

MAR 7 2014

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

| | | | |
|----|------------------------------|---|--------------------------|
| 5 | In re: |) | BAP No. NC-13-1037-JuKiD |
| 6 | BEATRICE LUI, |) | Bk. No. 12-55239 |
| 7 | Debtor. |) | Adv. No. 12-05220 |
| 8 | _____ |) | |
| 9 | MARGARET EVE-LYNNE MIYASAKI, |) | |
| 10 | Appellant, |) | |
| 11 | v. |) | M E M O R A N D U M* |
| 12 | BEATRICE LUI, |) | |
| 13 | Appellee. |) | |
| | _____ |) | |

Argued and Submitted on February 20, 2014
at San Francisco, California

Filed - March 7, 2014

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

Honorable Stephen L. Johnson, Bankruptcy Judge, Presiding

Appearances: Paul G. McCarthy, Esq. argued for appellant
Margaret Eve-Lynne Miyasaki; Melanie Tavare, Esq.
argued for appellee Beatrice Lui.

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

* 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 Judgment creditor Margaret Eve-Lynne Miyasaki (Appellant)
2 appeals from the bankruptcy court's order dismissing her
3 nondischargeability complaint against chapter 13¹ debtor
4 Beatrice Lui as untimely filed under Rule 4007(c).

5 The bankruptcy court found that ¶ 6 in Appellant's
6 objection to confirmation of debtor's plan (Objection) filed
7 prior to the bar date set for the filing of nondischargeability
8 complaints did not substantially comply with the pleading
9 requirements for a complaint under Civil Rule 8(a).² As a
10 result, her late-filed complaint did not relate back to the date
11 of her Objection. We agree and AFFIRM.

12 I. FACTS

13 The facts are undisputed. On June 1, 2005, debtor executed
14 a \$50,000 promissory note in favor of the late Richard Graber as
15 partial payment for real property located on Serena Way, Santa
16 Clara, California (property). Debtor was Graber's daughter-in-
17 law.

18 On November 4, 2005, Graber, Appellant's father, assigned
19 the note to her. The note was fully due and payable on June 1,
20 2010, in the amount of \$65,000. Debtor made no payments on the
21 note. Appellant filed a state court collection action against
22 debtor and obtained a judgment in the amount of \$89,558.67

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

² Civil Rule 8(a) is applicable to adversary proceedings in
bankruptcy under Rule 7008.

1 against her on March 20, 2012, which Appellant recorded as a
2 lien against the property on April 24, 2012.

3 Debtor filed her chapter 13 petition on July 13, 2012.
4 Debtor listed Chase Bank NA (Chase) as holding the first and
5 second deeds of trust against the property with balances of
6 \$484,128 and \$50,164, respectively. Appellant's judicial lien
7 was evidently third in priority; however, debtor listed
8 Appellant as an unsecured creditor in Schedule F with a claim in
9 the amount of \$89,558.67.

10 On July 30, 2012, Appellant's state court attorney, Paul
11 McCarthy, filed a proof of claim (POC) on her behalf which
12 asserted a secured claim in the amount of \$89,558.67 against the
13 property and an unsecured claim for \$2,822.10. Following the
14 filing of the POC, debtor sent notice of the meeting of
15 creditors to McCarthy which set October 26, 2012, as the
16 deadline to object to debtor's discharge or to challenge
17 dischargeability of certain debts.

18 Debtor's plan provided for monthly payments of \$280 to the
19 chapter 13 trustee for arrearages on the first deed of trust and
20 zero percent payment to unsecured creditors.³

21 On August 24, 2012, Appellant filed an objection to
22 confirmation of debtor's plan. Paragraph 6 of the Objection,
23 which is at issue in this appeal, stated:

24 _____
25 ³ Debtor also filed a motion to void Chase's second deed of
26 trust lien, contending that it was wholly unsecured based on a
27 recent appraisal of the property at \$440,000. According to
28 debtor, Chase's second lien was voidable because the balance due
on its first deed of trust was greater than the value of the
property.

1 Miyasaki's claim arises from a \$50,000 promissory note
2 that the debtor executed on June 1, 2005 as partial
3 payment for the property located . . . Serena Way,
4 Santa Clara, California. The note was originally made
5 to the late Richard Graber, the seller of . . . Serena
6 Way, and later assigned to Miyasaki. The due date of
7 the note was June 1, 2010 in the amount of \$65,000.
8 The debtor made no payments on the note nor did she
9 offer to make payments. She represented herself in
10 the state collection proceedings and made it clear
11 that she had never intended to pay the promissory note
12 and had signed it to induce Mr. Graber to convey
13 [sic] . . . Serena Way to her. Miyasaki believes
14 that, accordingly, the debt was incurred through fraud
15 and is thereby non-dischargeable under 11 U.S.C.
16 section 523(a)(2). Miyasaki intends to file an
17 adversary proceeding on this issue.

18 On November 16, 2013, three weeks after the October 26,
19 2012 deadline for filing nondischargeability complaints,
20 Appellant filed her complaint seeking to except the debt owed to
21 her from discharge, alleging that debtor incurred the debt by
22 fraud. Debtor moved to dismiss the complaint as late filed
23 under Rule 4007(c). Appellant opposed, claiming that the
24 late-filed adversary complaint related back to ¶ 6 of her
25 Objection, which was filed on August 24, 2012, almost two months
26 before the October 26, 2012 deadline for filing dischargeability
27 complaints. In support of her relation-back theory, Appellant
28 maintained that ¶ 6 provided debtor with fair notice that
Appellant's claim for nondischargeability was based on fraud,
and that debtor was not prejudiced by the three-week late filing
of the adversary complaint.

Debtor argued in response that ¶ 6 of Appellant's Objection
failed to meet the criteria for a complaint under Civil Rule 8
and Rule 7008 because it did not (1) provide a basis for the
bankruptcy court's jurisdiction; (2) make a demand for relief;
or (3) state whether the matter was core or non-core. According

1 to debtor, application of the relation-back doctrine was not
2 warranted under the facts and thus Appellant's complaint was
3 time barred.

4 At the January 14, 2013 hearing on the matter, the
5 bankruptcy court applied the relevant Ninth Circuit case law
6 construing the substantial compliance and relation back
7 doctrines and agreed with debtor. The court dismissed
8 Appellant's adversary proceeding by order entered on January 17,
9 2013. Appellant timely appealed.

10 **II. JURISDICTION**

11 The bankruptcy court had jurisdiction over this proceeding
12 under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (I). We have
13 jurisdiction under 28 U.S.C. § 158.

14 **III. ISSUE**

15 Whether the bankruptcy court erred by deciding that the
16 substantial compliance and relation back doctrines did not make
17 Appellant's complaint timely.

18 **IV. STANDARD OF REVIEW**

19 Whether a pleading substantially complies with Civil
20 Rule 8(a) is a question of law which we review de novo. We also
21 review a Civil Rule 15(c)(2)⁴ relation-back decision de novo.
22 Dominguez v. Miller (In re Dominguez), 51 F.3d 1502, 1508
23 (9th Cir. 1995); Classic Auto Refinishing, Inc. v. Marino
24 (In re Marino), 143 B.R. 728 (9th Cir. BAP 1992), aff'd, 37 F.3d
25 1354 (9th Cir. 1994).

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28 ⁴ Civil Rule 15 is applicable to adversary proceedings in
bankruptcy under Rule 7015.

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V. DISCUSSION

Rule 4007(c) provides:

A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of the creditors held pursuant to § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

Rule 4007(c) is strictly construed in the Ninth Circuit.

In re Marino, 37 F.3d at 1359. Here, there is no dispute that McCarthy received notice of the October 26, 2012 deadline for filing dischargeability complaints well in advance of the deadline and that Appellant's complaint against debtor was not filed or served until three weeks after the bar date had passed.

A. The Substantial Compliance and Relation Back Doctrines

Although untimely, a bankruptcy court may consider a nondischargeability complaint timely based on the doctrines of substantial compliance and relation back of amended pleadings. In re Marino, 37 F.3d 1354 (finding no substantial compliance); In re Dominguez, 51 F.3d at 1510 (finding substantial compliance and relation back); Markus v. Gschwend (In re Markus), 313 F.3d 1146, 1150-51 (9th Cir. 2002) (finding no substantial compliance). The Ninth Circuit's application of these doctrines to the underlying facts in each of the foregoing cases is instructive.

In Marino, the creditor received timely written notice of the bankruptcy and the bar date for filing claims under § 523(c). The creditor's counsel filed an "Opposition to Sale"

1 before the bar date and told the debtor's attorney that the
2 creditor intended to file a nondischargeability complaint. The
3 complaint was filed nine days late. The debtor filed an answer
4 asserting the bar date as an affirmative defense and moved to
5 dismiss the complaint. The bankruptcy court dismissed the
6 complaint. On appeal, this Panel and the Ninth Circuit
7 affirmed. In discussing whether the "Opposition to Sale" and
8 the documents filed with it substantially complied with
9 requirements of a complaint, the Ninth Circuit noted that Civil
10 Rule 8(a) requires a pleading that states a claim for relief to
11 "include a demand for judgment for the relief the pleader
12 seeks." 37 F.3d at 1357. The court found no language in the
13 opposition or documents filed with it that demanded a judgment
14 of nondischargeability as required by Rule 8(a). In addition,
15 the court noted that the opposition was not captioned as a
16 pleading, did not include the correct file number as required by
17 Rules 7(a) and 10(a) or satisfy the additional requirement of
18 Rule 7008(a) that in an adversary proceeding before a bankruptcy
19 judge, a complaint shall contain a statement that the proceeding
20 is core or non-core. Id.

21 The Ninth Circuit emphasized that the purpose of a pleading
22 is to give the defendant fair notice of the plaintiff's claim
23 and the grounds for the claim. Id. "However, the policy of
24 construing pleadings liberally does not justify the conclusion
25 that any document filed in a court giving some notice of a claim
26 satisfies the requirements of the Federal Rules." Id. In the
27 end, the court found that the opposition and the documents filed
28 with it did not satisfy the requirements for a complaint.

1 Accordingly, because the later filed complaint had nothing to
2 relate back to, it was not timely filed.

3 In Dominquez, the Ninth Circuit reached a different result.
4 There, debtor filed its chapter 11 petition and subsequently the
5 trustee filed a plan. In response to the trustee's plan,
6 creditors filed a "Memorandum Re: Relationship between Order
7 Confirming Trustee's Plan and Debtor's Discharge," in which they
8 alleged that confirmation of the trustee's plan should be denied
9 because the plan satisfied all the statutory requirements for
10 nondischargeability under § 1141(d)(3).⁵ Creditors did not file
11 a timely nondischargeability complaint. Creditors' counsel took
12 the position that an adversary complaint was unnecessary based
13 on his belief that § 1141(d)(3) prohibited the debtor's
14 discharge as a matter of law. 51 F.3d at 1505.

15 At the confirmation hearing, the bankruptcy court deferred
16 its decision on the creditors' memorandum and directed them to
17 submit their argument as a declaratory judgment action. The
18 court also suggested that Rule 4004(a) barred the creditors from
19 objecting to the debtor's discharge because they had not filed a
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21 ⁵ 1141(d)(3) provides:

22 The confirmation of a plan does not discharge a debtor
23 if--

24 (A) the plan provides for the liquidation of
all or substantially all of the property of
the estate;

25 (B) the debtor does not engage in business
after consummation of the plan; and

26 (C) the debtor would be denied a discharge
27 under section 727(a) of this title if the
28 case were a case under chapter 7 of this
title.

1 complaint by the date of the confirmation hearing. The
2 creditors responded by filing a complaint, after the
3 confirmation hearing. In response, the debtor asserted
4 Rule 4004(a) as an affirmative defense. The bankruptcy court
5 dismissed the creditors' complaint.

6 This Panel reversed, finding that the creditors'
7 pre-confirmation memorandum was sufficient to satisfy the
8 requirements of a timely complaint on the basis that it clearly
9 challenged the debtor's right to a discharge and contained
10 factual allegations and some evidence in support of those
11 allegations. On further appeal, the Ninth Circuit affirmed the
12 Panel, concluding that the post-confirmation hearing complaint
13 related back to the creditors' memorandum filed before the
14 hearing. Id. at 1510.

15 Finally, in Markus, the Ninth Circuit considered whether a
16 "Motion to Object to Debtors [sic] Discharge and Convert the
17 Chapter 7 Case to Chapter 13" was a complaint, albeit a
18 deficient one, under Rule 7008(a). In examining the content of
19 the motion, the Ninth Circuit found that it was "aimed at
20 converting Markus's case from Chapter 7 to Chapter 13."
21 313 F.3d at 1150. The court found that the document failed to
22 identify any code section or criteria for nondischargeability
23 nor did it set forth any facts having to do with a claim for
24 relief based on nondischargeability. Consequently, the
25 appellate court concluded that it was not like the document in
26 Dominguez where the main deficiency was that it was captioned a
27 "Discharge Memorandum" rather than a "complaint" but otherwise
28 cited the statutory criteria for nondischargeability, referenced

1 specific sections of the examiner's report as support for
2 allegations that the criteria were satisfied, and stated the
3 claim for relief by asserting that the confirmation order could
4 not discharge the debtor's debts. Id. The court found that
5 instead, the document was "more like" the "Opposition to Sale"
6 which it had deemed insufficient in Marino, "which also failed
7 to demand a judgment of nondischargeability, was not captioned
8 as a pleading, and contained no statement that the proceeding
9 was core or non-core." Id. In the end, the Ninth Circuit found
10 that the document, even if construed as meeting the requirements
11 for a complaint, could not relate back because the motion
12 pointed a completely different direction than the later filed
13 complaint. Therefore, the complaint did not relate back to the
14 motion and was untimely. Id. at 1150-51.

15 **B. Analysis**

16 The forgoing cases teach that application of the
17 substantial compliance doctrine is concerned with notice and not
18 just "some notice," but notice that substantially complies with
19 the requirements of the Federal Rules of Bankruptcy Procedure.
20 In re Markus, 313 F.3d at 1150 (framing the "dispositive
21 question" as whether the timely filed pleading put the debtor on
22 notice that the creditor was objecting to her discharge);
23 In re Marino, 37 F.3d at 1357 (the policy of construing
24 pleadings liberally does not justify the conclusion that any
25 document filed in a court giving some notice of a claim
26 satisfies the requirements of the Federal Rules).

27 The type of notice required for nondischargeability
28 complaints based on fraud is set forth in Civil Rules 8 and 9,

1 made applicable to bankruptcy proceedings under Rules 7008 and
2 7009. Generally, under Civil Rule 8(a), a complaint must
3 contain (1) a short and plain statement of the grounds for the
4 court's jurisdiction; (2) a short and plain statement of the
5 claim showing that the pleader is entitled to relief; and (3) a
6 demand for the relief sought. "[T]he main purpose of the
7 complaint is to provide notice of what plaintiff's claim is and
8 the grounds upon which the claim rests [the] plaintiff
9 must at least set forth enough details so as to provide a
10 defendant and the court with a fair idea of the basis of the
11 complaint and the legal grounds claimed for recovery." Acequia,
12 Inc. v. Clinton (In re Acequia, Inc.), 34 F.3d 800, 814 (9th
13 Cir. 1994). Rule 7008(a) imposes the additional requirement
14 that the complaint contain a statement that the proceeding
15 before a bankruptcy judge is core or non-core.

16 When fraud is alleged, Civil Rule 9(b) requires more.
17 Under that rule, "a party must state with particularity the
18 circumstances constituting fraud." Kearns v. Ford Motor Co.,
19 567 F.3d 1120, 1124 (9th Cir. 2009).

20 [Civil] Rule 9(b) demands that the circumstances
21 constituting the alleged fraud be specific enough to
22 give defendants notice of the particular misconduct
23 . . . so that they can defend against the charge and
24 not just deny that they have done anything wrong.
Averments of fraud must be accompanied by 'the who,
what, when, where, and how' of the misconduct charged.
A party alleging fraud must 'set forth more than the
neutral facts necessary to identify the transaction.'

25 Id. at 1124-25. "Fraud can be averred either directly, by
26 specifically averring fraud, or indirectly, by alleging facts
27 that, if true, would necessarily constitute fraud even if the
28 word 'fraud' is not used." Id. at 1124. "[M]ere conclusory

1 allegations of fraud are insufficient." Moore v. Kayport
2 Package Express, 885 F.2d 531, 540 (9th Cir. 1989).

3 Paragraph 6 of Appellant's Objection does not substantially
4 comply with the above criteria for a nondischargeability
5 complaint based on fraud. In examining the content of her
6 Objection as a whole, we find that its purpose appears "clearly
7 aimed" at defeating confirmation of debtor's plan and not at
8 objecting to debtor's discharge. The leading paragraphs relate
9 to confirmation issues: in ¶ one, Appellant alleged that the
10 plan ran afoul of § 1325(a)(5)(B)(ii) by not providing her with
11 distributions with a value equal to the allowed amount of her
12 claim and in ¶ two, she agreed with the trustee's objection to
13 the plan that it did not comply with the requirements of
14 § 1325(a)(6) in that it did not provide for arrears and/or
15 on-going payments to junior lienholders on the property. The
16 bulk of her remaining allegations relate to the valuation of the
17 property and the inaccuracies or incomplete nature of
18 information contained in debtor's petition. We construe these
19 allegations as addressing Appellant's perception that the
20 treatment of her claim under the plan was unfair.

21 Only at the end of her Objection in ¶ 6 does Appellant
22 mention debtor's alleged fraud, that the debt was
23 nondischargeable under § 523(a)(2), and that she intended to
24 file an adversary proceeding on this issue. However, ¶ 6 does
25 not make up for Appellant's failure to file a timely
26 nondischargeability complaint. Although Appellant mentions
27 § 523(a)(2) as a basis for her nondischargeability claim, we
28 conclude that ¶ 6 does not contain enough details to provide

1 debtor with a fair idea of the basis for Appellant's claim and
2 the legal grounds claimed for recovery for several reasons.

3 First, Appellant fails to differentiate between
4 § 523(a)(2)(A) and (B) and the justifiable reliance or
5 reasonable reliance standards of those sections. Although
6 counsel argued at the hearing on this matter that Appellant's
7 fraud claim could only be under § 523(a)(2)(A), even in that
8 case she does not mention facts showing Graber's reliance on
9 debtor's misrepresentations at all.

10 Second, the neutral and conclusory facts as alleged do not
11 meet the standard for pleading a fraud claim with the
12 particularity required under Civil Rule 9(b). See Dominguez,
13 51 F.3d at 1508 (explaining that within the context of
14 bankruptcy, courts construe deficient pleadings liberally, if
15 the pleading substantially complies with requirements of a
16 complaint under Civil Rule 9(b) by providing "fair notice of
17 what the plaintiff's claim is and the grounds upon which it
18 rests."); see also Kearns, 567 F.3d at 1124; Moore, 885 F.2d at
19 540.

20 Next, it does not appear that Appellant makes a demand for
21 relief in the Objection pertaining to the nondischargeability of
22 the debt. See In re Marino, 37 F.3d at 1357 (noting that there
23 was no language in the Opposition or documents filed with it
24 that demands judgment of nondischargeability as required by
25 Civil Rule 8(a)). Instead, Appellant states in ¶ 6 that she
26 intended to file an adversary proceeding based on her legal
27 conclusion that debtor committed fraud.

28 Finally, there is no statement that the proceeding was core

1 or non-core as required under Rule 7008(a). Id. at 1357.
2 Although counsel argued at the hearing that implicitly the
3 matter could only be core because Appellant alleged the debt was
4 nondischargeable under § 523(a), the Marino court found it
5 significant that this requirement for a complaint was lacking.
6 We cannot simply stretch the substantial compliance doctrine to
7 fit the notice requirements for a complaint through implication,
8 especially when faced with the strict deadline under
9 Rule 4007(c) for filing complaints objecting to the
10 dischargeability of specific debts.

11 Due to these deficiencies, we conclude that ¶ 6 of
12 Appellant's Objection is closer to the documents in Markus and
13 Marino than Dominquez. Because this paragraph was inadequate to
14 put debtor on notice of the claim against her, we agree with the
15 bankruptcy court's assessment that ¶ 6 did not substantially
16 comply with the requirements for a nondischargeability
17 complaint. Therefore, Appellant's complaint filed on
18 November 16, 2013, did not relate back to ¶ 6 of Appellant's
19 Objection. As her complaint was untimely filed under Rule
20 4007(c), dismissal was proper.

21 VI. CONCLUSION

22 For the reasons stated, we AFFIRM.
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