

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**



In re:

**Pasquale J. Vescio and Vatsala Vescio
Debtors-in-Possession.**

**Chapter 11 Case
96-10153**

**Pasquale J. Vescio and Vatsala Vescio,
Plaintiffs,**

v.

A.P. # 02-1005

**NSC 1, L.L.C.,
Defendant.**

Appearances: *Mary P. Kehoe, Esq.
Lisman, Webster, Kirkpatrick,
& Leckerling, P.C.
Burlington, Vermont
Attorney for Defendant NCS*

*Jess T. Schwidde, Esq.
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Rutland, Vermont
Attorney for Plaintiffs/Debtors*

**MEMORANDUM OF DECISION
DENYING DEFENDANT'S MOTION TO DISMISS**

The defendant, NSC 1, L.L.C. (hereafter "NCS") has filed a Motion to Dismiss [Dkt. #6-1] this adversary proceeding on two grounds: the doctrine of *res judicata* and untimeliness. The plaintiffs, Pasquale J. and Vatsala Vescio (hereafter "the debtors" or "Vescios"), filed their Objection to NCS's Motion to Dismiss [Dkt. # 10-1] opposing at length NCS's contentions and asserting that their pending action is neither time barred nor precluded by the various prior rulings entered either by this Court or the District Court. A hearing was held on April 4, 2002 and this Court reserved its ruling in order to review the record and evaluate the merits of the arguments of the parties. This Court has jurisdiction over this dispute. *See* 28 U.S.C. §§ 157 and 1334. Based upon the record and the following analysis, the Motion to Dismiss is denied.

PROCEDURAL BACKGROUND

The procedural history of this protracted dispute is well chronicled in the prior decisions of this Court and the District Court. However, a brief overview of the pertinent procedural history is essential to an understanding of the arguments presented. Prior to filing for bankruptcy protection under chapter 11 of title 11 U.S.C. (“the Bankruptcy Code”) on February 19, 1996, the Vescios had been involved in a series of commercial development projects in Brattleboro, Vermont financed, in part, by The Merchants Bank (hereafter “TMB”). The Vescios ultimately defaulted on a series of loans from TMB, and TMB initiated foreclosure proceedings in state court. In response to the foreclosure complaint, the Vescios filed a counterclaim against TMB alleging *inter alia* lender liability, fraud, common law bad faith, breach of contract, defamation and related claims. For purposes of the foreclosure litigation, the Vescios admitted in their Answer that their loans with TMB were secured by the subject development projects in Brattleboro. While the foreclosure action was pending, TMB sold the Vescios’ loans to AMRESKO New England LP, II (hereafter “AMRESKO”). Under the terms of this sale, AMRESKO continued with the foreclosure proceedings while TMB agreed to defend the counterclaim. Thereafter, the Vescios filed for reorganization under the Bankruptcy Code.

Upon filing for bankruptcy relief, the state court foreclosure proceedings were stayed and the counterclaim was removed to this Court as an adversary proceeding. The claim of AMRESKO was listed in the debtors’ bankruptcy schedules and AMRESKO filed a Proof of Claim on February 29, 1996. Subsequently, the debtors amended their previously filed counterclaim to include an allegation of equitable subordination against AMRESKO. This Court (Conrad, J.) severed the debtors’ equitable subordination claim against AMRESKO from the remainder of the counterclaim allegations and proceeded to trial on the adversary proceeding involving the debtors and TMB. However, thereafter Judge Conrad recused himself from all involvement in this adversary proceeding, and the District Court tried the matter and ruled in favor of TMB on all counts in an extensive decision issued October 10, 2001. The decision is presently on appeal. In the interim, NCS became the successor in interest to AMRESKO.

The procedural history of the bankruptcy reorganization proceedings is also relevant. On August 19, 1996 this Court (Conrad, J.) issued its Amended Order Confirming Third Amended Chapter 11 Plan (hereafter “the Confirmation Order”). An appeal ensued and after a series of remands by the District Court, this Court entered an Order resolving a valuation dispute between the parties on November 2, 2000, thereby rendering the debtors’ confirmed Plan final as of November 12, 2000. A key provision of the confirmed plan provided as follows:

- c). As detailed in part 11 of Debtor’s Plan, this Court shall continue and reserve jurisdiction post-confirmation to consider and determine, but not limited to, the following: determination of proceedings against The Merchants Bank and/or Amresco New England II, LP, equitable subordination of claims, if any, which must be filed within 60 days of the entry of this order, and objections to claims. To the extent necessary to preserve its jurisdiction over the foregoing, the Court invokes 11 U.S.C. §105.
- ...
- f). Within one year after consummation of the Plan, Debtors must file with the Clerk of the Court objection(s) to claim(s), or be barred from asserting any objection(s) after that date.

Confirmation Order, p. 4. In this regard, the Debtors assert, and the docket reflects, that on October 22, 1996, the Vescios filed their objections to, *inter alia*, AMRESKO’s proof of claim and reserved their right to proceed on their objections [Dkt. # 270].

The confirmed plan also provides that:

Notwithstanding the treatments [of Amresco’s claims] described above, Class 3(D)(i) or Class 3(D)(ii) above, the secured claim of Amresco *shall be reduced by any non-exempt amount awarded to the Debtors in connection with their counter-claim* filed in connection with the foreclosure action brought by Merchants Bank and assigned to Amresco.

Section 5.4; para. Class 3(D)(iii) (emphasis added). Furthermore, the confirmed plan contains a comprehensive retention of jurisdiction section that permits the Bankruptcy Court to retain jurisdiction over remaining claim disputes until the debtors receive their discharge as provided by the plan. *See* Section 12.0. On December 9, 1996, this Court (Conrad, J.) ordered that the Vescios’ objection to AMRESKO’s proof of claim be merged into the pending adversary proceeding against The Merchants Bank in A.P. # 96-1015. In its Order dated October 10, 2002, the District Court withdrew the reference as to this adversary proceeding against The

Merchants Bank which included the Vescios' objection to AMRESKO's proof of claim. The District Court then observed that the Vescios had filed a supplemental objection to AMRESKO's proof of claim on September 21, 2000. AMRESKO moved to dismiss the supplemental objections, which was denied by the District Court on May 11, 2001. Noting that AMRESKO's proof of claim and the Vescios' related objections should be decided first by this Court, the District Court's Order dated October 10, 2002 also specifically provided that the District Court "remand[ed] all issues regarding AMRESKO's proof of claim to the U.S. Bankruptcy Court."

DISCUSSION AND FINDINGS

In order to prevail on a motion to dismiss for failure to state a claim upon which relief can be granted, it is well-settled that the moving party must show beyond any doubt that the plaintiff can prove no set of facts in support of plaintiff's claim that would entitle the plaintiff to relief. See Padavan v. United States, 82 F.3d 23 (2nd Cir. 1996). In dismissing a case pursuant to the doctrine of *res judicata*, the moving party must establish that there has been a prior final judgment on the merits, that the prior action involved the same parties or their privies, and that the prior action involved the same claim. See Weldon v. United States, 70 F.3d 1, 5 (2nd Cir. 1995); In re Teltronics Services, Inc., 762 F.2d 185, 190 (2nd Cir. 1985). Moreover, under appropriate circumstances, a confirmed plan may be *res judicata* to all issues that were raised or should have been raised therein. See In re Crowley, 258 B.R. 587, 591 (Bankr. D. Vt. 2000)(and cases cited therein). Lastly, it is conventional law that a waiver "is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938). Courts of equity typically construe agreements and circumstances against waiver unless the facts supporting waiver are direct and clear. Cf. In re Hull, 19 B.R. 501, 510-11 (Bankr. N.D. Ind. 1982).

The defendant asserts that the claims being asserted by the Vescios against AMRESKO are barred

because the Vescios' claims have been precluded by their confirmed chapter 11 plan insofar as the claims are already deemed secured or established and because any objections should have been asserted long ago. The debtors counter that not only were the objections filed timely, but the terms of the plan specifically allow the subsequent pursuit of the claims and that the protracted, and often byzantine course of this dispute should not serve to preclude a decision upon the merits of their objections to the AMRESCO claim.

It is an advocate's responsibility to provide a court with intelligible legal briefs and appendices sufficient to support the requested relief. *Cf. Credit Francais Int'l, S.A. v. Bio-Vita, Ltd.*, 78 F.3d 698, 700 (1st Cir. 1996); *United States v. One Motor Yacht Named Mercury*, 527 F.2d 1112, 1113 (1st Cir. 1975). Despite any insufficiency in a litigant's pleadings, a court can review the merits as the record allows. *See Credit Francais*, 78 F.3d at 700; *One Motor Yacht*, 527 F.2d at 1113. However, the consequences of any insufficiency fall on the party seeking relief. *See Barilaro v. Consolidated Rail Corp.*, 876 F.2d 260, 263 (1st Cir. 1989). A court also has discretion to deny the requested relief if the absence of a complete record thwarts intelligent review. *See Credit Francais*, 78 F.3d at 700.

Based upon the record before the Court, it would be inappropriate and inequitable to conclude that the Vescios are barred from proceeding with their effort to have a determination on the merits regarding their objections to AMRESCO's proof of claim in this proceeding. The defendant fails to substantiate its defenses of *res judicata*, untimeliness or waiver. In fact, the record and confirmed plan appear to indicate that the Vescios preserved their objections to the proof of claim and that the confirmed plan precludes the defenses being raised by the defendant in the instant Motion to Dismiss. Hence, the Court finds that the defendant has failed to substantiate its Motion to Dismiss and further finds that a fair and accurate examination of this rather extensive record does not support dismissal. Therefore, the Motion to Dismiss is denied.



June 10, 2002
Rutland, Vermont

Colleen A. Brown
United States Bankruptcy Judge