

DEC 29 2006

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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In re:	)	BAP No.	NC-06-1252-PaDB
	)		
DAVID KIMMEL,	)	Bk. No.	05-35269
	)		
Debtor.	)	Adv. No.	06-03047
	)		
<hr/>			
WILLIAM B. ROOZ,	)		
	)		
Appellant,	)		
	)		
v.	)	<b><u>MEMORANDUM</u></b> <sup>1</sup>	
	)		
DAVID KIMMEL,	)		
	)		
Appellee.	)		
	)		

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.

\_\_\_\_\_  
Before: PAPPAS, DUNN and BRANDT, Bankruptcy Judges

<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 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 Rooz \$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 Rooz 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, Rooz, 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, Rooz alleged in the Complaint that:

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

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23 <sup>3</sup> Rooz filed a Request for Judicial Notice with this Panel  
24 on August 28, 2006, asking that, pursuant to Fed. R. Evid. 201, we  
25 take judicial notice of two documents from the state court action  
26 relating to the wage garnishment and exemption claim: the "Order  
27 Determining Claim Exemption", filed on September 30, 2005; and a  
28 "Register of Actions" in William B. Rooz 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.

<sup>4</sup> Kimmel submitted an amended Schedule F on November 21,  
2005, but did not change the entry for the Rooz debt.



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, Rooz 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 Rooz. On July 5, 2006, Rooz 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 Rooz 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.

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26           <sup>5</sup>(...continued)  
27 bankruptcy court at the hearing on July 7, 2006, when the court  
28 stated, "Mr. Rooz on May 16th on his own filed something called  
'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 Rooz'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 Rooz \$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 Rooz  
13 against Mrs. Kimmel. Tr. Hr'g 12:19 - 13:4.

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

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#### JURISDICTION

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

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<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 Rooz  
to cure deficiencies in his various complaints. Rooz has not  
raised the bankruptcy court's decision to deny him leave to  
further amend the complaint as an issue on appeal.

1 **ISSUES**

- 2 1. Whether Roosz's allegations that Kimmel fraudulently promised  
3 to pay \$400 per month on the judgment debt states a claim for  
4 relief for fraud under § 523(a)(2)(A).
- 5 2. Whether Roosz'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.
- 9

10 **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'Loughlin 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).

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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 Rooz 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 Rooz 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, Rooz 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 Rooz. This allegation  
20 disappears in the Third and Fourth Amended Complaints. Instead,  
21 Rooz now argues that Kimmel's post-judgment statements and acts  
22 are part of a plan and scheme to fraudulently deprive Rooz of his  
23 ability to collect the judgment.

24 Rooz's argument is made in two parts. First, Rooz 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 [Rooz] \$400 per month in payment of the judgment."  
28 Rooz alleges that this "promise was made to obtain a settlement of

1 the execution lien." Rooz 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 [Rooz] \$400 per month." In other  
5 words, fairly construing these allegations, Rooz 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 Rooz's second theory is that the Kimmels have jointly engaged  
9 in a "continuous scheme to fraudulently and intentionally hide  
10 substantial assets from Rooz over the past four years." In this  
11 regard, Rooz 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 [Rooz]  
17 from obtaining payment on his judgment." Rooz concedes, however,  
18 that "[t]he full details of the scheme, plan and artifice [are]  
19 unknown to [Rooz]."

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

22 A.

23 Under these facts, Rooz's allegations that Kimmel  
24 fraudulently promised to pay Rooz \$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, Rooz 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 Rooz extended any credit to Kimmel, nor is it alleged that  
22 Rooz otherwise justifiably relied upon Kimmel's representation to  
23 his detriment. Tr. Hr'g 7:11-13.

24 Kimmel had been indebted to Rooz since entry of the state  
25 court judgment in 1995. Rooz 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 Rooz. 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 Rooz 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 Rooz's debt. And the  
8 complaint does not allege what Rooz gave up in consideration of  
9 the monthly payment order. In fact, Rooz acknowledges that Kimmel  
10 paid him \$1,005 "thereafter."

11 Even assuming that Rooz could prove that Kimmel's  
12 representation in state court that he would pay Rooz monthly  
13 payments was intentionally false, Rooz 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, Rooz 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 Rooz'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. Rooz alleges  
6 that Kimmel "had no intention to perform his commitment to pay  
7 [Rooz] \$400 per month." However, he acknowledges that Rooz  
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 Rooz's argument that  
11 Kimmel never intended to pay the \$400 per month.

12 Moreover, the complaint fails to adequately allege how Rooz  
13 was damaged by Kimmel's allegedly fraudulent statements. Indeed,  
14 it appears Rooz may have received more than \$400 per month. Rooz  
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 Rooz according to the terms of the September 30  
18 order, Rooz can not show that he was damaged by Kimmel's alleged  
19 fraud.

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

21 While his argument is somewhat difficult to follow, Rooz 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  
26 determining that the state court's payment order was void because  
27 it was entered in violation of the § 524 discharge injunction.  
28 The bankruptcy court relied on an error in the Fourth Amended  
Complaint that alleges that the order was entered on December 2,  
2005, some three months after the bankruptcy petition was filed.  
Rooz has provided the Panel with the actual order entered by the  
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 Rooz's collection efforts.  
2 Specifically, Rooz alleges that Kimmel hid substantial assets from  
3 Rooz over the four years preceding his bankruptcy filing. Rooz  
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 Rooz.

7 The specific allegations made by Rooz 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  
18 in real estate properties; namely, their home  
19 at 1007 15th Avenue, San Francisco, CA; the  
20 real estate at 1155 Ellis Street, San  
21 Francisco, CA, other real estate properties  
22 and bank accounts; (3) arranged with insiders  
23 to hold title to real estate properties with  
24 the purpose and intent of preventing plaintiff  
25 from obtaining payment on his judgment.

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

21 Rooz 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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23  
24 <sup>8</sup> Rooz 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 Rooz but that the acts together  
27 "were part of a plan and scheme to fraudulently deprive [Rooz] 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 nondischargability under § 523(a)(2)(A); proof  
of any one fraud would be sufficient. However, as we discuss  
below, Rooz 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 Rooz 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 Rooz'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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21 <sup>9</sup> The elements of particularity of a fraud that must be  
22 pleaded under Rule 9(b) were very recently visited and affirmed by  
23 the Fifth Circuit in Ft. James Corp., 2006 WL 3399286 at \* 3 (Rule  
24 9(b) requires that plaintiffs plead enough facts to illustrate  
25 "the who, what, when, where, and how of the alleged fraud"  
26 [citations omitted]).

27 <sup>10</sup> For example, the allegations of the complaint are  
28 ambiguous concerning the alleged perpetrators of the frauds. Rooz  
argues that "defendants" were responsible for these actions.  
However, we can not tell from the complaint if Rooz alleges that  
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 Roosz'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 Roosz's claim under  
6 § 523(a)(2)(A).

7 Roosz 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 Roosz's counsel,

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

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

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

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26 <sup>11</sup> Section 727(a)(2) denies a discharge to a debtor who,  
27 with intent to hinder, delay or defraud a creditor or an officer  
28 of the estate, transfers or conceals property within one year  
before the date of filing of the petition, or property of the  
estate after the date of filing of the petition. Section  
727(a)(3) sanctions a debtor who conceals, falsifies or destroys  
financial books and records. Section 727(a)(4) prohibits  
discharge of a debtor who lies to the court. And § 727(a)(5)  
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, Rooz 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, Rooz is now barred from  
6 raising an objection to discharge.

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

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26 <sup>12</sup> In addition, since Rooz by his own admission was aware  
27 of Kimmels' alleged fraud before the granting of discharge, Rooz  
28 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, Rooz 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. Rooz argues that:

18                     The courts are to be wary of a plan or scheme  
19                     which has been hatched to attempt to escape  
20                     just obligations. McClellan v. Cantrell (7th  
21                     Cir. 2000) 217 F.3d 890. The Ninth Circuit  
22                     has recently followed these precedents.  
23                     Muegler v. Bening (9th Cir. 2005) 413 F.3d  
24                     980.

25           We think Rooz reads too much into McClellan. The creditor  
26 there suffered a particularized harm from the conduct of the  
27 debtor and her brother. They conspired to place the equipment,  
28 subject to McClellan's security interest, beyond his reach. Here,  
the harm alleged by Rooz against the Kimmels (that he was  
prevented from collecting) is much more general in nature.  
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 Rooz'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 Rooz'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 Rooz 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 Rooz's generalized allegations that one or both of the Kimmels  
4 engaged in a scheme to prevent Rooz 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 Rooz can prove no set of  
9 facts that would entitle him to relief. O'Loghlin, 229 F.3d at  
10 874. Consequently, the bankruptcy court did not err in dismissing  
11 the adversary proceeding.

12 III.

13 Rooz 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, Rooz 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, Rooz 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 . . . ."  
28 Even if Rooz held a valid claim against Kimmel under

1 § 523(a) (2) (A), we agree that the bankruptcy court lacked  
2 jurisdiction to entertain Rooz'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.

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

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**CONCLUSION**

For the above reasons, we AFFIRM the bankruptcy court.