FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
July 22, 2013
Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE MARK PAUL HALL, Debtor.	BAP No. WO-12-084
MARK PAUL HALL and CHRISTI ANNE HALL, Plaintiffs – Appellants, v. NORTH AMERICAN MORTGAGE COMPANY, and STATE STREET BANK AND TRUST COMPANY, as Custodian Trustee, Defendants – Appellees, and JP MORGAN CHASE BANK, N.A., Successor in Interest from the Federal Deposit Insurance Corporation, as receiver for Washington Mutual Bank, F.A., Appellee, and U.S. BANK NATIONAL ASSOCIATION, As Trustee, Successor in Interest to State Street Bank and Trust, as Trustee for Washington Mutual MSC Mortgage Pass Thru Certificates Series 2002-MS7, WASHINGTON MUTUAL HOME LOANS, INC., LITTON LOAN SERVICING, LP, and US BANCORP,	Bankr. No. 11-13797 Adv. No. 11-01169 Chapter 13 OPINION*

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* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

Defendants.

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before CORNISH, NUGENT, and ROMERO, Bankruptcy Judges.

ROMERO, Bankruptcy Judge.

Mark and Christi Hall (collectively "the Halls") appeal the bankruptcy court's order abstaining from hearing their adversary complaint for wrongful foreclosure, negligence, wantonness, unjust enrichment, slander of title, and civil conspiracy. The bankruptcy court abstained because every claim asserted in the adversary complaint was based on facts and issues previously determined against the Halls in state court. The Halls argue the bankruptcy court erred in abstaining based on the *Rooker-Feldman* doctrine because the party that obtained the state foreclosure judgment was not the party who filed a proof of claim on the underlying note. Finding no abuse of discretion, we AFFIRM.[1]

I. Factual Background

The Halls purchased a home on Bartlett Drive in Oklahoma City, Oklahoma (the "Property") in 2001. To fund the purchase, Mark borrowed money from North American Mortgage Company ("NAMC") and executed a promissory note to NAMC (the "Note"). Contemporaneously, the Halls granted NAMC a mortgage on their home (the "Mortgage").

NAMC was acquired by Washington Mutual Bank FA ("WaMu") in 2002. In March 2002, WaMu assigned the Mortgage to State Street Bank and Trust as

[1] The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Custodian Trustee ("State Street").[2]

In February 2007, State Street filed a foreclosure action against the Halls in state court. On March 10, 2009, the state court granted summary judgment in favor of State Street (the "Judgment").[3] The Halls appealed the Judgment to the Oklahoma Court of Civil Appeals ("OCOCA"). On October 9, 2009, the OCOCA affirmed the Judgment.[4] The Halls raised two issues before the OCOCA: (1) they disputed default on the Note, arguing State Street miscalculated their payment obligation, and (2) they disputed State Street's standing to enforce the Note because it was not indorsed in its favor.[5] The OCOCA rejected both arguments, concluding (1) the record undisputedly supported a finding that the Halls were in default on their monthly payment obligation under the Note and Mortgage, and (2) because neither the validity of the assignment of the Mortgage nor the intent to transfer all rights to State Street was disputed, State Street, being in lawful possession of the Note, was a secured party entitled to foreclose on it.[6]

Mark Hall filed his Chapter 13 petition on July 13, 2011, and his Plan on

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[2] Assignment of Mortgage, *in* Appellants' Appendix ("App.") at 104. Because the Halls did not bates stamp their appendix, all record page references herein are to the PDF page numbers of the documents as they appear in the appellate record. Thus, the reference to "App. at 104" refers to page 104/128 of the PDF document, as opposed to the page numbers they designated in their Table of Contents.

[3] Neither the Judgment nor the Note was provided to this Court as part of the appellate record.

[4] OCOCA Opinion, *in* App. at 86-92.

[5] *Id.* at 3, ¶ 3, *in* App. at 88 ("Property Owners dispute the fact of their default, arguing the Transferee Lender miscalculated their payment obligations. . . . Additionally, Property Owners argue Transferee Lender cannot enforce the Note because the Note was not indorsed in favor of Transferee Lender.").

[6] *Id.* at 4-6, ¶¶ 5-7, *in* App. at 89-91.

July 14, 2011.[7] On November 21, 2011, JP Morgan Chase Bank, NA ("Chase") filed a proof of claim based on the Mortgage and objected to confirmation of the Debtor's Plan, alleging the Plan did not provide for the curing of prepetition defaults and tried to avoid its lien.[8] That same day, the Halls filed an adversary complaint against NAMC, US Bank National Association ("US Bank"),[9] State Street, WaMu, Litton Loan Servicing LP, and US Bancorp, asserting claims for negligence, wantonness, unjust enrichment, wrongful foreclosure, slander of title, and civil conspiracy (the "Complaint").[10] Chase was not a listed defendant, but it filed an answer as "Successor In Interest From The FDIC, as Receiver For WaMu."[11] State Street, Chase, and NAMC (collectively "the Defendants") filed a motion to dismiss the adversary complaint on June 29, 2012. The motion sought dismissal of the Complaint under the *Rooker-Feldman* doctrine, res judicata or

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[7] Mr. Hall previously sought bankruptcy relief on October 14, 2009, and June 23, 2010.

[8] Debtor neither filed an objection to Chase's proof of claim nor a response to Chase's Objection to Confirmation of Plan. The hearing on confirmation is currently scheduled for August 20, 2013.

[9] US Bank succeeded State Street's interest. Appellees' Combined Entry of Appearance, Statement of Interested Parties and Statement Regarding Oral Argument, *in* BAP Appeal No. 12-84, Docket No. 9.

[10] Complaint, *in* App. at 15-24.

[11] Answer of JP Morgan Chase Bank, N.A., Successor in Interest From the Federal Deposit Insurance Corporation, as Receiver for Washington Mutual Bank, F.A., to Plaintiffs' Complaint, *in* App. at 36-43. On September 25, 2008, the Office of Thrift Supervision closed WaMu, and the Federal Deposit Insurance Corporation ("FDIC") was appointed as WaMu's receiver. Chase acquired the assets of WaMu through an agreement with the FDIC. *See* Reply of Defendants [] in Support of Their Motion to Dismiss at 3-4 n.1, *in* App. at 110-11; FDIC Failed Bank Information for WaMu, http://www.fdic.gov/bank/individual/failed/wamu.html. A printed copy of this webpage is provided as an attachment located at the end of this decision. The Court accepts no responsibility for, and does not endorse, any product, organization, or content that appears at any hyperlinked site, or at any site to which that site might be linked. The Court accepts no responsibility for the availability or functionality of any hyperlink. Thus, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the Opinion of the Court.

collateral estoppel, as well as for failing to meet applicable pleading standards. The Halls objected to dismissal, arguing (1) Chase did not have standing to file its proof of claim and (2) the *Rooker-Feldman* doctrine did not apply to bar the bankruptcy court from examining which of the defendants had an interest in the property.[12]

On September 17, 2012, the bankruptcy court held a scheduling conference, and according to the Halls, asked for argument on the motion to dismiss without any warning. The bankruptcy court ruled it would abstain from the adversary in its entirety.[13] On September 24, 2012, the bankruptcy court entered the Abstention Order.[14]

II. Appellate Jurisdiction and Standard of Review

We have jurisdiction over this appeal. Although § 1334(d) of Title 28 of the United States Code prohibits appeals from orders of abstention by courts of appeals,[15] we nonetheless have jurisdiction to review the Abstention Order because (1) this Court is not the court of appeals referred to in § 1334(d) and (2) the Abstention Order is a final order as it fits within the criteria of the collateral order doctrine.[16] Moreover, the Halls timely filed a notice of appeal, and the

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[12] Plaintiff's Objection to Defendants' Motion to Dismiss for Failure to State a Claim [], and Brief in Support, *in* App. at 94-106.

[13] Adversary Proceeding Docket at 7-8, *in* App. at 11-12.

[14] Abstention Order, *in* App. at 123-25.

[15] Section 1334(d) provides:

> [a]ny decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under § 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

[16] *See Strong v. W. United Life Assurance Co. (In re Tri-Valley Distrib., Inc.)*, 533 F.3d 1209, 1216 (10th Cir. 2008) (citing *Mt. McKinley Ins. Co. v. Corning, Inc.*, 399 F.3d 436, 442 (2d Cir. 2005) (BAP had authority to decide that

(continued...)

parties have not elected to have the appeal heard by the United States District Court for the Western District of Oklahoma.[17]

We review a bankruptcy court's order abstaining under § 1334(c)(1) for abuse of discretion.[18] Under the abuse of discretion standard, the appellate court will not disturb the trial court's decision unless it has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice.[19]

III. Discussion

Section 1334(c)(1) of Title 28 of the United States Code grants discretion to a bankruptcy court to abstain from hearing a case "in the interest of justice, or in the interest of comity with State courts or respect for State law."[20] In examining whether to abstain under that provision, courts typically examine twelve non-exclusive factors to determine whether abstention is appropriate:

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[16] (...continued)
permissive abstention was appropriate); *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 768-69 (10th Cir. BAP 1997) (BAP not the court of appeals referred to in § 1334(d) as BAP's appellate jurisdiction arises under § 158(a)-(c)).

[17] 28 U.S.C. § 158; Fed. R. Bankr. P. 8001(e); Fed. R. Bankr. P. 8002(a).

[18] *In re Delta Towers, Ltd.*, 924 F.2d 74, 79 (5th Cir. 1991) (section 1334(c)(1) accords a court the discretion to abstain from hearing state law claims; finding bankruptcy court did not abuse its discretion in abstaining); *In re Petrie Retail, Inc.*, 304 F.3d 223, 232 (2d Cir. 2002); *Ragosa v. Canzano (In re Colarusso)*, 295 B.R. 166, 178 (1st Cir. BAP 2003), *aff'd*, 382 F.3d 51 (1st Cir. 2004) (reviewing bankruptcy court's permissive abstention decision for abuse of discretion). *But see Telluride Asset Resolution, LLC v. Telluride Global Dev. LLC (In re Telluride Income Growth, L.P.)*, 364 B.R. 390, 398 (10th Cir. BAP 2007) (citing *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 770 (10th Cir. BAP 1997); and *Midgard* at 770 ("Review of the Bankruptcy Court's decision refusing to abstain from hearing the State Court action involves mixed questions of law and fact, but is primarily based on interpretation of section 1334(c)(2)). As such, the Bankruptcy Court's decision related to abstention is also subject to *de novo* review."). *Midgard*, however, is distinguishable because it involved an order refusing to abstain under § 1332(c)(2), while this case involves abstention under § 1334(c)(1).

[19] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994).

[20] 28 U.S.C. § 1334(c)(1).

> (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.[21]

Courts often employ a totality of the circumstances approach when determining if abstention is appropriate.[22] In this case, the bankruptcy court abstained from hearing the adversary proceeding in its entirety because:

> Every claim asserted by [the Halls] in this proceeding is based on state law and entails claims only related to a Title 11 case, but not arising in or under a Title 11 case. Further, the claims Plaintiffs assert in this action are based on facts and issues previously determined against Plaintiffs in a judgment entered in an Oklahoma state court action to which Plaintiffs were party and in which Plaintiffs were represented by counsel. Moreover, that judgment was affirmed on appeal by the Oklahoma Court of Civil Appeals. The facts and issues determined by a state court of competent jurisdiction may not be re-litigated in a federal forum.[23]

Thus, the bankruptcy court considered factors 2, 4, 5, 6, and 7 favored abstaining.

On appeal, the Halls do not contest the bankruptcy court's findings that the

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[21] *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1167 (9th Cir. 1990) (citing *Republic Reader's Serv., Inc. v. Magazine Serv. Bureau, Inc. (In re Republic Reader's Serv., Inc.)*, 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987)).

[22] *In re Wilson*, 85 B.R. 722, 728 (Bankr. E.D. Pa. 1988) (whether a court should abstain must be decided upon consideration of the totality of the circumstances specific to each case); *White Oak Corp. v. Am. Int'l Grp., Inc. (In re Nat'l E. Corp.)*, 391 B.R. 663, 671 (Bankr. D. Conn. 2008) (pursuit of equity, justice, and comity involves a thoughtful, complex assessment of what makes good sense in the totality of circumstances); *Bickerton v. Bozel S.A. (In re Bozel S.A.)*, 434 B.R. 98, 107 (Bankr. S.D.N.Y. 2010) (finding facts weighed against abstention upon considering the totality of the circumstances).

[23] Abstention Order at 2, *in* App. at 124.

claims in the Complaint are based solely on state law or that the adversary case is a noncore proceeding.[24] Instead, they only challenge the court's application of the *Rooker-Feldman* doctrine. They claim the bankruptcy court erred when it abstained under the *Rooker-Feldman* doctrine because Chase and WaMu were not affiliated with the state court action.[25] They argue the *Rooker-Feldman* doctrine cannot provide cover to different parties claiming an interest in the same note and mortgage.[26] We find these arguments unpersuasive.

The *Rooker-Feldman* doctrine precludes a losing party in state court who complains of injury caused by the state-court judgment from bringing a case seeking review and rejection of that judgment in federal court.[27] This is exactly what the Halls are attempting to do. State Street brought a foreclosure action in state court and obtained a judgment against them. The Halls appealed that judgment to the OCOCA, who affirmed it. The Halls, the "state-court losers," turned to the bankruptcy court and filed an adversary proceeding challenging the Judgment. Although they do not ask directly for reversal of the Judgment, they seek damages based on alleged injuries incurred as a result of the state foreclosure action.[28] They repeat contentions and arguments rejected by the state

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[24] The requirement that a bankruptcy court apply state law, by itself, does not justify discretionary abstention. *Wilson*, 85 B.R. at 726-27.

[25] Appellants' Br. at 7-8.

[26] *Id.* at 8.

[27] *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291-92 (2005).

[28] In their appellate brief, the Halls argue "[their claimed legal injury was] not caused by the state court judgment but by JP Morgan Chase." Appellants' Br. at 8. They maintain they "only request the Bankruptcy Court look at the state court judgment to verify that the Plaintiff in state court is not the party filing the proof of claim in Debtor's bankruptcy." *Id.* No rule, however, precludes a "state court winner" from assigning the state judgment to a nonparty in the state action or subsequently transferring the note. Nor is there a rule that prevents a state judgment assignee or note transferee from filing a claim in the state court loser's

(continued...)

court; specifically, whether their payments were misapplied, whether they defaulted on the Note, and whether State Street had standing to enforce the Note. Contrary to their characterizations of the Complaint, consideration of the Complaint by the bankruptcy court would necessarily require the court to review and reject the Judgment.

The fact that WaMu and Chase were not parties to the state foreclosure action does not preclude the application of the *Rooker-Feldman* doctrine here. It's the party against whom the doctrine is invoked that must be a party to the underlying state-court proceeding.[29] Otherwise, "state court losers" can circumvent the doctrine by simply naming a nonparty in the state court action as a defendant in the federal action. We thus conclude the bankruptcy court properly relied upon the *Rooker-Feldman* doctrine as a basis to abstain.[30]

IV. Conclusion

For the above reasons, the bankruptcy court did not abuse its discretion in abstaining and we AFFIRM the Abstention Order.[31]

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[28] (...continued)
bankruptcy. Simply put, the Halls erroneously conflate their Complaint with Chase's proof of claim.

[29] *See Lance v. Dennis*, 546 U.S. 459, 465 (2006) (recognizing general rule that *Rooker-Feldman* may not be invoked against a federal court plaintiff who was not actually a party to the prior state court judgment); *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994) (*Rooker-Feldman* held inapplicable where the party against whom the doctrine is invoked was not a party to the underlying state court proceeding.).

[30] We note the bankruptcy court did not specifically reference which rule it relied upon as a basis to abstain (*i.e.*, the *Rooker-Feldman* doctrine, collateral estoppel/issue preclusion, or res judicata/claim preclusion). Because we have concluded the *Rooker-Feldman* doctrine applied, we need not discuss whether issue preclusion or claim preclusion applied.

[31] We grant Appellees' motion (as set forth in their brief at 18 n.6) to strike Exhibits 2 and 3 attached to Appellants' Brief as neither were presented to the bankruptcy court. *See, e.g., Adams v. Royal Indem. Co.*, 99 F.3d 964, 968 n.3 (10th Cir. 1996) (court should strike documents in appendix not presented to trial court); *Aero-Med., Inc. v. United States*, 23 F.3d 328, 329 n.2 (10th Cir. 1994)
(continued...)

[31] (...continued)
(court should strike documents in appendix not presented to trial court).

Failed Bank Information

Information for Washington Mutual Bank, Henderson, NV and Washington Mutual Bank, FSB, Park City, UT

I. Introduction

On September 25, 2008, the banking operations of Washington Mutual, Inc - Washington Mutual Bank, Henderson, NV and Washington Mutual Bank, FSB, Park City, UT (Washington Mutual Bank) were sold in a transaction facilitated by the Office of Thrift Supervision (OTS) and the Federal Deposit Insurance Corporation (FDIC).

Footnote 11

The FDIC has assembled useful information regarding your relationship with this institution. Besides a checking account, you may have Certificates of Deposit, a car loan, a business checking account, a commercial loan, a Social Security direct deposit, and other relationships with the institution. The FDIC has compiled the following information which should answer many of your questions.

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II. Press Release

The FDIC has issued a press release (PR-85-2008) about this transaction. If you represent a media outlet and would like information about the transaction, please contact Andrew Gray (angray@fdic.gov) at 202-898-7192 or 202-494-1049.

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III. Unclaimed Deposits

Please note that any deposits that have not been claimed within 18 months of the failure of Washington Mutual Bank FSB was sent to the FDIC by JP Morgan Chase Bank as acquirer of Washington Mutual Bank, FSB on April 15th, 2010. The unclaimed funds will be sent to the appropriate states according to Federal Law (12 U.S.C., 1822(e)). For more information, please see:

- **Unclaimed Deposits - FAQ**
- **Addendum to the FAQ**
- **Unclaimed Deposits - States websites**

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V. Banking Services

The Automated Teller Machines (ATM) and on line services will remain available.

You may continue to use the services to which you previously had access, such as, safe deposit boxes, night deposit boxes, wire services, etc, as normally available at each branch.

Your checks will be processed as usual. All outstanding checks will be paid against your available balance(s) as if no change had occurred. Your new

Footnote 11

bank will contact you soon regarding any changes in the terms of your account. If you have a problem with a merchant refusing to accept your check, please contact your branch office. An account representative will clear up any confusion about the validity of your checks.

All interest accrued through Thursday, September 25, 2008, will be paid at your same rate. JPMorgan Chase Bank will be reviewing rates and will provide further information soon. You will be notified of any changes.

Your automatic direct deposit(s) and/or automatic withdrawal(s) will be transferred automatically to your new bank. If you have any questions or special requests, you may contact a representative of your assuming institution at your branch office.

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VI. Loan Customers

If you had a loan with Washington Mutual Bank, you should continue to make your payments as usual. The terms of your loan will not change because they are contractually agreed to in your promissory note. Checks should be made payable as usual and sent to the same address until further notice.

For all questions regarding new loans and the lending policies of JPMorgan Chase Bank, please contact your branch office.

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VII. Possible Claims

On September 25, 2008, Washington Mutual Bank was closed by the Office of Thrift Supervision and the Federal Deposit Insurance Corporation was named receiver. Subsequent to the closure, JPMorgan Chase acquired the assets and most of the liabilities, including covered bonds and other secured debt, of Washington Mutual Bank from the FDIC as Receiver for Washington Mutual Bank. Any claims by equity, subordinated and senior unsecured debt holders were not acquired.

There was no publicly-owned stock in Washington Mutual Bank. If you are an equity shareholder, your shares are in Washington Mutual, Inc., the holding company for Washington Mutual Bank, and not the Bank. Washington Mutual, Inc., and the interests of equity, debt holders or other creditors of Washington Mutual, Inc., are not included in the closure or receivership of the Bank. Washington Mutual, Inc. filed for bankruptcy protection on Friday,

Footnote 11

September 26th. Please contact Washington Mutual, Inc. directly for information about this bankruptcy proceeding.

If you hold senior unsecured debt or subordinated debt, your claim with the Receiver has already been registered by virtue of bond ownership and there is no need for you to make an additional claim. If the ownership of the bond changes, the claim against the Receiver will follow the ownership of the bond. Please note that under federal law, 12 U.S.C. § 1821(d)(11), claims by subordinated debt holders are paid only after all claims by general creditors of the institution. At this time, the FDIC as Receiver for Washington Mutual Bank does not anticipate that subordinated debt holders of the bank will receive any recovery on their claims

Other claims against Washington Mutual Bank, together with proof of the claims, must be submitted in writing to the Receiver at the following address:

FDIC as Receiver of Washington Mutual Bank
1601 N. Bryan Street
Dallas, TX 75201-3430
Attention: Claims Agent

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Last Updated 08/16/2012 cservicefdicdal@fdic.gov

Footnote 11