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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No	SC-07-1278-MkDoK
)		
7	THOMAS R. BEATY and)	Bk. No.	91-10342-A7
	NANCY Z. BEATY,)		
8)	Adv. No.	05-90432-A7
	Debtors.)		
9)		
10	DAVID SELINGER,)		
)		
11	Appellant,)		
)		
12	v.)	MEMORANDUM¹	
)		
13	THOMAS R. BEATY; NANCY Z.)		
	BEATY; MICHAEL E. STERES,)		
14)		
	Appellees.)		
15)		

Argued and Submitted on January 23, 2008
at San Diego, California

Filed - February 12, 2008

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

Hon. Louise DeCarl Adler, Bankruptcy Judge, Presiding

Before: MARKELL, DONOVAN² and KLEIN, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP R. 8013-1.

² Hon. Thomas B. Donovan, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 This appeal is a continuation of a sixteen year odyssey. In
2 2005, David Selinger ("Selinger") filed a complaint in bankruptcy
3 court for abuse of process under § 105(a)³ against debtors Thomas
4 R. Beaty ("Thomas") and Nancy Z. Beaty ("Nancy") (collectively the
5 "Beatys"). The complaint also sought relief against Michael E.
6 Steres ("Steres"), the Beatys' legal counsel.

7 The background of Selinger's complaint is long and tortuous.
8 Selinger was an unsecured creditor in the Beatys' 1991 chapter 7
9 case; at the same time, Selinger had sued, but not served, Thomas
10 in state court. The Beatys thereafter received their discharge,
11 and Selinger named Thomas and obtained a default judgment against
12 him, all without either knowing of the other.

13 After much litigation, which we detail below, Selinger was
14 able to have his state court default judgment for \$5,000 declared
15 nondischargeable. His effort to prove-up and add about \$15,000 in
16 punitive damages to this award, however, stalled, again for complex
17 and sundry reasons we detail below. His abuse of process lawsuit,
18 which leads to this appeal, sought damages for the loss of
19 opportunity to prove up punitive damages in his state court case.

20 On the Beatys' and Steres' motion for summary judgment, and
21 Selinger's motion to strike, the bankruptcy court found sua sponte
22 that it lacked subject matter jurisdiction over the entire action.

24 ³ Unless otherwise indicated, all chapter, section, and
25 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330
26 as enacted and promulgated prior to the effective date (October
27 17, 2005) of the relevant provisions of the Bankruptcy Abuse
28 Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.
L. 109-8, 119 Stat. 23 (2005), and to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9037.

1 It therefore ruled that the § 105(a) claim failed as a matter of
2 law. Alternatively, the court found that even if it had subject
3 matter jurisdiction, the applicable statute of limitations for
4 abuse of process had run. Selinger appeals this order and a number
5 of other related orders as well.

6 For reasons detailed below, the bankruptcy court's order is
7 AFFIRMED.

8 I. FACTS

9 Procedural History

10 The parties' peregrinations began in 1991, when Selinger filed
11 a "Complaint for Breach of Duty to Exercise Reasonable Care,
12 Negligence, Assumption of Premises Liability and Fraudulent
13 Concealment with Malice against Saraston Development Company and
14 Does 1-50" in California municipal court ("State Court Action").⁴
15 Unrelated to this lawsuit, on September 12, 1991, the Beatys had
16 filed a petition for bankruptcy relief under chapter 7⁵; they
17 received their discharge in January 1992. Neither Selinger nor the
18 Beatys knew about the others' cases when they filed their own.

19 Two months after the Beatys received their bankruptcy
20 discharge, Selinger substituted Thomas for one of the doe
21 defendants in the State Court Action. On May 18, 1992, after
22 learning of the substitution, the Beatys' bankruptcy attorney,
23 Steres, sent Selinger a letter demanding Selinger dismiss Thomas.
24 Selinger admits receiving the letter but ignored it and continued
25 to prosecute his claim.

26
27 ⁴ Case No. 112878.

28 ⁵ Bankruptcy Case No. 91-10342.

1 On June 10, 1993, Selinger obtained a default judgment against
2 Thomas in the State Court Action. Compensatory damages of \$5,000
3 were awarded, with the court reserving the determination of
4 punitive damages until later. Soon thereafter, Steres served
5 Selinger with a "Notice of Injunction Against Further Proceedings,"
6 to which was attached a copy of the Beatys' discharge ("Notice of
7 Injunction"). The Notice of Injunction was invalid and inaccurate,
8 but Selinger has claimed he was "bamboozled" by its tone and by the
9 fact it incorporated an official document. Indeed, he claims that
10 because of it, he ceased prosecuting his state court proceedings.

11 In August 1994, Selinger filed a pro se adversary proceeding
12 seeking to revoke the Beatys' discharge under 11 U.S.C. § 727.⁶ In
13 June 1995, the bankruptcy court granted summary judgment to the
14 Beatys in that action. It later denied Selinger's motion for
15 reconsideration. The district court affirmed the bankruptcy
16 court's dismissal in April 1997.

17 Undeterred, on April 24, 1998, Selinger filed a non-
18 dischargeability action in bankruptcy court against Thomas. He
19 alleged that his state court default judgment was nondischargeable
20 under §§ 523(a)(2), (4), and (6) ("523 Action").⁷ He also sought
21 a modification of the discharge to allow him to continue to
22 prosecute the State Court Action in order to obtain a determination
23 of punitive damages. In September 1998, the bankruptcy court
24
25
26

27 ⁶ Adversary No. 94-90619.

28 ⁷ Adversary No. 98-90205.

1 dismissed the 523 Action. In December 1999, the BAP reversed and
2 remanded.⁸

3 After remand, Thomas answered, but moved for summary judgment
4 based on laches. Selinger counter-moved for summary judgment based
5 on issue preclusion, and also moved to strike portions of Thomas'
6 answer. The bankruptcy court granted Thomas' motion, denied
7 Selinger's motions, and dismissed Selinger's complaint with
8 prejudice.

9 Selinger again appealed to the BAP, which reversed in part and
10 remanded in a published opinion. Beaty v. Selinger (In re Beaty),
11 268 B.R. 839 (9th Cir. BAP 2001), aff'd, Beaty v. Selinger, 306
12 F.3d 914 (9th Cir. 2002). The majority of the panel held that
13 laches could never apply to a § 523(a)(3)(B) action. Id. at 846.
14 One panel member wrote separately that there was a role for the
15 laches defense. Id. at 849 (Klein, J., concurring). Thomas
16 appealed to the 9th Circuit.

17 In May 2002, while the 523 Action was still pending at the
18 Ninth Circuit, Selinger renewed his attempt to obtain an award of
19 punitive damages in state court. The state court, however, denied
20 his claim as no longer viable because the judge in the case had
21 previously retired. There is nothing in the record to indicate
22 Selinger appealed the state court's denial, or that he moved to
23 reopen his default judgment to have compensatory and punitive
24 damages heard anew and together.

25 Thereafter, the Ninth Circuit affirmed the BAP, on the
26 reasoning stated in the BAP's concurring opinion. Beaty v.

27

28 ⁸ BAP Case No. SC-98-1657.

1 Selinger, 306 F.3d 914, 923-26 (9th Cir. 2002). On February 21,
2 2003, following the Ninth Circuit's decision, Selinger filed a
3 motion in bankruptcy court for summary judgment for non-
4 dischargeability of the compensatory damages granted in the State
5 Court Action. In May 2003, the bankruptcy court ruled the default
6 judgment was non-dischargeable, at least as to its award of
7 compensatory damages ("Non-Dischargeability Summary Judgment"). It
8 left punitive damages to the state court. In August 2003, Thomas
9 appealed this decision to BAP, but voluntarily dismissed the case
10 in December 2003.⁹

11 Present Appeal

12 The adversary proceeding that leads to this appeal began on
13 September 29, 2005. On that day, Selinger filed an "Adversary
14 Complaint for Equitable Relief and to Recover Money" in bankruptcy
15 court ("Abuse of Process Complaint"). The complaint was filed as
16 an equitable proceeding but sought to recover money damages from
17 the Beatys and Steres under § 105(a) for abuse of process. The
18 abuse of process claimed was interference with Selinger's conduct
19 of the State Court Action.

20 On October 27, 2005, the Beatys and Steres answered
21 separately, each asserting affirmative defenses, and each including
22 a statute of limitation defense. Selinger moved to strike the
23 Beatys' affirmative defenses and moved to strike portions of
24 Steres' answer. A hearing was held on both motions on January 12,
25 2006. A minute order of even date, addressing both motions, denied
26 the motion to strike the Beatys' affirmative defenses ("Minute
27

28 ⁹ BAP Case No. SC-03-1419.

1 Order re: Motions to Strike"). An order denying the motion to
2 strike the Beatys' answer was entered on January 24, 2006 ("Order
3 re: Motion to Strike Beatys' Answer"). An order granting the
4 motion to strike certain portions of Steres' answer and denying the
5 motion as to the affirmative defenses was entered on March 28, 2006
6 ("Order re: Motion to Strike Steres' Answer").

7 Selinger also moved to amend his complaint. He wanted to add
8 facts and allegations of prior bank fraud and other fraud judgments
9 against Thomas, ulterior motives for abuse by the Beatys,
10 conspiracy between Steres and the Beatys, and malice. In a minute
11 order dated October 5, 2006, the bankruptcy court denied the motion
12 ("Minute Order re: Motion to Amend"). It held that the requested
13 additions were unnecessary because an action of abuse of process
14 necessarily includes as essential elements malice and ulterior
15 purpose. Therefore, all allegations were within the scope of the
16 complaint without precise facts being specifically alleged.

17 On January 29, 2007, Selinger filed a motion for summary
18 judgment against Nancy only. Nancy opposed. As a further
19 response, the Beatys moved for summary judgment asserting various
20 affirmative defenses, including that Selinger's action was barred
21 by California's two-year tort statute of limitations. Steres filed
22 a joinder in the Beatys' motion. (Selinger's, Beatys', and Steres'
23 motions are collectively referred to as the "Cross Motions").

24 Before the scheduled hearing on the Cross Motions, the
25 bankruptcy court posted its tentative decision dated March 29,
26 2007, containing specific case law in support of its proposed
27 decision ("Minute Order re: Cross Motions"). This tentative
28 decision found that the court lacked subject matter jurisdiction.

1 Alternatively, the bankruptcy court ruled Selinger's claim was
2 time-barred. After the hearing, on April 26, 2007, the court
3 entered an order on the Cross Motions in favor of the Beatys and
4 Steres. A separately entered judgment, of even date, dismissed the
5 case ("Judgment Dismissing Cross Motions Case").

6 Selinger then filed a motion to Alter or Amend the Judgment
7 pursuant to Rule 9023. Selinger essentially sought reversal of the
8 order on the Cross Motions on the same grounds on which he now
9 appeals. In a minute order dated June 21, 2007, the bankruptcy
10 court denied the motion as a "poorly-disguised motion for
11 reconsideration" ("Minute Order re: Motion to Amend Judgment").
12 The court's order was entered on July 2, 2007 ("Order Denying
13 Motion to Amend Judgment").

14 Selinger appeals each of the orders and the judgment related
15 to the Abuse of Process Complaint. These include the:

- 16 • Minute Order re: Motions to Strike;
- 17 • Order re: Motion to Strike Steres' Answer¹⁰;
- 18 • Order re: Motion to Amend;
- 19 • Minute Order re: Cross Motions;
- 20 • Order on Cross Motions;

21
22 ¹⁰ Selinger appeals what at first appears to be an
23 inconsistency between these orders. The minute order references
24 line numbers 22-28 of paragraph 6, while the order references
25 line numbers 22-27. The minute order includes a statement that
26 the "[t]entative ruling is altered as stated in open court." At
27 hearing, the bankruptcy court made clear what was to be stricken.
28 In any case, the inconsistency is irrelevant because line 28 is
blank.

27 Selinger also appeals the ruling stated in the minute order
28 that "[a]ll of the defendants' defenses have substantial legal
and factual merit."

- 1 • Judgment Dismissing Cross Motions Case;
2 • Minute Order re: Motion to Amend; and
3 • Order Denying Motion to Amend the Judgment.¹¹

4 (collectively the "Orders").

5 Lastly, Selinger seeks recusal on remand of the Hon. Louise
6 DeCarl Adler.

7 **II. JURISDICTION**

8 The bankruptcy court's jurisdiction is at issue in this appeal
9 and will be discussed below. We have jurisdiction pursuant to 28
10 U.S.C. §§ 158(a)(1) and (c)(1).

11 **III. ISSUES**

12 1) Whether the bankruptcy court had subject matter
13 jurisdiction over the tort claim for abuse of process to recover
14 monetary damages for post-discharge abusive conduct, which
15 allegedly occurred in the State Court Action.

16 2) If the court did have subject matter jurisdiction, whether
17 the bankruptcy court erred in ruling on the Cross Motions against
18 Selinger that the statute of limitations had run on his complaint
19 for compensatory damages.

20 **IV. STANDARDS OF REVIEW**

21 "This court reviews the bankruptcy court's conclusions of law
22 and questions of statutory interpretation de novo, and factual
23 findings for clear error." Village Nurseries v. Gould (In re
24 Baldwin Builders), 232 B.R. 406, 410 (9th Cir. BAP 1999) (citations
25 omitted).

27 ¹¹ Selinger asserts only that he has not received a notice
28 of this judgment by mail.

1 We review the existence of subject-matter jurisdiction and the
2 scope of the court's power to act under 11 U.S.C. § 105 de novo.
3 Johnson v. TRE Holdings, LLC (In re Johnson), 346 B.R. 190, 193
4 (9th Cir. BAP 2006).

5 V. DISCUSSION

6 The court's Order on Cross Motions subsumes the issues raised
7 by the other orders on appeal and is dispositive. Its rulings that
8 the court lacked subject matter jurisdiction or alternatively that
9 Selinger's complaint was barred by the statute of limitations are
10 thus examined in turn.

11 1. Subject Matter Jurisdiction

12 The bankruptcy court is "required to consider the presence or
13 absence of subject matter jurisdiction sua sponte." Moldo v. Ash
14 (In re Thomas), 428 F.3d 1266, 1268 (9th Cir. 2005). Here, though
15 neither party raised the issue, the bankruptcy court held that it
16 lacked subject matter jurisdiction.

17 The bankruptcy court's subject matter jurisdiction arises on
18 referral under 28 U.S.C. § 157(a)¹² from the district court, which
19 has original and exclusive jurisdiction of all cases that arise
20 under Title 11, pursuant to 28 U.S.C. § 1334.¹³ "The 'case'
21 referred to in 28 U.S.C. § 1334 is the umbrella under which all of
22

23 ¹² 28 U.S.C. § 157(a) provides:

24 Each district court may provide that any or all cases
25 under title 11 and any or all proceedings arising under
26 title 11 or arising in or related to a case under title
27 11 shall be referred to the bankruptcy judges for the
district.

28 ¹³ 28 U.S.C. § 1334(a) provides:

Except as provided in subsection (b) of this section,
the district courts shall have original and exclusive
jurisdiction of all cases under title 11.

1 the proceedings that follow the filing of a bankruptcy petition
2 take place.” 1 COLLIER ON BANKRUPTCY ¶ 3.01[3] (15th ed. 2007). It
3 includes all manner of proceedings from the filing of the petition
4 until the case is closed that occur as the case unfolds in
5 bankruptcy court. Id.

6 Exclusive jurisdiction exists over “core” proceedings. Huse
7 v. Huse-Sporsen, A.S. (In re Birting Fisheries, Inc.), 300 B.R.
8 489, 499 (9th Cir. BAP 2003) A “core proceeding is one that
9 invokes a substantive right provided by title 11 or . . . a
10 proceeding that, by its nature, could arise only in the context of
11 a bankruptcy case.” Id. (internal quotations omitted).

12 Selinger asserts that because he filed his adversary
13 proceeding under the guise of § 105(a), it is a “core” proceeding
14 and therefore that the bankruptcy court had jurisdiction. It is
15 not, however, a core proceeding. While, actions relating to
16 dischargeability are core proceedings, 28 U.S.C. § 157(b)(2)(I),
17 Selinger’s action is a new tort action for money damages based upon
18 post-discharge activities. It is not related to the prior Non-
19 Dischargeability Summary Judgment. It neither invokes a
20 substantive right provided by Title 11, nor by its nature, does it
21 arise only in the context of a bankruptcy case. Therefore, it is
22 not a core proceeding for which the bankruptcy court has subject
23 matter jurisdiction.

24 Further, § 105

25 does not confer subject matter jurisdiction.
26 “Subject matter jurisdiction and power are
27 separate prerequisites to the court’s capacity
28 to act. Subject matter jurisdiction is the
court’s authority to entertain an action
between the parties before it. Power under
section 105 is the scope and forms of relief

1 the court may order in an action in which it
2 has jurisdiction."

3 Birting, 300 B.R. at 497 (internal citations omitted). In this
4 instance, the bankruptcy court has neither the jurisdiction nor
5 the power to grant the relief requested.

6 A bankruptcy court has subject matter jurisdiction if the
7 action "could conceivably have any effect on the administration of
8 the bankruptcy estate." Solidus Networks, Inc. v. Excel
9 Innovations, Inc. (In re Excel Innovations, Inc.), 502 F.3d 1086,
10 1096 (9th Cir. 2007).

11 Although the bankruptcy court stated no reasoning for its
12 view that it lacked subject matter jurisdiction, it did state a
13 standard for a limitation on its equitable powers under § 105(a).
14 It stated that its "equitable powers are limited to correcting
15 abuses of process which occur during . . . and within the
16 bankruptcy case."

17 Selinger uses this phrase as proxy for the bankruptcy court's
18 standard for subject matter jurisdiction. He argues that the
19 purported abuse of process, service of the Notice of Injunction,
20 occurred before the bankruptcy case was closed in April 1995, and
21 therefore occurred "during" the case. Citing to In re Hicks, 184
22 B.R. 954 (Bankr. C.D. Cal. 1995), he argues that by virtue of his
23 status as an omitted creditor, the state had concurrent
24 jurisdiction to determine dischargability of the default judgment.
25 He reasons that the concurrent jurisdiction brought the purported
26 abuse "within" the bankruptcy case. Selinger, however, provides
27 no citation for authority to support this leap of logic.

1 Selinger then argues that the bankruptcy court has
2 jurisdiction whether or not the abuse occurred during and within
3 the bankruptcy case. In Hicks there was an abuse of discharge by
4 an omitted creditor from which the chapter 7 debtor sought relief.
5 The court did conclude that a debtor was penalized for omitting
6 creditors by the loss of exclusive federal jurisdiction to
7 determine dischargeability under § 523(a)(3)(B). Hicks at 962.
8 But Hicks says little or nothing about actions beyond the standard
9 nondischargeability action. Selinger ignores this and seems to
10 carry Hicks to a conclusion, however, that confuses two different
11 concepts; abuse of process and abuse of discharge.

12 In short, Selinger apparently believes that a debtor can
13 abuse his own discharge. He seems to equate the claimed abuse of
14 process to an abuse of discharge. Viewing the abuse of discharge
15 as committed by a debtor, Selinger foresees an open door to
16 debtors to abuse creditors after a case is closed if the court
17 does not have jurisdiction in such matters.

18 But here the claimed abuse is not an abuse of discharge,
19 which is committed by a creditor, but an abuse of process by the
20 debtor. The abuse, if any, was service of the Notice of
21 Injunction. The harm alleged is not linked to any specific
22 Bankruptcy Code section. Neither does it have an effect on the
23 discharge, the bankruptcy estate, creditors, or on any other
24 administration of the bankruptcy case. Therefore, under Solidus,
25 the bankruptcy court did not have subject matter jurisdiction.¹⁴

27 ¹⁴ The fact that the bankruptcy court did not state a
28 standard for subject matter jurisdiction is not reversible error;
we may affirm on any basis reasonably found in the record.
California Self-Insurers' Security Fund v. Official Comm. of
Unsecured Creditors (In re Lorber Indus. of Cal.), 373 B.R. 663,
670 (9th Cir. BAP 2007).

1 Separate from the jurisdiction question, the bankruptcy court
2 also found that it did not have the power to grant the remedy
3 sought under § 105. Section 105(a) provides that “[t]he court may
4 issue any order, process, or judgment that is necessary or
5 appropriate to carry out the provisions of this title.”

6 The court’s power is not, as Selinger declares it to be, an
7 unlimited power. 2 COLLIER ON BANKRUPTCY ¶ 105.01[2] (15th ed. 2007).
8 “It should be universally recognized that the power granted to the
9 bankruptcy courts under § 105 is not boundless and should not be
10 employed as a panacea for all ills confronted in the bankruptcy
11 case.” Id. “[Section] 105 is not a roving commission to do
12 equity.” Yadidi v. Herzlich (In re Yadidi), 274 B.R. 843, 848
13 (9th Cir. BAP 2002). Accord Saxman v. Educ. Credit Mgmt. Corp.
14 (In re Saxman), 325 F.3d 1168, 1175 (9th Cir. 2003). For the
15 court to exercise its powers to dispense an equitable remedy under
16 § 105, the remedy must be linked to an identifiable right
17 conferred under the code. Myrvang v. Myrvang (In re Myrvang), 232
18 F.2d 1116, 1125 (9th Cir. 2000).

19 Yet even as Selinger claims the court has the power to grant
20 the relief requested, his claim is not for equitable relief. He
21 characterizes his claim as one for equitable relief to recover
22 money damages pursuant to § 105(a). But an equitable remedy is
23 available only when there is no adequate remedy at law, such as an
24 award of damages. See BLACKS LAW DICTIONARY 1320 (8th ed. 2004).
25 And, as the bankruptcy court pointed out, “Selinger has not cited
26 (and cannot cite) any Bankruptcy Code provision which confers upon
27 a creditor a substantive right to recover monetary damages . . .

1 for a debtor's post-discharge abusive conduct which occurred in a
2 state court action."

3 Selinger received an unfavorable ruling in state court.
4 Rather than using his right to appeal in state court, however, he
5 seeks money damages for post-discharge activity in bankruptcy
6 court. He attempts to use bankruptcy law to effect a state law
7 remedy, which remedy could have no conceivable effect on the
8 bankruptcy case. Thus, the bankruptcy court could not exercise
9 subject matter jurisdiction, and Selinger fails to state a claim
10 under § 105(a) for which the court could exercise its power under
11 that section.

12 2. Statute of Limitations

13 Under California law, a cause of action for abuse of process
14 is considered to be an injury to the person, and is subject to the
15 two-year period prescribed by CAL. CODE CIV. PROC. § 335.1. See
16 Cantu v. Resolution Trust Corp., 4 Cal. App. 4th 857, 886, 6 Cal.
17 Rptr. 2d 151, 168 (Ct. App. 1992) (citing former CAL. CODE CIV. P.
18 § 340(3); Nancy Hersch, Ward Smith, CAL. CIV. PRACTICE Torts § 19.43.
19 The limitations period begins to run when the abuse of process
20 occurs or when the injury occurs, if later. Cantu, 4 Cal. App.
21 4th at 886-87, 6 Cal. Rptr. 2d at 168-69.

22 Selinger alleges that the wrongful act that constituted abuse
23 of process occurred when he was served with the Notice of
24 Injunction on June 17, 1993. The injury complained of was the
25 loss of opportunity to pursue punitive damages. Service of the
26 Notice of Injunction alone did not produce the injury. The
27 question then is when did the injury occur?

1 The bankruptcy court ruled that the injury occurred on May
2 14, 2002. That is the date that the state court denied Selinger's
3 motion to pursue punitive damages due to the earlier resignation
4 of the original trial judge.

5 Selinger contends that the injury did not occur until May 13,
6 2003; the date of the Non-Dischargeability Summary Judgment. He
7 argues that his claim was not ripe until then because the
8 existence of the dispute hung on the outcome of the 523 Action.
9 Further, he argues that the limitations period was tolled while
10 Thomas' appeal of that decision was pending at BAP. Thus, he
11 concludes that his filing on September 29, 2005, was not outside
12 the limitations period.

13 The bankruptcy court is correct. The default judgment in the
14 State Court Action was for compensatory damages, which the
15 bankruptcy court found to be non-dischargeable in the 523 Action.
16 Selinger did not, however, receive a punitive damages award that
17 could be affected by the Non-Dischargeability Summary Judgment.
18 Therefore, the outcome of the 523 Action did not, and could not,
19 affect the injury. Even if the 523 Action had not been decided in
20 Selinger's favor, its outcome would not have negated the injury.

21 Because the 523 Action had no impact on the alleged injury,
22 tolling during appeal is not applicable. Selinger's argument that
23 his claim was not ripe pending appeal of the 523 Action by Thomas
24 is likewise incorrect. Selinger admits as much in a letter of May
25 8, 2002, to Thomas. In the letter he wrote:

26 Though at present, I cannot yet commence
27 collection of the judgment, your fraudulent
28 Notice of Injunction with respect to your
bankruptcy proceeding does not bar me from
continuing prosecution of this case in the
punitive damages phase. See In re Beaty
(Selinger v. Beaty), 268 B.R. 839 (9th Cir.BAP

1 2001) page 847, column 1, 3rd paragraph where
2 the Bankruptcy Appellate Panel said:
3 "...[Beaty]. . . by filing a 'Notice of
4 Injunction' in which he inaccurately
5 represented that the discharge functioned to
6 enjoin prosecution of the particular lawsuit
7 in that court - it did not and does not."^{15]}

8 Declaration Dated February 26, 2007 of Thomas Beaty, at 4
9 (reprinting letter sent to him by David Selinger dated April 24,
10 2002), set forth at ER B:8:533.

11 So although Selinger had earlier requested, as part of his
12 523 Action, a modification of the discharge order to pursue
13 punitive damages in state court, he knew as early as July 2001,
14 that he was free to go forward. Selinger went forward in state
15 court and learned his suit was no longer viable on May 14, 2002.
16 It was at that point that the injury, if any, occurred. It was
17 also at that point that he had a remedy of appeal in state court,
18 which he chose not to pursue.

19 The standard for the start of the limitations period is the
20 date of the injury. Therefore, the limitations period began on
21 May 14, 2002. Selinger filed his abuse of process complaint on
22 September 29, 2005, over sixteen months after the limitations
23 period ran on May 14, 2004. Selinger's complaint is time barred.

24 VI. CONCLUSION

25 The bankruptcy court lacked subject matter jurisdiction over
26 the matter, and the matter was otherwise time-barred under CAL.
27 CIV. CODE P. § 335.1. All Orders of the bankruptcy court are
28 AFFIRMED.

¹⁵ Selinger quoted Judge Klein's concurring opinion.