

AUG 19 2014

NOT FOR PUBLICATION

SUSAN M. SPRAY, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. NC-13-1508-JuKuD  
)  
SIMONE ST. CLARE, ) Bk. No. NC-12-47701-MEH  
)  
Debtor. )

\_\_\_\_\_  
SIMONE ST. CLARE,  
Appellant,

v.

M E M O R A N D U M\*

THE BANK OF NEW YORK MELLON )  
FKA THE BANK OF NEW YORK, AS )  
TRUSTEE FOR THE CERTIFICATE- )  
HOLDERS OF THE CWALT, INC., )  
ALTERNATIVE LOAN TRUST 2007- )  
0A4 MORTGAGE PASS-THROUGH )  
CERTIFICATES, SERIES 2007-0A4; )  
UNITED STATES TRUSTEE; MARTHA )  
G. BRONITSKY, Chapter 13 )  
Trustee, )  
Appellees. )

Argued and Submitted on July 24, 2014  
at San Francisco, California

Filed - August 19, 2014

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

Honorable M. Elaine Hammond, Bankruptcy Judge, Presiding

Appearances: Michael James Yesk, Esq., argued for appellant  
Simone St. Clare; Bernard Kornberg, Esq., of

\* 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                   Severson & Werson, argued for appellee The Bank  
2                   of New York Mellon.

3                   \_\_\_\_\_  
4                   Before: JURY, KURTZ, and DUNN, Bankruptcy Judges.

5                   Chapter 7<sup>1</sup> debtor Simone St. Clare objected to proof of  
6                   claim (POC) 6-1 filed by Bank of America, N.A. (BANA) on behalf  
7                   of the Bank of New York Mellon (BONY)<sup>2</sup> on the grounds that BANA  
8                   did not have standing to assert the claim on behalf of BONY and  
9                   that BONY did not have standing to enforce the note.

10                  BANA filed amended claim 6-2 with a declaration asserting  
11                  that BANA was the loan servicer for BONY and thus had standing.  
12                  The bankruptcy court found that the declaration did not provide  
13                  sufficient evidence to establish the agency relationship between  
14                  BANA and BONY, thereby leaving enforcement of the note in  
15                  dispute. To resolve the factual and legal issues asserted, the  
16                  bankruptcy court entered a scheduling order on September 9,  
17                  2013, setting an evidentiary hearing (Scheduling Order) on  
18                  debtor's claim objection. Debtor moved for reconsideration of  
19                  the bankruptcy court's decision asserting that the court should  
20                  instead sustain her objection. The court denied her motion by  
21                  order entered on September 27, 2013 (Reconsideration Order).  
22                  On the same date, the bankruptcy court entered an order setting  
23                  a pre-trial conference (Pre-Trial Conference Order) in advance

24                  \_\_\_\_\_  
25                  <sup>1</sup> Unless otherwise indicated, all chapter and section  
26                  references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
27                  "Rule" references are to the Federal Rules of Bankruptcy  
28                  Procedure.

29                  <sup>2</sup> BONY was fka the Bank of New York, as Trustee for the  
30                  Certificate-holders of the CWALT, Inc., Alternative Loan Trust  
31                  2007-0A4 Mortgage Pass-through Certificates, Series 2007-0A4.

1 of the evidentiary hearing.

2 Debtor's notice of appeal (NOA) states that she is  
3 appealing the Scheduling Order, the Reconsideration Order and  
4 the Pre-Trial Conference Order. These orders simply set  
5 deadlines for the filing of various papers at the bankruptcy  
6 court in connection with debtor's objection to claim 6-2 and  
7 became final when the bankruptcy court entered an order  
8 overruling debtor's objection as moot after she converted her  
9 case from chapter 13 to chapter 7. Debtor did not amend her NOA  
10 to include this order or any other orders that were entered  
11 subsequent to those designated in her NOA and she has made no  
12 arguments in her opening brief that relate to the orders on  
13 appeal. Accordingly, we AFFIRM.

14 **I. FACTS**

15 In January 2007, debtor obtained a loan from Countrywide  
16 Bank, N.A. in the principal amount of \$700,000, which was  
17 evidenced by a note and secured by a deed of trust against her  
18 property located in Benicia, California (Benicia Property).

19 Debtor was in default on the loan when she filed her  
20 chapter 13 petition pro se on September 18, 2012. In Schedule A  
21 she listed the Benicia Property as unencumbered by any secured  
22 debt. Debtor listed no secured creditors in Schedule D.

23 On January 8, 2013, BANA filed claim 6-1 on behalf of BONY  
24 asserting a secured claim against the Benicia Property in the  
25 total amount of \$805,232.85, including arrearages and other  
26 charges in the amount of \$105,643.82. Attached to the POC was  
27 (1) an itemized statement of interest, fees, expenses and  
28 charges; (2) a copy of the deed of trust; (3) the note and

1 assignment of rents; and (4) and a corrective corporation  
2 assignment of deed of trust.

3 On February 26, 2013, debtor amended her Schedule A to  
4 state that the Benicia Property was encumbered by a secured  
5 claim in the amount of \$715,000. On the same day, she filed an  
6 adversary proceeding against BANA, BONY, and others seeking to  
7 avoid the lien against the Benicia Property and quiet title  
8 (Adv. No. 13-04045). BONY moved to dismiss the complaint on  
9 Civil Rule 12(b)(6) grounds. The bankruptcy court granted  
10 debtor leave to amend her complaint. Instead of amending her  
11 complaint, debtor voluntarily dismissed the adversary proceeding  
12 without prejudice on May 29, 2013.

13 Prior to dismissal of the adversary proceeding, on May 13,  
14 2013, debtor filed an objection to BONY's POC. Debtor argued  
15 that the POC did not contain evidence that BANA, as loan  
16 servicer, had the right to file the POC on behalf of BONY and  
17 that BONY did not have standing to enforce the note. In  
18 response, BONY argued that BANA, by virtue of its servicing  
19 rights with BONY – the holder of the claim – had standing to  
20 file the POC on BONY's behalf. BONY pointed out that the POC  
21 did not label BANA as the creditor and copies of the deed of  
22 trust and note bearing an endorsement in blank along with the  
23 assignment assigning the beneficial interest under the deed of  
24 trust to BONY were attached to the POC.

25 At the first hearing on debtor's objection to BONY's POC,  
26 the bankruptcy court sustained debtor's objection on the ground,  
27 among others, that BONY had not established that BANA had  
28 authority to file the POC on its behalf. Due to the

1 deficiencies, the court gave BONY time to file an amended POC  
2 and continued the hearing to September 5, 2013.

3 On August 14, 2013, BANA filed an amended POC on behalf of  
4 BONY designated as claim 6-2. Attached to the POC was the  
5 declaration of Peter Murphy, Assistant Vice President of BANA,  
6 who declared that BANA, as servicer for BONY, "has the right to  
7 enforce the Note on behalf of Movant."

8 At the September 5, 2013 hearing, the bankruptcy court  
9 found that Murphy's declaration was insufficient evidence to  
10 establish the agency relationship between BANA and BONY, thereby  
11 leaving enforcement of the note in dispute. To resolve the  
12 factual and legal issues asserted, the bankruptcy court entered  
13 the Scheduling Order setting an evidentiary hearing for  
14 November 5, 2013.

15 Meanwhile, at a September 12, 2013 hearing on debtor's  
16 objection to claim 8-1, also filed by BANA, the bankruptcy court  
17 decided that debtor's arguments regarding BANA's standing to  
18 enforce the note in claim 8-1 were without merit, overruled her  
19 objection, and concluded that BANA's claim 8-1 was secured and  
20 allowed in the amount of \$1,894,662.21. After allowing BANA's  
21 secured claim, the bankruptcy court found debtor's liquidated  
22 secured debt was no longer subject to dispute. The court thus  
23 concluded that debtor was over the debt limit stated in § 109(e)  
24 and no longer eligible for chapter 13 relief. The bankruptcy  
25 court stated its intent to dismiss the case within ten days of  
26 the hearing unless debtor requested conversion of the case to  
27 either chapter 7 or 11 and entered the order  
28 (Conversion/Dismissal Order) consistent with its decision.

1 Debtor moved for reconsideration of this order, which the  
2 bankruptcy court denied.

3 Debtor also moved for reconsideration of the Scheduling  
4 Order arguing that the bankruptcy court should instead sustain  
5 her objection to POC 6-2 because it was not entitled to prima  
6 facie validity. The court denied her motion in the  
7 Reconsideration Order entered on September 27, 2013. On the  
8 same date, the bankruptcy court entered the Pre-Trial Conference  
9 Order setting a pre-trial conference for October 9, 2013, which  
10 was continued to October 18, November 11 and, finally to  
11 November 25, 2013.

12 On October 8, 2013, debtor filed a NOA listing the  
13 Scheduling Order, the Reconsideration Order and the Pre-Trial  
14 Conference Order as the orders appealed from.

15 On November 7, 2013, debtor voluntarily converted her case  
16 from chapter 13 to chapter 7 due to the bankruptcy court's  
17 ruling that debtor was no longer eligible for chapter 13 once it  
18 allowed secured claim 8-1 filed by BANA in an amount over \$1.8  
19 million. See BAP No. 13-1507.

20 On November 25, 2013, debtor's counsel failed to appear at  
21 the pre-trial conference in connection with claim 6-2. On the  
22 next day, the bankruptcy court entered an order overruling  
23 debtor's objection to claim 6-2 due to lack of prosecution. The  
24 order states in pertinent part: "Upon consideration of Debtor's  
25 objection, and the pleadings and files in this case, and the  
26 failure of Debtor to appear, Debtor's Objection to BONY's proof  
27 of claim No. 6-2 is overruled due to lack of prosecution."

28 Debtor's attorney filed an emergency motion for

1 reconsideration, which the bankruptcy court granted by order  
2 entered on December 5, 2013. That order stated: "The debtor's  
3 Motion is granted. The November 25, 2013 Order Overruling  
4 Debtor's Objection to Claim No. 6-2 is hereby voided." The  
5 status conference was continued to December 16, 2013.

6 At the December 16, 2013 status conference, the bankruptcy  
7 court overruled debtor's objection to claim 6-2 as moot due to  
8 the conversion of debtor's case.

9 On December 19, 2013, the Panel issued an order stating  
10 that the finality issues raised in this appeal were satisfied by  
11 the bankruptcy court's December 16, 2013 order finding debtor's  
12 objection to claim 6-2 as moot, but noted that if debtor sought  
13 to challenge the bankruptcy court's rulings in that order she  
14 needed to file an amended NOA. Debtor did not amend her NOA.

15 Debtor's efforts to obtain a stay pending appeal were  
16 denied by both the bankruptcy court and this Panel. The  
17 chapter 7 trustee has since filed a report of no distribution  
18 and debtor received her discharge on February 12, 2014.

## 19 **II. JURISDICTION**

20 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
21 §§ 1334 and 157(b) (2) (A), (N) and (O). We have jurisdiction  
22 under 28 U.S.C. § 158.

## 23 **III. ISSUE**

24 Debtor states the issue on appeal is whether the bankruptcy  
25 court erred in overruling her objection to BONY's claim 6-2.  
26 However, debtor's NOA did not designate any order appealed from  
27 which overruled her objection to BONY's claim 6-2. Therefore,  
28 we have rephrased the issue to conform to the orders appealed

1 from: Did the bankruptcy court err by scheduling an evidentiary  
2 hearing on debtor's objection to claim 6-2 and denying debtor's  
3 motion for reconsideration of that order?

#### 4 **IV. STANDARDS OF REVIEW**

5 A bankruptcy court's decision whether to hold an  
6 evidentiary hearing is reviewed for an abuse of discretion.  
7 Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1139 (9th Cir.  
8 2004). A bankruptcy court's denial of a motion for  
9 reconsideration is also reviewed for an abuse of discretion.  
10 Arrow Elecs., Inc. v. Justus (In re Kaypro), 218 F.3d 1070, 1073  
11 (9th Cir. 2000); Sewell v. MGF Funding, Inc. (In re Sewell),  
12 345 B.R. 174, 178 (9th Cir. BAP 2007).

13 In determining whether the court abused its discretion we  
14 first determine de novo whether the trial court identified the  
15 correct legal rule to apply to the relief requested and then, if  
16 the correct legal standard was applied, we determine whether the  
17 court's application of that standard was "(1) illogical,  
18 (2) implausible, or (3) without support in inferences that may  
19 be drawn from the facts in the record." United States v. Loew,  
20 593 F.3d 1136, 1139 (9th Cir. 2010).

#### 21 **V. DISCUSSION**

22 In her opening brief, debtor states that she is challenging  
23 the bankruptcy court's November 25, 2013 order overruling her  
24 objection to claim 6-2. However, debtor filed her NOA on  
25 October 8, 2013, well before the November 25, 2013 order.  
26 Further, she never amended her NOA to include this order or the  
27 bankruptcy court's subsequent ruling issued on December 16,  
28 2013, which overruled debtor's objection to claim 6-2 on



1 mootness grounds. As a result, we do not consider matters which  
2 were ruled upon in either the November 25 or December 16, 2013  
3 orders.

4 Moreover, the bankruptcy court entered the November 25,  
5 2013 order overruling debtor's objection because debtor's  
6 counsel failed to appear at the hearing. Subsequently, the  
7 bankruptcy court granted debtor's motion for reconsideration of  
8 the November 25, 2013 order. In that order, the court stated  
9 that the November 25, 2013 order overruling debtor's objection  
10 to claim no. 6-2 "is hereby voided." Since the bankruptcy court  
11 voided the November 25, 2013 order, it follows that even if  
12 debtor had appealed from this order there is no decision for us  
13 to vacate, reverse, or remand stemming from that order.

14 Debtor's NOA states that she is appealing the Scheduling  
15 Order, the Reconsideration Order and the Pre-Trial Conference  
16 Order. However, she makes no arguments in relation to those  
17 orders in her opening brief. Arguments not specifically and  
18 distinctly made in the appellant's opening brief are deemed  
19 waived. Brownfield v. City of Yakima, 612 F.3d 1140, 1149 n.4  
20 (9th Cir. 2010); see also Wilcox v. C.I.R., 848 F.2d 1007, 1008  
21 n.2 (9th Cir. 1988) (holding that even pro se litigants must  
22 brief arguments on appeal, or they will forfeit them).

## 23 VI. CONCLUSION

24 For the reasons stated, we AFFIRM.  
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28