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MAR 14 2011

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-10-1330-PaJuMk
TIMOTHY RAY WRIGHT,	Bk. No. 09-3224
Debtor.	
TIMOTHY RAY WRIGHT,	
Appellant,	
v.	**M E M O R A N D U M**[1]
WASHINGTON FEDERAL SAVINGS; BANK OF AMERICA; U.S. BANK NATIONAL ASSOCIATION, as trustee for the holder of Bear Sterns ARM Trust, Mortgage Pass-Thru Certificates, Series 2005-10; PHH MORTGAGE CORPORATION; NORTHERN TRUST, N.A.; BANK OF OKLAHOMA, NA fka Bancoklahoma Mortgage Corp.; HSBC BANK USA, NATIONAL ASSOCIATION, as Trustee for MLCC 2007-2; MIDFIRST BANK; JPMORGAN CHASE BANK; CHASE HOME FINANCE LLC; BAC HOME LOANS SERVICING, LP; WELLS FARGO BANK; SPECIALIZED SERVICING, LLC; BBVA COMPASS BANK; TST HOME LOANS, INC., fka Thornburg Mortgage, Inc.; CENLAR, FSB; CORTEZ FINANCIAL VENTURES, LLC; DON WALSH; RICHARD TRELEASE; CARL GRAEBER; SHERYL WRIGHT,	
Appellees.	

Argued and Submitted on February 18, 2011
at Phoenix, Arizona

Filed - March 14, 2011

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

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

Honorable Sarah Sharer Curley, Bankruptcy Judge, Presiding

Appearances: Howard C. Meyers of Burch & Cracchiolo, P.A. for Appellant Timothy Ray Wright
Isaac M. Gabriel of Quarles & Brady LLP for Appellee Midfirst Bank
Margaret Gillespie of Collins, May, Potenza, Baran & Gillespie, P.C. for Appellee BBVA Compass Bank
L. Edward Humphrey of Jennings, Strouss & Salmon, P.C. for Appellee Washington Federal Savings

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Before: PAPPAS, JURY and MARKELL, Bankruptcy Judges.

Appellant, chapter 11[2] debtor Timothy Ray Wright ("Wright"), appeals the bankruptcy court's order holding that certain prebankruptcy real property rents constitute cash collateral. We AFFIRM.

FACTS

Wright is in the business of leasing residential real property. On December 14, 2009, Wright filed a petition for relief under chapter 11 of the Bankruptcy Code. On the petition date, Wright owned approximately 160 residential rental properties, encompassing approximately 240 rentable units. These rental units produced an income stream to Wright of cash rents from the third-party tenants.

On January 6, 2010, Wright filed an Emergency Motion for Limited Authorization to Use Cash Collateral (Rents) and [to] Surcharge Cash Collateral to Maintain Property Rental Business as

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

a Going Concern (the "Emergency Motion"), seeking authority to use postpetition rental income to "maintain an operational status quo and is not intended to effect a global disposition of the rights of secured creditors[.]" The hearing on the Emergency Motion was held by the bankruptcy court on January 20, 2010, at which time Wright's testimony and exhibits were admitted into evidence. The hearing was continued to February 16, 2010.

Wright's motion was opposed by several creditors that claimed an interest in the prebankruptcy rents under the terms of either assignment of rents clauses in recorded deeds of trust, or in separate, recorded assignment contracts. For example, on January 14, 2010, creditor Washington Federal Savings filed its objection to Wright's Emergency Motion. Washington Federal argued that it was not satisfied with Wright's prepetition management of rents, and that he had been in default on loan payments for a period of seven months. Midfirst Bank filed an objection on January 19, 2010, demanding that Wright be prohibited from use of the rents and that all pre- and postpetition rents be sequestered. And on January 25, 2010, creditor BBVA Compass Bank filed its objection, also requesting sequestration of all pre- and postpetition rents.[3]

At the continued hearing on Wright's cash collateral motion on February 16, 2010, Wright and the Objecting Secured Creditors stipulated to entry of an Order Authorizing Limited Use of Cash Collateral (Rents). This order granted the Emergency Motion as

[3] Hereafter, Washington Federal, Midfirst and Compass are collectively referred to as the "Objecting Secured Creditors."

to any rents that were the cash collateral of non-objecting secured creditors. However, as to the Objecting Secured Creditors, Wright was ordered to sequester the cash rents in which they claimed an interest, and only authorized its use with the written consent of the Objecting Secured Creditor. The order was entered on March 2, 2010.

On March 30, 2010, Wright filed a Motion for Determination (1) that Secured Creditors Failed to Take Affirmative Action Prepetition as Required under A.R.S. §33-702(B) and Thus Failed to Perfect any Choate Interest in Prepetition Rents; (2) That Secured Creditors Whose Deeds of Trust Have No Assignment of Rents Have No Interest in Either Prepetition or Postpetition Rents; and (3) That Strong Arm Powers of DIP Trump Interest of Secured Creditors in Prepetition Rents (the "Prepetition Rents Motion"). The basis for Wright's Prepetition Rents Motion was his argument that the various secured creditors had not perfected their interest in any Prepetition Rents by failing to take enforcement action of the type described in A.R.S. § 33-702(B),[4]

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[4] Since 1984, this statute has provided that:

A mortgage or trust deed may provide for an assignment to the mortgagee or beneficiary of the interest of the mortgagor or trustor in leases, rents, issues, profits or income from the property covered thereby, whether effective before, upon or after a default under such mortgage or trust deed or any contract secured thereby, and such assignment may be enforced without regard to the adequacy of the security or the solvency of the mortgagor or trustor by any one or more of the following methods:

1. The appointment of a receiver.

(continued...)

and as a result, that he could use the rents. Wright also argued that the creditors' rights in the rents could be defeated by Wright, as a chapter 11 debtor in possession, by exercising his "strong arm" avoidance powers under §§ 544(a)(1)-(3).

On April 16, 2010, Midland responded to the Prepetition Rents Motion. Midland argued that, as prescribed in the default provision in the deed of trust, it had mailed a written default notice to Wright on July 29, 2009, or about five months before the filing of the bankruptcy petition, and therefore, it held an enforceable interest in the rents.

Washington Federal responded to the Prepetition Rents Motion on April 22, 2010. Washington Federal argued, inter alia, that it had, pursuant to the default provision in the deed of trust, a valid interest in rents, and it had mailed a written default notice to Wright on September 22, 2009, approximately 90 days prior to the bankruptcy filing.

Compass Bank also responded to the Prepetition Rents Motion on April 22, 2010. In addition to asserting that its contract documents created a valid interest in the rents, Compass submitted copies of a verified complaint and application for

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[4](...continued)

2. The mortgagee or beneficiary taking possession of the property, or without the mortgagee or beneficiary taking possession of the property.

3. Collecting such monies directly from the parties obligated for payment.

4. Injunction.

A.R.S. § 33-702(B).

appointment of a receiver filed in a state court action it had commenced before the bankruptcy was filed, as well as the state court's order appointing an interim receiver.

In arguing that they held an enforceable interest in Wright's prepetition rents under applicable state law, and that the rents were therefore cash collateral in the bankruptcy case, the Objecting Secured Creditors all relied heavily on the decision of this Panel in Scottsdale Medical Pavilion v. Mutual Benefit Life Ins. Co. In Rehabilitation (In re Scottsdale Medical Plaza), 159 B.R. 295 (9th Cir. BAP 2003), aff'd 52 F.3d 244 (9th Cir. 1995) (hereafter "Scottsdale"). They contended that, under Scottsdale, so long as their recorded loan documents granted them an interest in Wright's rents, they were not required to take any of the enforcement steps listed in A.R.S. § 33-702(B).

The bankruptcy court conducted the hearing on Wright's Prepetition Rent Motion on April 29, 2010. Wright and the Objecting Secured Creditors were represented by counsel. Wright argued that Scottsdale was not controlling, and that, in any event, the Panel's decision was not compatible with Butner v. United States, 440 U.S. 48 (1973), which directed bankruptcy courts to apply state law to determine a creditor's interest in a debtor's property, in this case, A.R.S. §33-702(B). Counsel for the Objecting Secured Creditors each argued that Scottsdale was applicable. In addition, counsel for Washington Federal reminded the bankruptcy court that the Ninth Circuit Court of Appeals had affirmed Scottsdale in a published order wherein the court adopted the BAP's opinion as its own. Scottsdale Medical Pavilion v. Mutual Benefit Life Ins. Co. In Rehabilitation (In re

Scottsdale Medical Plaza), 52 F.3d 244 (9th Cir. 1995). Therefore, counsel argued, Scottsdale was indeed binding precedent in this Circuit.

After considering the arguments, the bankruptcy court made several rulings on the record. Most important among its oral legal conclusions, the court held that where there was an assignment of rents clause in a recorded deed of trust, Scottsdale controls, and the creditor's rights in the rents are, without further action by the creditor, properly secured. On May 14, 2010, the bankruptcy court entered its Order re Prepetition Rents. The principal findings and conclusions set forth in the order were:

- The motion concerns only the parties' respective rights in prepetition rents collected by Wright from July 1, 2009 up to the day prior to filing the bankruptcy petition on December 14, 2010.

- Wright's properties are generally encumbered by recorded deeds of trust, and the motion does not challenge the perfected status of these deeds as security interests in the real estate. Most of the deeds of trust contain assignment of rent provisions.

- The Scottsdale decision is dispositive of the issues before the bankruptcy court for those creditors which had included assignment of rents clauses in their deeds of trust. Under Scottsdale, such creditors perfected their interests in the prepetition rents upon the recordation of the deeds of trust.

- In order for the bankruptcy court to decide whether Wright could avoid the secured creditors' rights in the rents under the strong arm powers of §544(a)(1)-(3), an adversary proceeding under Rule 7001 was required, and so this relief was denied

without prejudice.[5]

The bankruptcy court's order required Wright to account to the respective secured creditors for the rents in which they claimed an interest, less any expenses previously approved by the court in its cash collateral orders.

Wright filed a timely appeal of the Order re: Prepetition Rents on May 28, 2010.

JURISDICTION

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

ISSUE

Whether the bankruptcy court erred in determining that the secured creditors had valid interests in the prebankruptcy rents, and that the rents were cash collateral?

STANDARD OF REVIEW

We review de novo the propriety of the legal standard used

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[5] The bankruptcy court made several rulings that are not challenged on appeal, including that (1) the secured creditors' rights in the prepetition rents were not defeated by the fact that Wright commingled the rents in several common accounts because Wright always maintained detailed accounting records and maintained substantial unencumbered funds in the accounts; (2) that creditors without an assignment of rents provision in their recorded loan documents had no interest in the rents; and (3) that Wright could freely use the prepetition rents collected prior to the time he was in default to the respective secured creditors.

by the bankruptcy judge in determining whether the funds in question are cash collateral. In re Scottsdale Medical Pavilion, 159 B.R. at 297 (citing Zeeway Corp. v. Rio Salado Bank (In re Zeeway Corp.), 71 B.R. 210, 211 (9th Cir. BAP 1987)).

DISCUSSION

I.

We begin with the basics.

A chapter 11 debtor in possession may use property of the bankruptcy estate in the ordinary course of operating its business without approval of a creditor holding an interest in that property, and without first securing a bankruptcy court order. § 363(c)(1); Aalfs v. Wirum (In re Straightline Invs.), 525 F.3d 870, 881 (9th Cir. 2008); Fursman v. Urlich (In re First Prot., Inc.), 440 B.R. 821, 832-33 (9th Cir. BAP 2010). However, an important limitation was imposed by Congress upon this general right with regard to certain types of property subject to a creditor's interest denominated as "cash collateral." In particular, if the property of the estate is cash collateral, the debtor in possession may not use it without the permission of the creditor holding an interest in the property, or in the alternative, without first obtaining bankruptcy court approval after notice and a hearing. § 363(c)(2); Rule 4001(b); Sec. Leasing Partners, LLC v. ProAlert, LLC (In re ProAlert, LLC), 314 B.R. 426, 440 (9th Cir. BAP 2004). In all cases, the debtor in possession must provide adequate protection of the creditor's interest as a condition of using cash collateral. § 363(e).

The definition of cash collateral is found in § 363(a), which includes, among others types of property, "cash, . . . in

which the estate and an entity other than the estate have an interest and includes . . . rents, . . . whether existing before or after the filing of the commencement of the [bankruptcy] case . . . ." However, while the Bankruptcy Code defines what types of property can constitute cash collateral for purposes of bankruptcy cases, and that "rents" can be cash collateral, the Supreme Court made clear in Butner v. United States, 440 U.S. 48, 55 (1973), that it is applicable state law which controls whether an entity other than the estate has an interest in the debtor's property. See Norfolk S. Ry. v. Consol. Freightways Corp. (In re Consol. Freightways Corp.), 443 F.3d 1160, 1162 (9th Cir. 2006).

II.

Given this statutory framework, at its heart, this appeal focuses on the continuing vitality of the rule announced by the Panel in Scottsdale that, under Arizona law, the recording of an assignment of rents, or a deed of trust containing an assignment of rents provision, is sufficient to perfect a creditor's security interest in those rents so as to render the rents "cash collateral" in a bankruptcy case. In other words, if the Objecting Secured Creditors hold a valid interest in Wright's prebankruptcy rents, the rents are cash collateral, and Wright can not use them without either the creditors' consent, or special permission of the bankruptcy court, and then only by providing the creditors adequate protection of their interests.

Stripped of nonessentials, Wright's argument is that, notwithstanding Scottsdale, Arizona law requires that creditors perform certain acts to enforce their rights in a debtor's rents

before their interests are fully perfected and enforceable. In the absence of those actions, Wright contends, the rents are not cash collateral, and he may use those funds to operate his business without the consent of the Objecting Secured Creditors or authorization by the bankruptcy court. The Objecting Secured Creditors counter that recording their contracts, coupled with Wright's default, were all that was required to properly perfect their interests in Wright's rents.

As noted above, the impact of Scottsdale is key in this dispute. In that decision, after reviewing Arizona case and statutory law, the Panel concluded that the effectiveness of assignment of rents is determined with reference to the instrument creating the assignment, and that a creditor's interest may arise either before, upon, or after a default. 159 B.R. at 300. As explained in Scottsdale, through a contract, a creditor may have a present, effective interest in a debtor's rents even though that contract does not grant the creditor the present right to enforce that interest. The Panel concluded that, under Arizona law, the assignment of rents in play in Scottsdale was effective immediately, even though the contract postponed the creditor's rights to enforce its interest and take possession of those rents until a default by the debtor. Id. at 301.

In this case, relying on the Scottsdale analysis, the bankruptcy court concluded that "all of the Secured Creditors with an assignment of rents provision in their deeds of trust became perfected in the Prepetition Rents upon the recordation of those documents . . . ." Order re: Prepetition Rents at ¶ 12.

It is this ruling that, at bottom, Wright challenges.

III.

This Panel has decided that it is bound by its prior published decisions. Gaughan v. Edward Dittlof Revocable Trust (In re Costas), 346 B.R. 198, 201 (9th Cir. BAP 2006); Palm v. Klapperman (In re Cady), 266 B.R. 172, 181 (9th Cir. BAP 2001), aff'd, 315 F.3d 1121 (9th Cir. 2003). The Objecting Secured Creditors insist that the outcome in this appeal is controlled by Scottsdale. In contrast, Wright's Opening Brief argues that we need not follow Scottsdale because it violates Butner v. United States, 440 U.S. 48 (1973). Wright's Reply Brief alters course to suggest there is no need to overturn Scottsdale in this case and attempts to distinguish the present appeal from Scottsdale on the facts.

Wright acknowledges that Scottsdale was affirmed by the Court of Appeals. But what Wright fails to appreciate is that the Court of Appeals decision affirming and adopting Scottsdale was ordered published, and thus the BAP's opinion is binding on courts in the Ninth Circuit. Indeed, the entire published decision of the Court of Appeals in Scottsdale reads as follows:

> Scottsdale Medical Pavilion appeals the order of the Bankruptcy Appellate Panel which upheld an order of the bankruptcy court sequestering $15,605, which had been collected as rent before the bankruptcy proceedings started. The bankruptcy court ruled that the money was cash collateral subject to Mutual Benefit Life Insurance Company's security interest in an assignment of rents from Scottsdale, which was given as part of a deed of trust.
>
> We have carefully reviewed the record, the law, and the BAP's excellent opinion. We affirm for the reasons set forth in the BAP's opinion, which we adopt as our own. See In re Scottsdale Medical Pavilion, 159 Bankr. 295 (Bankr. 9th Cir. 1993).

52 F.3d 244 (9th Cir 1995).

The Court of Appeals' rules provide that its unpublished dispositions and unpublished orders are not precedential. 9th Cir. R. 36-3(a)(2010). However, an order that is ordered published may be "used for any purpose for which an opinion may be used." 9th Cir. R. 36-5 (2010). An order is deemed published when the circuit panel incorporates the phrase, "FOR PUBLICATION" in uppercase letters on its decision. Id.[6]

In its order adopting Scottsdale, the circuit panel directed that its decision was "FOR PUBLICATION." See Ninth Circuit docket number 93-17165, Scottsdale Medical Pavilion v. Mutual Benefit Life Ins. Co. In Rehabilitation, entry 39, April 10, 1995: "Order filed AFFIRMED (FOR PUBLICATION) (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. . . ." The circuit's published order in Scottsdale is therefore precedential under 9th Cir. R. 36-3, 36-5.

It is of no moment that the Court of Appeals' decision "adopted" the BAP's decision, rather than offering a separate reasoned disposition. In several cases, the court has ruled that published decisions in which it adopts decisions from other courts of the circuit have the same precedential effect as its

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[6] "As used in this rule, the term 'PUBLICATION' means to make a disposition available to legal publishing companies to be reported and cited." 9th Cir. R. 36-1. As can be seen, publication refers to the order to make available for precedential citation rather than the fact of publication. Even though a circuit decision is printed in the Federal Reporter, it is not considered published for purposes of the 9th Circuit Rules, nor is it precedential, unless its publication was ordered by the circuit panel as an opinion or published order.

own written decisions. For example, in Ledlin v. U.S. (In re Tomlan), 907 F.2d 114 (9th Cir. 1990), a decision even shorter than the one in Scottsdale, the circuit opinion reads as follows:

> PER CURIAM:
>
> We consider whether the IRS must timely file a proof of its unsecured claims in order to obtain priority status in a Chapter 13 bankruptcy. We conclude that it must, adopting as our own the excellent opinion of Judge Quackenbush below, reported at 102 Bankr. 790 (E.D. Wash. 1989).
>
> AFFIRMED.

The Court of Appeals later examined the precedential value of its adoption of the district court's decision in In re Tomlin. In IRS v. Osborne (In re Osborne), 76 F.3d 306, 310 (9th Cir. 1996), the Court of Appeals ruled that a rule of law announced even in a "succinct per curiam opinion," became the law of the circuit, and could only be overruled by an en banc panel. See also, Gardenhire v. I.R.S. (In re Gardenhire), 209 F.3d 1145, 1148 (9th Cir. 2000); United States v. AMC Entm't, Inc., 549 F.3d 760, 778 n.5 (9th Cir. 2008)(Wardlaw, J., dissenting on grounds not relevant here, but citing In re Gardenhire for the notion that "When we adopt an opinion of the district court as our own, that opinion becomes relevant precedent on the issues it decides.").

The Court of Appeals' adoption in a published order of the BAP's opinion in Scottsdale renders that decision the law of the circuit. As such, contrary to Wright's suggestion, this Panel may not overrule or modify its holding. The bankruptcy court held that Scottsdale was dispositive of all issues raised in the bankruptcy court. Order re: Prepetition Rents at ¶ 11. Indeed, all the issues but one raised in this appeal by Wright are

premised on what he suggests are error in Scottsdale.[7] While Wright argues that: "Scottsdale Medical Pavilion must be overruled, the Order reversed and this contested matter remanded to the bankruptcy court for further proceedings including evidentiary proceedings to determine if and when each of the Secured Creditors enforced their interests pursuant to A.R.S. § 33-702(B) . . .", Op. Br. at 32-33, we are unable to grant him any such relief.

IV.

As precedent, the binding effect of Scottsdale can only be avoided under very limited conditions. Hart v. Massanari, 266 F.3d 1155, 1159 (9th Cir. 2001) (holding that circuit law binds all courts of the circuit, including the Court of Appeals itself); see United States v. Vasquez-Ramos, 531 F.3d 987, 991 (9th Cir. 2008) ("We are bound by circuit precedent unless there has been a substantial change in relevant circumstances . . . or a subsequent en banc or Supreme Court decision that is clearly irreconcilable with our prior holding.").

Wright identifies no changes in circumstances or subsequent intervening authority as a basis for dodging the holding in Scottsdale. Instead, he argues that, based on the Supreme Court's decision in Butner, Scottsdale "diverges from the directive of Butner and fails to properly follow Arizona law on the subject of assignment of rents."

In theory, if Scottsdale were inconsistent with a subsequent

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[7] Wright's arguments concerning the application in this case of § 544(a) are not resolved by reference to the Scottsdale decision. That issue is discussed below.

Supreme Court decision, neither the bankruptcy court nor this Panel would be bound to follow it. Obviously, though, Butner was not decided after Scottsdale; the Supreme Court's decision was made in 1979, some fourteen years before the BAP's decision, and sixteen years before the circuit's order, in Scottsdale. Moreover, the Scottsdale panel was aware of Butner, citing to that decision for the principle that a creditor's interest in prepetition rents is to be determined under state law. In re Scottsdale, 159 B.R. at 298. And consistent with its teachings, immediately following its reference to Butner, Scottsdale reviewed four decisions of Arizona law before reaching its conclusion that enforcement of rights was not a precondition to full perfection of a creditor's rights in prepetition rents. Id. at 299-300.[8]

In his Reply Brief, Wright, for the first time in either the bankruptcy court or in this appeal, suggests that the resolution of the issues "may not necessitate a holding requiring this court to overturn its prior holding in Scottsdale Medical Pavilion but only a narrowing . . . to reflect that the discrete facts in that case involved circumstances . . . which are not present in the

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[8] Interestingly, one of the cases examined in Scottsdale was In re Am. Continental Corp., 105 B.R. 564 (Bankr. D. Ariz. 1989), authored by the bankruptcy judge presiding in this case. Am. Continental has been cited several times in this appeal by Wright for the proposition that a lien in rents requires one of the acts of enforcement in Ariz. Rev. Stat. § 33-702(B). However, in the transcript for the hearing on cash collateral on April 29, 2010, the bankruptcy court explicitly repudiated its position in Am. Continental, holding that Scottsdale "supersedes the issues in American Continental." Hr'g Tr. 52:22-23 (April 29, 2010).

facts at bar." Wright is correct that a precedent can be distinguished on the facts in a subsequent appeal. But the task of distinguishing binding precedent based on the facts can be a daunting one. Massanari, 266 F.3d at 1170 ("In determining whether it is bound by an earlier decision, a court considers not merely the reason and spirit of cases but also . . . the facts giving rise to the dispute. . . ." (citations omitted)).

Here, Wright suggests that three facts make this case distinguishable: that Scottsdale was a single asset real estate case, whereas Wright owns 160 rental properties; that in Scottsdale the creditors had taken steps to enforce their rights as required by the Arizona statute; and that in Scottsdale the secured creditor had recorded a UCC-1 financing statement filed to perfect its interest in rents, something that the Objecting Secured Creditors had not done in this case. None of these distinctions enable Wright to avoid Scottsdale's binding effect, though.

As to the first factual difference, Wright correctly observes that Scottsdale was a single asset real estate case. This appeal, on the other hand, involves 160 different properties. However, Wright does not explain why this amounts to a material difference for purposes of the legal treatment of the creditors' assignments of rents. To the contrary, the holding in Scottsdale is applicable in this case on a property-by-property basis to determine whether there is an enforceable assignment of rents and deed of trust. Whether this analysis is performed once, or 160 times, does not impact the application of Scottsdale to these facts.

As to the second factual difference, Wright notes:

> On January 24, 1992, Mutual sent a letter to the tenants instructing them to forward all rent payments to Mutual. . . . The distinction between the facts at bar and the facts in Scottsdale Medical Pavilion is that in the latter case there was prepetition "enforcement" so that the "inchoate" interest of the lender became a "choate" interest in rents while under the facts at bar there was no such prepetition "enforcement."

Op. Br. at 21. Wright is apparently correct that in the Scottsdale case, the creditor had "enforced" its rights in the debtor's rents by notifying tenants to pay the creditor directly, In re Scottsdale Medical Pavilion, 159 B.R. at 297, and that this enforcement mechanism is described in A.R.S. § 33-703(B)(3). ("Collecting such monies directly from the parties obligated for payment.") In this appeal, except for Compass Bank, there was no attempted enforcement of the assignment of rents by the Objecting Secured Creditors.

The Scottsdale panel was aware that Mutual had taken one step in enforcing its lien by notifying the tenants to pay it directly. In re Scottsdale Medical Pavilion, 159 B.R. at 297. The panel nevertheless ruled that such enforcement actions were not necessary in order for the creditor to have perfected its interest in the rents, and that recording the assignment of rents was all that was necessary for perfection and to constitute the rents "cash collateral" for bankruptcy purposes. Consequently, while Wright may be correct that the creditor acted to enforce its rights in the Scottsdale case, this is a factual distinction without legal significance.

Finally, Wight argues that the creditor in Scottsdale had filed a UCC-1 financing statement, something the creditors in the

present appeal did not do. However, Wright raises this point for the first time to this Panel in his reply brief, and without having made the argument in the bankruptcy court. Absent exceptional circumstances, an appellate court "will not consider arguments raised for the first time on appeal." Ganis Credit Corp. v. Anderson (In re Jan Weilert Rv., Inc.), 315 F.3d 1192, 1199 (9th Cir. 2003); Greenfield Drive Storage Park v. Cal. Para-Professional Servs. Inc. (In re Cal. Para-Professional Servs. Inc.), 207 B.R. 913, 918 (9th Cir. BAP 1997) ("Issues that are raised for the first time on appeal will not be considered."). Wright offers no reason why this contention arises from any exceptional circumstance; indeed, he could have raised this argument at any time in the bankruptcy court. Further, Wright delayed raising this issue until his reply, effectively depriving the other parties to the appeal of the opportunity to respond. This was inappropriate. Indep. Towers of Wash. v. Washington, 350 F.3d 925, 929 (9th Cir. 2003)(noting that the appellate court should "review only issues which are argued specifically and distinctly in a party's opening brief."); Jodoin v. Samayoa (In re Jodoin), 209 B.R. 132, 143 (9th Cir. BAP 1997) (same).

Further, even were we to consider the argument, there is nothing in the record before the Panel to support that the creditor in Scottsdale had filed a UCC-1. The Scottsdale decision makes no reference to such a statement. Instead, Wright seeks to bootstrap this information into the record by his request that the Panel take judicial notice of the "entire appellate record before the Ninth Circuit BAP [in the Scottsdale decision],

including the excerpts of record and any appendixes."[9]

We decline to accept Wright's invitation to launch our own investigation into the record in Scottsdale. Wright has not provided copies of any documents from the Scottsdale appeal, even though it is his responsibility to assemble the record in this appeal. Rules 8006, 8009. He also does not cite in his briefs to any particular documents to support his factual assertions as required by Rule 8010(a)(1)(D) and (E). Even were we able to successfully retrieve records from that sixteen-year old case, neither the appellees nor this Panel are obligated to search it unaided to locate relevant materials. Dela Rosa v. Scottsdale Mem. Health Sys., Inc., 136 F.3d 1241, 1244 (9th Cir. 1998) (noting that "it should never be forgotten that the attorney of record is ultimately responsible for *both* the form *and* the content of the materials submitted to this court. It is therefore the professional duty of the attorney of record to ensure through proper supervision that all materials submitted to this court comply with the applicable rules.") (emphasis in original).[10]

Even if we were to assume Wright is correct and the creditor in Scottsdale did indeed record a UCC-1 financing statement,

[9] To be fair, we acknowledge that Wright made his request that we take judicial notice of the entire Scottsdale record by joining in the similar request of Washington Federal that we take notice of three briefs filed in the Scottsdale appeal to the Ninth Circuit. We likewise decline that request and did not examine those briefs in reaching our decision.

[10] This decision was unrelated to the Scottsdale decisions discussed in this appeal; similarity in the parties' names is mere coincidence.

Wright's argument lacks merit. Wright notes that the secured creditor in Scottsdale had a "comprehensive set of personal property security interests duly perfected prepetition by the filing of a UCC-1 Financial Statement in the Office of the Arizona Secretary of State pursuant to Article 9 of the UCC in all assets of the debtor in Scottsdale Medical Pavilion including all sums on deposit in the debtor's bank accounts." However, we fail to see how this fact is material.

Scottsdale explicitly notes that under A.R.S. § 47-9104.10 (the statute in effect at the time the Scottsdale decision was published), the UCC does not apply "to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder. . . ." 159 B.R. at 302.[11] Instead, under Arizona law, an assignment of rents for security is treated as an interest in real property. Valley Nat'l Bank v. AVCO Dev. Co., 480 P.2d 671, 675 (Ariz. Ct. App. 1971) ("assignment of rents is a transfer of an interest in realty.") The Scottsdale panel therefore ruled that "the proper method of perfecting an assignment of rents in Arizona is by recording in the real property records as provided by A.R.S. § 33-411[.]" In other words, the presence of a recorded UCC-1 financing statement in Scottsdale had no impact on the outcome of that decision.

In sum, Wright has not established that there was either substantial change in relevant circumstances, intervening change in law, or significant, material factual distinctions between

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[11] Following the revision of UCC Art. 9, Arizona moved this provision, substantially unchanged, to A.R.S. § 47-9109(D)(11) (2011).

Scottsdale and the present appeal. We therefore conclude that the bankruptcy court properly determined that Scottsdale controlled the outcome in this contest, and that it did not err in deciding that the prepetition rents were the cash collateral of the Objecting Secured Creditors and others. The bankruptcy court correctly concluded that the deeds of trust containing the assignment of rents granted the Objecting Secured Creditors an immediate interest in Wright's rents, that this interest was perfected when the trust deeds were recorded, and that the creditors were not required to take enforcement actions in order for the rents to constitute cash collateral.

V.

In his brief, Wright also questions whether "the DIP is entitled to have his status as an ideal creditor without notice under 11 U.S.C. § 544(A) [sic] considered by the bankruptcy court in a contested matter without imposing on the DIP as the estate representative the necessity of filing an adversary proceeding?" Wright's Op. Br. at 2-3.

The bankruptcy court did not err in its decision to deny Wright's strong-arm claim without prejudice on procedural grounds, coupled with its offer to Wright to assert this issue in a separate adversary proceeding. A chapter 11 debtor's exercise of its strong-arm powers to assail a creditor's security interest requires an adversary proceeding under Rule 7001(2) because it is a "proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d)." In re Siebold, 351 B.R. 741, 747 (Bankr. D. Idaho 2006) ("[A]n adversary proceeding is necessary to obtain a

judgment or order of the Court deeming an otherwise enforceable lien 'avoided.'"); see also 10 COLLIER ON BANKRUPTCY ¶7001.03[1] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed., 2010) (exercise of powers under § 544(a) requires an adversary proceeding). The bankruptcy court therefore correctly denied, without prejudice, Wright's challenge via motion to the Objecting Secured Creditors' security interests.

CONCLUSION

For all the above reasons, we conclude that the bankruptcy court did not err in granting the Order re Prepetition Rents. We AFFIRM the decision of the order of the bankruptcy court in all respects.