

JUL 02 2013

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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NOT FOR PUBLICATION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. CC-12-1360-DKiPa
	)	
MICHAEL FRANZESE,	)	Bk. No. 11-25169-CB
	)	
Debtor.	)	Adv. No. 12 -AP-01169-CB
_____	)	
	)	
IRWIN A. MANDEL,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>M E M O R A N D U M</b> <sup>1</sup>
	)	
MICHAEL FRANZESE,	)	
	)	
Appellee.	)	
_____	)	

Argued and Submitted on June 20, 2013  
at Pasadena, California

Filed - July 2, 2013

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

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

Appearances: David L. Speckman, Esq. appeared and argued  
for Appellant Irwin A. Mandel.

Before: DUNN, KIRSCHER, and PAPPAS, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8013-1.

1 Appellant Irvin Mandel ("Mandel") appeals the order  
2 ("Dismissal Order") dismissing his exception to discharge  
3 adversary proceeding against the debtor appellee Michael Franzese  
4 ("Debtor") as untimely filed. We AFFIRM.

5 **I. FACTUAL BACKGROUND**

6 The relevant background facts in this appeal are not in  
7 dispute.

8 Before the Debtor's bankruptcy filing, Mandel had obtained a  
9 fraud judgment in the San Diego Superior Court ("State Court  
10 Judgment") against the Debtor by default, supported by fact  
11 findings made after a prove up hearing on May 6, 2011. The State  
12 Court Judgment is final and not appealable.

13 The Debtor filed for relief under chapter 7 of the  
14 Bankruptcy Code<sup>2</sup> on October 31, 2011. In the notice ("Notice")  
15 of the Debtor's bankruptcy filing sent to all scheduled  
16 creditors, interested parties were advised in bold-faced type  
17 that the deadline to "Object to Debtor's Discharge or to  
18 Challenge Dischargeability of Certain Debts" was February 13,  
19 2012.

20 It is not clear from the record exactly when Mandel and his  
21 counsel became aware of the Debtor's bankruptcy. However, by  
22 letter dated January 16, 2012, Mandel's counsel responded to a  
23 letter dated January 10, 2012, from the Debtor's counsel advising  
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25 <sup>2</sup> Unless otherwise indicated, all chapter and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
27 all "Rule" references are to the Federal Rules of Bankruptcy  
28 Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure  
are referred to as "Civil Rules."

1 of the Debtor's bankruptcy filing.

2 The § 341(a) meeting in the Debtor's chapter 7 case was  
3 originally scheduled for December 15, 2011, but it apparently was  
4 continued a number of times based on the Debtor's nonappearance.  
5 Mandel's counsel did not attend the initially scheduled § 341(a)  
6 meeting, but he attended "a number of those which had been  
7 continued."

8 On January 25, 2011, the duly appointed trustee ("Trustee")  
9 in the Debtor's bankruptcy case and Debtor's counsel entered into  
10 a stipulation ("Original Stipulation"), apparently prepared by  
11 Debtor's counsel, to extend the deadline for the Trustee to  
12 object to the Debtor's discharge to April 13, 2012. The  
13 substance of the Original Stipulation reads as follows:

14 The deadline for filing either a complaint objecting to  
15 the debtor's discharge under 11 U.S.C. §727 and  
16 11 U.S.C. §523 or a motion to dismiss under §727(b)(3)  
17 [sic] by the chapter 7 trustee currently set for  
February 13, 2012 is extended up to April 13, 2012.  
(Emphasis added.)

18 On April 10, 2012, the bankruptcy court entered an order  
19 titled "Order Approving Stipulation to Extend Deadlin[e] for the  
20 Chapter 7 Trustee to file a Complaint, an Objection to Discharge,  
21 or a Motion to Dismiss" ("Extension Order"). The Extension Order  
22 in its entirety reads as follows:

23 A stipulation to continue extend [sic] the deadlines  
24 described in the above-caption was filed January 25,  
25 2012 as docket number 10.  
26 IT IS ORDERED  
27 The stipulation is approved and the deadline for filing  
28 either a complaint objecting to the debtor's discharge  
under 11 U.S.C. § 727 and 11 U.S.C. § 523, or a motion  
to dismiss under 11 U.S.C. § 727(b)(3) [sic] by the  
chapter 7 trustee is extended up to and including  
April 13, 2012. (Emphasis added.)

1           The Trustee and Debtor's counsel ultimately entered into two  
2 further stipulations to extend the deadline for the Trustee to  
3 object to the Debtor's discharge, extending the deadline to  
4 June 12, 2012, and further to August 13, 2012, respectively. On  
5 June 18, 2012, the bankruptcy court entered an order approving  
6 the later stipulation between the Trustee and Debtor's counsel,  
7 extending the deadline for the Trustee to object to the Debtor's  
8 discharge to August 13, 2012.

9           The Trustee filed a "no asset" report on July 11, 2012, and  
10 the Debtor received his discharge on August 20, 2012.

11           In the meantime, Mandel filed a complaint ("Complaint") to  
12 except the State Court Judgment debt from the Debtor's discharge  
13 on April 12, 2012. On May 16, 2012, Debtor's counsel filed a  
14 Civil Rule 12(b)(6) motion to dismiss ("Motion to Dismiss") the  
15 Complaint as not timely filed under Rule 4007(c). Rule 4007(c)  
16 generally requires that a complaint to except a debt from  
17 discharge be filed "no later than 60 days after the first date  
18 set for the meeting of creditors under § 341(a)." In the  
19 Debtor's case, as noted above, that deadline had been noticed as  
20 February 13, 2012.

21           Mandel opposed the Motion to Dismiss, arguing that the  
22 Extension Order misled Mandel and his counsel into believing that  
23 the deadline to file exception to discharge claims had been  
24 extended to April 13, 2012 for the benefit of all creditors.  
25 The Debtor responded that the Extension Order was not confusing  
26 or ambiguous and extended the § 523 claim deadline only as to the  
27 Trustee.

28           The bankruptcy court heard the Motion to Dismiss on June 26,

1 2012 (the "Hearing"). After hearing argument from counsel for  
2 Mandel and the Debtor, the bankruptcy court noted that Mandel was  
3 not a party to the Original Stipulation and found that "the fact  
4 that the Trustee got a stipulation with the Debtor does not  
5 translate to a stipulation with the creditors." At the  
6 conclusion of the Hearing, the bankruptcy court granted the  
7 Motion to Dismiss.

8 The bankruptcy court entered an order dismissing Mandel's  
9 adversary proceeding on July 5, 2012. Mandel filed a timely  
10 Notice of Appeal on July 6, 2012. Mandel filed an amended Notice  
11 of Appeal on July 20, 2012, attaching a copy of the dismissal  
12 order.

## 13 II. JURISDICTION

14 The bankruptcy court had jurisdiction under 28 U.S.C.  
15 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.  
16 § 158.

## 17 III. ISSUE

18 Did the bankruptcy court err in dismissing Mandel's  
19 Complaint as untimely?<sup>3</sup>

## 20 IV. STANDARDS OF REVIEW

21 Interpretation of Rule 4007(c) is a legal question reviewed  
22 de novo. Herndon v. De La Cruz (In re De La Cruz), 176 B.R. 19,  
23 22 (9th Cir. BAP 1994). The application of equitable estoppel or  
24 waiver principles likewise is a question of law reviewed de novo.  
25 Valenzuela v. Kraft, Inc., 801 F.2d 1170, 1172 (9th Cir. 1986),  
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27 <sup>3</sup> In Appellant's Opening Brief, Mandel articulates six  
28 separate issues, all of which revolve around and are encompassed  
by the single issue stated above.

1 amended and reh'g denied, 815 F.2d 570 (1987); Schunck v. Santos  
2 (In re Santos), 112 B.R. 1001, 1004 (9th Cir. BAP 1990). De novo  
3 review requires that we consider a matter afresh, as if no  
4 decision had been rendered previously. United States v.  
5 Silverman, 861 F.2d 571, 576 (9th Cir. 1988); B-Real, LLC v.  
6 Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008).

7 Fact findings with respect to notice of bar dates and  
8 extensions of bar dates are reviewed for clear error.

9 In re Buckman, 951 F.2d 204, 206 (9th Cir. 1991); In re De La  
10 Cruz, 176 B.R. at 22. We must affirm the bankruptcy court's  
11 fact findings unless we conclude that they are "(1) 'illogical,'  
12 (2) 'implausible,' or (3) without 'support in inferences that may  
13 be drawn from the facts in the record.'" United States v.

14 Hinkson, 585 F.3d 1247, 1262 & n.20 (9th Cir. 2009) (en banc).

15 "Where there are two permissible views of the evidence, the fact  
16 finder's choice between them cannot be clearly erroneous."

17 Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574  
18 (1985).

19 We review a bankruptcy court's interpretation of its own  
20 orders for abuse of discretion. Marciano v. Fahs  
21 (In re Marciano), 459 B.R. 27, 35 (9th Cir. BAP 2011), aff'd,  
22 Marciano v. Chapnick (In re Marciano), 708 F.3d 1123 (9th Cir.  
23 2013). A bankruptcy court abuses its discretion if it applied  
24 the wrong legal standard, or if its fact findings were illogical,  
25 implausible or without any support in the record.

26 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th  
27 Cir. 2011).

1 **V. DISCUSSION**

2 As noted above, with an exception not relevant in this  
3 appeal, Rule 4007(c) provides that a complaint to except a debt  
4 from a chapter 7 debtor's discharge under § 523(c) must be filed  
5 no later than 60 days after the first date set for the meeting of  
6 creditors under § 341(a). In the Notice, that deadline date was  
7 specified as February 13, 2012. Mandel missed that deadline.  
8 The Complaint was not filed until April 12, 2012, almost two  
9 months beyond the deadline date.

10 Mandel argues that his filing of the Complaint to initiate  
11 his adversary proceeding against the Debtor beyond the  
12 Rule 4007(c) deadline should be excused for a number of reasons.  
13 First, he argues that application of the Rule 4007(c) deadline is  
14 subject to the equitable defenses of estoppel and waiver as to  
15 the Debtor, based on the Original Stipulation. The basis for  
16 Mandel's argument is that he was misled by the terms of the  
17 Original Stipulation to conclude that the deadline for the  
18 assertion of § 523 exception to discharge claims had been  
19 extended to April 13, 2012. Since the Trustee would not be  
20 asserting any § 523 claims, from the perspectives of Mandel and  
21 his counsel, the extension of the § 523 deadline in the Original  
22 Stipulation must apply to the entire creditor body.

23 We can see from the language of the Original Stipulation,  
24 which apparently was prepared by Debtor's counsel, as the name,  
25 address and telephone number of Debtor's counsel appear in the  
26 upper left-hand corner of the Original Stipulation, how Mandel's  
27 counsel might have been confused or misled. The language of the  
28 Original Stipulation is not a model of clarity and, indeed, is

1 even inaccurate in its Bankruptcy Code references.<sup>4</sup>

2       However, Mandel's argument does not deal effectively with  
3 the problem of the Original Stipulation language referring only  
4 to the "chapter 7 trustee." If the deadline extension was meant  
5 to apply to the entire creditor body, why include the limitation  
6 "by the chapter 7 trustee" at all? Or why is there no reference  
7 to creditors in addition to the Trustee? The bankruptcy court  
8 concluded that the original stipulation only was binding between  
9 the parties to the stipulation.

10       At worst, the language of the Original Stipulation can be  
11 characterized as ambiguous, and if that is the case, authority  
12 that binds us is not helpful to Mandel. This Panel considered  
13 the potential application of equitable defenses, including  
14 estoppel and waiver, to preclude strict application of a bar date  
15 to an exception to discharge complaint in the published opinion  
16 in In re Santos, 112 B.R. 1001 (9th Cir. BAP 1990). At the  
17 outset, we note that Mandel did not explicitly raise either  
18 waiver or equitable estoppel as defenses to the Motion to Dismiss  
19 in his filed opposition or in argument at the Hearing. Issues  
20 not raised in proceedings before the bankruptcy court generally  
21 are not considered on appeal. See, e.g., El Paso v. Am. W.  
22 Airlines, Inc. (In re Am. W. Airlines, Inc.), 217 F.3d 1161, 1165  
23 (9th Cir. 2000) ("Absent exceptional circumstances, we generally  
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26       <sup>4</sup> The Original Stipulation purports to extend the deadline  
27 for the Trustee to file "a motion to dismiss under § 727(b)(3)  
28 . . . ." Section 727(b) does not have any numbered subparts. A  
proper reference would have been to the Trustee's right to move  
to dismiss under § 707(b)(3).



1 will not consider arguments raised for the first time on appeal,  
2 although we have discretion to do so.”).

3 We further note with respect to equitable estoppel, as  
4 stated in Santos, that,

5 Equitable estoppel requires reasonable reliance on the  
6 defendant’s words or conduct in forbearing from taking  
7 the necessary action within the applicable limitations  
8 period. A plaintiff cannot reasonably rely upon the  
9 defendant’s representation that they would extend a  
deadline when the applicable rules clearly provide that  
a motion to extend the bar date must be filed prior to  
the expiration of the bar date and only the court may  
extend the deadline. (Emphasis added.)

10 In re Santos, 112 B.R. at 1007.

11 Rule 4007(c) provides that, “On motion of a party in  
12 interest, after hearing on notice, the court may for cause extend  
13 the time fixed under this subdivision. The motion shall be filed  
14 before the time has expired.” No such motion was filed by Mandel  
15 before February 13, 2012, and the bankruptcy court did not enter  
16 the Extension Order until April 10, 2012, long after the original  
17 deadline expired. On the record before us, Mandel does not meet  
18 the “reasonable reliance” standard as stated in Santos for  
19 application of equitable estoppel.

20 A “waiver” is the “intentional relinquishment or abandonment  
21 of a known right.” United States v. Oliver, 507 U.S. 725, 733  
22 (1933) (citations omitted). There is no evidence in the record  
23 that the Debtor ever knowingly waived the application of the  
24 Rule 4007(c) deadline as to any interested party other than the  
25 Trustee. Accordingly, Mandel’s equitable estoppel and waiver  
26 arguments based on the Original Stipulation lack merit.

27 Mandel’s primary argument to excuse the late filing of his  
28 Complaint is that he was misled by the bankruptcy court’s

1 Extension Order. There is Ninth Circuit authority for the  
2 proposition that a party can be relieved from the adverse effects  
3 of a missed bar date under "unique" or "extraordinary"  
4 circumstances. See, e.g., Allred v. Kennerly (In re Kennerly),  
5 995 F.2d 145, 147-48 (9th Cir. 1993). "In light of this court's  
6 statements in Slimick v. Silva (In re Slimick), 928 F.2d 310 (9th  
7 Cir. 1990), the unique circumstances exception would appear to be  
8 limited to situations where a court explicitly misleads a party."  
9 Id. at 148 (emphasis in original).

10 In Anwiler v. Patchett (In re Anwiler), 958 F.2d 925 (9th  
11 Cir. 1992), the Ninth Circuit affirmed a decision of this Panel  
12 excusing the filing of an exception to discharge and denial of  
13 discharge complaint beyond the Rule 4007(c) deadline date noticed  
14 in the first notice of § 341(a) meeting because the court had  
15 sent a second notice of § 341(a) meeting date noticing a new,  
16 later exception to discharge deadline date. "The intent behind  
17 the rules is not circumvented by allowing an untimely complaint  
18 to stand when a party relied on a court document sent before the  
19 deadline had expired." Id. at 929.

20 This appeal is distinguishable from In re Anwiler for the  
21 following reasons. First, the Extension Order was entered  
22 approximately fifty-six days after the Rule 4007(c) deadline date  
23 (February 13, 2012) had passed. If Mandel or his counsel were  
24 confused in advance of February 13, 2012 about whether the  
25 Rule 4007(c) deadline had been extended as to all creditors, such  
26 confusion could only have been created by the Original  
27 Stipulation. It was Mandel's obligation to file a motion to  
28 clarify the impact of the Original Stipulation and/or request an

1 extension of the Rule 4007(c) deadline before it expired. See  
2 Rules 4004(b) and 4007(c). In fact, the Extension Order was  
3 entered only two days before Mandel filed the Complaint. On this  
4 record, the Extension Order could not have had any impact on  
5 Mandel's decision to wait to file his Complaint until after  
6 February 13, 2012.

7 In addition, as we have discussed, Mandel emphasizes the  
8 facts that both the Original Stipulation and the Extension Order  
9 provided extensions of the § 523 exception to discharge deadline  
10 as well as the § 727 denial of discharge deadline, and the  
11 Trustee would not file any § 523 actions. See Appellant's  
12 Opening Brief at 9-10. At the Hearing, after being confronted  
13 with this argument, the bankruptcy court noted that Mandel was  
14 not a party to the Original Stipulation, and "the fact that the  
15 Trustee got a stipulation with the Debtor does not translate to a  
16 stipulation with the creditors." The bankruptcy court also noted  
17 that "the drop dead date for a 523 action is 60 days from the  
18 first meeting of creditors," as specified in Rule 4007(c). While  
19 the bankruptcy court stated its authority for that deadline was  
20 the Bankruptcy Code rather than Rule 4007(c), its statement of  
21 the applicable legal rule was correct. The Extension Order  
22 itself stated both in its title and in the body of the order that  
23 it applied "for . . .[and] by the chapter 7 trustee." It did not  
24 grant any extension of the Rule 4007(c) deadline to, or even  
25 refer to, the creditor body generally.

26 Based on the record before us in this appeal, we perceive no  
27 abuse of discretion or clear error of the bankruptcy court in  
28 granting the Motion to Dismiss.

**VI. CONCLUSION**

Based on the foregoing analysis, we AFFIRM.

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