

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NOT FOR PUBLICATION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,)
Debtor.) Bk. No. 09-3224

TIMOTHY RAY WRIGHT,
Appellant,

v.

M E M O R A N D U M¹

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

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 District of Arizona

3 Honorable Sarah Sharer Curley, Bankruptcy Judge, Presiding

4 Appearances: Howard C. Meyers of Burch & Cracchiolo, P.A. for
5 Appellant Timothy Ray Wright
6 Isaac M. Gabriel of Quarles & Brady LLP for
7 Appellee Midfirst Bank
8 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

9 Before: PAPPAS, JURY and MARKELL, Bankruptcy Judges.

10
11 Appellant, chapter 11² debtor Timothy Ray Wright ("Wright"),
12 appeals the bankruptcy court's order holding that certain
13 prebankruptcy real property rents constitute cash collateral. We
14 AFFIRM.

15 **FACTS**

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

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

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

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

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

22 At the continued hearing on Wright's cash collateral motion
23 on February 16, 2010, Wright and the Objecting Secured Creditors
24 stipulated to entry of an Order Authorizing Limited Use of Cash
25 Collateral (Rents). This order granted the Emergency Motion as
26

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

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

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

19
20 ⁴ Since 1984, this statute has provided that:

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

1. The appointment of a receiver.

(continued...)

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

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

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

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

21 _____
22 ⁴(...continued)

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

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

27 4. Injunction.

28 A.R.S. § 33-702(B).

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

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

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

1 Scottsdale Medical Plaza), 52 F.3d 244 (9th Cir. 1995).

2 Therefore, counsel argued, Scottsdale was indeed binding
3 precedent in this Circuit.

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

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

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

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

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

1 without prejudice.⁵

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

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

8
9 **JURISDICTION**

10 The bankruptcy court had jurisdiction under 28 U.S.C.
11 §§ 1334 and 157(b)(2)(K),(M), and (O). We have jurisdiction
12 under 28 U.S.C. § 158.

13
14 **ISSUE**

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

18
19 **STANDARD OF REVIEW**

20 We review de novo the propriety of the legal standard used

21
22 ⁵ The bankruptcy court made several rulings that are not
23 challenged on appeal, including that (1) the secured creditors'
24 rights in the prepetition rents were not defeated by the fact
25 that Wright commingled the rents in several common accounts
26 because Wright always maintained detailed accounting records and
27 maintained substantial unencumbered funds in the accounts;
28 (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.

1 by the bankruptcy judge in determining whether the funds in
2 question are cash collateral. In re Scottsdale Medical Pavilion,
3 159 B.R. at 297 (citing Zeeway Corp. v. Rio Salado Bank (In re
4 Zeeway Corp.), 71 B.R. 210, 211 (9th Cir. BAP 1987)).

5 DISCUSSION

6 I.

7 We begin with the basics.

8 A chapter 11 debtor in possession may use property of the
9 bankruptcy estate in the ordinary course of operating its
10 business without approval of a creditor holding an interest in
11 that property, and without first securing a bankruptcy court
12 order. § 363(c)(1); Aalfs v. Wirum (In re Straightline Invs.),
13 525 F.3d 870, 881 (9th Cir. 2008); Fursman v. Urlich (In re First
14 Prot., Inc.), 440 B.R. 821, 832-33 (9th Cir. BAP 2010). However,
15 an important limitation was imposed by Congress upon this general
16 right with regard to certain types of property subject to a
17 creditor's interest denominated as "cash collateral." In
18 particular, if the property of the estate is cash collateral, the
19 debtor in possession may not use it without the permission of the
20 creditor holding an interest in the property, or in the
21 alternative, without first obtaining bankruptcy court approval
22 after notice and a hearing. § 363(c)(2); Rule 4001(b); Sec.
23 Leasing Partners, LLC v. ProAlert, LLC (In re ProAlert, LLC),
24 314 B.R. 426, 440 (9th Cir. BAP 2004). In all cases, the debtor
25 in possession must provide adequate protection of the creditor's
26 interest as a condition of using cash collateral. § 363(e).

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

1 which the estate and an entity other than the estate have an
2 interest and includes . . . rents, . . . whether existing before
3 or after the filing of the commencement of the [bankruptcy] case
4” However, while the Bankruptcy Code defines what types
5 of property can constitute cash collateral for purposes of
6 bankruptcy cases, and that “rents” can be cash collateral, the
7 Supreme Court made clear in Butner v. United States, 440 U.S. 48,
8 55 (1973), that it is applicable state law which controls whether
9 an entity other than the estate has an interest in the debtor’s
10 property. See Norfolk S. Ry. v. Consol. Freightways Corp. (In re
11 Consol. Freightways Corp.), 443 F.3d 1160, 1162 (9th Cir. 2006).

12
13 **II.**

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

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

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

9 As noted above, the impact of Scottsdale is key in this
10 dispute. In that decision, after reviewing Arizona case and
11 statutory law, the Panel concluded that the effectiveness of
12 assignment of rents is determined with reference to the
13 instrument creating the assignment, and that a creditor's
14 interest may arise either before, upon, or after a default.
15 159 B.R. at 300. As explained in Scottsdale, through a contract,
16 a creditor may have a present, effective interest in a debtor's
17 rents even though that contract does not grant the creditor the
18 present right to enforce that interest. The Panel concluded
19 that, under Arizona law, the assignment of rents in play in
20 Scottsdale was effective immediately, even though the contract
21 postponed the creditor's rights to enforce its interest and take
22 possession of those rents until a default by the debtor. Id. at
23 301.

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

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

2 **III.**

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

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

21 Scottsdale Medical Pavilion appeals the order of the
22 Bankruptcy Appellate Panel which upheld an order of the
23 bankruptcy court sequestering \$15,605, which had been
24 collected as rent before the bankruptcy proceedings
25 started. The bankruptcy court ruled that the money was
26 cash collateral subject to Mutual Benefit Life
27 Insurance Company's security interest in an assignment
28 of rents from Scottsdale, which was given as part of a
deed of trust.

26 We have carefully reviewed the record, the law, and the
27 BAP's excellent opinion. We affirm for the reasons set
28 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).

1 52 F.3d 244 (9th Cir 1995).

2 The Court of Appeals' rules provide that its unpublished
3 dispositions and unpublished orders are not precedential.
4 9th Cir. R. 36-3(a)(2010). However, an order that is ordered
5 published may be "used for any purpose for which an opinion may
6 be used." 9th Cir. R. 36-5 (2010). An order is deemed published
7 when the circuit panel incorporates the phrase, "FOR PUBLICATION"
8 in uppercase letters on its decision. Id.⁶

9 In its order adopting Scottsdale, the circuit panel directed
10 that its decision was "FOR PUBLICATION." See Ninth Circuit
11 docket number 93-17165, Scottsdale Medical Pavilion v. Mutual
12 Benefit Life Ins. Co. In Rehabilitation, entry 39, April 10,
13 1995: "Order filed AFFIRMED (FOR PUBLICATION) (Terminated on the
14 Merits after Oral Hearing; Affirmed; Written, Signed, Published.
15 . . ." The circuit's published order in Scottsdale is therefore
16 precedential under 9th Cir. R. 36-3, 36-5.

17 It is of no moment that the Court of Appeals' decision
18 "adopted" the BAP's decision, rather than offering a separate
19 reasoned disposition. In several cases, the court has ruled that
20 published decisions in which it adopts decisions from other
21 courts of the circuit have the same precedential effect as its
22

23 ⁶ "As used in this rule, the term 'PUBLICATION' means to
24 make a disposition available to legal publishing companies to be
25 reported and cited." 9th Cir. R. 36-1. As can be seen,
26 publication refers to the order to make available for
27 precedential citation rather than the fact of publication. Even
28 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.

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

4 PER CURIAM:

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

11 AFFIRMED.

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

24 The Court of Appeals' adoption in a published order of the
25 BAP's opinion in Scottsdale renders that decision the law of the
26 circuit. As such, contrary to Wright's suggestion, this Panel
27 may not overrule or modify its holding. The bankruptcy court
28 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

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

9 IV.

10 As precedent, the binding effect of Scottsdale can only be
11 avoided under very limited conditions. Hart v. Massanari, 266
12 F.3d 1155, 1159 (9th Cir. 2001) (holding that circuit law binds
13 all courts of the circuit, including the Court of Appeals
14 itself); see United States v. Vasquez-Ramos, 531 F.3d 987, 991
15 (9th Cir. 2008) ("We are bound by circuit precedent unless there
16 has been a substantial change in relevant circumstances . . . or
17 a subsequent en banc or Supreme Court decision that is clearly
18 irreconcilable with our prior holding.").

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

25 In theory, if Scottsdale were inconsistent with a subsequent

26
27 ⁷ Wright's arguments concerning the application in this
28 case of § 544(a) are not resolved by reference to the Scottsdale
decision. That issue is discussed below.

1 Supreme Court decision, neither the bankruptcy court nor this
2 Panel would be bound to follow it. Obviously, though, Butner was
3 not decided after Scottsdale; the Supreme Court's decision was
4 made in 1979, some fourteen years before the BAP's decision, and
5 sixteen years before the circuit's order, in Scottsdale.
6 Moreover, the Scottsdale panel was aware of Butner, citing to
7 that decision for the principle that a creditor's interest in
8 prepetition rents is to be determined under state law. In re
9 Scottsdale, 159 B.R. at 298. And consistent with its teachings,
10 immediately following its reference to Butner, Scottsdale
11 reviewed four decisions of Arizona law before reaching its
12 conclusion that enforcement of rights was not a precondition to
13 full perfection of a creditor's rights in prepetition rents. Id.
14 at 299-300.⁸

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

21
22 ⁸ Interestingly, one of the cases examined in Scottsdale
23 was In re Am. Continental Corp., 105 B.R. 564 (Bankr. D. Ariz.
24 1989), authored by the bankruptcy judge presiding in this case.
25 Am. Continental has been cited several times in this appeal by
26 Wright for the proposition that a lien in rents requires one of
27 the acts of enforcement in Ariz. Rev. Stat. § 33-702(B).
28 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).

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

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

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

1 As to the second factual difference, Wright notes:

2 On January 24, 1992, Mutual sent a letter to the
3 tenants instructing them to forward all rent payments
4 to Mutual. . . . The distinction between the facts at
5 bar and the facts in Scottsdale Medical Pavilion is
6 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."

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

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

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

1 present appeal did not do. However, Wright raises this point for
2 the first time to this Panel in his reply brief, and without
3 having made the argument in the bankruptcy court. Absent
4 exceptional circumstances, an appellate court "will not consider
5 arguments raised for the first time on appeal." Ganis Credit
6 Corp. v. Anderson (In re Jan Weilert Rv., Inc.), 315 F.3d 1192,
7 1199 (9th Cir. 2003); Greenfield Drive Storage Park v. Cal.
8 Para-Professional Servs. Inc. (In re Cal. Para-Professional
9 Servs. Inc.), 207 B.R. 913, 918 (9th Cir. BAP 1997) ("Issues that
10 are raised for the first time on appeal will not be
11 considered."). Wright offers no reason why this contention
12 arises from any exceptional circumstance; indeed, he could have
13 raised this argument at any time in the bankruptcy court.
14 Further, Wright delayed raising this issue until his reply,
15 effectively depriving the other parties to the appeal of the
16 opportunity to respond. This was inappropriate. Indep. Towers
17 of Wash. v. Washington, 350 F.3d 925, 929 (9th Cir. 2003)(noting
18 that the appellate court should "review only issues which are
19 argued specifically and distinctly in a party's opening brief.");
20 Jodoin v. Samayoa (In re Jodoin), 209 B.R. 132, 143 (9th Cir. BAP
21 1997) (same).

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

1 including the excerpts of record and any appendixes."⁹

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

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

21
22
23 ⁹ To be fair, we acknowledge that Wright made his request
24 that we take judicial notice of the entire Scottsdale record by
25 joining in the similar request of Washington Federal that we take
26 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.

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

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

9 Scottsdale explicitly notes that under A.R.S. § 47-9104.10
10 (the statute in effect at the time the Scottsdale decision was
11 published), the UCC does not apply "to the creation or transfer
12 of an interest in or lien on real estate, including a lease or
13 rents thereunder. . . ." 159 B.R. at 302.¹¹ Instead, under
14 Arizona law, an assignment of rents for security is treated as an
15 interest in real property. Valley Nat'l Bank v. AVCO Dev. Co.,
16 480 P.2d 671, 675 (Ariz. Ct. App. 1971) ("assignment of rents is
17 a transfer of an interest in realty.") The Scottsdale panel
18 therefore ruled that "the proper method of perfecting an
19 assignment of rents in Arizona is by recording in the real
20 property records as provided by A.R.S. § 33-411[.]" In other
21 words, the presence of a recorded UCC-1 financing statement in
22 Scottsdale had no impact on the outcome of that decision.

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

26
27 ¹¹ Following the revision of UCC Art. 9, Arizona moved this
28 provision, substantially unchanged, to A.R.S. § 47-9109(D)(11)
(2011).

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

12 **V.**

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

19 The bankruptcy court did not err in its decision to deny
20 Wright's strong-arm claim without prejudice on procedural
21 grounds, coupled with its offer to Wright to assert this issue in
22 a separate adversary proceeding. A chapter 11 debtor's exercise
23 of its strong-arm powers to assail a creditor's security interest
24 requires an adversary proceeding under Rule 7001(2) because it is
25 a "proceeding to determine the validity, priority, or extent of a
26 lien or other interest in property, other than a proceeding under
27 Rule 4003(d)." In re Siebold, 351 B.R. 741, 747 (Bankr. D. Idaho
28 2006) ("[A]n adversary proceeding is necessary to obtain a

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

8
9 **CONCLUSION**

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