

**FEB 07 2007**

**HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**ORDERED PUBLISHED**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

In re:	)	BAP No.	CC-06-1109-BKMo
	)		
SUZANNE SUMMERVILLE,	)	Bk. No.	SV-02-20061-KT
	)		
Debtor.	)		
<hr/>			
MARIA PILAR ALONSO,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>O P I N I O N</b>	
	)		
SUZANNE SUMMERVILLE; ELIZABETH	)		
F. ROJAS, Chapter 13 Trustee,	)		
	)		
Appellees.	)		
<hr/>			

Argued and Submitted on November 15, 2006  
at Orange, California

Filed - February 7, 2007

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

Honorable Kathleen Thompson, Bankruptcy Judge, Presiding

Before: BRANDT, KLEIN and MONTALI, Bankruptcy Judges.

1 BRANDT, Bankruptcy Judge:

2

3 This appeal from an amended stay relief order presents the  
4 question of the effect of a confirmed Chapter 13<sup>1</sup> plan on a claim to  
5 be paid outside of the plan. Applying preclusion analysis, we  
6 conclude that the chapter 13 plan and confirmation order did not bar  
7 the debtor from contesting an obligation based on a debt being paid  
8 outside the plan, and AFFIRM.

9

10

### I. FACTS

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Debtor Suzanne Summerville filed a chapter 13 petition in 2002, scheduling a secured debt of \$50,000 she had borrowed from Maria Alonso to purchase her home in Van Nuys, California (the "Property"). The loan was documented by a note, secured by a deed of trust on the Property, which allowed Alonso to elect to have the debt satisfied by splitting the Property, upon which election Summerville was required to quitclaim to Alonso the rear 10,000 square feet of the Property. Alonso filed a \$52,000 proof of claim, attaching the note and deed of trust.

Early in 2003 the bankruptcy court confirmed Summerville's Second Amended Chapter 13 Plan (the "Plan"), which provided for payment of \$2,000 of arrearage to Alonso by the trustee through the Plan, and for Summerville to make the ongoing monthly payments

---

<sup>1</sup> Absent contrary indication, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 119-8, 119 Stat. 23, as the case from which the adversary proceeding and these appeals arise was filed before 17 October 2005. All "Rule" references are to the Federal Rules of Bankruptcy Procedure, all "FRCP" references are to the Federal Rules of Civil Procedure.

1 directly to Alonso. The Plan provided that property of the estate  
2 would not revert in debtor until discharge or dismissal. In case of  
3 default, the Plan expressly allowed Alonso to seek relief from the  
4 automatic stay under § 362. The record provided to us does not  
5 suggest that Alonso or anyone else objected to plan confirmation, or  
6 that there was ever an objection to Alonso's claim.

7 In 2005, Alonso moved for relief from stay, alleging  
8 Summerville was delinquent on her payments on the note. She also  
9 gave notice of her election to split the lot. Summerville opposed  
10 stay relief, disputing the amount of the post-petition delinquency.  
11 After a contested hearing, the court granted the motion and entered  
12 an order providing in part:

13 Movant and Debtor are both granted Relief from the  
14 Automatic Stay and have agreed that any and all further  
15 action(s), claim(s), remedies, etc., shall be sought and  
16 governed by the laws and courts of the State of California  
and that the United States Bankruptcy Courts and laws  
thereunder shall have no further jurisdiction and/or  
application over this request for relief from stay.

17 Order Granting Relief from Automatic Stay, 1 March 2005 ("RFS  
18 Order").

19 In 2006, Summerville filed a state court action to prevent  
20 Alonso from proceeding with the lot split. Superior Court of  
21 California, County of Los Angeles, No. LC073318. Although the  
22 pleadings are not in the excerpts of record, counsel advise that  
23 Summerville's claims and defenses relate to the amount of the loan,  
24 usury, and whether Alonso's election to split the lot was proper.

25 The state court ruled:

26 I don't believe that the state court has jurisdiction to  
27 effectively relitigate an issue that either was before the  
28 bankruptcy court or should have been before the bankruptcy  
court. That's a serious issue . . . if the bankruptcy  
court dealt with the issue, approved the plan in the

1 bankruptcy court, I don't see how you are going to amend  
2 around that because you are asking to relitigate that very  
3 issue, and I think the bankruptcy court order is  
controlling.

4 Transcript, 15 February 2006 at 119.

5 I think your remedy is in the bankruptcy court and you  
6 ought to proceed there with all haste because you've got  
7 legitimate issues; but on the other hand, I don't see how  
8 you folks are going to be able to confer jurisdiction in  
9 a state court to override[,] change or relitigate issues  
10 that have been subject to a final determination of a  
11 federal bankruptcy court. That was your forum. That's  
12 where your issue was. That's where your order came from.  
13 And frankly, that's where you go and get whatever question  
14 you have resolved.

15 Id. at 126. Although stated in jurisdictional terms, the state  
16 court's ruling sounds more in the nonjurisdictional realm of claim  
17 or issue preclusion.

18 Summerville promptly returned to the bankruptcy court and filed  
19 a motion with hearing on shortened time seeking, inter alia,  
20 clarification of the RFS Order. She requested "additional language  
21 to state that no issues regarding the validity of the note and deed  
22 of trust were litigated or determined in the bankruptcy court."

23 On the day of the hearing on shortened time, Alonso filed an  
24 opposition and Summerville filed a supplemental brief, neither of  
25 which are in the excerpts of record provided to us. At the hearing,  
26 Alonso's counsel asserted that he had not received notice of the  
27 motion until the morning of the hearing. Transcript, 24 February  
28 2006 at 134.

29 The bankruptcy court entertained argument on the motion and  
30 ruled that the Plan "set out the debtor's proposal for treating or  
31 managing Alonso's secured claim during the term of the plan," but  
32 that the court had not adjudicated the parties' contractual and





1 732-33 (9th Cir. BAP 2004), aff'd, 144 Fed. Appx. 636 (9th Cir.  
2 2005), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 126 S. Ct. 1068 (2006).

3 E. Whether a particular procedure comports with basic requirements  
4 of due process is a question of law which we review de novo. In re  
5 Garner, 246 B.R. 617, 619 (9th Cir. BAP 2000).

6  
7

**V. DISCUSSION**

8 A. Jurisdiction to Enter the Amended RFS Order

9 Alonso argues the bankruptcy court lacked jurisdiction to  
10 clarify its RFS Order because that order purported to relinquish  
11 jurisdiction to state court by way of a recitation to the effect  
12 that the parties had agreed to resolution of the underlying dispute  
13 in state court and that the bankruptcy court would not have  
14 jurisdiction.

15 It is fundamental that jurisdiction is governed by statute, in  
16 this case 28 U.S.C. § 1334, and not by agreement of the parties.  
17 Debtor's legal and equitable interests in the Property remained  
18 property of the estate under § 541 and § 1306. Although  
19 confirmation may revest property of the estate in the debtor,  
20 compare § 1306(b) with § 1327(b), Debtor's Plan provided that  
21 revesting would not occur until discharge or dismissal. The case  
22 had not been dismissed, there had been no abandonment under § 554,  
23 and as the Plan had not been completed, Summerville had not received  
24 her discharge. The Property remained property of the estate.

25 The Property remained in the jurisdiction of the bankruptcy  
26 court as property of the estate. 28 U.S.C. § 1334(e). When a  
27 bankruptcy court grants relief from the automatic stay to permit a  
28 nonbankruptcy court to resolve a dispute affecting property of the

1 estate, the fact of stay relief does not operate to relinquish  
2 jurisdiction under 28 U.S.C. § 1334. See In re Orfa Corp. of  
3 Philadelphia, 170 B.R. 257, 268-69 (E.D. Pa. 1994); In re Cordry, 149  
4 B.R. 970, 973-74 (D. Kan. 1993).

5 Moreover, even if the bankruptcy court could relinquish  
6 jurisdiction over the Property and over questions regarding the note  
7 and its security, it does not follow that it could not clarify its  
8 own order. No explicit provision is needed for the bankruptcy court  
9 to do so:

10 [The] Ninth Circuit [has] held . . . [a] bankruptcy court  
11 retained jurisdiction to "interpret" its orders entered  
12 prior to dismissal and "to dispose of ancillary matters .  
13 . . . rendered in connection with the underlying action" but  
not to grant "new relief independent of its prior  
rulings."

14 In re Aheong, 276 B.R. 233, 239-40 & n.8 (9th Cir. BAP 2002)  
15 (quoting In re Taylor, 884 F.2d 478, 481 (9th Cir. 1989)). See also  
16 In re La Sierra Fin. Servs., Inc., 290 B.R. 718, 731-32 & n.9 (9th  
17 Cir. BAP 2002) (FRCP 60(b), applicable via Rule 9024, preserves  
18 court's inherent power to set aside a judgment in equity).

19 It follows that the bankruptcy court had jurisdiction to  
20 clarify its RFS order.

21  
22 B. Plan Confirmation and Preclusion

23 Alonso argues, citing Brawders, 325 B.R. at 410, and In re  
24 Shook, 278 B.R. 815, 827 (9th Cir. BAP 2002), that since a chapter  
25 13 plan confirmation order is binding by virtue of § 1327(a), the  
26 order bars Summerville from raising new defenses and claims to the  
27 note.

28 There are two difficulties with this argument. First, the



1 binding effect of § 1327(a) depends on the terms of the plan  
2 confirmed. Second, the principles of res judicata are scalpels, not  
3 broadswords. They require careful and situation-specific analysis,  
4 and are not susceptible to simplistic application.

5  
6 1. § 1327

7 Section 1327 provides (and did when the Plan was confirmed):

8 (a) The provisions of a confirmed plan bind the debtor and  
9 each creditor, whether or not the claim of such creditor  
10 is provided for by the plan, and whether or not such  
11 creditor has objected to, has accepted, or has rejected  
12 the plan.

13 (b) Except as otherwise provided in the plan or the order  
14 confirming the plan, the confirmation of a plan vests all  
15 of the property of the estate in the debtor.

16 (c) Except as otherwise provided in the plan or in the  
17 order confirming the plan, the property vesting in the  
18 debtor under subsection (b) of this section is free and  
19 clear of any claim or interest of any creditor provided  
20 for by the plan.

21 See 3 Keith M. Lundin, Chapter 13 Bankruptcy, § 229.1 at 229-1 et  
22 seq. (3d ed. 2000).

23 Under this provision, a creditor who fails to object timely to  
24 a plan or to appeal a confirmation order may be precluded from later  
25 challenging plan provisions, even if those provisions are  
26 inconsistent with the Bankruptcy Code. In re Enewally, 368 F.3d  
27 1165, 1172 (9th Cir. 2004) (citing In re Pardee, 193 F.3d 1083, 1086  
28 (9th Cir. 1999)). However, this rule is subject to the limitation  
that “[a] confirmed plan has no preclusive effect on issues that  
must be brought by an adversary proceeding, or were not sufficiently  
evidenced in a plan to provide adequate notice to the creditor.”  
Id. at 1173. This is because, where a plan fails to state its  
intended effect on a given issue, any ambiguity may reflect that

1 that issue was not considered by the bankruptcy court, and/or that  
2 the parties did not contemplate that the plan would resolve the  
3 issue. Brawders, 325 B.R. at 411 (9th Cir. BAP 2005).  
4 Additionally, it may offend due process to confer preclusive effect  
5 on matters not explicitly determined in a confirmed plan. Id.

6 The terms of the Plan confirmed in this case do not support  
7 Alonso's argument. The applicable provisions identify Alonso as a  
8 class 2 creditor, to be paid outside the Plan except for payment of  
9 a modest and apparently agreed arrearage within it, and allow for  
10 relief from stay in case of default. No further specifics are  
11 included, and nowhere are parties' respective state law rights  
12 mentioned.

13 With the exception of the prepetition arrearage to be paid  
14 through the Plan, neither the amount of the debt nor any other  
15 aspects of the obligation or the relationship between the parties  
16 were at issue in any way. The Plan neither identifies a dollar  
17 amount for the entire obligation, nor provides a valuation  
18 procedure, nor deals with the amount, validity, or enforceability of  
19 the note or deed of trust. Respecting those issues, the Plan says  
20 nothing which could be given binding effect.

## 21 22 2. Preclusion

23 In addition to the statutory binding effect of a chapter 13  
24 plan, the confirmation order may have a res judicata, or preclusive,  
25 effect. The res judicata doctrines regarding judgments of federal  
26 courts are a matter of federal common law. As we have noted:

27 [t]he Supreme Court treats the Restatement (Second) of  
28 Judgments ("Restatement") as an authoritative statement of  
federal res judicata doctrines and has applied the

1 Restatement's substitution of the terms "claim preclusion"  
2 and "issue preclusion" for "res judicata" and "collateral  
3 estoppel." E.g., New Hampshire v. Maine, 532 U.S. 742,  
748 (2001) ("res judicata doctrines commonly termed claim  
and issue preclusion").

4 George, 318 B.R. at 733 (additional citations omitted). Preclusion  
5 is an affirmative matter, and the proponent of preclusion has the  
6 burden of proof and bears the risk of non-persuasion. George, 318  
7 B.R. at 737; and In re Repp, 307 B.R. 144, 148 n.3 (9th Cir. BAP  
8 2004).

9  
10 a. Claim Preclusion

11 Claim preclusion operates to bar a legal theory that has never  
12 been, but could and should have been, litigated by the parties in a  
13 prior proceeding:

14 Claim preclusion treats a judgment, once rendered, as the  
15 full measure of relief to be accorded between the same  
16 parties on the same claim or cause of action. Claim  
17 preclusion prevents litigation of all grounds for, or  
defenses to, recovery that were previously available to  
the parties, regardless of whether they were asserted or  
determined in the prior proceeding.

18 Robi v. Five Platters, Inc., 838 F.2d 318, 321-22 (9th Cir. 1988)  
19 (quotations, citations, and footnote omitted).

20 For these purposes, a "claim" is a party's right to pursue  
21 remedies "with respect to all or any part of the transaction, or  
22 series of connected transactions, out of which the action arose."  
23 Restatement (Second) of Judgments § 24(1) (1982) ("Dimensions of  
24 'Claim' for Purposes of Merger or Bar - General Rule Concerning  
25 'Splitting'") ("Restatement"). When there has been a final judgment  
26 on a part of a "claim," the right to obtain remedies respecting that  
27 claim is extinguished. George, 318 B.R. at 735-37; Christopher  
28 Klein et al., Principles of Preclusion and Estoppel in Bankruptcy

1 Cases, 79 Am. Bankr. L.J. 839, 852-58 (2005).

2 The transactional test for determining what forms the same  
3 "claim" for purposes of preclusion is applied pragmatically, based  
4 on myriad factors, and focuses on a specific transaction or series  
5 of transactions. George, 318 B.R. at 735-36; Restatement § 24(2).<sup>2</sup>

6 Although an order confirming a chapter 13 plan is a final order  
7 with potentially preclusive effect, Pardee, 193 F.3d at 1087, the  
8 extent of that effect is determined in each instance by applying the  
9 transactional test to the terms of the specific plan and the manner  
10 in which the confirmation was accomplished. George, 318 B.R. at  
11 735.

12 Here, nothing in the Plan implicated the Alonso note or deed of  
13 trust except the amount of the delinquency. The factual issues  
14 raised in the state court litigation regarding the original amount  
15 of the note, usury, and division of the Property are not related in  
16 time, space, or origin to the factual issues attendant to an  
17 uncontested confirmation of a chapter 13 plan, as set out in  
18 § 1325(a): compliance with the Code, the debtor's good faith, and  
19 the best interest of creditors test of § 1325(a)(4). Restatement  
20 § 24(2). Nor do they form the "convenient trial unit" that the  
21 transactional test also requires.

22 \_\_\_\_\_  
23 <sup>2</sup> The language of the Restatement is:

24 (2) What factual grouping constitutes a "transaction", and  
25 what groupings constitute a "series", are to be determined  
26 pragmatically, giving weight to such considerations as  
27 whether the facts are related in time, space, origin, or  
expectations or business understanding or usage.

28 Restatement § 24(2).

1           To be sure, these considerations might yield a different result  
2 had it been necessary to determine the issues of amount, validity,  
3 and enforceability of the obligation in order to resolve the  
4 confirmation issues, as when the debt is to be paid through the plan  
5 and feasibility is at issue. Even then, caution is in order,  
6 because the Rules contemplate that contests regarding the validity  
7 and amount of claims be resolved by way of two-party claim objection  
8 proceedings. Thus, we have held that it is ordinarily error to  
9 resolve two-party claim objection disputes in a collective plan  
10 confirmation proceeding. In re Garvida, 347 B.R. 697, 703-04 (9th  
11 Cir. BAP 2006); Rule 3007.

12           At confirmation, the parties did not litigate, nor did the  
13 court address, defenses to the note and deed of trust or  
14 Summerville's possible claims against Alonso, nor was it necessary  
15 to do so, when the Plan only addressed the (undisputed, insofar as  
16 the record before us discloses) arrearage on her obligation to  
17 Alonso. Applying the transactional test, the Alonso debt which was  
18 being paid outside the Plan was not part of the same transaction as  
19 the confirmation. Hence, no claim preclusion.

20           Alternatively, if the Alonso debt were regarded as part of the  
21 same transaction, the exceptions set forth at Restatement § 26  
22 ("Exceptions to the General Rule Concerning Splitting") would come  
23 into play. George, 318 B.R. at 736. That section provides, in  
24 pertinent part:

25           (1) When any of the following circumstances exists, the  
26 general rule of § 24 does not apply to extinguish the  
27 claim, and part or all of the claim subsists as a possible  
28 basis for a second action by the plaintiff against the  
defendant:

. . . .

1 (b) The court in the first action has expressly  
2 reserved the plaintiff's right to maintain the second  
3 action; or

4 . . . .

5 (d) The judgment in the first action was plainly  
6 inconsistent with the fair and equitable implementation of  
7 a statutory or constitutional scheme, or it is the sense  
8 of the scheme that the plaintiff should be permitted to  
9 split his claim[.]

10 Restatement § 26.

11 The court in the first action has the power to preserve a  
12 plaintiff's right to maintain a second action by being clear about  
13 the point. Restatement § 26(1)(b). That, in effect, is what the  
14 court did in the Amended RFS Order on appeal.

15 Moreover, it is the sense of the Rules that one is permitted to  
16 split a claim by segregating two-party disputes, such as claim  
17 objections, from collective matters involving the entire creditor  
18 body, such as plan confirmation matters. Such a structure  
19 implicates Restatement § 26(1)(d), and that was the gravamen of our  
20 recent decision in Garvida, 347 B.R. at 703-04.

21 In short, even if the Alonso debt could be construed as part of  
22 the same transaction as plan confirmation for purposes of  
23 Restatement § 24, claim preclusion would nevertheless not ensue in  
24 light of the Restatement § 26 exceptions.

25 It follows that Alonso has not carried her affirmative burden  
26 to establish claim preclusion.

27 b. Issue Preclusion

28 The issue preclusion analysis is more straightforward here.  
While claim preclusion bars litigation of issues that have never  
been litigated, as the Ninth Circuit has explained, issue

1 preclusion:

2 prevents relitigation of all "issues of fact or law that  
3 were actually litigated and necessarily decided" in a  
4 prior proceeding . . . . The issue must have been  
"actually decided" after a "full and fair opportunity" for  
litigation.

5 Robi, 838 F.2d at 322 (citations omitted).

6 After an issue is determined by a court, "that determination is  
7 conclusive in subsequent suits based on a different cause of action  
8 involving a party to the prior litigation." Robi, 838 F.2d at 326,  
9 quoting Shapley v. Nevada Bd. of State Prison Commissioners, 766  
10 F.2d 404, 408 (9th Cir. 1985). We have recently held:

11 Six basic elements must be satisfied before issue  
12 preclusion will be applied. Five of the elements are  
13 described as "threshold" requirements: (1) identical  
14 issue; (2) actually litigated in the former proceeding;  
15 (3) necessarily decided in the former proceeding; (4)  
former decision final and on the merits; and (5) party  
against whom preclusion sought either the same, or in  
privity with, party in former proceeding.

16 The sixth element is a mandatory "additional" inquiry  
17 into whether imposition of issue preclusion in the  
particular setting would be fair and consistent with sound  
public policy.

18 In re Khaligh, 338 B.R. 817, 824-25 (9th Cir. BAP 2006) (citation  
19 and footnote omitted).

20 Only the fifth element is satisfied here. Alonso does not even  
21 contend that the issues raised in state court were actually  
22 litigated in bankruptcy court, or that there was any adjudication of  
23 Alonso's claim, or a final decision on the merits. She has not  
24 shown that issue preclusion applies in this instance.

25

26 C. Other Issues

27 Alonso also argues on appeal that Summerville's claims and  
28 defenses should be barred by laches or delay, and that she was

1 denied due process. But as the Amended RFS Order had no substantive  
2 impact, any errors would be harmless, and the laches and delay  
3 arguments will presumably be available to Alonso in state court.  
4

5 **VI. CONCLUSION**

6 The bankruptcy court had jurisdiction to clarify its RFS Order,  
7 and as it had made no determinations in confirming the Plan  
8 regarding Summerville's obligation to Alonso which merit preclusive  
9 effect (except respecting the arrearage not at issue in this  
10 appeal), the clarification sought by debtor was innocuous. The  
11 court merely explicated the confirmation order in a manner  
12 consistent with settled law; there was no abuse of discretion.

13 Of course, the lack of preclusion does not bar the use of  
14 Summerville's petition, schedules, and judicial admissions (if any)  
15 in the state court litigation.

16 We AFFIRM.  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28