

DEC 29 2006

**NOT FOR PUBLICATION**1  
2 HAROLD S. MARENUS, CLERK  
3 U.S. BKCY. APP. PANEL  
4 OF THE NINTH CIRCUIT5  
6 **UNITED STATES BANKRUPTCY APPELLATE PANEL**  
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8 **OF THE NINTH CIRCUIT**9  
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In re:	)	BAP No.	NC-06-1252-PaDB
DAVID KIMMEL,	)	Bk. No.	05-35269
Debtor.	)	Adv. No.	06-03047
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WILLIAM B. ROOZ,	)		
Appellant,	)		
v.	)		<b><u>M E M O R A N D U M<sup>1</sup></u></b>
DAVID KIMMEL,	)		
Appellee.	)		
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Argued and Submitted on November 17, 2006  
at San Jose, California

Filed - December 29, 2006

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

Honorable Dennis Montali, Bankruptcy Judge, Presiding.

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Before: PAPPAS, DUNN and BRANDT, Bankruptcy Judges

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<sup>1</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

1 Creditor William B. Rozz appeals the bankruptcy court's order  
2 dismissing his complaint in a § 523(a)(2)(A) adversary proceeding  
3 pursuant to Fed. R. Civ. P. 9(b) and 12(b) without leave to amend.  
4 We AFFIRM.

5

6 **FACTS**

7 David Kimmel and William B. Rozz were engaged in a real  
8 estate venture concerning properties in Northern California.  
9 Disputes had arisen between the parties as early as 1991. Rozz  
10 alleges that he was damaged by the actions of Kimmel and his wife  
11 ("Mrs. Kimmel"). Rozz filed an action against the Kimmels in  
12 Superior Court, San Mateo County, entitled Rozz v. Kimmel, No.  
13 368482. Mrs. Kimmel thereafter filed a bankruptcy petition under  
14 chapter 7<sup>2</sup> and the action against her was stayed pursuant to  
15 § 362(a). Case No. NC-93-33089. However, a judgment was entered  
16 on May 30, 1995, against Kimmel for \$114,834.99, which on remitter  
17 was increased to \$515,000. Rozz alleges that the amount of the  
18 judgment debt had increased to \$1,081,500 by May 30, 2006.

19 On July 7, 2005, the San Mateo Superior Court issued a writ  
20 of execution on the Rozz judgment against Kimmel directing that  
21 his wages be seized. On August 22, 2005, Kimmel filed a Claim of  
22 Exemption in San Mateo Superior Court, seeking to reduce the  
23 amount being garnished from his wages under the writ. On  
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25       <sup>2</sup> Unless otherwise indicated, all chapter, section and  
rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,  
26 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036,  
27 as enacted and promulgated prior to the effective date (October  
17, 2005) of most of the provisions of the Bankruptcy Abuse  
Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,  
28 April 20, 2005, 119 Stat. 23.

1 September 29, 2005, the superior court conducted a hearing at  
2 which it granted Kimmel's claim of exemption in part, and denied  
3 it in part. The court's order provided that Kimmel pay Roz \$400  
4 per month, which Kimmel had suggested at the hearing, until the  
5 judgment debt was paid. The order was filed on September 30,  
6 2005.<sup>3</sup>

7 Kimmel filed a petition under chapter 7 of the Bankruptcy  
8 Code on October 16, 2005. On Kimmel's Schedule F, he listed a  
9 debt to Roz for \$982,366.30, "for a judgment against the debtor  
10 that arises out of a real estate sales transaction that occurred  
11 more than ten years ago."<sup>4</sup> Kimmel was granted a discharge by the  
12 bankruptcy court on February 13, 2006.

13 On February 6, 2006, one week before the entry of the  
14 discharge, Roz, acting pro se, filed an adversary complaint in  
15 the bankruptcy court seeking a determination that his judgment  
16 against Kimmel be excepted from discharge under § 523(a)(2)(A) (the  
17 "Complaint"). Specifically, Roz alleged in the Complaint that:

Defendant made representations to plaintiff which were false. Plaintiff believed defendant's representations to be true and relied upon them to his detriment. Plaintiff's reliance upon defendant's representations were reasonable since defendant was Plaintiff's business partner.

23       <sup>3</sup>      Roz filed a Request for Judicial Notice with this Panel  
on August 28, 2006, asking that, pursuant to Fed. R. Evid. 201, we  
take judicial notice of two documents from the state court action  
relating to the wage garnishment and exemption claim: the "Order  
Determining Claim Exemption", filed on September 30, 2005; and a  
"Register of Actions" in William B. Roz v. David Kim[mel], Case  
no. Civ368482. Kimmel did not object to the Request for Judicial  
Notice. Since the contents of the documents are material to the  
issues we consider, the request for judicial notice is GRANTED.

4 Kimmel submitted an amended Schedule F on November 21,  
28 2005, but did not change the entry for the Rozz debt.

Plaintiff sustained damages in excess of \$500,000 as a proximate result of defendant's fraudulent conduct.

On February 17, 2006, Roz amended the complaint by striking the words "business partner" and inserting the word "leasee" (the "First Amended Complaint").

On March 6, 2006, Kimmel filed a motion to dismiss Roz's  
complaint because the fraud allegations in the First Amended  
**Complaint** were not pleaded with particularity as required by Fed.  
R. Civ. P. 9(b). A hearing in the bankruptcy court was held to  
consider Kimmel's motion on April 28, 2006, at which Roz appeared  
and Kimmel was represented by counsel. The bankruptcy court  
granted Kimmel's motion to dismiss, but it also granted leave to  
Roz to further amend the complaint within 20 days to plead with  
particularity the factual allegations supporting the claim of  
fraud.

16 On May 16, 2006, Roz filed an "Amendment to Complaint,"  
17 drawing the court's attention to three documents: (1) Letter  
18 Agreement to Settle Disputes Between Roz and Kimmel, dated April  
19 5, 1991; (2) Ms. Weckerle's Statement; and (3) the State Court  
20 Judgment. Accompanying the documents was Roz's written  
21 statement that "The documents above contain the required specifics  
22 demanded by council [sic] Mr. John G. Warner." (collectively, the  
23 "Second Amended Complaint").<sup>5</sup>

1 On May 25, 2006, Kimmel filed a Motion to Dismiss Adversary  
2 Proceeding Without Leave to Amend.

3 On or about June 6, 2006, Roz submitted to the bankruptcy  
4 judge and opposing counsel, but did not file with the clerk,  
5 another document entitled "Complaint to Determine  
6 Nondischargeability under the Provisions of 11 U.S.C.  
7 § 523(a)(2)(A)" (the "Third Amended Complaint"). Unlike the  
8 earlier pleadings, which asserted a single claim for fraud, the  
9 Third Amended Complaint asserted three claims (1) fraud and false  
10 representation, (2) active concealment of assets and (3)  
11 fraudulent concealment. Kimmel submitted a Reply Memorandum which  
12 protested the late addition of the new claims yet addressed them  
13 seriatim.

14 On June 28, 2006, Maxwell Keith filed a notice of his  
15 appearance as attorney for Rozoo. On July 5, 2006, Rozoo through  
16 Keith filed an "Amended Complaint for Judgment Upon Frauds to  
17 Evade Payment of Debt Under 11 U.S.C. 523(a)(2)(A)" (the "Fourth  
18 Amended Complaint"). The Fourth Amended Complaint significantly  
19 expanded the allegations against Kimmel. Among other things, it  
20 accused Kimmel of fraudulently promising to pay the Rozoo judgment  
21 in full in \$400 monthly payments and of hiding assets and  
22 conspiring with insiders to transfer assets; and it attempted to  
23 add Mrs. Kimmel as a defendant.

24

25

<sup>5</sup> (...continued)  
26 bankruptcy court at the hearing on July 7, 2006, when the court  
27 stated, "Mr. Roz on May 16th on his own filed something called  
28 'Amendment to Complaint' that makes references to three documents,  
only one of which was provided, and even that was almost illegible  
because of the way it was photocopied." Tr. Hr'g 5:9-13.

1 On July 7, 2006, the bankruptcy court conducted a hearing on  
2 Kimmel's May 25th motion to dismiss. After argument, the  
3 bankruptcy court determined that Roz's new claims set forth in  
4 the Third and Fourth Amended Complaints, that Kimmel failed to pay  
5 \$400 per month, hid assets, failed to disclose assets and provide  
6 information about earnings, constituted objections to discharge  
7 under § 727(a), and were not properly raised in a § 523(a)(2)(A)  
8 complaint. Tr. Hr'g 9:1-7 (July 7, 2006). Further, the  
9 bankruptcy court concluded that the state court order requiring  
10 Kimmel to pay Roz \$400 a month was entered in violation of § 524  
11 and therefore void. Tr. Hr'g 15:5-6. The court also determined  
12 that it had no jurisdiction over any potential claims by Roz  
13 against Mrs. Kimmel. Tr. Hr'g 12:19 - 13:4.

Because it concluded Roz had not stated with particularity any grounds to establish fraud under § 523(a)(2)(A), the bankruptcy court granted Kimmel's motion to dismiss without leave to amend<sup>6</sup> in an order entered on July 11, 2006. Roz filed a timely appeal on July 17, 2006.

## JURISDICTION

21 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
22 and 157(b) (2) (A) and (K). We have jurisdiction pursuant to 28  
23 U.S.C. § 158(b).

<sup>6</sup> As the Supreme Court observed in Foman v. Davis, leave to amend should be freely granted unless one of several factors is present. 371 U.S. 178, 182 (1962); accord Johnson v. Buckley, 356 F.3d 1067, 1077 (9th Cir. 2004); Carroll v. Ft. James Corp., 2006 WL 3399286 \*4 (5th Cir., November 27, 2006). Two of those factors are implicated here: undue delay and a repeated failure by Roz to cure deficiencies in his various complaints. Roz has not raised the bankruptcy court's decision to deny him leave to further amend the complaint as an issue on appeal.

## ISSUES

1. Whether Roz's allegations that Kimmel fraudulently promised  
2 to pay \$400 per month on the judgment debt states a claim for  
3 relief for fraud under § 523(a)(2)(A).
  - 4
  5. Whether Roz's allegations that the Kimmels fraudulently  
6 concealed information or transferred assets states a claim  
7 for relief for fraud under § 523(a)(2)(A).
  8. 3. Whether Mrs. Kimmel was a proper party-defendant.

## **STANDARD OF REVIEW**

11 We review de novo dismissals for failure to state a claim  
12 under Fed. R. Civ. P. 12(b)(6), made applicable in bankruptcy  
13 proceedings by Fed. R. Bankr. P. 7012. Marder v. Lopez, 450 F.3d  
14 445, 448 (9th Cir. 2006); Decker v. Advantage Fund, Ltd., 362 F.3d  
15 593, 595-96 (9th Cir. 2004). All allegations of material fact and  
16 inferences are viewed in the light most favorable to the nonmoving  
17 party. Marder, 450 F.3d at 448. A complaint should not be  
18 dismissed unless "it appears beyond doubt that the plaintiff can  
19 prove no set of facts that would entitle her to relief."  
20 O'Loghlin v. City of Orange, 229 F.3d 871, 874 (9th Cir. 2000).  
21 The scope of review on a motion to dismiss for failure to state a  
22 claim is limited to the contents of the complaint. Marder, 450  
23 F.3d at 448.

24 The bankruptcy court's interpretation of the Bankruptcy Code  
25 is reviewed de novo. In re Deville, 361 F.3d 536, 547 (9th Cir.  
26 2004).

## DISCUSSION

I.

Analysis of the issues in this appeal is complicated by the fact that, at various times, Roz has relied upon five different pleadings to allege his claims against the Kimmels: a complaint and four amended complaints. The hearing on July 7, 2006, at which the bankruptcy court reached its decision dismissing the adversary proceeding without leave to amend, was intended to consider Kimmel's motion to dismiss filed on May 25, 2006. That motion was presumably filed to test the allegations of Roz's Second Amended Complaint. However, by the time of the hearing, Roz had offered up two more versions of a complaint to Kimmel and the bankruptcy court. The court expressed its frustration in dealing with all these pleadings:

15 Mr. Roz on May 16th on his own filed  
16 something called "Amendment to Complaint"  
17 [Second Amended Complaint] that makes  
18 references to three documents, only one of  
19 which was provided, and even that was almost  
20 illegible because of the way it was  
21 photocopied. Then after that, in June, Mr.  
22 Roz signs a document called "Complaint to  
23 Determine . . . Non-Dischargeability," [Third  
24 Amended Complaint] but doesn't file it and  
then Mr. Warner files his second motion to  
dismiss [the current motion before the court]  
and then you [referring to Roz's counsel,  
Keith] apparently file without leave of court  
and don't provide a chambers copy, a document  
called "Amended Complaint for Judgment Upon  
Fraud[s]" [Fourth Amended Complaint] and  
proceed to allege matters that have nothing to  
do with Section 523 of the Bankruptcy Code.

25 Tr. Hr'g 5:9-23.

26 The bankruptcy court attempted to bring some order to the  
27 proceeding by treating the Fourth Amended Complaint as a reply to  
28 Kimmel's motion to dismiss without leave to amend. Tr. Hr'g 7:2-3.

1 We have no quarrel with this approach. However, in the interests  
2 of justice, we believe the issues on appeal should be resolved by  
3 allowing Roz to rely on the allegations in his Fourth Amended  
4 Complaint, filed by his attorney, to test the adequacy of his  
5 claims against the Kimmels.

6 But even allowing Roz to rely upon the latest version of his  
7 complaint, filed without leave of the court, we still conclude, as  
8 did the bankruptcy court, that the action was properly dismissed  
9 for failure to state a claim. While the reasons for our  
10 conclusion in some respects differ from those relied upon by the  
11 bankruptcy court, if support exists in the record, a dismissal may  
12 be affirmed on any proper ground, even if the trial court did not  
13 reach the issue or relied on different grounds or reasoning.  
14 Adams v. Johnson, 355 F.3d 1179, 1183 (9th Cir. 2004).

15 II.

16 In the first three complaints, Roz argues that Kimmel's 1995  
17 judgment debt to him should be excepted from discharge under  
18 § 523(a)(2)(A) because that debt arose from fraudulent  
19 misrepresentations made by Kimmel to Roz. This allegation  
20 disappears in the Third and Fourth Amended Complaints. Instead,  
21 Roz now argues that Kimmel's post-judgment statements and acts  
22 are part of a plan and scheme to fraudulently deprive Roz of his  
23 ability to collect the judgment.

24 Roz's argument is made in two parts. First, Roz alleges  
25 that Kimmel represented at the September 29, 2005, state court  
26 hearing on the wage garnishment and exemption claim, that "he was  
27 willing to pay [Roz] \$400 per month in payment of the judgment."  
28 Roz alleges that this "promise was made to obtain a settlement of

1 the execution lien." Roz then alleges that while he thereafter  
2 received \$1,005 in payments from Kimmel, "[Kimmels] have now  
3 refused to make any payment" and that "[Kimmel] had no intention  
4 to perform his commitment to pay [Roz] \$400 per month." In other  
5 words, fairly construing these allegations, Roz claims Kimmel  
6 made a fraudulent representation to him and the state court that  
7 he would pay off the judgment in \$400 monthly payments.

8 Roz's second theory is that the Kimmels have jointly engaged  
9 in a "continuous scheme to fraudulently and intentionally hide  
10 substantial assets from Roz over the past four years." In this  
11 regard, Roz alleges, based upon unspecified information and  
12 belief, that Kimmels failed to disclose to the state court and the  
13 bankruptcy court their "substantial earnings;" "the true extent of  
14 the true holdings of the community in real estate properties;" and  
15 that the Kimmels had "arranged with insiders to hold title to real  
16 estate properties with the purpose and intent of preventing [Roz]  
17 from obtaining payment on his judgment." Roz concedes, however,  
18 that "[t]he full details of the scheme, plan and artifice [are]  
19 unknown to [Roz]."

20 As discussed below, neither of Roz's theories supports  
21 relief under § 523(a)(2)(A).

22 A.

23 Under these facts, Roz's allegations that Kimmel  
24 fraudulently promised to pay Roz \$400 a month, without any intent  
25 of doing so, fails to state a claim for relief for fraud under  
26 § 523(a)(2)(A).

27 In essence, Roz alleges that Kimmel committed promissory  
28 fraud. Promissory fraud is a subspecies of the action for fraud

1 and deceit. Downey Venture v. LMI Ins. Co., 66 Cal. App. 4th 478,  
2 510 (Cal. Ct. App. 1998). Under California law, the elements of  
3 promissory fraud are identical to the elements of common law  
4 fraud, when the misrepresentation at issue is a promise made  
5 without intent to perform. See Service by Medallion, Inc. v.  
6 Clorox Co., 44 Cal. App. 4th 1807, 1816 (Cal. Ct. App. 1996).

7 "The elements of § 523(a)(2)(A) 'mirror the elements of  
8 common law fraud' and match those for actual fraud under  
9 California law, which requires that the plaintiff show: (1)  
10 misrepresentation; (2) knowledge of the falsity of the  
11 representation; (3) intent to induce reliance; (4) justifiable  
12 reliance; and (5) damages. Younie v. Gonya (In re Younie), 211  
13 B.R. 367, 373-74 (9th Cir. BAP 1997), aff'd, 163 F.3d 609 (9th  
14 Cir. 1998) (table decision)." Tobin v. Sans Souci Ltd. Pshp. (In  
15 re Tobin), 258 B.R. 199, 205 (9th Cir. BAP 2001).

16 The bankruptcy court described the Fourth Amended Complaint  
17 as a "defective pleading." Tr. Hr'g 7:22. We agree with this  
18 conclusion, in the sense that the allegations of the complaint  
19 fail to state a claim for relief for fraud. Even if the  
20 allegations are presumed to be true, the complaint does not allege  
21 that Rozoz extended any credit to Kimmel, nor is it alleged that  
22 Rozoz otherwise justifiably relied upon Kimmel's representation to  
23 his detriment. Tr. Hr'g 7:11-13.

24 Kimmel had been indebted to Rozoz since entry of the state  
25 court judgment in 1995. Rozoz had caused Kimmel's wages to be  
26 garnished. In response to that garnishment, Kimmel claimed his  
27 wages exempt. It was at the state court hearing concerning that  
28 exemption claim on September 29, 2005, that Kimmel offered to make

1 \$400 monthly payments to Roz. The state court incorporated this  
2 payment arrangement in its order to resolve the issues raised by  
3 Kimmel's exemption claim. The Fourth Amended Complaint does not  
4 allege that Kimmel agreed to forego further execution on judgment if  
5 Kimmel made these payments, or that he was precluded from doing  
6 so. It is also not alleged that Kimmel promised not to file for  
7 bankruptcy relief as a means of dealing with Roz's debt. And the  
8 complaint does not allege what Roz gave up in consideration of  
9 the monthly payment order. In fact, Roz acknowledges that Kimmel  
10 paid him \$1,005 "thereafter."

11 Even assuming that Roz could prove that Kimmel's  
12 representation in state court that he would pay Roz monthly  
13 payments was intentionally false, Roz does not allege how he  
14 thereafter justifiably relied on that statement to his detriment  
15 for purposes of a claim under § 523(a)(2)(A). Justifiable  
16 reliance is one of the necessary elements of actual,  
17 nondischargeable fraud under § 523(a)(2)(A). Further, although  
18 the Ninth Circuit has never specifically ruled on this issue, the  
19 three circuits that have are unanimous in holding that justifiable  
20 reliance must be pleaded with particularity, alleging specific  
21 facts and actions taken by the victim of the fraud in reliance on  
22 the misrepresentation. Roberts v. Francis, 128 F.3d 647, 651 (8th  
23 Cir. 1997); Williams v. WMX Technologies, 112 F.3d 175, 177 (5th  
24 Cir. 1997); S.Q.K.F.C., Inc. v. Bell Atlantic Tricon Leasing  
25 Corp., 84 F.3d 629, 633 (2d Cir. 1996).

26 Here, Roz has provided no particularized examples of how he  
27 justifiably relied and suffered damages as a result of Kimmel's  
28

1 September 29 "promise"<sup>7</sup> to pay his judgment debt. As a result,  
2 Roz's Fourth Amended Complaint fails to satisfy the legal  
3 requirements for a claim under § 523(a)(2)(A).

4 There is also an obvious contradiction in the Fourth Amended  
5 Complaint which is highlighted by subsequent events. Roz alleges  
6 that Kimmel "had no intention to perform his commitment to pay  
7 [Roz] \$400 per month." However, he acknowledges that Roz  
8 "thereafter" received \$1,005 in payments from Kimmel on the debt.  
9 These payments, apparently made both before and after Kimmel's  
10 bankruptcy petition was filed, discredit Roz's argument that  
11 Kimmel never intended to pay the \$400 per month.

12 Moreover, the complaint fails to adequately allege how Roz  
13 was damaged by Kimmel's allegedly fraudulent statements. Indeed,  
14 it appears Roz may have received more than \$400 per month. Roz  
15 does not allege Kimmel promised not to seek bankruptcy relief, and  
16 since Kimmel's bankruptcy filing excused his obligation to  
17 continue to pay Roz according to the terms of the September 30  
18 order, Roz can not show that he was damaged by Kimmel's alleged  
19 fraud.

20 \_\_\_\_\_ B.

21 While his argument is somewhat difficult to follow, Roz also  
22 apparently contends that, prior to and after the filing of  
23 Kimmel's bankruptcy, the Kimmels engaged in a continuing  
24 \_\_\_\_\_

25 <sup>7</sup> The bankruptcy court committed a harmless error in  
determining that the state court's payment order was void because  
26 it was entered in violation of the § 524 discharge injunction.  
The bankruptcy court relied on an error in the Fourth Amended  
27 Complaint that alleges that the order was entered on December 2,  
2005, some three months after the bankruptcy petition was filed.  
Roz has provided the Panel with the actual order entered by the  
28 state court on September 29, 2005, and filed on September 30,  
about two weeks before Kimmel's bankruptcy filing.

1 fraudulent scheme<sup>8</sup> to frustrate Roz's collection efforts.  
2 Specifically, Roz alleges that Kimmel hid substantial assets from  
3 Roz over the four years preceding his bankruptcy filing. Roz  
4 insists these allegations state a claim to except his debt from  
5 discharge under § 523(a)(2)(A). Like the bankruptcy court, we  
6 disagree with Roz.

7 The specific allegations made by Roz of fraudulent acts are  
8 stated in paragraph 10 of his Fourth Amended Complaint:

9 The Plaintiff is informed and believes and  
10 based upon such information and belief alleges  
11 that pursuant to said scheme and plan  
12 defendants have: (1) failed to disclose in the  
13 answers to the questionnaires required by the  
14 state court and this Court the substantial  
15 earnings of the Community; (2) failed to  
16 disclose to the state court and this court the  
17 extent of the true holdings of the community  
in real estate properties; namely, their home  
at 1007 15th Avenue, San Francisco, CA; the  
real estate at 1155 Ellis Street, San  
Francisco, CA, other real estate properties  
and bank accounts; (3) arranged with insiders  
to hold title to real estate properties with  
the purpose and intent of preventing plaintiff  
from obtaining payment on his judgment.

18 Later in the Fourth Amended Complaint, Roz admits that the full  
19 details of the scheme, plan and artifice in which the Kimmels  
20 allegedly engaged were unknown to Roz.

21 Roz has failed to satisfy an elementary rule of pleading.  
22 Under Fed. R. Civ. P. 9(b), "In all averments of fraud or mistake,  
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24       <sup>8</sup> Roz uses the terms "scheme" and "fraudulent scheme" to  
25 argue that there were not only fraudulent acts committed by Kimmel  
26 to avoid payment of his debt to Roz but that the acts together  
27 "were part of a plan and scheme to fraudulently deprive [Roz] of  
28 full payment of his judgment." [Fourth Amended Complaint at ¶ 8.] The existence of a scheme or plan tying various frauds together is not necessary for nondischargeability under § 523(a)(2)(A); proof of any one fraud would be sufficient. However, as we discuss below, Roz has not alleged with sufficient particularity in the Fourth Amended Complaint that any particular fraud took place.

1 the circumstances constituting fraud or mistake shall be stated  
2 with particularity." According to the Ninth Circuit, to properly  
3 plead fraud with particularity, the complaint must allege the  
4 time, place, and content of the allegedly fraudulent  
5 representation, act or omission, as well as the identity of the  
6 person allegedly perpetrating fraud. In re GlenFed, Inc. Sec.  
7 Litig., 42 F.3d 1541, 1547 (9th Cir. 1994). "[M]ere conclusory  
8 allegations of fraud are insufficient." Moore v. Kaypro Package  
9 Express, 885 F.2d 531, 540 (9th Cir. 1989). A failure to plead  
10 fraud with the requisite particularity constitutes sufficient  
11 grounds to dismiss a complaint. Wool v. Tandem Computers, Inc.,  
12 818 F.2d 1433, 1439 (9th Cir. 1987).<sup>9</sup>

13 We doubt the three allegations offered by Roz to describe  
14 the Kimmels' supposed "fraudulent scheme" show when or where the  
15 alleged fraud occurred. The allegations are ambiguous as to the  
16 substantive facts constituting fraud.<sup>10</sup> Like the bankruptcy court,  
17 we think Roz's Fourth Amended Complaint is deficient in necessary  
18 detail to show Kimmel engaged in the sort of fraud required by  
19 § 523(a)(2)(A).

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20         <sup>9</sup> The elements of particularity of a fraud that must be  
21 pleaded under Rule 9(b) were very recently visited and affirmed by  
22 the Fifth Circuit in Ft. James Corp., 2006 WL 3399286 at \* 3 (Rule  
23 9(b) requires that plaintiffs plead enough facts to illustrate  
"the who, what, when, where, and how of the alleged fraud"  
[citations omitted]).

24         <sup>10</sup> For example, the allegations of the complaint are  
25 ambiguous concerning the alleged perpetrators of the frauds. Roz  
26 argues that "defendants" were responsible for these actions.  
27 However, we can not tell from the complaint if Roz alleges that  
28 the Kimmels jointly committed the alleged frauds, or if one or the  
other engaged in the conduct described in the complaint. In  
particular, we are left to wonder how Mrs. Kimmel may have been  
involved in making false statements to either the bankruptcy court  
or state court, because she was not a participant (at least to  
this point) in Kimmel's bankruptcy or wage garnishment  
proceedings.

1       But even assuming Roz's complaint is not technically  
2 defective, we believe the bankruptcy court was correct in  
3 construing its allegations to embody what are more properly  
4 objections to Kimmel's discharge under § 727(a), rather than  
5 grounds for an exception to discharge of Roz's claim under  
6 § 523(a)(2)(A).

7       Roz alleges that the Kimmels concealed assets and  
8 information so their creditors could not collect. This is  
9 precisely the sort of conduct the various provisions of § 727(a)  
10 are intended to punish by denying the offending debtor a  
11 discharge.<sup>11</sup> Such a severe remedy is justified because concealment  
12 or destruction of assets harms all creditors. As the bankruptcy  
13 court explained to Roz's counsel,

14       If a debtor hides assets, a timely objection  
15 to the debtor's discharge under Section 727 is  
the remedy and it benefits all creditors. It  
is not specific to individual creditors.  
16 There's no individual harm; it's harm  
generally and the consequence of general harm  
17 of hiding assets is to deny a discharge.

18 Tr. Hr'g 9:16-21.

19       But as the bankruptcy court correctly noted, an adversary  
20 proceeding seeking denial of discharge under § 727(a) must be  
21 commenced within 60 days of the meeting of creditors. FED. R.  
22 BANKR. P. 4004(a). Since the meeting of creditors in Kimmel's

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23

24       <sup>11</sup> Section 727(a)(2) denies a discharge to a debtor who,  
with intent to hinder, delay or defraud a creditor or an officer  
25 of the estate, transfers or conceals property within one year  
before the date of filing of the petition, or property of the  
26 estate after the date of filing of the petition. Section  
727(a)(3) sanctions a debtor who conceals, falsifies or destroys  
27 financial books and records. Section 727(a)(4) prohibits  
discharge of a debtor who lies to the court. And § 727(a)(5)  
28 denies a discharge to a debtor who fails to satisfactorily explain  
any loss or deficiency of assets.

1 bankruptcy case occurred on December 7, 2005, the 60-day period  
2 for filing objections to discharge expired on or about February 7,  
3 2006. As a result, Roz can not ask that Kimmel be denied a  
4 discharge under § 727(a) in an amendment to a complaint filed  
5 after this deadline.<sup>12</sup> As a result, Roz is now barred from  
6 raising an objection to discharge.

Rooz argued in both the bankruptcy court and in his appeal briefs that, as explained in a decision of the Seventh Circuit, an intentional fraudulent scheme is actionable under § 523(a)(2)(A). McClellan v. Cantrell, 217 F.3d 890 (7th Cir. 2000). In that case, Cantrell filed a chapter 7 bankruptcy case in 1996. McClellan had years earlier sold machinery to her brother on credit. McClellan retained, but did not perfect, a security interest in the equipment to secure payment of the purchase price. When the balance owed to McClellan for the purchase price was around \$100,000, the brother defaulted, and McClellan sued the brother, and asked the court to enjoin him from transferring the equipment. With the suit pending, the brother "sold" the machinery to Cantrell, who knew about the suit, for \$10. Before she filed her bankruptcy petition, Cantrell resold the machinery for \$160,000 to another party, and in the words of the court, "she's not telling anyone what has happened to the money." McClellan, 217 F.3d at 892.

<sup>12</sup> In addition, since Roz by his own admission was aware of Kimmels' alleged fraud before the granting of discharge, Roz can not seek revocation of discharge. § 727(d)(1) (providing that revocation of a discharge obtained by fraud is allowed only if "the requesting party did not know of such fraud until after the granting of such discharge . . . .")

1 McClellan filed an adversary complaint against Cantrell  
2 seeking a determination that his claim against her for her role in  
3 this scheme was nondischargeable under § 523(a)(2)(A). The  
4 bankruptcy court, and later the district court, rejected  
5 McClellan's argument because he had not alleged that Cantrell made  
6 any fraudulent representations upon which he had relied. The  
7 court of appeals reversed, holding that § 523(a)(2)(A) fraud  
8 actions are not limited to misrepresentations or misleading  
9 omissions, but may include wider applications, such as  
10 participation in a fraudulent transfer. McClellan, 217 F.3d at  
11 893. In its opinion, the Seventh Circuit expresses concern that  
12 the bankruptcy court should use its equitable powers to rectify an  
13 obvious fraudulent transfer. Id.

14 Based upon McClellan, Rozz argues that § 523(a)(2)(A) should  
15 encompass all types of potential fraudulent conduct, as opposed to  
16 the "false pretenses, false representation, or actual fraud"  
17 specified in the statute. Rozz argues that:

18 The courts are to be wary of a plan or scheme  
19 which has been hatched to attempt to escape  
just obligations. McClellan v. Cantrell (7th  
20 Cir. 2000) 217 F.3d 890. The Ninth Circuit  
has recently followed these precedents.  
Muegler v. Bening (9th Cir. 2005) 413 F.3d  
21 980.

22 We think Rozz reads too much into McClellan. The creditor  
23 there suffered a particularized harm from the conduct of the  
24 debtor and her brother. They conspired to place the equipment,  
25 subject to McClellan's security interest, beyond his reach. Here,  
26 the harm alleged by Rozz against the Kimmels (that he was  
27 prevented from collecting) is much more general in nature.  
28 Indeed, the Seventh Circuit's opinion acknowledged that its

1 interpretation was not a perfect fit with the statute, and that  
2 the facts could also be shoe-horned to fit an exception to  
3 discharge under § 523(a)(6). McClellan, 217 F.3d at 896.

4 We have examined the Ninth Circuit's Muegler decision, and  
5 contrary to Roz's suggestion, there is no reference to McClellan  
6 in that opinion. Based upon the Supreme Court's ruling in Cohen  
7 v. de la Cruz, 523 U.S. 213, 118 S.Ct. 1212 (1998), Muegler  
8 interprets § 523(a)(2)(A) to allow an exception to discharge for  
9 any debt arising out of a debtor's fraud, without regard to  
10 whether the debtor received any benefit from that fraud. In re  
11 Muegler, 413 F.3d at 984. Again, given the vague allegations of  
12 Roz's Fourth Amended Complaint, it is unclear what "debt" arose  
13 out of the Kimmels' fraud, even assuming the general kind of acts  
14 referenced therein can amount to fraud.

15 Based upon our research, neither the Ninth Circuit nor this  
16 Panel has endorsed the approach taken to interpretation of  
17 § 523(a)(2)(A) in McClellan in any reported decision. On the  
18 other hand, there is ample authority in this Circuit instructing  
19 that the provisions of the § 523(a) exceptions to discharge should  
20 be construed narrowly. See, e.g., Cal. Franchise Tax Bd. v.  
21 Jackson (In re Jackson), 184 F.3d 1046, 1051 (9th Cir. 1999);  
22 Bowen v. Francks (In re Bowen), 102 B.R. 752, 756 (9th Cir. BAP  
23 2001).

24 Roz does not allege how Kimmel's activities impaired his  
25 particular efforts to collect his debt, nor otherwise caused him  
26 any damage. Given our charge to construe § 523(a) exceptions  
27 narrowly, the availability of § 727(a) to deny a scheming debtor a  
28 discharge upon a timely request, and the absence of authority in

1 our Circuit supporting the use of the bankruptcy court's equitable  
2 powers to expansively interpret the Code, we decline to hold that  
3 Roz's generalized allegations that one or both of the Kimmels  
4 engaged in a scheme to prevent Roz from collecting his judgment  
5 states a claim for relief against Kimmel under § 523(a)(2)(A).

6 C.

7 Based on the above analysis of the Fourth Amended Complaint,  
8 the Panel concludes that it appears that Roz can prove no set of  
9 facts that would entitle him to relief. O'Loglin, 229 F.3d at  
10 874. Consequently, the bankruptcy court did not err in dismissing  
11 the adversary proceeding.

12 III.

13 Roz admits that a spouse is not ordinarily made a party to  
14 an adversary proceeding seeking an exception to discharge where  
15 she is not a debtor. This Panel has consistently endorsed that  
16 position. Beltran v. Beltran (In re Beltran), 182 B.R. 820, 825  
17 (9th Cir. BAP 1995); In re Maready, 122 B.R. 378, 381-82 (9th Cir.  
18 BAP 1991). However, Roz suggests that where a spouse engages in  
19 an attempt to hide community assets, she is a proper defendant in  
20 a § 523(a)(2)(A) complaint. To support this statement, Roz cites  
21 several decisions from the California state courts.

22 State case law is generally not helpful in determining the  
23 extent of federal court jurisdiction. As the bankruptcy court  
24 noted, the action before it was to determine the extent of  
25 Kimmel's discharge. As such, the court's jurisdiction was founded  
26 upon 28 U.S.C. § 1334(b), authorizing the court to entertain the  
27 action as a "civil proceeding[] arising under title 11 . . . ." Even if Roz held a valid claim against Kimmel under

1 § 523(a)(2)(A), we agree that the bankruptcy court lacked  
2 jurisdiction to entertain Roz's claims against Mrs. Kimmel for  
3 common law fraud in connection with her husband's bankruptcy case.  
4 Any attempt to join her as a party-defendant in the Fourth Amended  
5 Complaint was therefore inappropriate.

In any event, since the bankruptcy court properly dismissed  
Rooz's complaint against Kimmel, at that point, the bankruptcy  
court clearly lacked jurisdiction over Mrs. Kimmel.

## CONCLUSION

11 For the above reasons, we AFFIRM the bankruptcy court.