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OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	SC-10-1423-MkHKi
)		
7	JASON BELICE AND MISHELLE)	Bk. No.	09-14236
	BELICE,)		
8)	Adv. No.	09-90576
	Debtors.)		
9	_____)		
)		
10	MICHAEL BARNES,)		
)		
11	Appellant,)		
)		
12	v.)	OPINION	
)		
13	JASON BELICE,)		
)		
14	Appellee.)		
15	_____)		

Argued and Submitted on October 20, 2011
at San Diego, California

Filed - December 2, 2011

Appeal from the United States Bankruptcy Court
for the Southern District of California

Honorable Peter W. Bowie, Chief Bankruptcy Judge, Presiding

Appearances: Michael L. Klein of Greenman, Lacy, Klein, O'Harra
& Heffron appeared on behalf of Appellant Michael Barnes.*

Before: MARKELL, HOLLOWELL and KIRSCHER, Bankruptcy Judges.

* No one appeared at oral argument on behalf of Jason Belice, and the panel deemed Mr. Belice's position submitted on the briefs filed. Subsequently, counsel for Mr. Belice requested that the panel reset oral argument, or allow him to file a letter brief in lieu of oral argument. The panel denied the motion.

1 MARKELL, Bankruptcy Judge:
2

3 **INTRODUCTION**

4 Plaintiff Michael Barnes ("Barnes") claims debtor Jason
5 Belice ("Belice") obtained loans from him by fraud. When Belice
6 filed a chapter 7¹ bankruptcy and attempted to discharge those
7 debts, Barnes objected. He filed an adversary proceeding under
8 § 523(a)(2), alleging that Belice lied about various parts of his
9 financial life and his assets in order to obtain the loan.

10 Belice objected to Barnes' complaint, and the bankruptcy
11 court granted several motions by Belice to dismiss it.
12 Ultimately, the bankruptcy court held that Belice's alleged lies
13 and misrepresentations about specific assets were "statement[s]
14 respecting the debtor's . . . financial condition" as
15 contemplated by § 523(a)(2)(A). It thus dismissed Barnes'
16 complaint. We disagree, and REVERSE and REMAND.

17 **BACKGROUND**

18 Belice and his wife filed their chapter 7 bankruptcy
19 petition on September 22, 2009. Upon review, the clerk
20 classified Belices' case as a no-asset bankruptcy case. The
21 Belices' schedules listed only roughly \$10,000 in exempt personal
22 property.²

23
24 ¹ Unless specified otherwise, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
26 all "Rule" references are to the Federal Rules of Bankruptcy
27 Procedure, Rules 1001-9037. All "Civil Rule" references are to
the Federal Rules of Civil Procedure.

28 ² We obtained this information by reviewing the items on
the bankruptcy court's automated bankruptcy case docket in the
(continued...)

1 Barnes filed his first nondischargeability complaint in
2 December 2009. This complaint alleged that Barnes had lent
3 Belice \$15,000 ("Loan") in March 2008 based in part on Belice's
4 representation that he would and did provide adequate security.
5 The security offered was a warrant purportedly entitling Barnes
6 to acquire 30% of Belice's interest in a partnership known as the
7 Belice-Mehta Partnership. The warrant's strike price was the
8 satisfaction of all amounts owed on the Loan.

9 The complaint alleged that Belice's representation regarding
10 the nature of the security was false. It further alleged that
11 Belice knowingly and intentionally made this misrepresentation
12 with the intent to deceive Barnes and to induce him to make the
13 Loan. In addition, Barnes' complaint indicated that Barnes later
14 lent Belice another \$10,000 based on the same misrepresentation.
15 Barnes thus claimed damages of \$25,000 plus interest as Belice
16 never repaid anything and the security given was worthless.

17 In February 2010, Belice moved to dismiss Barnes' complaint
18 under Civil Rule 12(b)(6) ("First Motion To Dismiss"), arguing
19 that the complaint did not sufficiently allege claims for relief
20 under any of the nondischargeability grounds cited.³ Barnes

21
22 ²(...continued)
23 Belices' bankruptcy case. We may take judicial notice of the
24 contents and filing of these items. See Atwood v. Chase
25 Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th
26 Cir. BAP 2003) (citing O'Rourke v. Seaboard Sur. Co. (In re E.R.
27 Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989)).

28 ³ Civil Rule 12(b)(6) applies in bankruptcy through
application of Rule 7012(b).

Belice's response to the First Motion To Dismiss contained
his own version of the circumstances surrounding the Loan, and he
(continued...)

1 disagreed.⁴

2 The bankruptcy court granted Belice's motion, stating that
3 Barnes' allegations regarding Belice's misrepresentations about
4 the proposed collateral were not sufficiently specific. But the
5 court went further and identified another flaw in Barnes'
6 § 523(a)(2)(A) claim: according to the court, any
7 misrepresentation regarding the value of the proposed collateral
8 would have been a "statement respecting the debtor's or an
9 insider's financial condition." If correct, any fraud based on
10 those representations would be excluded from § 523(a)(2)(A).

11 The court thus granted the First Motion to Dismiss, but did
12 so without prejudice to Barnes amending his complaint. Barnes
13 then filed a first amended complaint which attempted to address
14 the court's concerns. In particular, Barnes alleged that Belice
15 had made the following false statements:

16 a) Debtor's [Belice's] monthly salary as an
17 attorney . . . was \$30,000;

18
19 ³(...continued)
20 has reiterated these factual assertions in his brief on appeal.
21 Nothing in the record indicates that the bankruptcy court
22 considered Belice's version of the facts, nor will we. In
23 considering Civil Rule 12(b)(6) motions, a court must accept as
24 true all well-pled facts, unaffected by any contrary factual
25 assertions. Johnson v. Riverside Healthcare Sys., 534 F.3d 1116,
26 1122 (9th Cir. 2008) (citing Broam v. Bogan, 320 F.3d 1023, 1028
27 (9th Cir. 2003)).

28 ⁴ Barnes' original complaint had also sought declarations
of nondischargeability under §§ 523(a)(4) and (a)(6). Barnes
expressly abandoned his § 523(a)(4) claim at the hearing on the
First Motion To Dismiss. Barnes abandoned his § 523(a)(6) claim
when he did not challenge on appeal the court's dismissal of that
claim. See Golden v. Chicago Title Ins. Co. (In re Choo), 273
B.R. 608, 613 (9th Cir. BAP 2002) (holding that arguments not
raised in the appellant's opening brief are deemed waived).

1 b) Debtor had made a \$100,000 profit on the sale of his
2 La Jolla residence in 2007;

3 c) Debtor was paying \$7,000 per month in rent which he
4 could well afford;

5 d) Debtor was a San Diego Charger [sic] season ticket
6 holder;

7 e) Debtor had purchased a \$28,000 diamond engagement
8 ring in July 2007;

9 f) Debtor voluntarily left [his law firm] in late 2007
10 because of more lucrative income in the luxury
11 transportation sector (helicopter and jet service) and
12 his involvement with a computer systems company;

13 g) The security for Plaintiff's loan would be a partial
14 ownership interest in the BELICE-MEHTA PARTNERSHIP, an
15 investor in an entertainment establishment in Macau,
16 called the Monkey Bar;

17 h) The Monkey Bar was extremely successful, would
18 likely be sold to the Sands Casino company in 2008, and
19 would provide the Debtor with yet another revenue
20 source; and

21 i) Debtor's interest in the BELICE-MEHTA PARTNERSHIP
22 was worth far more than the loan from the Plaintiff to
23 the Debtor.

24 First amended complaint (July 7, 2010) at 3:18-4:13. Barnes
25 further alleged that Belice had fraudulently failed to disclose
26 that Belice was being sued for \$530,000 as a guarantor of a debt
27 of a company known as Running Horse Development Group, LLC (the
28 "Running Horse Liability").

Belice filed a motion to dismiss the first amended
complaint, which the court also granted without prejudice. We do
not know the basis for this ruling.⁵

⁵ Neither party ordered the transcript from the June 2010
hearing on the Second Motion To Dismiss, so we do not know
precisely how or why the court ruled as it did on the Second
Motion To Dismiss, but the statements the court later made when

(continued...)

1 Barnes then duly filed a second amended complaint, the
2 complaint that is at issue in this appeal (the "Complaint").
3 Although he made some nonmaterial changes, he did not change the
4 series of Belice's alleged misrepresentations, including the
5 assertion that the failure to disclose the Running Horse
6 Liability was a misrepresentation precluding discharge.

7 Belice moved yet again to dismiss the Complaint with
8 prejudice. At the hearing, the bankruptcy court based its
9 decision on familiar grounds: "The bulk of my problem remains the
10 same as it was the last time around And that is, it
11 appears to me that the representations of which you complain are
12 representations going to financial condition." Hr'g Tr. (Sept.
13 13, 2010) at 4:8-11.

14 Barnes countered that the court should apply the strict
15 definition of the phrase "statement respecting financial
16 condition" applied in Cadwell v. Joelson (In re Joelson), 427
17 F.3d 700 (10th Cir. 2005) and in Eugene Parks Law Corp. Defined
18 Benefit Pension Plan v. Kirsh (In re Kirsh), 973 F.2d 1454, 1457
19 (9th Cir. 1992). Under this definition, he asserted, the
20 Complaint allegations regarding Belice's misrepresentations were
21 sufficient to state a claim under § 523(a)(2)(A).

22 The court disagreed. It again ruled against Barnes. The
23 court also expressed the view that Barnes had not alleged and
24

25 ⁵(...continued)
26 it dismissed Barnes' Complaint indicate that, in large part, the
27 court granted the Second Motion To Dismiss because it construed
28 all of the alleged misrepresentations to be "statement[s]
respecting the debtor's or an insider's financial condition"
expressly excluded from coverage under § 523(a)(2)(A).

1 could not allege any duty to disclose the Running Horse
2 Liability.

3 On October 21, 2010, the bankruptcy court entered a short
4 memorandum and order in which it reasoned that Barnes'
5 allegations were insufficient under § 523(a)(2)(A) because they
6 consisted of oral statements respecting Belice's financial
7 condition, and as such could not be used to support a claim under
8 § 523(a)(2)(A). Even though Belice had requested that any
9 dismissal be with prejudice, the bankruptcy court without
10 explanation crossed out the words "with prejudice" from Belice's
11 proposed form of order.

12 On November 3, 2010, Barnes filed a notice of appeal.

13 JURISDICTION

14 The bankruptcy court's striking of "with prejudice" in the
15 proposed form or order raises a jurisdictional issue. When a
16 court dismisses a complaint without prejudice, the plaintiff may
17 file an amended complaint even if the dismissal order does not
18 expressly state that leave to amend is granted. See McCrary v.
19 Barrack (In re Barrack), 217 B.R. 598, 603 n.4 (9th Cir. BAP
20 1998).⁶ An order dismissing a complaint without prejudice is an

21
22 ⁶ When an order dismissing a complaint is silent as to
23 whether the dismissal is with or without prejudice, we must
24 determine whether the bankruptcy court intended the order to
25 fully and finally dispose of the entire lawsuit. Mendondo v.
26 Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1102 (9th Cir. 2008);
27 Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 983 (9th
28 Cir. 2000). This is consistent with the general rule that we
must look beyond the labels used by the bankruptcy court, and
instead determine what effect the court intended that its order
have. Disabled Rights Action Comm. v. Las Vegas Events, Inc.,
375 F.3d 861, 870 (9th Cir. 2004) (citing Nat'l Distrib. Agency

(continued...)

1 interlocutory order. Id.; WMX Techs., Inc. v. Miller, 104 F.3d
2 1133, 1136-37 (9th Cir. 1997) (en banc).

3 We generally lack jurisdiction to hear an appeal from an
4 interlocutory order, unless we grant leave to appeal. See
5 Giesbrecht v. Fitzgerald (In re Giesbrecht), 429 B.R. 682, 687
6 (9th Cir. BAP 2010). Under Rule 8003, however, we may treat a
7 notice of appeal as a motion for leave to file an interlocutory
8 appeal. And we typically grant leave to appeal when "the order

9
10
11 ⁶(...continued)

12 v. Nationwide Mut. Ins. Co., 117 F.3d 432, 433 (9th Cir. 1997)).
13 Under this standard, we do not treat an order dismissing a
14 complaint as final and appealable unless the bankruptcy court
15 clearly manifested its intent that the dismissal order be its
16 final act in the matter. See Disabled Rights Action Comm., 375
17 F.3d at 870 (citing Campbell Indus., Inc. v. Offshore Logistics
18 Int'l, Inc., 816 F.2d 1401, 1404 (9th Cir. 1987)); see also Casey
19 v. Albertson's Inc., 362 F.3d 1254, 1258 (9th Cir. 2004) (stating
20 that decision is not considered final for appeal purposes unless
21 the decision: (1) fully adjudicates the issues and (2) "clearly
22 evidences the judge's intention that it be the court's final act
23 in the matter."). Here, there are several indications that the
24 bankruptcy court did not intend the dismissal order to be its
25 final act in the adversary proceeding. First and foremost, it
26 crossed out the words "with prejudice" from Belice's proposed
27 form of order. Further, the order dismissed the complaint, as
28 opposed to dismissing the underlying adversary proceeding. See
Disabled Rights Action Comm., 375 F.3d at 870 (citing Montes v.
United States, 37 F.3d 1347, 1350 (9th Cir. 1994)). Finally,
there is no indication in the record that the bankruptcy court
ever determined that the lawsuit could not be saved by amendment.
Id. The court never said that Barnes could not state a viable
claim for relief; rather, the court said "I'm just afraid that
the facts, at least after the second try, just don't support
where you want to go." Hr'g Tr. (Sept. 13, 2010) at 9:2-
3(emphasis added). We acknowledge that, shortly after the
dismissal order was entered, a docket clerk entered on the docket
a notation that the adversary proceeding was closed. This
notation by itself, however, does not persuade us that the court
clearly manifested its intent that the dismissal order would be
its final act in the matter.

1 involves [1] a controlling question of law [2] where there is
2 substantial ground for difference of opinion and [3] when the
3 appeal is in the best interests of judicial economy because an
4 immediate appeal may materially advance the ultimate termination
5 of the litigation.” Travers v. Dragul (In re Travers), 202 B.R.
6 624, 626 (9th Cir. BAP 1996); see also Magno v. Rigsby (In re
7 Magno), 216 B.R. 34, 38 (9th Cir. BAP 1997) (granting leave to
8 appeal under the Travers standard).

9 Here, the validity of the order appealed from involves a
10 controlling question of law concerning the meaning of
11 § 523(a) (2) (A)’s phrase “statement respecting the debtor’s . . .
12 financial condition.” As discussed below, the meaning of that
13 phrase is unsettled. Moreover, exercising jurisdiction here
14 would serve the interests of judicial economy by resolving the
15 meaning of that disputed phrase. In turn, this enables the
16 parties to move on and address the other issues essential to the
17 eventual disposition of the underlying adversary proceeding.

18 Indeed, although the bankruptcy court appears to have
19 dismissed the Complaint without prejudice, the record before us
20 strongly suggests that the court and Barnes had reached an
21 impasse. Barnes over time had narrowed his focus to a single
22 claim for relief under § 523(a) (2) (A), and the court had
23 consistently concluded that Barnes’ core allegations were
24 insufficient to state a claim under § 523(a) (2) (A).

25 While the better practice would have been for Barnes, before
26 filing his notice of appeal, to file a written notice of his
27 election to forego any further amendments to his Complaint so
28 that the court could enter a final judgment of dismissal of the

1 adversary proceeding, WMX Techs., 104 F.3d at 1135-36, we have no
2 trouble concluding here, under the particular circumstances of
3 this matter, that the interests of everyone involved - Barnes,
4 Belice and the bankruptcy court - will be best served by our
5 hearing and deciding this appeal now. We thus grant leave to
6 appeal.

7 **STANDARDS OF REVIEW AND CIVIL RULE 12(b)(6) LEGAL STANDARDS**

8 We review a dismissal under Civil Rule 12(b)(6) de novo.
9 See AlohaCare v. Hawaii Dept. of Human Services, 572 F.3d 740,
10 744 n.2 (9th Cir. 2009). We also review the bankruptcy court's
11 interpretation of the Bankruptcy Code de novo. See W. States
12 Glass Corp. of N. Cal. (In re Bay Area Glass, Inc.), 454 B.R. 86,
13 88 (9th Cir. BAP 2011).

14 When we conduct a de novo review, "we look at the matter
15 anew, the same as if it had not been heard before, and as if no
16 decision previously had been rendered, giving no deference to the
17 bankruptcy court's determinations." Charlie Y., Inc. v. Carey
18 (In re Carey), 446 B.R. 384, 389 (9th Cir. BAP 2011); see also
19 B-Real, LLC v. Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th
20 Cir. BAP 2008).

21 As a result, in order to decide this appeal, we apply the
22 same legal standards governing motions to dismiss under Civil
23 Rule 12(b)(6) that apply in all federal courts. "A Rule 12(b)(6)
24 dismissal may be based on either a 'lack of a cognizable legal
25 theory' or 'the absence of sufficient facts alleged under a
26 cognizable legal theory.'" Johnson, 534 F.3d at 1121 (quoting
27 Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir.
28 1990)).

1 Under Civil Rule 12(b)(6), a court must also construe the
2 complaint in the light most favorable to the plaintiff, and must
3 accept all well-pleaded factual allegations as true. Johnson,
4 534 F.3d at 1122; Knox v. Davis, 260 F.3d 1009, 1012 (9th Cir.
5 2001).

6 In both instances, the key is whether the allegations are
7 well-pled; a court is not bound by conclusory statements,
8 statements of law, or unwarranted inferences cast as factual
9 allegations. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-57
10 (2007). "While a complaint attacked by a Rule 12(b)(6) motion to
11 dismiss does not need detailed factual allegations, a plaintiff's
12 obligation to provide the 'grounds' of his 'entitlement to
13 relief' requires more than labels and conclusions, and a
14 formulaic recitation of the elements of a cause of action will
15 not do." Id. at 555 (citations omitted). "In practice, a
16 complaint . . . must contain either direct or inferential
17 allegations respecting all the material elements necessary to
18 sustain recovery under some viable legal theory." Id. at 562
19 (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101,
20 1106 (7th Cir. 1984)).

21 The Court elaborated on the Twombly standard in Ashcroft v.
22 Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009), as follows:

23 To survive a motion to dismiss, a complaint must
24 contain sufficient factual matter, accepted as true, to
25 state a claim to relief that is plausible on its
26 face. . . . A claim has facial plausibility when the
27 plaintiff pleads factual content that allows the court
28 to draw the reasonable inference that the defendant is
liable for the misconduct alleged. . . . Threadbare
recitals of the elements of a cause of action,
supported by mere conclusory statements, do not
suffice.

1 Id. (citations and internal quotation marks omitted.)

2 With these standards in mind, we turn our attention to the
3 proper construction of Barnes' claim for relief under
4 § 523(a)(2)(A). Once we have set out the limits of
5 § 523(a)(2)(A), we then can determine whether Barnes alleged a
6 viable claim for relief under that provision.

7 **DISCUSSION**

8 **A. The correct legal standard regarding whether**
9 **misrepresentations are "statement[s] respecting the**
10 **debtor's . . . financial condition."**

11 Section 523(a)(2)(A) excepts debts from discharge when those
12 debts were incurred by way of "false pretenses, false
13 representation, or actual fraud" But not all fraud leads
14 to nondischargeability. Congress expressly excluded oral
15 "statement[s] respecting the debtor's or an insider's financial
16 condition" from § 523(a)(2)(A)'s coverage. In short, oral
17 misrepresentations regarding financial condition are
18 dischargeable.

19 Had Congress defined the phrase "respecting the
20 debtor's . . . financial condition," we could easily resolve this
21 and many other cases. But it did not, and courts have sharply
22 differed over its proper scope. See Spencer v. Bogdanovich (In
23 re Bogdanovich), 292 F.3d 104, 112-13 (2d Cir. 2002) (listing
24 cases); see also Christopher W. Frost, Nondischargeability Based
25 on Fraud: What Constitutes a "Statement Respecting the Debtor's
26 Financial Condition?", 26 Bankr. L. Ltr. 1, 5 (Issue No. 4 April
27 2006) (stating that courts interpreting the scope of the phrase
28 had divided into two camps, "one adopting a broad construction of
the phrase and one adopting a narrow or strict interpretation.").

1 Those cases adopting a broad interpretation of the phrase have
2 concluded that the phrase includes "any statement that has a
3 bearing on the financial position of the debtor or an insider."
4 Douglas v. Kosinski (In re Kosinski), 424 B.R. 599, 608-09 & n.8
5 (1st Cir. BAP 2010). This includes any statement regarding "the
6 status of a single asset or liability," Joelson, 427 F.3d at 705,
7 as is the case here.

8 Those cases adopting a narrow or strict interpretation have
9 concluded that the phrase includes "only statements providing
10 information as to a debtor's net worth, overall financial health,
11 or an equation of assets and liabilities." In re Kosinski, 424
12 B.R. at 609.

13 The Ninth Circuit Court of Appeals has not expressly stated
14 whether it interprets the controversial phrase broadly or
15 narrowly. However, in at least one decision, it held that a
16 debtor's statement regarding the value of and encumbrances
17 against proposed collateral for a loan was not, by itself, a
18 statement respecting the debtor's financial condition within the
19 meaning of § 523(a)(2)(A): "For present purposes it is enough to
20 point out that the statement we are considering did not purport
21 to set forth the debtors' net worth or overall financial
22 condition, so our analysis must revolve around 11 U.S.C.
23 § 523(a)(2)(A)." In re Kirsh, 973 F.2d at 1457.

24 While Kirsh did not expressly state whether the phrase
25 "statement respecting financial condition" should be interpreted
26 broadly or narrowly in all contexts, it would be difficult if not
27 impossible to reconcile Kirsh's specific holding with a broad
28 interpretation of that phrase. Kirsh used language - "debtors'

1 net worth or overall financial condition" - which closely mirrors
2 the language that the strict interpretation courts have used.
3 Moreover, had Kirsh applied a broad interpretation, it likely
4 would have concluded that the statement regarding the value of
5 and encumbrances against the proposed collateral was a statement
6 respecting the debtor's financial condition, as other broad
7 interpretation courts have concluded, and reached a different
8 result. See, e.g., Engler v. Van Steinburg (In re Van
9 Steinburg), 744 F.2d 1060, 1061 (4th Cir. 1984); Beneficial Nat'l
10 Bank v. Priestley (In re Priestley), 201 B.R. 875, 882 (Bankr. D.
11 Del. 1996).

12 The most recent circuit-level opinion addressing the issue
13 is In re Joelson, 427 F.3d at 700. After considering the
14 language and structure of the Code, the legislative history
15 leading up to the enactment of § 523(a)(2)(A) and (B), and the
16 decisions of other courts, Joelson concluded that the phrase
17 should be interpreted narrowly. Id. at 714. Joelson provides a
18 good analytic framework for analyzing the issues in this case.

19 **1. Contextual Reading of Statute**

20 Joelson initially read § 523(a)(2)(A) in the context of the
21 entire Code. Id. at 706-07. Although admitting, as it had to,
22 that the Code does not define the phrase "respecting the
23 debtor's . . . financial condition," the court observed that §
24 101(32)'s definition of "insolvent" does use the phrase
25 "financial condition," and uses it to describe the overall
26 financial health of the debtor. As Joelson noted, "[t]he Code
27 defines 'insolvent' as, inter alia, the 'financial condition such
28 that the sum of [an] entity's debts is greater than all of such

1 entity's property ... exclusive of [certain types] of property.'" "

2 Id. at 706 (quoting 11 U.S.C. § 101(32)(A)) (emphasis in
3 original). This usage of the "financial condition" phrase
4 provides "tangential support" for a strict interpretation of the
5 phrase "respecting the debtor's . . . financial condition." Id.

6 Joelson's second contextual argument is more to the point.
7 The court noted that the Code treats financial condition
8 misrepresentations very differently depending on whether these
9 representations are oral or written. Id. at 707. As Joelson
10 explained, this difference in treatment makes sense only to the
11 extent Congress meant financial condition misrepresentations to
12 refer to statements about one's overall financial position,
13 rather than to statements about a specific asset or liability:

14 [I]t is logical to give more leeway (and more
15 dischargeability) to a debtor who errs in stating his
16 or her overall position orally, since it is more likely
17 that he or she may have made a mistake inadvertently.
18 It is also logical to give less leeway to a debtor who
19 makes a specific oral misrepresentation as to a
20 particular asset, because it is less likely that such a
21 misrepresentation is inadvertent. By the same token,
22 it is logical to give little leeway (and less
23 dischargeability) under § 523(a)(2)(B) to a debtor who
24 fraudulently misstates his or her overall financial
25 position in writing, since such communications carry an
26 air of formality that their oral counterparts do not
27 and are typically made after more studied
28 consideration.

22 Id.

23 Against this analysis, the court acknowledged that Congress
24 intended § 523(a) to serve as a comprehensive scheme of
25 exceptions to discharge to further the cornerstone policy
26 embodied in the Bankruptcy Code "of affording relief only to the
27 'honest but unfortunate debtor.'" Cohen v. De La Cruz, 523 U.S.
28 213, 217 (1998) (quoting Grogan v. Garner, 498 U.S. 279, 287

1 (1991)). The broad interpretation of the financial condition
2 phrase would expand the types of dishonestly incurred debts that
3 could be discharged, in apparent contrast to the central
4 principal favoring honest debtors.

5 **2. Legislative History**

6 Joelson next examined the legislative history leading up to
7 enactment of § 523(a)(2)(A) and (B), mirroring in many respects
8 the Supreme Court's detailed account of this same history in
9 Field v. Mans, 516 U.S. 59 (1995). Both Field and Joelson
10 explained that the origins of § 523(a)(2)(A) and (B) date back to
11 the turn of the Twentieth Century. Field, 516 U.S. at 64-65;
12 Joelson, 427 F.3d at 707-08. As of 1903, the precursor to
13 § 523(a)(2)(A) provided for the nondischargeability of debts
14 arising from any oral misrepresentation. Field, 516 U.S. at 65-
15 66; Joelson, 427 F.3d at 708.

16 In 1903, Congress added the precursor to § 523(a)(2)(B).
17 This section denied the debtor's discharge as to all of his or
18 her debts to the extent he or she used a materially false written
19 statement to obtain an extension of credit. Field, 516 U.S. at
20 65; Joelson, 427 F.3d at 708. Notably, neither the debtor's
21 deceptive intent nor the creditor's reliance were prerequisites
22 to the denial of the debtor's discharge under this provision.
23 Field, 516 U.S. at 65.

24 By 1960, it became apparent to Congress that some creditors
25 were abusing the existing system by reaping a windfall at the
26 expense of the debtor and other creditors. Joelson, 427 F.3d at
27 708. These creditors were encouraging or otherwise inducing
28 their borrowing clientele to issue less than complete and

1 accurate financial statements, thereby effectively enabling those
2 creditors to render amounts owed to them bankruptcy-proof; such
3 creditors later could coerce payment notwithstanding the filing
4 of a bankruptcy by using previously-submitted inaccurate
5 financial statements to raise the specter of the complete denial
6 of the debtor's discharge. Id. Accordingly, in 1960 Congress
7 amended the Bankruptcy Act to combine the precursor to
8 § 523(a)(2)(B) with the precursor to § 523(a)(2)(A). Field, 516
9 U.S. at 66 n.6; Joelson, 427 F.3d at 708.

10 To this combination Congress added intent and reliance
11 requirements. Field, 516 U.S. at 66 n.6; Joelson, 427 F.3d at
12 708.⁷ As noted in Field:

13 Thus, as of 1960 the relevant portion of § 17(a)(2)
14 provided that discharge would not release a bankrupt
from debts that

15 are liabilities for obtaining money or
16 property by false pretenses or false
17 representations, or for obtaining money or
18 property on credit or obtaining an extension
19 or renewal of credit in reliance upon a
20 materially false statement in writing
respecting [the bankrupt's] financial
condition made or published or caused to be
made or published in any manner whatsoever
with intent to deceive.

21 Field, 516 U.S. at 66 n.6 (quoting Act of July 12, 1960, Pub.L.
22 86-621, 74 Stat. 409) (emphasis added).

23 The 1960 amendments did not provide for any divergent
24

25 ⁷As one commentator stated, "[t]his history of increasing
26 limits placed on nondischargeability based on false statements
27 respecting the debtor's financial condition indicates
28 congressional intent to narrow the reach of Section
523(a)(2)(B)." Frost, supra, at 5. The broad interpretation, of
course, accomplishes the exact opposite result by bringing more
misrepresentations within the ambit of § 523(a)(2)(B).

1 treatment of debts incurred through the use of false oral
2 statements concerning a debtor's financial condition.
3 Furthermore, the legislative history accompanying the 1960
4 amendments made reasonably clear that the new phrase "materially
5 false statement in writing respecting [the bankrupt's] financial
6 condition" was meant to refer to formal written financial
7 statements, by its repeated reference to "financial statements"
8 when describing the purpose and effect of the revised statute.
9 See Joelson, 427 F.3d at 708-09. Indeed, in reviewing this same
10 legislative history, Field used interchangeably the phrases
11 "financial statements," "written statement[s] of financial
12 condition" and "statement[s] in writing respecting [the
13 bankrupt's] financial condition" thereby suggesting that it
14 viewed the meaning of these phrases as at least roughly
15 synonymous. Field, 516 U.S. at 65-66.

16 The legislative history of the 1978 Code is silent on why
17 the new statute expressly excepted oral statements respecting the
18 debtor's financial condition from coverage under § 523(a)(2)(A).
19 But as Joelson pointed out, this same legislative history
20 reflected a general intent to maintain existing law, see Joelson,
21 427 F.3d at 709, and not exempt a significant class of
22 misrepresentations from the Code's scheme of nondischargeable
23 debts. Id.

24 [T]here is no indication in the legislative history
25 that Congress intended to remove from the coverage of
26 § 523(a)(2)(A) any of the debts based on oral
27 misrepresentations going to financial condition that
28 had been within the coverage of that provision's
predecessors.

Id.

1 The Revision Notes accompanying the 1978 enactment of the
2 Bankruptcy Code support Joelson's account of the legislative
3 history. Those Revision Notes state that § 523(a)(2) "is
4 modified only slightly from current section 17(a)(2)." H.R. Rep.
5 No. 95-595, at 364 (1977). The Revision Notes describe both the
6 general coverage of § 523(a)(2) and the substantive changes from
7 prior § 17(a)(2), and neither of those descriptions mention
8 anything about § 523(a)(2)(A)'s new exception from coverage. In
9 short, it would have been exceedingly odd for Congress to have
10 made a significant change in the substantive law's coverage
11 without even mentioning it in this context.

12 **3. Existing Case Law**

13 After making the same observations about Field as we make
14 above, Joelson discussed the decisions of other courts that have
15 chosen between the broad and narrow interpretation of the phrase
16 "statement respecting the debtor's . . . financial condition."
17 Joelson, 427 F.3d at 710-14; see also Skull Valley Band of
18 Goshute Indians v. Chivers (In re Chivers), 275 B.R. 606, 614
19 (Bankr. D. Utah 2002); Weiss v. Alicea (In re Alicea), 230 B.R.
20 492, 502-04 (Bankr. S.D.N.Y. 1999).

21 On the opposing side, the seminal decision opting for the
22 broad approach is In re Van Steinburg, 744 F.2d at 1060-1061.
23 Van Steinburg is very short, and so we easily can quote the full
24 extent of its reasoning:

25 Concededly, a statement that one's assets are not
26 encumbered is not a formal financial statement in the
27 ordinary usage of that phrase. But Congress did not
28 speak in terms of financial statements. Instead it
referred to a much broader class of statements - those
"respecting the debtor's . . . financial condition." A
debtor's assertion that he owns certain property free

1 and clear of other liens is a statement respecting his
2 financial condition. Indeed, whether his assets are
3 encumbered may be the most significant information
4 about his financial condition. Consequently, the
5 statement must be in writing to bar the debtor's
6 discharge.

7 Id. at 1061.

8 In our view, Van Steinberg and its progeny base their
9 decision on an oversimplified version of plain-meaning analysis.
10 Without considering the relationship of the phrase in question to
11 the contextual statutory scheme or the logical impact of their
12 broad interpretation on that scheme, they improperly emphasize
13 one meaning of the words to the exclusion of all other
14 considerations. See Corley v. United States, 129 S.Ct. 1558, 1567
15 n.5 (2009).⁸

16 Based on the foregoing analysis, we hold that the phrase
17 "statement respecting the debtor's . . . financial condition"
18 should be narrowly interpreted. We agree with Joelson's
19 conclusion that such statements "are those that purport to
20 present a picture of the debtor's overall financial health."

21 ⁸ We acknowledge that some courts have rejected Joelson's
22 approach in favor of Van Steinberg's. See, e.g., Jacobs v. Versa
23 Corp. (In re Jacobs), 2011 WL 5313825, at ** 4-5 (Bankr. E.D.
24 Mich. 2011); Material Prods. Int'l, Ltd. v. Ortiz (In re Ortiz),
25 441 B.R. 73, 82-83 (Bankr. W.D. Tex. 2010). However, Van
26 Steinberg and its progeny collectively bring into focus another
27 concern that we have with the broad interpretation: that is, it
28 is difficult to conceive of any false representation regarding an
asset or a particular financial condition that could justifiably
induce "an extension, renewal or refinancing of credit" that
would not also be a "statement respecting the debtor's . . .
financial condition" under the broad interpretation. And yet the
plain language of § 523(a)(2) contemplates on its face the
existence of such representations, even if the broad
interpretation renders them all but inconceivable.

1 Joelson, 427 F.3d at 714. As Joelson put it:

2 Statements that present a picture of a debtor's overall
3 financial health include those analogous to balance
4 sheets, income statements, statements of changes in
5 overall financial position, or income and debt
6 statements that present the debtor or insider's net
7 worth, overall financial health, or equation of assets
8 and liabilities. . . . What is important is not the
9 formality of the statement, but the information
10 contained within it - information as to the debtor's or
11 insider's overall net worth or overall income flow.

12 Id.⁹

13 In this appeal, the bankruptcy court never expressly stated
14 whether it was applying a broad or narrow interpretation of the
15 financial condition phrase. Nonetheless, the court's rulings
16 granting all three of Belice's motions to dismiss, as described
17 in the court's last order, are inconsistent with a narrow
18 interpretation of the financial condition phrase. Moreover, the
19 court's comments at the hearing on Belice's last motion to
20 dismiss suggest that the court declined to follow Joelson.
21 Shortly after Barnes argued that the court should follow both

22 ⁹ Two of our prior opinions, In re Barrack, 217 B.R. at
23 598; and Medley v. Ellis (In re Medley), 214 B.R. 607 (9th Cir.
24 BAP 1997), involved the issue of whether certain alleged
25 misrepresentations qualified as statements respecting the
26 debtor's financial condition within the meaning of § 523(a)(2)(A)
27 and (B). But neither opinion decided the issue. Barrack
28 accepted without any review the bankruptcy court's determination
that the statements therein were "respecting the debtor's . . .
financial condition" because the appellant did not challenge that
determination on appeal. In re Barrack, 217 B.R. at 605.
Meanwhile, in Medley, we acknowledged the controversy over the
broad versus the narrow interpretation of the phrase "respecting
the debtor's . . . financial condition," but we explained that we
did not need to decide which interpretation to apply because at
least some of the debtor's alleged misrepresentations would have
qualified under either interpretation. In re Medley, 214 B.R. at
612.

1 Kirsh and Joelson, the following colloquy took place:

2 The Court: I understand what you want to do. I
3 understand how frustrating it is when you borrow money
4 from somebody and they don't pay it back; and they said
5 all these great things are going to happen. But
6 they've got to fit within the four corners of the
7 statute. And Congress wrote those intentionally.

8 And I'm just afraid that the facts, at least after
9 the second try, just don't support where you want to
10 go.

11 Ms. Crothall: I understand. I just -- I -- our
12 contentions, I believe, fall squarely under the Joelson
13 case in the 10th Circuit, your honor. And I've made my
14 argument.

15 * * *

16 The Court: Motion to dismiss will be granted.

17 Hr'g Tr. (Sept. 13, 2010) at 8:21-9:9.

18 The bankruptcy court thus rejected Joelson and implicitly
19 adopted the broad interpretation of the phrase "respecting the
20 debtor's . . . financial condition." The bankruptcy court erred
21 in doing so.

22 **B. Under the narrow interpretation, Belice's alleged
23 misrepresentations do not qualify as "statement[s] respecting the
24 debtor's . . . financial condition."**

25 Even though we have concluded that the bankruptcy court
26 applied the incorrect legal standard, we nonetheless could affirm
27 its order if Belice's alleged misrepresentations qualified as
28 statements respecting the debtor's financial condition under the
proper legal standard. See generally Johnson, 534 F.3d at 1121
(holding that appellate court can affirm the trial court on any
basis supported by the record); Leavitt v. Soto (In re Leavitt),
171 F.3d 1219, 1223 (9th Cir. 1999) (same).

 But Belice's misrepresentations do not qualify as financial
condition statements. Barnes alleged in his Complaint that

1 Belice had made the following misrepresentations:

- 2 a) Debtor's monthly salary as an attorney . . . was
3 \$30,000;
- 4 b) Debtor had made a \$100,000 profit on the sale of his
5 La Jolla residence in 2007;
- 6 c) Debtor was paying \$7,000 per month in rent which he
7 could well afford;
- 8 d) Debtor was a San Diego Charger[sic] season ticket
9 holder;
- 10 e) Debtor had purchased a \$28,000 diamond engagement
11 ring in July 2007;
- 12 f) Debtor voluntarily left [his law firm] in late 2007
13 because of more lucrative income in the luxury
14 transportation sector (helicopter and jet service) and
15 his involvement with a computer systems company;
- 16 g) The security for Plaintiff's loan would be a partial
17 ownership interest in the BELICE-MEHTA PARTNERSHIP, an
18 investor in an entertainment establishment in Macau,
19 called the Monkey Bar;
- 20 h) The Monkey Bar was extremely successful, would
21 likely be sold to the Sands Casino company in 2008, and
22 would provide the Debtor with yet another revenue
23 source; and
- 24 i) Debtor's interest in the BELICE-MEHTA PARTNERSHIP
25 was worth far more than the loan from the Plaintiff to
26 the Debtor.

27 Statements a, b, c and f relate to Belice's income and
28 expenses, but they simply cannot be conceived as akin to any sort
of complete or comprehensive statement of income and expenses.
While these alleged misrepresentations reflect some aspects of
Belice's historical income and expenses, they do not either
separately or when taken together reflect his overall cash flow
situation, his overall income and expenses, or the relative
values and amounts of his assets and liabilities. Cf. Joelson,
427 F.3d at 715 ("a statement about one part of Joelson's income

1 flow . . . does not reflect Joelson's overall financial
2 health.").

3 Statements d, e, g, h and i relate to a handful of Belice's
4 assets, but they do not reveal anything meaningful or
5 comprehensive about his overall net worth. These statements do
6 not purport to reflect all of Belice's assets, and they tell us
7 nothing regarding his liabilities or any liens against any of his
8 property. Cf. Id. at 714-15 (holding that statements regarding
9 some of the assets that Joelson claimed to own did not constitute
10 "a statement as to Joelson's overall financial health analogous
11 to a balance sheet, income statement, statement of changes in
12 financial position, or income and debt statement.").

13 Accordingly, under our interpretation of the financial
14 condition phrase, Belice's alleged misrepresentations do not
15 amount to a statement respecting his financial condition. At
16 most, they are isolated representations regarding various items
17 that might ultimately be included as assets in a balance sheet or
18 in a statement of net worth. The bankruptcy court thus erred
19 when it ruled that Barnes had not stated and could not state a
20 claim for relief under § 523(a)(2)(A), and we must reverse.

21 **C. Fraudulent Omission**

22 In addition to Belice's affirmative representations, Barnes
23 argued that Belice committed fraud by failing to disclose a
24 significant liability. In particular, Barnes vigorously argues
25 on appeal that, contrary to the bankruptcy court's ruling,
26 Belice's alleged failure to disclose the \$530,000 Running Horse
27 Liability was an actionable fraudulent omission.

28

1 A claim for relief based on a fraudulent omission must
2 allege facts that, if proven, demonstrate that the defendant had
3 a duty to disclose the omitted information. See Citibank (South
4 Dakota), N.A. v. Eashai (In re Eashai), 87 F.3d 1082, 1089 (9th
5 Cir. 1996) (stating that an omission can be fraudulent and
6 actionable under § 523(a)(2)(A) when the debtor had a duty to
7 disclose the omitted facts).

8 Section 551 of the Restatement (Second) of Torts provides in
9 relevant part:

10 (2) One party to a business transaction is under a duty
11 to exercise reasonable care to disclose to the other
before the transaction is consummated,

12 * * *

13 (b) matters known to him that he knows to be
14 necessary to prevent his partial or ambiguous
statement of the facts from being misleading;

15

16 Id.¹⁰ The comments accompanying Restatement § 551 explain the

17
18 ¹⁰ We ordinarily look to the Restatement (Second) of Torts
19 for guidance in determining what constitutes a fraudulent
20 nondisclosure for purposes of § 523(a)(2)(A). See Apte v. Romesh
21 Japra, M.D., F.A.C.C., Inc. (In re Apte), 96 F.3d 1319, 1324 (9th
Cir. 1996); Tallant v. Kaufman (In re Tallant), 218 B.R. 58,
64-65 (9th Cir. BAP 1998) (citing Field, 516 U.S. at 68-70).

22 The Restatement (Second) of Contracts also is instructive
23 when, as here, the alleged misrepresentation arises in the
context of contractual relations. The Restatement (Second) of
Contracts provides in relevant part:

24 A person's non-disclosure of a fact known to him is
25 equivalent to an assertion that the fact does not exist
26 in the following cases only:

* * *

27 (b) where he knows that disclosure of the fact
28 would correct a mistake of the other party as to a

(continued...)

1 meaning of clause (b) as follows: “[a] statement that is partial
2 or incomplete may be a misrepresentation because it is
3 misleading, when it purports to tell the whole truth and does
4 not.” Id. at cmt. g (emphasis added).

5 Barnes’ brief did not cite to any duty to disclose the
6 Running Horse Liability. Barnes’ attorney could not point us to
7 one when asked at oral argument. Without any such duty to
8 disclose, no implied representation can be found in Belice’s
9 silence. Without a false representation, there can be no fraud.
10 The bankruptcy court was correct to accept Belice’s argument on
11 this point.

12 **CONCLUSION**

13 For all of the foregoing reasons, the bankruptcy court’s
14 order is REVERSED. This matter shall be REMANDED for further
15 proceedings consistent with this opinion.

24 ¹⁰(...continued)

25 basic assumption on which that party is making the
26 contract and if non-disclosure of the fact amounts to a
27 failure to act in good faith and in accordance with
reasonable standards of fair dealing.

28 Restatement (Second) of Contracts § 161 (1981).