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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NOT FOR PUBLICATION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.	SC-14-1189-KuJuKi
)		
WOLFGANG PATERNO,)	Bk. No.	13-06182
)		
Debtor.)		
_____)		
MESA PINES HOMEOWNER'S)		
ASSOCIATION,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM*	
)		
WOLFGANG PATERNO,)		
)		
Appellee.)		
_____)		

Argued and Submitted on January 22, 2015
at Pasadena, California

Filed - February 20, 2015

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

Honorable Christopher B. Latham, Bankruptcy Judge, Presiding

Appearances: Cindy A. Brand argued for appellant Mesa Pines
Homeowner's Association.**

Before: KURTZ, JURY and KIRSCHER, Bankruptcy Judges.

*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 8024-1.

**Appellee Wolfgang Paterno has not actively participated in
this appeal.

1 **INTRODUCTION**

2 The Mesa Pine Homeowners Association filed a proof of claim
3 in Wolfgang Paterno's chapter 13¹ bankruptcy case. The claim was
4 based on fines the Association imposed against Paterno for
5 violating certain restrictions regarding the use of his real
6 property. Paterno objected to the claim, and the bankruptcy
7 court sustained the objection, holding in relevant part that the
8 Association's claim was time barred under the applicable statute
9 of limitations, Cal. Civ. Proc. Code ("CCP") § 336(b).

10 On appeal, the Association contends that CCP § 336(b) was
11 not applicable to its claim because the claim was in essence an
12 action to recover possession of common area property that
13 Paterno's home improvements encroached on. We disagree. The
14 claim was nothing more than an action for money (fines) for
15 violation of the Association's real property restrictions, which
16 action squarely falls within the scope of CCP § 336(b).
17 Accordingly, we AFFIRM.

18 **FACTS**

19 Paterno's home is located in a planned community governed by
20 the Association and is subject to a recorded Amended Declaration
21 of Restrictions. The stated restrictions run with the land and
22 are binding on all homeowners within the community and their
23 successors. Among other restrictions, Paterno was prohibited
24 from making any exterior improvements without first obtaining the
25

26 ¹Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

1 written approval of the Association's board of directors or the
2 board's architectural review committee. The Amended Declaration
3 of Restrictions gave the Association broad authority over such
4 improvements:

5 **6.2 Standard of Review.** The Board shall be the final
6 arbiter with regard to approval of any improvement
7 regardless of but not limited to the nature, kind, shape,
8 size, height, materials and color scheme.

8 Amended Declaration of Restrictions (May 4, 1994) at ¶ 6.2.

9 In July and September of 2006, Paterno appeared at and
10 participated in two Association board meetings. According to the
11 minutes from the July board meeting, Paterno appeared at the July
12 meeting at the board's request to discuss his ongoing front yard
13 improvements and certain alleged violations of the Association's
14 restrictions. During that meeting, Paterno requested help from
15 the board in determining the boundary lines of his lot. The
16 president of the board told Paterno in response that, if Paterno
17 "did not know where [his] property lines were located," he should
18 "have a survey completed." Gambill Decl. (Feb. 18, 2014) at ¶ 6.
19 The board president reiterated this point in a letter he caused
20 to be sent to Paterno shortly after the meeting. The letter
21 further advised Paterno that the board was not responsible for
22 assisting homeowners in determining their property lines.

23 At the September board meeting, Paterno presented his
24 proposed plans for improving his back yard and side yards. The
25 landscaping and hardscaping plans Paterno submitted contemplated
26 the construction of walls on Paterno's lot up to edges of the
27 property. The board did not require Paterno to obtain and submit
28 a site survey verifying that none of his improvements would

1 extend beyond his property lines and thereby encroach on the
2 community's common area, which the Association had a duty to
3 manage and maintain. Instead, the board approved Paterno's
4 proposed improvements with only two minor exceptions, one
5 relating to a shed and the other related to the color of his
6 fencing. Paterno thereafter went ahead with the construction of
7 his improvements.²

8 Roughly five years elapsed with nothing relevant occurring.
9 Then, in October 2011, Paterno sent a letter to the Association
10 threatening to sue unless the Association constructed a retaining
11 wall on the common area slope behind his house to reduce the risk
12 of mudslides and erosion. In response, the Association ordered a
13

14 ²The Association's papers are equivocal regarding what
15 Paterno's landscaping plans indicated regarding the boundary
16 lines of his lot. On the one hand, Association president Paul
17 Gambill submitted declaration testimony stating that "[t]he plans
18 show that all improvements are within the boundaries of the
19 property." Gambill Decl. (Feb. 18, 2014) at ¶ 10. On the other
20 hand, Gambill later submitted additional declaration testimony
21 referring to the exact same plans and stating that "the drawings
22 submitted by the Debtor to [the Association] did not include his
23 property's boundary lines." Gambill Decl. (Feb. 28, 2014) at
24 ¶ 5. It is difficult to reconcile these two statements. If
25 Gambill and the Association understood from the plans that all of
26 Paterno's proposed improvements were within the "boundaries of
27 the property" as Gambill first declared, how is it that Gambill
28 and the Association obtained this understanding? In any event,
the bankruptcy court found that Paterno's landscaping plans
submitted to the Association "contemplated the construction of
walls that would extend to the Property's edge." Order
Sustaining Claim Objection (April 3, 2014) at p. 2. On appeal,
the Association has not challenged this finding. In fact, the
Association's opening brief contains a virtually identical
statement in its recitation of the facts. Aplt. Opn. Brf. at
p. 7. We generally accept as true findings not disputed on
appeal. See Sachan v. Huh (In re Huh), 506 B.R. 257, 272 (9th
Cir. BAP 2014) (en banc).

1 survey to determine the boundary lines of Paterno's lot, and the
2 survey concluded that some of Paterno's 2006 improvements
3 encroached on the Association's common area by three to six feet.

4 The Association then notified Paterno of the alleged
5 encroachment and directed him either to order his own competing
6 survey or to remove the encroaching improvements. Paterno took
7 neither of these actions. Consequently, over the course of
8 several months, the Association levied several thousand dollars
9 in fines against Paterno explicitly because Paterno's alleged
10 encroachment onto the common area violated certain restrictions
11 set forth in the Amended Declaration of Restrictions. In
12 particular, the Association pointed to ¶ 1.8 of the restrictions,
13 which indicated that the common areas of the development were for
14 the "common use and enjoyment" of all of the owners. In
15 addition, ¶ 2.1 of the restrictions provided:

16 Every owner of a Lot shall have a right and easement of
17 ingress and egress and of enjoyment in and to the
18 Common area which shall be appurtunant to and shall
pass with title to every such Lot

19 Amended Declaration of Restrictions (May 4, 1994) at ¶ 2.1.

20 When Paterno did not pay the fines, the Association filed a
21 complaint against Paterno in 2012 in the Small Claims Division of
22 the San Diego County Superior Court. However, before the
23 completion of trial, the Association voluntarily dismissed its
24 complaint.

25 Paterno filed his chapter 13 bankruptcy petition on June 13,
26 2013, and the Association filed its proof of claim on October 2,
27 2013. On its face, the proof of claim is based on "HOA Fine -
28 Violation of governing documents." Paterno then filed his claim

1 objection, in which he asserted, among other things, that the
2 Association's claim was time barred under the statute of
3 limitations set forth in CCP § 336(b). This assertion was not
4 new, and it should not have been any surprise to the Association,
5 inasmuch as Paterno had made this same argument in response to
6 the Association's state court complaint. Oddly, in its papers
7 responding to the claim objection, the Association largely
8 ignored Paterno's statute of limitations defense.³

9 After holding two hearings on the claim objection and
10 directing the parties to submit additional evidence, the
11 bankruptcy court entered its order sustaining Paterno's claim
12 objection. The bankruptcy court explicitly found that the
13 Association should have suspected in 2006, when Paterno's
14 improvements were made, that they might encroach on the common
15 area. The court noted that, at the time Paterno submitted his
16 landscaping plans to the Association's board of directors in
17 September 2006, the board had reason to suspect that there might
18 be an encroachment issue in light of Paterno's admitted ignorance
19 of his boundary lines just two months before at the July 2006
20 board meeting. According to the court, if the Association had

21
22 ³In its appeal brief, the Association states that the
23 bankruptcy court "did not allow briefing" on the statute of
24 limitations issue. We are perplexed by this statement given the
25 advance warning the Association had regarding this issue and the
26 absence of anything in the record indicating that the Association
27 requested supplemental briefing or that the bankruptcy court
28 denied that request. It is possible that briefing was discussed
at one or both of the two hearings on the claim objection, but
the Association declined to provide us with the transcripts from
either hearing. In addition, the statute of limitations defense
was mentioned in the initial declaration of Paterno filed in
support of the claim objection.

1 **DISCUSSION**

2 Under § 502(b)(1), a claim must be disallowed if the claim
3 is unenforceable under applicable nonbankruptcy law. Durkin v.
4 Benedor Corp. (In re G.I. Indus., Inc.), 204 F.3d 1276, 1281 (9th
5 Cir. 2000). The grounds for disallowance that may be asserted in
6 support of a § 502(b)(1) claim objection include those defenses
7 that would be available to the debtor under state law. Id. In
8 disallowing the Association's claim, the bankruptcy court applied
9 California's five-year statute of limitations set forth in
10 CCP § 336(b). That statute fixes a five year limitations period
11 for actions for violation of a restriction affecting real
12 property and further provides that the limitations period begins
13 to run "from the time the person seeking to enforce the
14 restriction discovered or, through the exercise of reasonable
15 diligence, should have discovered the violation." CCP § 336(b);
16 see also Harry D. Miller & Marvin B. Starr, 9 CAL. REAL ESTATE
17 § 25B:107 (3d ed. 2014).

18 On appeal, the Association in essence argues that its proof
19 of claim was an action to recover possession of the common area
20 property that Paterno encroached on, so CCP § 336(b) does not
21 apply. In support of its position, the Association cites Kapner
22 v. Meadowlark Ranch Ass'n, 116 Cal.App.4th 1182, 1189 (2004).
23 Kapner held that CCP § 336(b) does not apply to actions to
24 recover possession of commonly owned real property encroached on
25 by one of residents of a development, who thereby excludes from
26 the commonly owned property other residents of the development.
27 Id.

28 As a threshold matter, we note that nothing in the record

1 before us indicates that the Association raised this argument in
2 the bankruptcy court, and we may decline to consider arguments
3 raised for the first time on appeal. See United Student Aid
4 Funds, Inc. v. Espinosa, 559 U.S. 260, 270 (2010) (“We need not
5 settle that question, however, because the parties did not raise
6 it in the courts below.”); Scovis v. Henrichsen (In re Scovis),
7 249 F.3d 975, 984 (9th Cir. 2001) (stating that court would not
8 consider argument raised for the first time on appeal absent
9 exceptional circumstances).

10 More importantly, however, there is a fatal flaw in the
11 Association’s argument. Its proof of claim did not seek to
12 recover possession of the common area upon which Paterno
13 encroached. The proof of claim merely sought to enforce the
14 fines the Association had imposed against Paterno for violation
15 of the restrictions set forth in the Amended Declaration of
16 Restrictions. As such, the proof of claim falls squarely within
17 the scope of CCP § 336(b). See generally Pac. Hills Homeowners
18 Assn. v. Prun, 160 Cal.App.4th 1557, 1563-64 (2008) (holding that
19 CCP § 336(b) applies to any action to enforce a restriction on
20 real property regardless of whether the restriction is set forth
21 in a recorded document).

22 At oral argument, counsel for the Association suggested that
23 the bankruptcy court's order disallowing its claim could be
24 construed as holding that the Association is time barred from
25 pursuing an action to recover possession of the real property
26 upon which Paterno allegedly encroached. We disagree. The order
27 only ruled upon the proof of claim the Association filed and that
28 claim only asserted a right to payment based on fines for

1 violation of the restrictions set forth in the Association's
2 Amended Declaration of Restrictions. Thus, the Association's
3 concern regarding the scope of the bankruptcy court's ruling is
4 unfounded.

5 The applicability of CCP § 336(b) is the only argument the
6 Association made in its appeal brief. While the Association's
7 statement of issues in its brief raised questions regarding some
8 of the bankruptcy court's findings of fact, the argument the
9 Association made in its brief did not challenge any findings.
10 When arguments are not specifically and distinctly made in the
11 appellant's opening brief, those arguments typically are deemed
12 forfeited. See, e.g., Christian Legal Soc'y v. Wu, 626 F.3d 483,
13 487-88 (9th Cir. 2010); Brownfield v. City of Yakima, 612 F.3d
14 1140, 1149 n.4 (9th Cir. 2010) (citing Greenwood v. F.A.A.,
15 28 F.3d 971, 977 (9th Cir. 1994)).

16 Even if we were to review the bankruptcy court's findings,
17 we perceive no reversible error. The Association apparently
18 disputes the bankruptcy court's determination that the
19 Association did not exercise reasonable diligence and that, if
20 the Association had exercised reasonable diligence, it would have
21 discovered the extent of any encroachment in 2006, when Paterno
22 made the improvements. These determinations were findings of
23 fact. See Fox v. Ethicon Endo-Surgery, Inc., 35 Cal.4th 797, 810
24 (2005); see also Leaf v. City of San Mateo, 104 Cal.App.3d 398,
25 409 (1980) ("Whether plaintiffs in fact exercised reasonable
26 diligence in discovering the negligence of defendant City of San
27 Mateo is a question of fact.").

28 As indicated in the standards of review section above, in

1 reviewing the bankruptcy court's factual findings, we cannot
2 reverse unless those findings were illogical, implausible or
3 without support in the record. In re Retz, 606 F.3d at 1196.
4 The Association has not demonstrated any of these criteria for
5 reversal. Nor, on this record, are any of these criteria
6 apparent.

7 This is not a case where the bankruptcy court imposed a
8 general duty of care on the Association requiring it in all
9 instances to demand site surveys before permitting homeowners to
10 make landscaping improvements. We would be reluctant to uphold
11 the imposition of such a general duty of care. Instead, the
12 bankruptcy court's diligence findings were based on the unique
13 facts of this case. These facts included Paterno's July 2006
14 admission to the Association's board of directors that he did not
15 know where the boundary lines of his lot were located. These
16 facts also included Paterno's September 2006 board meeting
17 presentation of his landscaping plans, which proposed to
18 construct walls just within the purported boundaries of his lot.

19 "A plaintiff has reason to discover a cause of action when
20 he or she 'has reason at least to suspect a factual basis for its
21 elements.'" Fox, 35 Cal.4th at 807 (quoting Norgart v. Upjohn
22 Co. 21 Cal.4th 383, 398 (1999)). The Association's lack of
23 subjective suspicion regarding Paterno's landscaping proposals is
24 irrelevant because the measure is an objective standard. See
25 Wilshire Westwood Assoc. v. Atl. Richfield Co., 20 Cal.App.4th
26 732, (1993); Mangini v. Aerojet-Gen. Corp., 230 Cal.App.3d 1125,
27 1150 (1991). Once the Association became aware of facts that
28 would have made a reasonably prudent person suspicious - like

1 Paterno's admitted ignorance of his property lines followed soon
2 after by his proposal to build walls just within the purported
3 boundaries of his lot - the Association had a duty to investigate
4 further and is charged with knowledge of those matters that would
5 have been revealed by such investigation. Id.

6 The record here establishes that, when the Association
7 ordered a survey of Paterno's lot in 2012, the survey concluded
8 that Paterno's improvements had encroached on the common area.
9 On this record, we cannot hold as clearly erroneous the
10 bankruptcy court's findings that the Association should have
11 required Paterno in 2006, at his own expense, to order such a
12 survey of his lot as a prerequisite to approving his landscaping
13 plans and that, had such a survey been ordered, the extent (if
14 any) of Paterno's encroachment would have been apparent to the
15 Association.

16 In sum, we perceive no reversible error in the bankruptcy
17 court's determination that the limitations period under
18 CCP § 336(b) began to run in 2006, when Paterno constructed his
19 landscaping improvements and by which time the Association, with
20 the aid of a site survey, should have known whether Paterno's
21 improvements encroached on the common area.

22 **CONCLUSION**

23 For the reasons set forth above, we AFFIRM the bankruptcy
24 court's order sustaining Paterno's claim objection and
25 disallowing the Association's claim.