

APR 24 2014

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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-13-1350-DKiTa
	)		
RAED YAHIA ALAZZEH,	)	Bk. No.	SA 11-24735-CB
	)		
Debtor.	)	Adv. No.	SA 12-01058-CB
	)		
_____ MOSTAFFA SHAHRESTANI,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>OPINION</b>	
	)		
RAED YAHIA ALAZZEH,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on March 20, 2014  
at Pasadena, California

Filed - April 11, 2014  
Ordered Published - April 24, 2014

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

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

Appearances: David Brian Lally, Esq. argued for Appellant  
Mostaffa Shahrestani; and David Van Luu, Esq.  
argued for Appellee Raed Yahia Alazzeh.

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

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1 DUNN, Bankruptcy Judge:  
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3 The chapter 7<sup>1</sup> debtor agreed to extend the time for the  
4 creditor to file an adversary proceeding seeking to deny debtor's  
5 discharge pursuant to § 727 of the Bankruptcy Code. The creditor  
6 filed the adversary proceeding complaint ("Complaint") within the  
7 agreed extension. More than a year later, after engaging in an  
8 unsuccessful mediation and substantial discovery, the debtor  
9 filed a motion for summary judgment ("SJ Motion") seeking  
10 dismissal of the Complaint on the basis that it was untimely  
11 filed. The bankruptcy court granted the SJ Motion and dismissed  
12 the Complaint. We AFFIRM.

13 **I. FACTUAL BACKGROUND**

14 In November 2008, Raed Yahia Alazzeah assumed, as obligor, a  
15 promissory note ("Note") obligation payable to Mostaffa  
16 Shahrestani in the amount of \$140,800. The Note was due and  
17 payable in full in August 2010.

18 After Mr. Alazzeah defaulted on his payment obligation under  
19 the Note, Mr. Shahrestani obtained a default judgment against  
20 Mr. Alazzeah in the Orange County (California) Superior Court.  
21 The judgment was for the full amount due under the Note, plus  
22 interest, costs, and attorneys' fees.

23 Mr. Alazzeah filed a chapter 7 bankruptcy case on October 24,  
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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 all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure  
are referred to as "Civil Rules."

1 2011. Thereafter, Mr. Shahrestani filed the Complaint seeking  
2 denial of Mr. Alazzeh's discharge pursuant to §§ 727(a)(2),  
3 (a)(3), (a)(4)(A), and (a)(5).

4 As provided in the "Notice of Chapter 7 Bankruptcy Case,  
5 Meeting of Creditors, & Deadlines" issued by the bankruptcy court  
6 on October 25, 2011, the § 341(a) Meeting of Creditors  
7 ("Creditors' Meeting") was set for December 6, 2011, and the  
8 deadline ("Deadline") for filing the Complaint was February 6,  
9 2012.<sup>2</sup> The chapter 7 trustee held the Creditors' Meeting as  
10 scheduled on December 6, 2011, but thereafter continued it, first  
11 to January 19, 2012, and finally to February 21, 2012.

12 On January 20, 2012, Mr. Shahrestani's attorney, Susan K.  
13 Ashabraner, began an email correspondence with Mr. Alazzeh's  
14 attorneys with the goal of obtaining an agreement to extend the  
15 Deadline. On February 2, 2012, attorney Michael N. Nicastro  
16 responded:

17 Mr. Alazzeh has agreed to extend the time to object to  
18 one week after the continued 341a meeting date. That  
19 provides enough time for you to examine the documents  
and then examine Mr. Alazzeh at the continued 341a  
meeting.

20 Mr. Nicastro's email to Ms. Ashabraner concluded, "I await your  
21 proposed stipulation to extend." Seven minutes later  
22 Ms. Ashabraner sent a follow up email which stated,

23 I will stipulate to extend the deadline for Mr.  
24 Shahrestani to object to Mr. Alazzeh's discharge from  
25 Monday, February 6, 2012, to Tuesday, February 28,  
2012, which is 7 days after the February 21 creditors'  
meeting.

26 \_\_\_\_\_  
27 <sup>2</sup> The sixtieth day following the date set for the  
28 Creditors' Meeting was February 4, 2012, a Saturday. See  
Rule 9006(a)(1)(C).

1           The Complaint was filed February 24, 2012, four days prior  
2 to the date contemplated by the parties as the extended Deadline.  
3 Mr. Alazzeh, acting in pro per, filed his answer ("Answer") on  
4 March 21, 2012. The Answer denied each of the allegations of the  
5 Complaint and asserted generically a boilerplate laundry list of  
6 sixteen affirmative defenses, including one alleging that  
7 Mr. Shahrestani's claims were barred "by the applicable Statute  
8 of Limitations."

9           Thereafter, Mr. Alazzeh engaged counsel to represent him in  
10 defending the adversary proceeding. The adversary proceeding  
11 docket reflects that the matter was submitted to mediation, where  
12 it was reported settled by the mediator on July 24, 2012. On  
13 September 13, 2012, Mr. Shahrestani filed a motion to approve the  
14 compromise under Rule 9019, which ultimately was withdrawn.

15           Following the failed settlement effort, a status hearing was  
16 set for November 28, 2012, and was continued to December 18,  
17 2012, to January 8, 2013, to February 12, 2013, to April 2, 2013,  
18 and to June 4, 2013; during this time the parties completed  
19 discovery. In a Joint Status Report filed May 20, 2013,  
20 Mr. Alazzeh advised that a motion for summary adjudication was to  
21 be filed "fairly soon."

22           Mr. Alazzeh's motion for summary judgment ("SJ Motion") was  
23 filed on May 20, 2013, and asserted that the Complaint should be  
24 dismissed because all of the claims it asserted were statutorily  
25 barred by Rule 4004(a). Mr. Shahrestani opposed the SJ Motion on  
26 the basis that the parties had agreed to an extension of the  
27 Deadline. At the hearing on the SJ Motion held July 2, 2013, the  
28 bankruptcy court granted the SJ Motion after noting that no

1 motion ever had been filed requesting that the bankruptcy court  
2 extend the Deadline as required by Rule 4004(b).<sup>3</sup>

3 On July 15, 2013, the bankruptcy court entered an order  
4 granting the SJ Motion and dismissing the Complaint.  
5 Mr. Shahrestani timely appealed.

## 6 II. JURISDICTION

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

## 10 III. ISSUE

11 Whether the bankruptcy court erred and/or abused its  
12 discretion when it dismissed the Complaint as untimely in light  
13 of the agreement of Mr. Alazzeh's attorney to extend the  
14 Deadline.

## 15 IV. STANDARDS OF REVIEW

16 We review the trial court's order granting summary judgment  
17 de novo. Aquilera v. Baca, 510 F.3d 1161, 1167 (9th Cir. 2007).  
18 De novo review requires that we consider a matter afresh, as if  
19 no decision had been rendered previously. United States v.  
20 Silverman, 861 F.2d 571, 576 (9th Cir. 1988); B-Real, LLC v.  
21 Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008).

22 We review for an abuse of discretion the bankruptcy court's  
23 decision regarding the treatment of an affirmative defense.

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25 <sup>3</sup> The bankruptcy court focused on the "public policy" of  
26 ensuring that an extension of the Deadline appears on the docket,  
27 because the court should not have to guess whether it was  
28 appropriate to enter the discharge once the Deadline had run.  
However, it does not appear that a discharge ever has been  
entered in Mr. Alazzeh's case.

1 389 Orange St. Partners v. Arnold, 179 F.3d 656, 664 (9th Cir.  
2 1999). However, whether an affirmative defense is waived, is a  
3 question of law reviewed de novo. See Owens v. Kaiser Found.  
4 Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001).

5 A bankruptcy court abuses its discretion if it applies an  
6 incorrect legal standard or misapplies the correct legal  
7 standard, or its factual findings are illogical, implausible or  
8 without support from evidence in the record. TrafficSchool.com  
9 v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011). Only if the  
10 bankruptcy court did not apply the correct legal standard, or if  
11 its fact findings were illogical, implausible, or without support  
12 in inferences that can be drawn from facts in the record, is it  
13 proper to conclude that the bankruptcy court abused its  
14 discretion. United States v. Hinkson, 585 F.3d 1247, 1262 (9th  
15 Cir. 2009) (en banc).

#### 16 **V. DISCUSSION**

17 Rule 4004 is a claim processing rule that governs the grant  
18 or denial of a debtor's discharge. Rule 4004(a) provides, "In a  
19 chapter 7 case, a complaint . . . objecting to the debtor's  
20 discharge shall be filed no later than 60 days after the first  
21 date set for the meeting of creditors under § 341(a)."

22 Mr. Shahrestani asserts that notwithstanding Rule 4004(a),  
23 the Complaint was timely, because Mr. Alazzeah "stipulated" to the  
24 extension of the Deadline. However, agreements between the  
25 parties that implicate court deadlines are not always effective.

26 Rule 9006(b) governs requests for extensions of time.  
27 Rule 9006(b)(3) specifically states that the bankruptcy court can  
28 extend the time for taking action under Rule 4004(a) "only to the

1 extent and under the conditions stated in that rule.”

2 Rule 4004(b) governs the procedure for requesting an extension of  
3 the deadline set forth in Rule 4004(a):

4 (1) On motion of any party in interest, after notice  
5 and hearing, the court may for cause extend the time to  
6 object to discharge. Except as provided in subdivision  
7 (b)(2),<sup>4</sup> the motion shall be filed before the time has  
8 expired.

9 Thus, Rule 4004(b) sets forth two guiding principles  
10 governing the filing of the Complaint after the Deadline. First,  
11 a motion for an extension must not only be filed, it must be  
12 filed before the Deadline has passed. Second, an extension is  
13 not automatically granted just because a motion has been filed.  
14 The bankruptcy court, rather than the parties, has discretion to  
15 determine if cause exists.

16 It is undisputed that Mr. Shahrestani did not file a motion  
17 seeking an order from the bankruptcy court extending the Deadline  
18 before the Deadline expired. The Ninth Circuit recently  
19 reemphasized that the deadlines which implicate a debtor’s  
20 discharge are strict, and “without qualification,” cannot be  
21 extended by the bankruptcy court unless a motion is made before  
22 the deadline expires. Wilms v. Sanderson, 723 F.3d 1094, 1100  
23 (9th Cir. 2013). Thus, the Complaint was untimely as a matter of  
24 law. The bankruptcy court did not err when it granted the SJ  
25 Motion and dismissed the complaint.

26 Mr. Shahrestani next makes what we construe to be a waiver  
27 argument. Specifically, Mr. Shahrestani contends that where

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28 <sup>4</sup> The exception in Rule 4004(b)(2) does not apply to this  
appeal.

1 Mr. Alezzeh (1) agreed to the extension, and (2) did not seek to  
2 enforce the Deadline until fifteen months after the Complaint had  
3 been filed, and after extensive efforts had been expended to  
4 mediate the dispute and to complete discovery, the bankruptcy  
5 court abused its discretion when it granted the motion for  
6 summary judgment and dismissed the Complaint.

7 The assertion of a time bar constitutes an affirmative  
8 defense that, pursuant to Civil Rule 8(c), applicable in a  
9 bankruptcy adversary proceeding pursuant to Rule 7008(a),  
10 generally must be raised in an answer or be deemed waived.  
11 Kontrick v. Ryan, 540 U.S. 443, 458 (2004). In Kontrick, the  
12 Supreme Court answered the question: How long do the affirmative  
13 defenses in Rules 4004(a) and (b) and 9006(b)(3) afforded to a  
14 debtor/defendant "linger" in an adversary proceeding? Id. In  
15 Kontrick, the debtor/defendant did not raise the issue that a new  
16 claim in an amended complaint was untimely until after the  
17 bankruptcy court had entered summary judgment against him on the  
18 new claim. The Supreme Court ruled that the outermost point at  
19 which a time bar may be raised is before a decision on the  
20 merits.

21 In the matter before us, Mr. Alazzezh first asserted the time  
22 bar in his Answer as his Twelfth Affirmative Defense: "Defendant  
23 alleges that Plaintiff's cause of action is barred by the  
24 applicable Statute of Limitations."<sup>5</sup> Because the time bar was

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26 <sup>5</sup> Mr. Alazzezh incorrectly characterized the time bar  
27 established by Rules 4004(a) and (b) and 9006(b)(3) as a statute  
28 of "limitations." It actually is a statute of "repose." See  
(continued...)



1 raised in the Answer, it was not waived in the first instance.  
2 Further, under Kontrick, because Mr. Alazzeah requested  
3 adjudication of this affirmative defense well before a  
4 determination on the merits, the bankruptcy court did not abuse  
5 its discretion when it enforced the time bar by granting the  
6 SJ Motion and dismissing the Complaint.

7 Mr. Shahrestani could not properly rely only on the  
8 agreement of Mr. Alazzeah's counsel to extend the Deadline. We  
9 observe that the "agreement" can be read only to advise  
10 Mr. Shahrestani that Mr. Alazzeah would stipulate to a motion  
11 Mr. Shahrestani would present to the bankruptcy court to obtain  
12 the requested extension of the Deadline. Thus his lawyer's  
13 concluding statement, "I await your proposed stipulation to  
14 extend," which left no doubt that something more was required  
15 from Mr. Shahrestani to obtain the extension. That  
16 Mr. Shahrestani's counsel misinterpreted that sentence does not  
17 translate into an abuse of discretion by the bankruptcy court in  
18 refusing to deem a time bar affirmative defense waived.

## 19 VI. CONCLUSION

20 Mr. Shahrestani could not rely on Mr. Alazzeah's agreement to  
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22 <sup>5</sup>(...continued)  
23 DeNoce v. Neff (In re Neff), 505 B.R. 255, 264 (9th Cir. BAP  
24 2014)("Statutes of repose are not concerned with plaintiff's  
25 diligence; they are concerned with the defendant's peace.").  
26 That mischaracterization does not change either our analysis or  
27 the result. We interpret pro se pleadings liberally, and a time  
28 bar defense was asserted in the Answer. We also note that in his  
Second Affirmative Defense, Mr. Alazzeah asserted that  
Mr. Shahrestani was estopped by his "own acts and omissions  
occurring at all times relevant to this action" from obtaining  
the relief sought in the Complaint.

1 extend the § 727 complaint Deadline. Any such extension is  
2 dependent upon the bankruptcy court granting a motion filed prior  
3 to the Deadline, for cause shown. Where Mr. Alazzeh  
4 affirmatively raised the time bar defense in his Answer, the  
5 bankruptcy court did not abuse its discretion in allowing him to  
6 assert it through the SJ Motion, notwithstanding that the  
7 SJ Motion was not filed until fifteen months after the Complaint  
8 had been filed.

9 We AFFIRM.

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