NOT FOR PUBLICATION

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.

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

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

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

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

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

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

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

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

Before: PAPPAS, DUNN and NOVACK,[2] Bankruptcy Judges[3]

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

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[2] The Honorable Charles D. Novack, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

[3] 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. The Federal Rules of Civil Procedure are referred to as Civil Rules.

FACTS

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

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

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

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

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

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

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

The Stay Relief Motions

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

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

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

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

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

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

The Adversary Proceeding and Motions to Dismiss

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

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

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

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

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

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[6] Not all claims were asserted against all defendants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JURISDICTION

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

ISSUE

Whether the bankruptcy court erred in granting the various motions to dismiss under Civil Rule 12(b)(6).

Whether the bankruptcy court abused its discretion in dismissing Homecomings, Aurora and National City Bank under Civil Rule 4(m).

STANDARD OF REVIEW

Dismissal pursuant to Civil Rule 12(b)(6) is reviewed de novo. Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120 (9th Cir. 2007)

Dismissal under Civil Rule 4(m) is reviewed for abuse of discretion. Oyama v. Sheehan (In re Sheehan), 253 F.3d 507, 512-13 (9th Cir. 2001) (“Under the terms of this rule, the court’s discretion is broad.”). In applying an abuse of discretion test, we first "determine de novo whether the [bankruptcy] court identified the correct legal rule to apply to the relief requested." United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009). If the bankruptcy court identified the correct legal rule, we then determine whether its "application of the correct legal standard [to the facts] was (1) illogical, (2)implausible, or (3) without support in inferences that may be drawn from the facts in the record." Id. (internal quotation marks omitted). If the bankruptcy court did not identify the correct legal rule, or if its application of the correct legal standard to the facts was

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

DISCUSSION

I.

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

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

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

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

(Emphasis added.)

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

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

(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

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

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

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

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[7] After oral argument before the Panel and submission, on (continued...)

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

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

First, additional briefs may not be filed except with leave of the Panel, which Debtor has not requested and we have not granted. Rule 8009(a)(3); FED. R. APP. P. 28(c). Second, the Amended SOFA is not in the excerpts of record, and the Panel is not obligated to consider any document not presented in the excerpts. In re Kritt, 190 B.R. 382, 386-87 (9th Cir. BAP 1995). Third, this argument was, as noted above, not raised in the 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.

however, did Debtor challenge in any of these motions the bankruptcy court's conclusion that none of the properties was Debtor's principal dwelling as required for a claim under TILA. Having failed to raise such argument before the bankruptcy court, we are under no obligation to review this aspect of the court's decision. In re E.R. Fegert, Inc.), 887 F.2d at 957 ("The rule in this circuit is that appellate courts will not consider arguments that are not 'properly raise[d]' in the trial courts."). We therefore agree with the bankruptcy court 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, and were properly dismissed under Civil Rule 12(b)(6).

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

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

> As a rescission under § 1635(b) is an ongoing process consisting of a number of steps, there is no reason why a court that may alter the sequence of procedures after deciding that rescission is warranted, may not do so 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

II.

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

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

First, by its terms, Debtor's contention constitutes an improper collateral attack on the BAP's orders dismissing Debtor's appeals from the three stay relief orders entered in the bankruptcy court. Debtor did not seek rehearing by the Panel concerning dismissal of those appeals, nor did he appeal the orders to the Ninth Circuit. Consequently, our decisions dismissing those appeals constitute the law of the case in this 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]

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

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

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[8](...continued)
granting relief from the stay were entered on July 16, 2008. A timely appeal must have been filed by July 28, 2008. Instead, Debtor filed the appeals on February 11, 2010. A timely notice of appeal is mandatory and jurisdictional. Bowles v. Russell, 551 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.

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

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

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

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

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

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[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.

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

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

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

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

"A plaintiff may be required to show the following factors in 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.

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

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

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

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[12] For an attorney to have authority to accept process for a corporate client, the authority must be established by an act of 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.

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

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

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

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

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

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

CONCLUSION

We AFFIRM the decisions of the bankruptcy court.