

JAN 03 2014

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-13-1229-PaTaD
	)		
TRACHT GUT, LLC,	)	Bk. No.	SV 12-20308-MT
	)		
Debtor.	)	Adv. No.	SV 12-01433-MT
	)		
TRACHT GUT, LLC,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>O P I N I O N</b>	
	)		
COUNTY OF LOS ANGELES	)		
TREASURER AND TAX COLLECTOR;	)		
DAVID HAGHAZARZADEH; YURI	)		
VOLODINSKY,	)		
	)		
Appellees.	)		

Argued and Submitted on November 22, 2013  
at Pasadena, California

Filed - January 3, 2014

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

Honorable Maureen Tighe, U.S. Bankruptcy Judge, Presiding

Appearances: Mark Eugene Goodfriend argued for appellant Tracht  
Gut, LLC. Barry S. Glaser argued for appellee  
County of Los Angeles Treasurer and Tax Collector.

Before: PAPPAS, TAYLOR and DUNN, Bankruptcy Judges.

1 PAPPAS, Bankruptcy Judge:

2  
3 Chapter 11<sup>1</sup> debtor Tracht Gut, LLC ("Debtor") appeals the  
4 orders of the bankruptcy court dismissing without leave to amend  
5 its adversary complaint against appellees Los Angeles County  
6 Treasurer and Tax Collector ("the County"), David Hagnazarzadeh  
7 ("Hagnazarzadeh") and Yuri Volodinsky ("Volodinsky") under Rule  
8 7012 and Civil Rule 12(b)(6), and denying reconsideration of that  
9 order under Rule 9024 and Civil Rule 60(b)(1). We AFFIRM.

10 **FACTS**

11 This appeal concerns Debtor's efforts to avoid the County's  
12 prepetition tax sales of two parcels of real property formerly  
13 owned by Debtor.

14 The first property is located on Hatteras Street in Tarzana,  
15 California (the "Hatteras Property"). Real property taxes owed  
16 to the County had not been paid on the Hatteras Property since  
17 2008. Pursuant to California tax law, the properties were "tax  
18 defaulted" and "subject to [the County's] power to sell" three  
19 years after default. Debtor purchased the Hatteras Property from  
20 E.R. Financial Services & Development, Inc. ("E&N"), NH Simpson  
21 Partnership, OF General Partnership, and EM Partnership on April  
22 9, 2012, for \$60,000, subject to three deeds of trust totaling  
23 \$920,000. Debtor recorded the grant deed on July 11, 2012.

---

24  
25  
26 <sup>1</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
28 "Rule" references are to the Federal Rules of Bankruptcy  
Procedure. All "Civil Rule" references are to the Federal Rules  
of Civil Procedure.

1           The second property is located in San Fernando, California  
2 (the "San Fernando Property" and together, the "Properties").  
3 Taxes on the San Fernando Property also had not been paid since  
4 2008. On April 9, 2012, E&N transferred the San Fernando Property  
5 to Debtor for "valuable consideration."<sup>2</sup> The record does not  
6 indicate if there were any encumbrances on the San Fernando  
7 Property at the time of that sale. Debtor recorded a grant deed  
8 on November 26, 2012, one day before filing its bankruptcy  
9 petition.

10           On August 31, 2012, the County served a Notice of Auction  
11 for a tax sale of the Properties on all interested parties; the  
12 sale was set for October 22, 2012. The Notice of Auction was  
13 published on that date in the Los Angeles Daily News. The record  
14 indicates that Debtor, as record owner of the Hatteras Property,  
15 was notified of the auction. Debtor is not on the list of  
16 parties given notice concerning the sale of the San Fernando  
17 Property, likely because the record owner of the San Fernando  
18 Property in August 2012 was still E&N, who received notice.

19           The County conducted the tax sales of the Properties at  
20 public auction on October 22, 2012. The Hatteras Property was  
21 sold to appellee Haghazarzadeh for \$300,000, subject to the  
22 three deeds of trust. The San Fernando Property was sold to  
23 appellee Volodinsky for approximately \$100,000.

24           Debtor filed its petition for relief under chapter 11 on  
25

---

26           <sup>2</sup> The recorded grant deed, however, also provided that the  
27 transfer was a "bona fide gift and grantor received nothing in  
28 return." The parties do not dispute that Debtor was the owner of  
the San Fernando Property.

1 November 27, 2012. On December 11, 2012, Debtor filed schedules.  
2 In Schedule A, Debtor claimed to own both of the Properties and  
3 indicated that:

4 A disputed tax sale occurred on or about October 21,  
5 2012. The sales price was far less than the market  
6 value of this property. Debtor attempted to pay the  
7 taxes in full, which the [County] refused to take. As  
of the date of this petition, no Tax Deed has been  
recorded and Debtor disputes the validity of the  
transfer as an avoidable transfer.

8 The tax deeds transferring title of the Hatteras Property to  
9 Hagnazarzadeh and the San Fernando Property to Volodinsky were  
10 both recorded by the County on December 13, 2012.

11 On December 12, 2012, Debtor commenced the adversary  
12 proceeding at issue in this appeal. In its complaint against the  
13 Appellees, Debtor asked the bankruptcy court to grant relief on  
14 five separate claims: (1) to avoid the tax sales as fraudulent  
15 transfers; (2) for declaratory judgment; (3) for an injunction;  
16 (4) for violation of the automatic stay; and (5) for unjust  
17 enrichment.

18 The County filed a motion to dismiss the complaint on  
19 January 22, 2013, citing Civil Rule 12(b)(6), made applicable in  
20 adversary proceedings by Rule 7012. The County argued that  
21 Debtor, on all five counts, had failed to state an adequate claim  
22 for relief. According to the County, there were no facts alleged  
23 in the complaint to support granting any relief to Debtor on its  
24 claims. Additionally, the County argued that the Properties were  
25 each sold before bankruptcy was commenced, at a regularly  
26 scheduled tax sale with competitive bidding procedures, all in  
27 compliance with applicable state law. As a result, the County  
28 contended, the purchase price paid by the buyers of the

1 Properties should be conclusively presumed to represent  
2 reasonably equivalent value and, therefore, there was no legal  
3 basis to avoid the tax sales as fraudulent transfers under  
4 § 548(a). Further, since the tax sales occurred prepetition, the  
5 County argued that the Properties were not property of the estate  
6 under § 541 and thus were not protected by the automatic stay  
7 when Debtor's bankruptcy petition was filed. Hagnazarzadeh  
8 filed a substantially similar motion to dismiss under Civil Rule  
9 12(b)(6) on January 24, 2013.<sup>3</sup>

10 Debtor responded to the dismissal motions on February 11,  
11 2013. It generally repeated its arguments that the sales were  
12 not made for reasonably equivalent value and, thus, were  
13 avoidable.

14 The hearing on the motions to dismiss was set for February  
15 20, 2013. Before the hearing, the bankruptcy court posted a  
16 tentative ruling providing, in part:

17 The Complaint is comprised purely of threadbare  
18 recitals of the elements of the causes of action and  
19 conclusory statements. As it reads, the Complaint and  
20 the allegations therein, are not entitled to the  
21 assumption of truth. Most of the information  
22 surrounding the events in question (dates, relationship  
among parties, etc.) is fleshed out solely within the  
[motions to dismiss]. . . . For all the reasons stated  
above, the Court shall dismiss the Complaint with leave  
to amend.

23 The bankruptcy court's tentative ruling also indicated its intent  
24 to dismiss Debtor's claims for declaratory relief and an  
25 injunction because they were not claims, but merely forms of  
26 relief.

---

27  
28 <sup>3</sup> Volodinsky did not actively participate in the bankruptcy  
court proceedings.

1 At the hearing on the motions to dismiss on February 20,  
2 2013, the bankruptcy court heard arguments from counsel for  
3 Debtor, the County and Hagnazarzadeh. The bankruptcy court  
4 concluded that the complaint should be dismissed and that  
5 amendment of the complaint would be an exercise in futility.

6 Well, I generally allow one amendment . . . but this  
7 complaint was unbelievably bad and just clearly was  
8 such a placeholder to see if you could stab at some  
9 legal theory that might slow things down, but it was  
10 shockingly bad, and now I'm thinking about the legal  
11 theories that you've really refocused my attention on  
12 here at the argument. . . . I agree [with the County]  
13 that I don't see what you could plead to get around,  
14 and you haven't convinced me, Mr. Brownstein [Debtor's  
15 counsel], that you have some theory that can allow you  
16 to plead facts which would warrant relief under  
17 [§] 548. . . . So I'm going to grant the motion to  
18 dismiss with prejudice for the reasons stated in the  
19 tentative as supplemented by the argument here today.

20 Hr'g Tr. 10:18-11:12, April 20, 2013.

21 The bankruptcy court entered an order granting the motions  
22 to dismiss on March 13, 2013 (the "Dismissal Order"), stating  
23 that:

- 24 1. The Debtor can never amend the Complaint to state  
25 a viable cause of action as the real properties  
26 foreclosed upon at the duly conducted tax sale of  
27 the subject properties held on October 22, 2012 as  
28 set forth in the Complaint, were and are not  
properties of the Debtor's estate for purposes of  
11 U.S.C. § 541;
2. [t]he Debtor could not properly allege that the  
County's post-petition recording of the deeds  
violated the automatic stay in 11 U.S.C. § 362 as  
it was solely a ministerial act;
3. [t]he Debtor could not properly allege that the  
duly conducted tax sale of the subject properties  
could be the basis of an action under 11 U.S.C.  
§§ 548 or 549; and
4. [t]he Court thereby dismissed the Complaint, with  
prejudice.

1 On March 27, 2013, Debtor filed a motion for reconsideration  
2 of the Dismissal Order, arguing that "the judgment/order(s) were  
3 entered as a result of surprise, excusable mistake, inadvertence  
4 and/or neglect and/or error of law, that good cause exists  
5 therefore, and that such relief would be in the interests of  
6 justice."<sup>4</sup> Attached to the reconsideration motion was a proposed  
7 First Amended Complaint. The First Amended Complaint contained  
8 additional factual allegations for the first claim for avoidance  
9 of the tax sales as fraudulent transfers, but simply restated  
10 without factual support the second through fifth claims.

11 On May 7, 2013, the bankruptcy court entered a memorandum of  
12 decision and an order denying reconsideration. The court also  
13 concluded that Debtor's proposed First Amended Complaint was not  
14 viable:

15 The fact that Debtor now has a proposed amended  
16 complaint is too little too late. . . . Debtor had  
17 ample opportunity to address the lack of a viable  
18 complaint prior to the filing of the [dismissal  
19 motions]. . . . There is no explanation why Debtor did  
20 not complete due diligence or amend within the 21 days  
21 following the filing of the complaint. Fed. R. Civ. P.  
22 15(a)(1)(A). There is also no explanation why Debtor  
23 did not complete due diligence and amend in response to  
24 the [Civil Rule 12(b)(6) motions] as opposed to filing  
25 an Opposition. Fed. R. Civ. P. 15(a). That Debtor's  
26 counsel filed an opposition to the [dismissal motions]  
27 and now admits that his complaint was conclusory and

---

23 <sup>4</sup> Debtor's motion cites Civil Rules 55, 59 and 60,  
24 applicable in adversary proceedings by Rules 7055, 9023 and 9024,  
25 as authority for reconsideration, but Debtor only argued under  
26 Civil Rule 60(b)(1). The bankruptcy court also analyzed Debtor's  
27 motion under that rule. Under these circumstances, Debtor's  
28 motion should have been treated as one under Civil Rule 59(e).  
Am. Ironworks & Erectors, Inc. v. N. Am. Constr. Corp., 248 F.3d  
892, 898-99 (9th Cir. 2001). However, since the outcome of  
Debtor's request would be the same under either standard, we also  
consider only Debtor's Civil Rule 60(b)(1) arguments.

1 lacked specificity tests the spirit of Rule 11. . . .  
2 Debtor failed at every stage of the litigation process  
3 to provide the grounds of its entitlement to relief.  
4 Debtor's failure to timely conduct due diligence and  
5 amend evidences Debtor's intent to merely delay the  
6 litigation process. . . . Debtor's failure to present  
7 a timely viable complaint was purposeful and a delaying  
8 tactic. The Court declines to exercise its discretion  
9 in favor of a party whose "gross negligence" has caused  
10 the mistake from which relief is sought.

11 Debtor filed a timely appeal of the Dismissal Order and the  
12 order denying reconsideration on May 14, 2013.

### 13 JURISDICTION

14 The bankruptcy court had jurisdiction under 28 U.S.C.  
15 §§ 1334 and 157(b)(2)(A) and (H).<sup>5</sup> We have jurisdiction under 28  
16 U.S.C. § 158.

### 17 ISSUES

18 Whether the bankruptcy court erred in dismissing Debtor's  
19 complaint under Civil Rule 12(b)(6).

20 Whether the bankruptcy court abused its discretion in  
21 declining to allow Debtor to file an amended complaint.

22 Whether the bankruptcy court abused its discretion in  
23 denying Debtor's motion for reconsideration of the dismissal  
24 order.

---

25 <sup>5</sup> This is a proceeding which, in part, involved Debtor's  
26 attempt to recover a fraudulent transfer from third parties.  
27 Thus, the constitutional power of the bankruptcy court to enter a  
28 final judgment resolving such claims may be in doubt for the  
reasons discussed in Stern v. Marshall, 131 S. Ct. 2594 (2011)  
and Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins.  
Agency, Inc.), 702 F.3d 553 (9th Cir. 2011), cert. granted, 133  
S. Ct. 2880 (2013). Since none of the parties, either in the  
bankruptcy court or this appeal, have questioned the authority of  
the bankruptcy court, we also express no opinion concerning that  
topic.





1 trial court need not accept as true conclusory allegations in a  
2 complaint or legal characterizations cast in the form of factual  
3 allegations. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56  
4 (2007); Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139  
5 (9th Cir. 2003). To avoid dismissal under Civil Rule 12(b)(6), a  
6 plaintiff must aver in the complaint "sufficient factual matter,  
7 accepted as true, to 'state a claim to relief that is plausible  
8 on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)  
9 (quoting Twombly, 550 U.S. at 570). A dismissal under Civil Rule  
10 12(b)(6) may be based on either the lack of a cognizable legal  
11 theory or on the absence of sufficient facts alleged under a  
12 cognizable legal theory. Johnson v. Riverside Healthcare Sys.,  
13 534 F.3d 1116, 1121 (9th Cir. 2008).

14 In deciding to dismiss it, the bankruptcy court described  
15 Debtor's original complaint as "unbelievably bad and just clearly  
16 was such a placeholder to see if [Debtor] could stab at some  
17 legal theory that might slow things down, but it was shockingly  
18 bad[.]" Hr'g Tr. 10:18-20, April 20, 2013. We agree.

19 Debtor's first claim for relief in that complaint, which  
20 asserted that the tax sales were avoidable fraudulent transfers,  
21 consisted of a verbatim recitation of § 548(a)(1)(B), followed by  
22 a single sentence:

23 As such, pursuant to 11 U.S.C. Sections 548 and 549, as  
24 well as on state law grounds, including, but not  
25 limited to, California Civil Code 3275, the tax sales  
of the Properties conducted by Defendants should be  
avoided and set aside.

26 Simply put, even under the liberal rules referenced above,  
27 Debtor's cavalier approach to pleading a claim for relief is  
28 inadequate. The complaint plainly fails to allege the facts

1 necessary to state a claim for avoidance of the tax sales.

2 As to Debtor's four other claims for relief, two appear, on  
3 their faces, to be legitimate claims (i.e., unjust enrichment and  
4 violation of the automatic stay). However, like the claim for  
5 fraudulent transfer, they too are cast entirely as conclusory  
6 statements, not facts. As to Debtor's "claim" for an injunction  
7 and for declaratory relief, while the bankruptcy court correctly  
8 noted that injunction and declaratory relief are remedies, the  
9 court's dismissal of those claims solely on that basis was likely  
10 harmless error. Courts routinely consider injunctive and  
11 declaratory relief "claims" as demands for relief, provided that  
12 there are other claims and facts asserted in the complaint that  
13 would warrant such remedies. Wankowski v. Taylor Bean & Whitaker  
14 Mortg. Corp., 2010 WL 5141745, at \*3 (D. Nev. Dec. 13, 2010);  
15 Infor Global Solutions (Michigan), Inc. v. Hanover Foods Corp.,  
16 2009 WL 2778258, at \*2 (N.D. Ga. Aug. 28, 2009). In this case,  
17 though, there were no facts asserted in the claims for fraudulent  
18 transfer, violation of the stay, or unjust enrichment to support  
19 injunctive or declaratory relief, so the bankruptcy court's  
20 dismissal of those claims simply because they were incorrectly  
21 labeled "claims" was harmless error. Further, Debtor did not  
22 argue that dismissal of the claims for injunctive relief,  
23 declaratory relief, and unjust enrichment was error in its  
24 opening brief on appeal, and any such argument is therefore  
25 waived. Ore. Natural Desert Ass'n v. Locke, 572 F.3d 610, 614  
26 n.3 (9th Cir. 2009) ("this court will not address claims not  
27 argued in the opening brief").

28 At bottom, none of Debtor's claims presented "sufficient

1 factual matter, accepted as true, to 'state a claim to relief  
2 that is plausible on its face.'" Iqbal, 556 U.S. at 678;  
3 Twombly, 550 U.S. at 570. Indeed, even liberally read, Debtor's  
4 complaint presented no factual matter to support its prayer for  
5 relief. The bankruptcy court's decision to dismiss the complaint  
6 was proper.

7 B. The bankruptcy court did not err in dismissing Debtor's  
8 claim for violation of the automatic stay.

9 As mentioned above, Debtor did not argue in its opening  
10 brief that the bankruptcy court erred in dismissing the other  
11 four claims asserted in its original complaint, and we will not  
12 ordinarily address matters not argued in the opening brief.  
13 Locke, 572 F.3d at 614 n.3. However, since the County has  
14 addressed the stay violation claim in its brief, we review it  
15 here.

16 In the original complaint, Debtor claimed that its legal  
17 title in the Properties was not extinguished until the tax deeds  
18 were recorded. Because this occurred postpetition, Debtor argued  
19 that the recordings of the deeds violated the automatic stay  
20 under § 362(a). There are at least two flaws in Debtor's  
21 argument.

22 First, Debtor's right of redemption as to the Properties  
23 lapsed the day before the tax sales occurred. Cal. Rev. & Tax  
24 Code § 3707. A tax deed subsequently provided to a purchaser  
25 "conveys title to the purchaser free of all encumbrances of any  
26 kind." Cal. Rev. & Tax Code § 3712.<sup>6</sup> Under these facts, since

---

27  
28 <sup>6</sup> There is California case law suggesting that a  
foreclosure sale induced by fraud or irregularities might be set  
aside and, consequently, the power to redeem revived. Luna v.

(continued...)

1 Debtor's interest in the Properties lapsed before it filed for  
2 bankruptcy, the Properties never became property of the estate  
3 under § 541, and any action by the County concerning those  
4 Properties would not run afoul of the automatic stay under  
5 § 362(a).

6 Secondly, as the bankruptcy court ruled, the recording of  
7 the tax deeds postpetition was a ministerial act and, as such,  
8 would not violate the automatic stay. The Ninth Circuit adopted  
9 the ministerial act exception to the automatic stay in McCarthy,  
10 Johnson & Miller v. North Bay Plumbing, Inc. (In re Pettit), 217  
11 F.3d 1072, 1080 (9th Cir. 2000) ("Ministerial acts or automatic  
12 occurrences that entail no deliberation, discretion, or judicial  
13 involvement do not constitute continuations of such a [judicial]  
14 proceeding" for purposes of possible violations of the automatic  
15 stay). In Pettit, the court cited with approval to a First  
16 Circuit case that extended the ministerial act exception to acts  
17 of public officials. Soares v. Brockton Credit Union (In re  
18 Soares), 107 F.3d 969, 973-74 (1st Cir. 1997) ("Thus, when an  
19 official's duty is delineated by, say, a law or a judicial decree  
20 with such crystalline clarity that nothing is left to the  
21 exercise of the official's discretion or judgment, the resultant  
22 act is ministerial."). Cal. Rev. & Tax Code § 3708.1 provides:  
23 "Upon execution [of the tax sale and payment of the purchase  
24 price] the tax collector shall immediately record the deed with  
25 the county recorder and pay the recording fees." There is no  
26 indication in this or related provisions of California law that

27  
28 \_\_\_\_\_  
29 <sup>6</sup>(...continued)

Citibank, N.A., 202 Cal. App.4th 89, 104 (2011). However, Debtor  
has not argued either in the bankruptcy court or in this appeal  
that there were any irregularities or fraud in the tax sale.

1 the tax collector has any discretion in recording the deed; he  
2 instead is commanded to record it.

3 On this record, we conclude that the County's recording of  
4 the tax deeds was a ministerial act, and the bankruptcy court did  
5 not err in ruling that the recordings did not violate the  
6 automatic stay.

7 **II.**

8 **Debtor could not amend the complaint as a matter of right.**

9 On appeal, Debtor apparently concedes that its complaint was  
10 deficient factually: "The [bankruptcy] court admittedly did not  
11 have the requisite factual allegations to render a decision[.]"  
12 Debtor's Op. Br. at 8.<sup>7</sup> Rather, Debtor's focus on appeal is its  
13 contention that the bankruptcy court abused its discretion when  
14 it denied Debtor's request to amend the complaint.

15 Debtor's first argument is that, under these facts, it could  
16 amend the complaint at any time as a matter of right. To support  
17 this contention, Debtor argues that Civil Rule 15(a)<sup>8</sup> allows a

18 \_\_\_\_\_  
19 <sup>7</sup> At oral argument before the Panel, counsel for Debtor  
20 again conceded that the bankruptcy court did not err in  
21 dismissing the original complaint. He conceded that the First  
22 Amended Complaint Debtor attempted to submit with its  
23 reconsideration motion was also deficient in pleaded facts.

24 <sup>8</sup> Civil] Rule 15(a) provides in relevant part that:

25 Amended and Supplemental Pleadings.

26 (a) Amendments Before Trial.

27 (1) Amending as a Matter of Course. A party may  
28 amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive

(continued...)

1 plaintiff to amend a complaint once as a matter of course, and  
2 that the rule does not treat a motion to dismiss under Civil Rule  
3 12(b)(6) as a "responsive pleading" that would terminate the  
4 right to file an amended pleading within 21 days. Debtor cites  
5 several cases that, arguably, support its position.<sup>9</sup>

6 Unfortunately for Debtor, the version of Civil Rule 15 upon  
7 which it relies in its briefing was amended in 2009, after the  
8 cases cited in Debtor's brief were decided. A newly added  
9 provision, Civil Rule 15(a)(1)(B), dictates that the right to  
10 amend once as a matter of course terminates 21 days after service  
11 of a motion under Civil Rule 12(b), (e), or (f). The Advisory  
12 Committee Notes to the 2009 Amendments provide instruction  
13 regarding the effects of the change:

14 Former Rule 15(a) addressed amendment of a pleading to  
15 which a responsive pleading is required by  
16 distinguishing between the means used to challenge the  
17 pleading. Serving a responsive pleading terminated the

---

17 <sup>8</sup>(...continued)  
18 pleading is required, 21 days after service of a  
19 responsive pleading or 21 days after service of a  
20 motion under Rule 12(b), (e), or (f), whichever is  
earlier.

21 (2) Other Amendments. In all other cases, a party may  
22 amend its pleading only with the opposing party's written  
23 consent or the court's leave. The court should freely give  
leave when justice so requires.

24 Civil Rule 15(a) (2013) (emphasis added).

25 <sup>9</sup> Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101 (7th  
26 Cir. 1984); Kelly v. Del. River Jt. Comm'n, 187 F.2d 93 (3d Cir.  
1951); McGruder v. Phelps, 608 F.2d 1023 (5th Cir. 1979); Adams  
27 v. Campbell City School Dist., 483 F.2d 1351 (10th Cir. 1973);  
28 Smith v. Blackledge, 451 F.2d 1201 (4th Cir. 1971); Nolen v.  
Fitzharris, 450 F.2d 958 (9th Cir. 1971); Smith v. Cal., 336 F.2d  
530 (9th Cir. 1964).

1 right to amend. Serving a motion attacking the pleading  
2 did not terminate the right to amend, because a motion  
3 is not a "pleading" as defined in Rule 7. The right to  
4 amend survived beyond decision of the motion unless the  
5 decision expressly cut off the right to amend.

6 The distinction drawn in former Rule 15(a) is  
7 changed [so that] the right to amend once as a matter  
8 of course terminates 21 days after service of a motion  
9 under Rule 12(b), (e), or (f). This provision will  
10 force the pleader to consider carefully and promptly  
11 the wisdom of amending to meet the arguments in the  
12 motion. A responsive amendment may avoid the need to  
13 decide the motion or reduce the number of issues to be  
14 decided, and will expedite determination of issues that  
15 otherwise might be raised seriatim. It also should  
16 advance other pretrial proceedings.

17 [Civil Rule] 15 Advisory Committee Notes (2009).

18 The County's motion was filed on January 22, 2013. Under  
19 the applicable revised version of Civil Rule 15(a)(1), Debtor's  
20 right to amend its complaint as a matter of course expired on  
21 February 12, 2013. Rather than file an amended complaint within  
22 that time, Debtor was instead satisfied to file only an  
23 opposition to the motion to dismiss on February 11, 2013. In  
24 other words, Debtor's rule and case law authorities are no longer  
25 good law.<sup>10</sup>

### 26 III.

27 **The bankruptcy court did not abuse its discretion when it denied  
28 Debtor's request to file an amended complaint.**

29 Since Debtor's right to file an amended complaint as a  
30 matter of course expired on February 12, 2013, under Civil Rule  
31 15(a)(2), Debtor was required either to obtain the County's

---

32 <sup>10</sup> It is puzzling why Debtor continues to make this  
33 argument on appeal. In its Memorandum Decision, the bankruptcy  
34 court explicitly cited to Civil Rule 15(a)(1)(B) as an example of  
35 Debtor's complicity in delaying judicial process: "There is also  
36 no explanation why Debtor did not complete due diligence and  
37 amend in response to the [motions to dismiss], as opposed to  
38 filing an opposition. Fed. R. Civ. P. 15(a)(1)(B)."



1 consent or leave of the bankruptcy court to amend its complaint.  
2 Here, the County did not consent to Debtor's request to amend its  
3 complaint, and Debtor faults the bankruptcy court for refusing to  
4 grant leave to amend.

5 Civil Rule 15(a)(2) requires that the trial court freely  
6 grant leave to amend "when justice so requires." There is  
7 extensive case law examining the relevant considerations for a  
8 trial court's decision to grant or deny leave to amend a  
9 complaint. The best known, and most frequently cited, precedent  
10 is the Supreme Court's decision in Foman v. Davis, 371 U.S. 178  
11 (1962). In Foman, the Court considered, among other issues,  
12 whether a district court abused its discretion by denying leave  
13 to amend a complaint without providing any reasons for its  
14 decision. The Court instructed that:

15 In the absence of any apparent or declared reason -  
16 such as undue delay, bad faith or dilatory motive on  
17 the part of the movant, repeated failure to cure  
18 deficiencies by amendments previously allowed, undue  
19 prejudice to the appealing party by virtue of allowance  
of the amendment, futility of amendment, etc. - the  
leave sought should, as the rules require, be "freely  
given."

20 Id. at 182. Based on this decision, the exceptions to the policy  
21 and rule requiring a liberal approach to requests to amend a  
22 complaint have come to be known as the "Foman Factors."

23 The Ninth Circuit has employed the Foman Factors to review  
24 whether a trial court properly exercised its discretion in  
25 determining whether to grant leave to amend a complaint. Sonoma  
26 City. Ass'n of Retired Emples. v. Sonoma City, 708 F.3d 1109,  
27 1118 (9th Cir. 2013); Griqqs v. Pace Am. Group, Inc., 170 F.3d  
28 877, 880 (9th Cir. 1999) (holding that a trial court should

1 decide a motion to amend a complaint by ascertaining the presence  
2 of any of four factors: bad faith, undue delay, prejudice to the  
3 opposing party, and/or futility). Of the Foman Factors, the  
4 Ninth Circuit has held that a trial court's denial of leave to  
5 amend for futility, alone, will be upheld if it is clear that the  
6 complaint could not be saved by any amendment. Carvalho v.  
7 Equifax Info. Servs., LLC, 629 F.3d 876, 892 (9th Cir. 2010).  
8 In this case, the bankruptcy court based its decision to deny  
9 leave to Debtor to file an amended complaint on two of the Foman  
10 Factors, explaining that an amendment would be futile, and  
11 concluding that Debtor had engaged in undue delay in proposing  
12 the amendment. These reasons constitute an adequate basis to  
13 sustain the bankruptcy court's decision. Ecological Rights  
14 Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 520 (9th Cir. 2013)  
15 (denying leave to amend for futility and undue delay).

16 As to undue delay, the bankruptcy court determined that,  
17 There is no explanation why Debtor's counsel did not  
18 complete due diligence prior to filing the complaint.  
19 Debtor's counsel simply states that he intended to meet  
20 and confer with the principal of Debtor and Debtor's  
real estate attorney, and then he intended to file an  
amended complaint.

21 The bankruptcy court then noted that Debtor could not  
22 satisfactorily explain why it did not complete due diligence and  
23 seek to amend the complaint (a) within the 21-day period after  
24 filing the original complaint, (b) within the 21-day period  
25 following the filing of the County's Civil Rule 12(b)(6) motion,  
26 (c) instead of, or in conjunction with, filing an opposition to  
27 the Civil Rule 12(b)(6) motion, or (d) otherwise prior to the  
28 hearing on the County's motion to dismiss. Indeed, Debtor made

1 no attempt to file an amended complaint until the Reconsideration  
2 Motion, three months after filing the original complaint. As the  
3 bankruptcy court observed,

4 Debtor failed at every stage of the litigation process  
5 to provide the grounds of its entitlement to relief.  
6 Debtor's failure to timely conduct due diligence and  
7 amend evidences Debtor's intent to merely delay the  
8 litigation process.

9 Our review of the record confirms that the facts support the  
10 bankruptcy court's determination that Debtor engaged in undue  
11 delay in attempting to amend the complaint. Thus, at least one  
12 Foman Factor supports the court's decision to deny leave to amend  
13 the complaint.

14 Another and compelling ground for denying leave to amend  
15 Debtor's complaint is futility. Ecological Rights Found., 713  
16 F.3d at 520. Indeed, a determination that any amendment would be  
17 futile requires the trial court to dismiss the complaint with  
18 prejudice. Mirmehdi v. United States, 689 F.3d 975, 985 (9th  
19 Cir. 2012) ("However, a party is not entitled to an opportunity  
20 to amend his complaint if any potential amendment would be  
21 futile. See, e.g., May Dep't Store v. Graphic Process Co., 637  
22 F.2d 1211, 1216 (9th Cir. 1980)."); Sanford v. MemberWorks, Inc.,  
23 625 F.3d 550, 557 (9th Cir. 2010) (observing that although leave  
24 to amend is to be "freely given when justice so requires," denial  
25 of a motion to amend is proper if it is clear "that the complaint  
26 would not be saved by any amendment.").

27 Here, the bankruptcy court determined that,

28 The Debtor could not properly allege that the duly  
conducted tax sale of the subject properties could be  
the basis of an action under 11 U.S.C. [§]§ 548 or

1 549.<sup>11</sup>

2 In other words, the bankruptcy court concluded that any attempt  
3 by Debtor to amend the first claim for relief would be futile  
4 because a duly conducted tax sale under California law  
5 presumptively provides for reasonably equivalent value, and thus  
6 the essential condition for avoidance of the sales as fraudulent  
7 transfers, i.e., for less than reasonably equivalent value, could  
8 not be established. We agree with the bankruptcy court.

9 An analysis of the relationship of tax foreclosure sales to  
10 "reasonably equivalent value" for purposes of § 548(a)(1)(B)  
11 should begin with a review of the U.S. Supreme Court's opinion in  
12 BFP v. Resolution Trust Corp., 511 U.S. 531 (1994). In BFP, the  
13 Supreme Court addressed whether a regularly conducted  
14 prebankruptcy mortgage foreclosure sale gives rise to a  
15 conclusive presumption that the price obtained at that sale was  
16 for reasonably equivalent value such that the sale could not  
17 later be avoided under § 548(a) as a constructively fraudulent  
18 transfer. In that case, BFP held title to a parcel of real  
19 property encumbered by a deed of trust. After BFP defaulted on  
20

---

21  
22 <sup>11</sup> It was never clear in Debtor's complaint why it referred  
23 to § 549, the Code provision dealing with avoidance of  
24 unauthorized postpetition transfers, in the context of the first  
25 claim for fraudulent transfer, a claim which, by definition,  
26 deals solely with prebankruptcy transfers. Perhaps Debtor was  
27 conflating the claim for fraudulent transfer with the claim for  
28 violation of the automatic stay. As to the other claims for  
injunction, declaratory judgment, and unjust enrichment, Debtor  
has not discussed these claims in its opening brief and we will  
not address them. Ore. Natural Desert Ass'n v. Locke, 572 F.3d  
610, 614 n.3 (9th Cir. 2009) ("this court will not address claims  
not argued in the opening brief").

1 the loan payments, the creditor properly noticed a foreclosure  
2 sale in compliance with applicable California law. At that sale,  
3 the property was purchased by a third party for \$433,000. After  
4 BFP initiated a chapter 11 case, it filed a complaint to avoid  
5 the foreclosure sale and transfer to the third party as a  
6 constructively fraudulent transfer under § 548(a), arguing that,  
7 as compared to the sale price, the property was actually worth  
8 \$725,000 at the time of the sale. The bankruptcy court held that  
9 the foreclosure sale was not collusive or fraudulent because it  
10 was conducted in compliance with state law, and so the sale could  
11 not be avoided. This Panel and the Ninth Circuit affirmed.

12 Id.<sup>12</sup>

13 On appeal, the Supreme Court held that fair market value was  
14 not the appropriate measure of "reasonably equivalent value"  
15 under § 548(a) because market value, as commonly understood, has  
16 no applicability in the forced-sale context; indeed, it is "the  
17 very antithesis of forced-sale value." Id. at 537. The Court  
18 held that § 548(a) "requires judicial inquiry into whether the  
19

---

20 <sup>12</sup> By its ruling in BFP, the Supreme Court effectively  
21 endorsed what was known as the "Madrid Rule," a term attributable  
22 to this Panel's decision in Lawyers Title Insurance Corp. v.  
23 Madrid (In re Madrid), 21 B.R. 424 (9th Cir. BAP 1982), aff'd,  
24 725 F.2d 1197, 1199 (9th Cir. 1982). The Panel reiterated the  
25 Madrid Rule in deciding the appeal that eventually led to the  
26 Supreme Court's BFP decision. BFP v. Imperial Savings & Loan  
27 Ass'n (In re BFP), 132 B.R. 748, 750 (9th Cir. BAP 1991)("A  
28 non-collusive and regularly conducted nonjudicial foreclosure  
sale prior to the filing of a bankruptcy case cannot be  
challenged as a fraudulent conveyance because the consideration  
received in such a sale establishes 'reasonably equivalent value'  
as a matter of law."), aff'd, 974 F.2d 1144 (9th Cir. 1992),  
aff'd sub nom., BFP v. Resolution Trust Corp., 511 U.S. 531  
(1994).

1 foreclosed property was sold for a price that approximated its  
2 worth at the time of sale." Id. at 538-39. Recognizing that the  
3 state mortgage foreclosure regulatory scheme is designed to  
4 achieve just such a result, the Court held that "[a]bsent a clear  
5 statutory requirement to the contrary, we must assume the  
6 validity of this state-law regulatory background and take due  
7 account of its effect." Id. at 539.

8 The Supreme Court then reviewed the history of state  
9 foreclosure laws:

10 Foreclosure laws typically require notice to the  
11 defaulting borrower, a substantial lead time before the  
12 commencement of foreclosure proceedings, publication of  
13 a notice of sale, and strict adherence to prescribed  
14 bidding rules and auction procedures. . . . When these  
15 procedures have been followed, however, it is "black  
16 letter" law that mere inadequacy of the foreclosure  
17 sale price is no basis for setting the sale aside,  
18 though it may be set aside (under state foreclosure  
19 law, rather than fraudulent transfer law) if the price  
20 is so low as to "shock the conscience or raise a  
21 presumption of fraud or unfairness."

22 Id. at 542. A state's interest in its real estate laws was at  
23 the heart of the BFP Court's analysis: "a fair and proper price,  
24 or a 'reasonably equivalent value,' for foreclosed property, is  
25 the price in fact received at the foreclosure sale, so long as  
26 all the requirements of the State's foreclosure law have been  
27 complied with." Id. at 545.

28 Many of the elements of the BFP analysis are also applicable  
to state tax foreclosure sales. As noted by the Court, federal  
courts should pay considerable deference to state law on matters  
relating to real estate, and where there has been "notice to the  
defaulting party, a substantial lead time before the commencement  
of foreclosure proceedings, publication of a notice of sale, and

1 strict adherence to prescribed bidding rules and auction  
2 procedures," a tax sale is likely to yield reasonably equivalent  
3 value for the foreclosed property. Indeed, numerous other courts  
4 have applied the teachings of the Supreme Court in BFP in  
5 analyzing whether a conclusive presumption arises that reasonably  
6 equivalent value is present as the result of regularly-conducted  
7 state tax-defaulted property sales.

8 Notably, two circuit courts have extended BFP's holding to a  
9 non-collusive tax sale of real property conducted in accordance  
10 with state law. In Kajima v. Girandole Intel Ltd. Lab. Co. (In  
11 re Grandote Country Club Co., Ltd.), 252 F.3d 1146 (10th Cir.  
12 2001), the Tenth Circuit ruled that:

13 [T]he decisive factor in determining whether a transfer  
14 pursuant to a tax sale constitutes "reasonably  
15 equivalent value" is a state's procedure for tax sales,  
in particular, statutes requiring that tax sales take  
place publicly under a competitive bidding procedure.

16 Id. at 1152. The Kajima court compared the requirements set  
17 forth in BFP to the Colorado tax sale procedures and found those  
18 procedures to be consistent with BFP. The court therefore held  
19 that a Colorado tax sale was for reasonably equivalent value.

20 Id.

21 Earlier, the Fifth Circuit had applied the teachings of BFP  
22 to tax-defaulted property sales under Oklahoma law. The court  
23 determined that not only was BFP applicable to determining  
24 reasonably equivalent value under § 548(a) regarding a  
25 prepetition tax sale, but also to determining present fair  
26 equivalent value under § 549 concerning a post-petition tax sale.  
27 T.F. Stone Co. v. Harper (In re T.F. Stone Co.), 72 F.3d 466,  
28 468-69 (5th Cir. 1995).

1 Bankruptcy courts have also applied BFP's holding in the tax  
2 sale context. Russell-Polk v. Bradley (In re Russell-Polk), 200  
3 B.R. 218, 220-22 (Bank. E.D. Mo. 1996); Golden v. Mercer County  
4 Tax Claim Bureau (In re Golden), 190 B.R. 52, 58 (Bankr. W.D. Pa.  
5 1995); Holla v. Myers (In re Holla), 184 B.R. 243, 252 (Bankr.  
6 M.D.N.C. 1995); Lord v. Neumann (In re Lord), 179 B.R. 429,  
7 432-35 (Bankr. E.D. Pa. 1995); McGrath v. Simon (In re McGrath),  
8 170 B.R. 78, 82 (Bankr. D.N.J. 1994).

9 Informed by this case law, we conclude that the holding in  
10 BFP should be applied to regularly conducted sales of tax-  
11 defaulted real property in California, where there is a  
12 substantial lead time before the commencement of foreclosure  
13 proceedings, there is publication of a notice of the sale, and  
14 there is strict adherence to prescribed competitive bidding rules  
15 and auction procedures as formulated in the state law. Put  
16 another way, based on the procedural requirements of California  
17 law, the tax-default sales of the Properties held in this case on  
18 October 22, 2012, were for reasonably equivalent value.

19 Cal. Rev. & Tax Code § 3691(a)(1)(A) provides that, after a  
20 property has become tax-defaulted, the tax collector shall have  
21 the power to sell all or any part of a tax-defaulted property  
22 that has not been redeemed. The sale of a non-residential  
23 commercial property may take place three years after the tax  
24 default. Id. Cal. Rev. & Tax Code § 3691.1, 3691.2 and 3691.4  
25 require that when the property becomes available for tax sale,  
26 the tax collector must file notice with the county clerk and the  
27 notice is recorded. Cal. Rev. & Tax. Code § 3699 requires that  
28 the county board of supervisors must approve the tax sale.



1 Debtor has not argued that any of these provisions were not  
2 satisfied.

3 Cal. Rev. & Tax Code § 3701 provides that the notice of a  
4 tax sale must be given to interested parties no less than 45  
5 days, nor more than 120 days, before the proposed sale. The  
6 Notice of Auction concerning these sales was dated August 31,  
7 2012, 53 days before the date set for the auction, October 22,  
8 2012.

9 Cal. Rev. & Tax Code § 3702 requires that the notice of sale  
10 be published in a newspaper of general circulation, once a week  
11 for three consecutive weeks. Cal. Rev. & Tax Code § 3704  
12 requires extensive information in the notice of sale: (a) date,  
13 time and place of the sale; (b) location of publicly available  
14 computer workstations if the sale allows internet bids; (c)  
15 description of the property; (d) name of last assignee of the  
16 property; (e) minimum bid; (f) statement that right of redemption  
17 ceases day before the sale; (g) statement that parties in  
18 interest have right to file claims in excess of liens and costs  
19 to be recovered; (h) statement that parties will be notified of  
20 any excess proceeds; ( I) if property remains unsold after the  
21 scheduled sale, date, time, and place of subsequent sale; (j)  
22 deposit if required for bidding; (k) if property purchased by  
23 credit bid, notice that right of redemption would revive if full  
24 payment not made by a date specified [not relevant in this  
25 appeal]. In this case, the sale notice was published in the Los  
26 Angeles Daily News. Debtor has not challenged that the notice  
27 requirements were not satisfied.

28 Cal. Rev. & Tax Code § 3691(a)(3)(A) and Cal. Civ. Code

1 § 2924b(c)(1) require that the notice of the sale be sent by  
2 certified mail to all parties in interest, including the  
3 defaulting parties, within the 45-120 day period. Debtor has not  
4 argued that this notice was not properly given.

5 Finally, Debtor does not challenge that the actual sales  
6 were not regularly conducted in compliance with all applicable  
7 statutes, including Cal. Rev. & Tax Code § 3693, which requires  
8 that all tax sales "shall be at public auction to the highest  
9 bidder"; and Cal. Rev. & Tax Code § 3691(a)(1)(A), which provides  
10 that "[a]ny person, regardless of any prior or existing lien on,  
11 claim to, or interest in the property, may purchase at the sale."

12 In addition, Cal. Rev. & Tax Code § 3701 provides that the  
13 property owner's right of redemption expires at the close of  
14 business of the last business day preceding the sale. Debtor did  
15 not redeem the Properties prior to the sales. Cal. Rev. & Tax  
16 Code § 3708 provides that the tax collector shall execute a deed  
17 to the purchaser for the property; the recorded tax deeds are in  
18 the excerpts of record submitted in this appeal. This is  
19 significant, because Cal. Rev. & Tax Code § 3711 provides that  
20 the deeds issued by the tax collector are "conclusive evidence of  
21 the regularity of all proceedings from the assessment of the  
22 assessor to the execution of the deed."

23 Debtor has not argued in the bankruptcy court or this appeal  
24 that the tax sales of the Properties did not comply with the  
25 applicable state statutes. To the contrary, as noted above, the  
26 record supports that there was an appropriate lead time before  
27 the commencement of foreclosure proceedings, notice was properly  
28 given to the defaulting parties, there was publication of a

1 notice of sale, and there was competitive bidding at a public  
2 auction in strict adherence to prescribed competitive bidding  
3 rules and auction procedures as clearly formulated in the  
4 California statutes. Under BFP and the cases applying the rule  
5 in that decision to state tax sales, the transfer of the  
6 Properties in this case at the sales on October 22, 2012,  
7 resulted in a conclusive presumption that the sales were for  
8 reasonably equivalent value. Therefore, the transfers were not  
9 subject to avoidance under § 548(a), and the bankruptcy court did  
10 not abuse its discretion in declining to allow Debtor an  
11 opportunity to file an amended complaint, since any amendment  
12 would have been a futile gesture.

13 In sum, the bankruptcy court did not abuse its discretion  
14 when it declined to allow Debtor to file an amended complaint.

15 **IV.**

16 **The bankruptcy court did not abuse its discretion**  
17 **in denying reconsideration of its Dismissal Order.**

18 Debtor asked the bankruptcy court to reconsider its  
19 Dismissal Order under Civil Rule 60(b)(1), incorporated by Rule  
20 9024. That rule provides that, "On motion and just terms, the  
21 court may relieve a party or its legal representative from a  
22 final judgment, order, or proceeding for the following reasons:  
23 (1) mistake, inadvertence, surprise, or excusable neglect[.]" In  
24 the bankruptcy court, Debtor argued it should be granted relief  
25 based on excusable neglect.

26 A careful review of the motion for reconsideration, and  
27 Debtor's brief in this appeal, shows that Debtor does not discuss  
28 or identify the "neglect" from which it wishes to be excused.

1 Debtor's arguments are solely directed to alleged errors by the  
2 bankruptcy court in dismissing the complaint with prejudice.  
3 Debtor likewise does not address the concerns expressed by the  
4 bankruptcy court for Debtors' dilatory tactics and failure "at  
5 every stage of the litigation process to provide the grounds of  
6 its entitlement to relief."

7 The bankruptcy court's Memorandum Decision detailed Debtor's  
8 conduct and, based on those actions, found that the Debtor  
9 intended to delay the proceedings and, in doing so, abused the  
10 bankruptcy process. We therefore find it noteworthy that Debtor  
11 began its motion for reconsideration by proclaiming that  
12 "[e]xcusable neglect may serve as the basis for relief, provided  
13 the moving party has shown diligence in seeking relief, and the  
14 opposing party has not suffered prejudice in this interim."  
15 While suggesting that the County would not be prejudiced by  
16 reconsideration, Debtor never addressed its repeated failures  
17 throughout the proceedings to exercise diligence in seeking  
18 relief.

19 When faced with a motion for relief from an order under  
20 Civil Rule 60(b)(1), a recent Ninth Circuit opinion notes that  
21 "[a trial] court may exercise its discretion to deny relief to a  
22 defaulting defendant based solely upon a finding of defendant's  
23 culpability." Brandt v. Am. Bankers Ins. Co., 653 F.3d 1108,  
24 1112 (9th Cir. 2011). Here, the bankruptcy court made extensive  
25 findings concerning Debtor's culpability in failing to exercise  
26 diligence in seeking to amend its complaint. The bankruptcy  
27 court did not abuse its discretion in denying Debtor's motion for  
28

1 reconsideration.<sup>13</sup>

2 **CONCLUSION**

3 We conclude that the bankruptcy court did not err in  
4 dismissing Debtor's complaint under Civil Rule 12(b)(6) and did  
5 not abuse its discretion in denying leave to amend the complaint  
6 and reconsideration of the Dismissal Order. We therefore AFFIRM  
7 the bankruptcy court's orders.

---

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22 <sup>13</sup> With its motion for reconsideration, Debtor submitted a  
23 First Amended Complaint and has suggested repeatedly in both the  
24 bankruptcy court and this appeal that by submitting the amended  
25 complaint it had satisfied the bankruptcy court's demands that it  
26 provide the grounds for its entitlement to relief. However, as  
27 the bankruptcy court properly noted, submitting the First Amended  
28 Complaint at the reconsideration stage was yet another example of  
the Debtor's dilatory behavior and was "too little, too late."  
Memorandum Decision at 2, May 7, 2013. Further, at oral argument  
before the Panel, counsel for Debtor conceded that, even as  
amended, the First Amended Complaint was still deficient in the  
necessary facts to support the claims.