

JAN 31 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NOT FOR PUBLICATION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.	WW-06-1191-SPaMo
		)		
7	CHARLES V. McCLAIN, III and	)	Bk. No.	05-19334
	ARLENE J. McCLAIN,	)		
8		)	Adv. No.	05-01382
	Debtors.	)		
9		)		
10	CHARLES V. McCLAIN, III and	)		
	ARLENE J. McCLAIN,	)		
11		)		
	Appellants,	)		
12		)		
	v.	)	<b>MEMORANDUM<sup>1</sup></b>	
13		)		
	BOEING EMPLOYEES CREDIT	)		
14	UNION,	)		
		)		
15	Appellee.	)		
16		)		

Argued and Submitted on November 16, 2006  
at Seattle, Washington

Filed - January 31, 2007

Appeal from the United States Bankruptcy Court  
for the Western District of Washington

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding.

Before: SMITH, PAPPAS and MONTALI, Bankruptcy Judges.

<sup>1</sup> 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 Rule 8013-1.

1 Boeing Employees Credit Union ("BECU") filed a non-  
2 dischargeability action against debtors under § 523(a)(2)(A)<sup>2</sup>.  
3 Debtors counterclaimed with allegations of defamation and  
4 malicious prosecution. The bankruptcy court granted summary  
5 judgment dismissal in favor of BECU on the counterclaims. A  
6 timely notice of appeal was filed on May 18, 2006. We AFFIRM.

7 **I. FACTS**

8 In 2003, Charles McClain ("McClain") sued BECU and certain  
9 of its employees in Snohomish County Superior Court alleging  
10 wrongful imprisonment, negligent and intentional infliction of  
11 emotional distress, and theft of money. BECU counterclaimed that  
12 McClain had breached his BECU account agreement and conspired  
13 with others to appropriate \$40,538.89 from BECU between September  
14 and December 2003.

15 On July 21, 2005, Charles and Arlene McClain (collectively,  
16 "Debtors") filed a chapter 7 petition. BECU timely filed an  
17 adversary proceeding against Debtors for a determination under  
18 § 523(a)(2)(A) that Debtors' indebtedness to it was non-  
19 dischargeable (the "complaint"). The complaint asserted that  
20 between September 22, 2003, and October 28, 2003, Debtors engaged  
21 in a check kiting scheme<sup>3</sup> and that, as a consequence of this

22 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
24 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
25 enacted and promulgated pursuant to The Bankruptcy Abuse  
Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,  
Apr. 20, 2005, 119 Stat. 23.

26 <sup>3</sup> The facts surrounding the check kiting scheme are as  
27 follows. Between October 26 and 28, 2003, McClain received  
28 checks from Erik Helmersen, Greg Vaughn, and Roy Veal. Each  
check was made out to Arlene McClain in the amount of \$30,000.

(continued...)

1 scheme, McClain fraudulently obtained \$40,536.89 from BECU.

2 Debtors denied the check kiting allegations and countersued  
3 for pre-petition wrongful acts<sup>4</sup>, defamation, and post-petition  
4 malicious prosecution based upon the filing of the non-  
5 dischargeability proceeding.

6 In March 2006, BECU entered into a court approved settlement  
7 with the chapter 7 trustee that resolved all of Debtors' pre-  
8 petition claims against BECU and its employees. As part of the  
9 settlement, BECU agreed to dismiss the non-dischargeability  
10

11 <sup>3</sup>(...continued)

12 On October 27, 2003, McClain deposited the \$30,000 check  
13 from Helmersen in his wife's account at BECU and subsequently  
14 telephonically transferred the funds to Debtors' joint account at  
15 BECU. Immediately after making the transfer, McClain purchased a  
16 \$24,500 cashier's check against the joint account. Later that  
17 same day, he deposited the cashier's check into an account at a  
18 different bank.

19 The very next day, McClain returned to BECU and attempted to  
20 deposit the two remaining checks. McClain endorsed the back of  
21 each check with the name "Arlene McClain" and deposited the  
22 checks into his wife's account. He then walked from the teller's  
23 booth to an internal BECU customer telephone and transferred  
24 \$51,000 of the \$60,000 "deposit" from his wife's account to their  
25 joint account. Upon completing the telephonic transfer, he  
26 walked outside and withdrew \$500 from BECU's automated teller  
27 machine.

28 Less than two hours later, McClain returned to BECU and  
attempted to purchase a cashier's check for \$39,000 (made payable  
to himself) and to withdraw \$6,000 in cash from their joint  
account. The teller informed McClain that approval was needed  
for such a large transaction. At that point, the teller  
contacted BECU's security risk specialist. After some  
investigation, BECU learned that there were insufficient funds in  
Helmersen, Veal, and Vaughn's accounts to cover the checks.

<sup>4</sup> The alleged wrongful pre-petition acts revolve around BECU  
withdrawing funds from the Debtors' bank account on October 28,  
2003, November 28, 2003, and December 5, 2003, to offset the  
amounts that had been lost from the check kiting scheme.

1 action against Debtors. However, Debtors did not agree to  
2 dismiss the counterclaims filed in response to it. As a result,  
3 BECU filed its "Motion for a Summary Judgment Dismissal of  
4 Charles and Arlene McClain's Counterclaims Against BECU" (the  
5 "motion") on March 31, 2006.

6 BECU maintained that summary judgment was warranted because  
7 1) the counterclaims which arose out of events that occurred  
8 prior to the bankruptcy petition date (July 21, 2005) had been  
9 resolved by the March 2006 settlement, 2) the defamation claims  
10 stemmed from statements made either in state court or in the  
11 bankruptcy court causing them to be absolutely privileged under  
12 Washington law, and 3) the malicious prosecution counterclaim was  
13 without merit because BECU had probable cause to bring the non-  
14 dischargeability action.

15 Debtors opposed the motion arguing that BECU was not  
16 entitled to absolute immunity for the defamatory statements  
17 published and spoken during the prosecution of the adversary  
18 proceeding because it had been wrongfully initiated.  
19 Consequently, BECU was not protected by the absolute privilege  
20 because Debtors held a viable defamation claim upon which relief  
21 could be granted. In addition, Debtors contended that the  
22 inclusion of Arlene McClain in the non-dischargeability action  
23 was malicious since there was no evidence that she had engaged in  
24 the check kiting scheme. Finally, BECU had violated various  
25 Washington banking laws by failing to provide proper notice of  
26 the dishonored checks. Thus, Debtors were discharged of any  
27 liability relating to the checks.

28

1 The matter came on for hearing on April 26, 2006. After  
2 both parties were given the opportunity to argue, the bankruptcy  
3 court dismissed the counterclaims finding that "[i]ssues of  
4 defamation and malicious prosecution don't belong as defenses in  
5 a case like [the present], or frankly, very many cases at all."<sup>5</sup>  
6 Debtors appeal.

## 7 **II. JURISDICTION**

8 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334  
9 and §§ 157(b)(1), (b)(2)(A), and (2)(B). We have jurisdiction  
10 under 28 U.S.C. §§ 158(b)(1) and (c)(1).

## 11 **III. ISSUE**

12 Whether Debtors' counterclaims against BECU were properly  
13 dismissed.

## 14 **IV. STANDARD OF REVIEW**

15 The scope of review on a motion to dismiss for failure to  
16 state a claim is limited to the contents of the complaint.  
17 Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006). Thus, "if  
18 matters outside the pleading are presented to and not excluded by  
19 the court, the motion shall be treated as one for summary  
20 judgment." Fed. R. Civ. P. 12(b)(6).

21 A grant of a summary judgment is reviewed de novo.  
22 Patterson v. Int'l Bhd. of Teamsters, Local 959, 121 F.3d 1345,  
23 1349 (9th Cir. 1997). If viewing the evidence in the light most

24 <sup>5</sup> At the hearing, the bankruptcy court briefly addressed the  
25 issues surrounding the alleged banking law violations and  
26 determined that these issues dealt with the complaint and not the  
27 counterclaims, therefore, they should be tested through a  
28 separate motion for partial or complete summary judgment as to  
the complaint. However, by the time of the hearing, BECU had  
already dismissed the complaint pursuant to the settlement with  
the trustee rendering these issues moot.

1 favorable to the nonmoving party, we can see that there is no  
2 genuine issue of fact and the applicable substantive law has been  
3 correctly applied by the bankruptcy court, then the granting of a  
4 motion for summary judgment should be sustained. City of Vernon  
5 v. S. Cal. Edison Co., 955 F.2d 1361, 1365 (9th Cir. 1992). The  
6 moving party can satisfy its burden of establishing the absence  
7 of a genuine issue of material fact by: (1) presenting evidence  
8 that negates an essential element of the nonmoving party's case;  
9 or (2) by demonstrating that the nonmoving party failed to make a  
10 showing sufficient to establish an element essential to the  
11 party's case on which that party will bear the burden of proof at  
12 trial. Celotex Corp v. Catrett, 477 U.S. 317, 322-23 (1986).

#### 13 **V. DISCUSSION<sup>6</sup>**

14 The motion included evidence outside the four corners of  
15 Debtors' counterclaims. As there is no indication that the  
16 bankruptcy court excluded this evidence in making its  
17 determination, the court's dismissal of the counterclaims must be  
18 viewed as a grant of summary judgment. See Fed. R. Civ. P.

19 \_\_\_\_\_  
20 <sup>6</sup> In addition to seeking damages for defamation and  
21 malicious prosecution, Debtors sought to recover from BECU the  
22 funds it withdrew from their account between October 28, 2003,  
23 and December 5, 2003. These claims, however, arose prior to  
24 Debtors filing for bankruptcy on July 21, 2005, making them pre-  
25 petition claims. Pursuant to the settlement agreement entered  
26 into between the chapter 7 trustee and BECU, which was approved  
27 by the bankruptcy court on March 27, 2006, the trustee agreed to  
28 "settle, release, dismiss and waive, with prejudice, all claims"  
held by the estate against BECU including those "which arose on  
or before the bankruptcy petition date." Accordingly, these  
claims were resolved prior to BECU filing the motion. As the  
parties do not address these claims in their briefs, we deem any  
argument that the bankruptcy court wrongly dismissed them as  
waived. See Ellingson v. Burlington N., Inc., 653 F.2d 1327,  
1332 (9th Cir. 1981); Fed. R. App. P. 28(a)(2).

1 12 (b) (6) .

2 A. Defamation<sup>7</sup>

3 A defamation claim requires proof of (1) a false statement,  
4 (2) an unprivileged statement, (3) fault, and (4) damages  
5 proximately caused by the statement. Kauzlarich v. Yarbrough, 20  
6 P.3d 946, 950 (Wash. Ct. App. 2001). Defamatory "statements,  
7 spoken or written by a party or counsel in the course of a  
8 judicial proceeding, are absolutely privileged if they are  
9 pertinent or material to the redress or relief sought, whether or  
10 not the statements are legally sufficient to obtain that relief."  
11 McNeal v. Allen, 621 P.2d 1285, 1286 (Wash. 1980). An absolute  
12 privilege absolves the defendant of all liability for defamatory  
13 statements. Kauzlarich, 20 P.3d at 951.

14 Debtors complain that the bankruptcy court erred in  
15 dismissing their defamation claim because their actions did not  
16 satisfy the legal definition of check kiting. Thus, BECU defamed  
17 them by accusing them of such in the complaint. While there is  
18 no disagreement that the complaint includes allegations of check  
19 kiting, BECU has presented evidence sufficient to establish that  
20 its statements were both absolutely privileged and not  
21 defamatory.

22 BECU sought a determination that Debtors' debt to it should  
23 be excepted from discharge under § 523(a) (2) (A). Under

---

24 <sup>7</sup> The counterclaim does not specify what defamatory  
25 statements were made. It simply states that "Plaintiff has  
26 defamed Defendants." In reviewing Debtors' opposition to the  
27 motion and their opening brief, it can be inferred that the  
28 defamatory comment was that "[Debtors] engaged in a check kiting  
scheme." When the counterclaim was filed, the only place this  
defamatory statement could be found was in the non-  
dischargeability complaint.

1 § 523(a)(2)(A), a debtor may be denied a discharge from any debt  
2 for money obtained by "false pretenses, a false representation,  
3 or actual fraud." 11 U.S.C. § 523(a)(2)(A). In this regard,  
4 BECU alleged the following facts:

5 4. Between September 22, 2003 and October 28, 2003  
6 Defendants engaged in a check kiting scheme by  
7 depositing bad checks, obtaining provisional credit  
8 from BECU, then immediately transferring the funds to  
9 another BECU account and subsequently withdrawing the  
10 funds in cash.

11 5. During the above dates, 3 bad checks totalling  
12 [sic] \$44,000.00 were deposited to Defendant, Arlene J.  
13 McClain's account, BECU provisionally credited her  
14 account, the funds were transferred to Defendant  
15 Charles V. McClain's account and the funds were  
16 subsequently withdrawn. . . .

17 6. The bad checks were subsequently returned to BECU  
18 as non-sufficient funds ("NSF") and the provisional  
19 credit revoked resulting in a negative balance in the  
20 account.

21 7. After all appropriate offsets and credits there  
22 remains a balance due and owing to BECU in the sum of  
23 \$40,538.89.

24 The above facts are material to obtaining the relief under  
25 § 523(a)(2)(A) since they describe the actions Debtors took to  
26 defraud BECU. Because the statements were made in the course of  
27 a judicial proceeding and were pertinent to the relief sought,  
28 the statements are privileged. Whether they were legally  
sufficient to obtain relief under § 523(a)(2)(A) or establish  
check kiting is irrelevant for the purpose of determining their  
privileged status. See McNeal, 621 P.2d at 1286.

By establishing that its statements were privileged, BECU  
satisfied its burden of proving the absence of a genuine issue of  
material fact by negating an essential element of Debtors'  
defamation claim. Thus, for Debtors to defeat the summary

1 adjudication of this claim, they needed to present evidence  
2 sufficient to establish the existence of a genuine issue of  
3 material fact as to whether the statements are privileged.  
4 Celotex, 477 U.S. at 324. As Debtors failed to do this,  
5 dismissal of the defamation claim was warranted.

6 B. Malicious Prosecution

7 In order to maintain an action for malicious prosecution  
8 based on a civil proceeding, the plaintiff needs to prove

9 (1) that the prosecution claimed to have been malicious  
10 was instituted or continued by the defendant; (2) that  
11 there was want of probable cause for the institution or  
12 continuation of the prosecution; (3) that the  
13 proceedings were instituted or continued through  
14 malice; (4) that the proceedings terminated on the  
15 merits in favor of the plaintiff, or were abandoned; .  
16 . . (5) that the plaintiff suffered injury or damage as  
17 a result of the prosecution . . . (6) arrest or seizure  
18 of property[; and] (7) special injury (meaning injury  
19 which would not necessarily result from similar causes  
20 of action).

21 Clark v. Baines, 84 P.3d 245, 248-49 (Wash. 2004). Although a  
22 plaintiff must prove all the required elements, "malice and want  
23 of probable cause constitute the gist of a malicious prosecution  
24 action." Id. at 249; Hanson v. City of Snohomish, 852 P.2d 295,  
25 297 (Wash. 1993). An absolute defense to a malicious prosecution  
26 claim is proof of probable cause. Hanson, 852 P.2d at 297.  
27 Probable cause is present if the "facts [are] sufficient to lead  
28 a man of prudence and caution to believe the offense had been  
committed." Hayes v. Sears, Roebuck & Co., 209 P.2d 468, 476  
(Wash. 1949).

Debtors argue that the complaint was wrongfully initiated  
against Arlene McClain because 1) BECU failed to provide any  
facts which indicated that there was probable cause to accuse her

1 of check kiting; 2) BECU accused her of check kiting for purposes  
2 other than to secure an adjudication of the asserted debt; 3) the  
3 state court action was terminated in her favor; and 4) her  
4 actions did not meet the legal definition of check kiting.

5 As with the defamation claim, BECU has presented evidence  
6 sufficient to establish that Debtors will not be able to prove  
7 essential elements of their malicious prosecution claim at the  
8 time of trial. As previously indicated, one of the key elements  
9 of malicious prosecution is lack of probable cause to assert a  
10 particular claim.

11 Through declarations of BECU employees, Debtors' testimony,  
12 and bank documents, BECU has shown that it had probable cause to  
13 file the complaint against Debtors.<sup>8</sup> Between October 26 and 28,  
14 2003, McClain obtained three checks made out to Arlene McClain in  
15 the amounts of \$30,000 each. In a period of two days, he  
16 successfully deposited all three into his wife's personal account  
17 at BECU and then transferred \$81,000 of the \$90,000 deposited  
18 into the Debtors' joint account. From these funds, he was able  
19 to obtain a \$24,500 cashier's check, which he later deposited  
20 into an account at a different bank, and attempted to obtain  
21 another cashier's check for \$39,000 and withdraw \$6,000, but was  
22 prevented from doing so when BECU learned that there were  
23 insufficient funds in each of the check writers' accounts to  
24 cover the deposited checks. Based on these facts, BECU filed its  
25 complaint against Debtors alleging that their indebtedness should  
26 not be discharged pursuant to § 523(a)(2)(A) because their

---

27  
28 <sup>8</sup> A detailed account of Debtors' banking transactions can be  
found in footnote 3, supra p. 2-3.

1 actions represented check kiting - a fraud upon BECU.

2 Debtors take issue with the characterization of McClain's  
3 banking transactions as "check kiting." In this regard, they  
4 rely on the Sixth Circuit's definition of check kiting.<sup>9</sup> We are,  
5 however, controlled by the decisions of the Ninth Circuit and not  
6 the Sixth Circuit. See Coyne v. Westinghouse Credit Corp. (In re  
7 Global Illumination Co.), 149 B.R. 614, 617 (Bankr. C.D. Cal.  
8 1993) ("a decision of a circuit court of appeal is binding on all  
9 lower courts in the circuit"). Accordingly, we must look to the  
10 Ninth Circuit's definition to determine whether BECU had probable  
11 cause to accuse Debtors of checking kiting, and therefore, fraud  
12 for § 523(a) (2) (A) purposes.

13 The Ninth Circuit broadly defines checking kiting as "the  
14 practice of playing one checking account against another" in  
15 order to "create[] the appearance of funds present and  
16 immediately available for withdrawal in an account, when none in  
17 fact are there." United States v. Turner, 312 F.3d 1137, 1139  
18 n.1 (9th Cir. 2002). Unlike the Sixth Circuit, the Ninth Circuit  
19 does not require that the funds be deposited into an account at a  
20 different bank. Applying the Ninth Circuit's definition,

---

21 <sup>9</sup> The Sixth Circuit defines check kiting as

22  
23 Check kiting consists of drawing checks on an account  
24 in one bank and depositing them in an account in a  
25 second bank when neither account has sufficient funds  
26 to cover the amounts drawn. Just before the checks are  
27 returned for payments to the first bank, the kiter  
covers them by depositing checks drawn on the account  
in the second bank. Due to the delay created by the  
collection of funds by one bank from the other, known  
as the "float time," an artificial balance is created.

28 United States v. Stone, 954 F.2d 1187, 1188 n.1 (6th Cir. 1992).

1 McClain's actions clearly provide sufficient probable cause for  
2 BECU to allege that he was involved in a check kiting scheme.  
3 McClain deposited three checks each in the amount of \$30,000. At  
4 the time of their deposit, none of the accounts from which the  
5 checks had been written had sufficient funds. Nevertheless,  
6 McClain immediately transferred a significant amount of the  
7 deposited funds into another account, from which he then withdrew  
8 a large sum. By depositing the checks into Arlene McClain's  
9 personal account and then immediately telephonically transferring  
10 the "funds" into the Debtors' joint account, McClain was able to  
11 convert nonexistent funds into actual funds by taking advantage  
12 of the float time. Clearly, this constitutes check kiting under  
13 the Ninth Circuit standard and thus probable cause to assert the  
14 same in the complaint.

15         Although Arlene McClain was not actually involved with the  
16 transfers and withdrawals, there was probable cause for BECU to  
17 name her in the adversary proceeding based upon the fact that 1)  
18 all three checks were made payable to her, endorsed with her  
19 name, and deposited into her account, 2) her name and bank  
20 account were used to create artificially high balances in the  
21 couple's joint account, which inferred that she was involved in  
22 the fraud, and 3) she potentially benefitted from the receipt of  
23 the funds. These facts would be sufficient to lead BECU to  
24 reasonably believe that Arlene McClain played some active role in  
25 the kiting transactions.

26         BECU's evidence is sufficient to establish that it had  
27 probable cause to initiate the complaint against Debtors.  
28 Because proof of probable cause is an absolute defense to any

1 malicious prosecution claim, BECU has demonstrated that Debtors  
2 have failed to establish a key element of their claim.  
3 Accordingly, we find that the bankruptcy court correctly granted  
4 summary judgment dismissal of the malicious prosecution claim.

5 **VI. CONCLUSION**

6 For the foregoing reasons, we AFFIRM the order entered by  
7 the bankruptcy court dismissing all counterclaims raised by  
8 Debtors.

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28