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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NOT FOR PUBLICATION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.	)	<b>MEMORANDUM*</b>	
	)		
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 13<sup>1</sup> 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  
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26 <sup>1</sup>Unless 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.<sup>2</sup>

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  
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14 <sup>2</sup>The 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 appurtenant 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.<sup>3</sup>

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

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21  
22 <sup>3</sup>In 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 been acting in a reasonably diligent manner, it would have  
2 required Paterno to obtain at his cost a survey establishing the  
3 boundaries of his lot as a prerequisite to the Association's  
4 approval of the improvements.

5 Consequently, the bankruptcy court held that the applicable  
6 five-year statute of limitations under CCP § 336 began to run in  
7 2006. Because the Association's proof of claim was not filed  
8 until October 2013, well after the expiration of the five-year  
9 limitations period, the court concluded that the Association's  
10 claim was time barred.

11 The Association timely filed a notice of appeal.

#### 12 JURISDICTION

13 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
14 §§ 1334 and 157(b) (2) (A), (B) and (O). We have jurisdiction  
15 under 28 U.S.C. § 158.

#### 16 ISSUE

17 Did the bankruptcy court commit reversible error when it  
18 sustained Paterno's objection to the Association's claim?

#### 19 STANDARDS OF REVIEW

20 In appeals arising from a ruling on a claim objection, we  
21 review the bankruptcy court's conclusions of law de novo and its  
22 findings of fact under the clearly erroneous standard. See Allen  
23 v. U.S. Bank, NA (In re Allen), 472 B.R. 559, 564 (9th Cir. BAP  
24 2012). Factual findings are not clearly erroneous unless they  
25 are illogical, implausible or without support in the record.  
26 Retz v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010)  
27 (citing United States v. Hinkson, 585 F.3d 1247, 1261-62 & n.21  
28 (9th Cir. 2009) (en banc)).

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.