NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-05-1124-MoSK
DONALD BUSH and NANCY BUSH,	Bk. No. 03-06824-PHX-SSC
Debtors.	Adv. No. 03-00824-PHX-SSC
DONALD BUSH and NANCY BUSH,	
Appellants,	**M E M O R A N D U M**[1]
v.	
TOM WOODS and BECKY WOODS,	
Appellees.	

Argued and Submitted on September 22, 2005
at Phoenix, Arizona

Filed - December 15, 2005

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Sarah Sharer Curley, Bankruptcy Judge, Presiding.

Before: MONTALI, SMITH and KLEIN, Bankruptcy Judges.

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[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 doctrines of law of the case, claim preclusion, or issue preclusion. See 9th Cir. BAP Rule 8013-1.

Debtors Donald and Nancy Bush appeal from the bankruptcy court's judgment that they owe $171,570.00 to Tom and Becky Woods and that such debt is nondischargeable under Section 523(a)(2)(A).[2] The Woodses concede that because Ms. Bush is an "innocent" spouse the judgment should not apply to her personally or her separate property. The Bushes argue that it should also not apply to Ms. Bush's interest in community property. We reject that argument and the Bushes' contention that the parol evidence rule bars Mr. Woods' testimony about the nature of the transaction between the parties. We nevertheless REVERSE IN PART because the Woodses did not make a claim on that part of the debt owed by Mr. Bush arising from an oral loan, and because recovery on the oral loan is barred by Arizona's statute of limitations. We remand for entry of judgment in the lesser amount due on a promissory note.

I. FACTS

In 1998, Mr. Woods made two loans to Mr. Bush. In the first loan, Mr. Woods wired $106,000 to an overseas bank account as directed by Mr. Bush. In return, Mr. Woods received a $212,000 promissory note ("Note"), due in three months. The second loan, for $65,570, had no written documentation. No payments were ever made, and on April 22, 2003, Mr. and Ms. Bush filed their joint voluntary Chapter 7 petition.

On September 13, 2003, Mr. and Ms. Woods filed their nondischargeability complaint against the Bushes. The Woodses'

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[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

complaint identified the two separate loans, but treated both as if they were made pursuant to the Note. In their prayer, they requested damages of $171,570, plus interest, costs and attorney's fees, "reflecting the debt due them on the note signed by Defendant Donald Bush." They alleged that Mr. Bush fraudulently represented that the loans were for an investment in a pump station in Arizona and that Mr. Woods would receive double (viz. $106,000 x 2 = $212,000) his money back in three months after European investors put money into the project.[3]

In their answer, the Bushes acknowledged that the Woodses wired separate payments of $106,000 and $65,570. They did not include as an affirmative defense that the later payment was an oral loan barred by the statute of limitations. In the parties' joint pre-trial statement, they stipulated as an undisputed statement of material fact that the "[Mr.] Woods made two loans, the first for $106,000.00 and the second for $65,570.00," but did not mention an oral loan.

At trial, the Bushes' attorney elicited testimony from Mr. Woods that the second payment was an oral loan and that no action had been brought to collect it until after the Bushes filed their bankruptcy petition. The Woodses' attorney did not object to this testimony and did not introduce any evidence to show, or otherwise argue, that an action on the second loan had been brought within Arizona's three-year statute of limitations on oral obligations. Instead, he clarified that the Woodses' claim was only for amounts

[3] Mr. Bush contends that he told Mr. Woods the funds were for a Nigerian farm equipment export deal where they would wire money to Nigeria and receive a $4,000,000 "commission" in return.

due under the Note, and conceded in his closing argument that action on the $65,570 oral loan was probably barred by the statute of limitations. In his closing argument, the Bushes' attorney agreed and argued that the statute of limitations barred action on the oral loan.

After trial the bankruptcy court issued a memorandum decision holding that Mr. Bush had engaged in actual fraud and had knowingly made numerous false representations with the intent to deceive Mr. Woods, on which Mr. Woods justifiably relied, thereby sustaining a loss of the $171,570 of principal. The court did not address the statute of limitations issue or award prejudgment interest, costs, or attorney's fees. As to Ms. Bush, the court added that:

> Mr. Bush obtained the funds and, presumably, utilized them on behalf of himself and his marital community. No evidence was presented by Ms. Bush to rebut the presumption that Mr. Bush incurred a community obligation and utilized the funds for the benefit of the community.

The Woodses submitted, and the bankruptcy court signed, a judgment ("Judgment") that "Donald and Nancy Bush" owe them $171,570 and that such debt is nondischargeable. The Bushes filed a timely appeal.

II. ISSUES

1. Does the parol evidence rule bar the admission of Mr. Woods' testimony about the pump station?

2. Should Ms. Bush's community property be liable on the Judgment?

3. Should Ms. Bush's sole and separate property be liable on the Judgment?

4. Did the bankruptcy court err in including the oral loan in the Judgment?

III. STANDARDS OF REVIEW

"We review the bankruptcy court's conclusions of law and questions of statutory interpretation de novo, and factual findings for clear error. When there are two permissible views of the evidence, the trial judge's choice between them cannot be clearly erroneous." Vill. Nurseries v. Gould (In re Baldwin Builders), 232 B.R. 406, 410 (9th Cir. BAP 1999) (citations omitted).

"The procedural sufficiency of a pleaded claim or defense in federal court is governed by federal rules, even though the defense relied on may be a state defense." Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979). We review the sufficiency of the pleading of an affirmative defense de novo. Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001).

IV. DISCUSSION

1. The Parol Evidence Rule Does Not Bar Admission Of Mr. Woods' Testimony About the Pump Station

The Bushes contend that Mr. Woods' testimony about the nature of the transaction between the parties should have been barred by the parol evidence rule. Mr. Woods testified that he thought he was investing in a pump station. The Bushes assert that this testimony violates Arizona's parol evidence rule and should be barred because it contradicts the parties' written agreement, the Note, which establishes that the transaction was a loan, not an investment in a pump station.

Arizona's parol evidence rule governs because federal courts apply state law regarding the parol evidence rule. Jinro Am. Inc. v. Secure Invs., Inc., 266 F.3d 993, 998-999 (9th Cir. 2001). "Arizona's parol evidence rule prohibits the introduction of extrinsic evidence to vary or contradict, but not to interpret, an agreement." Id. at 999. The court considered Mr. Woods' testimony, along with other evidence, in determining that Mr. Bush engaged in actual fraud within the meaning of Section 523(a)(2)(A), but not to vary or contradict the terms or conditions of the Note. Neither the Woodses nor the Bushes disputed any of the Note's terms and conditions, and the parol evidence rule is not applicable.

The Bushes argue that Mr. Woods contradicted the Note when he testified that the scheme was an "investment" which the Bushes distinguish from a "loan." Mr. Woods testimony does not contradict the terms of the Note because investments can take many forms, including loans. Mr. Woods' testimony about the terms of the transaction (doubling his money) is consistent with the written terms of the Note.

Even if the written agreement did contradict Mr. Woods' testimony (which it does not), the parol evidence rule does not apply because "[p]arol evidence is always admissible to show fraud in the inducement of a contract." Barnes v. Lopez, 544 P.2d 694, 697 (Ariz. App. 1976). The Bushes cite Spudnuts, Inc. v. Lane, 641 P.2d 912 (Ariz. App. 1982), for the proposition that parol evidence, while admissible to show fraud even when it varies from the terms of a writing, is inadmissible when it is squarely against the terms of the writing. In Spudnuts, a franchisor sued

a franchisee for breach of contract. The franchisee used fraudulent inducement as a defense and attempted to introduce statements made by the franchisor before the contract was signed. The court upheld the lower court's refusal to admit the parol evidence, offered to show fraud in the inducement, because the franchisor's alleged statements (that the Spudnuts shop would open within six months) were squarely against the terms of the written contract (that the franchisee was responsible for opening the shop within six months).

Unlike the case at bar, the debtor in Spudnuts attempted to use parol evidence to establish fraud in order to avoid performance under the contract. The underlying case involved establishing a debt pursuant to the contract. Here, the court relied on evidence (Mr. Woods' testimony about the pump station) not squarely against the terms of the contract, but in order to establish fraud for purposes of nondischargeability. The fraud question does not involve establishing a debt pursuant to contract, which is a separate question altogether from nondischargeability. See, e.g., RTC v. McKendry (In re McKendry), 40 F.3d 331, 336 (10th Cir. 1994) ("In bankruptcy court, there are two separate and distinct causes of action: One cause of action is on the debt and the other cause of action is on the dischargeability of that debt . . . .").

Finally, we note that the Bushes did not raise the parol evidence rule at trial or otherwise object to Mr. Woods' testimony. In the Ninth Circuit, "appellate courts will not consider arguments that are not 'properly raise[d]' in the trial courts." O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.),

887 F.2d 955, 957 (9th Cir. 1989). Therefore, they cannot raise the issue on appeal.

For each of these reasons, we reject the Bushes' argument that the bankruptcy court erred in admitting Mr. Woods' testimony about the pump station in order to establish Mr. Bush's fraud.

2. Ms. Bush's Interest In Community Property Is Liable For The Debt

Under section 524(a)(3), the nondischargeable debt of one spouse that is a "community claim" is enforceable against after-acquired community property.[4] 4 Collier on Bankruptcy ¶ 524.02[3][a], at 524-28 (15th ed. rev. 2005). After-acquired community property remains free from prebankruptcy community claims so long as "neither spouse has committed an act creating a nondischargeable debt." Id. at 524-27, 524-28. The underlying policy is that the "guilty spouse should not be able to hide behind the innocent spouse's discharge" and "[b]oth spouses will suffer by reason of one spouse's prior 'sins' insofar as after-acquired jointly owned community property is concerned." Judge v. Braziel (In re Braziel), 127 B.R. 156, 158 n.9 (Bankr. W.D. Tex. 1991).

A "community claim" is a prepetition claim for which property of the kind specified in section 541(a)(2), viz., community property, is liable. 11 U.S.C. § 101(7).

The Bushes contend that Ms. Bush's interest in their community property should not be liable for the Judgment because

[4] Non-exempt community property owned as of the petition date is property of the estate under section 541(a)(2), subject to administration by the representative of the estate for the benefit of all creditors.

Ms. Bush did not participate in or know about her husband's fraud, and because the marital community did not actually benefit from the scheme. They contend that the Woodses had to show fraudulent intent by Ms. Bush to enforce the judgment against her interest in the community property. We agree with the Woodses that under Arizona law, which governs, the marital community is "liable for the intentional or negligent torts of one spouse when a community purpose or benefit can be established." FDIC v. Soderling (In re Soderling), 998 F.2d 730, 733 (9th Cir. 1993). See also Arcadia Farms v. Rollinson (In re Rollinson), 322 B.R. 879, 881-882 (Bankr. D. Ariz. 2005); Valley Nat'l Bank v. LeSueur, 53 B.R. 414, 416 (Bankr. D. Ariz. 1985).

The Bushes confuse this issue with whether an "innocent" spouse and her separate property should be liable for the nondischargeable debts of the "guilty" spouse. In Rollinson, the court articulated a two-part inquiry to determine the dischargeability of a debt as to an innocent co-debtor spouse. 322 B.R. at 881. First, the court determines "whether the debt is a community debt or the sole and separate debt of the guilty spouse." Id. This is a question of state law. Id. Second, if the debt is found to be a community debt under state law, the court must determine the scope of the discharge. Id. If the court determines that the debt is nondischargeable to one spouse and the debt is a community debt, then it is nondischargeable to the marital community "and the innocence of the other spouse is no defense to that liability." Id. at 880. The court reached a similar result in LeSueur, 53 B.R. at 415 ("nonexempt, post-petition community property and the separate property of the

spouse whose actions led to nondischargeability" held liable for the debt).

Here the bankruptcy court found that Mr. Bush acted on behalf of and for the benefit of the marital community in obtaining the loans from Mr. Woods and utilized the proceeds to support the community. That finding was not clearly erroneous. Accordingly, the bankruptcy court was correct that as a matter of Arizona law, the entire debt owed to Mr. Woods is a community obligation. See Soderling, 998 F.2d at 733; Rollinson, 322 B.R. at 882; LeSueur, 53 B.R. at 416. As such, the Judgment constitutes a community claim and as in Rollinson, since the debt is nondischargeable as to Mr. Woods under section 523(a)(2)(A), it is nondischargeable as to the marital community. Rollinson, 322 B.R. at 880.

The Bushes contend that the marital community should not be held liable for Mr. Bush's actions because the marital community did not actually benefit from the fraud and because Ms. Bush had no knowledge of the fraud. The Bushes cite Taylor Freezer Sales of Ariz., Inc. v. Oliphant (In re Oliphant), 221 B.R. 506 (Bankr. D. Ariz. 1998), for the proposition that in an "innocent spouse" case, the marital community may be held liable for one spouse's fraud only when fraudulent intent is imputed to the innocent spouse under "egregious facts and circumstances such as a large benefit conferred upon the marital community." Their reliance is misguided.

Oliphant involved a creditor's attempt to establish in personam liability against an innocent spouse, or collect from her sole and separate property, or both. There was no community property at issue in Oliphant, nor would there be any in the

future because the debtor and her husband had divorced during the bankruptcy case. Oliphant, 221 B.R. at 509. The court held that "in order for the debt to be nondischargeable in the 'innocent' spouse's [separate] bankruptcy," the plaintiff seeking a nondischargeability order "must show culpable conduct or fraudulent intent on the part of the 'innocent' spouse." Id. at 511. Oliphant is irrelevant because the Woodses are not attempting to collect from Ms. Bush personally or her separate property

The Bushes misapply the innocent spouse defense because it applies "only to determine whether the innocent spouse gets her own discharge, and thus whether her sole and separate property will be free from [community] debt or liable for it." Rollinson, 322 B.R. at 884. We reject the Bushes' application of the defense and hold that Ms. Bush's interest in after-acquired community property is fully liable for the nondischargeable debt.

While it may seem harsh that all future community property acquired by Ms. Bush (including future wages) will be liable on the Judgment, Congress has continued in a bankruptcy setting the community property state law notion that a spouse may subject the other non-culpable spouse's community property interests to nondischargeable debts. Congress alone has the authority to provide relief to someone in Ms. Bush's situation; we do not.

3. Ms. Bush's Sole And Separate Property Is Not Liable For The Debt

The Bushes contend that Ms. Bush's sole and separate property should not be liable for the debt. The Woodses do not dispute the issue, and agree that the Judgment should be modified to exempt

Ms. Bush and her sole and separate property.

4. The Bankruptcy Court Erred In Including The Amount Of The Oral Loan In The Judgment

"Generally, a party cannot succeed on a cause of action not stated in the complaint." Jodoin v. Samayoa (In re Jodoin), 209 B.R. 132, 136 (9th Cir. BAP 1997). In their complaint, the Woodses requested $171,570 of damages, plus costs, interests, and fees, on the Note. Mr. Woods conceded on cross examination that $65,570 of that amount was on the separate oral loan. The Woodses did not move to amend under Fed. R. Civ. P. 15(b) ("Rule 15(b)") and seek a nondischargeability determination on the oral loan. Instead, they clarified that their claim was for recovery of $212,000 on the Note. Accordingly, the bankruptcy court erred in including the oral loan in the Judgment.[5]

Alternatively, the Bushes contend that the $65,570 oral loan is barred by Arizona's statute of limitations and that the bankruptcy court erred when it entered the Judgment that included the oral debt. The Woodses assert that the Bushes waived the statute of limitations defense by not pleading it in their answer, and that the Bushes' assertion of the defense in closing arguments was insufficient.

Fed. R. Civ. Proc. 8(c) ("Rule 8(c)") requires that a defendant raise affirmative defenses, including the statute of limitations, in the answer to a complaint. Rule 8(c) is intended to prevent surprise and prejudice by giving the opposing party

[5] Why the Woodses did not seek more than $106,000 on the Note in their complaint is not before us. Perhaps they were concerned about the excessive interest involved in seeking to double their money on a three month obligation.

notice of the affirmative defense and time to rebut it. See, e.g., Moore, Owen, Thomas & Co. v. Coffey, 992 F.2d 1439, 1445 (6th Cir. 1993); Harris v. Sec'y, U.S. Dept. of Veterans Affairs, 126 F.3d 339, 343 (D.C. Cir. 1997). Under Rule 8(c), an affirmative defense is generally waived and excluded from the case if not pleaded in the answer. Id.

A defendant is entitled to have a complaint state whether a claim is for an oral debt, and, if so, its duration, because "in the absence thereof, it cannot know whether to plead affirmative defenses based on applicable statutes of limitations." Marquardt-Glenn Corp. v. Lumelite Corp., 11 F.R.D. 175, 177 (S.D.N.Y. 1951). See also Reed v. Gen. Implement Exp. Corp., 9 F.R.D. 182, 183 (N.D. Ohio 1949) ("An oral contract, by its very nature, requires specific identification in pleading as to time, place, and parties or agents."). Because the Woodses did not allege, describe, or make a claim on the oral loan in their complaint,[6] the Bushes were not required to plead the statute of limitations in their answer and did not waive the defense by not pleading it. See Stupak v. Hoffman-La Roche, Inc., 315 F. Supp. 2d 970, 973 (E.D. Wis. 2004) ("It would be unreasonable to prevent a defendant from asserting a defense that was not reasonably apparent until after his responsive pleading was filed.").

Even if the complaint had alleged an oral loan, an affirmative defense is not always waived when not pleaded in the

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[6] The Woodses first attempted to recover on the oral loan when they submitted their proposed judgment, having previously clarified at trial that they were only attempting to collect the amount due on the Note and having acknowledged that collection on the oral loan was likely barred by the statute of limitations.

answer. Coffey, 992 F.2d at 1445. Exceptions to Rule 8(c) are recognized when late assertion of an affirmative defense gives the plaintiff fair notice of the defense, does not result in surprise or prejudice, or when the issue is tried by the express or implied consent of the parties. See, e.g., Wyshak, 607 F.2d at 827 ("The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense."); Allied Chem. Corp. v. Mackay, 695 F.2d 854, 855-856 (5th Cir. 1983) ("[W]here the matter is raised in the trial court in a manner that does not result in unfair surprise, . . . technical failure to comply precisely with Rule 8(c) is not fatal."); Jones v. Miles, 656 F.2d 103, 107 n.7 (5th Cir. 1981) (failure to plead an affirmative defense "does not constitute a waiver where there is no claim of surprise"); Coffey, 992 F.2d at 1445 (affirmative defense not waived if the defendant raises the issue "at a pragmatically sufficient time" and the plaintiff is not "prejudiced in its ability to respond"); Haskins v. Roseberry, 119 F.2d 803, 805 (9th Cir. 1941) (under Rule 15(b), the statute of limitations defense is not waived by failure to plead it when the issue is tried by express or implied consent of the parties). Nonetheless, to take advantage of these exceptions, "the defendant remains obligated to act in a timely fashion" and to raise the statute of limitations "at the earliest possible moment." Venters v. City of Delphi, 123 F.3d 956, 967 (7th Cir. 1997) (internal quotations omitted).

Here, the Woodses were the first parties to raise the statute of limitations issue when their counsel conceded, in closing arguments, that the $67,570 payment was an oral debt that might

not be enforceable under state law, and that "these funds . . . are probably going to be gone." Since the Woodses raised and conceded the statute of limitations themselves, they cannot claim they lacked notice of the defense when the Bushes asserted it in closing arguments, or were surprised or prejudiced by the Bushes' failure to raise the defense in their answer. See Jones, 656 F.2d at 107 ("[A]n affirmative defense is not waived to the extent that . . . the opposing party's own evidence discloses the defense."); Coffey, 992 F.2d at 1445 ("[I]f a plaintiff receives notice of an affirmative defense by some means other than the pleadings, . . . defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice.").

Moreover, the litigation of the issue at trial supercedes any alleged omission in the answer. See Rule 15(b); Harris, 126 F.3d at 344 ("Where a matter has gone to trial and parties have litigated the unpled issues by express or implied consent, Rule 15(b) may render a failure to amend irrelevant."); Haskins, 119 F.2d at 805 (Rule 15(b) cures failure to plead the statute of limitations in the answer when the issue is tried by the express or implied consent of the parties); Jones, 656 F.2d at 107 n.7 ("[A]n affirmative defense is not waived if the party who should have pled the defense introduces evidence in support thereof without objection by the adverse party or . . . the opposing party's own evidence discloses the defense, necessarily indicating his express consent."); 6A Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 1493, at 19 (2d ed. 1990) (implied consent under Rule 15(b) "seems to depend on whether the parties recognized that an issue not presented by the pleadings

entered the case at trial."); Dunn v. Trans World Airways, Inc., 589 F.2d 408, 413 (9th Cir. 1978) (Rule 15(b) cured any defect in the plaintiff's pleadings when the defendant raised an issue not disclosed in the pleadings, the parties were aware of the issue, and evidence regarding the issue was introduced at trial). Accordingly, the Bushes did not waive the statute of limitations defense. They were fully justified in presenting uncontroverted evidence that the $65,570 portion of the amount sought by the Woodses was based on an obligation that was barred by the statute of limitations.

The Woodses argue that an affirmative defense cannot be raised for the first time in closing arguments. Under the circumstances, asserting the statute of limitations in closing arguments came at a pragmatically sufficient time (immediately after the Woodses raised the issue) and the Woodses were not prejudiced in their ability to respond (because they had already conceded the issue). See Coffey, 992 F.2d at 1445. Furthermore, a Rule 15(b) amendment may be made at any time, even after judgment.[7] Rule 15(b).

Because the Bushes properly asserted and did not waive the statute of limitations defense, and because the Woodses conceded the issue, the bankruptcy court erred in including the oral loan in the Judgment.[8]

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[7] Even though the Bushes did not seek leave to amend their answer, "such formality can be excused when the issue is otherwise adequately raised." Stupak, 315 F. Supp. 2d at 973.

[8] Even if the Woodses had not conceded the issue, the evidence introduced at trial indicates that enforcement of the oral loan is barred by Arizona's three-year statute of limitations (continued...)

V. CONCLUSION

The parol evidence rule does not bar Mr. Woods' testimony regarding the circumstances of his investment with Mr. Bush. The Bushes did not raise the parol evidence rule before the bankruptcy court; it is inapplicable because Mr. Woods' testimony did not contradict the Note and alternatively because he alleged fraud in the inducement.

The Woodses need not establish any culpability by Ms. Bush in order to enforce the Judgment against the Bushes' community property. Nevertheless, the Woodses concede that the Judgment should not impose liability on Ms. Bush personally or her separate property.

We also hold that the Judgment must be reduced by $65,570, to $106,000,[9] because the Woodses did not make a claim on the oral loan and because the applicable statute of limitations bars any action on it. The Bushes did not waive the statute of limitations defense because the Woodses did not allege an oral debt in their complaint and because the issue was litigated at trial.

Accordingly, we REVERSE IN PART and REMAND for entry of a judgment based upon a principal obligation of $106,000 solely

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[8](...continued)
on oral debts. Mr. Woods made the oral loan in August 1998. He testified that he "realized it wasn't going to work" six to eight months later, indicating that the loan had already come due, and that he had not filed any pre-bankruptcy collection actions against the Bushes in state court. Even if the cause of action did not accrue for a full year after the oral loan was made, the statute of limitations had expired when the Bushes filed their bankruptcy petition in April 2003.

[9] The Judgment submitted by the Woodses did not include any interest, costs or attorney's fees. The panel does not express a view on whether the Woodses would have been entitled to more than $106,000, the amount loaned to Mr. Woods pursuant to the Note.

against Mr. Bush as a nondischargeable debt, enforceable against him personally, his separate property, and all of the Bushes' community property.

KLEIN, Bankruptcy Judge, dissenting in part:

I join the majority decision to the extent that it affirms the $106,000 judgment declared nondischargeable on account of fraud, concluding that the parol evidence rule does not bar admission of testimony about the pump station, that community property is liable for the debt, and that the separate property of Nancy Bush is not liable for the nondischargeable debt incurred by Donald Bush.

I do not agree, however, that the trial court erred when it awarded the Woods' the other $65,570 component of the $171,570 that Donald Bush cheated them out of. I would affirm the judgment of the trial court in its entirety on either of two alternative, independent grounds. First, unlike the majority, I am persuaded that the potential defense of statute of limitations with respect to an oral loan was waived when it was not timely raised by defendant. Second, because we can affirm (but not reverse) for any reason supported by the record regardless of the whether the limitations issue with respect to the oral debt was waived, I would affirm on the basis that the plaintiff pled and proved the elements of the tort of intentional misrepresentation, together with damages of $171,570, in the course of establishing that the debt is nondischargeable under 11 U.S.C. § 523(a)(2).

I

The majority's reasoning that the complaint was too vague to place the defendant on notice that he was being sued regarding a transaction that might implicate a statute of limitations defense is out of step with the requirements of notice pleading under Federal Rule of Civil Procedure 8 as recently re-emphasized by the Supreme Court. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510-15 (2002).

The complaint alleged two loans made in 1998 totaling $171,570, the first of which was evidenced by a $212,000 promissory note, requesting "damages" of $171,570, plus interest and costs, together with a determination that the debt is excepted from discharge under 11 U.S.C. §§ 523(a)(2) and (a)(6). The answer conceded that the full $171,570 had been received. The answer made no mention of a statute of limitations defense notwithstanding the requirement of Federal Rule of Civil Procedure 8(c) that the defense of statute of limitations be set forth affirmatively. Fed. R. Civ. P. 8(c), incorporated by Fed. R. Bankr. P. 7008(a). Further, it was stipulated in the Joint Pretrial Statement, which was silent about any limitations issue, that plaintiffs "made two loans, the first for $106,000.00 and the second for $65,570.00" and that "none of those moneys were ever returned to Woods." Finally, there was no actual mention of the statute of limitations until closing arguments after the evidentiary record closed.

The nub of the question is whether testimony that the second loan was made based on an oral agreement, which testimony Mr. Bush's counsel elicited on cross-examination, amounts to express

or implied consent to try the question of the Arizona statute of limitations on oral loans.[1] If the testimony amounted to consent to try the limitations issue, then it would be permissible for the trial court to deem the pleadings to conform to the evidence. Fed. R. Civ. P. 15(b), incorporated by Fed. R. Bankr. P. 7015. The analysis is necessarily on a case-by-case basis that turns upon the peculiarities of the particular circumstances. Here, the majority says there was consent to try the issue; I say no.

As of the beginning of trial, it is beyond cavil that the statute of limitations defense had not been raised. The full amount of the two loans was conceded. Nothing in the answer or proceedings before trial hinted at a limitations defense. Plaintiff had no notice that a limitations defense would be

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[1]The pertinent testimony of Mr. Woods on cross-examination was as follows:

Q. Now after you transferred the $106,000 overseas you made a second transfer; is that correct?
A. That's correct.
Q. And how many weeks transpired between the two transfers.
A. About a month actually.
Q. About a month?
A. Uh-huh.
Q. Did you get a new note executed when you transferred the second sums?
A. No, I did not.
Q. All right. Did you ever file a[n] action in state court attempting to collect on either one of the sums that you transferred, the 106 or the $65,000 and some cents?
A. No, I did not.
Q. First action you filed was the action that you filed in the bankruptcy court; is that correct?
A. That's correct. The reason being is is [sic] I didn't even know that Don Bush was filing bankruptcy. Okay? And the first time that I heard about it is when I get the notice that he had filed bankruptcy. All of a sudden it dawned on me, well, Mr. Bush has really been totally lying to me about everything from the git-go.

Tr. 3/11/04 at 34-35.

raised. One would have thought that any limitations defense had been waived (or forfeited) as of that time.

The trial evidence was scant and was essentially limited to the fraud victim's statement on cross-examination that the second loan ($65,570) was made pursuant to an oral request about a month after the defendant executed the $212,000 note in connection with the initial $106,000 loan. Such testimony elicited in such circumstances does not, in the context of this case, amount to either express or implied consent to try the issue of the statute of limitations regarding oral agreements. Moreover, the fact that the oral nature of the second part of the loan transaction was elicited on cross-examination is significant: it suggests that defense counsel was sandbagging.

The majority inaccurately asserts that "the Woods did not allege, describe or make a claim on the oral loan in their complaint" and uses that assertion to excuse the defendant's omission to plead the limitations defense. The reasoning is that, in the absence of mention whether the debt is oral, a defendant "cannot know whether to plead affirmative defenses based on applicable statutes of limitations." In other words, the majority thinks Mr. Bush was prejudiced by not being reminded in the complaint that the second part of the debt was pursuant to his oral agreement with the plaintiff.

I submit that it is so absurd to think that Mr. Bush could not have known from the complaint that he needed to plead a limitations defense, that it is impossible to find that he was prejudiced. The full $171,570 amount of the two loans was alleged in the complaint as the measure of damages. Since Mr. Bush was

the borrower and conceded the full amount of the two loans, he plainly had notice that a claim was being made on both loans and, similarly, plainly knew the circumstances of his transactions with Mr. Woods.

There is no requirement for pleading the oral nature of a loan. The fundamental pleading requirement is notice that gives the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Swierkiewicz, 534 U.S. at 512; Conley v. Gibson, 355 U.S. 41, 47 (1957).

The Supreme Court's position in Swierkiewicz and Conley is consistent with the explanation by Circuit Judge Charles Clark, who was a prime architect of the Federal Rules of Civil Procedure, of notice pleading:

> The notice in mind is rather that of the general nature of the case and the circumstances or events upon which it is based, so as to differentiate it from other acts or events, to inform the opponent of the affair or transaction to be litigated - but not of details which he should ascertain for himself in preparing his defense - and to tell the court the broad outlines of the case.

Charles E. Clark, Simplified Pleading, 2 F.R.D. 456, 460-61 (1943).

It is worth noting that Form 6 of the Federal Rules of Civil Procedure, which is the model "Complaint for Money Lent," does not mention whether the loan is oral or based on a writing:

> Form 6. Complaint for Money Lent
>
> 1. Allegation of jurisdiction.
>
> 2. Defendant owes plaintiff _____ dollars for money lent by plaintiff to defendant on June 1, 1936.
>
> Wherefore plaintiff demands judgment against the defendant for the sum of _____ dollars, interest, and costs.

Fed. R. Civ. P. Form 6.

As a matter of law, the Forms are sufficient under the rules and indicate the simplicity and brevity of statement that the rules contemplate. Fed. R. Civ. P. 84; Swierkiewicz, 534 U.S. at 513 n.4. Surely, Form 6 is not so inadequate as to excuse compliance with Rule 8(c) by a defendant who plainly knows as much (and probably more) about the transaction than the plaintiff.

The reality is that the defendant had precise notice of actual transactions over which he was being sued, admitted the transactions in the Answer and in the Joint Pretrial Statement and, by definition, knew how he, as borrower, had obtained the loans, including the oral nature of the second transaction. In other words, he had the notice and the personal knowledge that put him in the position of being about, and needing to, assert a defense of statute of limitations in accordance with Rule 8(c) at the time he filed his Answer.

It follows that the majority's emphasis upon the omission of the complaint to mention the oral nature of the second loan as an excuse for not pleading the limitations defense places an unreasonable burden of specificity on the plaintiff. Such a burden would amount to validating blame-the-victim strategy that is the usual last refuge of a fraudfeasor.

Nor is it of any consequence that the plaintiff's counsel was the first person to mention the possible existence of a statute of limitations issue when, in closing argument, he appeared to concede that the $65,570 might be barred by the statute of limitations. In the first place, the fact that he made no mention of the issue until he made his remark in closing argument can be construed as indicating that, during the evidentiary phase of the

trial, there was no consent to try the issue and that the putative raising of the issue was a matter of surprise and prejudice. In the second place, the putative concession was ambiguous because it was made in an "even if" context in which he was arguing that the proper measure of damages was the $212,000 stated in the note;[2] and defense counsel conceded that $212,000 might be the appropriate measure of damages.[3] Moreover, the lack of lucidity in that part of his argument is consistent with the proposition that he had been sandbagged and was still picking himself up off the floor.

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[2]The pertinent portion of plaintiff's closing argument was:

> We believe that we're entitled to judgment. We're – we believe we're entitled [to] a finding of nondischargeability and [to] a money judgment for the first note of $212,000. Law in the Ninth Circuit is that interest on a nondischargeable debt is also nondischargeable. The agreement that Mr. Bush made was to pay $212,000. That is the debt. It's not the [$]106,000 that was invested, it was what the claim is. The claim is the note, the $212,000.
> ...
> So in effect Mr. Woods – the benefit of the bargain to Mr. Woods was the 212, not simply a return of the money he invested. The [$]67,000 admittedly is problematic. It's an oral debt. I'm not sure that under applicable state law it would be enforceable at the time of the filing of the bankruptcy. So I will concede that those funds, I think, are probably going to be gone. But I think we're entitled to the $212,000, which represents the claim, because that's the contractual obligation of Mr. Bush to Mr. Woods.

Tr. 3/11/04 at 71-72.

[3]The defense's closing argument responded:

> Finally, the issue of damages, if you were to award them to them. I don't agree with Mr. Hirsch that he gets the [$]212,000 and interest. The amount here that they timely brought a claim for is the $106,000 that was loaned pursuant to a promissory note that allows them to collect $212,000 with no interest. So I think he needs to elect does he want his [$]106,000 back with interest or would he like to have the 212 with no interest, but he can't have it both ways.

Tr. 3/11/04 at 76.

It is also of some importance that the trial court did not believe that the statute of limitations issue had been tried by implied or express consent.

In short, I am persuaded that the defense of statute of limitations with respect to an oral debt was waived.

II

Finally, the Woods' successful proof that the debt is nondischargeable under 11 U.S.C. § 523(a)(2) means, since the essential elements in this Circuit are identical, that they pled and proved the elements of the tort of intentional misrepresentation. The court found fraud to the tune of damages of $171,570.

The issue of the tort of intentional misrepresentation, i.e. civil fraud, was tried by the parties. Nowhere in the record is there any hint that the question of statute of limitations for fraud was raised. The judgment matches precisely the measure of simple damages for such a fraud.

This is an adequate independent basis supported by the record for affirming.[4] I would do so.

[4]Another adequate, independent basis for affirming that is arguably available would be to view the $171,570 in loans as a single transaction in two installments that both were covered by the $212,000 note. An advance made on an oral request that is consistent with an existing note that can be viewed as establishing a loan facility is not an oral loan. It would not have been unreasonable for the parties to have regarded repayment of the $65,570 to have been assured by the existence of the $212,000 note.

***

At the human level, this appeal boils down to whether a fraudfeasor should be permitted to get away with $65,570 of the fraud on the theory that the fraudfeasor's silence about the statute of limitations regarding oral transactions cannot be held to constitute the fraudfeasor's waiver of a waivable defense because the fraudfeasor should not be charged with knowing that part of the fraudfeasor's ill-gotten gains were obtained through the fraudfeasor's oral request. My answer is in the negative.

On my reading of this trial record, the defense of statute of limitations for an action on an oral loan was waived in the pleadings (as confirmed by the Joint Pretrial Statement) and was not tried by express or implied consent. Moreover, the essential elements of the tort of intentional misrepresentation were necessarily tried by consent in the course of establishing that the debt is excepted from discharge under § 523(a)(2), which entitles us to affirm for a reason supported by the record, regardless of whether there was a waiver of the statute of limitations with respect to an action on an oral loan.

Accordingly, I DISSENT from that aspect of the decision and would affirm the entire judgment as entered by the trial court.