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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 12-12020-mg; Adv. Proc. No. 14-02388-mg
- - - - -x
In the Matters of:
RESIDENTIAL CAPITAL, LLC, et al.,
Debtors.
- - - - -x
OCWEN LOAN SERVICING, LLC,
Plaintiff,
- against -
THE RESCAP LIQUIDATING TRUST,
Defendant.
- - - - -x
United States Bankruptcy Court
One Bowling Green
New York, New York
December 10, 2014
10:10 AM
B E F O R E:
HON. MARTIN GLENN
U.S. BANKRUPTCY JUDGE



(CC: Doc# 7552) Adjourned Hearing RE: Motion for Omnibus
Objection to Claim(s) / ResCap Borrower Claims Trusts Seventy-
Fifth Omnibus Objection to Claims (No Liability Borrower
Claims)

Adversary proceeding: 14-02388-mg Ocwen Loan Servicing, LLC v.
The Rescap Liquidating Trust, a Delaware Statutory
Pretrial Conference

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23 Pro Se (TELEPHONICALLY)

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1 P R O C E E D I N G S

2 THE COURT: All right, please be seated. We're here
3 in Residential Capital, number 12-12020. Who's going to begin?

4 MS. LEVITT: Good morning, Your Honor. Jamie Levitt
5 from Morrison & Foerster, here on behalf of the ResCap
6 Liquidating Trust. It's very nice to be back in your
7 courtroom, Your Honor.

8 I believe that Ocwen might be going first, if we're
9 going the adversary conference.

10 THE COURT: Okay, all right. May I have your
11 appearance, please?

12 MR. ROBSON: Good morning, Your Honor. Patrick
13 Robson, Hunton & Williams, on behalf of Ocwen Loan Servicing.

14 THE COURT: Okay. Go ahead.

15 MR. ROBSON: Your Honor, I have no affirmative
16 presentation. We're here for a preliminary conference that the
17 Court scheduled. We have prepared a draft scheduling order
18 consistent with the Court's template. I've provided it to Ms.
19 Levitt yesterday. I don't know if she has any comments or
20 otherwise with respect to the scheduling order.

21 THE COURT: Tell me what -- about the issues in this
22 matter.

23 MR. ROBSON: Your Honor, we initiated this adversary
24 proceeding in connection with one of the agreements that's
25 attendant to the asset purchase agreement. When Ocwen Loan

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1 Servicing purchased mortgage servicing rights from the ResCap
2 estate, under the terms of that agreement, among other
3 responsibilities, ResCap is responsible for directing third
4 parties that are holding physical mortgage files to segregate
5 those file that are now controlled or owned by Ocwen Loan
6 Servicing, as part of the asset acquisition.

7 In the course of the parties' performance under that
8 agreement, a dispute arose as to whether or not ResCap was
9 actually willing to instruct those third parties to perform
10 that obligation. It relates largely to a rather significant
11 cost associated with performance of those obligations.

12 The estimates that we've received are that the costs
13 may exceed ten million dollars. It's a manual process. It's
14 rather exhaustive. You actually have to review each document
15 and segregate out files according to each borrower's loan file.
16 And although the parties attempted, in good faith, for many
17 months to try to negotiate a resolution, we were unable to do
18 so. And as a result, we brought this adversary proceeding
19 seeking a declaratory judgment that ResCap perform its
20 contractual obligations and direct these third parties to
21 segregate these loan files.

22 THE COURT: So are there factual disputes? That's
23 what I -- but what I don't understand is what -- I mean, is
24 this purely a legal issue? Can you -- can both sides
25 proceed -- can you enter into a stipulation of facts that sets

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1 forth all of the pertinent facts, and then is it just an issue
2 of law?

3 MR. ROBSON: Your Honor --

4 THE COURT: That's -- what I'm trying understand is,
5 what's this all about and what's the most efficient way of
6 resolving it?

7 MR. ROBSON: Absolutely, Your Honor. I think -- and
8 I've not had an opportunity to meet and confer with Ms. Levitt,
9 although we have negotiated with some of her partners in
10 Morrison & Foerster about this issue -- I don't believe that
11 there are significant factual disputes, although ResCap has not
12 yet answered our complaint. They sought an extension of time
13 to respond and --

14 THE COURT: I know. And I decided to go ahead. I
15 know I had an inquiry about whether to put off this conference.
16 I didn't want to put it off, and I know I don't have an answer
17 yet, but having looked at the complaint some time ago -- I
18 didn't go back yesterday to look at it -- I'm trying to
19 understand what is this dispute really about. Are there
20 factual disputes? Have you -- and have you tried to -- have
21 counsel tried to sit down and see whether you can agree on as
22 many facts as possible? If there are any factual disputes,
23 focus limited discovery on those. And then -- I mean, is this
24 a contract interpretation issue? From your view, what is this?

25 MR. ROBSON: From our perspective, it absolutely is,

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1 Your Honor. I think there are a limited number of facts,
2 perhaps, the parties could stipulate to, and then leave the
3 Court to resolve the legal issues.

4 THE COURT: Let me hear from Ms. Levitt.

5 MR. ROBSON: I'll let Ms. Levitt --

6 THE COURT: And then -- and I'll -- Mr. Robson, I'll
7 give you a chance to address this further.

8 So what's this about, Ms. Levitt.

9 MS. LEVITT: Thank you, Judge Glenn. Yes, we agree
10 with you. We think it's a contractual dispute. There are two
11 contracts at issue: a records management statement of work,
12 which Mr. Robson has a little wrong, but it says that Ocwen
13 shall, at ResCap's cost, direct Iron Mountain to do certain
14 things. But there is then a later dated agreement called the
15 servicing transfer agreement that specifically addressed the
16 issue of loan files and says to the extent that loan files are
17 physically held in a vendor used by both, then the -- what you
18 need to do to effect a transfer is notify the vendor, here Iron
19 Mountain, to hold those loan files for the account of Ocwen.

20 But that's -- I mean that will be a contractual
21 obligation -- a contractual interpretation.

22 Your Honor, what we think is the most efficient way to
23 handle this is to do it as part of the claims resolution
24 process. And that's why we intend to move to dismiss in about
25 a week. And we're going to say that this is entirely

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1 duplicative, which it is, of a claim that Ocwen filed when it
2 filed its claims. There's specifically a claim in connection
3 with the records management statement of work.

4 What we think should happen is we intend to object to
5 all of the claims in the next week or so, have that be done in
6 the normal claims resolution process. They will respond.
7 There'll be a hearing. If the Court cannot resolve that on the
8 papers -- and we think the Court can -- then there would be
9 limited targeted discovery and then a final resolution.

10 So what our discussion yesterday was, we didn't think
11 it makes any sense to enter an adversary scheduling order and
12 engage in lots of costly discovery, because we think this can
13 be done as part of the claims process. It is -- we don't think
14 it's anything other than a question of money and who pays for
15 this process, depending on what it is.

16 THE COURT: So why is this properly an adversary
17 proceeding rather than -- it sounds like Ocwen has filed proofs
18 of claim.

19 MR. ROBSON: Correct, Your Honor. Ocwen did file
20 proofs of claim prophylactically. But in your confirmation
21 order, Ocwen's contract rights with respect to ResCap were
22 preserved and --

23 THE COURT: I don't think that's being disputed.

24 MR. ROBSON: Right. But I think maybe the most
25 fundamental disagreement here is the form of relief we're

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1 seeking. We're seeking --

2 THE COURT: Okay, so what --

3 MR. ROBSON: -- equitable relief. We're seeking a
4 declaratory judgment that Ocwen -- excuse me -- ResCap has to
5 take certain actions required under the agreement. And as
6 such, an adversary proceeding was the appropriate vehicle.

7 The other comment I'd just like to make --

8 THE COURT: Sure.

9 MR. ROBSON: -- Your Honor, is with respect to the
10 administrative claim writ large, which admittedly is about
11 amounts Ocwen believes it's owed, although that issue,
12 hopefully, will begin to move forward, the reason why we felt
13 compelled to bring this action and seek resolution of this
14 issue in particular, is because there is an acute prejudice,
15 not just to Ocwen, which is incurring costs it should not have
16 to incur, but with respect to all the borrowers that are being
17 serviced by Ocwen.

18 The inability to have those files segregated, the
19 inability to transfer the files to Ocwen and allow us to go
20 about our jobs, servicing those loans, is affected by this
21 delay. And as such, we're perfectly willing to work with
22 ResCap to find the most efficient and straightforward
23 resolution, but we respectfully do not want this claim to be
24 delayed by resolution of the other administrative claims.

25 MS. LEVITT: Your Honor, may I say one more thing?

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1 THE COURT: Come on up to the microphone, Ms. Levitt.

2 MS. LEVITT: And I apologize for taking too much time.

3 But I --

4 THE COURT: You're not.

5 MS. LEVITT: Okay. I don't understand the comment
6 that they're seeking a declaratory judgment for us to do
7 anything other than pay money. Their claim is a declaratory
8 judgment that the trust must pay the vendors' charges and
9 reimburse Ocwen. That is exactly duplicative of their contract
10 claim, which we'll put in our motion to dismiss.

11 But there is no relief here that cannot be done
12 through the claims resolution process. This is not a delay
13 tactic. We will have that in before the 23rd.

14 THE COURT: So what I -- let me ask this as a
15 question. Why isn't it a waste of time to go through a motion
16 to dismiss? You obviously intend to object to their claims.
17 If all they're entitled to is monetary relief, I would agree
18 that the claims allowance process is the appropriate vehicle
19 for resolving the issue. If they make a colorable showing that
20 they're also entitled to some equitable relief, and just
21 denominating something as declaratory judgment, does not
22 convert it into equitable relief, we're going to go through
23 what I consider probably the useless exercise of motion to
24 dismiss, and then if the motion is granted, and they seek to
25 leave -- and they want to replead, because they believe they're

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1 really entitled to some equitable relief that isn't just simply
2 a declaratory judgment that they're entitled to the payment of
3 money.

4 So in some other cases, where -- obviously not
5 identical to this circumstance, I've basically consolidated an
6 adversary and claim objections together, because they're all
7 part of the same ball of wax. And you just resolve it. And to
8 the extent that -- I come back to whether -- are there disputed
9 issues of fact. I mean, you may dispute -- there may be a
10 dispute between the parties about if Ocwen is correct, what
11 form of relief is it entitled to. Okay? Well, that's a -- if
12 the facts are undisputed, that's likely to be a legal issue as
13 to what the form of relief that they're entitled to.

14 If the contract is interpreted in such a way that the
15 trust prevails, well, then they're going to be out of luck,
16 whether it's in an adversary proceeding or in connection with
17 claims objections.

18 So I'm not telling you that you can't go forward with
19 the motion to dismiss, but it seems like an utter waste of time
20 to me, just burdening the Court and the parties -- you with the
21 expense of preparing a motion to dismiss, Ocwen with responding
22 to the motion to dismiss. Aren't you all -- what I would like
23 to see is the most efficient way of resolving the dispute.

24 Sit down together, see if you can draft a stipulation
25 of facts that attaches the relevant documents, that has

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1 whatever additional facts might be required. To the extent
2 that one or both of you believe it's appropriate to have
3 declarations, you'll put in declarations. I suspect there
4 isn't going to be any issue about authenticity or
5 identification of the documents. The documents are the
6 documents.

7 If there are -- you can -- and it sounds like you
8 haven't done this yet -- is sit down, and I think probably you
9 have to go through the exercise of trying to draft the
10 stipulation to facts, to see whether there are some factual
11 disputes that you can't resolve. And you may or may not
12 believe you need discovery in order to address those issues.
13 Even if there are factual disputes, you may conclude it's not
14 necessary to take any depositions. Each side will do
15 declarations. If one or the other of you believes you want to
16 depose the declarant, you'll work out a schedule for doing
17 that.

18 I mean, it just seems to me that that's going to be
19 the most efficient and cost-effective way for you to resolve
20 it. Tell me why you disagree with that.

21 MS. LEVITT: Well, Your Honor, I don't really
22 disagree. Our motion to dismiss was -- prior to having spoken
23 to everyone here, was to say that the declaratory judgment is
24 not seeking any equitable relief, it's just a contractual
25 damages claim. And with respect to that damages claim, it

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1 should be done in the claims resolution process that exists.

2 I think what Your Honor just said is what we would do
3 in the claims resolution process which we intend to commence on
4 December 22nd, when we file our objection, and then we would
5 put in the declaration. And I think this could be set for
6 hearing in the February, or at latest, early March hearing
7 date.

8 THE COURT: Depending on the -- I have no idea --
9 depending on the complexity of the legal arguments that both
10 sides make, we can especially set it, not on an omnibus hearing
11 day, so that -- we'll just set a hearing. And I'll make
12 sure -- you'll confer and you'll tell me how much time each
13 side thinks they need for argument. On the omnibus hearing
14 days, the number of matters we're handling has been mercifully
15 dwindling, and so I'm not saying it shouldn't be on an omnibus
16 hearing day. But this is a fairly -- this is not the typical
17 stuff that I'm dealing with on omnibus hearing days.

18 So whether you want to schedule it for an omnibus
19 hearing day or you work with Deanna in getting a special
20 hearing -- setting for a hearing date, I'm indifferent to,
21 frankly.

22 What I'm more interested in -- look, you've got to go
23 ahead and file a motion to dismiss and say this is damages,
24 consequently, claims allowance process. They're going to come
25 back and say, we think that we're entitled to equitable relief.

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1 For all I see, he has a declaratory judgment and entitled to
2 money --

3 MS. LEVITT: That's all they've asked for.

4 THE COURT: -- that's not going to be --

5 MR. ROBSON: That's absolutely, not right, Your Honor.

6 THE COURT: Okay.

7 MS. LEVITT: It's what the complaint --

8 THE COURT: Okay. Stop; stop. Okay?

9 You'll --

10 MS. LEVITT: We'll talk.

11 THE COURT: I'm not sure what you're going to
12 accomplish with the motion, because they're going to come
13 forward and they're going to say they're entitled to the
14 following equitable relief. It's not just money. It has to do
15 with segregation of loan files, et cetera. I don't know.
16 Okay? I'm not -- but I think you could prepare a stipulation,
17 the recitals of which refer to both the pending adversary
18 proceeding and your pending claim objection -- not yet pending,
19 but soon it will be pending.

20 MS. LEVITT: Um-hum.

21 THE COURT: Okay? The two of you ought to work out a
22 briefing schedule for the two matters. To the extent that
23 there are no factual disputes, well -- if there are facts that
24 you're both presenting, essentially they're cross motions for
25 summary judgment.

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1 MS. LEVITT: That's correct.

2 THE COURT: And whether you do it in the adversary or
3 you do it on a claim objection, I can still -- I can hear the
4 cross motions for summary judgment together, and they'll get
5 resolved. I mean, I just don't want to see both of you
6 spinning your wheels and going through needless motion
7 practice.

8 Am I telling you, you can't? No. But I'd like you to
9 sit down together and see if you can agree how you want to do
10 it. Then what I would like is, in the first instance, just
11 send me a short letter and tell me the parties have agreed to
12 negotiate a stipulation of facts. To the extent that there are
13 factual disputes, we will seek to agree on limited discovery
14 and a schedule. If you agree not to proceed with the motion to
15 dismiss, you agree to have the adversary proceeding and the
16 claim objection heard together -- heard and resolved together.

17 So put that in a simple letter to me, and then go
18 off -- I don't expect you to -- I'd like that before you
19 actually hammer out the stipulation and whatever else you're
20 doing.

21 MS. LEVITT: Okay.

22 THE COURT: So that we have -- and you can -- if
23 you're able, when you send the letter, to give me some
24 parameters of the time schedule, fine. If not, so when you get
25 the stipulation done, get that done.

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1 MS. LEVITT: Okay.

2 THE COURT: Is it -- are you willing to at least try
3 to do that?

4 MS. LEVITT: Yes, Your Honor.

5 MR. ROBSON: Absolutely, Your Honor.

6 THE COURT: Okay. The other thing I would say --
7 well, you're going to go -- you have an extension to answer the
8 complaint. I'm not sure how much gets accomplished with an
9 answer to the complaint, but if you feel it does, go ahead and
10 do that. You may be able to work out and agree that the
11 material allegations -- that the parties are working on a
12 stipulation of facts. Parties disagree about the legal
13 interpretation of the agreements. I don't know. If you insist
14 on an answer, we'll work it out.

15 MS. LEVITT: Well, we were going to file a motion.

16 THE COURT: Frequently, I don't think that that's
17 really -- you're going to file a motion.

18 MS. LEVITT: Yeah.

19 MR. ROBSON: Your Honor, I think the stipulation of
20 facts would really address the principal issues.

21 THE COURT: Okay.

22 MR. ROBSON: We don't require an answer in order to
23 move forward.

24 THE COURT: Try and do that.

25 MS. LEVITT: Okay, thank you, Your Honor.

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1 THE COURT: Okay? All right. Thanks.

2 Can I just ask one other question? I know you've said
3 that you've tried to work this out. Have you --

4 MS. LEVITT: We haven't.

5 THE COURT: You haven't. But the parties have.

6 MS. LEVITT: The parties have, yes.

7 THE COURT: Does mediation make sense, or is this
8 something that's really going to have to get resolved by the --
9 the legal issue's going to have to get resolved by the Court?

10 MR. ROBSON: Your Honor, for Ocwen, I'm not sure I
11 could answer that question, at this point. I can certainly
12 talk to my client --

13 THE COURT: Could the two of you talk about it and see
14 whether --

15 MR. ROBSON: -- and get back --

16 THE COURT: -- it makes sense? Okay?

17 MS. LEVITT: We will do that.

18 THE COURT: All right. Thanks very much.

19 MS. LEVITT: Thank you.

20 MR. ROBSON: Thank you, Your Honor.

21 THE COURT: Okay. Mr. Wishnew, were you going to
22 proceed now?

23 MR. WISHNEW: Yes, Your Honor.

24 THE COURT: The only other thing we have is the Boyd
25 claim that we're dealing with. Is that right?

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1 MR. WISHNEW: And the McDougal claim, Your Honor.

2 THE COURT: And the McDougal claim. Okay, go ahead.

3 (Pause)

4 THE COURT: I just need to finish making a note.

5 (Pause)

6 THE COURT: Okay.

7 MR. WISHNEW: Thank you, Your Honor. Jordan Wishnew,
8 Morrison & Foerster, for the ResCap Borrower Claims Trust.

9 Your Honor, the next matter on today's agenda is under
10 (III) on page 3, omnibus claims objections. We are moving
11 forward today with regards to two claims that were previously
12 included in the ResCap Borrower Claims Trust's seventy-fifth
13 omnibus objection to claims, filed at docket number 7552.

14 The Borrower Trust filed two replies in support of the
15 objection. The first was an omnibus reply at docket number
16 7727. The second was a reply as to Mr. Boyd's claim; and that
17 was filed at docket number 7825.

18 Your Honor, through the seventy-fifth omnibus claims
19 objection, the Borrower Trust seeks to respond to those proofs
20 of claim that do not represent valid pre-petition claims
21 against the debtors, because they do not prove by a
22 preponderance of the evidence, any specific wrongdoing by the
23 debtors.

24 The Borrower Trust thoroughly examined the debtors'
25 books and records in an effort to validate the accuracy of the

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1 allegations made in the responses in the claims at issue and
2 determined that the books and records to not show liability due
3 and owing to the respondents.

4 In support of the objection and the replies, the
5 Borrower Trust submitted a supplemental declaration by Ms.
6 Horst --

7 THE COURT: Just slow down a little bit.

8 MR. WISHNEW: I apologize, Your Honor. Chief claims
9 officer to the ResCap Liquidating Trust, which is attached as
10 Exhibit 1 to both of the replies. Ms. Horst is on the phone
11 today and available to answer any questions the Court might
12 have for her.

13 The Borrower Trust previously addressed the objection
14 as it relates to Mr. McDougal's claim during the hearing held
15 on November 13th. However, after the hearing, it came to the
16 Borrower Trust's attention that while Mr. McDougal was served
17 with a copy of the objection, the reply to his response was
18 sent to the wrong address. As a result, Mr. McDougal was not
19 provided timely notice of the November 13th hearing.
20 Therefore, the Borrower Trust rescheduled the hearing on Mr.
21 McDougal's claim to today. And I believe Mr. McDougal is
22 appearing telephonically.

23 THE COURT: Mr. McDougal, are you on the phone?

24 MR. MCDUGAL: Yes, I am, Your Honor.

25 THE COURT: All right, thank you.

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1 MR. WISHNEW: Your Honor, with regard to Mr.
2 McDougal's claim, it's the Borrower's Trust's position that he
3 has failed to show how the debtors are liable -- I'm sorry --
4 how the debtors are liable for not assisting him in a lawsuit,
5 only between himself and a third party, specifically the Marin
6 County.

7 Your Honor, as the documents show, this was a
8 litigation that was filed by Mr. McDougal against Marin County.
9 The debtors were not a party to the action, were never named in
10 the action, were never pled into the action.

11 While there was a foreclosure pending against Mr.
12 McDougal that was started by GMAC Mortgage, as noted in our
13 pleadings, there were at least five different adjournments or
14 postponements of those foreclosure proceedings, as a result of
15 Mr. McDougal advising the debtors that he was trying to work
16 through the issues with Marin County.

17 Ultimately, the litigation did not succeed against
18 Marin County. The matter -- or I'm sorry -- the property of
19 the loan was relisted for foreclosure. However, at the time
20 that the debtors transferred servicing rights of this loan to
21 Ocwen Loan Servicing in February of 2013, the foreclosure was
22 never completed.

23 Therefore it's the Borrower's Trust's position that
24 the debtors have no liability for not assisting with the Marin
25 County lawsuit. The debtors are not liable for any wrongful

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1 foreclosure claims, because a foreclosure was never completed.
2 And as set forth in the reply and in the original objection,
3 the exhaustive loan mitigation efforts were entirely
4 appropriate and consistent with general procedures. And
5 moreover, the debtors had standing to foreclose at the time,
6 because the assignment of mortgage properly assigned the note
7 to Deutsche. And so for all those reasons set forth in both
8 Exhibit A to the original objection, as well as to the reply,
9 we would ask that this claim be disallowed.

10 THE COURT: All right, Mr. McDougal?

11 MR. MCDUGAL: Yes.

12 THE COURT: Go ahead, do you want to be heard?

13 MR. MCDUGAL: Yes, Your Honor. You basically have
14 two points of contention that I have with ResCap, lack of
15 standing with respect to the nonfiling of the assignment of
16 deed of trust, and failure to assist with respect to the
17 encumbrances placed on the property by the County of Marin and
18 the legal action that I filed against the County in February.

19 Mr. Wishnew, I think his -- Mr. Wishnew states that
20 the assignment of deed of trust was completed with Deutsche
21 Bank. But that was after I was forced to file bankruptcy. And
22 I filed bankruptcy in July 2010. And the assignment of deed of
23 trust was filed in August of 2010.

24 GMAC/ResCap, they had a -- they had a fiduciary
25 responsibility to put me and my representatives in contact with

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1 Deutsche Bank. In 2000 -- the encumbrances come from -- by the
2 County of Marin, come from a road failure that I was blamed for
3 in 2005, when I was building this -- the subject property. The
4 County of Marin required that I get a geological report to
5 determine the cause and the failure of the road failure. The
6 geological report determined that my construction had nothing
7 to do with the road failure.

8 When the -- when those -- when that evidence was
9 presented to the County, the -- let's just say the engineers
10 took offense to it and then proceeded on a witch hunt against
11 me. Those engineers were subject to a state investigation.

12 So Mr. Wishnew tends to portray the events as I'm the
13 bad guy and everything went against me. Well, that's not the
14 case.

15 The -- with respect to the failure to assist, when we
16 were fighting this out and that's -- it started -- it started
17 in 2007, after I had to liquidate all my assets to cover the
18 legal action, and with re -- with exception to the subject
19 property, which is in Mill Valley.

20 Let me see. GMAC and ResCap, we did -- we did work
21 out certain arrangements. But the fact of the matter is, they
22 should have put me in contact with Deutsche Bank, and Deutsche
23 Bank could have -- could have made the decisions whether to
24 assist me in the lawsuit, say no, tell GMAC/ResCap to stand
25 down. You know. So the --

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1 THE COURT: Why would Deutsche Bank have had any
2 responsibility for assisting you in the lawsuit?

3 MR. MCDUGAL: Well, I'm not saying assisting me.
4 They -- they could have -- they could have denied it. But GMAC
5 and ResCap did not have legal standing at that point, because
6 the assignment of deed of trust had not been -- had not been
7 recorded with the County of Marin.

8 Did Your Honor get my pleadings that I -- that I
9 filed -- that I sent -- that I wrote on the 4th and filed with
10 the court on this past Monday? Because I cite a dis -- Judge
11 Federman's U.S. Bankruptcy Court of Western District of
12 Missouri, his order denying motion for relief from stay? Did
13 you get that pleading?

14 THE COURT: I'm not sure whether I read it. I'll go
15 back -- I'm taking the matter under submission in any event,
16 Mr. McDougal, so I'll go back and look at it.

17 MR. MCDUGAL: I mean, because -- because I did send
18 this pleading and the -- and my subsequent pleading -- this
19 pleading and his decision to Mr. Wishnew, and he failed to
20 respond to that.

21 THE COURT: Well, he didn't have to respond to it, Mr.
22 McDougal.

23 MR. MCDUGAL: Oh. Okay. Well, the -- Judge
24 Federman, it has -- he --if you'll bear with me, can I read the
25 first paragraph?

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1 THE COURT: Yes, go ahead.

2 MR. MCDUGAL: Okay. Okay. Order denying motion for
3 relief from stay. It's the -- it's case number 10-20086 in
4 United States Bankruptcy Court for the Western District of
5 Missouri. And it's Marty Eugene Box and Tammy Jean Box: "BAC
6 Home Loans Servicing, Countrywide Home Loans Servicing (BAC)
7 seeks relief from the automatic stay to allow it to exercise
8 its rights under state law as to the debtors' real property.
9 The debtors do not oppose the motion but the Chapter 7 trustee
10 has challenged BAC's standing to seek relief from the stay.
11 The trustee asserts that the note and deed of trust were not
12 properly assigned to BAC and because it is not the holder of
13 the note of deed of trust, it lacks standing to seek relief
14 from the stay to enforce those documents. This is a core
15 proceeding under 28 U.S.C. 157(b)(2) over which the court has
16 jurisdiction pursuant to 28 U.S.C. 1334(b), 157(a), and
17 157(b)(1). For the reasons that follow, the court finds that
18 BAC has not proven that it is the holder of the note, therefore
19 it lacks standing, so its motion for relief from stay will be
20 denied."

21 This is very similar to my situation. The only -- the
22 only exception is, when I was forced to file bankruptcy because
23 of the lawsuit and GMAC/ResCap, the -- I'm the one who
24 challenged it in Judge Jaroslovsky's court as to the standing
25 of the assignment of deed of trust, because they filed it after

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1 I filed Chapter 7.

2 Now, in the BAC case, the trustee is the one who went
3 to the defense of the Boxes, whereas the trustee in my case,
4 seized the ten-million-dollar lawsuit that I had against the
5 County of Marin, and -- and proceeded to bring on Greene
6 Radovsky, Edward Dimmick (ph.) and then bring on my lawyers,
7 who's my real estate lawyer, and then pursue the case in
8 federal court.

9 Now, the reasons why that didn't work out in federal
10 court, I cannot answer, because at the end of the day, the --
11 my lawyer, John Sharp, and Ed Dimmick, could not agree upon
12 compensation. And then the -- after two years in federal
13 court, the case reverted back to me. And when I went back --
14 when it reverted back to me and then I pursued it again in
15 superior court, Judge D'Opal basically said it's been too long.
16 You know, that was the end of it. It's been -- your motions
17 are -- it's just delay of game. You know?

18 So anyway, the fact that I was forced into Chapter 7
19 by GMAC/ResCap for -- you know, completely -- I mean, put me in
20 federal court for two years. So it's a much more complicated
21 situation than Mr. Wishnew portrays.

22 THE COURT: Mr. McDougal, when did you -- I've been
23 checking the court docket, and I don't see the filing -- the
24 additional filing. When did you say you filed it?

25 MR. MCDUGAL: I sent it -- well, I received the

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1 notice that my hearing would be rescheduled to the 10th on the
2 1st. I did my research from the 1st, and wrote the pleadings
3 on the 4th, and sent them out UPS on the 4th to arrive at the
4 court on Monday. So it should have arrived on Monday, which
5 would be the 8th. But I did provide a copy to -- I did contact
6 the Morrison & Foerster, and I faxed them a copy of my
7 pleadings, plus the case as it -- I identified it as Exhibit A,
8 Judge Federman's decision.

9 THE COURT: It's not in the --

10 MR. MCDUGAL: So --

11 THE COURT: -- it's not on the docket. It has not
12 been filed. At least I'm not seeing it.

13 MR. MCDUGAL: Okay. Well, I --

14 THE COURT: Mr. Wishnew --

15 MR. MCDUGAL: I don't -- you know --

16 THE COURT: -- Mr. Wishnew do you have a copy?

17 MR. WISHNEW: Your Honor, we have a copy at the
18 office. We can scan it and send it to chambers after the
19 hearing.

20 THE COURT: Would you scan it and file it on ECF?

21 MR. WISHNEW: Sure, Your Honor.

22 THE COURT: I'll double check again, Mr. McDougal, but
23 I don't remember seeing it, and I'm looking at the docket, and
24 I don't see it on the docket.

25 MR. MCDUGAL: Well, I mean, I can send it to the

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1 court. I can fax it to you. I mean, he's -- Mr. Wishnew
2 said --

3 THE COURT: No, we'll -- I've asked Mr. Wishnew to
4 scan it. He acknowledges he has it. He'll scan it, and his
5 office can file it on the docket. So you don't have to do
6 that.

7 MR. MCDUGAL: Okay.

8 THE COURT: It's possible -- when somebody sends hard
9 copy to the Court in a pro se borrower, who doesn't have an ECF
10 password and can't file it electronically, it's possible that
11 it's in the clerk's office and it has not been -- they have to
12 scan -- our clerk's office winds up having to scan it, and then
13 file it. So I don't see it yet. It's possible it's here. And
14 I don't remember seeing it.

15 I will look at it. So I'm going to take -- I'll be
16 taking the matter under submission today anyway. But so it'll
17 be considered.

18 MR. MCDUGAL: Okay, fair enough.

19 THE COURT: Anything else you want to add, Mr.
20 McDougal.

21 MR. MCDUGAL: No. I mean, I -- you know, obviously
22 I'm not a lawyer, and standing up and pleading my case isn't --
23 isn't my specialty. So, you know, I tried to do the best that
24 I could with presenting it in written form, so --

25 THE COURT: Okay. All right, Mr. Wishnew, do you want

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1 to respond?

2 MR. WISHNEW: Just a few points, Your Honor. Just to
3 clarify the record, we are not trying to portray Mr. McDougal
4 as the bad guy. We're simply just saying that he unfortunately
5 fell behind on his loan payments. Foreclosure was properly
6 commenced by GMAC Mortgage, who serviced the loan for Deutsche,
7 who properly held the note at the time of the foreclosure.

8 The nonjudicial foreclosure was commenced. As I noted
9 in my earlier presentation, foreclosure -- a foreclosure sale
10 never actually occurred while GMAC Mortgage serviced this loan.
11 And that's pretty much it. We will stand on our papers.

12 THE COURT: Can you just address the issue of
13 recording of the assignment.

14 MR. WISHNEW: Sure, Your Honor. I believe that the
15 case we cited in our brief, the Haynes case out of
16 California -- so I'll note that while Mr. McDougal does cite a
17 Missouri case, we are dealing with a property in California.
18 California law governs here. And we believe the case that's
19 most on point is Haynes v. EMC Mortgage Corporation, 140 Cal.
20 Rptr.3d 32, which was issued on April 9th, 2012.

21 And in that regards, Your Honor, the court clearly
22 held that there was no necessity of a recording prior to the
23 commencement of nonjudicial foreclosure proceedings.

24 THE COURT: Okay. And it was -- I take it -- has
25 foreclosure been completed? Mr. McDougal's still --

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1 MR. WISHNEW: I don't know, Your Honor.

2 THE COURT: Mr. McDougal, are you still in possession
3 of the property?

4 MR. MCDUGAL: I am in possession of the property, but
5 Ocwen has brought on Severson & Werson, Adam Barash, and Edward
6 Buell. And they're awaiting the decision of the Court.

7 THE COURT: Okay. All right. I'm going to take the
8 matter under submission. Thank you very much, Mr. McDougal.

9 MR. MCDUGAL: Thank you.

10 THE COURT: All right.

11 MR. WISHNEW: Thank you, Your Honor. One additional
12 claim, Your Honor. That is the claim of Michael Boyd, claim
13 number 960.

14 Your Honor, the basis for this objection --

15 THE COURT: Pause -- is Mr. Boyd on the phone?

16 MR. WISHNEW: Oh, I'm sorry.

17 THE COURT: Go ahead, Mr. Wishnew.

18 MR. WISHNEW: Thank you, Your Honor. The basis for
19 this objection is res judicata, and the reason being is that
20 the claim seeks to contest liens related to two loans that the
21 debtors were connected with. And the problem though, is that
22 Mr. Boyd sought Chapter 13 bankruptcy protection. He
23 subsequently had his Chapter 13 plan confirmed. He
24 acknowledged in his Chapter 13 plan that the --

25 THE COURT: I thought this claim objection was only

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1 with respect to claim 960?

2 MR. WISHNEW: It is, Your Honor.

3 THE COURT: Okay. I -- you said two claim, and I --

4 MR. WISHNEW: Oh, I meant to say -- I may have said
5 claims, I said two loans --

6 THE COURT: Yes.

7 MR. WISHNEW: -- within the claim for two separate
8 pieces of property.

9 And in essence, the Chapter 13 plan acknowledged the
10 validity of the loans being serviced by GMAC Mortgage. To now
11 try and contest those liens through the claim is entirely
12 improper, considering that he previously acknowledged them
13 through is Chapter 13 plan, agreed to pay them going forward.
14 So our argument, basically, Your Honor, is that he is precluded
15 from prosecuting a claim and trying to get a monetary recovery
16 for any sort of invalidity of the liens, when in fact, in his
17 own bankruptcy proceeding, acknowledged the validity of those
18 liens.

19 THE COURT: So let me ask you a few questions. Mr.
20 Boyd had filed an action in the District Court in the Northern
21 District of California.

22 MR. WISHNEW: Yes, Your Honor.

23 THE COURT: The district court dismissed it.

24 MR. WISHNEW: Yes.

25 THE COURT: And the Ninth Circuit affirmed. But Mr.

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1 Boyd filed a petition for a rehearing.

2 MR. WISHNEW: So -- and I think I know where you're
3 going, Your Honor. There is no -- because there is a petition
4 for rehearing, there is no necessary res judicata.

5 THE COURT: But you agree that there's no res judicata
6 from the district court dismissal of the Boyd action, at least
7 at this stage?

8 MR. WISHNEW: I do agree, Your Honor.

9 THE COURT: What's the status of the petition for
10 rehearing? When was it filed and has anything transpired with
11 respect to it?

12 MR. WISHNEW: Give me one moment, Your Honor.

13 THE COURT: And you did -- your papers conceded that
14 there's no res judicata effect at this stage --

15 MR. WISHNEW: Correct.

16 THE COURT: -- from the California District Court
17 dismissal, because in the California action, Mr. Boyd did
18 challenge the validity of the liens.

19 MR. WISHNEW: Correct, Your Honor.

20 THE COURT: And the California District Court action
21 was filed before Mr. Boyd filed his Chapter 13 case?

22 MR. WISHNEW: Yes, Your Honor.

23 THE COURT: Okay.

24 MR. WISHNEW: The only -- the most recent information
25 I do have about the district court litigation is that on

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1 September 9th he filed a -- he petitioned for panel rehearing.

2 I have not had a chance to --

3 THE COURT: I'm sorry, the date again?

4 MR. WISHNEW: I'm sorry, September 9th, 2014.

5 THE COURT: September 9th.

6 MR. WISHNEW: He petitioned for the panel rehearing --

7 I have not been able to check the docket -- or I have not

8 checked the dockets to see where that's progressed.

9 THE COURT: So here's what -- the issue of whether or
10 the extent to which a Chapter 13 plan confirmation order is
11 entitled to res judicata effect on -- it seems to me there are
12 two relevant decisions I'm dealing with.

13 MR. WISHNEW: Um-hum.

14 THE COURT: The Second Circuit's decision in Layo, the
15 2006 decision by Judge Hall -- it's an opinion by Judge Hall;
16 and the Fourth Circuit's decision in Cen-Pen Corp. v. Hanson, a
17 1995 decision.

18 MR. WISHNEW: That's right, Your Honor. I would only
19 add, I think, just for further support, about the finality and
20 preclusive effect of the confirmation, we'd add the Corbett
21 case that we cited --

22 THE COURT: Corbett is discussed in Layo.

23 MR. WISHNEW: Right. Correct, Your Honor.

24 THE COURT: And so the issue that I'm focusing on is
25 that Judge Hall, in Layo, distinguishes Cen-Pen Corp. And

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1 what Judge Hall says in Layo is that, "Where, at the outset,
2 there is no dispute as to the basis of the lien, however, given
3 the policy embodied in Section 1327(a) that confirmation of a
4 plan bind the debtor and each creditor it does not follow that
5 a nonobjecting creditor has a right to bring an adversary
6 proceeding whenever he gets around to doing so. To allow that
7 practice would fly in the face of Congress' expressed intention
8 that confirmation give debtors and creditors finality with
9 respect to satisfaction of outstanding debts."

10 And in Layo, the Chapter 13 debtor had scheduled the
11 lender's debt as a secured debt. And Judge Hall, in his
12 opinion states that, "It is clear from the record that both
13 Layo and FNB, that was the lender, "agreed that Layo owed FNB
14 99,000 dollars and that the mortgage note was secured by a
15 first mortgage interest in Layo's homestead property." That's
16 at page 291 of the decision.

17 So at the time of the confirmation of Layo's Chapter
18 13 plan, there was no -- no issue had been raised by anyone
19 about the validity of the mortgage lien. And Judge Hall
20 acknowledged in his opinion that challenges to the validity of
21 the lien must be brought by an adversary proceeding. But he
22 went on to explain why, under the circumstances of Layo he
23 distinguished it on its facts from Cen-Pen. There should be
24 res judicata effect.

25 But here, Boyd had filed his district court action,

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1 challenging the validity of the lien before he filed his
2 Chapter 13 case. He tried to bring that district court case
3 into the bankruptcy court, and the bankruptcy judge dismissed
4 it. It appears that it was viewed as an improper removal.

5 MR. WISHNEW: Um-hum.

6 THE COURT: So the district court action was pending
7 before, during, and after the Chapter 13 case, until it was
8 dismissed by the district court.

9 MR. WISHNEW: Sure.

10 THE COURT: And I mean -- explain why I shouldn't read
11 Layo and Cen-Pen together? Because I don't read Judge Hall as
12 saying, well, if there was a challenge to the validity of the
13 lien, unless the bankruptcy court adjudicated that claim, res
14 judicata wouldn't apply. That's my words, not Judge Hall's
15 words.

16 MR. WISHNEW: Um-hum.

17 THE COURT: But that's what I read the decision to be
18 saying.

19 MR. WISHNEW: Um-hum.

20 THE COURT: So why is that wrong?

21 MR. WISHNEW: Well, I think, Your Honor, here,
22 notwithstanding Mr. Boyd's attempt to bring his district court
23 litigation into the bankruptcy court, he did have the
24 alternative of commencing an adversary proceeding within his
25 Chapter 13 to determine the extent, validity and nature of the

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1 lien.

2 THE COURT: And you had that ability, too.

3 MR. WISHNEW: True. But at the same time, he also --
4 notwithstanding the fact that he had the litigation against us,
5 he clearly scheduled his claim or acknowledged the validity of
6 his (sic) claim. So I don't know that the burden was on us to
7 bring the action so much as --

8 THE COURT: The dispute is about the liens.

9 MR. WISHNEW: Correct, Your Honor. But again, to the
10 extent that an individual is seeking to rehabilitate himself,
11 the fundamental dispute that he is concerned about is the
12 validity of his liens and being able to keep his home. If he's
13 going to seek the shelter of -- or the protection of the
14 bankruptcy court, then he's got remedies available to him to
15 have the bankruptcy court adjudicate what the district court
16 might also be dealing with. But that's really -- because
17 ultimately, how the bankruptcy court would rule on the lien
18 would affect the ability -- would affect how he would shape his
19 Chapter 13 plan.

20 If the court ultimately ruled in the bankruptcy court
21 that the lien was invalid, then all of a sudden he might have a
22 home, unencumbered, and only have to pay back unsecured
23 creditors. But he chose not to do that. He had the
24 opportunity to do that. Rather, he filed his sixth amended
25 Chapter 13 plan which, again, is filed at Exhibit O, docket

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1 7825-16, page 2 of 7, and clearly acknowledged the fact that
2 there are two liens -- two secured claims -- allowed secured
3 claims of GMAC Mortgage, LLC that will be paid going forward,
4 that will be allowed.

5 And so for him to -- he had his opportunity and he
6 didn't take advantage of it. And frankly, at this point, he
7 represented to the bankruptcy court in his own case and to his
8 other creditors, I have the ability to pay. The court agreed
9 with him. And that's his right. If --

10 THE COURT: Well, the ability to pay -- the issue now
11 is not whether he had the ability to pay. The issue now is
12 whether the lien is valid.

13 MR. WISHNEW: Correct.

14 THE COURT: I understand the arguments. I'm going to
15 take it under submission.

16 MR. WISHNEW: Understood.

17 THE COURT: Okay?

18 MR. WISHNEW: Thank you, Your Honor.

19 THE COURT: Could you do me a favor? Could you please
20 put a letter on the docket, check the status of the petition?
21 Look, if the judgment of the district court becomes final --

22 MR. WISHNEW: Yeah.

23 THE COURT: -- you're clearly entitled to have the
24 claim expunged on res judicata grounds.

25 MR. WISHNEW: Correct, Your Honor.

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1 THE COURT: That, despite Mr. Boyd's argument that he
2 invokes his First Amendment rights to judicial review and he
3 believes that the debtors are majority owned by the United
4 States, and therefore their executive or legislative act --
5 this case -- this claim objection becomes really simple --

6 MR. WISHNEW: Yeah, agreed.

7 THE COURT: -- if the Ninth Circuit does what almost
8 invariably happens --

9 MR. WISHNEW: Sure.

10 THE COURT: -- namely they deny the petition for a
11 rehearing.

12 MR. WISHNEW: I'll just add one other point, Your
13 Honor. If Mr. Boyd thought that -- he would always have the
14 right to go back into his bankruptcy court if he prevailed and
15 seek to adjust his Chapter 13 plan. So my argument --

16 THE COURT: As the --

17 MR. WISHNEW: I'll leave it at that.

18 THE COURT: Find the other one -- find out, if there's
19 no change --

20 MR. WISHNEW: Yes.

21 THE COURT: -- to the status -- just let us know what
22 the status of the petition for rehearing.

23 MR. WISHNEW: Do you want us to docket that letter
24 with the status or just --

25 THE COURT: Yes.

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1 MR. WISHNEW: Okay.

2 THE COURT: I think you should. Okay.

3 MR. WISHNEW: Your Honor, that was the last matter on
4 today's calendar, so that's it.

5 THE COURT: Okay, thank you very much.

6 MR. WISHNEW: Thank you for your time.

7 THE COURT: When do I see you next?

8 MR. WISHNEW: Next Thursday.

9 THE COURT: Okay. I was hoping it wasn't going to be
10 until next year, but --

11 MR. WISHNEW: I'm sorry, Your Honor.

12 THE COURT: No offense.

13 MR. WISHNEW: None taken.

14 THE COURT: We're adjourned.

15 (Whereupon these proceedings were concluded at 11:00 AM)

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C E R T I F I C A T I O N

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I, Penina Wolicki, certify that the foregoing transcript is a
5 true and accurate record of the proceedings.

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Penina Wolicki

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Date: December 11, 2014

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