

OCT 09 2007

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	NC-06-1463-MkKD
7	ALEXIS JAN BRIGHAM,)	Bk. No.	04-50040-ASW
8	Debtor.)	Adv. No.	05-05355-ASW
9	THOMAS SPIELBAUER,)		
10	Appellant,)		
11	v.)	MEMORANDUM ¹	
12	ALEXIS JAN BRIGHAM,)		
13	Appellee.)		

Argued and Submitted on September 19, 2007
at San Francisco, California

Filed - October 9, 2007

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

Hon. Arthur S. Weissbrodt, Bankruptcy Judge, Presiding.

Before: MARKELL, KLEIN, and DUNN, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP R. 8013-1.

1 This matter raises the issue of applicability of Cal. Civ.
2 Code § 1714.10² to a complaint of civil conspiracy brought in an
3 adversary proceeding by the appellee, Alexis Brigham
4 ("Plaintiff"), against the appellant, attorney Thomas Spielbauer
5 ("Appellant"). Section 1714.10 requires that a California
6 plaintiff obtain judicial authorization prior to filing a
7 qualifying complaint against an attorney if the complaint
8 contains a claim of civil conspiracy between the attorney and his
9 or her client ("Pre-Filing Requirement").

10 Plaintiff's multi-count complaint, which included an
11 allegation of conspiracy between Appellant and his brother Dennis
12 S. Spielbauer, who Appellant claims to be his client, was filed
13 without seeking prior leave of the bankruptcy court. Appellant
14 contends that the defense provided by the statute is controlling
15 and therefore Plaintiff's failure to comply with the Pre-Filing
16 Requirement is fatal. Appellant, however, ignores the threshold
17 issue of whether section 1714.10 is applicable to trigger the
18 Pre-Filing Requirement. It is on that basis that the bankruptcy
19 court ruled in favor of the Plaintiff and that we AFFIRM.

20 I. FACTS

21 Plaintiff's complaint contains the following allegations,
22 which at this stage of the proceedings we take as true. In
23 September 2003, Plaintiff retained Appellant as counsel after
24 receiving a solicitation from him offering hope and assistance in
25 saving her home from foreclosure.³ The representation continued

27 ² Unless otherwise indicated, all further section references
28 are to the Cal. Civ. Code.

³ In January 2004, Plaintiff retained a second attorney to
represent her in filing for bankruptcy under Chapter 13 of the
Bankruptcy Code, 11 U.S.C. §§ 101-1330. Appellant continued to
(continued...)

1 until Plaintiff terminated it in July 2004. There was no written
2 retainer agreement initially.

3 In February 2004, Appellant drew up a retainer agreement
4 which extended the representation to include Appellant's services
5 as a broker for sale of Plaintiff's home. This was contrary to
6 statements Appellant made to Plaintiff, in soliciting the
7 representation, that he was not seeking to list Plaintiff's home
8 for sale. The agreement included a contingency fee of up to 50%
9 of any recovery for legal services and a fee of up to seven
10 percent for brokerage services. Despite concerns over these
11 terms, Plaintiff agreed because Appellant told her that no other
12 attorney would take her case. Plaintiff's complaint recites a
13 similar pattern of conduct by Appellant with others, with the
14 core of such conduct being the luring of others in foreclosure to
15 retain his services with false representations in order to allow
16 Appellant to serve as broker for the sale of the client's home.

17 Plaintiff states she signed the retainer agreement naming
18 Appellant as her attorney in February 2004. She also states
19 that, in April 2004, Appellant required her to sign a retainer
20 agreement and a listing agreement for continuation of legal
21 services.⁴ Thereafter, in April 2004, Appellant filed an action
22 against all of the lenders holding Deeds of Trust on Plaintiff's
23 home. He also listed her home for sale.

24 Two weeks later, the bankruptcy court instructed Appellant
25 that he was not to represent Plaintiff as both legal counsel and
26 real estate broker, and further, that he could have no interest
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28 ³ (...continued)
represent her with respect to foreclosure.

⁴ It is unclear if there were, in fact, two separate retainer agreements; only one is provided in the record.

1 in the sale of her home if he chose to serve as her legal
2 counsel. Appellant agreed to serve only as her attorney, but he
3 took no action to withdraw as the listing broker on her home. He
4 left the listing in place until its natural expiration in October
5 2004. Appellant did, however, revise the listing by adding a
6 statement that quoted Plaintiff as saying, "I am not selling my
7 house and want you to remove it from your listing." Plaintiff
8 believes this was done to prevent the sale of the home.

9 Appellant continued to represent Plaintiff as attorney of
10 record, negotiating a "Settlement Agreement" with the lender in
11 third position on her home. Plaintiff's complaint concludes that
12 Appellant induced Plaintiff to sign the Settlement Agreement
13 against her best interests in order to provide him control over
14 the sale for his personal gain. The Settlement Agreement was
15 later approved by the bankruptcy court, although Plaintiff does
16 not remember either signing it on July 2, 2004 or even seeing it
17 until well after the fact. Ultimately, Plaintiff lost her home,
18 and substantial equity she claims to have held in it, at a
19 foreclosure sale conducted after she was unable to perform on the
20 Settlement Agreement.

21 On July 6, 2005, Plaintiff, in pro per, filed a multi-count
22 complaint against Appellant and Dennis S. Spielbauer (Appellant's
23 brother). The complaint included a cause of action for

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1 conspiracy between Appellant and his brother.⁵ Plaintiff did not
2 seek leave of court prior to filing the complaint.

3 On August 8, 2005, Appellant filed a motion to dismiss
4 Plaintiff's complaint. On September 15, 2005, in a reply to
5 Plaintiff's response to his motion, Appellant raised, for the
6 first time, the defense that Plaintiff failed to comply with the
7 Pre-Filing Requirement of section 1714.10.

8 The bankruptcy court found Plaintiff's complaint to be
9 poorly drafted, insufficiently pled, and that it did not comply
10 with federal pleading rules. It also found, however, that the
11 complaint contained two basic theories, including legal
12 malpractice based on dual representation. It then stated that
13 either theory might entitle the Plaintiff to relief if the
14 pleading defects were cured and if the facts alleged were proven.

15 On that basis the bankruptcy court granted the motion to
16 dismiss in large part, but with leave to amend. It did not
17 address Appellant's defense under section 1714.10, but dismissed
18 the conspiracy claim along with the others as conclusory, because
19 it did not allege the necessary elements of conspiracy.

20 Plaintiff retained new counsel and subsequently filed a
21 first amended complaint. The amended complaint generally
22 realleged the causes of action in the original complaint,
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24 ⁵ The cause of action for conspiracy incorporated all
25 preceding causes of action; including a request for declaratory
26 judgment, Fraud, Violation of California Business and Professions
27 Code §§ 17500 and 17200, Fraud under Cal. Civ. Code §§ 1709,
28 1710, and 1572, Unfair Business Practices, Interference in
Business Contract, and Breach of Fiduciary Duty. The conspiracy
cause of action did not incorporate the last two causes of
action, violation of 18 U.S.C. §§ 1962-1968 and 18 U.S.C.
§§ 1341, 1342, 1346, and 1349, which though, in turn,
incorporated all preceding claims.

1 although it was pled with greater specificity and proper form.
2 It was, however, again filed without seeking prior leave of
3 court.

4 The amended cause of action for conspiracy alleges that
5 Appellant and his brother, Dennis, conspired to violate 18 U.S.C.
6 §§ 1962-1968 (Civil RICO).⁶ The amended complaint alleges that
7 the brothers, as investment partners, agreed to solicit
8 homeowners facing foreclosure to retain Appellant as their
9 attorney. The complaint attributes their ultimate goal as having
10 Appellant also being named as listing agent for the troubled
11 property in order to provide the Appellant's brother with a first
12 chance to buy the home.

13 Appellant renewed his motion to dismiss, again asserting
14 that the complaint should be dismissed for failure to comply with
15 the Pre-Filing Requirement. The bankruptcy court denied the
16 renewed motion in large part, dismissing only one of the ten
17 claims, and that again, with leave to amend. The bankruptcy
18 court specifically allowed the conspiracy cause of action as
19 sufficiently pled and denied Appellant's contention that
20 Plaintiff was subject to the Pre-Filing Requirement. The court
21 found that section 1714.10 was not applicable to the claim
22 because it is based on an investment relationship between the
23 brothers, rather than on an attorney-client relationship as
24 required by the statute.

25 **II. ISSUE**

26 Did the bankruptcy court err by denying Appellant's motion
27 to dismiss Plaintiff's complaint containing an allegation of
28 conspiracy between her attorney and his brother, who her attorney

⁶ The conspiracy claim again incorporates all preceding causes of action.

1 claims is also a client, on the basis of Plaintiff's failure to
2 obtain judicial authorization prior to filing the complaint
3 pursuant to Cal. Civ. Code § 1714.10?

4 **III. JURISDICTION**

5 The bankruptcy court had jurisdiction under 28 U.S.C.
6 §§ 1334, 157(b)(2)(O), and 157(c)(1). The Bankruptcy Appellate
7 Panel granted leave to appeal on an interlocutory basis pursuant
8 to 28 U.S.C. § 1292(b) and has jurisdiction under 28 U.S.C.
9 §§ 158(a)(3) and (b).

10 **IV. STANDARDS OF REVIEW**

11 "We review the bankruptcy court's conclusions of law and
12 questions of statutory interpretation de novo, and factual
13 findings for clear error." Village Nurseries v. Gould (In re
14 Baldwin Builders), 232 B.R. 406, 410 (9th Cir. BAP 1999)
15 (citations omitted). A factual finding is clearly erroneous if
16 the appellate court, after reviewing the record has a firm and
17 definite conviction that a mistake has been committed. Wall St.
18 Plaza, LLC v. JSJF Corp. (In re JSJF Corp.), 344 B.R. 94, 99 (9th
19 Cir. BAP 2006).

20 **V. DISCUSSION**

21 Section 1714.10's Pre-Filing Requirement mandates that a
22 party obtain judicial authorization prior to filing any complaint
23 against an attorney that includes a cause of action alleging
24 civil conspiracy between the attorney and his client arising from
25 any attempt to contest or compromise a claim or dispute and based
26 on the attorney's representation of the client. Cal. Civ. Code
27 § 1714.10(a). The party seeking the authorization must establish
28 a "reasonable probability" of prevailing on its complaint. Id.

1 Failure to obtain prior judicial authorization when required is a
2 defense to such actions. § 1714.10(b).

3 By exception, however, the Pre-Filing Requirement is not
4 applicable to a cause of action if either 1) the attorney owes an
5 independent legal duty to the plaintiff("Independent Duty
6 Exception") or 2) the attorney's acts go beyond the performance
7 of a professional duty to serve the client and involve a
8 conspiracy to violate a legal duty in furtherance of the
9 attorney's financial gain. § 1714.10(c).⁷

11 ⁷ Section 1714.10 provides in full:

13 (a) No cause of action against an attorney for a civil conspiracy
14 with his or her client arising from any attempt to contest or
15 compromise a claim or dispute, and which is based upon the
16 attorney's representation of the client, shall be included in a
17 complaint or other pleading unless the court enters an order
18 allowing the pleading that includes the claim for civil
19 conspiracy to be filed after the court determines that the party
20 seeking to file the pleading has established that there is a
21 reasonable probability that the party will prevail in the action.
22 The court may allow the filing of a pleading claiming liability
23 based upon such a civil conspiracy following the filing of a
24 verified petition therefore accompanied by the proposed pleading
25 and supporting affidavits stating the facts upon which the
26 liability is based The filing of the petition, proposed
27 pleading, and accompanying affidavits shall toll the running of
28 any applicable statute of limitations until the final
determination of the matter, which ruling, if favorable to the
petitioning party, shall permit the proposed pleading to be filed.

(b) Failure to obtain a court order where required by subdivision
(a) shall be a defense to any action for civil conspiracy filed
in violation thereof. The defense shall be raised by the attorney
charged with civil conspiracy upon that attorney's first
appearance by demurrer, motion to strike, or such other motion or
application as may be appropriate. Failure to timely raise the
defense shall constitute a waiver thereof.

(c) This section shall not apply to a cause of action against an
attorney for a civil conspiracy with his or her client, where
(1) the attorney has an independent legal duty to the plaintiff,

(continued...)

1 In reviewing decisions of the bankruptcy court we may affirm
2 on any basis supported by the record. Heath v. Am. Express
3 Travel Related Svcs. Co. (In re Heath), 331 B.R. 424, 431 (9th
4 Cir. BAP 2005). Here, the bankruptcy court held that the statute
5 was not applicable on the basis that the claim of conspiracy went
6 to the relationship between brothers as investment partners
7 rather than to any relationship they might have as attorney-
8 client. Although we agree with the bankruptcy court, we will
9 presume, without deciding, that Plaintiff alleges a valid claim
10 of civil conspiracy with Dennis Spielbauer to which section
11 1714.10 would otherwise be applicable.⁸ We believe the more
12 clearly determinative question is whether an exception applies to
13 remove Plaintiff's complaint from application of the Pre-Filing
14 Requirement.

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17⁷(...continued)
18 or (2) the attorney's acts go beyond the performance of a
19 professional duty to serve the client and involve a conspiracy to
20 violate a legal duty in furtherance of the attorney's financial
21 gain.

21 (d) This section establishes a special proceeding of a civil
22 nature. Any order made under subdivision (a), (b), or (c) which
23 determines the rights of a petitioner or an attorney against whom
24 a pleading has been or is proposed to be filed, shall be
25 appealable as a final judgment in a civil action.

24 (e) Subdivision (d) does not constitute a change in, but is
25 declaratory of, the existing law.

25⁸ We note also, that Appellant misinterprets Hung v. Wang, 8
26 Cal. App. 4th 908, 11 Cal. Rptr. 2d 113 (Ct. App. 1992), in
27 contending that Plaintiff failed to meet her burden of proof that
28 the statute is applicable. In Hung the court addressed the
burden of proof not with respect to whether the statute is
applicable, but with respect to a claim's reasonable probability
of success, only after such determination is made. The burden of
proof of applicability remains with the Appellant.

1 Independent Duty Exception

2 The exceptions, "mirror[ing] those carved out from the
3 agent's immunity rule," apply when the attorney acts as an
4 individual rather than merely an agent to the client with whom
5 the conspiracy is alleged. Berg & Berg Enters. v. Sherwood
6 Partners, Inc., 131 Ca. App. 4th 802, 824, 32 Cal. Rptr. 3d 325,
7 341 (Ct. App. 2005). The Independent Duty Exception exempts a
8 claim of conspiracy from the Pre-Filing Requirement when the
9 attorney violates a duty owed to the plaintiff that is
10 independent of any duty owed to the plaintiff by the attorney's
11 client. Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon &
12 Gladstone, 107 Cal. App. 4th 54, 84, 131 Cal. Rptr. 2d 777, 800
13 (Ct. App. 2003) (finding attorney had a duty to provide truthful
14 information to homeowner regarding claim against insured,
15 independent of any duty attorney's client may have had as
16 insurer).

17 Appellant does not argue that the claim, properly pled,
18 would not fall within an exception, but rather that the
19 exceptions were extinguished by Plaintiff's improperly pled
20 original complaint. He contends that the bankruptcy court should
21 have ruled on the inadequate original complaint, which clearly
22 would not have survived under section 1714.10. He argues the
23 Pre-Filing Requirement cannot be circumvented by giving a second
24 bite at the apple by leave to amend an improper pleading.

25 Appellant's argument is misguided. "Leave to amend shall be
26 freely given when justice so requires" in the sound discretion of
27 the trial court. Fed. R. Civ. P. 15. "A pro se litigant must be
28 given leave to amend his or her complaint, and some notice of its

1 deficiencies, unless it is absolutely clear that the deficiencies
2 of the complaint could not be cured by amendment." Noll v.
3 Carlson, 889 F.2d 1446, 1448 (9th Cir. 1987).

4 The essential determination to the necessary finding of
5 "reasonable probability" under the Pre-filing Requirement is
6 whether the allegations had merit. Hung, 8 Cal. App. 4th at 929,
7 11 Cal. Rptr. at 125. In granting leave to amend, the bankruptcy
8 court found that the allegations had, or could have, merit, if
9 properly pled. The court, therefore, acted within its discretion
10 in granting leave to amend. Foman v. Davis, 371 U.S. 178, 182
11 (1962).

12 Appellant raises other issues, which he contends bear on an
13 appropriate decision that Plaintiff's complaint should be
14 dismissed for failure to comply with the Pre-Filing Requirement.
15 We find these irrelevant under the statute.⁹ Beyond these issues
16 however, the Appellant does not even attempt to argue that he did
17 not owe independent duties to Plaintiff. It is unquestionable

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19 ⁹ Appellant's contention that Plaintiff's purpose in filing
20 the complaint is to "pierce the attorney-client privilege,"
21 bringing it squarely within the statute's intent to protect the
22 attorney-client privilege, is also misguided. It is well settled
23 that the legislative intent addressed creation of conflict of
24 interest during an ongoing representation by frivolous conspiracy
25 claims rather than attorney-client confidentiality or privilege.
26 Pavicich v. Santucci, 85 Cal. App. 4th 382, 393-396, 102 Cal.
27 Rptr. 2d 125, 134-136 (Ct. App. 2000); Castro v. Higaki, 31 Cal.
28 App. 4th 350, 356 n.5., 37 Cal. Rptr. 2d 84, 86 n.5 (Ct. App.
1994); Hung, 8 Cal. App. 4th at 920, 11 Cal. Rptr. at 119.

Appellant also asserts that Plaintiff has "unclean hands"
and that the court must take this into consideration in applying
the statute. While if true and proven, Appellant's charges would
be serious, they are not directly relevant to our determination,
and without the benefit of any evidence beyond Appellant's
unsubstantiated statements, we decline to apply the doctrine.

1 that, serving as both her attorney and her broker, he had duties
2 to her and that those duties are independent of whatever duties
3 he may have owed to Plaintiff on the basis of his representation
4 of his brother. Given such duties, Plaintiff's complaint falls
5 within the scope of the Independent Duty Exception making the
6 statute inapplicable to invoke the protection of the Pre-filing
7 Requirement.

8 **VI. CONCLUSION**

9 Even assuming arguendo that Plaintiff's claim of civil
10 conspiracy against Appellant falls within the initial scope of
11 section 1714.10, the bankruptcy court correctly held that
12 Appellant is not entitled to the protections of section 1714.10.
13 Plaintiff's filing of her complaint without prior court order
14 does not warrant dismissal. We AFFIRM.

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