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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-14-1101-KiBrD
)		
LAUREL BELKIN GREENSTEIN,)	Bk. No.	1:12-15099-AA
)		
Debtor.)		
_____)		
)		
LAUREL BELKIN GREENSTEIN,)		
)		
Appellant,)		
)		
v.)	AMENDED MEMORANDUM¹	
)		
WELLS FARGO BANK, N.A.,)		
SUCCESSOR BY MERGER WITH)		
WELLS FARGO BANK SOUTHWEST,)		
N.A., f/k/a WACHOVIA MORTGAGE,)		
FSB, f/k/a WORLD SAVINGS BANK,)		
)		
Appellee.)		
_____)		

Argued and Submitted on July 23, 2015,
at Pasadena, California

Filed - January 26, 2016

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

Honorable Alan M. Ahart, Bankruptcy Judge, Presiding

Appearances: Appellant Laurel Belkin Greenstein argued pro se;
Robert A. Bailey of Anglin Flewelling Rasmussen
Campbell & Trytten LLP argued for appellee Wells
Fargo Bank, N.A.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have, it has no precedential value. See 9th Cir. BAP Rule 8024-1.

1 Before: KIRSCHER, BRANDT² and DUNN, Bankruptcy Judges.

2 Memorandum by Judge Kirscher
3 Concurrence by Judge Dunn

4 Chapter 7³ debtor Laurel Greenstein appeals an
5 order denying her motion to set aside the sale of her home, a sale
6 she contends is void because it violated the automatic stay. The
7 bankruptcy court denied the motion on the basis of claim
8 preclusion, but failed to articulate any findings to support the
9 doctrine's application. Thus, we VACATE and REMAND for further
10 proceedings.

11 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

12 **A. The Lipkis bankruptcy case and the in rem order**

13 In 2007, Debtor obtained a \$510,000 loan from World Savings
14 Bank, predecessor to appellee Wells Fargo Bank, N.A., secured by a
15 deed of trust recorded against her residence in Woodland Hills,
16 California ("Property"). Debtor later defaulted and a notice of
17 default was recorded in July 2011. A notice of sale was recorded
18 on October 26, 2011, with a trustee's sale of the Property
19 scheduled for November 15, 2011. Meanwhile, Debtor sued Wells
20 Fargo and others in state court with respect to the pending
21 foreclosure in October 2011. On November 22, 2011, the state
22 court issued a temporary restraining order enjoining Wells Fargo
23 from selling the Property at foreclosure pending a hearing on the

24
25 ² Hon. Philip H. Brandt, Bankruptcy Judge for the Western
26 District of Washington, sitting by designation.

27 ³ Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 issuance of a preliminary injunction scheduled for January 9,
2 2012.

3 On November 10, 2011, five days before the scheduled sale, a
4 grant deed appeared to be recorded transferring title to the
5 Property from Debtor to Roger Lipkis ("Lipkis Deed"). On
6 November 18, 2011, Lipkis filed a chapter 13 bankruptcy case.⁴
7 Lipkis did not claim an interest in the Property.⁵ His case was
8 assigned to Judge Tighe.

9 In February 2012, Debtor sent an email to counsel for Wells
10 Fargo in the state court action informing him that the Lipkis Deed
11 was a fake and appeared to be a "cut and paste" job. She denied
12 knowing Lipkis or executing the Lipkis Deed. In actuality, the
13 recording number on the Lipkis Deed - 20111253614 - is identified
14 with a tax lien document recorded on September 15, 2011 (two
15 months before the Lipkis Deed), against an unrelated third party.

16 It later became clear that the Property had been transferred
17 to Lipkis without his knowledge or consent or the consent of Wells
18 Fargo prior to him filing bankruptcy. On March 7, 2012, counsel
19 for Lipkis and Wells Fargo filed a stipulation to terminate the
20 automatic stay with respect to the Property under § 362(d)(1).
21 The parties further agreed to in rem relief under § 362(d)(4).

22 On March 19, 2012, the bankruptcy court entered an order in
23 the Lipkis case granting the stipulated motion for relief from
24

25
26 ⁴ Wells Fargo contends that Lipkis's bankruptcy filing on
November 18, 2011, stopped the pending trustee's sale.

27 ⁵ Notably, the Lipkis Deed indicates that Lipkis is an
28 "unmarried man," but his bankruptcy documents filed just eight
days later indicate that he is "married."

1 stay under § 362(d)(1) and (d)(4) ("In Rem Order"). The In Rem
2 Order⁶ provides, in relevant part:

3 3. The motion is granted under:

- 4 11 U.S.C. § 362(d)(1)
5 11 U.S.C. § 362(d)(4) (See attached
continuation page)

6 4. As to Movant, its successors, transferees and
7 assigns, the stay of 11 U.S.C. § 362(a) is:

8 a. Terminated as to Debtor and Debtor's
bankruptcy estate.

9 5. Movant may enforce its remedies to foreclose
10 upon and obtain possession of the Property in
accordance with applicable nonbankruptcy law.

11 9. The filing of the petition was part of a
12 scheme to delay, hinder and defraud creditors
that involved either:

- 13 transfer of all or part ownership of, or
14 other interest in, the Property without
the consent of the secured creditor or
15 court approval. (see attached
continuation page).

16 If recorded in compliance with applicable state law
17 governing notices of interests or liens in the Property,
this Order is binding and effective under § 362(d)(4)(A)
18 and (B) in any other bankruptcy case purporting to affect
the Property filed not later than 2 years after the date
19 of the entry of this Order, except that a debtor in a
subsequent bankruptcy case may move for relief from this
20 Order based upon changed circumstances or for good cause
shown, after notice and a hearing. Any federal, state or
21 local government unit that accepts notices of interests or
liens in real property shall accept any certified copy of
22 this Order for indexing and recording.

23 The "attached continuation page" in the In Rem Order provides, in
24

25 ⁶ Prior to December 22, 2010, the relevant language in
26 § 362(d)(4) read "hinder, delay **and** defraud creditors" (emphasis
added). The Bankruptcy Technical Corrections Act of 2010, Pub. L.
27 No. 111-327, 124 Stat. 3557 (2010) (effective December 22, 2010)
replaced this language with "hinder, delay **or** defraud" (emphasis
28 added). The mandatory form used for the In Rem Order contained
the outdated "and" language.

1 relevant part:

- 2 a. That [Lipkis] asserts no interest in the [Property].
- 3 b. That an interest in the Property was impermissibly
4 transferred to [Lipkis] without the knowledge of
5 [Lipkis]. Without [Lipkis's] consent, his Chapter 13
6 bankruptcy case proceeding is being used for an
7 improper purpose as part of a scheme to delay, hinder
and defraud creditors that involved a transfer of all
or part ownership of, or interest in the [Property]
without the consent of this Movant or court approval.

8 Nothing in the record indicates Debtor was given notice of
9 the stipulation or any motion to approve it or of the entry of the
10 order. A certified copy of the In Rem Order was recorded on
11 March 28, 2012. A new notice of sale for the Property was
12 recorded on May 14, 2012, with a trustee's sale scheduled for
13 June 4, 2012.

14 **B. Debtor's bankruptcy case and her multiple attempts to vacate**
15 **the In Rem Order and/or to seek damages from the alleged stay**
16 **violation**

17 **1. The Lipkis motions and Debtor's adversary proceedings**

18 Debtor filed a chapter 7 bankruptcy case on May 31, 2012,
19 five days before the rescheduled foreclosure sale of the Property.
20 Her case was assigned to Judge Ahart. Debtor identified an
21 interest in the Property valued at \$975,000, subject to Wells
22 Fargo's secured claim of \$575,000. Debtor claimed a homestead
exemption of \$150,000.

23 A trustee's sale of the Property proceeded on July 11, 2012.⁷
24 Wells Fargo was the successful bidder with a credit bid of
25 \$563,411.26. A trustee's deed was recorded on November 13, 2012.

26 ⁷ The sale set for June 4 was apparently delayed to July 11
27 due to Debtor's listing of the Property in her bankruptcy
28 schedules and the chapter 7 trustee's ("Trustee") attempt to list
and sell the Property on behalf of the estate.

1 Debtor, pro se, proceeded thereafter to file three post-sale
2 motions in the Lipkis bankruptcy case attempting to obtain relief
3 from the In Rem Order. On August 7, 2012, Debtor filed a "Motion
4 for Hearing to Reverse Order Granting Motion for Relief Under
5 11 U.S.C. § 362 (Real Property)." Debtor alleged that the facts
6 presented in the stipulation by counsel for Lipkis and Wells Fargo
7 were false, and that Wells Fargo had used the In Rem Order to
8 bypass the automatic stay in her bankruptcy case and sell the
9 Property. Debtor alleged that the Lipkis Deed was a fake and that
10 she never transferred the Property to Lipkis, whom she did not
11 know. Debtor further alleged that while Trustee was not
12 challenging the July 11 sale, she had previously stated in writing
13 to Wells Fargo and Debtor that the In Rem Order was improper.
14 Debtor presented no evidence to support Trustee's alleged written
15 statement.⁸

16 Before the August 7 motion could be heard, Debtor filed an
17 "Amended Motion for Hearing to Reverse Order Granting Motion for
18 Relief Under 11 U.S.C. § 362 (Real Property)" on August 14, 2012.
19 This motion was identical to the first motion, except for the
20 inclusion of a declaration from Debtor. Debtor said she knew who
21 did the "cut and paste" job to create the fake Lipkis Deed and get
22 it to Wells Fargo, but she could not prove it. In any event, she
23 denied any involvement. Debtor stated that the notary who

24
25 ⁸ Debtor later included a copy of an email from Trustee to
26 Wells Fargo's counsel dated July 11, 2012 – the day of the sale –
27 with her motion to set aside the sale filed in December 2013. In
28 that email, Trustee opined "[t]here is no in rem relief contained
in the [In Rem Order]." Trustee further opined that the sale had
violated the automatic stay and had to be reversed immediately.
Trustee indicated that significant equity existed in the Property
(about \$133,000 based on a \$749,000 sale price).

1 allegedly signed the Lipkis Deed was willing to testify that she
2 never notarized the document and that she had no record of it in
3 her notary book.

4 Two days later on August 16, 2012, Debtor filed a third
5 motion - "Motion to set hearing Re contempt." In this motion,
6 Debtor requested that the bankruptcy court find counsel for Lipkis
7 and Wells Fargo in contempt for their alleged willful
8 misrepresentations made to the court in their stipulation for stay
9 relief in the Lipkis bankruptcy case.

10 Four days after filing the last of her three motions in the
11 Lipkis bankruptcy case, Debtor in her own bankruptcy case filed an
12 adversary proceeding against Wells Fargo, its counsel and counsel
13 for Lipkis, Adv. No. 12-1300 ("First Adversary Proceeding").
14 Although her complaint failed to set forth any precise claim for
15 relief, Debtor attacked the validity of the In Rem Order and
16 contended that the July 11 sale was void because it violated the
17 automatic stay in effect in her case. Debtor requested that title
18 to the Property be restored to her and that she be awarded
19 monetary damages for the alleged stay violation.

20 Wells Fargo moved to dismiss the First Adversary Proceeding
21 on September 24, 2012, asserting several theories as to why the
22 complaint should be dismissed, including that Debtor lacked
23 standing to bring the action. Wells Fargo argued that the claims
24 asserted by Debtor arose out of an alleged prepetition action and
25 were property of the bankruptcy estate. Because Debtor had not
26 scheduled these alleged claims and/or because Trustee had not yet
27 abandoned them, Wells Fargo argued that Debtor lacked standing to
28 pursue them on her own behalf. A hearing on Wells Fargo's motion

1 to dismiss was scheduled for October 23, 2012. Meanwhile, on
2 October 4, 2012, Trustee filed her notice of intent to abandon the
3 Property as burdensome and of inconsequential value to the estate.
4 No objections were filed.

5 The hearing on Wells Fargo's motion to dismiss the First
6 Adversary Proceeding went forward on October 23, 2012. We do not
7 have a transcript, but because Debtor filed another adversary
8 proceeding the next day, we assume the bankruptcy court announced
9 its intent to dismiss the First Adversary Proceeding at that
10 hearing.

11 The court entered an order on November 1, 2012, granting
12 Wells Fargo's motion to dismiss without leave to amend on the
13 basis that "Debtor has no standing." The First Adversary
14 Proceeding was closed shortly thereafter. Debtor did not appeal
15 the dismissal of the First Adversary Proceeding.

16 Before the First Adversary Proceeding was dismissed, Debtor
17 filed a second adversary proceeding against the same defendants on
18 October 24, 2012, Adv. No. 12-1379 ("Second Adversary
19 Proceeding"). The complaint in the Second Adversary Proceeding
20 was virtually identical to the first one, except Debtor asserted
21 that she now had standing to pursue the action against defendants
22 because Trustee had abandoned the Property. All three defendants
23 filed separate motions to dismiss under Civil Rule 12(b)(6).
24 Wells Fargo filed its motion to dismiss on November 26, 2012. It
25 contended that Debtor still lacked standing to pursue the action
26 despite Trustee's abandonment of the Property, because her
27 purported claims arose out of an alleged prepetition action
28 respecting the loan for the Property and those claims had not been

1 abandoned by Trustee.

2 On December 4, 2012, Judge Tighe ruled on Debtor's post-sale
3 motions filed in Lipkis's bankruptcy case, denying all three.
4 Judge Tighe noted that Debtor had filed the Second Adversary
5 Proceeding on October 24, 2012, in her own case which stated the
6 same allegations of fact that were the basis for the three
7 motions. Judge Tighe opined that the Second Adversary Proceeding,
8 rather than the post-sale motions, was the proper action for
9 Debtor to address her complaints. Debtor did not appeal the
10 orders.

11 On December 19, 2012, the bankruptcy court held a hearing on
12 two of the defendants' motions to dismiss the Second Adversary
13 Proceeding. Wells Fargo's motion was not scheduled to be heard
14 until January 2, 2013, but it appeared at the December 19 hearing.
15 As for the other two defendants, the bankruptcy court entered two
16 orders dismissing the Second Adversary Proceeding without leave to
17 amend on December 26 and 27, 2012. Before Wells Fargo's motion
18 was heard, Debtor voluntarily dismissed the Second Adversary
19 Proceeding without prejudice on December 28, 2012. The Second
20 Adversary Proceeding was closed July 24, 2013.⁹

21 _____
22 ⁹ A hearing on Wells Fargo's motion to dismiss the Second
23 Adversary Proceeding went forward on January 2, 2013, but Debtor
24 failed to appear. Judge Ahart announced at that hearing that he
25 would grant Wells Fargo's motion and dismiss the Second Adversary
26 Proceeding with prejudice, not knowing that Debtor had already
27 dismissed it without prejudice several days prior. For reasons
28 unknown, and without ever conducting a hearing, Judge Ahart then
entered an order granting Wells Fargo's motion to dismiss and
dismissing the Second Adversary Proceeding with prejudice on
February 7, 2014, even though the proceeding had already been
dismissed and closed on July 24, 2013. The order did not set
forth the reasons for the dismissal. Debtor tried to appeal the

(continued...)

1 **2. Debtor's motion to set aside the sale of the Property**

2 Debtor, pro se, filed the instant motion in her bankruptcy
3 case against Wells Fargo (only) on December 27, 2013. By this
4 time, she had been evicted from the Property. Essentially, Debtor
5 sought damages for Wells Fargo's alleged willful violation of the
6 automatic stay. As with her prior motions and adversary
7 complaints, Debtor contended that because Wells Fargo had failed
8 to seek relief from stay in her bankruptcy case, Wells Fargo
9 violated the stay when it foreclosed on the Property on July 11,
10 2012. Debtor made no mention of the In Rem Order.

11 Wells Fargo maintained that it had not violated the automatic
12 stay because the In Rem Order entered and recorded in March 2012
13 authorized the trustee's sale on July 11, 2012, despite Debtor's
14

15 ⁹(...continued)

16 February 7 dismissal order on August 11, 2014, and at the same
17 time filed a motion to reconsider in the bankruptcy court. We
dismissed the appeal as untimely on September 29, 2014. Debtor's
reconsideration motion went forward.

18 On July 8, 2015, Debtor informed the Panel of recent
19 developments respecting her motion to reconsider the dismissal
order entered on February 7, 2014. On June 25, 2015, Judge Barash
20 (to whom the adversary proceeding had been assigned) entered an
order allowing supplemental briefing on the matter, realizing the
21 court's potential mistake of dismissing the Second Adversary
Proceeding with prejudice when Debtor had already dismissed it
without prejudice. The bankruptcy court scheduled a hearing for
22 August 19, 2015. On September 1, 2015, the bankruptcy court
granted Debtor's motion and vacated the February 7, 2014 order
23 dismissing the Second Adversary Proceeding. Debtor subsequently
filed a third adversary proceeding, 1:15-ap-01220-MB. On
24 December 15, 2015, the bankruptcy court dismissed the third
adversary proceeding with leave to amend prior to February 5,
25 2016. To the extent the parties have requested that we take
judicial notice of these recent developments, we **GRANT** that
26 request. Otherwise, we are able to take judicial notice of the
existence, filing and content of documents filed in Debtor's
27 underlying bankruptcy case and her related adversary proceedings.
O'Rourke v. Seaboard Surety Co. (In re E.R. Fegert, Inc.),
28 887 F.2d 955, 957-58 (9th Cir. 1989).

1 bankruptcy filing on May 31, 2012. Therefore, because the sale
2 did not violate the automatic stay, Wells Fargo argued that no
3 basis existed for setting it aside.

4 In her reply, Debtor contended that the In Rem Order did not
5 apply in her case because: (1) the Lipkis court had no authority
6 or jurisdiction to make any order relating to the Property;
7 (2) the Property was never part of the Lipkis bankruptcy nor did
8 Lipkis ever claim any interest in it; and (3) Wells Fargo knew
9 months before the sale the Lipkis Deed was a fake and was never
10 recorded. Debtor further contended that the In Rem Order provided
11 no findings of an intent to hinder, delay or defraud creditors;
12 there was only a stipulation to that by parties she alleged had no
13 authority to make the stipulation. Debtor contended she had no
14 opportunity to address the allegations raised in support of the
15 In Rem Order.

16 Prior to the hearing on February 12, 2014, the bankruptcy
17 court issued a tentative ruling sua sponte denying Debtor's motion
18 on the basis of claim preclusion. The court stated that because
19 it had "previously determined that debtor is unable to void the
20 sale, the debtor cannot do so now via the motion."

21 At the hearing, Debtor was represented by attorney Lenore
22 Albert ("Albert"). Albert sought clarification from the
23 bankruptcy court as to which order or judgment had already
24 determined the issues raised in Debtor's motion. The court never
25 directly answered Albert's question, but when it noted that Wells
26 Fargo had filed a motion to dismiss the Second Adversary
27 Proceeding, Albert responded that the proceeding was dismissed
28 only as to the other two defendants, not as to Wells Fargo; Debtor

1 dismissed that proceeding without prejudice before Wells Fargo's
2 motion was decided. Nonetheless, Albert argued that even if the
3 Second Adversary Proceeding had been dismissed as to Wells Fargo
4 under Civil Rule 12(b)(6), such dispositions are not final
5 judgments on the merits.

6 Counsel for Wells Fargo conceded that Wells Fargo had not
7 been dismissed from the Second Adversary Proceeding before Debtor
8 dismissed it without prejudice, but argued that the issue of the
9 validity of the In Rem Order was decided in that proceeding as to
10 the other defendants when they were dismissed. The bankruptcy
11 court agreed and set forth its oral ruling:

12 THE COURT: Well, you know, I'm going to - first of all,
13 I agree with opposing counsel. I've already ruled on the
14 merits - how do I put this - it's really - you say res
15 judicata. I haven't used the word res judicata. I've
16 ruled on the particular claims here on the merits. Okay.
17 So I wouldn't call that - you want to call it collateral
18 estoppel, claim preclusion, whatever, it's there. It's
19 been done. She's had her bites at the apple. Okay. So
20 this - that's why I said what I said in the tentative.
21 So I believe she is barred from bringing this motion at
22 this point.

23

24 So I'm going to stick to my tentative and I'm going to
25 deny the motion and ask opposing counsel to prepare the
26 order.

27 Hr'g Tr. (Feb. 12, 2014) at 8:2-14, 8:19-21. The order denying
28 Debtor's motion to set aside the sale of the Property entered on
March 5, 2014, states only that the motion was "denied." This
timely appeal followed.¹⁰

26 ¹⁰ On July 9, 2015, Debtor filed a motion for sanctions. Her
27 motion is essentially an unauthorized third brief for her appeal.
28 Instead of the \$150,000 she requested in her Second Adversary
Proceeding, Debtor now seeks compensatory damages of "not less
(continued...)

1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
3 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158.

4 **III. ISSUE**

5 Did the bankruptcy court err in denying Debtor's motion to
6 set aside the sale of the Property on the basis of claim
7 preclusion?

8 **IV. STANDARDS OF REVIEW**

9 We review rulings regarding the availability of res judicata
10 doctrines, including claim preclusion, de novo as mixed questions
11 of law and fact in which legal questions predominate. George v.
12 City of Morro Bay (In re George), 318 B.R. 729, 732-33 (9th Cir.
13 BAP 2004) (citing Robi v. Five Platters, Inc., 838 F.2d 318, 321
14 (9th Cir. 1988), and Alary Corp. v. Sims (In re Associated Vintage
15 Grp., Inc.), 283 B.R. 549, 554 (9th Cir. BAP 2002)). Once we
16 determine that the doctrines are available to be applied, the
17 actual decision to apply them is left to the trial court's
18 discretion. In re George, 318 B.R. at 732-33 (citing Robi,
19 838 F.2d at 321).

20 The Panel must apply a two-part test to determine whether the
21 bankruptcy court abused its discretion. United States v. Hinkson,
22 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). First, we
23 consider de novo whether the bankruptcy court applied the correct
24

25 ¹⁰(...continued)
26 than \$5,000,000" and "substantial punitive damages." The Panel
27 cannot grant Debtor such relief in the context of this appeal,
28 even if we reversed. Any proof of damages would have to be
presented in the first instance to the bankruptcy court.
Accordingly, we **DENY** the sanctions motion.

1 legal standard. Id. A bankruptcy court abuses its discretion if
2 it applied the wrong legal standard or its findings were
3 illogical, implausible, or without support in the record. See
4 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th
5 Cir. 2011).

6 V. DISCUSSION

7 A. Governing law

8 1. Section 362

9 The filing of a bankruptcy petition creates an automatic
10 stay. See generally § 362(a). Unless an exception enumerated in
11 § 362(b)(1)-(28) applies, the automatic stay prohibits, among
12 other things, any act to enforce a lien against property of the
13 debtor or of the bankruptcy estate. § 362(a)(4), (5). Actions
14 taken by creditors in violation of the automatic stay are void.
15 Griffin v. Wardrobe (In re Wardrobe), 559 F.3d 932, 934 (9th Cir.
16 2009). In cases of a willful violation, the injured individual
17 can recover actual damages, including costs and attorney's fees,
18 and, in appropriate circumstances, may recover punitive damages.
19 § 362(k)(1); Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1215
20 (9th Cir. 2002).

21 Section 362(d)(4)¹¹ permits the bankruptcy court to grant "in
22 _____

23 ¹¹ The text of § 362(d)(4) in effect at the time the In Rem
24 Order was entered stated:

25 (d) On request of a party in interest and after notice and a
26 hearing, the court shall grant relief from the stay . . .
such as by terminating, annulling, modifying, or conditioning
such stay - . . .

27 (4) with respect to a stay of an act against real
28 property under subsection (a), by a creditor whose claim
(continued...)

1 rem" relief from the automatic stay to a creditor whose legitimate
2 foreclosure efforts are being thwarted through one or more
3 transfers of interest or multiple bankruptcy filings. "An order
4 entered under § 362(d)(4) has serious implications. By seeking
5 relief under § 362(d)(4), the creditor requests specific
6 prospective protection against not only the debtor, but also every
7 non-debtor, co-owner, and subsequent owner of the property."

8 First Yorkshire Holdings, Inc. v. Pacifica L 22, LLC (In re First
9 Yorkshire Holdings, Inc.), 470 B.R. 864, 871 (9th Cir. BAP 2012).

10 See also § 362(b)(20).¹²

11 _____
12 ¹¹(...continued)

13 is secured by an interest in such real property, if the
14 court finds that the filing of the petition was part of
15 a scheme to delay, hinder, or defraud creditors that
16 involved either -

- 17 (A) transfer of all or part ownership of, or other
18 interest in, such real property without the consent
19 of the secured creditor or court approval; or
20 (B) multiple bankruptcy filings affecting such real
21 property.

22 If recorded in compliance with applicable State laws
23 governing notices of interests or liens in real property, an
24 order entered under paragraph (4) shall be binding in any
25 other case under this title purporting to affect such real
26 property filed not later than 2 years after the date of the
27 entry of such order by the court, except that a debtor in a
28 subsequent case under this title may move for relief from
such order based upon changed circumstances or for good cause
shown, after notice and a hearing. Any Federal, State, or
local governmental unit that accepts notices of interests or
liens in real property shall accept any certified copy of an
order described in this subsection for indexing and
recording.

¹² Section 362(b)(20) provides that the filing of a petition
does not operate as a stay "under subsection (a), of any act to
enforce any lien against or security interest in real property
following entry of the order under subsection (d)(4) as to such
real property in any prior case under this title, for a period of
2 years after the date of the entry of such an order, except that
the debtor, in a subsequent case under this title, may move for

(continued...)

1 Thus, not only does the § 362(d)(4) order grant stay relief
2 to the moving party in the immediate bankruptcy case, if properly
3 recorded, it also gives the moving party stay relief in subsequent
4 bankruptcy cases. See Alakozai v. Citizens Equity First Credit
5 Union (In re Alakozai), 499 B.R. 698, 703 (9th Cir. BAP 2013).

6 **2. Claim preclusion**

7 Claim preclusion, sometimes referred to as res judicata,
8 prohibits relitigation of "any claims that were raised or could
9 have been raised" in a prior action between the same parties or
10 their privies. Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d
11 708, 713 (9th Cir. 2001). The doctrine "serves to promote
12 judicial efficiency by preventing multiple lawsuits and to enable
13 the parties to rely on the finality of adjudications." Dodd v.
14 Hood River Cty., 136 F.3d 1219, 1224-25 (9th Cir. 1998). Claim
15 preclusion bars a plaintiff from relitigating claims adjudicated
16 in a prior judgment, even if the prior decision was wrongly
17 decided. See, e.g., Federated Dep't Stores, Inc. v. Moitie,
18 452 U.S. 394, 398 (1981) ("Nor are the res judicata consequences of
19 a final, unappealed judgment on the merits altered by the fact
20 that the judgment may have been wrong or rested on a legal
21 principle subsequently overruled in another case.").

22 Claim preclusion requires three elements: (1) an identity of
23 claims; (2) a final judgment on the merits; and (3) the same
24 parties or privity between the parties. Owens, 244 F.3d at 713.
25 The Ninth Circuit has mandated a four factor test for determining

26
27 ¹²(...continued)
28 relief from such order based upon changed circumstances or for
other good cause shown, after notice and a hearing."

1 whether there is an identity of claims: "(1) whether rights or
2 interests established in the prior judgment would be destroyed or
3 impaired by prosecution of the second action; (2) whether
4 substantially the same evidence is presented in the two actions;
5 (3) whether the two suits involve infringement of the same right;
6 and (4) whether the two suits arise out of the same transactional
7 nucleus of facts." Harris v. Cty. of Orange, 682 F.3d 1126, 1132
8 (9th Cir. 2012). The common nucleus criterion is the most
9 important. Id.

10 **B. The bankruptcy court abused its discretion when it applied
11 claim preclusion to Debtor's motion to set aside the sale of
the Property.**

12 Debtor first contends that it was reversible error for the
13 bankruptcy court to apply claim preclusion sua sponte to the
14 motion to set aside the sale. We disagree.

15 The court may dismiss an action sua sponte where a defense of
16 claim preclusion is not raised by a defendant. United States v.
17 Sioux Nation of Indians, 448 U.S. 371, 432 (1980). As the Supreme
18 Court explained, the policy underlying this doctrine is "not based
19 solely on the defendant's interest in avoiding the burdens of
20 twice defending a suit, but [is] also based on the avoidance of
21 unnecessary judicial waste." Id.; see also Clements v. Airport
22 Auth. of Washoe Cty., 69 F.3d 321, 329 (9th Cir. 1995). A
23 district court's sua sponte recognition of claim preclusion is
24 "entirely proper" when the parties are permitted to address the
25 question before the court. See McClain v. Apodaca, 793 F.2d 1031,
26 1033 (9th Cir. 1986). Although Wells Fargo did not specifically
27 raise claim preclusion, the bankruptcy court was free to do so.
28 Further, the court put Debtor on notice of the question in its

1 tentative ruling, and she had an opportunity to address it at the
2 hearing before a final decision was rendered.

3 We are concerned, however, with Debtor's argument that the
4 bankruptcy court failed to articulate any findings as to why claim
5 preclusion applied. The court seemed to indicate at the hearing
6 that it had already decided the merits of Debtor's claims in the
7 Second Adversary Proceeding. But, without any findings, we cannot
8 know for sure. We must consider the bankruptcy court's
9 application of claim preclusion and determine whether an abuse of
10 discretion occurred in that application.

11 **1. Identity of claims**

12 Both the First Adversary Proceeding and the instant motion
13 are based on the same set of facts under the transactional test.
14 In re George, 318 B.R. at 735, citing W. Sys., Inc. v. Ulloa,
15 958 F.2d 864, 871 (9th Cir. 1991); Restatement (Second) of
16 Judgments § 24. In both actions, Debtor alleged the same course
17 of conduct: that the In Rem Order was invalid due to the fake
18 Lipkis Deed and the alleged false statements made by Wells Fargo
19 in the stipulation; that the July 11, 2012 foreclosure sale was
20 void because Wells Fargo had willfully violated the automatic stay
21 by not first seeking stay relief in her case; and that Debtor was
22 damaged as a result of Wells Fargo's alleged stay violation. In
23 addition, the same evidence was presented in both actions and the
24 two actions involved infringement of the same rights. Clearly,
25 the instant motion and the First Adversary Proceeding¹³ have an

26
27 ¹³ The Second and Third Adversary Proceedings also have an
28 identity of facts under the transactional test similar, if not
(continued...)

1 identity of claims.

2 **2. Identity of parties**

3 It is undisputed that Debtor sued Wells Fargo in the First
4 Adversary Proceeding and in her motion to set aside the sale of
5 the Property. Therefore, this criterion is met.

6 **3. Final judgment on the merits**

7 Debtor contends that her voluntary dismissal of the Second
8 Adversary Proceeding without prejudice, which was entered before
9 Wells Fargo's motion to dismiss that action was heard or decided,
10 was not a final judgment on the merits. The bankruptcy court
11 failed to identify which proceeding or order constituted the basis
12 for applying claim preclusion. Under Rule 7041, incorporating
13 Civil Rule 41(a)(1)(B), the voluntary dismissal by Debtor of the
14 Second Adversary Proceeding as to Wells Fargo was without
15 prejudice and was not an adjudication on the merits. Did the
16 disposition of the First Adversary Proceeding have any effect on
17 Debtor's motion to set aside the sale?

18 Wells Fargo moved to dismiss the First Adversary Proceeding
19 under Civil Rule 12(b)(1), (4) and (6). In that motion, Wells
20 Fargo challenged Debtor's standing. The bankruptcy court entered
21 an order on November 1, 2012, granting Wells Fargo's motion under
22 Civil Rule 12(b)(6) for failure to state a claim based on Debtor's
23 lack of standing. The court dismissed another defendant, Lipkis's
24 counsel, on the same ground before that on October 24, 2012. Both
25 orders state that the First Adversary Proceeding was dismissed

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27 ¹³(...continued)
28 nearly identical, to the First Adversary Proceeding and instant
motion.

1 "without leave to amend." Debtor did not appeal these orders; the
2 First Adversary Proceeding was closed shortly thereafter.

3 Although the bankruptcy court granted the motions to dismiss
4 under Civil Rule 12(b)(6), it did so on the basis that Debtor
5 lacked standing. Standing is a threshold question that must be
6 resolved before proceeding to the merits of a case. L.A. Cty. Bar
7 Ass'n v. Eu, 979 F.2d 697, 700 (9th Cir. 1992). See also Lujan v.
8 Defs. of Wildlife, 504 U.S. 555, 570 n.5 (1992) (Article III
9 standing like other bases of jurisdiction must be present at the
10 inception of the lawsuit). Therefore, because standing is
11 jurisdictional, lack of standing precludes a ruling on the merits.
12 Media Techs. Licensing, LLC v. Upper Deck Co., 334 F.3d 1366, 1370
13 (Fed. Cir. 2003) (citing Scott v. Pasadena Unified Sch. Dist.,
14 306 F.3d 646, 653-54 (9th Cir. 2002) ("[w]e must establish
15 jurisdiction before proceeding to the merits of the case"); Bird
16 v. Lewis & Clark Coll., 303 F.3d 1015, 1019 (9th Cir. 2002)
17 (recognizing that before reaching merits of the case the court
18 must determine the threshold issue of standing). Accord Stewart,
19 297 F.3d at 957.

20 Without question, "a judgment in favor of a defendant
21 ordinarily bars the plaintiff from maintaining another action on
22 the same claim." In re George, 318 B.R. at 735. But the
23 bankruptcy court failed to consider the implications of dismissal
24 for lack of standing, which is jurisdictional and precludes a
25 ruling on the merits. See Restatement (Second) of Judgments § 19

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1 & 20.¹⁴

2 **C. Procedural Due Process**

3 We do not reach the question of whether procedural due
4 process was satisfied when, after Debtor had informed Wells
5 Fargo's counsel that she challenged the validity of the Lipkis
6 Deed, Wells Fargo apparently failed to notice Debtor of the
7 stipulation for in rem relief from stay or its motion for approval
8 of it. Debtor was, after all, the borrower and the record title
9 holder if her allegation was correct - clearly someone whose

10 ¹⁴ The General Rule of Bar is:

11 § 19. Judgment for Defendant—The General Rule of Bar
12 A valid and final personal judgment rendered in favor of
13 the defendant bars another action by the plaintiff on the
14 same claim.

14 RESTATEMENT (SECOND) OF JUDGMENTS § 19.

15 The exceptions to the General Rule of Bar are:

16 § 20. Judgment for Defendant—Exceptions to the General
17 Rule of Bar

18 (1) A personal judgment for the defendant, although valid
19 and final, does not bar another action by the plaintiff on
20 the same claim:

21 (a) When the judgment is one of dismissal for lack of
22 jurisdiction, for improper venue, or for nonjoinder or
23 misjoinder of parties; or

24 (b) When the plaintiff agrees to or elects a nonsuit (or
25 voluntary dismissal) without prejudice or the court
26 directs that the plaintiff be nonsuited (or that the
27 action be otherwise dismissed) without prejudice; or

28 (c) When by statute or rule of court the judgment does not
operate as a bar to another action on the same claim, or
does not so operate unless the court specifies, and no
such specification is made.

(2) A valid and final personal judgment for the defendant,
which rests on the prematurity of the action or on the
plaintiff's failure to satisfy a precondition to suit,
does not bar another action by the plaintiff instituted
after the claim has matured, or the precondition has been
satisfied, unless a second action is precluded by
operation of the substantive law.

RESTATEMENT (SECOND) OF JUDGMENTS § 20.

1 property interest would be affected if in rem relief were granted.
2 See Ford v. Ford (In re Ford), 159 B.R. 590, 594 (Bankr. D. Or.
3 1993). Without dispute, Debtor has enjoyed due process in the
4 subsequent motions and proceedings.

5 Given the procedural history and pending proceedings, we
6 conclude that vacating and remanding the order denying the motion
7 to set aside the sale of the Property allows the bankruptcy court
8 to consider questions discussed herein in one comprehensive
9 proceeding.¹⁵

10 IV. CONCLUSION

11 For the foregoing reasons, we VACATE and REMAND for further
12 proceedings consistent with this memorandum.¹⁶

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15 Concurrence begins on next page.
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20 ¹⁵ We disagree with Wells Fargo's contention that this appeal
21 is "moot." Because Debtor was seeking stay violation damages
22 under § 362(k), this appeal would never be moot. Further, it does
not appear from the record that Wells Fargo has sold the Property
to a third party. Even if it has, that fact would not absolve
Wells Fargo from any potential stay violation damages.

23 ¹⁶ Debtor filed a request for judicial notice along with her
24 opening brief on appeal. She asks the Panel to take judicial
25 notice of three documents: (1) a copy of the complaint filed in
26 the First Adversary Proceeding; (2) the order dismissing the First
27 Adversary Proceeding; and (3) one of the three orders entered by
28 Judge Tighe respecting the post-sale motions filed in Lipkis's
bankruptcy case. Because we are able to take judicial notice of
the existence, filing and content of documents filed in Debtor's
underlying bankruptcy case and her related adversary proceedings,
In re E.R. Fegert, Inc., 887 F.2d at 957-58, we **GRANT** Debtor's
request for judicial notice of these documents.

1 Dunn, Bankruptcy Judge, concurring:

2 I join in the majority decision to vacate and remand the
3 denial of the Debtor's motion to set aside the foreclosure sale of
4 her home alleging violation of the automatic stay, based on the
5 inadequacy of findings and conclusions to support the denial
6 order. As set forth in detail in the majority Memorandum
7 decision, the Panel could not tell from the record even what order
8 or judgment(s) the bankruptcy court relied on in reaching its
9 conclusion that claim preclusion applied, let alone whether the
10 doctrine was applied appropriately. I write this concurrence to
11 state a substantive question that may be even more appropriate to
12 address on remand: Can a viable claim for violation of the
13 automatic stay of § 362(a) be asserted in light of the existence
14 of the unstayed In Rem Order when the foreclosure sale took place
15 on July 11, 2012, and no motion to vacate the In Rem Order was
16 filed in the Lipkis case until August 7, 2012 at the earliest, and
17 the First Adversary Proceeding was not filed in Debtor's own
18 bankruptcy case until later in that same month?

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