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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NOT FOR PUBLICATION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-11-1099-DKiPa
)	
RUBEN MARTINEZ,)	Bk. No. LA 10-25770-ER
)	
Debtor.)	Adv. No. LA 10-03133-ER
)	
_____)	
RUBEN MARTINEZ,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
EDWARD H. OLAGUE, SR.,)	
)	
Appellee.)	
_____)	

Argued and Submitted on September 23, 2011
at Pasadena, California

Filed - October 11, 2011

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

Honorable Ernest M. Robles, Bankruptcy Judge, Presiding

Appearances: Robert Anthony Brown, Esq. appeared for Appellant
Ruben Martinez. Thomas Andrew Fasel, Esq.
appeared for Appellee Edward H. Olague, Sr.

Before: DUNN, KIRSCHER and PAPPAS, 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.

1 The debtor, Ruben Martinez, appeals the bankruptcy court's
2 order dismissing his complaint against Edward H. Olague, Sr.
3 ("Olague") for an alleged violation of the discharge injunction.²
4 We AFFIRM.

5
6 **FACTS**

7 Five years before the debtor's bankruptcy filing, Olague, in
8 his capacity as Edward H. Olague, Sr., Successor Trustee of the
9 Theodosia A. Olague Living Trust, dated April 28, 1998, sold
10 certain real property located in Pico Rivera, California, to
11 Wladimir Klimenko ("Klimenko"). Klimenko executed a promissory
12 note, secured by a trust deed against the real property, in favor
13 of Olague. Under the terms of the promissory note, the entire
14 loan became due and payable if Olague's mother, Theodosia Olague,
15 died or if Klimenko transferred the real property.

16 Shortly after his mother's death in February 2009, Olague
17 demanded payment of the balance of the loan. However, three
18 years earlier, without Olague's consent, Klimenko had transferred
19 the real property to the debtor. Klimenko then recorded a
20 substitution of trustee and full reconveyance ("full
21 reconveyance") as to the real property, without paying off the
22 loan.

23 Sometime in late 2009, Olague initiated a state court action
24

25
26 ² Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 The Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
The Federal Rules of Civil Procedure are referred to as "Civil
Rules."

1 against Klimenko and the debtor.³ Olague alleged in the state
2 court action that Klimenko fraudulently obtained his signature on
3 the full reconveyance and falsely recorded the full reconveyance.
4 He further contended that Klimenko did not disclose to Olague his
5 intent to transfer the real property to Martinez. Olague also
6 alleged that the debtor had actual and/or constructive knowledge
7 of Olague's secured interest in the real property and/or the full
8 reconveyance.

9 Olague sought the following relief against the debtor:

10 (1) to quiet title in the real property, with a judgment
11 determining that he had a secured interest in the real property
12 free and clear of any right, title, estate or interest of the
13 debtor; (2) a determination that Olague had a continuing secured
14 interest in the real property through the trust deed; (3) to
15 cancel the full reconveyance, with a declaration that the full
16 reconveyance was void and unenforceable; and (4) an injunction
17 requiring the debtor to cancel the full reconveyance and
18 prohibiting him from enforcing the full reconveyance and from
19 transferring, hypothecating or encumbering the real property.⁴

21 ³ Olague initiated the state court action against Klimenko
22 in August 2009, adding the debtor as a defendant in November
23 2009. Olague named other defendants as well, including the
24 notary public of the full reconveyance and "Does 1 through 500."

25 Because the debtor was title holder of the real property in
26 which Olague sought to establish a secured interest in the state
27 court action, there is no question that the debtor was a
28 necessary party to that action.

⁴ Olague asserted seven causes of action, all of them
against Klimenko, but only four of them against the debtor. The
(continued...)

1 The debtor filed an answer in the state court action.

2 The debtor filed his chapter 7 petition on April 23, 2010.
3 He listed the real property in his schedules, with only Bank of
4 America holding two secured claims against it. The debtor listed
5 Olague as an unsecured creditor with a contingent, unliquidated
6 and disputed claim in an unknown amount, based on the state court
7 action. The debtor received his discharge on August 18, 2010.
8 Three months after his bankruptcy case closed on August 25,
9 2010,⁵ the debtor removed the state court action to the
10 bankruptcy court ("removed action").⁶ He also filed a complaint

11
12 ⁴(...continued)
13 remaining claims against Klimenko were: (1) breach of contract;
14 (2) breach of fiduciary duty; and (3) fraud.

15 ⁵ The debtor moved to reopen his bankruptcy case, but the
16 bankruptcy court neither held a hearing nor entered an order
17 granting the motion to reopen. In its tentative ruling on
18 Olague's motion to dismiss (which it adopted as its final
19 ruling), the bankruptcy court explained that the debtor received
20 "special permission" to remove the state court action and to
21 initiate the adversary proceeding.

22 ⁶ The debtor initiated two adversary proceedings: (1) the
23 adversary proceeding involving the discharge injunction complaint
24 ("discharge injunction adversary proceeding")(10-3133-ER) and
25 (2) the adversary proceeding involving the removed action
26 ("removal adversary proceeding")(10-3132-ER). The removal
27 adversary proceeding is not part of this appeal.

28 Olague filed the motion to dismiss and a motion to remand
the removal action ("remand motion") in both adversary
proceedings. The bankruptcy court addressed both motions at the
hearing on January 25, 2011, in the discharge injunction
adversary proceeding.

The bankruptcy court noted in its tentative ruling that it
was unclear whether Olague sought dismissal of the removed action
or the discharge injunction complaint. The bankruptcy court
(continued...)

1 against Olague for allegedly violating the discharge injunction
2 under § 524 ("discharge injunction complaint").

3 The debtor asserted in the discharge injunction complaint
4 that Olague had actual knowledge of the debtor's bankruptcy case
5 before he received his discharge. He contended that Olague
6 neither held title to nor had a secured interest in the real
7 property after the full reconveyance was recorded. He asserted
8 that Olague neither objected to entry of the discharge nor
9 pursued an action to except the debt from discharge. The debtor
10 also pointed out that Olague did not file a claim in the
11 bankruptcy case.

12 He argued that Olague violated the discharge injunction by
13 continuing to prosecute the state court action against him. He
14 claimed that any debt owed to Olague had been discharged, as
15 Olague only held an unsecured claim. The debtor further asserted
16 that he had "the right to reinstate his loan with Bank of

17 _____
18 ⁶(...continued)

19 pointed out that Olague listed in his motion to dismiss the
20 number for the discharge injunction adversary proceeding. It
21 further noted that Olague referred to the discharge injunction
22 complaint in the motion to dismiss and argued that he had not
23 violated the discharge injunction. The bankruptcy court thus
24 concluded that Olague sought dismissal of the discharge
25 injunction complaint.

26 The bankruptcy court ultimately found that the state court
27 action did not violate the discharge injunction, as the state
28 court action did not seek personal liability against the debtor.
It concluded that because the state court action did not violate
the discharge injunction, there was no reason to maintain the
removed action as it involved state law issues only. The
bankruptcy court thus granted the remand motion. It entered two
separate orders on the motion to dismiss and the remand motion in
both adversary proceedings.

1 America[,] free and clear of any purported lien [held] by
2 Olague.” He argued that Olague was interfering with the debtor’s
3 right to reinstate his loan by continuing to proceed with the
4 state court action against him.

5 The debtor sought a determination that Olague was in
6 contempt under § 105 for violating the discharge injunction. He
7 also sought to enjoin Olague permanently from prosecuting the
8 state court action. The debtor sought monetary “civil sanctions”
9 against Olague, as well as attorney’s fees and costs.

10 Olague moved to dismiss the discharge injunction complaint
11 under Civil Rule 12(b)(6).⁷ He stressed that he was not
12 attempting to collect a debt as a personal liability of the
13 debtor, but as a personal liability of Klimenko only. Olague
14 claimed he simply sought a determination as to his interest in
15 the real property.

16 He argued that a bankruptcy discharge does not prohibit a
17 creditor from pursuing in rem claims against real property.
18 Olague contended that the discharge injunction complaint failed
19 to state a claim upon which relief could be granted because all
20 the claims for relief against the debtor in the state court
21 action were in rem claims.⁸

23 ⁷ Civil Rule 12(b)(6) is applicable through Rule 7012(b).
24

25 ⁸ Olague also moved to dismiss the discharge injunction
26 complaint under Rule 12(b)(1) for lack of subject matter
27 jurisdiction. The bankruptcy court denied the motion to dismiss
28 to the extent Olague sought dismissal under Rule 12(b)(1), as the
discharge injunction complaint clearly involved issues of
bankruptcy law. Neither the debtor nor Olague appealed the
bankruptcy court’s determination on this issue.

1 The debtor opposed the motion to dismiss, asserting that
2 Olague had an unsecured claim on which the debtor's personal
3 liability was discharged. The debtor pointed out that Olague
4 neither objected to entry of the discharge nor sought to except
5 any debt from discharge. He further contended that Olague sought
6 to create a security interest in the real property through the
7 state court action, as he never held a security interest in the
8 real property in the first place. Because Olague did not have a
9 secured claim but an unsecured claim, the debtor contended, he
10 could not proceed with the state court action against the debtor
11 after entry of the discharge.

12 The debtor further argued that the claims in the state court
13 action sought "personal relief" against him. Specifically, the
14 debtor contended that claims against him were personal in nature
15 because they negatively affected his rights to and interest in
16 the real property. Because the state court action sought to
17 quiet title to the real property as to the debtor, it was not an
18 in rem action.

19 The debtor also argued that, even assuming Olague was a
20 secured creditor, the exception under § 524(j) did not apply.
21 Section 524(j) provides that the injunction would not prohibit a
22 secured creditor's post-discharge act if: (1) that secured
23 creditor had a security interest in the debtor's residence;
24 (2) the act was in the ordinary course of business between the
25 secured creditor and the debtor; and (3) the act was limited to
26 seeking or obtaining periodic payments associated with a valid
27 security interest in lieu of pursuit of in rem relief to enforce
28 the lien. Here, the debtor contended, Olague was not a secured

1 creditor, and the real property was not the debtor's home. The
2 debtor moreover pointed out that Olague conducted business with
3 Klimenko, not with him. Also, the debtor argued, Olague was not
4 seeking periodic payments from the debtor because the debt
5 matured prepetition.

6 The debtor further contended that Olague could not assert
7 claims against him because he was a bona fide purchaser for
8 value. The debtor argued that he was an "innocent purchaser" -
9 even Olague had not alleged in the state court action that the
10 debtor actually knew of the unauthorized reconveyance. Olague
11 instead alleged that the debtor had actual or constructive
12 knowledge of Olague's interest in the real property. The debtor
13 contended that Olague thus cannot prevail in the state court
14 action against him because he cannot prove that the debtor
15 actually knew of the unauthorized full reconveyance.

16 The bankruptcy court held a hearing on the motion to dismiss
17 on January 25, 2011. Before the hearing, it issued a tentative
18 ruling indicating that it would dismiss the discharge injunction
19 complaint with prejudice under Civil Rule 12(b)(6). The
20 bankruptcy court found that the state court action did not "seek
21 personal liability against [the] Debtor, but only [sought] a
22 determination of [Olague's] secured status with respect to the
23 [real property]." It pointed out that the debtor was a party to
24 the state court action because he was the record owner of the
25 real property, which might become subject to Olague's lien. The
26 bankruptcy court reasoned that if Olague prevailed in the state
27 court action, he would obtain a lien against the real property
28 and possibly damages against Klimenko but not against the debtor.

1 It thus concluded that the state court action did not violate the
2 discharge injunction under § 524(a)(2).

3 The bankruptcy court further determined that Olague's
4 continued pursuit of the state court action could not have
5 violated the discharge injunction at any rate because he did not
6 have any unsecured claim against the debtor. Even though the
7 debtor scheduled Olague as an unsecured creditor, Olague did not
8 have an unsecured claim, given the claims asserted against the
9 debtor in the state court action.

10 The bankruptcy court further found that the debtor's
11 arguments regarding his bona fide purchaser for value status were
12 irrelevant to whether the state court action violated the
13 discharge injunction. Even if the debtor successfully
14 demonstrated that he was a bona fide purchaser for value, "it
15 would not result in a [determination] that the state court action
16 violated the discharge injunction." The bankruptcy court
17 acknowledged, however, that the debtor could pursue his bona fide
18 purchaser status argument in state court.

19 The bankruptcy court told counsel for the debtor at the
20 hearing that the state court action claims were "all in rem [as
21 they had] to do with [the real] property." Tr. of January 25,
22 2011 hr'g, 6:3. The debtor, it found, "put himself on the chain
23 of possession of the [real] property. And to the extent that the
24 state court [was] going to go back and re-vest that property and
25 title into some other entity, then the Debtor [was] not going to
26 face personal liability. He may face . . . a declaratory
27 judgment that state[d] what his interest in the [real] property
28 [was] or would be." Tr. of January 25, 2011 hr'g, 6:3-9.

1 The bankruptcy court granted the motion to dismiss, entering
2 an order ("dismissal order") consistent with its tentative
3 ruling. The debtor timely appealed.
4

5 JURISDICTION

6 The bankruptcy court had jurisdiction under 28 U.S.C.
7 §§ 1334 and 157(b)(2)(O). We have jurisdiction under 28 U.S.C.
8 § 158.
9

10 ISSUE

11 Did the bankruptcy court err in granting the motion to
12 dismiss by determining that Olague did not violate the discharge
13 injunction?
14

15 STANDARDS OF REVIEW

16 We review de novo the bankruptcy court's grant of a Civil
17 Rule 12(b)(6) motion to dismiss. Movsesian v. Victoria
18 Versicherung AG, 629 F.3d 901, 905 (9th Cir. 2010). De novo
19 means we look at the matter anew, as if it had not been heard
20 before, and as if no decision had been rendered previously,
21 giving no deference to the bankruptcy court's determinations.
22 Freeman v. DirectTV, Inc., 457 F.3d 1001, 1004 (9th Cir. 2006).
23 "When ruling on a motion to dismiss, we accept all factual
24 allegations in the complaint as true and construe the pleadings
25 in the light most favorable to the nonmoving party." Movsesian,
26 629 F.3d at 905 (quoting Knievel v. ESPN, 393 F.3d 1068, 1072
27 (9th Cir. 2005)(quotation marks omitted)). To survive a motion
28 to dismiss, the complaint must state sufficient facts to state a

1 claim for relief that is plausible on its face. Ashcroft v.
2 Iqbal, 129 S.Ct. 1937, 1949 (2009)(quoting Bell Atl. Corp. v.
3 Twombly, 550 U.S. 544, 570 (2007)). The “plausibility standard
4 . . . asks for more than the sheer possibility that a defendant
5 acted unlawfully.” Iqbal, 129 S. Ct. at 1949.

6 The applicability of the discharge injunction is a question
7 of law that we review de novo. Watson v. Shandell (In re
8 Watson), 192 B.R. 739, 745 (9th Cir. BAP 1996).

9 We may affirm on any ground supported by the record. Shanks
10 v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008).

11 12 **DISCUSSION**

13 The issue, as the bankruptcy court succinctly put it, is
14 whether Olague’s “pursuit of the [state court action] violate[d]
15 the discharge injunction set forth [under] § 524(a)(2).” On
16 appeal, the debtor essentially repeats the arguments he made in
17 his opposition to the motion to dismiss.

18 Section 524(a)(2) provides that a discharge “operates as an
19 injunction against the commencement or continuation of an action
20 . . . to collect, recover or offset any such debt as a personal
21 liability of the debtor, whether or not such discharge of such
22 debt is waived[.]” The bankruptcy discharge “extinguishes only
23 one mode of enforcing a claim - namely, an action against the
24 debtor in personam - while leaving intact another - namely, an
25 action against the debtor in rem.” Johnson v. Home State Bank,
26 501 U.S. 78, 84 (1991).

27 An action in rem is one “determining the title to property
28 and the rights of the parties, not merely among themselves, but

1 also against all persons at any time claiming an interest in that
2 property." Black's Law Dictionary 34 (9th ed. 2009). A quasi in
3 rem action is one "brought against the defendant personally, with
4 jurisdiction based on an interest in property, the objective
5 being to deal with the particular property or to subject the
6 property to the discharge of the claims asserted." Id. Quiet
7 title actions are proceedings in rem. 40235 Washington Street
8 Corp. v. Lusardi, 976 F.2d 587, 589 (9th Cir. 1992). See also
9 Park v. Powers, 2 Cal.2d 590, 598 (Cal. 1935)("Actions relating
10 to land, such as suits to quiet title, are denominated quasi-in-
11 rem.").

12 Reviewing the state court action, we agree with the
13 bankruptcy court that Olague did not seek to recover or collect
14 on a debt as the debtor's personal liability. As the bankruptcy
15 court noted, all of the claims asserted against the debtor in the
16 state court action essentially seek to establish Olague's secured
17 interest in the real property.

18 The debtor characterizes Olague's quiet title action as an
19 attempt to collect on a debt as his personal liability, viewing
20 it as a "right to an equitable remedy for breach of performance
21 if such breach gives rise to a right to payment" under
22 § 101(5)(B).

23 Nothing in Olague's state court action sought the debtor's
24 personal liability on a right to payment. See generally Egebjerg
25 v. Anderson (In re Egebjerg), 574 F.3d 1045, 1049 (9th Cir.
26 2009)("In the Bankruptcy Code, the term 'debt' means 'liability
27 on a claim.' 'Claim' is defined very broadly within the
28 [Bankruptcy] Code to mean any 'right to payment' The

1 terms 'debt' and 'claim' are coextensive, 'flip sides to the same
2 coin.'" (internal citations omitted). Olague is not seeking a
3 right to payment of any kind from the debtor; he simply wishes to
4 assert his interest in the real property. The discharge
5 injunction thus does not bar such an action against the debtor.⁹

6 Also, contrary to the debtor's argument, Olague was not an
7 unsecured creditor. We agree with the bankruptcy court that
8 Olague does not have an unsecured claim based on the claims
9 asserted in the state court action, as they do not seek a right
10 to payment on a debt as to the debtor.

11 The debtor further argues that Olague's quiet title claims
12 are in personam, relying on Parker v. Handy (In re Handy),
13 624 F.3d 19 (1st Cir. 2010), in support of his argument.

14 At the outset, we note that Parker concerned a constructive
15 trust claim to pursue an alleged fraudulent transfer of funds,
16 rather than a quiet title action. In Parker, the appellant
17 initiated a state court action against the debtor, alleging that
18 the debtor purchased a home with funds conveyed to her by her ex-
19 husband in violation of the Uniform Fraudulent Transfer Act
20 ("UFTA"). The appellant sought money damages and the imposition
21 of a constructive trust on the home. When the appellant appealed
22

23 ⁹ Under the Bankruptcy Code, the term "claim" is broad
24 enough to encompass an equitable remedy "for breach of
25 performance," but only "if such breach gives rise to a right to
26 payment." Section 101(5)(B). "[R]ights to an equitable remedy
27 for a breach of performance with respect to which such breach
28 does not give rise to a right to payment are not 'claims' and
would therefore not be susceptible to discharge in bankruptcy."
H.R. Rep. No. 95-595, at 435 (1978), reprinted in 1978
U.S.C.C.A.N. 5963, 6437.

1 the state court's judgment in the debtor's favor, the debtor
2 filed for bankruptcy. The appellant then moved for relief from
3 stay, which the bankruptcy court denied because he did not have a
4 claim in rem. Id. at 21. The bankruptcy court held that the
5 appellant had not established an interest in the debtor's home by
6 attachment or a provisional remedy. Id. The appellant's request
7 for a constructive trust did not give rise to an in rem action.
8 Id.

9 The First Circuit affirmed, determining that simply seeking
10 a constructive trust "did not of itself give rise to an in rem
11 action." Id. at 22. Constructive trusts are not substantive
12 rights that confer a cause of action, the First Circuit
13 continued, but are remedial devices used by courts once liability
14 is found and where equity requires. Id. The First Circuit thus
15 concluded that the appellant's claims against the debtor were in
16 personam. Id.

17 The debtor misapprehends the nature of in rem/quasi in rem
18 actions. He construes Olague's quiet title claims as remedial
19 devices under Parker. He argues that Olague neither held title
20 to the real property nor obtained any provisional relief in state
21 court. Appellant's Opening Brief at 10. But as we mentioned
22 earlier, quiet title actions are in rem actions. See Lusardi,
23 976 F.2d at 589; Park, 2 Cal.2d at 598.

24 Moreover, contrary to the debtor's argument, Olague did not
25 need to have title to the real property nor obtain provisional
26 relief in order to assert a quiet title claim against the debtor.
27 The purpose of a quiet title action is to establish a party's
28 right and/or title to real property. See Peterson v. Gibbs,

1 81 P. 121, 122-23 (Cal. 1905) ("The object of the [quiet title]
2 action is to finally settle and determine, as between the
3 parties, all conflicting claims to the property in controversy,
4 and to decree to each such interest or estate therein as he may
5 be entitled to."). Olague is attempting to establish a secured
6 interest to the real property by compelling the debtor to
7 recognize his claim to it. He does not need to obtain
8 provisional relief first before asserting his quiet title claim
9 against the debtor.

10 Finally, the debtor's arguments as to the application of the
11 exception under § 524(j) and his status as a bona fide purchaser
12 for value are irrelevant to a determination of whether Olague
13 violated the discharge injunction. With respect to his argument
14 under § 524(j), this exception does not apply because Olague is
15 not seeking to enforce a right to payment on a debt.

16 As to the debtor's assertions regarding his bona fide
17 purchaser status, we agree with the bankruptcy court that it has
18 no bearing as to whether Olague violated the discharge
19 injunction. Even if the debtor was a bona fide purchaser of the
20 real property for value, it would not demonstrate that the state
21 court action sought to collect or recover a debt as the debtor's
22 personal liability in violation of § 524(a)(2). If the debtor
23 establishes his bona fide purchaser status, that may entitle him
24 to prevail on Olague's claims in the state court action, but it
25 has nothing to do with any alleged violation of the discharge
26 injunction.

27 ///

28 ///

1 **CONCLUSION**

2 The debtor has not shown how Olague's state court action
3 violated the discharge injunction under § 524(a)(2). The
4 bankruptcy court thus did not err in dismissing the debtor's
5 discharge injunction complaint for failure to state a claim upon
6 which relief can be granted under Civil Rule 12(b)(6).
7 Accordingly, we AFFIRM.