

MAY 31 2017

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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NOT FOR PUBLICATION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.	NC-16-1180-BTaF
)		
MARIANNE PRETSCHER-JOHNSON,)	Bk. No.	16-50083
)		
Debtor.)	Adv. No.	16-05015
_____)		
)		
MARIANNE PRETSCHER-JOHNSON,)		
)		
Appellant,)		
)		
v.)		
)		
AURORA BANK, FSB; AURORA LOAN)		
SERVICES, LLC; NATIONSTAR)		
MORTGAGE, LLC; QUALITY LOAN)		
SERVICE CORPORATION; SCME)		
MORTGAGE BANKERS, INC.;)		
MORTGAGE ELECTRONIC)		
REGISTRATION SYSTEMS, INC.,)		
)		
Appellees.)		
_____)		

MEMORANDUM¹

Submitted Without Oral Argument²
on February 23, 2017

Filed - May 31, 2017

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

Honorable Stephen L. Johnson, Bankruptcy Judge, Presiding

Appearances: Appellant Marianne Pretscher-Johnson pro se on

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.

² On December 2, 2016, the Panel unanimously determined this appeal was suitable for submission without oral argument. Rule 8019(b)(3). Appellees have not appeared.

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brief.

Before: BRAND, TAYLOR and FARIS, Bankruptcy Judges.

Chapter 7³ debtor Marianne Pretscher-Johnson ("Debtor") appeals an order dismissing her adversary proceeding against Aurora Bank, FSB ("Aurora Bank"), Aurora Loan Services, LLC, Nationstar Mortgage, LLC ("Nationstar"), Quality Loan Service Corporation ("Quality"), SCME Mortgage Bankers, Inc. ("SCME") and the Mortgage Electronic Registration System (collectively, "Defendants") for lack of subject matter jurisdiction or, alternatively, on the basis of permissive abstention.⁴ Although the bankruptcy court erred by applying an incorrect legal standard, such error was harmless because Debtor lacked standing to prosecute the adversary proceeding. Thus, dismissal was proper. We AFFIRM.⁵

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

⁴ We recognize that the dismissal order on appeal may not be considered a sufficiently separate judgment under Rule 7058. See Stephens v. Gomez (In re Gomez), 2016 WL 6561283, at *1 (9th Cir. Nov. 4, 2016). However, because 150 days have run from entry of the order, it is a final order.

⁵ Because Debtor failed to provide a proper excerpt of record and no appellee has appeared, we took the liberty of viewing the bankruptcy court's electronic docket and take judicial notice of the necessary documents relevant to this appeal. See Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003) (citing O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989)).

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

2 **A. Events prior to Debtor's chapter 7 bankruptcy case and**
3 **related adversary proceeding**

4 In June 2007, Debtor obtained a \$435,000 loan from SCME.
5 Debtor admits to receiving the funds and purchasing a home in
6 Aptos, California (the "Property") with those funds.

7 The role of each Defendant respecting the Property is not
8 entirely clear, but we do know that: Debtor defaulted on the loan
9 in or about February 2011; Aurora Bank as servicer substituted
10 Quality as trustee under the deed of trust in June 2012; Quality
11 recorded a notice of default and notice of trustee's sale in July
12 and October 2012, respectively; the Property was sold at a
13 trustee's sale on December 27, 2012; Nationstar was the successful
14 bidder; and a trustee's deed upon sale was recorded on January 7,
15 2013.

16 In 2012, Debtor sued Defendants in federal district court for
17 "Quiet Title" of the Property. That court dismissed Debtor's
18 complaint for lack of subject matter jurisdiction.

19 On the same day the federal case was dismissed, Debtor sued
20 Defendants in state court for three causes of action with respect
21 to the Property: quiet title, unjust enrichment and fraud.
22 Debtor alleged that, because SCME did not lend her real money but
23 rather "counterfeit currency" created through the use of
24 "Fractional Reserve Banking" and because SCME had destroyed the
25 note sometime between July and August 2007, her obligation to
26 repay the loan was forgiven, and all previous payments had to be
27 refunded. In addition, because the note had been destroyed prior
28 to the trustee's sale, Debtor argued that the foreclosure sale was

1 void, as none of the Defendants could have been the holder of a
2 non-existent note.

3 On Defendants' demurrer, the state court dismissed Debtor's
4 action with prejudice on October 28, 2014. Debtor appealed to the
5 California Court of Appeal, Case No. H041677. The record does not
6 reveal the outcome of that appeal.

7 Thereafter, Nationstar filed an unlawful detainer action.
8 Shortly before the scheduled trial, Debtor filed a chapter 13
9 bankruptcy case on August 5, 2015. Nationstar promptly moved for
10 relief from the automatic stay to continue with the unlawful
11 detainer action and gain possession of the Property, which the
12 bankruptcy court granted on October 1, 2015.

13 Debtor's chapter 13 case was dismissed on October 2, 2015,
14 for failure to make plan payments. That same day, Debtor filed an
15 adversary proceeding against Defendants, alleging the same claims
16 she raised previously in the state court action dismissed with
17 prejudice.

18 Defendants moved to dismiss the adversary proceeding. Debtor
19 did not oppose the motion or appear at the hearing. The
20 bankruptcy court determined that, even though it had "related to"
21 jurisdiction over Debtor's non-core complaint involving
22 exclusively state law claims, it would decline to retain
23 jurisdiction in favor of the matter being heard in state court,
24 citing Linkway Investment Co. v. Olsen (In re Casamont Investors,
25 Inc.), 196 B.R. 517 (9th Cir. BAP 1996). Debtor did not appeal
26 the dismissal order.

27

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1 **B. Debtor's chapter 7 bankruptcy case and related adversary**
2 **proceeding**

3 Debtor filed her chapter 7 bankruptcy case on January 11,
4 2016. The case was assigned to the Hon. Stephen L. Johnson, who
5 had presided over Debtor's recently dismissed chapter 13 case and
6 the dismissed adversary proceeding against Defendants. Although
7 Debtor lost the Property to foreclosure four years earlier, she
8 claimed an interest in it valued at \$480,000. Debtor did not
9 schedule her prepetition causes of action against Defendants or
10 claim them exempt. In her Statement of Financial Affairs, Debtor
11 disclosed the appeal of a "Quiet Title" action against "Aurora
12 Bank, FSB et al."

13 On February 18, 2016, Debtor filed the instant adversary
14 proceeding against Defendants. The complaint is virtually
15 identical to the one she filed in the state court action
16 (dismissed with prejudice and appealed) and in the former
17 dismissed adversary proceeding. Debtor contended that, once the
18 Property was returned to her bankruptcy estate, she would work
19 with the trustee to sell it and use the funds to pay creditors.

20 The trustee thereafter filed a "no-asset" report, indicating
21 that no assets were available for distribution to creditors.

22 The bankruptcy court then held a status conference in the
23 adversary proceeding; only Debtor appeared. The court discussed
24 Debtor's improper service of the complaint on Defendants and
25 commented that her suit probably belonged in state court. The
26 court assumed that the trustee was aware of Debtor's claims
27 against Defendants and must have believed they had no value for
28 the estate based on her no-asset report. The court announced that

1 it would file a show cause order regarding whether Debtor's claims
2 should remain before the bankruptcy court or be sent to the state
3 court.

4 On May 3, 2016, the bankruptcy court issued an order to show
5 cause why the adversary proceeding should not be dismissed on the
6 basis of abstention. The court noted in the OSC that Debtor had
7 not scheduled her claims against Defendants. Debtor's response
8 was due May 31, 2016.

9 Meanwhile, the bankruptcy court entered a Discharge of Debtor
10 and Final Decree on May 16, 2016 ("Final Decree"). Debtor's case
11 was closed on May 17, 2016. That same day, Debtor filed an
12 amended Schedule A/B listing the claims against Defendants:
13 "Damages against defendant of case #16-5015 filed in this court."
14 Debtor never filed an amended Schedule C to assert an exemption
15 for the claims.

16 In opposition to the OSC, Debtor contended the adversary
17 proceeding was a "core" proceeding that both "arose under"
18 title 11 and was "related to" her chapter 7 bankruptcy case. She
19 further contended that abstention did not apply because no party
20 had filed a timely motion requesting such relief.

21 Without a hearing, the bankruptcy court entered an order
22 dismissing the adversary proceeding for lack of subject matter
23 jurisdiction or, alternatively, on the basis of permissive
24 abstention. Debtor timely appealed.

25 **II. JURISDICTION**

26 Subject to the standing discussion set forth below, the
27 bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and
28 157(b) (2) (K). We have jurisdiction under 28 U.S.C. § 158.

1 **III. ISSUE**

2 Did the bankruptcy court err in dismissing Debtor's adversary
3 complaint for lack of subject matter jurisdiction or,
4 alternatively, on the basis of permissive abstention?

5 **IV. STANDARDS OF REVIEW**

6 Standing is an issue of law we review de novo. Palmdale
7 Hills Prop., LLC v. Lehman Comm. Paper, Inc. (In re Palmdale Hills
8 Prop., LLC), 654 F.3d 868, 873 (9th Cir. 2011) ("standing is a
9 necessary component of subject matter jurisdiction.").

10 We review the bankruptcy court's sua sponte dismissal of an
11 action for an abuse of discretion. Snell v. Cleveland, Inc.,
12 316 F.3d 822, 825 (9th Cir. 2002). A bankruptcy court abuses its
13 discretion if it applies the wrong legal standard, misapplies the
14 correct legal standard, or if its factual findings are clearly
15 erroneous. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820,
16 832 (9th Cir. 2011).

17 We may affirm on any ground supported by the record,
18 regardless of whether the bankruptcy court relied upon, rejected
19 or even considered that ground. Fresno Motors, LLC v. Mercedes
20 Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2014).

21 **V. DISCUSSION**

22 **A. The bankruptcy court's ruling**

23 The bankruptcy court determined that Debtor's adversary
24 proceeding, which consisted entirely of state law claims, was not
25 a "core" proceeding because the claims did not "arise under"
26 title 11 or "arise in" a case under title 11; the lawsuit could
27 exist independently of Debtor's bankruptcy case. The court
28 further determined that it also lacked non-core "related to"

1 jurisdiction. Because the trustee had filed a no-asset report,
2 which the court construed as an abandonment of the claims to
3 Debtor, the court reasoned that resolution of Debtor's lawsuit had
4 no conceivable effect on the administration of the estate.
5 Alternatively, the court determined that even if it had
6 jurisdiction, it was permissively abstaining from hearing the
7 case, citing the factors in Christiansen v. Tucson Estates, Inc.
8 (In re Tucson Estates, Inc.), 912 F.2d 1162, 1167 (9th Cir. 1990).
9 These rulings were erroneous.

10 Even though Debtor's bankruptcy case had been dismissed in
11 May 2016, the bankruptcy court had, at minimum, "related to"
12 jurisdiction over the state law claims against Defendants when she
13 filed her complaint in February 2016. See In re Casamont Inv'rs,
14 Ltd., 196 B.R. at 521 ("Jurisdiction is determined as of the
15 commencement of the action."); Charov v. Bank of N.Y. Mellon,
16 2016 WL 7406306, at *4 (9th Cir. BAP Dec. 20, 2016). Moreover, as
17 we explain below, the trustee did not abandon the claims via the
18 no-asset report and nothing in the record indicates that she ever
19 considered whether Debtor's claims had any value to the estate.
20 Therefore, resolving these claims could have had some effect on
21 the administration of the estate, at least prior to the dismissal
22 of Debtor's case. See Seymour v. Bank of Am., N.A.
23 (In re Seymour), 2013 WL 1736471, at *4 n.9 (9th Cir. BAP Apr. 13,
24 2013).

25 Abstention was also an incorrect ruling because nothing in
26 the record before the bankruptcy court established that a similar
27 action was pending in the state court. Abstention under 28 U.S.C.
28 § 1334(c)(1) can exist only where there is a parallel proceeding

1 in state court. Lazar v. California (In re Lazar), 237 F.3d 967
2 (9th Cir. 2001) (citing Sec. Farms v. Int'l Bhd. of Teamsters,
3 124 F.3d 999 (9th Cir. 1997)).

4 **B. Debtor lacked prudential standing to prosecute the claims**
5 **against Defendants.**

6 "A federal court may exercise jurisdiction over a litigant
7 only when that litigant meets constitutional and prudential
8 standing requirements." Veal v. Am. Home Mortg. Servicing, Inc.
9 (In re Veal), 450 B.R. 897, 906 (9th Cir. BAP 2010) (citing Elk
10 Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004)).

11 "Standing is a 'threshold question in every federal case,
12 determining the power of the court to entertain the suit.'" Id.
13 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)). Debtor
14 appears to have met the minimal standard for constitutional
15 standing - i.e., injury in fact, causation and redressability.
16 See United Food & Comm'l Workers Union Local 751 v. Brown Grp.,
17 Inc., 517 U.S. 544, 551 (1996). She alleged injury by irregular
18 lending practices and an improper foreclosure proceeding. Her
19 claim for relief of quiet title would have remedied her alleged
20 injuries.

21 However, Debtor failed to demonstrate that she was asserting
22 her own legal rights and not those belonging to others.
23 In re Veal, 450 B.R. at 907 (citing Sprint Commc'ns Co. v. APCC
24 Servs., Inc., 554 U.S. 269, 289-90 (2008)) (plaintiff must assert
25 his or her own legal rights and interests and not the legal rights
26 or interests of third parties). In other words, Debtor failed to

1 demonstrate prudential standing.⁶

2 When Debtor filed her chapter 7 case, her legal and equitable
3 interests in all property she owned at the time became property of
4 her bankruptcy estate (with exceptions not relevant here),
5 including prepetition causes of action. See § 541(a)(1); Sierra
6 Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 707-09
7 (9th Cir. 1986). Because the events giving rise to Debtor's
8 claims against Defendants occurred before her chapter 7 filing,
9 these claims became property of the estate when Debtor filed her
10 petition. This is true whether or not she scheduled the claims.
11 Cusano v. Klein, 264 F.3d 936, 945-46 (9th Cir. 2001) (an
12 unscheduled asset continues to belong to estate and does not
13 revert back to debtor when case closes); Edwards v. Wells Fargo
14 Bank (In re Edwards), 2011 WL 4485560, at *4 (9th Cir. BAP Aug.
15 26, 2011) (same).

16 The Bankruptcy Code designates the trustee as the estate's
17 representative and authorizes him or her to sue and be sued in
18 that capacity. See § 323(a); Spirtos v. One San Bernardino Cnty.
19 Super. Ct. Case, 443 F.3d 1172, 1175 (9th Cir. 2006). Thus,
20 generally speaking, only the trustee has standing to prosecute any

21 _____
22 ⁶ Another aspect of the prudential standing doctrine is
23 bankruptcy appellate standing, which requires an appellant to show
24 that he or she has been "directly and adversely affected
25 pecuniarily" by the bankruptcy court's decision. See
26 In re Palmdale Hills Prop., LLC, 654 F.3d at 874. The appellant
27 must show that the order on appeal diminished its property,
28 increased its burdens, or detrimentally affected its rights. See
Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 442 (9th
Cir. 1983). Debtor's potential residual interest in the estate's
assets appears sufficient to establish that she was a "person
aggrieved" by the bankruptcy court's dismissal order. Therefore,
we will not dispose of this appeal on bankruptcy appellate
standing grounds.

1 cause of action that is estate property. Spirtos, 442 F.3d 1175-
2 76 (as the representative of the bankruptcy estate, the trustee is
3 the proper party in interest and the only party with standing to
4 prosecute causes of action belonging to the estate). Therefore,
5 Debtor did not have the right to file the adversary proceeding.
6 That right belonged to the trustee.

7 There were two ways in which Debtor could have gained control
8 over the claims against Defendants while in bankruptcy:

9 (1) exempt the claims on her Schedule C without objection; or
10 (2) the trustee's abandonment of the claims. See § 522(1);
11 § 554(a)-(c). However, for either of these options, Debtor had to
12 schedule the claims as an asset in her bankruptcy case. Even if
13 one considers the amended Schedule A/B as timely, which we do not,
14 Debtor failed to file an amended Schedule C asserting an exemption
15 in the claims. That leaves abandonment.

16 Abandonment in a bankruptcy case occurs in two ways:

17 (1) after notice and a hearing on request by the trustee or
18 ordered by the court, property may be abandoned that is
19 "burdensome" or of "inconsequential value and benefit to the
20 estate" (§ 554(a), (b)); or (2) any property which has been
21 scheduled, but which has not been administered by the trustee at
22 the time of closing of a case, is abandoned by operation of law
23 (§ 554(c)). Clearly, the first method of abandonment did not
24 occur here. The trustee did not request that the claims be, nor
25 did the bankruptcy court order that the claims were, abandoned.
26 No notice was sent to creditors, and no hearing was held.
27 Contrary to the bankruptcy court's ruling, the trustee's filing of
28 the no-asset report on April 1, 2016 did not constitute a formal

1 abandonment of the claims. Schwaber v. Reed (In re Reed),
2 940 F.2d 1317, 1321 (9th Cir. 1991) (although filing of no-asset
3 report may exhibit the requisite intent to abandon an asset, that
4 report in and of itself does not result in abandonment).

5 The second method of abandonment did not happen here either.
6 Debtor's disclosure of a "Quiet Title" action without a value in
7 her SOFA was not sufficient to trigger an automatic abandonment by
8 the trustee under § 554(c). Mentioning an asset in the statement
9 of financial affairs is not the same as scheduling it for purposes
10 of abandonment under § 554(c). Orton v. Hoffman (In re Kayne),
11 453 B.R. 372, 384 (9th Cir. BAP 2011); In re McCoy, 139 B.R. 430,
12 431 (Bankr. S.D. Ohio 1991) ("The word 'scheduled' in [§] 554(c)
13 has a specific meaning and refers only to assets listed in a
14 debtor's schedule of assets and liabilities.").

15 Arguably, Debtor technically filed her amended Schedule A/B
16 disclosing the claims against Defendants on May 17, 2016, just
17 moments before her case was closed. However, she did not file the
18 amendment until after the Final Decree was entered on May 16,
19 2016. The Final Decree states that the trustee had filed a report
20 of no distribution and had performed all of her duties required in
21 the administration of the estate. Thus, Trustee had administered
22 or abandoned only those assets properly scheduled by Debtor as of
23 May 16, 2016. A trustee cannot administer or abandon an
24 unscheduled asset, even if the trustee knew about the asset. Pace
25 v. Battley (In re Pace), 146 B.R. 562, 564-66 (9th Cir. BAP 1992),
26 aff'd, 17 F.3d 395 (9th Cir. 1994) (unless formally scheduled,
27 property is not abandoned at the close of the case, even if the
28 trustee had knowledge of the asset). And nothing in the record

1 shows that the trustee knew of the claims, despite the bankruptcy
2 court's assumption to the contrary. Thus, because the trustee did
3 not administer or abandon the claims, they remained property of
4 the estate. § 554(d); Lopez v. Specialty Rests. Corp.
5 (In re Lopez), 283 B.R. 22, 28 (9th Cir. BAP 2002). Accordingly,
6 Debtor lacked prudential standing to prosecute them.

7 Debtor's untimely amendment was too little too late. Even if
8 the trustee learned of the claims the moment Debtor disclosed them
9 on May 17, 2016, this failed to give her (or creditors) sufficient
10 notice to make an intelligent decision about whether they should
11 be administered or abandoned, which is the purpose of scheduling.
12 In re Kayne, 453 B.R. at 384.

13 VI. CONCLUSION

14 Although the bankruptcy court erred in dismissing Debtor's
15 adversary proceeding for the reasons it stated, such error was
16 harmless because Debtor lacked prudential standing to prosecute
17 what constituted estate claims against Defendants. Accordingly,
18 we AFFIRM.⁷

26
27 ⁷ To the extent Debtor argues the bankruptcy court erred by
28 closing her bankruptcy case, that issue is not properly before us.
Debtor's case was closed on May 17, 2016. She did not file a
timely appeal of that order. Rule 8002(a).