NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	) BAP No. CC-10-1118-PaDKi
ELSA VIRAMONTES SPIRTOS,	) Bk. No. 97-22890-MJ
Debtor.	)
THELMA V. SPIRTOS,	)
Appellant,	)
v.	) **M E M O R A N D U M**[1]
KARL T. ANDERSON, Chapter 7 Trustee; NICHOLAS B. SPIRTOS; BRYAN HARTNELL; HARTNELL HORSEPOOL & FOX; HARTNELL LISTER & MOORE,	)
Appellees.	)

Submitted on the Briefs on January 21, 2011

Filed - February 2, 2011

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

Honorable Meredith Jury, Bankruptcy Judge, Presiding

Attorneys: Michelle Spirtos filed the brief for appellant.
Nicholas Spirtos filed the brief for appellees: Nicholas Spirtos (pro se); Bryan Hartnell; Hartnell, Horspool & Fox; and Hartnell, Lister & Moore, P.C.
Appellee Karl T. Anderson did not file a brief.

Before: PAPPAS, DUNN and KIRSCHER, Bankruptcy Judges.

---

[1] 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.

Appellant Thelma V. Spirtos ("Thelma")[2] appeals the decisions of the bankruptcy court dismissing her adversary complaint under Rule 7012,[3] incorporating Civil Rule 12(b)(6), and deeming her a vexatious litigant. We AFFIRM.

FACTS[4]

[2] Many of the principal individuals in this appeal are members of the Spirtos family. While intending no disrespect, for clarity we refer to them by their first names: Basil (patriarch of the family, deceased); Thelma (Basil's first wife and appellant herein); Elsa (Basil's third wife and debtor herein); Michelle, aka Michelle Eardley (daughter of Basil and Thelma and attorney to Thelma in this appeal); Nicholas (son of Basil, stepson of Thelma, former attorney for Elsa, probate administrator of Basil's probate estate, and appellee herein).

[3] Unless otherwise indicated, all chapter and section references are to the provisions of the Bankruptcy Code, 11 U.S.C. § 101-1330 in force prior to the effective date (October 17, 2005) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23. The Federal Rules of Bankruptcy Procedure, Rules 1001-9037, are referred to as "Rules," and the Federal Rules of Civil Procedure are referred to as "Civil Rules."

[4] The long course of litigation involving the members of the Spirtos family relates to three bankruptcy cases in the Central District of California: In re Basil N. Spirtos, M.D., Bankr. no. 87-10752-AA, filed as chapter 11 on May 28, 1987, converted to chapter 7 February 17, 1989; In re Thelma V. Spirtos, Bankr. no. 84-13757, filed as chapter 11 on June 28, 1984, converted to chapter 7 on July 7, 2001; and In re Elsa Viramontes Spirtos, the bankruptcy case from which the adversary proceeding and this appeal arose.

Because the parties are acquainted with them, we summarize only those facts necessary to resolution of the issues in this appeal. For additional information and background, the reader is invited to consult the record in the over forty appeals taken to the Ninth Circuit and the BAP, including In re Estate of Spirtos v. One San Bernadino County Sup. Ct. Case No. SPR-02211 (In re Thelma V. Spirtos), 443 F.3d 1172(9th Cir. 2006); Thelma V. Spirtos v. Moreno (In re Thelma V. Spirtos), 56 F.3d 1007 (9th Cir. 1995); Spirtos v. Moreno (In re Basil N. Spirtos), 992 F.2d 1004 (9th Cir. 1992); and Thelma V. Spirtos v. Ray (In re Basil N. Spirtos), 2006 Bankr. LEXIS 4894 (9th Cir. BAP May 19, 2006), aff'd, 270 Fed. Appx. 540 (9th Cir. 2008).

Background

Thelma and Basil were married in 1954. They separated in 1983, and were divorced in 1984. Los Angeles Superior Court case no. D-078 281 (the "Family Law Case"). In the divorce action, they entered into a Marital Support Agreement ("MSA") which was incorporated in a state court judgment in June 1984. Pursuant to the MSA and judgment, Basil was obligated to make support payments (the "Support Obligation") to Thelma.

Elsa and Basil were married on August 29, 1987. Basil died intestate on May 9, 1996; Elsa is his surviving spouse. In January 1997, Thelma commenced probate proceedings on behalf of Basil in state court by filing a petition for appointment of an administrator. San Bernadino Superior Court Case no. SPRSS 02211 (the "Spirtos Probate Case"). After extensive litigation and a trial, Nicholas was appointed administrator for the Spirtos Probate Case estate (the "Spirtos Estate") on August 1, 2000.

Elsa filed a chapter 7 bankruptcy petition on July 24, 1997. Karl T. Anderson ("Trustee") was appointed chapter 7 trustee. Elsa received a discharge on November 5, 1997, and the case was closed on November 18, 1997.

In August 2005, the bankruptcy court granted Thelma's motion to reopen the bankruptcy case to deal with unadministered assets, including Elsa's purported interests in Basil's probate estate and community property of her marriage to Basil. Trustee was reappointed.

Creditor Sanford A. Kassel ("Kassel") filed a proof of claim in the reopened bankruptcy case on October 7, 2005, alleging a debt for an unpaid loan of $350,000.

Thelma filed three proofs of claim in the reopened bankruptcy case: Claim 6 for $1,414,137.33 filed on October 7, 2005; Claim 7 for $4,526,250.00 filed on October 21, 2005; and Claim 9 for $5,940,387.00 filed on November 17, 2005. All of these claims sought, among other things, amounts alleged to be owed to Thelma under the Support Obligation, and damages arising from an alleged conspiracy between Basil and Elsa to conceal assets from Thelma. Elsa filed objections to each of Thelma's claims; Trustee joined the objections. Thelma withdrew Claim 9. The bankruptcy court conducted a hearing on Elsa's objections to Claims 6 and 7 on February 8, 2007.

On March 6, 2007, the bankruptcy court entered an order sustaining Elsa's objection to Claims 6 and 7, without prejudice, subject to Thelma's election to seek relief from stay to pursue the Support Obligation claims in state court. The bankruptcy court denied Elsa's objection to that part of Claim 6 founded on allegations that Elsa aided, abetted or conspired with Basil to conceal assets from Thelma. Objections to the remaining elements of Thelma's claims were to be resolved at an evidentiary hearing.

After considerable procedural maneuvering and delays, the evidentiary hearing on Elsa's objection to Claim 6 was set to begin February 25, 2008. However, this hearing was vacated when the parties reached a global settlement that resolved all disputes among Thelma, Michelle and her spouse Jon Eardley (the "Thelma Parties"); Elsa; the Spirtos Estate; Nicholas, as an individual and as administrator of the Spirtos Estate; and Trustee (altogether, the "Parties").

The Settlement Agreement

A Settlement Agreement and Mutual Releases ("Settlement Agreement") was entered into by the Parties as of February 12, 2008. It provides in Recital H: "The Parties wish to resolve all disputes between them related to the Family Law Case, the Elsa Bankruptcy Case, the Spirtos Bankruptcy Case, and other litigation that may be pending or threatened between the parties[.]" (the "Disputes").

As relevant here,[5] the parties to this appeal agreed to the following terms in the Settlement Agreement:

With respect to the Spirtos Estate,

> 3.1 Within five (5) business days after the Effective Date a petition shall be filed in the Spirtos Probate Case seeking authority to directly turn over to Elsa $50,000 and to turn over to Trustee a minimum of $75,000 [] out of the reserve being held by the Spirtos Estate, and for an order concluding the Spirtos Probate Case. The Thelma Parties agree not to oppose such petition.
>
> 4.1 Thelma is to be granted an allowed unsecured claim in the amount of $550,000.00 and all other claims shall be disallowed.
>
> 4.2 Thelma may apply to the bankruptcy court for a determination that her claim is entitled to § 507(a) priority. The Parties agree not to oppose such application; however, Thelma's obtaining such priority is not a condition to the effectiveness of this Agreement.

In ¶ 5.1 regarding the Family Law Case, the Thelma Parties agreed to dismiss or withdraw with prejudice any pending litigation or proceedings against the other parties to the Settlement Agreement.

The Settlement Agreement also provides for comprehensive

---

[5] We only cite to provisions that are disputed in this appeal.

releases as between the Parties:

> 6.1 Upon the Effective Date, except for the obligations created or preserved by this Agreement, without further action, the Thelma Parties, and each of them, shall be deemed to have generally released and fully discharged and covenanted not to sue [Parties including Trustee, Nicholas in both his individual capacity and as administrator, and Nicholas' attorneys and accountants, among others] from any and all claims, demands and causes of action of every kind and nature, whether known or unknown, suspected or unsuspected, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured which the Thelma Parties, or any of them, own or hold or at any time heretofore have owned or held, against the Trustee, Elsa, Spirtos Releasees [Nicholas in all his capacities and his attorneys and accountants], or any of them, arising out of or related to the Disputes between them.
>
> 6.2. Upon the Effective Date, except for the obligations created or preserved by this Agreement, without further action, the Trustee[,] shall be deemed to have generally released and fully discharged and covenanted not to sue [Elsa, Nicholas, among others] from any and all claims, demands and causes of action of every kind and nature, whether known or unknown, suspected or unsuspected, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured which the Trustee owns or holds or at any time heretofore ha[s] owned or held, against Elsa or the Spirtos Releasees, or any of them, arising out of or related to the Disputes between them.
>
> 6.3 Upon the Effective Date, except for the obligations created or preserved by this Agreement, without further action, Elsa, the Spirtos Estate, Nicholas and the Trustee shall be deemed to have generally released and fully discharged and covenanted not to sue the Thelma Parties ("Thelma Releasees") from any and all claims, demands and causes of action of every kind and nature, whether known or unknown, suspected or unsuspected, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured which Elsa, the Spirtos Estate, Nicholas and the Trustee owns or holds or at any time heretofore ha[ve] owned or held, against the Thelma Releasees, or any of them, arising out of or related to the Disputes between them.

The Settlement Agreement, at ¶ 7, provides for a waiver by

the Parties of rights and benefits under Cal. Civ. Code § 1542.[6]

On February 25, 2008, the Parties presented the Settlement Agreement to the bankruptcy court. The bankruptcy court approved the Settlement Agreement on February 26, 2008, and vacated the hearing on Elsa's remaining objections to Thelma's claims. The Settlement Agreement became effective upon expiration of the appeal period, March 8, 2008. See Rule 8002(a) (which, at the time, allowed 10 days for appeal).

On March 13, 2008, Thelma filed a motion for an order elevating her claim to priority status. However, rather than the $550,000 claim she agreed to accept in the Settlement Agreement, in this motion Thelma sought a distribution of "all funds currently held by the Trustee." She also argued in this motion that the Settlement Agreement contemplated "dispensing with" the Trustee. Thelma suggested that dispensing with the Trustee and giving her all the assets of the bankruptcy estate would allow her to "pursue assets of the estate" held by parties not subject to the Settlement Agreement.

Trustee filed a limited objection to Thelma's motion, acknowledging that, pursuant to the Settlement Agreement, he did not object to allowing Thelma a priority claim of $550,000, but objecting to the additional demands in the motion.

Kassel, a creditor who to this point had not actively participated in the bankruptcy case, filed an objection to

---

[6] "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor." CAL. CIV. CODE ¶ 1542.

Thelma's claim and to the priority request. Thelma responded by objecting to Kassel's proof of claim on the grounds that the claim lacked required documentation, that the claim was more likely against Nicholas rather than Basil, and that the claim was time-barred under Cal. Code Civ. Proc. § 366.2(A) and violated California's statute of frauds, Cal. Code Civ. Proc. § 1624, because Kassel could not support his claim with a writing.

Thelma and Kassel traded motions for summary judgment in the claims contest. On December 19, 2008, the bankruptcy court entered orders granting summary judgment to Kassel denying priority status to the claim of Thelma, and deeming that Thelma would be allowed a prepetition, unsecured, nonpriority claim in the amount of $550,000. On December 24, 2008, the bankruptcy court entered its order denying Thelma's motion for summary judgment disallowing the claim of Kassel.

Thereafter, Kassel and Thelma agreed to compromise their dispute (the "Kassel-Thelma Settlement Agreement"). The Kassel-Thelma Settlement Agreement provided in part that Kassel would receive $37,500 from the first distribution of proceeds by Trustee to creditors in the bankruptcy case. That agreement further provided that:

> ¶ C. The parties have agreed Kassel will then transfer the balance of his proof of claim to Thelma Spirtos. Spirtos is to collect on the transferred claim by Kassel for her to collect as she desires. Kassel agrees that any future litigation that may proceed to collect funds from third parties belonging to the Estate of Elsa V. Spirtos will be on behalf of the allowed Sanford Kassel claim and not Sanford Kassel as an individual.

The bankruptcy court approved the Kassel-Thelma Settlement Agreement in an order entered January 30, 2009.

The Adversary Proceeding

On August 27, 2009, Thelma[7] commenced the adversary proceeding out of which this appeal arises. The complaint asserted ten claims for relief: (1) tortious breach of contract, (2) negligent misrepresentation, (3) breach of contract, (4) intentional interference with economic advantage, (5) breach of fiduciary duty, (6) negligence, (7) intentional infliction of emotional distress, (8) rescission, (9) violation of the automatic stay, and (10) declaratory relief voiding the state court probate proceedings insofar as those proceedings administered property of the bankruptcy estate.

Trustee moved to dismiss the adversary proceeding with prejudice pursuant to Rule 7012, which incorporates Civil Rule 12(b)(6), on October 4, 2009, arguing that the complaint failed to allege sufficient facts to state a claim for the requested relief, and that the complaint misstated and misrepresented the provisions of the Settlement Agreement. Nicholas joined in the motion to dismiss.

On October 15, 2009, Trustee also moved for an order declaring Thelma a vexatious litigant. Trustee listed numerous examples of frivolous litigation prosecuted by Thelma, and sought an injunction requiring her to obtain the bankruptcy court's prior approval before filing additional pleadings in the bankruptcy case.

The motions to dismiss and for the vexatious litigant order

---

[7] In an Amended Complaint, discussed below, the designated plaintiff is changed from Thelma and Kassel to Thelma, individually and as assignee of Kassel.

were heard by the bankruptcy court on November 5, 2009. The bankruptcy court stated its intention to dismiss the adversary proceeding under Civil Rule 12(b)(6).

The bankruptcy court first reviewed the standard for dismissal under Civil Rule 12(b)(6) as announced in the Supreme Court decisions in Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). The court noted that the allegations in Thelma's complaint were premised on two incorrect interpretations of the Settlement Agreement. First, the court noted that Trustee did not agree in ¶¶ 6.1 through 6.3 of the Settlement Agreement, as Thelma alleged, that he would discharge himself as Trustee. Instead, the release and discharge language in the Settlement Agreement unambiguously referred to a contractual release and discharge of claims, not to a discharge of the Trustee in the bankruptcy. To underscore its view that Thelma's interpretation of the Settlement Agreement was flawed, the bankruptcy court opined that, "The only human being in the state of California that reads that language in the way that Mr. Eardley [Thelma's counsel in the adversary proceeding] reads it is Mr. Eardley." Hr'g Tr. 3:16-18.

As a second inaccuracy in Thelma's reading of the Settlement Agreement, the bankruptcy court observed that the complaint alleged that Trustee had opposed the priority status of Thelma's claim when he had agreed not to do so. The court found that, in fact, Trustee had never opposed priority status for Thelma's claim, but had only questioned the amount and timing of the distribution to which she was entitled. Hr'g Tr. 4:16-17.

In sum, the bankruptcy court concluded:

> There can be no claim for relief based on that purported breach of the settlement agreement or any other kinds of claims that have been alleged here against Mr. Anderson or his professionals, nor can there be a conspiracy by any of the other Defendants to conspire with Mr. Anderson to have never intended to perform the settlement agreement when there never ha[s] been a breach of that settlement agreement as a matter of undisputed and noticeable fact.

Hr'g Tr. 4:24–5:7.

The bankruptcy court, however, did note a remaining question whether the probate estate had been concluded, and whether Trustee had satisfied his fiduciary duties to conclude administration of the bankruptcy estate. Hr'g Tr. 5:19-20. The court allowed Thelma to amend the complaint for the limited purpose of determining whether she was entitled to relief based on the failure of Trustee to complete his fiduciary duties. Hr'g Tr. 6:21-24.

The bankruptcy court next considered the vexatious litigant motion. In announcing its intent to grant the motion, the court found Thelma had indeed engaged in vexatious behavior by her continuing assertions, in spite of the court's repeated rulings that there was no merit to her claims, that Trustee agreed to be discharged of his duties in the Settlement Agreement and breached his covenant not to oppose Thelma's priority claim. Hr'g Tr. 8:2–10.

The bankruptcy court entered a dismissal order on November 25, 2009, providing in relevant part:

> Defendant Karl T. Anderson, Chapter 7 Trustee's Motion to Dismiss is granted whereby Defendants Bryan Hartnell, Hartnell, Horspool & Fox, and Hartnell, Lister & Moore, APC and Nicholas B. Spirtos are dismissed with prejudice, and without leave to amend, from the above-captioned Adversary Proceeding. . . .

> Defendant Karl T. Anderson, Chapter 7 Trustee, is dismissed, without prejudice[;] however, Plaintiff Thelma Spirtos may file an Amended Complaint against Defendant, Karl T. Anderson, Chapter 7 Trustee based exclusively on allegations limited to whether the Chapter 7 Trustee, Karl T. Anderson has not complied, to the extent he is able, to the February 2008 Settlement Agreement, Paragraph 3.1, limited to the following: "and for an order concluding the Spirtos Probate Case", and any further monies, if any, still owed by the Basil Spirtos Probate Estate to the Debtor's bankruptcy estate.

On the same day, the bankruptcy court entered an order determining Thelma to be a vexatious litigant, which provided that:

> The only legal or factual issue that can ever be asserted against Defendant, Karl T. Anderson in any pleading before this court by Plaintiff Thelma Spirtos, is whether Defendant Chapter 7 Trustee, Karl T. Anderson, had completed his duties as the Debtor's bankruptcy estate Chapter 7 Trustee in relation to the limited issue of whether there are any monies remaining from the Basil Spirtos Estate that should be paid to the Debtor's bankruptcy estate.

Thelma filed a First Amended Complaint, limited to a single claim for breach of fiduciary duty to Thelma. Trustee moved to dismiss the First Amended Complaint on January 4, 2010, asserting that the Spirtos Probate Estate had been closed on November 23, 2009. Thelma did not oppose the dismissal motion, and the bankruptcy court granted Trustee's motion and dismissed the First Amended Complaint with prejudice on April 1, 2010.

Thelma timely appealed the order dismissing the complaint and First Amended Complaint, and the order declaring Thelma a vexatious litigant, on April 12, 2010.[8]

---

[8] On November 10, 2010, Nicholas filed a request for judicial notice of several pleadings in the docket of the bankruptcy case in this appeal. Nicholas did not explain the reasons for this request and the Panel did not consider those documents in the disposition of this appeal. The request is DENIED.

JURISDICTION

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

ISSUES

Whether the bankruptcy court erred in dismissing the complaint and First Amended Complaint under Civil Rule 12(b)(6).

Whether the bankruptcy court abused its discretion in deeming Thelma a vexatious litigant.

STANDARDS OF REVIEW

We review de novo the bankruptcy court's grant of a motion to dismiss under Civil Rule 12(b)(6). Movesian v. Victoria Versicherung AG, ___ F.3d ____, 2010 U.S. App. LEXIS 25225 at *6 (9th Cir. 2010). De novo means we will look at the case "anew, the same as if it had not been heard before, and as if no decision previously had been rendered," and giving no deference to the bankruptcy judge's determinations. McComish v. Bennett, 611 F.3d 510, 519 (9th Cir. 2010).

A settlement agreement is a contract, and state law controls the construction of a contract. Flavor Dry, Inc. v. Lines (In re James E. O'Connell Co., Inc.), 799 F.2d 1258, 1260 (9th Cir. 1986). The bankruptcy court's interpretation of a contract is reviewed de novo. Gerwer v. Salzman (In re Gerwer), 253 B.R. 66, 70 (9th Cir. BAP 2000).

A trial court's vexatious litigant order is reviewed for abuse of discretion. Molski v. Evergreen Dynasty Corp., 500 F.3d

1047, 1062 (9th Cir. 2007), cert. denied, 129 S.Ct. 594 (2008). In applying an abuse of discretion test, we first "determine de novo whether the [bankruptcy] court identified the correct legal rule to apply to the relief requested." United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009). If the bankruptcy court identified the correct legal rule, we then determine whether its "application of the correct legal standard [to the facts] was (1) illogical, (2)implausible, or (3) without support in inferences that may be drawn from the facts in the record." Id. (internal quotation marks omitted). If the bankruptcy court did not identify the correct legal rule, or its application of the correct legal standard to the facts was illogical, implausible, or without support in inferences that may be drawn from the facts in the record, then the bankruptcy court has abused its discretion. Id.

DISCUSSION

I.

The bankruptcy court did not err in its interpretation of the terms of the Settlement Agreement.

A settlement agreement executed in a bankruptcy case is a contract. Harris v. Whitman (In re Harris), 590 F.3d 730, 741 (9th Cir. 2009). In federal proceedings, state law controls the construction of a contract. Flavor Dry, Inc. v. Lines (In re James E. O'Connell Co., Inc.), 799 F.2d 1258, 1260 (9th Cir. 1986). Even were this not the general rule in federal courts, the Parties agreed in the Settlement Agreement that California law would control construction of its terms. We review de novo the

bankruptcy court's interpretation of a contract. In re Gerwer, 253 B.R. at 70.

California has well-developed, statutory-based rules for interpretation of contracts. CAL. CIV. CODE § 1635 et seq. For example, the language of the contract is to govern its interpretation, if the language is clear and explicit and does not result in an absurdity. CAL. CIV. CODE § 1638; Indemnity Ins. Co. v. Pac. Clay Prods. Co., 91 Cal. Rptr. 452, 458 (Cal. Ct. App. 1970) (interpreting § 1638, and holding that "A contract should receive such interpretation as will make it reasonable and avoid absurdities."). The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. CAL. CIV. CODE § 1641; Harris v. Klure, 23 Cal. Rptr. 313, 315 (Cal. Ct. App. 1962) (interpreting § 1641 and holding that the court should consider the contract as a whole, using each clause as an aid in understanding other clauses.). Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense. CAL. CIV. CODE § 1645. As discussed below, where a technical word is used in consecutive clauses of a contract, it is reasonable to presume that the word has the same meaning in all clauses. Palmer v. Truck Ins. Exch., 988 P.2d 568, 573 (Cal. 1999).

In this case, Thelma offers an implausible interpretation of the Settlement Agreement terms, and in arguing that Trustee and Nicholas breached its terms, she asks the Panel to ignore these fundamental rules. In sum, Thelma argues that the bankruptcy

court erred by not interpreting the "release and discharge" terms in ¶¶ 6.1 through 6.3 of the Settlement Agreement to mean that the Parties released each other and that Trustee agreed to discharge himself from the bankruptcy case. We decline to adopt this construction of the contract.

We first highlight several important portions of each of these paragraphs:

> 6.1 Upon the Effective Date, except for the obligations created or preserved by this Agreement, without further action, the Thelma Parties, and each of them, shall be deemed to have generally released and fully discharged and covenanted not to sue [Parties including Trustee, Nicholas, among others] from any and all claims. . . .
>
> 6.2. Upon the Effective Date, except for the obligations created or preserved by this Agreement, without further action, the Trustee shall be deemed to have generally released and fully discharged and covenanted not to sue [Elsa, Nicholas, among others] from any and all claims. . . .
>
> 6.3 Upon the Effective Date, except for the obligations created or preserved by this Agreement, without further action, Elsa, the Spirtos Estate, Nicholas and the Trustee shall be deemed to have generally released and fully discharged and covenanted not to sue the Thelma Parties ("Thelma Releasees") from any and all claims. . . .

In each of these consecutive paragraphs, the Settlement Agreement employs the same grammatical form: <SUBJECT PARTY> <ACTIVE VERB> <OBJECT PARTY>. As noted above, parallel construction is required by Cal. Civ. Code § 1641, meaning that each contract clause helps to interpret the other. This interpretive rule compels us to assign the same meaning to ¶ 6.2 as to ¶ 6.1, and to ¶ 6.3. When parallel construction is employed, it becomes clear that, in the Settlement Agreement, Trustee agreed to discharge Elsa, not that Trustee discharges himself. Indeed, if Thelma were correct that "discharge" is reflexive, then parallel construction would require

that in ¶ 6.1 Thelma discharges herself, and in ¶ 6.3 Elsa discharges herself, an absurd notion, and a meaning violative of Cal. Civ. Code § 1638. It is simply inconsistent with California case law to interpret a word differently in one out of three consecutive identical uses. Palmer, 988 P.2d at 573.

The bankruptcy court properly focused on the central flaw in Thelma's argument, noting that "release and discharge" is a standard, but technical phrase in contract law. Hr'g Tr. 3:19-21. "Release" and "discharge" in this contract context are synonymous terms, and mean the act by which one party gives up a right or claim to the person against whom it could have been enforced. Black's Law Dictionary 1403 (9th ed. 2009). The bankruptcy court's approach is consistent with Cal. Civ. Code § 1645, as these words are technical terms of art in contract law, and must therefore be assigned their special meaning as commonly used in contract law.

Even Thelma employs the terms "release and discharge" in this technical sense. In her settlement agreement with Kassel, where the Trustee was not a party, the following release provision is found:

> 3. In exchange for the assignment of Kassel's claim in the Bankruptcy Estate of Elsa Spirtos Case Number RS 97-22890 MJ, the parties hereby agree to forever discharge and release each other from any and all claims. . . .

Thelma/Kassel Settlement Agreement at 2. In using them to settle her dispute with Kassel, we presume Thelma appreciated the correct meaning of these terms. We also presume Thelma intended "release and discharge" to have the same meaning in both agreements she executed in connection with this action.

Thelma's second assignment of error in the bankruptcy court's decision concerns its interpretation of ¶ 3.1 of the Settlement Agreement, which provides:

> 3.1. Within five (5) business days after the Effective Date a petition shall be filed in the Spirtos Probate Case seeking authority to directly turn over to Elsa $50,000 and to turn over to Trustee a minimum of $75,000 [] out of the reserve being held by the Spirtos Estate, and for an order concluding the Spirtos Probate Case.

In her brief, Thelma insists that the bankruptcy court could not interpret this provision without resort to extrinsic evidence:

> The 2008 Global Compromise required Appellee Spirtos to turn over a minimum of $75K "within 5 days after the effective date" of the Settlement and to move for an order "closing" the probate estate of Basil Spirtos within the same time. Appellee Spirtos failed to do either. . . . In fact, the bankruptcy court stated that it didn't even know what a "minimum of $75k" meant. . . . Without allowing the introduction of parol evidence, the bankruptcy court could not determine if Appellees Spirtos and Harnell breached ¶ 3.1.

Thelma's Op. Br. at 29-30. Thelma's analysis incorporates two minor, and one very significant, errors.

First, ¶ 3.1 does not require turnover of the money within five days. More precisely, it requires Nicholas to petition the probate court within five days for permission to turn over the funds. Second, the Settlement Agreement refers to "concluding" the administration of the Spirtos Estate; it does not require the "closing" of the estate as Thelma suggests. While these two errors are not terribly significant, they are symptomatic of the continuing problem of lack of attention to detail in Thelma's arguments on appeal.

The much more important error in Thelma's approach is her contention that the bankruptcy court was required to conduct an evidentiary hearing to determine if this provision was breached.

But an evidentiary hearing was not required because the bankruptcy court acknowledged that it found this passage ambiguous: because it could be construed in different fashions, the bankruptcy court acknowledge that there was a possibility that this provision had been breached. As a result, it included an exception in its orders granting permission for Thelma to challenge this specific provision in an amended complaint, with particular attention to the question whether the Trustee and Nicholas had failed to properly close the Spirtos Probate Case. However, when filed, Thelma's First Amended Complaint ignored this issue, instead simply collapsing the original ten claims into a single claim for breach of fiduciary duty. On this record, Thelma thus cannot complain that the bankruptcy court erred by failing to conduct an evidentiary hearing because, while explicitly invited by the bankruptcy court to amend her complaint to address this issue, she ignored the invitation. When Trustee moved to dismiss her First Amended Complaint, Thelma did not object, and the dismissal was granted without opposition.

Thelma also argues that the bankruptcy court erred because the Settlement Agreement was breached by Nicholas and Trustee by their supposed opposition to the priority status sought by Thelma for her claim. But the bankruptcy court's decision to dismiss this claim did not involve contract construction; indeed, it held that ¶ 4.2 unambiguously forbade Nicholas and Trustee from opposing that status. Instead, the bankruptcy court properly decided that, after fully examining all of the pleadings in its docket, there had been no opposition to the priority status of Thelma's claim by Nicholas or Trustee. We, too, have examined the

record on appeal, and the relevant entries in the bankruptcy court's docket, and can find no instance where Nicholas or Trustee sought to deny Thelma's claim priority status. In short, the bankruptcy court did not err in making this determination.

For all the above reasons, we conclude that the bankruptcy court did not misconstrue the Settlement Agreement. Thelma can point to no facts to show that Nicholas or Trustee breached the Settlement Agreement. Consequently, there was no legal basis for Thelma's assertion that breach by the other Parties excused her from the effects of the releases she granted in favor of the other Parties in the Settlement Agreement. Simply put, Thelma may not assert any claims against the other Parties that could have been asserted at the time she signed the Settlement Agreement.

II.

Thelma is barred by the Settlement Agreement from asserting the Kassel claim.

Prior to their settlement, Kassel and Thelma occupied adverse positions in the bankruptcy proceedings. Both were creditors asserting significant creditor claims. Both objected to allowance of the other's claim. During this confrontation, Thelma argued that Kassel's claim was neither valid nor timely. Even in this appeal, Thelma casts doubts on the validity of the Kassel claim:

> In his declaration Kassel refers to Dr. Spirtos, an elderly OBGYN on call 24 hours a day in Lake Arrowhead, CA, as a "Mr. Spirtos" running a double and [physically impossible][9] double life as an "after hours" poker room entrepreneur in San Bernadino, CA, operating this business every day from 11:00 pm to 4:00 am. Kassel claimed to have no lease or documentation of the alleged

[9] The bracketed phrase [physically impossible] is in Thelma's opening brief.

loan and admitted that this transaction ceased in 1993. Thelma's Op. Br. at 20. Simply stated, Thelma continues to assert in this appeal the same arguments she made in the bankruptcy court as to why the Kassel claim is invalid. Yet she is attempting to stand in the shoes of the Kassel claim, which presumptively asserts its validity. These conflicting arguments are another example of inattention to detail in Thelma's advocacy in this appeal.

Thelma and Kassel compromised their differences in a settlement agreement wherein they agreed Kassel was to be paid $37,500 on account of his $350,000 claim. In consideration of this payment, the Thelma/Kassel settlement agreement provided "that Kassel will then transfer the balance of his proof of claim to Thelma Spirtos. Spirtos is to collect on the transferred claim by Kassel to her to collect as she desires." By virtue of this clause, Thelma argues that she can assert the claims in the complaint in Kassel's name, and thereby bypass the releases that bar her from personally asserting claims against other parties. Also, Thelma asserts that Trustee "stipulated" to the Thelma-Kassel settlement agreement.

This argument is, at least, disingenuous. The case law cited by Thelma supports the general legal principle that an assignee steps into the shoes of the assignor, acquiring whatever rights and duties the assignor had and may, depending on the circumstances, avoid claim or issue preclusion as it applies to the assignor. Perry v. Globe Auto Recycling, Inc., 227 F.3d 950, 951-53 (7th Cir. 2000); New Falls Corp. v. Boyajian (In re Boyajian), 367 B.R. 138, 145 (9th Cir. BAP 2007). However,

neither of those cases support the proposition that a party can assert, for her own benefit, through an assigned claim rights that the party has contractually released and agreed not to assert.

Through operation of the Thelma/Kassel settlement, which was approved in an order of the bankruptcy court, Thelma became the legal and beneficial owner of the balance of the Kassel claim. Now, Kassel himself cannot recover on any claim asserted in his name; any possible recovery would go to Thelma. Whether the claims in the complaint are asserted in Thelma's name or Kassel's name, they are Thelma's claims and, as such, Thelma is barred from asserting them by her execution of the Settlement Agreement.

Thelma also argues that Trustee stipulated to the Thelma-Kassel Settlement Agreement, and thus that Trustee cannot object to those terms in this appeal. First, Trustee never stipulated to the agreement; he filed a limited objection that merely stated that he objected to any disbursements, but had no other objections to the Thelma-Kassel Settlement Agreement. Such a "no objection" is far from a stipulation that would bind Trustee to the agreement's terms. Second, the case cited in support of Thelma's position, Avalanche Mar., Ltd. v. Parekh (In re Parmetex, Inc.), 199 F.3d 1029, 1031 (9th Cir. 1999), deals with a trustee's authority to delegate to a creditor the right to prosecute an avoidance action, and is irrelevant to the issue here.

We do not question that Thelma, as owner of the balance of Kassel's claim in the bankruptcy court, may be entitled to recover on that claim. However, she cannot use Kassel's assigned bankruptcy claim as a means of circumventing the releases in the Settlement Agreement.

III.

The bankruptcy court did not err in dismissing the adversary proceeding under Civil Rule 12(b)(6).

In reviewing a Rule 12(b)(6) dismissal, we accept as true all facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff. Al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009); Newcal Indus., Inc. v. Ikon Office Solutions, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008). To avoid dismissal under Rule 12(b)(6), a plaintiff must aver in his complaint "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 570). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Id. at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." Id. at 557.

As noted above, most, if not all, of the claims in the complaint are barred by the releases in the Settlement Agreement because they could have been asserted by Thelma at the time she signed that agreement. There has been no breach of the Settlement Agreement by Trustee or Nicholas and, consequently, Thelma is not relieved of her releases. As the California Court of Appeals summarized in its teachings on release clauses in settlement agreements:

> A release is the abandonment, relinquishment or giving up of a right or claim to the person against whom it

> might have been demanded or enforced [citations omitted] and its effect is to extinguish the cause of action. . . . Thus, a release conclusively estops the parties from reviving and relitigating the claim released.

In re Mission Ins. Co., 41 Cal. App.4th 828, 838 (Cal. Ct. App. 1995).

As discussed above, Thelma cannot use the Kassel claim to circumvent her contractual waiver of those claims in the Settlement Agreement. Thelma's other claims amount to bare legal conclusions, or contain insufficient factual information, to survive challenge under Civil Rule 12(b)(6).

Claims 1, 2, 3, 5, 6, 7, 8 and 9 in Thelma's original complaint all could have been asserted by Thelma at or before the time she signed the Settlement Agreement, or contain bare legal conclusions or insufficient factual information. Since the Settlement Agreement was not breached by any of the defendants named in the adversary proceeding, Thelma is bound by the releases, and cannot now assert those claims. The bankruptcy court did not err in dismissing those claims.

In Claim 4 for intentional interference with economic advantage, Thelma alleges that Nicholas and Trustee filed "numerous pleadings specifically requesting that the court deny [Thelma] any distribution in order to interfere with [Thelma's] ability to receive payment on her allowed claims in this estate." However, Thelma identifies no such pleadings, the bankruptcy court could locate none based upon its own search, and we can find no pleading in the record (other than Kassel's) filed after the Settlement Agreement was signed where the priority status of Thelma's creditor claim was challenged. We therefore concur with

the bankruptcy court's conclusion that Thelma's claim for relief lacks essential factual information. See Twombly, 550 U.S. at 557.

In Claim 10, Thelma sought a declaration of the bankruptcy court voiding the state court probate proceedings insofar "as those proceedings administered or concerned the debtor's intestate share." But the Spirtos Probate Case has been closed, and this claim is therefore moot. However, even before the probate estate was closed, the bankruptcy court lacked jurisdiction to interfere with the administration of property in the custody of a probate court. Although there have been changes in the Supreme Court's teachings on the probate exception in recent years, the fundamental principle remains intact: a federal court may not attempt to interfere with a probate court's administration of the probate estate.

> Federal courts have jurisdiction to entertain suits to determine the rights of creditors, legatees, heirs, and other claimants against a decedent's estate "so long as the Federal court does not interfere with the probate proceedings." . . . We read Markham's enigmatic words . . . to proscribe "disturb[ing] or affect[ing] the possession of the property in the custody of the state court. . . ." Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes Federal courts from endeavoring to dispose of property that is in the custody of a state probate court.

Marshall v. Marshall, 547 U.S. 293, 311-12 (2006).

Frankly, Thelma's Claim 10 was a brazen attempt to control property that was in the hands of the Spirtos Estate and thus outside the jurisdiction of the bankruptcy court. The bankruptcy court was correct to dismiss this claim.

Thelma submitted her First Amended Complaint in response to

the bankruptcy court's invitation to amend for the limited purpose of determining if Trustee had complied with his duties under ¶ 3.1 of the Settlement Agreement to seek an order concluding the probate case and determining if any monies were owed from the probate estate to the bankruptcy estate. But rather than comply with the court's direction and specifically address the court's concerns, Thelma collapsed all her assertions in the original complaint into a single claim. Since her First Amended Complaint merely repeats the allegations of the original complaint, it can be dismissed for the same reasons. Indeed, Thelma did not even argue against the motion to dismiss in the bankruptcy court. Under these circumstances, we will not consider Thelma's arguments on appeal that were not raised in the bankruptcy court. O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. BAP 1989).

In summary, the bankruptcy court did not err in dismissing the adversary proceeding under Civil Rule 12(b)(6).

IV.

The bankruptcy court did not abuse its discretion in deeming Thelma a vexatious litigant.

Federal courts have discretion to enjoin parties from frivolous litigation under the All-Writs Act, 28 U.S.C. § 1651. Clinton v. United States, 297 F.2d 899, 901 (9th Cir. 1961). Section 105(a) encompasses the powers of the All-Writs Act in bankruptcy proceedings. Ad Hoc Protective Comm. for 10-1/2% Debenture Holders v. Itel Corp. (In re Itel Corp.), 17 B.R. 942, 945 (9th Cir. BAP 1982). Bankruptcy courts have the power to regulate vexatious litigation pursuant to § 105 and 28 U.S.C.

§ 1651. Goodman v. Cal. Portland Cement Co. (In re GTI Capital Holdings, LLC), 420 B.R. 1, 22-23 (Bankr. D. Ariz. 2009).

In the Ninth Circuit, a federal court may restrict abusive litigants from submitting future filings, provided that the court: (1) gives the litigant the opportunity to oppose the order before it is entered; (2) creates an adequate record for review; (3) makes substantive findings as to the frivolous or harassing nature of the litigant's actions; and (4) drafts a sufficiently detailed order. DeLong v. Hennessy, 912 F.2d 1144, 1145-48 (9th Cir. 1990). All four of these requirements were satisfied by the bankruptcy court in this case.

The Trustee filed his motion for an order declaring Thelma a vexatious litigant on October 15, 2009, and there is proof in the bankruptcy docket that a copy of that motion was served on Thelma. The joinders in the motion by the other Parties, and proofs of service of the joinders on Thelma and her attorney, also appear in the record. In response to the motion, the bankruptcy court entered a tentative ruling, a discussion on the record of its views on the vexatious nature of Thelma's litigation practices, and findings related to the multiple incidents where Thelma had continued to argue positions that the bankruptcy court previously ruled lacked merit. In doing so, the bankruptcy court made the required findings to support its decision, and established an adequate record for review. Thereafter, the bankruptcy court entered an order sufficiently detailing the restrictions it was placing on Thelma's ability to file future pleadings in the adversary proceeding.

The Ninth Circuit has provided trial courts guidance in

deciding whether to issue a vexatious litigant order. Although not exclusive, the factors to be considered by a court include:

1. The litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits.

2. The litigant's motive in pursuing the litigation.

3. Whether the litigant is represented by counsel.

4. Whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel.

5. Whether other sanctions would be adequate to protect the courts and other parties.

Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1051 (9th Cir. 2007)(citing Safir v. United States Lines, Inc., 792 F.2d 19, 24 (2d Cir. 1986)), cert. denied, 129 S.Ct. 594 (2008).

Trustee addressed these five factors in his vexatious litigant motion, which the bankruptcy court acknowledged in the order it issued. In explaining the reasons for its decision to issue that order, the bankruptcy court examined the history of Thelma's vexatious conduct, noted that Thelma had caused needless expense to the Parties by repeatedly making claims and arguments previously rejected by the court, and found that Thelma's behavior was a significant burden on the bankruptcy court and its staff. On this record, we conclude that the bankruptcy court did not abuse its discretion in declaring Thelma a vexatious litigant.

CONCLUSION

We AFFIRM the bankruptcy court's orders declaring Thelma a vexatious litigant and dismissing the adversary proceeding.