

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
BILLY GENE ANTHONY and	)	CASE NO. 07-33275 HCD
KIMBERLY ELAINE ANTHONY,	)	CHAPTER 13
	)	
DEBTORS.	)	
	)	
	)	
BILLY GENE ANTHONY,	)	
KIMBERLY ELAINE ANTHONY, and	)	
DEBRA L. MILLER, TRUSTEE,	)	
	)	
PLAINTIFFS,	)	
vs.	)	PROC. NO. 09-3140
	)	
OCWEN LOAN SERVICING, LLC;	)	
BANK OF NEW YORK TRUST COMPANY, NA;	)	
BANK ONE, N.A., as Trustee of the Amortizing	)	
Residential Collateral Trust, 2002-BC1;	)	
THE CIT GROUP/CONSUMER FINANCE INC.,	)	
and JPMORGAN CHASE BANK, N.A.,	)	
	)	
DEFENDANTS.	)	

Appearances:

Brad A. Woolley, Esq., for plaintiff debtors, 103 East Broadway, Monticello, Indiana 47960;

Debra L. Miller, Esq., and Sarah Elisabeth Willms, Esq., for plaintiff Trustee, P.O. Box 11550, South Bend, Indiana 46634; and

Carl A. Greci, Esq., and Scott J. Fandre, Esq., for defendants, Baker & Daniels LLP, 202 South Michigan Street, Suite 1400, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on August 23, 2011.

Before the court is the Motion to Dismiss of the defendant Ocwen Loan Servicing, LLC (which describes itself as the “Servicing Agent for The Bank of New York, as Successor-in-Interest to JPMorgan Chase Bank, N.A., as Trustee, Successor-in-Interest to Bank One, N.A., as Trustee of the Amortizing

Residential Collateral Trust, 2002-BC1”, R.7, p. 1) (“Ocwen” or, collectively, “defendant”), seeking to dismiss the Complaint of the plaintiffs Billy Gene Anthony and Kimberly Elaine Anthony, chapter 13 debtors, and Debra L. Miller, Standing Chapter 13 Trustee of this bankruptcy case.<sup>1</sup> The Motion was brought pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that the Complaint failed to state a claim upon which relief could be granted. After the parties’ briefs were filed, the court took the matter under advisement.<sup>2</sup>

### BACKGROUND

This adversary proceeding has been filed in the second bankruptcy case of the debtors herein (“Second Case”). In the previous case (“First Case”), the court dismissed an adversary complaint brought by the debtors’ chapter 7 Trustee against these defendants. The dismissal, with prejudice, was based upon the fact that the complaint was time-barred under 11 U.S.C. § 546(a)(1). The court then dismissed the bankruptcy case itself, pursuant to 11 U.S.C. § 349, without prejudice to the debtors’ refiling another bankruptcy case if they qualified. No appeal was taken in either of the dismissals in the First Case.

Before the court now is Ocwen’s Motion to Dismiss the Complaint in the adversary proceeding of the Second Case. The underlying facts are unchallenged, and the pertinent factual background will clarify the issues now before the court. The court is mindful that, when weighing whether to grant a motion to dismiss, it “must accept as true all of the factual allegations contained in the complaint.” *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L.Ed.2d 1081 (2007); *see also Seidel v. Byron*, 405 B.R. 277, 284 (N.D. Ill. 2009). A court may also consider documents referenced in the plaintiff’s complaint and central to the plaintiff’s claims. *See Seidel*, 405 B.R. at 284. In addition, a court may take judicial notice of the

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<sup>1</sup> The court notes that the defendant Ocwen claims no relationship to or affiliation with the defendant The CIT Group/Consumer Finance Inc. (“CIT”). CIT is listed on the docket as pro se; it has not appeared or responded in this adversary proceeding.

<sup>2</sup> The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K).

records in its own cases. *See In re Fink*, 351 B.R. 511, 517 n. 1 (Bankr. N.D. Ill. 2006) (noting documents in previous bankruptcy).

On June 28, 2001, the debtors and The CIT Group/Consumer Finance, Inc. (“CIT”) executed a promissory note and mortgage, pledging the debtors’ residential property in Medaryville, Indiana, as collateral. The debtors filed their first chapter 13 petition on August 1, 2003. *See* Case No. 03-34359, First Case. Among their assets was the fee simple interest in the Medaryville property. Ocwen (on behalf of Bank One, N.A.) filed a Proof of Claim (“Claim No. 11”) asserting that it was a secured creditor under the note and mortgage on the Medaryville property. The debtors’ confirmed plan deemed Ocwen a secured creditor, and Ocwen received payments under it as a secured creditor.

However, when the Trustee determined that the mortgage lien had not been recorded or perfected, she filed a complaint (“complaint”) under 11 U.S.C. § 544 to avoid Ocwen’s mortgage lien. *See* Adv. Proc. No. 06-3085. Ocwen responded with a motion to dismiss, contending that the complaint had been filed untimely and was barred by the two-year statute of limitations set forth in 11 U.S.C. § 546(a)(1). The court found that § 546 applied to bar the complaint, and it dismissed the complaint with prejudice for failure to state a claim. (*See* R. 24, 25, Adv. Proc. No. 06-3085, “Judgment”).

Soon thereafter, the court ordered the debtors’ bankruptcy case dismissed because its plan was underfunded and the debtors’ payments were delinquent. That Order of Dismissal was without prejudice to the debtors’ refiling another bankruptcy case. Four days later, the debtors filed a second chapter 13 petition, one that commenced the bankruptcy case now before the court. *See* Case No. 07-33275 (“Second Case”). Ocwen (on behalf of JPMorgan Chase Bank) filed a Proof of Claim (“Claim No. 16”), again asserting its secured status, but it was filed one month after the claims bar date. The debtors’ Third Amended Plan, confirmed on July 6, 2010, listed the debtors’ debt to Ocwen as a secured debt “if allowed by the court” and as an unperfected lien.

To resolve Ocwen's status as a creditor, the debtors and Trustee commenced this adversary proceeding against Ocwen by filing a Complaint to Determine Extent and Priority of Lien ("Complaint") pursuant to § 544. In the factual allegations, the plaintiffs stated that CIT claimed to hold a mortgage on the property; that the Bank of New York, Bank One, and JPMorgan Chase Bank claimed to be successors in interest and/or trustees of the mortgage; and that Ocwen Federal Bank, FSB, filed the proof of claim and appeared to service the mortgage. According to the Complaint, a title search revealed that the mortgage executed on June 28, 2001, was not recorded. In addition, alleged the Complaint, the defendants admitted that the original warranty deed, quit-claim deed, and mortgage were lost and that the Pulaski County Recorder's Officer had refused to record the documents submitted as copies. The Complaint also contended that Ocwen's proof of claim was untimely and defective and that the plaintiffs could not tell from the defendants' pleadings who was the rightful owner of the note and mortgage.

In Count I, the plaintiffs sought to avoid the unrecorded, unperfected mortgage lien under § 544. In Count II, the plaintiffs argued that Ocwen's proof of claim, which attached the unrecorded, unperfected mortgage and copy of the note, should be disallowed as a secured claim and deemed an unsecured claim. Count III alleged that, because Ocwen did not produce the original note and did not file a timely proof of claim, Ocwen's proof of claim should be disallowed in its entirety. Count IV asserted that, under UCC 3, defendants were required to produce the original note in order to receive payment in the case. Because Ocwen allegedly could not produce the original note, the plaintiffs requested that Ocwen's proof of claim be disallowed in its entirety.

Ocwen, representing all the defendants with the exception of CIT, filed a Motion to Dismiss and a supporting Memorandum. It pointed out that, in the First Case, this court found the complaint barred by the applicable statute of limitations; it then argued that the court should reject the same complaint filed in this adversary proceeding. It asked the court to dismiss this second attempt to avoid its mortgage for three reasons: (1) The dismissal of the debtors' First Case did not vacate the court's order dismissing the

avoidance action; (2) the plaintiffs' avoidance claim was barred by the doctrine of res judicata; and (3) avoidance of Ocwen's mortgage claim violates policies underlying the Bankruptcy Code and policies of fairness.

### DISCUSSION

Motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)<sup>3</sup> are reviewed under the Supreme Court's directives established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, \_ U.S. \_, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009). Those decisions dictate that a complaint must be dismissed if its allegations do not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555); *see also Atkins v. City of Chicago*, 631 F.3d 823, 831-32 (7th Cir. 2011); *Reger Dev., LLC v. National City Bank*, 592 F.3d 759, 764 (7th Cir.), *cert. denied*, 130 S. Ct. 3507 (2010). In addition, when a party alleges fraud in the complaint, he "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b); Fed. R. Bankr. P. 7009; *see also Reger Dev.*, 592 F.3d at 764. In this case, however, the defendant does not base his arguments on the insufficiency of the complaint's factual allegations. Instead, it asserts that the Complaint fails to state a claim for relief on statutory, procedural and equitable grounds.

#### A. Dismissal under 11 U.S.C. § 349

Ocwen first claimed that the dismissal of the First Case did not vacate the court's Order dismissing the avoidance action. When the debtors' First Case was dismissed, the effect of that dismissal was governed by § 349 of the Bankruptcy Code:

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<sup>3</sup> Federal Rule of Bankruptcy Procedure 7012(b) states that Rule 12 (b)-(h) of the Federal Rules of Civil Procedure are applicable in adversary proceedings. Rule 12(b)(6) is the affirmative defense that the complaint must be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title –

(1) reinstates –

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) reverts the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

11 U.S.C. § 349.

Ocwen asserted that, under § 349(b)(2), the dismissal of the debtors' chapter 13 case vacated only those judgments and orders that were based upon the specific sections of the Bankruptcy Code listed in that subsection – §§ 522(i)(1), 542, 550, and 553. *See* R. 7 at 5-6 (citing *In re Depew*, 115 B.R. 965, 970 (Bankr. N.D. Ind. 1989)). Section 546 is not listed; therefore, Ocwen insisted, § 349(b)(2) has no effect on the court's Judgment dismissing the complaint under § 546, and Ocwen should be entitled to the Judgment's continued enforcement in the debtors' subsequent bankruptcy.

The plaintiffs contended that § 349(b) had no effect on the issue before the court. Relying on Judge Lundin's treatise *Chapter 13 Bankruptcy*, the plaintiffs pointed out that, if the Trustee had been successful in avoiding Ocwen's lien in the First Case, that lien would have been reinstated to Ocwen at dismissal. *See* Lundin, Keith M., *Chapter 13 Bankruptcy*, 3d Ed. § 51.2 at 51-16 (Supp. 2000 and Supp. 2004) (“[I]f the Chapter 13 plan fails and the case is dismissed, 11 U.S.C. § 349 reverses the lien avoidance and reinstates the creditor's lien to its condition at the petition.”). According to the plaintiffs, the complaint

dismissed in the First Case was based on a different claim, one that did not carry over to the Second Case, and Ocwen was required to file a proof of claim in this Second Case to prove its right to payment therein.

It is clear that a dismissal under § 349(b)(2) vacates certain orders and judgments, namely those entered pursuant to §§ 522(i)(1), 542, 550, and 553, and that § 546 (the basis of this court's Judgment dismissing the Trustee's complaint in the First Case) is not among those listed. Courts generally hold that, when orders are entered under Bankruptcy Code sections other than the four specified in § 349(b)(2), then the provision simply does not apply to such orders and has no effect on them. *See, e.g., In re Montgomery*, 200 Fed. Appx. 320 at \*\*2 (5th Cir. 2006) (holding that § 349(b)(2) has no effect on the default judgment entered under § 523); *In re Blue Mountain Investments, Ltd.*, 186 B.R. 508, 513 (D. Kan. 1995) (holding that § 349(b)(2) does not apply to vacate orders under § 362(a) or § 549). This court agrees that § 349(b)(2) simply did not apply to the court's Judgment and had no effect on it. At the dismissal of the debtors' First Case, therefore, the court's Judgment remained intact, and it barred the Trustee from filing an avoidance action against Ocwen's claim in that First Case. It is important to recognize, however, that at dismissal, Ocwen's mortgage lien did not need to be reinstated under § 349(b)(1)(B) because it had not been avoided under § 544.<sup>4</sup> At the end of the First Case, then, Ocwen maintained the lien it had claimed since the commencement of the case, the lien it had claimed in the Proof of Claim. Ocwen held its position as secured creditor when the First Case was dismissed, and no avoidance of its lien was possible.

It is equally clear and long settled that under § 349(a) a dismissal of a bankruptcy case generally "has no long-term consequences for the debtor's ability to re-file." *In re Hall*, 304 F.3d 743, 746 (7th Cir. 2002); *see also In re Smith*, 133 B.R. 467, 469 (Bankr. N.D. Ind. 1991) (stating general rule that dismissal is usually without prejudice to debtor's right to refile and to receive discharge). Although § 349(a) does limit a debtor's future filing in the bankruptcy court by reference to § 109(g), that limitation did not apply here.

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<sup>4</sup> As the plaintiffs pointed out, even if Ocwen's lien had been avoided by the Trustee under § 544, the transfer would have been restored to Ocwen upon dismissal under § 349(b)(1)(B). *See Wiese v. Community Bank*, 552 F.3d 584, 587 (7th Cir. 2009) (discussing the effects of dismissal under § 349).

In this case, the dismissal of the First Case was not ordered with prejudice, and it did not bar the debtors from filing a subsequent bankruptcy petition.<sup>5</sup>

The court therefore agrees with Ocwen's assertion that § 349(b)(2) had no effect on the court's Judgment, in the First Case, dismissing the adversary complaint under § 546(a)(1). However, it does not then conclude, as Ocwen did (without citation to authority), that § 349(b)(2) entitled Ocwen to that Judgment's continued enforcement in the debtors' subsequent bankruptcy. Indeed, such a conclusion simply does not follow from that premise. Section 546(a)(1) barred the Trustee's commencement of an avoidance action in the First Case because it was filed more than "2 years after the entry of the order for relief" in that First Case. However, the debtors had the right to file a subsequent bankruptcy petition after the dismissal of the First Case, and they did. The petition created a new bankruptcy estate, with a new order for relief that established new bar dates. *See Wiese v. Community Bank*, 552 F.3d 584, 589 (7th Cir. 2009) (commenting that, when debtors dismissed the case and refiled, "new effective dates attached"); *In re Harris*, 341 B.R. 660, 665 (Bankr. N.D. Ind. 2006) (noting that "the bankruptcy estate created on the date one petition is filed is not the same as the estate that is created on an entirely different date when another petition is filed, even if those petitions involve the same debtor"); *In re Jamesway Corp.*, 202 B.R. 697, 701 (Bankr. S.D.N.Y. 1996) ("[T]he estate created in one bankruptcy case is distinct from that created upon the commencement of a subsequent case."). Any statute of limitations defense in the new case must be measured from the new order for relief. Nothing in § 349 suggests otherwise.

The court concludes that § 349(b)(2) does not entitle Ocwen to the continued enforcement of the First Case's adversary proceeding Judgment in the debtors' subsequent bankruptcy.

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<sup>5</sup> It is noteworthy that § 349(a) allows the court, "for cause," to order that some debts are not discharged in a later case or that dismissal is with prejudice. However, the court made no cause determination and was not asked to place conditions on the dismissal or to sanction the debtors by limiting their ability to file a subsequent petition. *See In re Hall*, 304 F.3d at 746; *cf. In re Sadler*, 935 F.2d 918, 921 (7th Cir. 1991).

## B. Doctrine of Res Judicata

Ocwen's second argument was that the doctrine of res judicata barred relitigation of the mortgage avoidance issues raised in the adversary proceeding complaint in the First Case.<sup>6</sup> Ocwen asserted that the Complaint now before the court shared three elements with the earlier complaint: an identity of the parties or their privies; an identity of the causes of action; and a final judgment on the merits. Because each element was satisfied, Ocwen claimed, the doctrine of res judicata forbade the relitigation.

The defendant correctly identified the three elements by which to test whether res judicata applies. *See Matrix IV, Inc. v. American Nat'l Bank & Trust Co.*, \_F3d\_, 2011 WL 3211500 at \*6 (7th Cir. July 28, 2011). The court first considers whether the element of party identity is satisfied. It is clear that the parties to each complaint are not actually identical; the Trustee was the sole plaintiff filing the adversary proceeding in the First Case, and the debtors were added as co-plaintiffs with the Trustee in the Second Case.<sup>7</sup> Ocwen claimed, however, that the debtors stand in privity with the Trustee because both parties are attempting to exercise the trustee's avoidance powers under § 544. It relied upon *United States v. Dewes*, 315 B.R. 834, 836-37 (N.D. Ind. 2004), which affirmed the bankruptcy court's conclusion that a chapter 13 debtor has standing to bring an avoidance action under § 544. The court agrees that a trustee can represent the interests of many stakeholders. *See In re Kmart*, 359 F.3d 866, 870 (7th Cir.), *cert. denied sub nom. Handleman Co. v. Capital Factors, Inc.*, 543 U.S. 986 (2004). It thus appears that privity exists in the circumstances now before this court, as well, for the Trustee and debtors herein share a common interest in avoiding Ocwen's lien for the benefit of the debtors and their unsecured creditors. The first element of res judicata, therefore, is satisfied.

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<sup>6</sup> Res judicata is an affirmative defense, but it can be raised in a motion to dismiss when the allegations of the complaint provide a sufficient basis for the defense. *See Muhammad v. Oliver*, 547 F.3d 874, 878 (7th Cir. 2008) (citing *Jones v. Bock*, 549 U.S. 199, 215, 127 S. Ct. 910, 166 L.Ed.2d 798 (2007)).

<sup>7</sup> The court also notes that the defendants named in each case appear to share different relationships to one another from the first case to the second. However, the parties did not raise that distinction.

Ocwen next contended that the claims asserted in both actions – the avoidance of Ocwen’s mortgage under § 544 – were identical. Citing *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986), Ocwen stated that the Seventh Circuit determines this element of res judicata by using the “same transaction” test: If the factual allegations asserted and the relief sought are identical, there is identity of the causes of action. In each adversary, the complaint alleged that Ocwen’s claim was unsecured and sought to avoid the mortgage. For res judicata purposes, therefore, the claims were identical, argued the defendant.

The plaintiffs insisted, however, that the Complaint filed in the Second Case involved a different case concerning a different proof of claim in a different bankruptcy estate; there were different statutes of limitation and a different set of unsecured creditors as well, they pointed out. Ocwen replied that, despite these differences, the facts underlying both adversary proceedings consisted of a “single core of operative facts which would give rise to a remedy,” the same remedy sought in each case. R. 13 at 3 (quoting *Car Carriers, Inc.*, 789 F.2d at 593). There was no new legal theory presented, no new wrong alleged in the Second Case. Thus, there was identity in the causes of action, claimed the defendant.

When the court compared the two complaints that commenced the adversary proceedings, it found that Count I in each case sought to avoid an unrecorded, unperfected mortgage lien and that Count II sought to disallow Ocwen’s claim as a secured claim and to deem it unsecured. In the First Case, however, the complaint’s third (and final) Count requested turnover of the funds already paid on the mortgage. In the Second Case, Count III sought to disallow the proof of claim as untimely, and Count IV sought to disallow the proof of claim as defective. The court finds that the plaintiffs seek the same central remedy in each case, avoidance of the mortgage lien, and in the Second Case seek disallowance of the claim.

The court then compared the two Proofs of Claim underlying this dispute to determine whether the factual allegations asserted in each case were identical or reflected a single core of operative facts. Claim No. 11, filed in the First Case, was brought by “Bank One, N.A., as Trustee of the Amortizing Residential

Collateral Trust, 2002-BC1” (with notices to go to “Ocwen Federal Bank, FSB” at an address in Orlando, Florida). Eight pages were attached to the proof of claim:

Exhibit A – Itemization of Claim by Bank One (payment schedules and arrearages)

Exhibit B – “Payoff Information”

“Real Estate Mortgage” between CIT and the debtors (3 pages)

“Legal Description” of the real property

“Promissory Note” between Michael Pouch, second lienholder, and the debtors  
letter from Ocwen to the bankruptcy court, enclosing Proof of Claim.

Claim No. 16, filed in the Second Case, was brought by the creditor “JPMorgan Chase Bank, N.A., as Trustee successor in interest to Bank One, N.A., as Trustee of the Amortizing Residential Collateral Trust, 2002-BC1” (with notices to go to Ocwen, Bankruptcy Department, at a different address and zip code in Orlando, Florida). Attached to the proof of claim were eight pages of documentation:

Exhibit A – Itemization of Claim by JPMorgan Chase Bank (payment schedules, arrearages)

Exhibit B – “Payoff Information”

Exhibit C – “Pre-Petition Fee, Costs & Property Preservation Expenses Breakdown”

“Real Estate Mortgage” between CIT and the debtors (3 pages)

“Legal Description” of the real property

“Promissory Note,” first page of three-page document, between CIT and the debtors.

The court found significant differences in the two proofs of claim: For example, the creditors named on each claim form (defined as “the person or other entity to whom the debtor owes money or property”) are two different banks, and the two Ocwens receiving notice have different names and addresses and may be different entities. In addition, attached to each proof of claim is a different promissory note: Claim No. 11 presented an agreement between the debtors and Michael Pouch, and Claim No. 16 presented only the first page of a three-page agreement between the debtors and CIT.<sup>8</sup>

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<sup>8</sup> Equally significant is the information not attached to the two claims: Even though the Real Estate Mortgage (attached to both proofs of claim) states that the mortgagors are the debtors and the mortgagee is CIT, no document demonstrates any relationship between mortgagee CIT and the creditors now claiming that the debtors owe the mortgage obligation to them. *Cf. In re Koontz*, 2010 WL 5625883 at \*8ff (Bankr. N.D. Ind. Sept. 20, 2010) (finding that documents attached to Proofs of Claim did not show valid assignment of rights under note and mortgage); *In re Samuels*, 415 B.R. 8, 16 (Bankr. D. Mass. 2009) (same); *In re Wells*, 407 B.R. 873, 883 (Bankr. N.D. Ohio 2009) (same).

The court finds therefore that, even though the complaint in each adversary proceeding is based upon the same underlying mortgage and the relief sought in each is the avoidance of the allegedly invalid mortgage, in a bankruptcy case those similarities are not sufficient. Here, two different creditors claim the same mortgage debt. Because the entitlement to payment on the underlying mortgage is claimed by Bank One, N.A., in the First Case and by JPMorgan Chase Bank, N.A., in the Second Case, and yet the Mortgage itself states that CIT is the mortgagee, the court finds that there is not sufficient identity of claims to satisfy the transaction test used as the second requirement of res judicata.

The final test used to determine whether res judicata has preclusive effect is whether there was a final judgment on the merits. *Ocwen*, citing *Smith v. City of Chicago*, 820 F.2d 916, 918 (7th Cir 1987), and *Cannon v. Loyola U.*, 609 F.Supp. 1010, 1016 (N.D. Ill. 1985), *aff'd*, 784 F.2d 777 (7th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987), asserted that “dismissal based on the running of a statute of limitations precludes a second action based on the same claim brought in the same system of courts.” R. 7 at 11. The defendant also argued that this court’s Judgment in the adversary proceeding of the First Case, a dismissal with prejudice, was a final judgment on the merits which barred a later suit on the same cause of action. *See id.*

The plaintiffs, following the test set forth in *Car Carriers*, asserted that this adversary proceeding in the Second Case should not be barred under the doctrine of res judicata for two reasons: First, this proceeding did not arise from the “same transaction” or “single group of operative facts” that formed the basis of the first adversary proceeding. Instead, it proceeded from a different bankruptcy case in which a different proof of claim was filed, and that new claim was based upon a separate set of facts constituting a separate injury. This proof of claim at issue now, Claim No. 16, is a separate transaction, they explained, and should not be barred by res judicata. Secondly, the plaintiffs insisted that the Judgment in the previous adversary was a dismissal based on a technical point, a limitations period, rather than on the merits of the case. Therefore, they urged the court to conclude, there was no final judgment on the merits.

The court finds that the plaintiffs' second argument is unsustainable in this circuit. In *Smith v. City of Chicago*, the first action was dismissed on statute of limitations grounds, and the Seventh Circuit unequivocally held that a dismissal based on laches or the running of a statute of limitations was a decision on the merits. See *Smith*, 820 F.2d at 918-919. That ruling is upheld today in this circuit and virtually every other circuit. See, e.g., *In re MarchFirst, Inc.*, 448 B.R. 499, 514 (Bankr. N.D. Ill. 2011) ("A judgment that a statute of limitations bars a claim is a judgment on the merits."). As the Ninth Circuit Court of Appeals explained in *In re Marino*, 181 F.3d 1142 (9th Cir. 1999), the Restatement of Judgments "abandoned the 'on the merits' terminology because, as it explains, '[i]ncreasingly . . . judgments not passing directly on the substance of the claim have come to operate as a bar.'" *In re Marino*, 181 F.3d at 1144 (citing Restatement (Second) of Judgments § 19 cmt. a (1982)).

Nevertheless, after recognizing that a statute of limitations dismissal is a dismissal on the merits, it remains true that, under some fact patterns in bankruptcy law, the relitigation of a time-barred complaint is not barred.

There may be special circumstances . . . in which the logic of a particular remedial scheme dictates that the dismissal of a first untimely complaint should not preclude a second complaint that is timely. The most pressing reason would be that the second complaint is properly brought in a proceeding that could not have been brought at the time, or in the court, of the first proceeding.

18A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4441 (2d ed. 2011 update). The treatise referred, as illustration, to the Ninth Circuit's *In re Marino*, which discussed the unusual nature of a statute of limitations dismissal in a bankruptcy setting:

[T]he conundrum with which we are presented is unique to bankruptcy proceedings. Rarely do we see a situation where a time limitation applies when a first action is filed, but a wholly different time limitation, which did not even exist before, applies when a second action is filed. But that is the case here.

*Id.* at 1145. In that case, the Ninth Circuit examined the "unique posture" of more than one bankruptcy filing. It determined that, in such a circumstance, "the prior dismissal does not, in fact, have res judicata

effect.” *Id.* It then held that “dismissal of the complaint in the now defunct Chapter 11 proceeding did not bar filing of a complaint in the newborn Chapter 7 proceeding.” *Id.* at 1146.<sup>9</sup>

The case now before the court is the second bankruptcy case filed by these debtors. As the court noted earlier, this second bankruptcy estate is distinct and independent from the previous one. Indeed, the two bankruptcy cases are “separate and different legal event[s].” *In re Magee*, 444 B.R. 254, 262 (Bankr. S.D.N.Y. 2011) (holding that exemptions determined in the first case did not have a binding effect on the subsequent case); *see also In re Larsen*, 59 F.3d 783, 788 (8th Cir. 1995) (concluding, after dismissals of earlier cases, that subsequent chapter 7 case involved a newly created estate; denying administrative status for attorney fees incurred in past cases); *In re Jamesway Corp.*, 202 B.R. 697, 701 (Bankr. S.D.N.Y. 1996) (concluding that subsequent chapter 11 case was distinct from first chapter 11, with a different estate and different debtor, rejecting argument that administrative claims were res judicata in the second case).

The court finds that a second bankruptcy case was created when the second petition was filed. At that time, the automatic stay took effect, a trustee was appointed, and the administrative steps beginning a bankruptcy case – such as the setting of bar dates for the filing of complaints and for proofs of claim – were put into effect. In light of those indicia of the “separate and different legal event” created by the filing of the Second Case, the court concludes that the Judgment of dismissal in the adversary proceeding of the First Case did not create a res judicata bar to filing a new complaint in the debtors’ subsequent bankruptcy.

Because the Complaint now before the court is one filed in a legally distinct Second Case, this case is distinguishable from *In re Kroner*, 118 B.R. 86 (Bankr. N.D. Ill. 1990), a case on which the defendant

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<sup>9</sup> *In re Marino* is factually distinct from the case herein: It involved the conversion of a chapter 11 case to a chapter 7 case, not the dismissal and closing of the first case and refiling and opening of a second case. In this circuit, a dismissal of an adversary proceeding under § 546 is a final decision which applied in the subsequent converted case just as it did in the prior case. *See In re Luria Steel & Trading Corp.*, 189 B.R. 418, 424 (N.D. Ill. 1995); *see also In re Larsen*, 59 F.3d 783, 787 (8th Cir. 1995) (“When a single bankruptcy case is converted from a reorganization proceeding to a Chapter 7 liquidation, there is good reason to assume that all administrative expenses allowed under § 330 are entitled to at least some priority for benefitting the ultimate estate. That assumption is far less appropriate when dealing with administrative expense claims carried over to a second, distinct bankruptcy case.”).

relied in its Reply Brief. The *Kroner* case involved two adversary proceedings brought in the same bankruptcy case. The first action was dismissed with prejudice by an Agreed Order. The second action, which involved the same parties, same facts, and same property, was an attempt “to raise another claim that should have been raised at the time of the Prior Proceeding,” and thus was barred by res judicata. *Id.* at 88. In this case now before the court, in contrast, the second adversary proceeding was brought in the Second Case, with a new order for relief and a new statute of limitations. The second adversary proceeding was limited by § 546(a)(1)(A) as measured by that second order for relief, not by an attempt to raise another claim. Thus the *Kroner* decision is distinguishable from the case herein.

Accordingly, the court finds that the third requirement for res judicata has not been fulfilled by the defendant. With two elements of res judicata unsatisfied, therefore, it determines that the doctrine of res judicata does not bar relitigation of the plaintiff’s Complaint in this Second Case.

### C. Equitable Considerations

Finally, Ocwen contended that it was unfair and contrary to Bankruptcy Code policy to allow the Complaint. It asserted that Congress intended § 546 to provide certainty for potential litigants by requiring that actions be commenced within a reasonable time. Relying on *In re Luria Steel & Trading Corp.*, 189 B.R. 418 (N.D. Ill. 1995), which held that the conversion of a case did not restart § 546’s statute of limitations, Ocwen argued that it would experience similar prejudice if it were forced again to defend its claim. See R. 7 at 12-13. In addition, he insisted that allowing the Complaint encouraged a waste of resources, undermined the finality Ocwen obtained in the first bankruptcy case, and attempted to circumvent the court’s prior decision. Equity demanded that this court dismiss the adversary proceeding Complaint and prevent the debtors from avoiding the mortgage Ocwen holds on the property.

The plaintiffs responded that dismissal of the debtors’ Complaint would lead to an inequitable result, for it would allow Ocwen to collect from the bankruptcy estate when it twice had failed to file a valid

claim and once failed to file a timely claim.<sup>10</sup> Dismissing this adversary proceeding and allowing the defendant's claim would result in an abuse of the Bankruptcy Code and would be prejudicial to the debtors' unsecured creditors, they insisted. In addition, the Trustee pointed out that she has a statutory duty to avoid unperfected liens under 11 U.S.C. § 544 when such avoidance would increase the amount of disposable income among the unsecured creditors and would benefit the estate. *See In re Bell*, 194 B.R. 192, 196 (Bankr. S.D. Ill. 1996).

Ocwen correctly points out that the conversion of a case does not cause a statute of limitations period to run anew. Indeed, when a case is converted, no change is made "in the date of the filing of the petition, the commencement of the case, or the order for relief." 11 U.S.C. § 348(a).<sup>11</sup> But the case before this court did not involve conversion; it was a dismissal of one case, followed by the filing of a subsequent petition. The dismissal statute, § 349, does not contain § 348's provision maintaining the initiating dates from the first case. By negative implication, therefore, the court finds that a dismissal under § 349 does effect a change in the dates for the petition filing, the commencement of the case, and the order for relief.

It is clear that the adversary proceeding in the First Case was dismissed as time-barred because the statute of limitations was measured from the date of the order for relief in the First Case. When the debtors filed a new bankruptcy case, a new date for the order for relief was set, and a new two-year limitations period began to run under § 546. The plaintiffs filed a timely Complaint to commence an adversary proceeding in the Second Case. The court finds nothing inequitable, inappropriate, or unfair in the plaintiffs' actions. Accordingly, the court denies the defendant's request for an equitable dismissal of the adversary proceeding Complaint herein.

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<sup>10</sup> The court will not rule on the plaintiffs' arguments incorporated into its response concerning the untimeliness or defects of the defendant's claim. Those contentions address the merits of the plaintiffs' Complaint and not the merits of the defendant's Motion to Dismiss, which is now before the court.

<sup>11</sup> The exceptions to this general rule, found in § 348(b) and (c), are not pertinent herein.

CONCLUSION

For the reasons set forth in this Memorandum of Decision, the Motion to Dismiss filed by Ocwen Loan Servicing, LLC, pursuant to Federal Rule of Civil Procedure 12(b)(6) against the plaintiffs Billy Gene Anthony and Kimberly Elaine Anthony, chapter 13 debtors, and Debra L. Miller, chapter 13 Trustee, is denied. The defendant is directed to file an answer to the plaintiffs' Complaint within thirty (30) days of the date of this Order.

SO ORDERED.

/s/ HARRY C. DEES, JR. \_\_\_\_\_  
HARRY C. DEES, JR., JUDGE  
UNITED STATES BANKRUPTCY COURT