 appeal, and we will not revisit them. Parsons v. Plotkin (In re
Pac. Land Sales), 187 B.R. 302, 308-09 (9th Cir. BAP 1995).⁸

25 ⁸ Briefly restating the Panel's position concerning those
26 appeals, orders granting relief from stay are final orders.
27 Groshong v. Sapp (In re MILA, Inc.), 423 B.R. 537, 542 (9th Cir.
28 BAP 2010). As such, they must be appealed within the time
prescribed in Rule 8002(a). The bankruptcy court's orders

(continued...)

1 Secondly, Debtor argues that an analysis of the lenders'
2 standing is implicated in his allegations in Claims 14-17 that the
3 lenders "committed fraud in that at the beginning of the
4 foreclosure of the properties, the movants and trustee agents did
5 not own and most likely does not now, own the Deeds of Trust and
6 the promissory notes, and not owned or held in due course any
7 security agreement, nor did the movants and trustees allege facts
8 in support thereof." But, simply stated, there is no requirement
9 in California law that the initiator of a nonjudicial foreclosure
10 be the owner or holder of the note or trust deed. Cal. Civ.
11 Code § 2924(a)(1) provides that "the trustee, mortgagee, or
12 beneficiary, or any of their authorized agents, may commence the
13 nonjudicial foreclosure process by recording and serving a notice
14 of default." Indeed, there is not even a requirement that the
15 note be produced in the foreclosure proceeding. Gambooa v.
16 Trustee Corp., 2009 WL 656285 *4 (N.D. Cal. 2009) ("the statutory
17 framework governing nonjudicial foreclosures contains no
18 requirement that the lender produce the original note"); San Diego
19 Home Solutions, Inc. v. ReconTrust Co., 2008 WL 5209972 *2 (S.D.
20 Cal. 2008) ("California law does not require that the original
21 note be in the possession of the party initiating nonjudicial
22 foreclosure."). Nowhere does Debtor allege that any of the

23 ⁸(...continued)
24 granting relief from the stay were entered on July 16, 2008. A
25 timely appeal must have been filed by July 28, 2008. Instead,
26 Debtor filed the appeals on February 11, 2010. A timely notice of
27 appeal is mandatory and jurisdictional. Bowles v. Russell, 551
28 U.S. 205, 209 (2007); Atchison, Topeka & Santa Fe Ry. v. Cal.
State Bd. of Equalization, 102 F.3d 425, 427 (9th Cir. 1996). We
therefore have no authority to review the Panel's decision to
dismiss the appeals, nor to review the bankruptcy court's orders
granting relief from stay.

1 lenders in this appeal were not either a trustee, a mortgagee, a
2 beneficiary, or an authorized agent of the owner or holder of the
3 note.

4 Finally, attached to the various stay relief motions filed in
5 the bankruptcy court were copies of documents showing the
6 defendants' authority as holders, owners, or agents to initiate a
7 foreclosure proceeding. Consequently, in the adversary
8 proceeding, the bankruptcy court could conclude that there was no
9 false representation that those defendants had authority to
10 initiate foreclosure proceedings.⁹ Since the record before the
11 bankruptcy court was that the defendants were either holders,
12 owners, or agents, there was no false representation that the
13 lenders had authority to foreclose. Without a false
14 representation, there can be no fraud under California law. Vess
15 v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1105 (9th Cir. 2003)
16 (citing Hackethal v. Nat'l Cas. Co., 189 Cal. App. 3d 1102, 1105
17 (Cal. Ct. App. 1987) (discussing the elements of fraud in
18 California law: false representation, knowledge of its falsity,
19 intent to defraud, justifiable reliance, and damages). Therefore,
20 the fraud charges at the root of Claims 14-17 lack any support in
21 law, and thus they fail to state a claim for relief.

22 The bankruptcy court correctly concluded that Debtor failed
23 to state a claim on which relief could be granted based upon any
24 alleged lack of standing, and it properly dismissed Debtor's
25 claims under Civil Rule 12(b)(6).

27 ⁹ The bankruptcy court would later specifically find that
28 there was no such false representation, at least as to HSBC and
the Greenbriar property.

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III.

The bankruptcy court did not abuse its discretion in dismissing Aurora, Homecomings and National City under Civil Rule 4(m).¹⁰

The bankruptcy court ruled that Debtor had not properly served process on Aurora, Homecomings and National in the adversary proceeding as required by Civil Rule 4(h),¹¹ and as a result, the 120-day time limit for achieving good service set forth in Civil Rule 4(m) had expired, and that the action should

¹⁰ Debtor injected some confusion into this appeal with a misstatement in his opening brief: "One of the grounds the court used to dismiss Homecomings, Aurora, National and MERS was insufficient service of process [citing to the Memorandum of Decision Re Motions to Dismiss Filed by Homecomings, Aurora and National City at p. 334 of the excerpts]." Debtor's Op. Br. at 27. This prompted a response in the EMC/MERS brief that MERS was never included in the motion or order dismissing Homecomings, Aurora and National for insufficient service. EMC/MERS Br. at 8. Apparently ignoring the MERS statement, Debtor in his Reply Br. to EMC/MERS stated that he did effect timely service on the MERS President. Debtor's Reply Br. to EMC/MERS at 1.

Whether there was timely and effective service on MERS is, as MERS correctly argues, irrelevant. MERS was not dismissed under Civil Rule 4(m) and was never mentioned, directly or indirectly, by the bankruptcy court in its dismissal of the three parties under Rule 4(m). As discussed above, MERS was dismissed under Civil Rule 12(b)(6) as a similarly situated defendant to the HSBC group. Debtor's statement in his opening brief regarding MERS was incorrect. And as discussed *infra*, Debtor never argued that he timely and effectively served Aurora, Homecomings and National; his only defense in this appeal to ineffective service on those three parties is that those parties waived service.

¹¹ The bankruptcy court and parties all discuss application of the Civil Rules and state laws specifying the requirements for proper personal service on corporate defendants in legal actions. However, here it is undisputed that Debtor never attempted to have the corporations personally served; all purported service was accomplished by first-class mail. While Rule 7004(a) effectively endorses personal service under Civil Rule 4(h), mail service on a corporate defendant in adversary proceedings is governed by Rule 7004(3). However, since all of the relevant rules and statutes discussed by the parties and bankruptcy court require service, whether in-person or via mail, to be directed to a proper corporate agent, any failure to identify the correct governing rule is harmless.

1 be dismissed. While Debtor disagrees, the bankruptcy court did
2 not abuse its discretion in reaching this conclusion.

3 Civil Rule 4(m) provides, in relevant part:

4 If a defendant is not served within 120 days after the
5 complaint is filed, the court – on motion or on its own
6 after notice to the plaintiff – must dismiss the action
7 without prejudice against that defendant or order that
8 service be made within a specified time. But if the
9 plaintiff shows good cause for the failure, the court
10 must extend the time period. Second, if there is no
11 good cause, the court has the discretion to dismiss
12 without prejudice or to extend the time period.

13 Civil Rule 4(m) comes into play when a plaintiff fails to
14 properly serve a defendant within 120 days after filing its
15 complaint and when the plaintiff has notice that a motion for
16 dismissal for insufficiency of process will be heard by the court.
17 Civil Rule 4(m) allows for two possible responses by the trial
18 court in light of such circumstances. The first is mandatory: the
19 trial court must extend time for service if the plaintiff shows
20 good cause for its failure to timely complete good service.
21 In re Sheehan, 253 F.3d at 512. The second approach is
22 discretionary: if good cause is not established by the plaintiff,
23 the court may extend time for service upon a showing of excusable
24 neglect. Id. at 512, 514. Of course, if the plaintiff shows
25 neither good cause, nor excusable neglect, the trial court "must
26 dismiss the action."

27 "A plaintiff may be required to show the following factors in
28 order to bring the excuse to the level of good cause: (a) the
party to be served received actual notice of the lawsuit; (b) the
defendant would suffer no prejudice; and (c) plaintiff would be
severely prejudiced if his complaint were dismissed." In re
Sheehan, 253 F.3d at 512.

1 Aurora raised the insufficiency of service in its motion to
2 dismiss on October 24, 2008. Debtor did not address this issue in
3 his response to the motions to dismiss. At the hearing on the
4 motions to dismiss on January 21, 2009, Debtor was asked if he had
5 completed good service of process, and Debtor replied that he had
6 re-served all parties on November 20, 2008. Hr'g Tr. 12:6-15
7 (January 21, 2009). This single statement to the bankruptcy court
8 that he had accomplished service constituted his only defense in
9 the bankruptcy court to the defendants' charge of insufficiency of
10 service.

11 The bankruptcy court examined the proofs of service attached
12 to the amended summons and complaint and noted that they did not
13 comply with the service requirements of Civil Rule 4(h)(1) or Cal.
14 Code Civ. P. § 416.10. We, too, have examined those documents and
15 agree with the bankruptcy court: service had been made by Debtor,
16 but only on the attorneys appearing in this proceeding, and not on
17 any authorized recipient for service on corporate defendants as
18 required under the federal or California rules.¹²

19 Debtor bears the burden of showing that the process service
20 recipient was qualified to receive that service. In re Ass'n of
21 Volleyball Professionals, 256 B.R. 313 (Bankr. C.D. Cal. 2000).
22 But in this appeal, Debtor's only argument regarding the adequacy
23 of service of process is that the defendants' attorneys had made a
24 "general appearance" in the proceedings, and thus defendants

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26 ¹² For an attorney to have authority to accept process for a
27 corporate client, the authority must be established by an act of
28 the principal. Rubin v. Pringle (In re Focus Media, Inc.),
387 F.3d 1077, 1084 (9th Cir. 2004). Debtor provided no evidence,
nor even a representation, to the bankruptcy court to show that
the attorneys had authority to accept process for the lenders.

1 waived the defense of lack of service: "A general appearance by a
2 party is equivalent to personal service of summons on such party,"
3 Debtor's Open. Br. at 27, quoting Cal. Code Civ. P. § 410.50.
4 Debtor cites three California state cases to support his position
5 that an attorney entering a general appearance in an action waives
6 the defense of lack of service. Id. at 27.

7 The federal rules of civil and bankruptcy procedure govern
8 the making of defense appearances in response to a complaint, not
9 state procedural rules, and general and special appearances by
10 counsel were abolished for federal actions in 1938. Wright v.
11 Yackley, 459 F.2d 287, 291 n.9 (9th Cir. 1972); Marcical Ucin,
12 S.A. v. SS Gallicia, 723 F.2d 994, 997 (1st Cir. 1983) ("It is
13 well settled that a general appearance by a defendant does not
14 constitute waiver of the defense of lack of jurisdiction over the
15 person."). Therefore, in sum:

16 - The record supports the bankruptcy court's determination
17 that Debtor had not properly served Aurora, Homecomings and
18 National City within 120 days of commencement of the adversary
19 proceeding. Debtor had notice of this defect via Aurora's motion
20 to dismiss for insufficiency of process.

21 - The bankruptcy court determined that Debtor had not
22 established good cause for the delay. That determination by the
23 bankruptcy court is consistent with the factors in Ninth Circuit
24 case law: (1) there was no showing of actual service on the
25 defendants; and (2) there was certainly prejudice to the
26 defendants if Debtor's failure to serve them was allowed.
27 Arguably, the third factor, severe prejudice to the plaintiff,
28 would favor Debtor. However, it is only one of three factors, and

1 the other two do not support good cause. And even in the absence
2 of good cause for failing to properly serve the lenders, Debtor
3 could have attempted to show excusable neglect. He made no such
4 showing. In re Sheehan, 253 F.3d at 512.

5 The bankruptcy court identified the correct legal rule, and
6 its application of that rule was not illogical, implausible or
7 without support in inferences that may be drawn from the facts in
8 the record. The bankruptcy court did not abuse its discretion in
9 dismissing Homecomings, Aurora and National City under Civil
10 Rule 4(m).

11 **CONCLUSION**

12 We AFFIRM the decisions of the bankruptcy court.
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