

DEC 22 2017

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No.	NV-17-1096-TaBH
6	RUBILYN M. FERNANDO,	)	Bk. No.	2:16-bk-13250-LED
7	Debtor.	)	Adv. No.	2:16-ap-01115-LED
8	_____	)		
9	RUBILYN M. FERNANDO,	)		
10	Appellant,	)		
11	v.	)	<b>MEMORANDUM*</b>	
12	OCWEN LOAN SERVICING, LLC;	)		
13	HSBC BANK USA, N.A., as	)		
14	Trustee for the Benefit of	)		
15	People's Financial Realty	)		
16	Mortgage Securities Trust,	)		
17	Series 2006-1, Mortgage Pass-	)		
18	Through Certificates, Series	)		
19	2006-1; FRANKLIN CREDIT	)		
20	MANAGEMENT CORPORATION;	)		
21	DEUTSCHE BANK NATIONAL TRUST	)		
22	COMPANY, as Certificate	)		
23	Trustee on Behalf of Bosco	)		
24	Credit II Trust Series 2010-1;	)		
25	WESTERN PROGRESSIVE - NEVADA,	)		
26	INC.,	)		
27	Appellees.	)		
28	_____	)		

Submitted Without Argument on December 1, 2017

Filed - December 22, 2017

Appeal from the United States Bankruptcy Court  
for the District of Nevada

Honorable Laurel E. Davis, Bankruptcy Judge, Presiding

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\* 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(c)(2).

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2 Appearances: Appellant Rubilyn M. Fernando pro se on brief.

3 Before: TAYLOR, BRAND, and HOULE,\*\* Bankruptcy Judges.  
4

5 **INTRODUCTION**

6 Five days after the bankruptcy court dismissed her  
7 bankruptcy case and two minutes after she filed a redundant  
8 voluntary request for case dismissal, Rubilyn Fernando filed an  
9 adversary proceeding. The bankruptcy court later dismissed the  
10 litigation without prejudice and denied Ms. Fernando's motion  
11 for relief from the dismissal order. The bankruptcy court  
12 explained its decision in oral findings of fact and conclusions  
13 of law, which were incorporated by general reference into its  
14 order. Because Ms. Fernando refused to provide us with a  
15 transcript detailing these findings, we cannot adequately review  
16 the bankruptcy court's orders. And consideration of the merits  
17 on the limited record we have does not support a different  
18 result. Accordingly, we AFFIRM the bankruptcy court.

19 **FACTS**

20 Ms. Fernando filed a chapter 13<sup>1</sup> petition in June 2016.<sup>2</sup>  
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23 \*\* The Hon. Mark D. Houle, United States Bankruptcy Judge  
for the Central District of California, sitting by designation.

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

27 <sup>2</sup> We exercise our discretion to take judicial notice of  
28 (continued...)

1 Her chapter 13 plan drew opposition, and the bankruptcy court  
2 eventually entered an order denying confirmation of the plan and  
3 dismissing the case. Five days later, Ms. Fernando also, and  
4 unnecessarily, requested voluntary dismissal of her bankruptcy  
5 case under § 1307(b). And two minutes after her request for  
6 voluntary dismissal, Ms. Fernando filed an adversary complaint  
7 seeking declaratory relief and requesting clear title to her  
8 real property.

9 Some defendants moved to dismiss; others later joined in  
10 the motion. They argued lack of subject matter jurisdiction and  
11 failure to state a claim and, in the alternative, requested  
12 abstention.

13 While this motion was pending, the bankruptcy court's  
14 clerk's office issued a notice of conditional dismissal of the  
15 adversary proceeding based on dismissal of the bankruptcy case;  
16 the notice provided for dismissal without prejudice unless an  
17 objection was filed within 21 days of service. Ms. Fernando  
18 filed a timely response;<sup>3</sup> the clerk's office, however, took

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20 <sup>2</sup>(...continued)  
21 documents electronically filed in the adversary proceeding and  
22 in the underlying bankruptcy case. See Atwood v. Chase  
23 Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9  
(9th Cir. BAP 2003).

24 <sup>3</sup> The opposition questioned why the notice was issued by  
25 the clerk of court, who lacked authority to dismiss the case;  
26 argued that the bankruptcy court could only submit proposed  
27 findings of fact and conclusions of law in non-core proceedings;  
28 and quoted text from Menk v. Lapaglia (In re Menk), 241 B.R.  
896, 904 (9th Cir. BAP 1999), suggesting the bankruptcy court  
can entertain an adversary proceeding even when the main

(continued...)

1 almost two full days to docket it. And during this period of  
2 delay, the bankruptcy court entered a dismissal order based on  
3 the absence of a timely response to the notice on the docket.

4 **The reconsideration motion.** Given the dismissal,  
5 Ms. Fernando filed a reconsideration motion claiming that there  
6 was an oversight or omission because she timely filed her  
7 objection. She also repeated arguments from her opposition  
8 papers.

9 Some of the defendants opposed; they argued that granting  
10 the motion would be an exercise in futility because the case  
11 would remain subject to dismissal for all the reasons  
12 articulated in their motion to dismiss. In her reply,  
13 Ms. Fernando argued that her complaint initiated a non-core  
14 proceeding and that, as a result, the bankruptcy court could not  
15 enter a final judgment on her claims.

16 The bankruptcy court heard oral argument on the  
17 reconsideration motion and stated its oral findings of fact and  
18 conclusions of law on the record. It later incorporated those  
19 findings and conclusions into its order denying Ms. Fernando's  
20 reconsideration request.

21 Ms. Fernando timely appealed.

#### 22 **JURISDICTION**

23 Subject to the discussion below, the bankruptcy court had  
24 jurisdiction under 28 U.S.C. §§ 1334 and 157(b) (2) (K). We have  
25 jurisdiction under 28 U.S.C. § 158.

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26  
27 <sup>3</sup>(...continued)  
28 bankruptcy case is closed.



1 attached that order to her notice of appeal. Similarly, in her  
2 appellate brief, she states that she is appealing the order  
3 denying her motion for relief and identifies it by docket  
4 number.

5 Despite the infirmities in the notice of appeal and  
6 Ms. Fernando's express statement that she is appealing the  
7 reconsideration order, we conclude that she intended to also  
8 appeal the dismissal order.<sup>4</sup>

9 **We affirm the bankruptcy court's orders.**

10 The bankruptcy court's order denying Ms. Fernando's  
11 reconsideration motion incorporated oral findings of fact and  
12 conclusions of law made on the record. If a bankruptcy court  
13 makes its findings of facts and conclusions of law on the  
14 record, the appellant must include the transcript as part of the  
15 excerpts of record. McCarthy v. Prince (In re McCarthy),  
16 230 B.R. 414, 416-17 (9th Cir. BAP 1999). Here, Ms. Fernando  
17 elected not to obtain a transcript.<sup>5</sup> We thus cannot  
18 meaningfully review the bankruptcy court's order denying

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20 <sup>4</sup> Ms. Fernando's notice of appeal was timely as to the  
21 dismissal order: since she filed a reconsideration motion within  
22 14 days of the dismissal order, the 14-day time to file the  
23 appeal ran from the entry of the order denying that motion.  
24 Fed. R. Bankr. P. 8002(b)(1)(C)&(D).

25 <sup>5</sup> In her designation of the record and statement of  
26 issues, Ms. Fernando stated that she "designate[s] the case  
27 record in its entirety, without the transcript of the oral  
28 record . . ." In June 2017, the BAP issued an order noting  
that there were oral findings, informing Ms. Fernando why the  
transcript was necessary, and warning her that failure to  
provide it would impede review of her appeal and could lead to  
summary affirmance. Ms. Fernando filed a response stating that  
she was not going to provide the transcript.

1 reconsideration. Ehrenberg v. Cal. State Univ., Fullerton  
2 Found. (In re Beachport Entm't), 396 F.3d 1083, 1087-88  
3 (9th Cir. 2005); Morrissey v. Stuteville (In re Morrissey),  
4 349 F.3d 1187, 1189 (9th Cir. 2003) (failing to provide a  
5 critical transcript may result in summary affirmance).  
6 Accordingly, we summarily affirm the order denying  
7 Ms. Fernando's motion for reconsideration.

8 We next consider the dismissal order. In her opening brief  
9 on appeal, Ms. Fernando repeats her argument that she timely  
10 objected to the notice of conditional dismissal. Now on appeal,  
11 she frames this as a due process concern. We independently  
12 consider her due process argument and conclude that her due  
13 process rights were not violated. Ms. Fernando's declaration in  
14 support of her motion for relief states that the bankruptcy  
15 court was closed on December 27 and 28, a Tuesday and Wednesday,  
16 due to water issues. But that is immaterial: Ms. Fernando was  
17 able to timely file her opposition. She thus had access to the  
18 court. Further, due process requires "notice 'reasonably  
19 calculated, under all the circumstances, to apprise interested  
20 parties of the pendency of the action and afford them an  
21 opportunity to present their objections.'" United Student Aid  
22 Funds, Inc. v. Espinosa, 559 U.S. 260, 272 (2010) (quoting  
23 Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314  
24 (1950)). Here, she does not contend that the bankruptcy court  
25 did not consider her arguments against dismissal in the context  
26 of the reconsideration motion. Nor could she, as the bankruptcy  
27 court heard the matter and made findings of fact and conclusions  
28 of law on the record. Instead, Ms. Fernando disagrees with the

1 bankruptcy court's resolution of her objections. That does not,  
2 however, mean her due process rights were violated. Given her  
3 failure to provide a transcript, we can do nothing but disregard  
4 her allegation that her arguments against dismissal did not  
5 receive appropriate consideration.

6 She also raised arguments for the first time on appeal; we  
7 deem them waived. "[I]n general, 'a federal appellate court  
8 does not consider an issue not passed upon below.'" Mano-Y&M,  
9 Ltd. v. Field (In re Mortg. Store, Inc.), 773 F.3d 990, 998  
10 (9th Cir. 2014) (quoting Singleton v. Wulff, 428 U.S. 106, 120  
11 (1976)).

12 And as to the arguments she did raise before the bankruptcy  
13 court, the lack of a transcript is again fatal to her appeal.  
14 We cannot adequately review the bankruptcy court's  
15 determinations, and we again summarily affirm.

16 **We would also affirm on the merits.**

17 While we can only guess at the actual analysis made by the  
18 bankruptcy court at the hearing, the appropriateness of  
19 dismissal of the adversary proceeding is unquestionable; the  
20 bankruptcy court lacked jurisdiction over Ms. Fernando's claims  
21 because she filed the adversary proceeding after dismissal of  
22 her chapter 13 bankruptcy case.

23 As a result, the claims were not assets of an existing  
24 bankruptcy estate and could not arise in or relate to an  
25 existing bankruptcy case. Further, the state law claims did not  
26 arise under bankruptcy law. Finally, they did not relate to a  
27 bankruptcy court order, so there was no ancillary jurisdiction.

28 We acknowledge that Ms. Fernando has a legitimate grievance

1 with the dismissal order because it states that there was no  
2 opposition when she had filed opposition. But we cannot avoid  
3 the obvious; the bankruptcy court never had jurisdiction because  
4 Ms. Fernando filed the adversary proceeding after bankruptcy  
5 case dismissal. And consistent with this determination, the  
6 bankruptcy court dismissed the adversary proceeding without  
7 prejudice; it did not finally adjudicate or pass judgment on the  
8 merits of any of Ms. Fernando's claims; it simply determined  
9 that the bankruptcy court was not the proper place for her to  
10 proceed. She is free to assert her claims elsewhere.

11 **CONCLUSION**

12 Based on the foregoing, we AFFIRM.