

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NOT FOR PUBLICATION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
)		
_____)		
WILLIAM B. ROOZ,)		
)		
Appellant,)		
)		
v.)	<u>MEMORANDUM</u> ¹	
)		
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

¹ 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. Rooz 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. Rooz were engaged in a real
8 estate venture concerning properties in Northern California.
9 Disputes had arisen between the parties as early as 1991. Rooz
10 alleges that he was damaged by the actions of Kimmel and his wife
11 ("Mrs. Kimmel"). Rooz filed an action against the Kimmels in
12 Superior Court, San Mateo County, entitled Rooz v. Kimmel, No.
13 368482. Mrs. Kimmel thereafter filed a bankruptcy petition under
14 chapter 7² 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. Rooz 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 Rooz 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 ² Unless otherwise indicated, all chapter, section and
26 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,
27 as enacted and promulgated prior to the effective date (October
28 17, 2005) of most of the provisions of the Bankruptcy Abuse
Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,
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 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 2005.³

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."⁴ 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.

23 ³ 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.

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

1 Plaintiff sustained damages in excess of
2 \$500,000 as a proximate result of defendant's
fraudulent conduct.

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

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

16 On May 16, 2006, Rooz filed an "Amendment to Complaint,"
17 drawing the court's attention to three documents: (1) Letter
18 Agreement to Settle Disputes Between Rooz and Kimmel, dated April
19 5, 1991; (2) Ms. Weckerle's Statement; and (3) the State Court
20 Judgment. Accompanying the documents was Rooz'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").⁵

24
25 ⁵ The Panel has reviewed the copy of the Second Amended
26 Complaint provided in the Excerpts of Record and compared it with
27 the copy in the adversary proceeding docket. Both copies are
28 identical. Only the first of the three alleged documents, the
Letter Agreement to Settle Disputes between Rooz and Kimmel, was
filed by Rooz on May 16, 2006. This was confirmed by the
(continued...)

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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25

26 ⁵(...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 amend⁶ in an order entered on July 11, 2006. Rooz filed a
18 timely appeal on July 17, 2006.

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20

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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⁶ 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 **DISCUSSION**

2 I.

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

15 Mr. Rooz 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 Rooz 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 Rooz'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 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"⁷ 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 ⁷ 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 scheme⁸ 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,

23
24 ⁸ 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).⁹

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.¹⁰ 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).

20
21 ⁹ 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 ¹⁰ 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 Rooz'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 Rooz's claim under
6 § 523(a)(2)(A).

7 Rooz 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.¹¹ Such a severe remedy is justified because concealment
12 or destruction of assets harms all creditors. As the bankruptcy
13 court explained to Rooz'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

26 ¹¹ 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.¹² 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 ¹² 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
 has recently followed these precedents.
 Muegler v. Bening (9th Cir. 2005) 413 F.3d
 980.

22 We think Rooz 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 Rooz 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 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.