

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

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IN RE Valley Mortgage, Inc., doing  
business as Valley Investments, Inc.,  
doing business as Blue Mountain  
Village, LLC, doing business as CLP,  
LLC, doing business as New Liberty  
Homes, Inc., doing business as S & P  
Properties, LLC, doing business as The  
Meadows, LLC,

Debtor.

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VMI LIQUIDATING TRUST DATED  
DECEMBER 16, 2011,

Plaintiff – Appellee,

v.

WELLS FARGO HOME MORTGAGE,  
INC.,

Defendant – Appellant.

BAP No.    CO-13-061

Bankr. No. 10-19101  
Adv. No. 12-01270  
Chapter 11

**ORDER DENYING MOTION FOR  
LEAVE AND DISMISSING APPEAL**

September 25, 2013

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Before CORNISH, NUGENT, and JACOBVITZ, Bankruptcy Judges.

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The matter before the Court is Appellant Wells Fargo Home Mortgage, Inc.’s (“Wells”) Motion for Leave to Appeal, filed August 20, 2013 (the “Motion for Leave”). The Appellee VMI Liquidating Trust Dated December 16, 2011 (the “Trust”) filed its Answer in Opposition to the Motion for Leave on September 4, 2013. Wells filed its Reply in Support of the Motion for Leave on September 10, 2013. For the reasons set forth below, the Motion for Leave is denied and this appeal is dismissed.

Background

Debtor Valley Mortgage, Inc. (“Debtor”) filed a Chapter 11 petition on

April 19, 2010, and its liquidation plan (“Plan”) was confirmed on November 1, 2011. The Plan vested in the Trust all of the Debtor’s assets and liabilities, as well as standing to pursue litigation on its behalf, including actions pursuant to 11 U.S.C. §§ 544, 545, 547, 548, 549, and 553(b). On April 19, 2012, the Trust filed an adversary proceeding against Wells, seeking to recover allegedly fraudulent transfers made by the Debtor’s principal to Wells (the “Adversary”).

On May 21, 2013, Wells filed a motion for summary judgment based on its affirmative defenses in the Adversary, arguing the Trust lacked standing to pursue the claims asserted against Wells because (1) under the doctrine of res judicata the order confirming Plan precluded it from asserting the claims, and (2) the Plan did not specifically retain the claims so as to except them from its preclusive bar. The Trust responded on July 1, 2013, arguing that it was not barred by res judicata because as the Plan specifically provided that it could bring an action under § 550 to avoid transfers pursuant to §§ 544, 545, 547, 548, 549, and 553(b), Debtor’s pre-confirmation rights were preserved for determination post-confirmation.

On August 5, 2013, the bankruptcy court entered an Order Denying [Wells’] Motion for Summary Judgment (the “Summary Judgment Order”), finding that “[g]iven the Tenth Circuit's endorsement of reserving claims by reference to Bankruptcy Code section only, and given the language of Section 7.5 of the Plan in this case, the Plan sufficiently reserved the claims brought by [the Trust] in this case and gave standing to [the Trust] to litigate them post-confirmation.” Summary Judgment Order at 5. On August 19, 2013, Wells filed a Notice of Appeal, thus commencing the above-captioned appeal, seeking review of the Summary Judgment Order.

### Analysis

The Summary Judgment Order is not the final order in the case. *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248 (1992). As such, this Court may exercise

jurisdiction over the Summary Judgment Order only if leave of court is appropriate. 28 U.S.C. § 158(a)(3); *see United States v. Browning*, 518 F.2d 714, 717 (10th Cir. 1975); *Sabin v. Butz*, 515 F.2d 1061, 1067 n.6 (10th Cir. 1975); *Med. Dev. Corp. v. Indus. Molding Corp.*, 479 F.2d 345, 349 (10th Cir. 1973).

We have stated:

Leave to hear appeals from interlocutory orders should be granted with discrimination and reserved for cases of exceptional circumstances. Appealable interlocutory orders must involve a controlling question of law as to which there is substantial ground for difference of opinion, and the immediate resolution of the order may materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(b); Fed. R. Bankr. P. 8018(b); *American Freight Sys., Inc. v. Transport Ins. Co. (In re American Freight Sys., Inc.)*, 194 B.R. 659, 661 (D. Kan. 1996); *Intercontinental Enter., Inc. v. Keller (In re Blinder Robinson & Co.)*, 132 B.R. 759, 764 (D. Colo. 1991).

*Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 769-70 (10th Cir. BAP 1997).

Wells argues that the controlling question of law as to which there is a substantial ground for difference of opinion is whether a blanket reservation of rights in a plan (i.e. by merely specifying Code sections under which claims arise) is enough to preserve a party's claims for post-confirmation litigation. Motion for Leave at 4. The Summary Judgment Order states that

Bankruptcy Code Section 1123(b)(3)(B) is the statutory mechanism for reserving in a plan of reorganization claims which would otherwise be barred by the res judicata effect of the plan's confirmation order. In order to establish standing under § 1123(b)(3)(B) to bring claims post-confirmation, [the Trust] must show[, *inter alia*,] that the plan retains the claims to be asserted post-confirmation []. *Connolly v. City of Houston (In re Western Integrated Networks, LLC)*, 329 B.R. 334, 337-38 (Bankr. D. Colo. 2005); *Retail Marketing Company v. Rhuems (In re Mako)*, 985 F.2d 1052, 1055-56 (10th Cir. 1993).

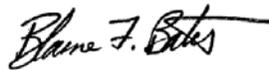
Summary Judgment Order at 3. In *Mako* the Tenth Circuit found that plan provisions expressly and clearly conferring authority on a trustee of a litigation trust to bring particular kinds of actions are sufficient to confer such authority. *See Mako*, 985 F.2d at 1055; Summary Judgment Order at 5 (“reservation of claims by reference to specific code sections is sufficient, and it is not required

that the plan identify a particular defendant or the specific factual basis for reserved claims.”). However, the court also acknowledged the trend in caselaw outside the Tenth Circuit towards disallowing this sort of blanket reservation of rights. *See* Summary Judgment Order at 4, citing *In re W. Integrated Networks*, 322 B.R. at 161. *In re Western Integrated Networks* notes “[h]owever, until the Tenth Circuit provides direction contrary to the strong implication in *Mako* approving section-specific reservation language, this Court does not believe it is appropriate to apply [a] more restrictive analysis.” *Id.*

Given *Mako*’s approval of section-specific reservation language, we do not believe that exceptional circumstances exist to warrant an interlocutory appeal.

Accordingly, it is HEREBY ORDERED that the Motion for Leave is DENIED and this appeal is DISMISSED.

For the Panel:



Blaine F. Bates  
Clerk of Court