

DEC 09 2011

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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NOT FOR PUBLICATION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

5	In re:)	BAP No. EC-10-1318-JuKiD
)	BAP No. EC-10-1319-JuKiD
6	LARRY TEVIS and NANCY TEVIS,)	BAP No. EC-10-1320-JuKiD
)	BAP No. EC-10-1321-JuKiD*
7	Debtors.)	(related appeals)
)	
8	<hr/> LARRY TEVIS; NANCY TEVIS,)	Bk. No. 04-26357
)	Adv. No. 08-2004
9	Appellants,)	
)	M E M O R A N D U M**
10	v.)	
)	
11	MAX HOSEIT; HERMAN L.)	
	KOELEWYN; HOSEIT & KOELEWYN;)	
12	DANIEL L. EGAN; MICHAEL F.)	
	BURKART, Trustee; FIRST)	
13	AMERICAN TITLE COMPANY,)	
)	
14	Appellees.)	
)	

Argued and Submitted on November 16, 2011
at Sacramento, California

Filed - December 9, 2011

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

Honorable Thomas C. Holman, Bankruptcy Judge, Presiding

* While not formally consolidated, these four related appeals were heard at the same time and were considered together. This single disposition applies to the four appeals, and the clerk is directed to file a copy of this disposition in each appeal.

** 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 allegations in debtors' TAC.

2 **Prepetition Events**

3 Debtors purchased unimproved property in Recuse, California
4 in March 1989. After making improvements, they placed a
5 manufactured house on the property which was later destroyed by
6 wind and rain. In 1998, they signed a contract to purchase a
7 new manufactured house with Taylor's Capitol Mobile Home Sales
8 ("TCMHS"). To purchase the house and make the necessary
9 improvements, they also applied for a State of California,
10 Department of Veterans Affairs ("Cal Vet") mortgage loan which
11 was eventually consummated and funded. FATCO recorded the grant
12 deed in favor of Cal Vet on their property.

13 Debtors took steps to place the new house on their
14 property, which included, among other things, a new foundation.
15 The foundation was completed and the house delivered, but
16 debtors were not happy for a variety of reasons. As a result,
17 they commenced litigation against Fleetwood Homes of California,
18 dba Fleetwood, TCMHS, Affordable Awnings, and Lee Williams dba
19 Gold Key Mobile Home Contractors (the "Modular Home
20 Litigation"). Debtors also commenced a separate lawsuit against
21 their escrow company, Spring Mountain Escrow, dba Heritage
22 Escrow ("Heritage").

23 Debtors retained H&K to represent them in the litigation
24 after their initial attorney withdrew due to retirement. Later,

25
26 _____
27 ¹(...continued)

28 Although we excused debtors from filing excerpts of record, we
did not excuse them from providing us with adequate citations to
the record, which they did not do. See Rule 8010(a)(1)(D).

1 H&K withdrew for reasons not apparent from the record.
2 Debtors then retained attorney Paul L. Cass ("Cass"), who is not
3 part of this appeal.

4 In July 2002, on the morning of the trial, Cass
5 successfully negotiated a settlement of the Modular Home
6 Litigation for \$65,000. Although most of the defendants
7 tendered checks to Cass, debtors decided not to consummate the
8 settlement. After further litigation, the California Superior
9 Court confirmed the settlement on March 24, 2003. Cass then
10 prepared a stipulation and release (the "Stipulation") which the
11 defendants signed, but the debtors did not.

12 At some point, debtors filed malpractice actions against
13 H&K and Cass. In turn, H&K and Cass asserted attorney's liens
14 against the proceeds from the Modular Home Litigation settlement
15 and filed suit against debtors for their fees.

16 Meanwhile, debtors defaulted on the loan with Cal Vet.
17 In early 2004, Cal Vet filed an unlawful detainer action against
18 debtors in the California Superior Court, County of Eldorado.

19 **Bankruptcy Events**

20 On June 21, 2004, debtors filed their chapter 7² petition,
21 and Michael F. Burkart was appointed as their Trustee. Debtors
22 removed the Modular Home Litigation to the bankruptcy court.
23 Thereafter, the Trustee, with court authorization, employed Egan
24 as his counsel. With Egan's assistance, the Trustee negotiated

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

1 an amendment to the Stipulation signed by the parties in state
2 court in order to implement the original settlement for \$65,000.
3 The Trustee also reached an agreement with H&K and Cass
4 regarding the malpractice claims and their attorney's liens.

5 Despite debtors' objections, the bankruptcy court approved
6 the settlements in a Memorandum Decision filed October 29, 2004.
7 Debtors appealed that decision on November 8, 2004 (BAP No. 04-
8 1575). Two days later, on November 10, 2004, the bankruptcy
9 court entered the order approving the settlements. On
10 February 16, 2005, the Panel dismissed debtors' appeal for lack
11 of prosecution.

12 A condition precedent to the settlements involving the
13 Modular Home Litigation and the malpractice actions was a
14 settlement agreement between the Trustee and Cal Vet. On
15 November 16, 2004, the Trustee filed a motion to approve his
16 agreement with Cal Vet. That agreement established the amount
17 of the indebtedness on debtors' property, authorized the Trustee
18 to sell the property, and required Cal Vet to dismiss their
19 prepetition state court action against debtors. This settlement
20 apparently was not consummated because debtors moved to convert
21 their case to chapter 13 when they learned that the Trustee
22 intended to sell their residence. The bankruptcy court
23 converted their case on December 1, 2004, and the Trustee's
24 appointment was terminated.

25 Debtors confirmed a chapter 13 plan on July 18, 2005, which
26 assumed and ratified the settlements of the Modular Home
27 Litigation and malpractice actions.

1 **A. The Adversary Complaint**

2 On January 2, 2008, debtors commenced the adversary
3 proceeding out of which these appeals arise. The complaint
4 asserted claims for relief for: (1) fraud; (2) fraudulent
5 inducement; (3) defamation; (4) breach of written contract;
6 (5) breach of oral/IMPLIED contract; (6) breach of fiduciary
7 duty; (7) gross negligence; (8) equitable, declaratory,
8 injunctive relief, and accounting; (9) intentional infliction of
9 emotional distress; (10) negligent infliction of emotional
10 distress; (11) violation of bankruptcy automatic stay;
11 (12) violation of Health and Safety Code § 18000, et seq.; and
12 (13) breach of the duty of good faith and fair dealing.

13 **The First Amended Complaint**

14 Debtors filed a first amended complaint ("FAC") on May 13,
15 2008. Appellees filed motions to dismiss, which the court
16 granted, with leave to amend.

17 **The Second Amended Complaint**

18 Debtors filed a second amended complaint on September 22,
19 2008. Appellees filed another round of motions to dismiss,
20 which the court granted, with further leave to amend. In its
21 civil minute order, which was virtually identical with respect
22 to each appellee, the court stated:

23 Plaintiffs . . . are granted leave to amend the
24 complaint a final, third time. Plaintiffs may file a
25 third amended complaint that comports with Fed. R.
26 Civ. P. 8(a), made applicable herein pursuant to Fed.
27 R. Bankr. P. 7008, as to Defendant [] on or before
28 September 1, 2009. In the amended complaint, each
claim and the involvement of each defendant in that
claim must be sufficiently alleged. Plaintiffs'
amended complaint must include clear, concise, and
complete factual allegations describing the conduct
and events which underlie Plaintiffs' claims. Simply

1 naming numerous defendants and then alleging that
2 'defendants' acted wrongfully is not sufficient.
3 Failure to file an amended complaint that conforms to
4 the requirements of this ruling may result in
5 dismissal of this action without leave to amend for
6 failure to state a claim upon which relief can be
7 granted.

8 **The TAC**

9 Debtors filed the TAC on September 1, 2009. The TAC
10 complaint added claims for relief for malicious prosecution,
11 fraud under 18 U.S.C. §§ 152 and 3571, declaratory relief, and
12 injunctive relief. Due to its length, we recite only an
13 abbreviated version of the general statements and allegations
14 taken from debtors' TAC in ¶¶ 35-71³ and accepted as true for
15 the purpose of deciding Appellees' separately filed motions to
16 dismiss.

17 **General Allegations In ¶¶ 35-71 Of The TAC**

18 Debtors alleged that TCMHS never reported the sale of
19 the manufactured house to the State of California
20 until 2003.

21 Debtors alleged that on June 4, 1998, Cal Vet
22 appraised debtors' new manufactured home and their
23 property for \$188,000. The appraisal was done before
24 the loan approval, before the house foundation was
25 built, and before their modular home was built. A
26 central air conditioner was included in the appraisal
27 and paid for by debtors. Debtors alleged that they
28 never received the air conditioner.

Debtors further alleged that the foundation for the
manufactured house never passed the El Dorado County
inspection because it was defective and not built
according to the approved engineer's plans. According
to debtors, TCHMS directed them to Pacific Consulting

³ Debtors incorporate ¶¶ 35-71 into their first through
tenth claims for relief. The eleventh and thirteenth through
eighteen claims for relief are included in the prayer of the TAC
and do not incorporate these paragraphs nor do they assert any
additional allegations to support any claim. There is no twelfth
claim for relief in the TAC.

1 Engineers ("PCE") and David Dahmen to have the
2 foundation plans drawn up. They paid PCE \$350.
3 Debtors alleged that their home was a total loss due
4 to its placement on the defective foundation and
because the home was not built according to plan.
Debtors allege that TCHMS and Fleetwood refused to
replace or repair the home.

5 Debtors further alleged that David Dahmen wrote a
6 fraudulent report regarding their foundation and that
he and PCE committed fraud against them. Debtors
7 maintain that they suffered mental, financial, and
8 loss of self worth for over a decade for the harm PCE
and David Dahmen had caused them.

9 Debtors alleged that on June 24, 1998, they obtained
10 the Cal Vet loan and signed the contract on the same
11 date. Debtors alleged that TCHMS signed the Cal Vet
12 contract, but then sent a fax to Cal Vet stating that
13 it was not going to abide by the contract's terms.

14 Debtors alleged that on July 22, 1998, FATCO recorded
15 the grant deed with Cal Vet on the property with an
16 "unverified" false/fake address and with a different
17 escrow number (8273) than the Cal Vet escrow number
18 (7989). Debtors alleged that FATCO recorded the
19 fraudulent grant deed at the El Dorado County Recorder
20 Office, in Placerville, California. Debtors stated in
21 the TAC that if FATCO had been honest and followed the
22 proper procedure of recording the grant deed, debtors
23 would not be in the dire situation that they are in,
24 of losing their residence and experiencing mental and
25 financial damage with more than a decade of litigation
26 and hardships.

27 Debtors alleged that in August 2002, they lost the
28 right of access to and from their property. Debtors
alleged that Roy and Alberta McKenzie, an El Dorado
County employee, and a state court clerk in El Dorado
County, removed the easement of record on their
property that allowed debtors access to and from their
residence. Debtors alleged that Cal Vet held the
title to the McKenzies' land, as Roy McKenzie had a
Cal Vet loan. Debtors alleged that Cal Vet knew that
debtors lost their right of access to and from the
land. Debtors further alleged that fraud was
committed when the McKenzies presented a fraudulent
"Exhibit." Debtors also alleged that the McKenzies'
attorney, Doug Roecea, is a party of interest against
debtors as Doug Roecea represented debtors at an
earlier time.

Debtors alleged that in 2002 FATCO denied their claim
under the title insurance policy when they lost their
access to their property. In the TAC, debtors sought

1 monetary relief from FATCO for the fraudulent grant
2 deed and legal fees and costs for the loss of right to
go in and out of the land.

3 Debtors alleged that on July 23, 1998, Cal Vet amended
4 debtors' contract without their knowledge or signature
5 for consent and/or approval. Debtors alleged that
this violated and breached the Cal Vet contract and
was fraud.

6 Debtors alleged that on July 27, 1998, their modular
7 house was delivered in poor and damaged condition.
This was allegedly in violation of the California
8 Health and Safety Code and the Cal Vet contract.

9 Debtors alleged that their escrow company (Heritage)
10 released all money owed to the dealer and violated the
Cal Vet contract.

11 Debtors alleged that they were left with a severely
12 damaged house and that it was a total loss, since it
would cost more to rebuild the house than it cost new.
13 Debtors alleged that Cal Vet refused to help them with
the damaged house as required by the Cal Vet contract.

14 Debtors alleged that on July 26, 1999, they filed the
Modular Home Litigation and hired Richard Rader
15 ("Rader") to assist them.

16 Debtors alleged that Cal Vet refused to let debtors
see their Cal Vet file. Debtors alleged that this was
17 in violation and in breach of the Cal Vet contract and
was also in violation of the Freedom of Information
Act.

18 Debtors alleged that when Rader withdrew as debtors'
19 attorney, they hired H&K on contingency in February
20 2002.

21 Debtors alleged that on August 5, 2002 a settlement
agreement was made under debtors' duress. According
22 to debtors, their state court attorneys Cass and
Galgani forced the agreement upon debtors under false
23 pretenses and dire consequences to debtors. Debtors
alleged that they did not want to settle for \$65,000
24 when the house cost \$65,000, H&K had a lien on the
debtors' house for over \$50,000, Cass had a lien for
25 over \$50,000, and the title was in TCMHS's name, not
debtors because TCMHS never reported the sale of the
26 house to the State of California. Debtors moved to
vacate the settlement agreement in the state court.

27 Debtors alleged that their attorney Cass wrote a
letter to William (Bill) Gwire to deny debtors' legal
28 representation by writing false misrepresentations to

1 slander debtors, by stating that Nancy Tevis had
2 attacked the judge in his chambers.

3 Debtors further alleged that Cass wrote false
4 misrepresentations in his motion of January 2003, such
5 as Nancy Tevis threatened to file a false rape charge
6 if Cal Vet did not give her husband a loan. Cal Vet
7 was allegedly subpoenaed to testify against debtors in
8 Sacramento County Superior Court during the Modular
9 Home Litigation. Debtors alleged that to defraud and
10 slander debtors, Cal Vet testified and lied to the
11 court that Nancy Tevis threatened to file a false rape
12 charge if Cal Vet did not give her husband a loan.
13 According to debtors, this information was allegedly
14 used against debtors in their bankruptcy case.

15 Debtors alleged that Cal Vet canceled their mandatory
16 life insurance, but continued to charge them for the
17 premium.

18 Debtors alleged that on September 12, 2003, Cal Vet
19 cancelled debtors' contract.

20 Debtors alleged that H&K had adverse interests to them
21 since H&K's client was the Opal Hampton Family Trust.
22 Opal Hampton was allegedly the owner of TCMHS.
23 Debtors alleged that H&K withdrew from their lawsuit
24 with no just cause. Debtors alleged that H&K
25 committed fraud on the court as a party to the
26 bankruptcy court settlement of their malpractice
27 claims. They alleged H&K agreed to fictitious facts
28 in the agreement and knew they were false so that
debtors would be blamed for H&K's withdrawal from
their state court litigation and H&K would get paid
money from debtors' estate. Debtors alleged that H&K
willfully, knowingly lied and defrauded debtors and
defrauded the court with the false records and false
statements by falsely portraying debtors as
responsible for H&K's departure from debtors' state
court case.

Debtors alleged that Egan falsely stated [in his
employment application] that there was not any contact
with debtors prior to their bankruptcy. Debtors
alleged that they had several contacts with Egan in
which they told him about the Modular Home Litigation.
According to debtors, their bankruptcy attorney,
Ronald Melliush, did nothing about the conflict of
interest.

Debtors alleged that when Egan filed a motion for the
bankruptcy court to approve the compromise of the
state court litigation, he knowingly made and used
false records and statements to get it approved.
Debtors alleged that Egan conspired and defrauded the

1 court and committed fraud upon the court to get Judge
2 Christopher Klein to approve and grant the motion to
compromise the state court litigation.

3 At another point, debtors alleged that the Trustee
4 knowingly, deliberately, and willfully committed fraud
upon the court to sell debtors' residence.

5 Due to Egan's conflict of interest, debtors alleged
6 that all agreements made by him must be vacated.

7 Debtors further alleged that Egan committed fraud upon
8 the court in the settlement with Cal Vet which
9 authorized the Trustee to sell their residence.

10 Debtors alleged that Cal Vet violated the automatic
11 stay and state court settlement agreement and that Cal
12 Vet threatened to obtain relief from stay to take
13 possession of debtors' property.

14 Appellees filed motions to dismiss debtors' TAC. On
15 August 9, 2010, the bankruptcy court issued detailed minute
16 orders granting the motions and dismissing the adversary
17 proceeding as to Appellees without leave to amend and certified
18 the dismissal orders as final judgments under Rule 54(b).
19 Debtors timely appealed the orders.

20 **B. The Limited Remand**

21 On October 15, 2010, the Panel remanded these appeals to
22 the bankruptcy court for an express determination, in
23 conformance with Rule 54(b), that there was no just reason for
24 delay in reviewing the various orders. After the remand,
25 debtors filed an ex parte motion requesting the bankruptcy court
26 to make the necessary findings for certification.

27 On January 12, 2011, the bankruptcy court issued separate
28 Supplemental Memoranda as to Appellees, finding that there was
no just reason for delay of entry of the dismissal orders as
final, appealable judgments under Civil Rule 54(b). The court
explained that the orders adjudicated all claims for relief in

1 the TAC as to Appellees, debtors could not further amend the
2 TAC, and Appellees had not filed counterclaims against debtors.
3 The bankruptcy court thus found that the dismissal of the TAC
4 ended the involvement of Appellees as parties in the adversary
5 proceeding.

6 II. JURISDICTION

7 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
8 §§ 1334 and 157(b)(1). This Panel has jurisdiction under
9 28 U.S.C. § 158.

10 III. ISSUES

11 A. Whether the bankruptcy court abused its discretion in
12 certifying the interlocutory dismissal orders as final judgments
13 under Civil Rule 54(b);

14 B. Whether the bankruptcy court erred in dismissing the
15 TAC as to Appellees under Civil Rule 12(b)(6); and

16 C. Whether the bankruptcy court abused its discretion in
17 dismissing the TAC as to Appellees without leave to amend.

18 IV. STANDARDS OF REVIEW

19 We review a certification of an interlocutory judgment
20 under Rule 54(b) for abuse of discretion. Texaco, Inc. v.
21 Ponsoldt, 939 F.2d 794, 797 (9th Cir. 1991).

22 We review de novo the bankruptcy court's grant of a motion
23 to dismiss under Civil Rule 12(b)(6). Movsesian v. Victoria
24 Versicherung AG, 629 F.3d 901, 905 (9th Cir. 2010). We may
25 affirm the bankruptcy court's dismissal of a complaint "'only if
26 it is clear that no relief could be granted under any set of
27 facts that could be proved consistent with the allegations.'" Cooke, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.,

1 911 F.2d 242, 244 (9th Cir. 1990)(quoting Hishon v. King &
2 Spalding, 104 S.Ct. 2229, 2232 (1984)).

3 We review a bankruptcy court's decision to dismiss a
4 complaint with prejudice for an abuse of discretion. Stearns v.
5 Ticketmaster Corp., 655 F.3d 1013, 1018 (9th Cir. 2011).

6 In applying our abuse of discretion test, we first
7 'determine de novo whether the [bankruptcy] court
8 identified the correct legal rule to apply to the
9 relief requested.' If the bankruptcy court identified
10 the correct legal rule, we then determine whether its
11 'application of the correct legal standard [to the
12 facts] was (1) illogical, (2) implausible, or
13 (3) without support in inferences that may be drawn
14 from the facts in the record.' If the bankruptcy court
15 did not identify the correct legal rule, or its
16 application of the correct legal standard to the facts
17 was illogical, implausible, or without support in
18 inferences that may be drawn from the facts in the
19 record, then the bankruptcy court has abused its
20 discretion.

21 USAA Fed. Sav. Bank. v. Thacker (In re Taylor), 599 F.3d 880,
22 887-88 (9th Cir. 2010)(citing United States v. Hinkson, 585 F.3d
23 1247, 1261-62 (9th Cir. 2009)).

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

26 V. DISCUSSION

27 A. The Bankruptcy Court Did Not Abuse Its Discretion In 28 Certifying The Dismissal Orders As Final Judgments Under Civil Rule 54(b)

29 The bulk of debtors' opening brief is devoted to the issue
30 of whether the bankruptcy court abused its discretion in
31 certifying its dismissal orders as final judgments under Civil
32 Rule 54(b). Debtors' position is curious when they themselves
33 appealed the dismissal orders and, after this Panel remanded the
34 matter back to the bankruptcy court to make further findings
35 under Civil Rule 54(b), they filed an ex parte pleading urging

1 the bankruptcy court to make the findings necessary for
2 certification. Now, taking a different approach, they maintain
3 that the very certification they once supported is improper.

4 Notwithstanding debtors' inconsistent positions, we briefly
5 consider whether the bankruptcy court's certification of the
6 dismissal orders was proper only because we must satisfy
7 ourselves that we are properly exercising our jurisdiction over
8 these appeals.⁴ "[Civil Rule] 54(b) controls the analysis of
9 finality of judgments for purposes of appeal in federal civil
10 actions, including bankruptcy proceedings." Belli v. Temkin
11 (In re Belli), 268 B.R. 851, 855 (9th Cir. BAP 2001). We give
12 great deference to the bankruptcy court's decision to certify
13 under Civil Rule 54(b). Texaco, Inc., 939 F.2d at 798.
14 Certification is proper if it will aid "expeditious decision" of
15 the case. Id. at 797.

16 Civil Rule 54(b), made applicable to the Bankruptcy Code by
17 Rule 7054(a), provides in part:

18 When an action presents more than one claim for relief
19 . . . or when multiple parties are involved, the court
20 may direct entry of a final judgment as to one or
21 more, but fewer than all, claims or parties only if
22 the court expressly determines that there is no just
reason for delay. Otherwise, any order or other
decision, however designated, that adjudicates fewer
than all the claims or the rights and liabilities of

23
24 ⁴ Even if the dismissal orders were not final, we have
25 broad discretionary authority to entertain interlocutory appeals
26 from orders that are not final judgments. Beverly v. Wolkowitz
27 (In re Beverly), 374 B.R. 221, 231 (9th Cir. BAP 2007). Upon
28 grant of leave to appeal, we may entertain an interlocutory
appeal. Id. However, because we conclude the bankruptcy court's
certification of the dismissal orders as final judgments was
proper, we need not further explore the possibility of an
alternative basis for our jurisdiction.

1 fewer than all the parties does not end the action as
2 to any of the claims or parties and may be revised at
3 any time before the entry of a judgment adjudicating
all the claims and all the parties' rights and
liabilities.

4 We conclude that the bankruptcy court properly applied the
5 standards for certification under the rule. The bankruptcy
6 court considered the finality of its orders dismissing the TAC
7 with respect to Appellees – the TAC could not be further
8 amended, none of Appellees had filed counterclaims, and the
9 dismissal orders adjudicated all claims for relief in the TAC as
10 to each appellee, thereby ending their involvement as parties in
11 the adversary proceeding. As a consequence, there was nothing
12 left to be done with respect to Appellees except to wait for the
13 final disposition of the litigation.

14 The bankruptcy court also found no justifiable reason for
15 delaying the entry of the dismissal orders as final orders. We
16 give great deference to this finding because the bankruptcy
17 court was “the one most likely to be familiar with the case and
18 with any justifiable reasons for delay.” Sheehan v. Atlanta
19 Int’l Ins. Co., 812 F.2d 465, 468 (9th Cir. 1987). Nowhere in
20 their brief do debtors set forth any justifiable reason for
21 delaying the entry of the dismissal orders as final orders. We
22 thus defer to the bankruptcy court’s findings and are satisfied
23 that we have jurisdiction over the orders on appeal.

24 **B. The Bankruptcy Court Did Not Err In Dismissing The TAC**

25 Although debtors contend that the bankruptcy court should
26 not have dismissed their TAC with respect to Appellees, they
27 never argue that the bases for the August 9, 2010 dismissal
28 orders under Rule 12(b)(6) – failure to state a claim for relief

1 and the running of the statute of limitations – were incorrect.
2 Instead, they argue only about the bankruptcy court’s abuse of
3 discretion in certifying the dismissal orders and set forth
4 other issues that are irrelevant to the underlying question on
5 appeal.⁵

6 By raising these issues, debtors clearly misunderstand the
7 scope of our review. The purpose of a motion to dismiss under
8 Civil Rule 12(b)(6) is simply to test the legal sufficiency of
9 the complaint. Therefore, our narrow scope of review of the
10 orders on appeal does not allow us to reach the merits of any
11 issue, and our inquiry is limited to the content of the
12 complaint. N. Star Int’l v. Ariz. Corp. Comm’n, 720 F.2d 578,
13 581 (9th Cir. 1983).

14 **1. Pleading Standards Under Civil Rule 8(a) and 9(b)**

15 Generally, a plaintiff’s burden at the pleading stage is
16 relatively light. Civil Rule 8(a)(2), made applicable to the
17 Bankruptcy Code by Rule 7008, states that all that is needed is
18 “a short and plain statement of the claim showing that the
19 pleader is entitled to relief.” In turn, this means that the
20 complaint must include “sufficient allegations to put defendants
21

22 ⁵ Debtors’ remaining “issues” ask (1) is FATCO’s recorded
23 grant deed valid? (2) does the BAP’s Opinion, “Trustee’s council
24 [sic] is Disqualified” stand? (3) is the Appellants’ Motion to
25 Vacate the Settlement Agreement, now the Adversary? and (4) Does
26 the “Fraud upon the Court” claim in this Adversary make this
27 appeal decision moot? Debtors’ questions appear related to facts
28 or allegations in their TAC which were not “adjudicated” to a
conclusion rather than any error committed by the court in
relation to the standards under Civil Rule 12(b)(6). Because
these “issues” or questions are irrelevant to this appeal, we do
not discuss them.

1 fairly on notice of the claims against them." McKeever v.
2 Block, 932 F.2d 795, 798 (9th Cir. 1991). When a plaintiff
3 asserts multiple claims against multiple defendants, this fair
4 notice standard requires that the allegations in the complaint
5 must show which defendants are liable to the plaintiff for which
6 wrongs. See Gauvin v. Trombatore, 682 F.Supp. 1067, 1071 (N.D.
7 Cal. 1988)(plaintiff must allege the basis of his claim against
8 each defendant to satisfy [Civil Rule] 8(a)(2)); Van Dyke Ford,
9 Inc. v. Ford Motor Co., 399 F.Supp. 277, 284 (E.D. Wis. 1975)
10 ("Specific identification of the parties to the activities
11 alleged is required . . . to enable the defendant[s] to plead
12 intelligently.").

13 These appeals also implicate Civil Rule 9(b) which states a
14 heightened standard for pleading fraud claims – a standard
15 slightly more onerous than the "short and plain statement"
16 standard under Civil Rule 8(a)(2). Civil Rule 9(b),
17 incorporated into the Bankruptcy Code by Rule 7009, requires
18 that a plaintiff must state "with particularity the
19 circumstances constituting fraud" The Ninth Circuit has
20 provided guidance for the "with particularity" requirement by
21 stating that to comport with Civil Rule 9(b) the complaint must
22 (1) specify the averred fraudulent representations; (2) aver the
23 representations were false when made; (3) identify the speaker;
24 (4) state when and where the statements were made; and (5) state
25 the manner in which the representations were false and
26 misleading. Lancaster Cmty. Hosp. v. Antelope Valley Hosp.
27 Dist., 940 F.2d 397, 405 (9th Cir. 1991).

28 Because fraud encompasses a wide variety of circumstances,

1 the requirements of Civil Rule 9(b) – like Civil Rule 8(a)(2) –
2 should provide all defendants with sufficient information to
3 formulate a response. Thus, the complaint cannot lump multiple
4 defendants together but “require[s] plaintiffs to differentiate
5 their allegations when suing more than one defendant . . . and
6 inform each defendant separately of the allegations surrounding
7 his alleged participation in the fraud.” Haskin v. R.J.
8 Reynolds Tobacco Co., 995 F.Supp. 1437, 1439 (M.D. Fla. 1998).
9 Moreover, the plaintiff must, at a minimum, “identif[y] the role
10 of [each] defendant[] in the alleged fraudulent scheme.” Moore
11 v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir.
12 1989).

13 **2. The Standards For Dismissal Under Civil Rule 12(b)(6)**

14 The above rules which set forth the pleading standards
15 overlie the standards for deciding motions to dismiss a
16 complaint under Civil Rule 12(b)(6).

17 When ruling on a motion to dismiss under Civil Rule
18 12(b)(6), we are instructed first to separate the factual and
19 legal elements of a claim. In examining the factual elements of
20 a claim, “we accept all factual allegations in the complaint as
21 true and construe the pleadings in the light most favorable to
22 the nonmoving party.” Movsesian, 629 F.3d at 905 (quoting
23 Knieval v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005)(quotation
24 marks omitted)). We then must determine whether the facts
25 alleged are sufficient to show that the plaintiff has a
26 plausible claim for relief. Ashcroft v. Iqbal, 129 S.Ct. 1937,
27 1949 (2009)(quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,
28 570 (2007)).

1 While a complaint attacked by a Rule 12(b)(6) motion
2 to dismiss does not need detailed factual allegations,
3 a plaintiff's obligation to provide the grounds of his
4 entitlement to relief requires more than labels and
5 conclusions, and a formulaic recitation of the
6 elements of a cause of action will not do. Factual
7 allegations must be enough to raise a right to relief
8 above the speculative level

9 Twombly, 550 U.S. at 555. Determining whether a complaint
10 states a plausible claim for relief will "be a context-specific
11 task that requires the reviewing court to draw on its judicial
12 experience and common sense." Iqbal, 129 S.Ct. at 1950. In the
13 end, the determinative question is whether there is any set of
14 "facts that could be proved consistent with the allegations of
15 the complaint" that would entitle plaintiff to some relief.
16 Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002); Cooke,
17 Perkiss & Liehe, 911 F.2d at 244. We will not assume that
18 plaintiffs "can prove facts which [they have] not alleged, or
19 that the defendants have violated . . . laws in ways that have
20 not been alleged." Associated Gen. Contractors of Cal., Inc. v.
21 Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983).

22 With respect to the legal elements of a claim, our mandate
23 is different. We are not "bound to accept as true a legal
24 conclusion couched as a factual allegation." Papasan v. Allain,
25 478 U.S. 265, 286 (1986).

26 Moreover, if the allegations show that relief is barred as
27 a matter of law, the complaint is subject to dismissal. Jones
28 v. Bock, 549 U.S. 199, 215 (2007)(dismissal appropriate under
Civil Rule 12(b)(6) if the allegations show that relief is
barred by the applicable statute of limitations); Pani v. Empire
Blue Cross Blue Shield, 152 F.3d 67, 74-75 (2d Cir. 1998)

1 (affirmative defense of official immunity may be resolved by
2 Civil Rule 12(b)(6) if clearly established by the allegations
3 within the complaint).

4 Finally, although the independent threshold pleading
5 requirements under Civil 9(b) support dismissal apart from Civil
6 Rule 12(b)(6), the Ninth Circuit has stated that "[a] motion to
7 dismiss a complaint or claim 'grounded in fraud' under [Civil]
8 Rule 9(b) for failure to plead with particularity is the
9 functional equivalent of a motion to dismiss under Rule 12(b)(6)
10 for failure to state a claim." Vess v. Ciba-Geigy Corp. USA,
11 317 F.3d 1097, 1107 (9th Cir. 2003).

12 **3. The Merits**

13 Here, our review of debtors' TAC shows that it was woefully
14 deficient with respect to the pleading requirements under Civil
15 Rules 8(a)(2) and 9(b). First, many of the claims for relief do
16 not contain a short and plain statement showing that debtors
17 were entitled to relief. Egregious examples are the eleventh
18 and thirteenth⁶ through eighteenth claims for relief. These
19 claims were not contained in the body of the TAC, but in the
20 prayer with no factual allegations whatsoever. Second, in
21 numerous instances, the TAC made allegations of fraud without
22 meeting the particularity requirements under Civil Rule 9(b).
23 No one can tell from reading the TAC which defendant made what
24 misrepresentation or even what the alleged misrepresentations
25 were. Third, references in most of the claims for relief are to
26

27
28 ⁶ There was no twelfth claim for relief in either the body
or prayer of the TAC.

1 "Defendants" generally,⁷ lumping them all together without
2 alleging which defendants were liable to debtors for which
3 wrongs. In short, this manner of pleading does nothing to
4 apprise the respective Appellees of which allegations might
5 apply to them. As a result, trying to sort out who said or did
6 what, where, or when is a pointless exercise. Therefore, at the
7 most fundamental level, the TAC failed to provide the "fair
8 notice" to Appellees which is required under the Civil Rules for
9 pleading.

10 Next, as apparent from the face of the complaint, many of
11 debtors' claims were based on California state law causes of
12 action which were time-barred.

13 Finally, as discussed below, with respect to the second
14 claim for relief, the trustee's affirmative defense of quasi-
15 judicial immunity was established by the allegations within the
16 TAC.

17 These numerous deficiencies, taken together, themselves
18 demonstrate there is no basis for overturning the bankruptcy
19 court's decision in these appeals. We may affirm on any ground
20 supported by the record. Shanks, 540 F.3d at 1086.

21 **First Claim For Relief**

22 Debtors' first claim for relief sought various damages and
23 costs against "Defendants" for fraud, deceit, misrepresentation
24 and constructive fraud against a fiduciary. The bankruptcy
25 court construed debtors' first claim for relief as a state law

26
27 ⁷ Similar to the bankruptcy court, we liberally construe
28 debtors' reference to "Defendants" in the various claims for
relief as including Appellees.

1 fraud claim. We do as well.

2 Civil Rule 9 (b) requires that fraud be pled with
3 particularity; general and conclusory allegations do not
4 suffice. A liberal reading of this claim makes it painfully
5 clear that debtors did little more than set forth conclusory
6 allegations as against all "Defendants". Nowhere did debtors
7 specify the averred fraudulent representations, identify the
8 speaker, state when and where the statements were made, and
9 state the manner in which the representations were false and
10 misleading. Accordingly, the bankruptcy court properly
11 dismissed debtors' fraud claim against Appellees on Civil
12 Rule 9(b) grounds.

13 California statutes of limitations govern debtors' fraud
14 claim for relief which is based on non-bankruptcy California
15 law. § 108(a); Cal. Sansome Co. v. U.S. Gypsum, 55 F.3d 1402,
16 1403 (9th Cir. 1995). Cal. Code Civ. Proc. ("CCP") § 338 sets
17 forth a three year statute of limitations for fraud. Under CCP
18 § 338(d), a cause of action for fraud "is not deemed to have
19 accrued until the discovery, by the aggrieved party, of the
20 facts constituting the fraud or mistake."

21 Here, debtors' TAC shows that they filed the Modular Home
22 Litigation on July 26, 1999, which was based, in part, on the
23 same facts giving rise to their fraud claim in the TAC (¶ 54).
24 Therefore, debtors' fraud claim accrued no later than July 26,
25 1999. Three years from that date would have been July 26, 2002.
26 Since debtors' complaint was not filed until January 2, 2008,
27 their fraud claim is time-barred unless some exception applies.

28 Debtors do not argue on appeal that the "rule of discovery"

1 applies to toll the statute of limitations. Moreover, the TAC
2 does not reveal any facts that showed, among other things,
3 debtors' lack of knowledge or lack of means of obtaining
4 knowledge of the facts constituting the alleged fraud. See Weir
5 v. Snow, 210 Cal. App. 2d 283, 292 (Cal. Ct. App. 1962)(the
6 plaintiff must plead and prove the facts showing: lack of
7 knowledge; lack of means of obtaining knowledge (in the exercise
8 of reasonable diligence the facts could not have been discovered
9 at an earlier date); and how and when he did actually discover
10 the fraud or mistake). Therefore, the bankruptcy court
11 correctly ruled that debtors' fraud claim was time-barred.

12 **Second Claim For Relief**

13 Debtors' second claim for relief sought various damages and
14 costs against "Defendants" for fraudulent inducement/rescission.
15 Our reading of the TAC comports with the bankruptcy court's
16 interpretation that this claim is a state law claim for
17 rescission of a written contract based on fraud. A claim for
18 rescission based on fraud must be pled with particularity just
19 like a claim for fraud. 4 Witkin, Cal. Proc. 5th, § 544 at p.
20 621 (2008).

21 Debtors' allegations are general and conclusory with
22 respect to Appellees. Debtors' fail to identify the written
23 contract(s) they were referring to and which Appellees were
24 parties to the alleged contract(s). Debtors refer to
25 "Defendants' express representations," but nowhere do they state
26 what those representations were or who made them. Thus,
27 debtors' allegations did not give Appellees fair notice of the
28 claims against them nor do the allegations allow us to

1 determine, on the facts pled, that there is any foundation for
2 debtors' charges of fraud. Accordingly, the bankruptcy court
3 properly dismissed this claim on Civil Rule 9(b) grounds.

4 Alternatively, debtors' claim based on the rescission of a
5 contract in writing was barred by the four-year statute of
6 limitations under CCP § 337(3).⁸ Under CCP § 337(3), the
7 limitations period begins to run from the date when the facts
8 occurred that entitled the aggrieved party to rescind. Since
9 the Modular Home Litigation debtors filed on July 26, 1999, was
10 based, in part, on the same facts giving rise to debtors'
11 rescission claim, this claim accrued no later than July 26,
12 1999. Four years from that date is July 26, 2003. Debtors did
13 not file the adversary proceeding until January 2, 2008.
14 Therefore, this claim was time-barred unless an exception
15 applied.

16 Again, debtors do not contend on appeal that the "rule of
17 discovery" applies to toll the statute of limitations. Nowhere
18 in the TAC did debtors plead any facts that showed, among other
19 things, their lack of knowledge or lack of means of obtaining
20 knowledge of the facts constituting the fraud. See Weir,
21 210 Cal. App. 2d at 292. We thus conclude the bankruptcy court
22 correctly ruled that debtors' second claim for relief was time-
23 barred.

24 Dismissal was also appropriate as to the Trustee on this
25 claim for relief because the doctrine of quasi-judicial immunity

26
27 ⁸ Here, because the claim was so ambiguous, the bankruptcy
28 court applied the lengthier four-year limitation period rather
than the three year period for fraud.

1 applied. "Bankruptcy trustees are entitled to broad immunity
2 from suit when acting within the scope of their authority and
3 pursuant to court order." Bennett v. Williams, 892 F.2d 822, 823
4 (9th Cir. 1989); Nilsen v. Neilson (In re Cedar Funding, Inc.),
5 419 B.R. 807, 820 (9th Cir. BAP 2009). Debtors allege that
6 "Defendants" made misrepresentations to them regarding a
7 compromise motion that was filed and ultimately granted by court
8 order in the bankruptcy proceeding. Debtors also alleged that
9 the Trustee "knowingly, deliberately, [and] willfully committed
10 fraud upon the court to sell [debtors'] residence." Not only
11 have debtors failed to plead their fraud upon the court with
12 particularity as required under Civil Rule 9(b), but the alleged
13 fraud occurred within the Trustee's scope of authority as
14 chapter 7 trustee for debtors' estate. Therefore, the
15 bankruptcy court correctly dismissed this claim as to the
16 Trustee on the additional ground that he was shielded from
17 liability under the derived quasi-judicial immunity defense.

18 **Third Claim For Relief**

19 Debtors' third claim for relief sought various damages and
20 costs against "Defendants" for defamation/libel/slander.
21 Under California law, an essential element of defamation,
22 whether alleged as an action for libel or slander, is a showing
23 of a false statement of fact. Cort v. St. Paul Fire & Marine
24 Ins. Cos., 311 F.3d 979, 985 (9th Cir. 2002)(citing Savage v.
25 Pac. Gas & Elec. Co., 21 Cal. App. 4th 434, 444 (Cal. Ct. App.
26 (1993)(internal quotation marks omitted)).

27 Our review of the TAC shows that debtors failed to allege
28 that any of Appellees made a false statement of fact through an

1 oral statement, writing, picture, or other fixed representation.
2 Instead, the TAC only uses conclusory terms like "fraud,"
3 "slander," or "[a] lie" without alleging any facts showing the
4 precise statements that were made or that they were false. The
5 allegations in this claim for relief fall far short of providing
6 fair notice to Appellees. Accordingly, the bankruptcy court
7 properly dismissed this claim for relief for failure to state a
8 claim against Appellees.

9 **Fourth Claim For Relief**

10 The fourth claim for relief sought various damages and
11 costs against "Defendants" for breach of written contract.
12 Under California law, a breach of contract action is comprised
13 of the following: (1) existence of a contract; (2) plaintiffs'
14 performance or excuse of nonperformance; (3) defendants' breach;
15 and (4) damages to plaintiffs as a result of the breach.
16 Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co., 116 Cal.
17 App. 4th 1375, 1391 (Cal. Ct. App. 2004).

18 Debtors allege that they entered into written contracts
19 with "Defendants" on June 21, 1998, and again on June 1, 2004.
20 Debtors refer to a contract that they signed on May 21, 1998,
21 with TCMHS to purchase a new modular home, but this contract was
22 entered into a month earlier than the date stated in this claim
23 for relief. We could not find any facts alleged that pertained
24 to a written contract with Appellees on either date referenced
25 in this claim for relief. Further, even if there were written
26 contracts in existence which Appellees could identify through
27 the allegations in the TAC, debtors fail to allege facts which
28 could be reasonably construed to match up with the remaining

1 elements of their claim. Nowhere did debtors allege their
2 performance or excuse for non-performance, and they failed to
3 allege which contract terms any of Appellees allegedly breached.
4 Therefore, we conclude that the bankruptcy court properly
5 dismissed this claim for relief because it failed to state a
6 claim against Appellees.

7 **Fifth Claim For Relief**

8 The fifth claim for relief sought various damages and costs
9 against "Defendants" for breach of an oral or implied contract.
10 Under California law, the elements to establish an implied
11 contract are the same as those for an express contract. See
12 Div. of Labor Law Enforcement v. Transpacific Transp. Co.,
13 69 Cal. App. 3d 268, 277 (Cal. Ct. App. 1977). In other words,
14 a plaintiff must show offer, acceptance, and consideration as
15 well as a meeting of the minds. Nissan N. Am., Inc. v. Jim
16 M'Lady Oldsmobile, Inc., 486 F.3d 989 (7th Cir. 2007). The
17 existence of an implied contract turns on the intent of the
18 parties. Tony v. Sec. Experts, 20 F.3d 967, 971 (9th Cir.
19 1994).

20 Debtors allege that on June 1, 2004, they and "Defendants"
21 entered into an oral and implied contract in the County of El
22 Dorado to be performed in the County of El Dorado and in the
23 United States Bankruptcy Court in the County and City of
24 Sacramento, regarding the Cal Vet contract. Debtors further
25 allege that "Defendants" have breached the oral and/or implied
26 contracts with debtors. Yet, debtors set forth no facts showing
27 that Appellees entered into an oral or implied contract with
28 debtors; there are no allegations showing an offer, acceptance

1 or consideration, or a meeting of the minds. Paragraphs thirty-
2 five through seventy-one of the TAC fail to mention any oral or
3 implied contract made on June 1, 2004. Instead, the TAC refers
4 to a settlement agreement that was reached between Cal Vet and
5 debtors, but no terms of the purported settlement agreement are
6 alleged. We agree with the bankruptcy court that these
7 allegations, taken together, are conclusory. We are not
8 required to assume the truth of legal conclusions merely because
9 they are cast in the form of factual allegations. Papasan,
10 478 U.S. at 286; see also, Ove v. Gwinn, 264 F.3d 817, 821 (9th
11 Cir. 2001)(explaining that conclusory legal allegations and
12 unwarranted inferences are insufficient to defeat a motion to
13 dismiss). Therefore, we conclude that the bankruptcy court
14 properly dismissed this claim for relief for failure to state a
15 claim against Appellees.

16 **Sixth Claim For Relief**

17 The sixth claim for relief sought various damages and costs
18 against "Defendants" for breach of fiduciary duties. Under
19 California law, to state a claim for breach of fiduciary duty, a
20 plaintiff must show the existence of a fiduciary relationship,
21 its breach, and damage proximately caused by that breach.
22 Thomson v. Canyon, 198 Cal. App. 4th 594, 604 (Cal. Ct. App.
23 2011)(citations omitted).

24 Even under the most liberal reading of this claim for
25 relief, the TAC does not allege any facts to support debtors'
26 theory as to the creation of a fiduciary relationship with any
27 of Appellees. The TAC simply alleges that "Defendants" owed
28 fiduciary duties to plaintiffs as their clients. Debtors did

1 not allege any facts showing that they were clients of
2 Appellees, that an agency relationship was created between
3 debtors and Appellees, or that debtors otherwise reposed trust
4 and confidence in Appellees to create a fiduciary relationship.
5 Wolf v. Sup. Court, 107 Cal. App. 4th 25, 29 (2003). We will
6 not assume that debtors can prove facts which they have not
7 alleged. Associated Gen. Contractors of Cal., Inc., 459 U.S. at
8 526. Moreover, debtors' allegations are conclusory. We are not
9 required to assume the truth of legal conclusions merely because
10 they are cast in the form of factual allegations. Papasan,
11 478 U.S. at 286. Therefore, we conclude that the bankruptcy
12 court properly dismissed this claim for relief for failure to
13 state a claim against Appellees.

14 **Seventh Claim For Relief**

15 The seventh claim for relief sought various damages and
16 costs against "Defendants" for negligence. The bankruptcy court
17 construed this claim as one for negligent performance of
18 professional services. We do as well.

19 A cause of action for professional negligence is generally
20 governed by the two-year statute of limitations under CCP
21 § 339(1) for an "action upon a contract, obligation or liability
22 not founded upon an instrument of writing." Thomson, 198 Cal.
23 App. 4th at 607 (stating that the shorter two-year statute of
24 limitations of CCP § 339(1) has been consistently applied to a
25 range of professional negligence actions from accountants to
26 real estate appraisers). A cause of action in tort for
27 professional negligence does not accrue until the plaintiff both
28 (1) sustains damage and (2) discovers, or should discover, the

1 negligence. Slavin v. Trout, 18 Cal. App. 4th 1536, 1540 (Cal.
2 Ct. App. 1993).

3 This claim for relief refers to the Cal Vet loan and, in
4 general, the TAC alleges that the negligent performance of
5 professional services occurred on or before the commencement of
6 the Modular Home Litigation on July 26, 1999. Debtors'
7 professional negligence claim for relief was initiated in
8 January 2, 2008, more than nine years after their negligence
9 claim accrued on July 26, 1999. Therefore, the bankruptcy court
10 correctly ruled that this claim for relief was time-barred.

11 **Eighth Claim For Relief**

12 The eighth claim for relief seeks a variety of forms of
13 relief, including damages, an accounting, declaratory relief,
14 injunctive relief, and damages against the "Defendants".

15 California law recognizes accounting as a remedy for
16 fiduciary breach. However, as stated above, debtors alleged no
17 facts showing that Appellees had a fiduciary relationship with
18 them.

19 An action for declaratory relief requires the plaintiff to
20 demonstrate the existence of an actual controversy regarding the
21 legal rights of the parties. McClain v. Octagon Plaza, LLC,
22 159 Cal. App. 4th 784, 800 (Cal. Ct. App. 2008). Where there is
23 an accrued cause of action for a past breach of contract or
24 other wrong, declaratory relief is inappropriate. Canova v.
25 Trs. of Imperial Irrigation Dist. Emp. Pension Plan, 150 Cal.
26 App. 4th 1487, 1497 (Cal. Ct. App. 2007). If a party has a
27 fully matured cause of action for money, the party must seek
28 damages rather than declaratory relief. Id. Here, the

1 assertions in the TAC including the alleged breach of contract,
2 fraud, slander, and fraudulent recording, have already occurred.
3 Thus, we agree with the bankruptcy court that debtors must seek
4 redress through a claim for money damages.

5 Further, debtors are not entitled to injunctive relief.
6 Under California law, "injunctive relief is a remedy and not, in
7 itself, a cause of action" McDowall v. Watson, 59 Cal.
8 App. 4th 1155, 1159 (Cal. 1997). Moreover, the TAC does not
9 allege any facts which would entitle them to the "remedy" of
10 injunctive relief. Debtors allege that they will continue to
11 suffer irreparable injury that cannot be adequately remedied at
12 law unless "Defendants," and their officers, agents, and
13 employees and all other persons acting in concert with them are
14 enjoined from engaging in any further conduct and all other
15 conduct which would cause or tend to cause plaintiffs damages or
16 injuries. However, as noted by the bankruptcy court, debtors
17 fail to specify the conduct that they want enjoined and merely
18 recite the consequences if the unspecified conduct is not
19 enjoined. Likewise, debtors fail to specify which of the
20 Appellees they wish to enjoin.

21 Debtors also request various types of damages, including
22 punitive damages under Cal. Civ. Code § 3294, in this claim for
23 relief. Their request for damages is clearly duplicative. They
24 have already alleged entitlement to various damages based on
25 their assertions that Defendants committed negligence, slander,
26 libel, and fraud. These allegations are cast as separate claims
27 in the TAC and those claims each seek various types of damages,
28 including punitive damages.

1 For all these reasons, we conclude the bankruptcy court
2 properly dismissed this claim for relief against Appellees.

3 **Ninth Claim For Relief**

4 The ninth claim for relief seeks various damages and costs
5 against "Defendants" for intentional infliction of emotional
6 distress. Under California law, the elements of the tort of
7 intentional infliction of emotional distress include the
8 following: (1) extreme and outrageous conduct by the defendant
9 with the intention of causing, or reckless disregard of the
10 probability of causing, emotional distress; (2) the plaintiff's
11 suffering severe or extreme emotional distress; and (3) actual
12 and proximate causation of the emotional distress by the
13 defendant's outrageous conduct. Davidson v. City of
14 Westminster, 32 Cal.3d 197, 209 (Cal. 1982).

15 There are no facts in the TAC matching the elements for the
16 tort of intentional infliction of emotional distress. The TAC
17 fails to mention any extreme and outrageous conduct of
18 Appellees, fails to mention any facts showing that Appellees
19 performed such conduct intentionally or with reckless disregard
20 of the probability of causing emotional distress, and other than
21 debtors' conclusory statements, fails to allege facts showing
22 that debtors suffered severe emotional distress as a result. We
23 will not assume that debtors can prove facts which they have not
24 alleged. Associated Gen. Contractors of Cal., Inc., 459 U.S. at
25 526.

26 Moreover, debtors' allegations in the ninth claim for
27 relief constitute insufficient legal conclusions and, therefore,
28 fail to state a claim for relief. Thus, the bankruptcy court

1 properly dismissed this claim for relief against Appellees.

2 **Tenth Claim For Relief**

3 The tenth claim for relief seeks various damages and costs
4 against "Defendants" for negligent infliction of emotional
5 distress. In California, negligent infliction of emotional
6 distress is a "species of negligence," not an independent tort.
7 Lawson v. Mgmt. Activities, Inc., 69 Cal. App. 4th 652, 656
8 (Cal. Ct. App. 1999). In that regard, the traditional elements
9 of negligence law come into play – duty, breach of duty,
10 causation, and damages. Id. at 657. Further, in negligence
11 cases based on emotional distress, California courts have
12 required "something more than foreseeability . . . to raise a
13 duty of care" Krupnick v. Hartford Accident & Indemnity
14 Co., 28 Cal. App. 4th 185, 202 (Cal. Ct. App. 1994).

15 Debtors allege that "Defendants" negligently and carelessly
16 failed to satisfy their duties, causing harm to debtors. These
17 allegations are nothing more than insufficient conclusory
18 allegations. Nowhere do debtors allege that Appellees owed them
19 a duty of care or whether such a duty was based on debtors'
20 relationships with Appellees or arose as a matter of law.
21 Accordingly, debtors' TAC fails to state a claim for negligent
22 infliction of emotional distress.

23 Further, because the gravamen of this claim for relief is
24 one of professional negligence, the two-year statute of
25 limitations in CCP § 339(1) applies. The TAC states that the
26 negligent infliction of emotional distress occurred on or before
27 debtors' commencement of the Modular Home Litigation on July 26,
28 1999. Therefore, their negligent infliction of emotion distress

1 claim accrued no later than July 26, 1999 and would have been
2 barred if not filed by July 25, 2001. Debtors initiated this
3 claim for relief on January 2, 2008 and, therefore, this claim
4 is time-barred. For these reasons, the bankruptcy court
5 properly dismissed this claim for relief against Appellees.

6 **Eleventh, Thirteenth Through Eighteenth Claims For Relief**

7 The body of the TAC contained no eleventh or thirteenth
8 through eighteenth claims for relief. Rather, the prayer of the
9 TAC referred to these claims. The eleventh claim for relief
10 sought various damages and costs against defendants Kohls, Jones
11 Sommer LLP, Jamie M. Errecart, Schools Credit Union, Cal Vet,
12 Hansen Culhane, and Ronald L. Melliush for violation of
13 § 362(a) and (h). The thirteenth claim for relief seeks various
14 damages and costs against Cal Vet, the Department of Housing and
15 Community Development, and the County of El Dorado, for
16 violation of Health and Safety Code § 18000, et seq. The
17 fourteenth claim for relief seeks various damages and costs
18 against "Defendants" for breach of duty of good faith and fair
19 dealing. The fifteenth claim for relief seeks various damages
20 and costs against "Defendants" for malicious prosecution.
21 The sixteenth claim for relief seeks various damages and costs
22 against "Defendants" for fraudulent claims under §§ 152 and
23 3571. The seventeenth claim for relief seeks various damages and
24 costs against "Defendants" for declaratory relief. And, the
25 eighteenth claim for relief seeks various damages and costs
26 against "Defendants" for injunctive relief.

27 It appears that debtors' only reference to these claims was
28 in the caption of their TAC and the prayer. These cursory

1 references were certainly not enough to constitute an
2 articulation of facts that demonstrate an entitlement to relief
3 under Iqbal. Moreover, none of these claims contained any facts
4 to put Appellees on notice of the asserted claims against them.
5 Thus, the bankruptcy court properly dismissed these claims for
6 relief against Appellees.

7 **C. The Bankruptcy Court Did Not Abuse Its Discretion In**
8 **Dismissing The TAC As To Appellees With Prejudice**

9 Debtors were given two chances to amend their complaint,
10 accompanied by detailed instructions from the court. See Noll v.
11 Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987)(noting that a pro se
12 litigant is entitled to notice of the deficiencies in the
13 complaint and an opportunity to amend, unless the complaint's
14 deficiencies could not be cured by amendment). Despite receiving
15 instructions from the bankruptcy court as to the nature of the
16 complaint's deficiencies and how they might be corrected,
17 debtors' TAC was once again woefully deficient.

18 Under these circumstances, we conclude that the bankruptcy
19 court did not abuse its discretion in dismissing the TAC as to
20 Appellees without leave to amend.

21 **D. Outstanding Matters**

22 On July 19, 2011, H&K filed an objection to debtors' reply
23 brief, arguing that debtors raised factual issues that were not
24 raised in their opening brief. H&K contends that those issues
25 should be stricken or not considered because they were abandoned
26 or waived. In response, debtors filed a motion for relief under
27 Civil Rule 60(b)(3) on the grounds that statements made in H&K's
28 pleading amounted to "fraud upon the court."

1 We agree with H&K that debtors' reply brief raises new
2 arguments with respect to allegations of fraudulent activity by
3 H&K and alleged potential conflict of interest. We do not
4 consider those arguments. See Ghahremani v. Gonzales, 498 F.3d
5 993, 997-98 (9th Cir. 2007)(issues not addressed in an opening
6 brief are deemed waived). Further, we find no merit to debtors'
7 motion under Civil Rule 60(b)(3), as the rule is inapplicable.
8 Therefore, the motion is denied.

9 **VI. CONCLUSION**

10 Having determined that there is no basis for reversal, we
11 AFFIRM each of the orders on appeal.