

**JUN 02 2006**

**HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

In re:	)	BAP No.	EC-05-1412-BPaA
	)		
GUST KEPREOS and LINDA	)	Bk. No.	05-21669
KEPREOS,	)		
	)	Adv. No.	05-02228
Debtors.	)		
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KIMBERLY R. OLSON,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
GUST KEPREOS and LINDA	)		
KEPREOS,	)		
	)		
Appellees.	)		
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Submitted Without Argument on May 17, 2006

Filed - June 2, 2006

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

Honorable Christopher M. Klein, Bankruptcy Judge, Presiding

Before: BRANDT, PAPPAS, and ALBERT,<sup>2</sup> 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 doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. Theodor C. Albert, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 The bankruptcy court dismissed Appellant's complaint, which sought  
2 a declaration of nondischargeability under § 523(a)(6),<sup>3</sup> and then denied  
3 reconsideration. Because the orders were based on a misunderstanding of  
4 the relief requested, we VACATE and REMAND.

5  
6 **I. FACTS<sup>4</sup>**

7 Debtors Gust and Linda Kepreos filed for chapter 7 relief on 16  
8 February 2005, listing a \$200,000 "lawsuit" in favor of Appellant  
9 Kimberly Olson on Schedule F. Olson moved for relief from the automatic  
10 stay on 28 March 2005 to proceed with an action against debtors in  
11 Siskiyou County Superior Court. The motion was dismissed on 29 April  
12 2005 for failure to pay the filing fee.

13 The deadline for filing complaints objecting to discharge or to  
14 determine the dischargeability of a debt was set for 16 May 2005; notice  
15 was sent to Olson on 20 February 2005. The case was discharged 24 May  
16 2005. Thereafter, on 17 June 2005, Olson filed an adversary proceeding  
17 seeking a determination of nondischargeability under § 523(a)(6). The  
18 complaint alleged that debtors were managers of the mobile home park  
19 where Olson resides, that they had harassed and intimidated her, had

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20  
21 <sup>3</sup> Absent contrary indication, all "Code," chapter and section  
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to  
23 its amendment by the Bankruptcy Abuse Prevention and Consumer  
24 Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from  
25 which the adversary proceeding and these appeals arise was filed  
26 before its effective date (generally 17 October 2005).

27 All "Rule" references are to the Federal Rules of Bankruptcy  
28 Procedure, and all "FRCP" references are to the Federal Rules of Civil  
Procedure.

<sup>4</sup> On 11 January 2006 we entered an order permitting Appellant  
to file an informal brief, and waiving Rule 8009's requirement that  
Appellant file and serve excerpts of record. The facts set forth in  
this memorandum are taken from documents retrieved from the bankruptcy  
court docket available on ECF/PACER.

1 attacked her caregiver (Olson is disabled), had refused to make necessary  
2 repairs, and had instituted frivolous legal actions against her.

3       The complaint referenced a \$1,000 judgment entered in Siskiyou  
4 County Superior Court on 15 June 2004 (no. YKCVUD 04 0750), in favor of  
5 defendant Olson and against plaintiff Cove Mobile Villa. That judgment  
6 contained the finding that Cove Mobile Villa, through its agent Gust  
7 Kepreos, had acted willfully, maliciously, and with intent to harass  
8 Olson in bringing that action. The judgment specifically excluded Gust  
9 Kepreos in his individual capacity. Olson attached a copy of that  
10 judgment, which she indicated was "one of the actions that form the basis  
11 for" her later suit against Gust Kepreos and others alleging negligence  
12 and intentional torts, and seeking compensatory and punitive damages of  
13 \$150,000 against each defendant (Siskiyou County Superior Court no.  
14 SCSCCVPO 04 001554). A copy of that complaint was also attached to the  
15 adversary complaint.

16       Defendants answered, denying the allegations of the complaint, but  
17 did not raise the issue of timeliness. When Olson did not appear at a  
18 status conference set by the court, the bankruptcy court issued an order  
19 to show cause why the case should not be dismissed for lack of  
20 prosecution. Olson's response to that order indicated her disability and  
21 attendant difficulties with travel, and stated: "All Plaintiff wants is  
22 to proceed with her action in Siskyou County Superior Court on its own  
23 merits."

24       The bankruptcy court thereafter dismissed the adversary proceeding  
25 on 16 September 2005. In its accompanying memorandum, the court  
26 indicated it was dismissing the case because

27       [t]he judgment that the plaintiff wishes to be excepted from  
28 discharge specifically excludes Gust Kepreos as a judgment  
debtor. Rather, it is a judgment against Cove Mobile Villa

1 and no one else. Accordingly, it is not a debt of the debtor  
2 . . . .

3 Olson timely moved for reconsideration, indicating that she was not  
4 asking for the judgment against Cove Mobile Villa to be excepted from  
5 discharge, but instead sought to be allowed to proceed with her Siskyou  
6 County Superior Court action against debtors and others. The bankruptcy  
7 court denied the motion for reconsideration on 3 October 2005 without  
8 elaboration. Olson timely appealed.

9 Appellees did not file a brief, and no one appeared for oral  
10 argument.

## 11 **II. JURISDICTION**

12 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and  
13 § 157(b) (1) and (B) (2) (I), and we do under 28 U.S.C. § 158(c).  
14

## 15 **III. ISSUES**

16 A. Whether the bankruptcy court erred in dismissing the adversary  
17 proceeding; and  
18

19 B. Whether the bankruptcy court abused its discretion in denying  
20 appellant's motion for reconsideration.  
21

## 22 **IV. STANDARDS OF REVIEW**

23 The bankruptcy court's dismissal order was, in essence, for failure  
24 to state a claim upon which relief could be granted. That is a legal  
25 determination which we review de novo. In re Saylor, 178 B.R. 209, 212  
26 (9th Cir. BAP 1995), aff'd, 108 F.3d 219 (9th Cir. 1997).

27 We review a bankruptcy court's denial of a motion for  
28 reconsideration for abuse of discretion. In re Basham, 208 B.R. 926, 930

1 (9th Cir. BAP 1997), aff'd, 152 F.3d 924 (9th Cir. 1998) (table). A  
2 bankruptcy court necessarily abuses its discretion if it bases its  
3 decision on an erroneous view of the law or clearly erroneous factual  
4 findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

5 "We do not reverse for errors not affecting substantial rights of  
6 the parties, and may affirm for any reason supported by the record."  
7 In re Maximus Computers, Inc., 278 B.R. 189, 194 (9th Cir. BAP 2002);  
8 28 U.S.C. § 2111; FRCP 61, incorporated by Rule 9005; Dittman v.  
9 California, 191 F.3d 1020, 1027 n. 3 (9th Cir. 1999).

## 11 V. DISCUSSION

### 12 A. Dismissal

13 The bankruptcy court misconstrued the relief sought by Olson.  
14 Presumably Olson's attachment of the \$1,000 judgment against Cove Mobile  
15 Villa caused the judge to think mistakenly that it was the subject of the  
16 nondischargeability action. But, as explained by Olson in her motion for  
17 reconsideration and on appeal, she wishes to pursue her separate state  
18 court action against debtors. This could be accomplished by removing the  
19 state court action to bankruptcy court and joining it with the adversary  
20 proceeding for trial, alleging the state law causes of action in an  
21 amended adversary complaint, or by staying the adversary proceeding  
22 pending the outcome of the state court action and granting relief from  
23 stay for that litigation. Because of the bankruptcy court's apparent  
24 misunderstanding of the relief requested, however, none of those options  
25 was explored.

26 Olson's Siskiyou County complaint alleges intentional torts and  
27 other causes of action which, if established, could satisfy the  
28 requirements for nondischargeability under § 523(a)(6). See In re

1 Sicroff, 401 F.3d 1101, 1104-06 (9th Cir. 2005), cert. denied \_\_\_\_ U.S.  
2 \_\_\_\_, 125 S.Ct. 2964 (2005), (debts for willful and malicious injury to  
3 another or to the property of another are nondischargeable; "willful" and  
4 "malicious" prongs are analyzed separately). Accordingly, dismissal was  
5 in error.

6

7 **B. Reconsideration**

8 Under FRCP 59(e), made applicable in bankruptcy proceedings by Rule  
9 9023, a bankruptcy court may alter or amend (reconsider) an order.  
10 Motions for reconsideration should not be granted unless the trial court  
11 "is presented with newly discovered evidence, committed clear error, or  
12 if there is an intervening change in controlling law." Kona Enter., Inc.  
13 v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000). Reconsideration  
14 is also available to prevent manifest injustice. Navajo Nation v.  
15 Confederated Tribes and Bands of the Yakama Indian Nation, 331 F.3d 1041,  
16 1046 (9th Cir. 2003).

17 Although Olson attempted to point out the court's mistaken premise  
18 in her motion for reconsideration, the court denied relief without  
19 explanation. As there are no findings of fact, it appears that the  
20 bankruptcy court remained under the impression that Olson was attempting  
21 to establish the nondischargeability of a judgment against someone other  
22 than a debtor. That was a clear error of fact, and thus denying  
23 reconsideration on that basis was technically an abuse of discretion.

24

25 **C. Harmless Error?**

26 Olson's complaint was not timely filed, but we will not affirm on  
27 that basis. The time limit set by Rule 4007(c) is not jurisdictional;  
28 it is an affirmative defense which is waived if not timely raised. See

1 Kontrick v. Ryan, 540 U.S. 443 (2004). Defendants here did not raise the  
2 defense in their answer, and thus may have waived it. Accordingly, the  
3 bankruptcy court did not have discretion to dismiss the complaint sua  
4 sponte as untimely, Levald, Inc. v. City of Palm Desert, 998 F.2d 680,  
5 686-87 (9th Cir. 1993), and dismissal and denial of reconsideration were  
6 not harmless.

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**VI. CONCLUSION**

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The bankruptcy court's rulings were based on a misunderstanding of  
10 the relief requested. Accordingly, we vacate the orders on appeal and  
11 remand for further proceedings.

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