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NOT FOR PUBLICATION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

In re:	)	BAP No. NV-14-1109-PaJuH1
	)	
STEVEN D. MOLASKY,	)	Bankr. No. 08-14517
	)	
Debtor.	)	Adv. No. 08-1246
	)	
<hr/>		
AUGUSTINE C. BUSTOS,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>MEMORANDUM<sup>1</sup></b>
	)	
STEVEN D. MOLASKY,	)	
	)	
Appellee.	)	
	)	

Argued and Submitted on September 18, 2014  
at Las Vegas, Nevada

Filed - October 20, 2014

Appeal from the United States Bankruptcy Court  
for the District of Nevada

Honorable Mike K. Nakagawa, Chief Bankruptcy Judge, Presiding

Appearances: John Messinger Netzorg argued for appellant  
Augustine C. Bustos; Jordan T. Smith argued for  
appellee Steven D. Molasky.

Before: PAPPAS, JURY and HOULE,<sup>2</sup> Bankruptcy Judges.

<sup>1</sup> 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.

<sup>2</sup> The Honorable Mark D. Houle, Bankruptcy Judge for the Central District of California, sitting by designation.



1 was sent to Bustos.

2 On August 11, 2008, OneCap filed an adversary complaint  
3 against Molasky seeking exception to discharge for several claims  
4 under § 523(a)(2)(A). The complaint alleged that, in connection  
5 with obtaining several loans via OneCap, including the loan  
6 represented by the Ellington Note, Molasky had executed documents  
7 containing false representations on which OneCap had relied in  
8 making the loans. The first claim for relief in OneCap's  
9 complaint sought an exception to discharge for amounts owed on the  
10 Ellington Note. Bustos was not named as a plaintiff in the  
11 adversary complaint filed by OneCap, nor did he file his own  
12 § 523(c) adversary complaint against Molasky before the August 11  
13 deadline.

14 A settlement agreement was reached in the main bankruptcy  
15 case relating to a group of debts not directly related to the  
16 Ellington Note, but indirectly involving Bustos.<sup>5</sup> The parties to  
17 that settlement apparently agreed to allow Bustos to intervene in

18

19 <sup>4</sup>...continue

20 determine the dischargeability of a debt under § 523(c)  
21 shall be filed no later than 60 days after the first  
22 date set for the meeting of creditors under § 341(a).  
23 The court shall give all creditors no less than 30 days'  
24 notice of the time so fixed in the manner provided in  
25 Rule 2002. On motion of a party in interest, after  
26 hearing on notice, the court may for cause extend the  
27 time fixed under this subdivision. The motion shall be  
28 filed before the time has expired.

29 Rule 4007(c).

30 <sup>5</sup> The settlement agreement was a complex instrument whereby  
31 Molasky and the entities he controlled transferred a certain  
32 property (not related to the debt in this appeal) to a group of  
33 entities known as the Lehman Parties. Although Bustos was  
34 apparently involved in the discussions on the settlement  
35 agreement, he was not a party to the agreement.

1 the OneCap adversary proceeding, and also that Molasky would waive  
2 any timeliness or statute of limitations defenses.

3 Bustos filed a motion to intervene in the OneCap adversary  
4 proceeding on September 8, 2008. Attached to the intervention  
5 motion was Bustos's proposed Complaint in Intervention. Molasky  
6 filed a limited opposition to this motion, arguing that while he  
7 did not object to allowing Bustos to intervene as a claimant, he  
8 did object to permitting Bustos to file the attached complaint  
9 because the deadline for filing a § 523(c) adversary complaint had  
10 passed and, therefore, any claims of Bustos independent of those  
11 asserted by OneCap were time-barred.

12 At a October 15, 2008 hearing, the bankruptcy court agreed  
13 with Molasky that while Bustos should be allowed to intervene as  
14 an "Intervenor/Claimant" in the OneCap action, he would not be  
15 allowed to file the Complaint in Intervention. In an October 31,  
16 2008 order (the "Intervention Order"), the court ordered in  
17 relevant part that:

18 [Bustos] is afforded all the rights and remedies as  
19 those granted to [OneCap] in this Adversary Proceeding,  
20 insofar as they pertain to any and all of the claims of  
21 [Bustos] against [Molasky]. That [Bustos] is not  
22 permitted to file the separate Complaint in Intervention  
23 but may participate in all aspects of this Adversary  
24 Proceeding as an Intervenor/Claimant against Molasky.

25 Intervention Order at 2.

26 In May 2009, the bankruptcy court permitted counsel for  
27 OneCap to withdraw without opposition. Then, when no attorney  
28 representing OneCap appeared at a status conference, on June 4,  
2009, the court issued an Order to Show Cause ("OSC") directing  
OneCap to appear and explain why OneCap should not be dismissed  
for failure to prosecute the adversary proceeding. OneCap did not

1 appear at the show cause hearing on July 15, 2009. Bustos was  
2 aware of the OSC, was represented at the hearing, and did not  
3 object to OneCap's dismissal. Notably, at the hearing, the court  
4 decided it would not dismiss the adversary proceeding or Bustos.  
5 However, the following colloquy took place between the bankruptcy  
6 court and counsel at the OSC hearing:

7 THE COURT: There being no appearance [by OneCap] the  
8 Court will issue an order dismissing OneCap from the  
9 proceeding; however, that leaves Mr. Bustos I guess as  
the lone party I guess to carry the flag in this matter;  
am I right?

10 NETZORG: [Bustos's counsel]: Yes, your Honor.

11 . . .

12 THE COURT: Well, the Court will issue an order  
13 dismissing it as to OneCap, the Plaintiff, but we'll go  
14 forward with the scheduling conference at the end of the  
month? All right?

15 . . .

16 PISANELLI: [Molasky's attorney]: An issue exists . . .  
17 whether the remaining claims [of Bustos] can continue in  
18 light of the fact that they were just joining into the  
OneCap complaint. . . . We'll file a motion on that  
point with you.

19 THE COURT: All right.

20 Hr'g Tr. 3:19-4:20, July 15, 2009. On July 21, 2009, the  
21 bankruptcy court entered an order that the adversary proceeding be  
22 "DISMISSED as to Plaintiff [OneCap]."

23 Molasky filed a motion to dismiss Bustos and the adversary  
24 proceeding on July 20, 2009. Molasky argued that Bustos was not  
25 entitled to an § 523(c) exception to discharge because he had  
26 missed the Rule 4007(c) complaint filing deadline. Bustos opposed  
27 the motion, arguing that it would be inequitable to dismiss the  
28 action under the circumstances, and that Molasky had voluntarily

1 waived any statute of limitations defense.

2 The bankruptcy court heard the dismissal motion on  
3 September 3, 2009. In a memorandum decision entered September 28,  
4 2009, the court dismissed Bustos, concluding that Bustos had no  
5 independent basis for an exception to discharge because Bustos  
6 missed the § 523(c) deadline. The court entered an order (the  
7 "Bustos Dismissal Order") the same day.

8 Earlier, on August 14, 2009, the bankruptcy court had  
9 approved a stipulation between Molasky and the W. Leslie Sully,  
10 Jr. Chtd. Profit Sharing Plan ("Sully Plan"), a creditor in the  
11 bankruptcy case, permitting Sully Plan to intervene in the  
12 OneCap/Bustos adversary proceeding as a Plaintiff. There were no  
13 restrictions placed on Sully Plan's participation in the adversary  
14 proceeding in the order approving the stipulation. Sully Plan did  
15 not file a separate Complaint in Intervention. The bankruptcy  
16 court thereafter dismissed Sully Plan from the adversary  
17 proceeding by order entered May 13, 2010, for the same reasons it  
18 dismissed Bustos.

19 Bustos and Sully Plan appealed the two dismissal orders to  
20 the district court. It reversed both dismissal orders in  
21 separate, although nearly identical, decisions, stating as  
22 follows:

23 The adversary proceeding underlying this appeal and the  
24 bankruptcy court's subject matter jurisdiction survived  
25 the dismissal of OneCap as plaintiff. At all times  
26 until the dismissal of the Sully Plan, the bankruptcy  
27 court and the parties treated the adversary proceeding  
28 as an open case. Before the dismissal of Bustos, as an  
intervenor, the bankruptcy court entered the August 14th  
order allowing the Sully Plan to intervene as Plaintiff.  
With the entry of the Sully Plan as plaintiff in the  
adversary proceeding, there was no basis for the  
dismissal of either Bustos as an intervenor, or the

1 Sully Plan as a plaintiff.  
2 Bustos v. Molasky, case no. 10-00779-JCM-PAL, slip op. at 3  
3 (D. Nev. Dec. 23, 2010); Sully v. Molasky, slip op. at 4 (D. Nev.  
4 Dec. 23, 2010) (identical paragraphs in both decisions).

5 However, on further appeal, the Ninth Circuit vacated the  
6 district court's two orders, also entering nearly identical  
7 decisions.<sup>6</sup> Molasky v. Bustos (In re Molasky), 492 F. App'x 801,  
8 803 (9th Cir. 2012); Molasky v. Sully (In re Molasky), 492 F.  
9 App'x. 805, 807 (9th Cir. 2012). In both decisions, the Ninth  
10 Circuit stated:

11 An intervenor can proceed after dismissal of the  
12 original party if 1) there is an independent basis for  
13 jurisdiction, and 2) unnecessary delay would otherwise  
14 result. See Benavidez v. Eu, 34 F.3d 825, 830 (9th Cir.  
15 1994). The bankruptcy court summarily found no  
16 independent basis for jurisdiction for [Bustos/Sully]  
17 because [Bustos/Sully] failed to file a timely § 523  
18 complaint. The bankruptcy court erred as a matter of  
19 law, however, in failing to recognize that the § 523  
20 deadline is discretionary and may be extended with  
21 cause. See [Rule] 4004(b).[<sup>7</sup>] The deadline can be  
22 extended even after the deadline has already run. See  
23 [Rule] 4004(b) (2). Failure to meet the § 523 deadline  
24 is not a mandatory jurisdictional bar.

25 The bankruptcy court could have considered various  
26 factors in determining whether "cause" existed for  
27 extending the § 523 deadline: "(1) whether granting the  
28 delay will prejudice the debtor, (2) the length of the

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22 <sup>6</sup> The only difference between the two circuit orders is that  
23 the Sully decision included the following two sentences:

24 The district court reversed the bankruptcy court's  
25 dismissal of Sully, finding Sully to be a party  
26 plaintiff to the § 523 complaint. . . . We proceed  
27 assuming that Sully was originally an intervenor and not  
28 a party plaintiff to the § 523 complaint. . . .

29 Sully, 492 F. App'x at 806-07.

30 <sup>7</sup> The Court of Appeals later amended the decision to read  
31 § 4007(b) rather than § 4004(b).

1 delay and its impact on efficient court administration,  
2 (3) whether the delay was beyond the reasonable control  
3 of the person whose duty it was to perform, (4) whether  
4 the creditor acted in good faith, and (5) whether  
5 clients should be penalized for their counsel's mistake  
6 or neglect." In re Magourik, 693 F.2d 948, 951 (9th  
7 Cir. 1982) (citations omitted). Molasky does not appear  
8 prejudiced by allowing jurisdiction, as he was already  
9 on notice as to OneCap's complaint. If the bankruptcy  
10 court limits [Bustos/Sully] to litigating OneCap's  
11 original complaint, Molasky is not exposed to any new  
12 complaints. The length of the delay is related  
13 specifically to the time it took for OneCap to fail to  
14 prosecute, so the delay should not be an undue burden to  
15 the court's administrative process. OneCap's failure to  
16 prosecute appears to be beyond the reasonable control of  
17 Sully. These equitable arguments suggest that  
18 [Bustos/Sully] should be allowed to continue the § 523  
19 action, and "bankruptcy courts . . . are courts of  
20 equity and appl[y] the principles and rules of equity  
21 jurisprudence." Young v. U.S., 535 U.S. 43, 50, 122 S.  
22 Ct. 1036, 152 L. Ed. 2d 79 (2002) (alteration in  
23 original) (quoting Pepper v. Litton, 308 U.S. 295, 304,  
24 60 S. Ct. 238, 84 L. Ed. 281 (1939)) (internal quotation  
25 marks omitted).

26 Bustos, 492 F. App'x at 803; Sully, 492 F. App'x. at 807.

27 On remand, the bankruptcy court directed the parties to brief  
28 the five In re Magourik factors discussed in the Ninth Circuit's  
29 decisions. At a February 12, 2013 hearing, Molasky argued that  
30 Magourik factors 2 and 4 clearly favored Molasky and factors 1, 3  
31 and 5 tilted in favor of Molasky. Bustos argued that all five  
32 factors favored Bustos.

33 The bankruptcy court entered a memorandum and order after  
34 remand on March 3, 2014 (the "Memorandum on Remand"). In it, the  
35 court concluded that "the deadline under FRBP 4007 should not be  
36 extended for cause under the [Magourik] factors." As to factors 1  
37 and 3, the bankruptcy court ruled in the Memorandum on Remand  
38 that:

[Molasky] is prejudiced because allowing Bustos to  
proceed after dismissal of the complaint brought by  
OneCap fundamentally changes the premise under which



1 [Molasky] consented to Bustos['] intervention. . . .  
2 Under the circumstances, OneCap's failure to prosecute  
3 the adversary proceeding simply was not beyond the  
4 reasonable control of Bustos.

5 The bankruptcy court found that no evidence had been presented  
6 regarding the other three Magourik factors: impact on court  
7 administration, good faith, or possible error or neglect of  
8 counsel.

9 The bankruptcy court concluded that, under the Magourik  
10 factors, Bustos had not met the burden of establishing that relief  
11 from the exception to discharge deadline should be granted on the  
12 basis of excusable neglect. Significantly, the bankruptcy court  
13 concluded its decision by observing that subsequent rulings by the  
14 Ninth Circuit had likely changed the law on which the court's  
15 decision had been premised. In Anwar v. Johnson, 720 F.3d 1183  
16 (9th Cir. 2013), the Ninth Circuit held that a bankruptcy court  
17 does not have equitable authority to grant retroactive relief from  
18 the deadline imposed by Rule 4007(c) to file complaints seeking  
19 exception to discharge. Id. at 1187-88. Thus, the bankruptcy  
20 court noted, "the legal premise for the remand directed by the  
21 panel majority in the instant case is no longer viable."

22 The bankruptcy court entered an order dismissing Bustos from  
23 the adversary proceeding on March 3, 2014. Bustos filed a timely  
24 appeal on March 13, 2014.

#### 25 JURISDICTION

26 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
27 and 157(b) (2) (I). The Panel has jurisdiction under 28 U.S.C.  
28 § 158.

1 **ISSUE**

2 Whether the bankruptcy court abused its discretion in  
3 dismissing Bustos as intervenor.

4 **STANDARD OF REVIEW**

5 An order dismissing a permissive intervenor is reviewed for  
6 abuse of discretion. Benavidez v. Eu, 34 F.3d 825, 830 (9th Cir.  
7 1994). A bankruptcy court abuses its discretion if it applies an  
8 incorrect legal standard, misapplies the correct legal standard,  
9 or if its factual findings are illogical, implausible or without  
10 support from evidence in the record. TrafficSchool.com v. Edriver  
11 Inc., 653 F.3d 820, 832 (9th Cir. 2011) (citing United States v.  
12 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

13 **DISCUSSION**

14 **I.**

15 **Bustos was a permissive intervenor, not an intervenor of right.**

16 Resolution of the issues on appeal requires us first to  
17 determine Bustos's status as a party in the adversary proceeding.

18 Under Civil Rule 24,<sup>8</sup> made applicable in adversary

19 \_\_\_\_\_  
20 <sup>8</sup> **Rule 24. Intervention**

21 (a) Intervention of Right. On timely motion, the  
22 court must permit anyone to intervene who: (1) is given  
23 an unconditional right to intervene by a federal  
24 statute; or (2) claims an interest relating to the  
25 property or transaction that is the subject of the  
26 action, and is so situated that disposing of the action  
27 may as a practical matter impair or impede the movant's  
28 ability to protect its interest, unless existing parties  
adequately represent that interest.

(b) Permissive Intervention. (1) In General. On  
timely motion, the court may permit anyone to intervene  
who: (A) is given a conditional right to intervene by a  
federal statute; or (B) has a claim or defense that

continue...

1 proceedings by Rule 7024, a bankruptcy court must allow a party to  
2 intervene in an action where the requirements of Civil Rule 24(a)  
3 are satisfied. Arakaki v. Cayetano, 324 F.3d 1078, 1083 (9th Cir.  
4 2003). It may, in its discretion, permit the intervention of a  
5 party when the requirements of Civil Rule 24(b) are satisfied.  
6 Montgomery v. Rumsfeld, 572 F.2d 250, 258 (9th Cir. 1978).

7 Bustos has steadfastly characterized his status in the  
8 adversary proceeding as that of an intervenor of right. Although  
9 his argument is far from a model of clarity, it appears that  
10 Bustos did not qualify for intervention of right:

11 A party seeking to intervene as of right must meet four  
12 requirements: (1) the applicant must timely move to  
13 intervene; (2) the applicant must have a significantly  
14 protectable interest relating to the property or  
15 transaction that is the subject of the action; (3) the  
16 applicant must be situated such that the disposition of  
17 the action may impair or impede the party's ability to  
18 protect that interest; and (4) the applicant's interest  
19 must not be adequately represented by existing parties.  
20 . . . . Each of these four requirements must be  
21 satisfied to support a right to intervene. League of  
22 United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1302  
23 (9th Cir. 1997).

24 Arakaki, 324 F.3d at 1081.

25 While Bustos arguably meets three of the four criteria to  
26 intervene of right in the adversary proceeding, Bustos concedes  
27 that he may not meet the fourth requirement: "Bustos was entitled  
28 to intervene under [Rule] 24(a) as he met all the requirements for  
mandatory intervention (with the one possible exception that

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25 <sup>8</sup>...continue  
26 shares with the main action a common question of law or  
27 fact. . . . (3) In exercising its discretion, the court  
28 must consider whether the intervention will unduly delay  
or prejudice the adjudication of the original parties'  
rights.

1 OneCap was prosecuting the case as his representative).” Bustos  
2 Bankr. Op. Br. On Remand at 13. Bustos repeats this argument in  
3 this appeal:

4 The only remedy recognized by the Rules, as non-parties,  
5 to protect their interests would be to intervene under  
6 Rule 7024 [here Bustos footnotes to Rule 7024(a) on  
7 intervention as of right] since their Servicing Agent no  
8 longer was representing their interests. Rule 7024 in  
9 this scenario, does no violence to Rule 4007(c), it  
10 simply serves to protect a represented party when their  
11 fiduciary is guilty of nonfeasance.

12 Reply Br. at 13-14. By these statements, Bustos acknowledges that  
13 OneCap was his legal representative, and that Bustos considered  
14 OneCap to be a fiduciary. Further, Bustos had represented to the  
15 bankruptcy court that OneCap was his legal representative under a  
16 contract; the Loan Service Agreement between OneCap and Bustos  
17 provides:

18 ¶ 24. Lender [Bustos] Acknowledgment. . . . b) Lender  
19 agrees not to represent themselves in any courts unless  
20 agreement is terminated . . . and agrees that OneCap  
21 Mortgage and or its attorneys will represent Lender on  
22 their behalf while any amounts are still outstanding  
23 under the Note.

24 Loan Service Agreement at 7 ¶ 24.

25 A leading treatise on federal procedure notes that, when a  
26 party is representing the creditor, that representation will be  
27 presumed adequate and, consequently, the creditor may not assert  
28 intervention as of right. Wright, Miller & Kane, FEDERAL PRACTICE &  
PROCEDURE CIVIL § 1909, 410-11 (citing Jones v. Prince George’s Cnty.  
Md., 348 F.3d 1014 (D.C. Cir. 2003); Meyer Goldberg, Inc. of  
Lorain v. Goldberg, 717 F.2d 290, 293 (6th Cir. 1983); Bumgarner  
v. Ute Indian Tribe, 417 F.2d 1305 (10th Cir. 1969)). This is  
particularly the case when the creditor is represented by a

1 fiduciary. Id.

2 Since at the time Bustos sought intervention in the adversary  
3 proceeding,<sup>9</sup> OneCap was, by contract, his legal representative for  
4 purposes of pursuing collection from Molasky, and since that  
5 representation was presumptively adequate, Bustos could not  
6 satisfy the fourth criterion in Arakaki for intervention of right.

7 In addition, although the bankruptcy court did not clearly  
8 specify whether it was granting Bustos's intervention under  
9 Rule 24(a) or (b), the intervention order implied that the  
10 intervention was permissive in nature: "That pursuant to  
11 Bankruptcy Rule 7024, Augustine C. Bustos [is] permitted to  
12 intervene in the pending OneCap Adversary Proceeding Objecting to  
13 Discharge. . . . That Augustine C. Bustos is not permitted to  
14 file the separate Complaint in Intervention but may participate in  
15 all aspects of this adversary proceeding as an Intervenor/Claimant  
16 against the Defendant/Debtor." Intervention Order at 2 (emphasis  
17 added).

18 That the Ninth Circuit also considered Bustos a permissive  
19 intervenor in the adversary proceeding is evidenced by its  
20 direction to the bankruptcy court on remand to apply Benavidez, a  
21 decision involving permissive intervention:

22 Permitting the intervenor to continue when 1) an  
23 independent basis for jurisdiction exists, and  
24 2) unnecessary delay would otherwise result, is sensible  
and consistent with our existing precedent. As to the  
first element of the test, we have previously held that

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25  
26 <sup>9</sup> Our decision here relates to the nature of the  
27 Intervention Order, that is, whether the bankruptcy court granted  
28 intervention of right or permissive intervention. Whether there  
was a later breakdown or failure to perform that representation is  
not relevant to determination of whether the bankruptcy court  
ordered permissive or mandatory intervention.

1 a permissive intervenor must establish an independent  
2 basis for jurisdiction. E.E.O.C. v. Nev. Resort Ass'n,  
3 792 F.2d 882, 886 (9th Cir. 1986). The second element  
4 of the test asks whether refusing to allow the  
5 intervenors to continue would lead to senseless delay,  
because a new suit would inevitably bring the parties,  
at a much later date, to the point where they are now.  
The rule promotes judicial economy and preserves  
litigant resources, and we adopt it.

6 34 F.3d at 830 (emphasis added). As can be seen, the first  
7 condition in Benavidez, which the Ninth Circuit's mandate directs  
8 the bankruptcy court to apply, concerns permissive intervenors.  
9 Although the Ninth Circuit has not ruled on the issue, the other  
10 circuits to address the issue have uniformly held that  
11 intervention of right under Civil Rule 24(a) falls within a  
12 federal court's ancillary jurisdiction and, consequently, there is  
13 no need to find an independent basis for jurisdiction. Sweeney v.  
14 Athens Reg'l Med. Ctr., 917 F.2d 1560, 1566 (11th Cir. 1990);  
15 Int'l Paper Co. v. Inhabitants of Town of Jay, Me., 887 F.2d 338,  
16 346 (1st Cir. 1989); Curtis v. Sears, Roebuck & Co., 754 F.2d 781,  
17 783 (8th Cir. 1985); see also Zahn v. Int'l Paper Co., 414 U.S.  
18 291, 306, 38 L. Ed. 2d 511, 94 S. Ct. 505 (1973) (Brennan, J.  
19 dissenting) (Supreme Court sustains the exercise of ancillary  
20 jurisdiction "where a party's intervention was held to be a matter  
21 of right, as is now provided by Rule 24(a)").

22 We conclude that Bustos did not intervene in the adversary  
23 proceeding of right, but instead was a permissive intervenor. As  
24 a result, Bustos may not assert the equitable or jurisdictional  
25 arguments of an intervenor of right. Further, as a permissive  
26 intervenor, the bankruptcy court did not have presumptive  
27 ancillary jurisdiction over Bustos that would allow him to  
28 continue in the adversary proceeding after dismissal of OneCap

1 and, as the Ninth Circuit held, Bustos had to establish an  
2 independent basis for the bankruptcy court's jurisdiction over his  
3 claim against Molasky. Bustos failed to do so.

4 **II.**

5 **The bankruptcy court did not abuse its discretion**  
6 **in dismissing Bustos.**

7 **A. The Court of Appeals remand order.** The Ninth Circuit  
8 concluded that the bankruptcy court erred as a matter of law when  
9 it ruled that there was no independent basis of jurisdiction for  
10 Bustos's claim against Molasky because Bustos had never filed, nor  
11 could he timely file, a separate § 523(c) complaint against  
12 Molasky. According to the court, this was error because the  
13 bankruptcy court failed to consider that the sixty-day deadline  
14 for filing complaints under § 523(a) established by Rule 4007(c)  
15 was discretionary and could be extended by the bankruptcy court  
16 for cause. The court therefore remanded the matter to the  
17 bankruptcy court with instructions that it consider whether, under  
18 the Rule, "cause" existed to extend the time for Bustos to file a  
19 complaint against Molasky and thereby establish an independent  
20 basis for jurisdiction. To decide whether cause existed, the  
21 court noted that the bankruptcy court "could have considered" the  
22 five factors discussed in Fasson v. Magourik (In re Magourik),  
23 693 F.2d 948 (9th Cir. 1982):

24 (1) whether granting the delay will prejudice the  
25 debtor, (2) the length of the delay and its impact on  
26 efficient court administration, (3) whether the delay  
27 was beyond the reasonable control of the person whose  
28 duty it was to perform, (4) whether the creditor acted  
in good faith, and (5) whether clients should be  
penalized for their counsel's mistake or neglect.

1 Id. at 951.<sup>10</sup>

2 **B. The bankruptcy court's decision on remand.** After  
3 briefing and oral argument, the bankruptcy court's Memorandum on  
4 Remand considered the Magourik factors. The court noted that  
5 Molasky conceded that factors 2 and 4 favored granting Bustos  
6 equitable relief from the Rule 4007(c) deadline, while the  
7 remaining three favored Molasky's position. Memorandum on Remand  
8 at 7. Bustos argued that all five factors suggested relief should  
9 be granted. Id. In the bankruptcy court's analysis, factors 1, 2  
10 and 3 favored Molasky, and insufficient evidence had been  
11 presented for the court to weigh factors 4 and 5.<sup>11</sup>

12 In its decision, the bankruptcy court satisfied the  
13 instructions of the Ninth Circuit's Remand Order. It thoughtfully  
14 considered whether Bustos had presented a proper basis for an  
15 extension of the § 523(c) filing deadline and decided he had not,  
16 based upon the factors in the case law identified by the Ninth  
17 Circuit. In this respect, we conclude that the bankruptcy court  
18 did not abuse its discretion in dismissing Bustos's claim against  
19 Molasky.

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21 <sup>10</sup> As discussed below, the scope of the bankruptcy court's  
22 discretion in determining cause under Rule 4007(c) has been  
restricted by intervening Ninth Circuit case law.

23 <sup>11</sup> The bankruptcy court did not examine the other  
24 "non-Magourik" equitable arguments made by Bustos: i.e., that  
25 where a plaintiff is improperly named in a timely filed action,  
26 the correct plaintiff may be substituted under Civil Rules 15 and  
27 17; permitting complaints to be amended even after the  
28 Rule 4007(c) deadline has expired under the relation-back  
doctrine; allowing an action to proceed where the intervening  
party had adopted the original plaintiff's complaint. However,  
none of these arguments represent circumstances where, under the  
later Ninth Circuit cases we discuss below, the bankruptcy court  
may extend the Rule 4007(c) deadline.



1           **C. The Willms and Anwar cases.** The bankruptcy court also  
2 buttressed its decision to dismiss Bustos based on two Ninth  
3 Circuit decisions entered after the Remand Order: Willms v.  
4 Sanderson, 723 F.3d 1094 (9th Cir. 2013), and Anwar v. Johnson,  
5 720 F.3d 1183 (9th Cir. 2013). The bankruptcy court reasoned,  
6 correctly we believe, that these two decisions had effectively  
7 restricted the discretion of the bankruptcy court to grant  
8 extensions of the Rule 4007(c) complaint filing deadline for the  
9 sort of equitable reasons identified in Magourik. Memorandum on  
10 Remand at 10.<sup>12</sup> In those decisions, the Ninth Circuit instructs:

11           [W]e have repeatedly held that the sixty-day time limit  
12 for filing nondischargeability complaints under  
13 11 U.S.C. § 523(c) is strict and, without qualification,  
14 cannot be extended unless a motion is made before the  
15 60-day limit expires." (internal quotation marks  
16 omitted); Anwiler v. Patchett (In re Anwiler), 958 F.2d  
17 925, 927 (9th Cir. 1992) ("[A] court no longer has the  
18 discretion to set the deadline, nor can it sua sponte  
19 extend the time to file . . . ."); cf. Kontrick v. Ryan,  
20 540 U.S. 443, 448 n.3, 456, 124 S. Ct. 906, 157 L. Ed.  
21 2d 867 (2004) (characterizing Rule 4004's time  
22 prescription, which is "essentially the same" as that in  
23 Rule 4007, as "an inflexible claim-processing rule" that  
24 is "unalterable on a party's application"). Strict  
25 construction of Rule 4007(c) is necessary due to "the  
26 need for certainty in determining which claims are and  
27 are not discharged."

28 Willms, 723 F.3d at 1100.

29           The humorist Douglas Adams was fond of saying, "I love  
30 deadlines. I love the whooshing sound they make as they  
31 fly by." But the law more often follows Benjamin  
32 Franklin's stern admonition: "You may delay, but time  
33 will not." To paraphrase Émile Zola, deadlines are  
34 often the terrible anvil on which a legal result is  
35 forged. . . . We decline Anwar's invitation to revise

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36           <sup>12</sup> The bankruptcy court also pointed out that the  
37 Rule 4007(c) legal landscape had changed based upon two BAP  
38 decisions: Johnson v. Safarian (In re Safarian), 2010 WL 6259763  
at \*6 and n.13 (9th Cir. BAP April 13, 2010); Herndon v. de la  
Cruz (In re de la Cruz), 176 B.R. 19, 24 (9th Cir. BAP 1994).  
Memorandum on Remand at 11.

1 the Federal Rules of Bankruptcy Procedure, which plainly  
2 provide that a party may file a nondischargeability  
3 complaint under 11 U.S.C. § 523 outside the sixty-day  
4 window established by FRBP 4007(c) if, and only if, she  
files a motion showing good cause for an extension  
before the sixty-day period lapses. Fed. R. Bankr.  
P. 4007(c), 9006(b)(3).

5 Anwar, 720 F.3d at 1183, 1188 (emphasis added).

6 In our view, the bankruptcy court correctly inferred from  
7 these two decisions that the earlier case law in this Circuit  
8 (including In re Maqourik), which had adopted a more liberal  
9 treatment of "cause" for extension of the sixty-day time limit  
10 under Rule 4007(c), had been modified by the newer decisions.  
11 Memorandum on Remand at 11. Admittedly, the Ninth Circuit's  
12 Remand Order had directed the bankruptcy court to determine if  
13 there was cause for extension, something that is clearly  
14 authorized in Rule 4007(c). However, as discussed in Wilms and  
15 Anwar, supra, the two Ninth Circuit cases decided after entry of  
16 the Remand Order expressly limited the type of cause which could  
17 justify an extension:

18 On occasion, we have suggested that "'unique' or  
19 'extraordinary' circumstances" might allow an untimely  
§ 523(a)(2) complaint to stand. [Allred v. Kennerley,  
20 995 F.2d 145, 47 (9th Cir. 1993)]; see also Anwar v.  
21 Johnson, 720 F.3d 1183, 1187 (9th Cir. 2013) ("[A]bsent  
22 unique and exceptional circumstances . . . , we do not  
23 inquire into the reason a party failed to file on time  
24 in assessing whether she is entitled to an equitable  
exception from [Bankruptcy Rule] 4007(c)'s filing  
deadline . . . ."). But "the validity of the doctrine  
remains doubtful" and "would appear to be limited to  
situations where a court explicitly misleads a party."  
Kennerley, 995 F.2d at 147-48.

25 Wilms, 723 F.3d at 1103.

26 The impact of the change in the relevant Ninth Circuit  
27 authority is important in this case. While the instruction in the  
28 Remand Order that the bankruptcy court examine whether Bustos

1 could show "cause" for an extension of time to assert a § 523(c)  
2 claim against Molasky remained viable, based on the more recent  
3 case law the showing required to justify an extension has been  
4 significantly restricted, and satisfaction of the Magourik factors  
5 may no longer be adequate. We conclude that none of the arguments  
6 offered by Bustos would support an extension of the deadline for  
7 filing a § 523(c) complaint under the more recent Ninth Circuit  
8 case law. Therefore, the bankruptcy court's decision to dismiss  
9 Bustos from the adversary proceeding because there was no adequate  
10 cause shown for an extension of Rule 4007(c)'s deadline was not an  
11 abuse of discretion.

12 **CONCLUSION**

13 We AFFIRM the order of the bankruptcy court.  
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