

MAR 23 2016

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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In re:	)	BAP No.	CC-15-1020-KiKuF
	)		
JOHN DOVALIS GANTES and	)	Bk. No.	8:08-bk-18272-TA
LINDA BRIDGFORD GANTES,	)		
	)	Adv. No.	8:09-ap-01236-TA
Debtors.	)		
_____	)		
MORRISSEY CONSTRUCTION CO.,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
JOHN DOVALIS GANTES,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on October 22, 2015,  
at Los Angeles, California

Filed - March 23, 2016

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

Honorable Theodor C. Albert, Bankruptcy Judge, Presiding

Appearances: \_\_\_\_\_  
 Samy S. Henein of Suppa, Trucchi & Henein, LLP  
 argued for appellant Morrissey Construction  
 Company; William Miles Burd of Burd & Naylor argued  
 for appellee John Dovalis Gantes.

Before: KIRSCHER, KURTZ and FARIS, 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 8024-1.

1 Appellant Morrissey Construction Company ("Morrissey")  
2 appeals an order dismissing Morrissey's Third Amended Complaint  
3 ("Complaint") to Determine Dischargeability of Debt against  
4 Appellee John D. Gantes ("Debtor") as untimely filed. We AFFIRM  
5 the dismissal of the Third Amended Complaint, VACATE the dismissal  
6 of the three claims under § 523(a)(2)(A) in the Second Amended  
7 Complaint, and REMAND for further proceedings consistent with this  
8 Memorandum.

9 **I. PROCEDURAL HISTORY**

10 John Dovalis Gantes and Linda Bridgford Gantes filed a  
11 chapter 7<sup>2</sup> petition on December 12, 2008. Morrissey filed a  
12 timely complaint on March 23, 2009, seeking to except the sum of  
13 \$652,182.24 from Debtor's discharge pursuant to §§ 523(a)(2)(A)  
14 and 523(a)(6). By stipulation of the parties, the bankruptcy  
15 court stayed the adversary proceeding pending the outcome of two  
16 § 727 complaints objecting to the Debtor's discharge. The court  
17 eventually dismissed those complaints in 2010 and 2011.

18 On October 23, 2013, Debtor answered Morrissey's complaint,  
19 raising a Civil Rule 12(b)(6)<sup>3</sup> defense that Morrissey's complaint  
20 failed to state a claim. Morrissey responded by filing a first  
21 amended complaint ("FAC") on November 13, 2013, which sought to  
22 except the sum of \$1,269,337.48 from Debtor's discharge pursuant  
23 to § 523(a)(2). Morrissey alleged that it was a general  
24

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

<sup>3</sup> Rule 7012(b) incorporates Civil Rule 12(b)(6).

1 contractor who had built several restaurants for Debtor and was  
2 owed \$1,269,337.48. It further alleged that Debtor had obtained  
3 the labor, materials and other valuable property under false  
4 pretenses, false representations, actual fraud and false  
5 statements, and that Debtor had induced Morrissey into not  
6 recording certain mechanics liens based upon false pretenses,  
7 false representations, actual fraud, and intentionally false  
8 statements.

9 Debtor moved to dismiss the FAC. In an order entered  
10 March 11, 2014, the bankruptcy court dismissed the FAC and granted  
11 Morrissey thirty days to further amend its complaint.

12 On April 10, 2014, Morrissey filed a second amended complaint  
13 ("SAC") seeking to except the sum of \$1,269,337.48 from Debtor's  
14 discharge, alleging three claims under § 523(a)(2)(A) for actual  
15 fraud and a fourth claim under § 523(a)(2)(A) and (B) for actual  
16 fraud and use of a false statement in writing.<sup>4</sup> In the first  
17 three claims of the SAC, Morrissey alleged that Debtor executed  
18 two promissory notes, deeds of trust and personal guarantees on  
19 February 5, 2008, that Debtor executed a third promissory note on  
20 April 14, 2008, and that Debtor made certain promises in the  
21 aforementioned documents, including the promise to pay Morrissey,  
22 with no intention or ability to perform the promises.

23 In the first promissory note, Antelope 138 Partners, LP  
24 promised to pay \$652,182.24. The first promissory note is signed  
25 by Debtor on behalf of Antelope 138 Partners, LP. Morrissey  
26

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27 <sup>4</sup> The Fourth Claim for Relief in Morrissey's Second Amended  
28 Complaint references both §§ 523(a)(2)(A) and (a)(2)(B), but  
§ 523(a)(2)(B) is not mentioned in Morrissey's prayer for relief.

1 alleged it suffered damages of \$252,972.80 as a result of Debtor's  
2 fraud and deceit relating to the first promissory note and related  
3 deed of trust and personal guaranty.

4 In the second promissory note, dated February 18, 2008,  
5 TemBreck, LLC promised to pay Morrissey \$408,760.23. Debtor  
6 signed this promissory note as TemBreck, LLC's managing member.  
7 Morrissey alleged it suffered damages of \$169,141.14 stemming from  
8 Debtor's fraud and deceit relating to the second promissory note  
9 and related deed of trust and personal guaranty.

10 The third claim stemmed from a promissory note in the amount  
11 of \$513,792.12 dated April 14, 2008. The third promissory note is  
12 not signed by Debtor; Debtor only signed a personal guaranty for  
13 the third promissory note. Morrissey alleged that Debtor's fraud  
14 and deceit in signing the third personal guaranty caused damages  
15 to Morrissey of \$304,677.17. As to each of the first three  
16 claims, Morrissey also alleged that Debtor "had defaulted on other  
17 loans which he had personally guaranteed, that several of the  
18 entities he controlled were about to file for bankruptcy, and that  
19 the security for the promissory note[s] was worthless."

20 Debtor again sought dismissal of Morrissey's SAC for failure  
21 to satisfy the plausibility requirements of Civil Rule 8 and  
22 failure to allege fraud with particularity as required by Civil  
23 Rule 9(b). Prior to a hearing held June 5, 2015, the bankruptcy  
24 court tentatively ruled that, with regard to the three claims  
25 under § 523(a) (2) (A), Morrissey's SAC:

26 [C]ontains *some* facts, but relies primarily on the  
27 allegation that promises made in the various financial  
28 instruments were fraudulent because they were made  
without a present intention on Mr. Gantes' part to  
perform. There is a light sprinkling of supporting

1 facts alleged at ¶¶8, 27 suggesting that Mr. Gantes knew  
2 or should have known of the unlikelihood of performance  
3 given his presumed knowledge that entities he controlled  
4 were about to file bankruptcy and/or that collateral for  
5 a note was worthless. The question is whether there is  
6 enough here to survive the motion given the commands of  
7 Iqbal and Twombly, compared with a more relaxed standard  
8 that allegations concerning defendant intent are  
9 sufficient if averred generally (See e.g. Petersen v.  
10 Allstate Indemnity Co., 281 F.R.D. 413, 416 (C.D. Cal.  
11 2012). While it is close, construed in the light most  
12 favorable to the responding party as the court is  
13 obliged to do, the court believes there is enough to  
14 make out a plausible case, and there is enough (just) to  
15 alert the defendant as to what he must defend. The  
16 court is persuaded that consequently all salutary  
17 purposes of Rule 12 are satisfied here on this record,  
18 even under the enhanced Twombly and Iqbal standards.

19 At a hearing held June 5, 2015, the bankruptcy court first  
20 granted Debtor's motion as it related to Morrissey's fourth claim  
21 for relief. The bankruptcy court then turned its focus on the  
22 remaining three claims. The bankruptcy court, after considering  
23 counsel's arguments, indicated that even though the SAC could be  
24 more specific, it met the plausibility standard articulated in  
25 Iqbal and Twombly. The court then asked Morrissey's counsel  
26 whether he could add substance to one paragraph (paragraph 8) of  
27 the SAC. While Morrissey's counsel did not specifically answer  
28 the court's question, the court found its question answered, and  
changed its tentative ruling:

29 THE COURT: Here's what I want you to do. I am  
30 going to change the tentative. I'm going to grant the  
31 motion, and I want you to redo it. I want you to give  
32 us more detail on paragraph eight particularly. And you  
33 can dress up any other part that you want to, but I want  
34 you to list -- and you've already mentioned one loan.  
35 Be specific.

36 And if you suspect others, but you're not sure,  
37 then frame it as I'm informed and believe. And that  
38 will be sufficient to get this thing going. And I think  
it does fair service to all the rules in question,  
Rule 8, Rule 9, Rule 11 and Rule 12(b). So that's what

1 I want you to do. Any questions?

2 I'm going to grant the motion with leave to amend.  
3 I'm going to strike the jury trial demand because I  
4 don't think a jury trial fits here under any theory,  
5 unless the Supreme Court in the meantime tells me that I  
6 don't have authority to do anything, which is a  
7 possibility.

8 Anything further?

9 MR. BURD: Time, your Honor, for the --

10 MR. HENEIN: Not from the Plaintiff, your Honor.  
11 That's fine. Thank you.

12 THE COURT: I'm sorry, Mr. Burd. I didn't  
13 catch -

14 MR. BURD: A deadline for them to file the amended  
15 complaint?

16 THE COURT: When can you have the amended complaint  
17 in, Counsel?

18 MR. HENEIN: Can I have 30 days, your Honor?

19 THE COURT: Thirty days it is. The motion is  
20 granted, 30 days leave to amend. And I will allow you  
21 to amend on all issues except the jury trial, which I  
22 don't think is correct under any theory. So that's  
23 without leave to amend. Okay.

24 \* \* \*

25 MR. HENEIN: Your Honor, could the 30 days run from  
26 the entry of the order?

27 THE COURT: Your 30 days to amend? Yeah, we can do  
28 it from there.

The bankruptcy court followed up its oral ruling with a  
written order entered June 18, 2014, which reads:

The Defendant's Motion: (1) for Dismissal for  
Failure to State a Claim Upon Which Relief Can Be  
Granted [Civil Rule 12(b)(6)]; and (2) to Strike Demand  
for Jury Trial came on regularly for hearing . . . .

Upon consideration of all papers, pleadings and  
files of record and the argument of counsel and good  
cause appearing therefor, it is hereby

1           **ORDERED** that the Plaintiff's demand for a jury  
2 trial is stricken and the Second Amended Complaint to  
3 Determine Dischargeability of Debt is dismissed with  
4 leave to amend. It is further

5           **ORDERED** that Plaintiff may file a further amended  
6 complaint within thirty (30) days from the date of entry  
7 of this order. No demand for a jury trial shall be  
8 included. Defendant shall have thirty (30) days from  
9 the date of service of an amended complaint to file a  
10 responsive pleading.

11 The bankruptcy court's docket shows that the court's June 18, 2014  
12 order was served via first class mail on Morrissey's counsel,  
13 Samy S. Henein, on Saturday, June 20, 2014.

14           Morrissey's counsel filed a Third Amended Complaint  
15 ("Complaint") on July 22, 2014. This Complaint seeks to except  
16 the sums of \$252,972.80, \$169,141.14, \$304,677.17 and \$542,546.37  
17 from Debtor's discharge pursuant to § 523(a)(2)(A). On August 21,  
18 2014, Debtor filed a motion to dismiss the Complaint on grounds it  
19 was not timely filed. Debtor argued in paragraph 15 of the motion  
20 that "under [Rule] 9006(b)(3) the time for filing a complaint to  
21 determine dischargeability can only be enlarged in accordance with  
22 Rule 4007(c)." Morrissey responded that the order entered on  
23 June 18, 2014, was never lodged as required by Local  
24 Rule 9021-1(b)(3),<sup>5</sup> and that the Complaint was timely filed

25           <sup>5</sup> Local Rule 9021-1(b)(3) reads:

26           (3) Proposed Order when Opposition to Motion was Filed.

27           (A) Service of Proposed Order on Contesting Party.

28           Pursuant to the Notice of Lodgment Procedures set forth  
in the Court Manual, the attorney who has the duty to  
prepare any order required by this rule must serve a  
copy of the proposed order on counsel, or party if filed  
without counsel, who filed an opposition or other  
objection to the relief requested, either before or on  
the same day that the order is lodged with the court and

(continued...)

1 because the Order was entered on June 18, 2014, served by mail on  
2 June 20, 2014, and that the Complaint was filed within 33 days  
3 thereafter, on July 22, 2014. Morrissey requested in its  
4 opposition that the bankruptcy court deny Debtor's motion. In the  
5 alternative, Morrissey requested that the bankruptcy court either  
6 allow the Complaint to stand by granting leave to amend nunc pro  
7 tunc, or allow an enlargement of time for Morrissey to refile the  
8 Complaint.

9 The bankruptcy court, in a tentative ruling, indicated its

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11 <sup>5</sup>(...continued)

12 must file a proof of service with the order.  
13 Alternatively, the attorney preparing the order may  
14 present it to opposing counsel for approval as to form  
15 before the order is lodged, in which case opposing  
16 counsel must immediately approve or disapprove the form  
17 of order and return it to counsel who prepared it.

18 (B) Separate Objection to Proposed Order. Opposing  
19 counsel may, within 7 days after service of a copy of a  
20 proposed order prepared pursuant to this rule, file and  
21 serve an objection to the form of the order, setting  
22 forth the grounds therefor. Opposing counsel must  
23 attach as exhibits to the objection (i) a copy of the  
24 order that is the subject of the objection and (ii) a  
25 copy of the proposed alternative form of order. The  
26 proposed alternative form of order so labeled, must be  
27 lodged with the objection. A judge's copy of the  
28 objection and proposed alternative form of order must be  
served on the judge in chambers in accordance with LBR  
5005-2(d). The failure to file and serve a timely  
objection will constitute a waiver of any defects in the  
form of the order.

(C) Endorsement of Counsel. Unless the court otherwise  
directs, a proposed order will not be signed by the  
judge unless (i) opposing counsel has endorsed thereon  
an approval as to form; (ii) opposing counsel has  
stipulated thereto on the record at the hearing, or  
(iii) the time for objection to a form of order properly  
served has expired under subsection (b) (3) (B) of this  
rule. If it finds the ends of justice so requires, the  
court may conduct a hearing on the proper form of the  
order or decide any objection thereto without a hearing.

1 intent to grant Debtor's motion, explaining "[p]ursuant to an  
2 order entered 6/18/14, the [SAC] was dismissed with leave to amend  
3 and Plaintiff expressly had 30 days **from entry of the order** to  
4 file an amended complaint. Plaintiff did not file the [Complaint]  
5 until 7/22/14, four days late." (Emphasis in original). The  
6 bankruptcy court went on to tentatively hold that: (1) under  
7 Rule 4007(c), the time for filing nondischargeability complaints  
8 may be enlarged by motion, but the motion must be filed before the  
9 time has expired; (2) under Rule 9006(b)(3), once the deadline for  
10 filing a complaint has expired, a bankruptcy court does not have  
11 the discretion to waive the requirement that enlargements be  
12 sought within the initial period; and (3) the three day mail rule  
13 in Rule 9006(f) was inapplicable.

14 At a hearing held December 11, 2014, the court explained:

15 THE COURT: The problem that movant has here is  
16 that the deadlines set by 4007(c) are deliberately made,  
17 unambiguous and there's no room for error. The case law  
in this area is almost uniformly against the late  
creditor.

18 And I think the answer is because the enactors of  
19 the rule wanted nondischargeability complaints to be  
20 timely adjudicated, and anything that goes outside of it  
is just not gratefully received.

21 Now, I hear your argument about this should be  
22 about notice. I'm not entirely sure it's about notice  
23 because what it is also about is timely prosecution. So  
that's the purpose of the rule that would not be served  
by giving extensions.

24 I do not buy the argument that the period of time  
25 should be figured from the filing of a notice of entry.  
Of course, if you do take notice of entry, it's still  
late, but I don't buy that.

26 I think when an order says by a certain date, you  
27 don't get three days for reason of mailing. That's not  
the purpose of the three-day rule.

28 So just anywhere you turn, I think the doors are

1 closed on plaintiff in this case. And I don't say that  
2 lightly because clearly the Court would rather resolve  
things on their merits than on procedure.

3 But I am aware that in the realm of  
4 nondischargeability litigation, the deadlines are very  
5 finite and they're not in fact susceptible even to  
excusable neglect arguments. There's cases that say  
that that doesn't apply.

6 The only time I've ever seen any wiggle room or  
7 moving on these deadlines is in the context of where the  
Court itself added to the confusion by giving wrong  
8 deadlines in its notices.

9 So that's bad news, Mr. Henein, I know, but that's  
10 the way I see it. So the motion is granted as indicated  
in the tentative.

11 Movant, you're to submit a form of order.

12 MR. BURD: Sure, your Honor. And may I attach the  
tentative and that the Court -

13 THE COURT: Yes, you may.

14 On January 5, 2015, the bankruptcy court entered a written order  
15 adopting by reference its December 11, 2014, tentative ruling.  
16 Morrissey filed a notice of appeal on January 20, 2015.

17 Morrissey also filed on January 20, 2015, a Rule 9023 motion  
18 for reconsideration.<sup>6</sup> Morrissey asserted that the Complaint was  
19 not time-barred under Rule 4007(c) because such Rule was  
20 inapplicable to the facts of this case and because the Complaint  
21 related back to the original complaint under Civil Rule 15(c).  
22 Debtor opposed the motion, arguing in part that the bankruptcy  
23 court had granted Morrissey thirty days to amend its complaint  
24 under Civil Rule 15(a)(2), that Morrissey failed to meet the  
25 thirty-day filing deadline, and that Civil Rule 15(c), therefore,  
26 never came into play. Debtor went on in his opposition to argue:

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27  
28 <sup>6</sup> Rule 9023 incorporates Civil Rule 59.

1 "Even if [Rule] 4007(c) were not implicated in this case, it was  
2 well within the Court's discretion to dismiss the [] [C]omplaint  
3 due to [Morrissey]'s failure to file it within the time allowed by  
4 the Court." Following a hearing held on February 26, 2015, the  
5 bankruptcy court entered an order on April 9, 2015, denying  
6 Morrissey's request for reconsideration. Attached to the  
7 bankruptcy court's April 9, 2015, order is the court's  
8 February 25, 2015 tentative ruling which reads, in part:

9 [Morrissey seeks] reconsideration of the order  
10 granting a motion to dismiss . . . because their third  
11 amended pleading was dismissed by the Court for not  
12 being filed within the 30 day period the court allowed  
13 from the date of entry of the order. The third amended  
14 complaint was filed four days after the 30 day time  
15 period.

16 \* \* \*

17 The question here comes down to one of whether clear  
18 orders of the court having to do with time limits for  
19 filing are mere suggestions, or can be ignored with  
20 impunity. It was well within the court's discretion to  
21 deny the third amended complaint for not being filed  
22 within the time allowed and to dismiss the complaint.  
23 Therefore, no manifest error of law appears which is  
24 required by [Rule] 59(e) to reconsider the order.

25 Morrissey does not appeal the bankruptcy court's April 9, 2015,  
26 order denying Morrissey's request for reconsideration.

## 27 **II. JURISDICTION**

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

## **III. ISSUES**

Morrissey raises several issues on appeal which we restate as  
follows:

1. Whether Rule 4007(c) governs the time to file amended  
complaints containing relation-back amendments.

- 1 2. Whether the bankruptcy court abused its discretion in  
2 dismissing the Complaint for being untimely filed.
- 3 3. Whether Debtor's failure to lodge his order is harmless  
4 error.
- 5 4. Whether the SAC adequately stated a cause of action as to the  
6 first, second and third claims for relief.

#### 7 IV. STANDARDS OF REVIEW

8 Pursuant to Rule 7041, a bankruptcy court may dismiss an  
9 adversary proceeding for failure to comply with any order of the  
10 court. We review for abuse of discretion a bankruptcy court's  
11 dismissal of an action for failure to comply with the court's  
12 order requiring submission of an amended complaint in a timely  
13 manner. Eldridge v. Block, 832 F.2d 1132, 1136 (9th Cir. 1987);  
14 Nevijel v. N. Coast Life Ins. Co., 651 F.2d 671, 674 (9th Cir.  
15 1981). The trial court's dismissal should not be disturbed unless  
16 there is "a definite and firm conviction that [it] committed a  
17 clear error of judgment in the conclusion it reached upon a  
18 weighing of the relevant factors.'" Malone v. United States  
19 Postal Serv., 833 F.2d 128, 130 (9th Cir. 1987); Eldridge,  
20 832 F.2d at 1136 (quotation omitted).

21 "We may affirm 'on any ground supported by the record,  
22 regardless of whether the [bankruptcy] court relied upon,  
23 rejected, or even considered that ground.'" Fresno Motors, LLC v.  
24 Mercedes Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2014)  
25 (citation omitted).

26 We review de novo the bankruptcy court's Civil Rule 12(b)(6)  
27 dismissal. Barnes v. Belice (In re Belice), 461 B.R. 564, 572  
28 (9th Cir. BAP 2011).

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V. DISCUSSION

**A. Federal Rule of Bankruptcy Procedure 4007(c) does not govern the time to amend complaints with relation-back amendments.**

We begin by considering Morrissey's first issue on appeal: that Rule 4007(c) does not apply to amended complaints so long as the amendments relate back to the timely-filed original complaint. We agree. Rule 4007(c) provides that "a complaint to determine the dischargeability of a debt . . . shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)." The first date set for Debtor's § 341(a) meeting of creditors was January 21, 2009, and the sixtieth day thereafter was March 22, 2009. Morrissey's original complaint was timely filed on the next business day, March 23, 2009. The language of Rule 4007(c) itself omits any reference to amended pleadings, and Rule 9006(b) (3) restricts enlargement of the time period in Rule 4007(c) to "only [] the extent . . . stated in [that] rule[]." If subsequently filed amended pleadings relate back to the original complaint, which was timely filed, Rule 4007(c) does not apply.

The Ninth Circuit has considered relation-back amendments of pleadings in the context of bankruptcy proceedings. Rule 7015, incorporating Civil Rule 15(c), provides that when the amended claim for relief or defense arises out of the "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading[,]" it relates back to the date of the original pleading. See, e.g., Mission Viejo Nat'l Bank v. Englander (In re Englander), 92 B.R. 425, 427-28 (9th Cir. BAP 1988).

The bankruptcy court did not specifically determine whether

1 Morrissey's second or third amended complaints would relate back  
2 to the date of the original complaint. However, if the claims for  
3 relief alleged by Morrissey in its second and third amended  
4 complaints arose out of the conduct, transaction or occurrence set  
5 forth or attempted to be set forth in the original complaint, then  
6 Morrissey is correct that Rule 4007(c) would not govern.  
7 Nevertheless, Morrissey's technical victory is ephemeral after we  
8 consider Morrissey's next issue on appeal.

9 **B. The Complaint was untimely filed; the bankruptcy court did  
10 not abuse its discretion in dismissing it.**

11 Morrissey's second issue on appeal is that its Complaint was  
12 timely filed. As noted above, we may affirm on any grounds  
13 supported by the record. The bankruptcy court, in open court on  
14 June 5, 2014, gave Morrissey thirty days from the date the order  
15 was entered to file a further amended complaint. The order was  
16 entered on June 18, 2014. Morrissey filed its Complaint on  
17 July 22, 2014, four days past the explicit deadline set forth in  
18 the order. The bankruptcy court correctly held that Rule 9006(f)  
19 did not grant Morrissey three extra days for mailing. Rule  
20 9006(f) only applies when the prescribed period to act runs from  
21 service of a notice by mail, not when, as here, the deadline was  
22 conveyed to Morrissey in open court. J&S Wholesale, Inc. v.  
23 Cloninger (In re Cloninger), 197 B.R. 308, 309 (Bankr. E.D. Ark.  
24 1996). The three-day mailing rule is especially inapt when  
25 Morrissey itself requested the time to run from entry of the  
26 order.

27 Courts may set and enforce deadlines. In the context of  
28 scheduling orders under Rule 7016, incorporating Civil Rule 16,

1 our Circuit recognizes the importance of adhering to deadlines set  
2 by the trial court:

3 In these days of heavy caseloads, trial courts in both  
4 the federal and state systems routinely set schedules  
5 and establish deadlines to foster the efficient  
6 treatment and resolution of cases. Those efforts will  
7 be successful only if the deadlines are taken  
8 seriously by the parties, and the best way to  
9 encourage that is to enforce the deadlines.

10 Wong v. Regents of the Univ. of Cal., 410 F.3d 1052, 1060 (9th  
11 Cir. 2005).

12 A bankruptcy court may dismiss an untimely complaint for  
13 failure to comply with a court-ordered deadline. Rule 7041,  
14 incorporating Civil Rule 41(b), allows the bankruptcy court to  
15 dismiss adversary proceedings where “the plaintiff fails . . .  
16 to comply with . . . a court order[.]”

17 In Ferdik v. Bonzalet, 963 F.2d 1258, 1260-61 (9th Cir.  
18 1991), the Ninth Circuit articulated five factors that courts  
19 should consider when deciding to dismiss a case for a party’s  
20 failure to comply with a court order: (1) the public’s interest  
21 in expeditious resolution of litigation; (2) the court’s need to  
22 manage its docket; (3) the risk of prejudice to the defendant;  
23 (4) the public policy favoring disposition of cases on their  
24 merits; and (5) the availability of less drastic alternatives.

25 Id. At least four, if not all five, factors favor the  
26 bankruptcy court’s decision to dismiss Morrissey’s Complaint.

27 The procedural posture of Kleban v. Tedesco, 207 B.R. 876  
28 (N.D. Ill. 1997), is instructive. There, a creditor filed a  
complaint against the debtor alleging nondischargeability due to  
fraud under §§ 523(a)(2)(A) and (a)(2)(B). Id. at 877. The  
bankruptcy court entered an order dismissing the complaint for

1 failing to plead with particularity the circumstances of the  
2 alleged fraud. Id. The creditor was granted leave to amend.  
3 Id. Like the original complaint, the creditor's first amended  
4 complaint was also dismissed for failure to plead with  
5 particularity the fraud that allegedly occurred. Id. The  
6 creditor was given another chance to amend the complaint; the  
7 bankruptcy court set a deadline of December 6, warning that  
8 failure to meet the deadline would result in dismissal with  
9 prejudice. When the creditor failed to timely file its second  
10 amended complaint, the bankruptcy court dismissed the adversary  
11 proceeding under Civil Rule 41(b). Id. On appeal, the district  
12 court affirmed, finding that the bankruptcy court did not abuse  
13 its discretion when the creditor's "conduct range[d] from  
14 untimely responses to failing to follow the bankruptcy court's  
15 directions . . . ." Id. at 878. The district court concluded  
16 that the creditor's "failure to file the second amended  
17 complaint by December 6 . . . was the straw that broke the  
18 camel's back." Id.

19 Like the creditor in Kleban, Morrissey's failure to timely  
20 file its Complaint was "the straw that broke the camel's back,"  
21 and we cannot say that the bankruptcy court abused its  
22 discretion in dismissing it. Court-ordered deadlines "must not  
23 be enforced mindlessly," Wong, 410 F.3d at 1060. Here the  
24 bankruptcy court generously gave Morrissey three opportunities  
25 to amend its complaint and even granted Morrissey an extra  
26 month's time to file its Complaint only for Morrissey to miss  
27 the deadline. As acknowledged by the United States Supreme  
28 Court, while "deadlines may lead to unwelcome results, . . .

1 they prompt parties to act and they produce finality.” Taylor  
2 v. Freeland & Kronz, 503 U.S. 638, 644 (1992).

3 Moreover, Morrissey has provided no explanation for its  
4 untimeliness. Morrissey has delayed the resolution of this case  
5 on the merits by failing to adhere to the clear directions and  
6 deadlines mandated by the bankruptcy court. See Kleban,  
7 207 B.R. at 878. Thus, we hold that the bankruptcy court did  
8 not abuse its discretion in dismissing Morrissey’s Complaint for  
9 failure to comply with the deadline set by the bankruptcy court.

10 **C. Debtor’s failure to lodge the order was harmless error.**

11 Morrissey also argues that the order setting the thirty-day  
12 deadline for filing the Complaint was never lodged as required  
13 by Local Rule 9021-1(b)(3) and, thus, the Complaint should be  
14 considered timely. Morrissey’s contention is without merit.

15 Rule 9005 incorporates Civil Rule 61. That rule states:

16 Unless justice requires otherwise, no error in admitting or  
17 excluding evidence - **or any other error by the court or a**  
18 **party** - is ground for . . . disturbing . . . [an] order.  
19 At every stage of the proceeding, the court must disregard  
20 all errors and defects that do not affect any party’s  
21 substantial rights.

22 (Emphasis added). In other words, when an error does not affect  
23 the substantial rights of a party, the error is harmless and the  
24 trial court will not be reversed on appeal. Citibank v. Arens  
25 (In re Arens), 139 B.R. 667, 669 (Bankr. N.D. Ohio 1991).

26 Here, the order entered by the bankruptcy court on June 18,  
27 2014, mirrored the bankruptcy court’s oral ruling made June 5,  
28 2014, in that it struck Morrissey’s demand for a jury trial,  
dismissed the SAC, and granted Morrissey “thirty (30) days from  
the date of entry of [the June 18, 2014] order” to file a

1 further amended complaint. Morrissey fails to identify any part  
2 of that order that would have been objectionable had the order  
3 been lodged prior to its entry. Moreover, Morrissey does not  
4 explain how Debtor's failure to lodge the order prejudiced  
5 Morrissey in any way, especially where Morrissey was given  
6 notice at the June 5, 2014 hearing that it would have thirty  
7 days from entry of the order to file a further amended  
8 complaint. We hold that, since Morrissey fails to show what  
9 substantial right was affected, Debtor's failure to lodge the  
10 order was harmless error.

11 **D. Counts one through three in the SAC adequately state a**  
12 **cause of action.**

13 Finally, Morrissey contends that the SAC adequately stated  
14 a cause of action as to the first, second, and third claims for  
15 relief and that Morrissey should be allowed to proceed on those  
16 claims. We agree. The bankruptcy court concluded in its  
17 June 5, 2014 tentative ruling that, though a close call, there  
18 were just enough facts alleged in those claims for relief to  
19 comply with the plausibility standard enunciated in Ashcroft v.  
20 Iqbal, 556 U.S. 662 (2009). However, at the June 5, 2014  
21 hearing, the court abandoned its tentative ruling by dismissing  
22 the SAC with leave to amend. At that point, Morrissey could not  
23 properly appeal the dismissal of the SAC; the June 18, 2014  
24 order operated as an unappealable interlocutory order. See  
25 Lopez v. City of Needles, 95 F.3d 20 (9th Cir. 1996). We  
26 acquired jurisdiction over dismissal of the SAC only after the  
27 bankruptcy court entered its order dismissing the entire action  
28 under Rule 7041 for being untimely filed. Civil Rule 41(b)

1 operates as an adjudication on the merits.

2 A claim may be dismissed under Civil Rule 12(b)(6) either  
3 because it asserts a legal theory that is not cognizable as a  
4 matter of law or because it fails to allege sufficient facts to  
5 support an otherwise cognizable legal claim. SmileCare Dental  
6 Grp. v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th  
7 Cir. 1996). In addressing a Civil Rule 12(b)(6) challenge, the  
8 Court accepts all factual allegations in the complaint as true  
9 (Hospital Building Co. v. Trustees of the Rex Hospital, 425 U.S.  
10 738, 740 (1976)), and construes the pleading in the light most  
11 favorable to the nonmoving party. Tanner v. Heise, 879 F.2d  
12 572, 576 (9th Cir. 1989). “[D]ismissal without leave to amend  
13 is improper unless it is clear, upon de novo review, that the  
14 complaint could not be saved by any amendment.” Schneider v.  
15 Cal. Dep’t of Corr., 151 F.3d 1194, 1196 (9th Cir. 1998)  
16 (quoting Chang v. Chen, 80 F.3d 1293, 1296 (9th Cir. 1996)). To  
17 survive a motion to dismiss under Civil Rule 12(b)(6), a  
18 complaint need only set forth a short and plain statement of the  
19 claim showing the pleader is entitled to relief; it “does not  
20 need detailed factual allegations[.]” Twombly, 127 S. Ct. at  
21 1964. Nevertheless, a plaintiff must set forth “more than  
22 labels and conclusions, and a formulaic recitation of the  
23 elements of a cause of action will not do[.]” Id. at 1965.

24 Section 523(a)(2)(A) excepts from discharge debts incurred  
25 through “false pretenses, a false representation, or actual  
26 fraud.” For this exception to discharge to apply, a creditor  
27 must prove by a preponderance of the evidence each of the  
28 following elements: “(1) misrepresentation, fraudulent

1 omission or deceptive conduct by the debtor; (2) knowledge of  
2 the falsity or deceptiveness of his statement or conduct; (3) an  
3 intent to deceive; (4) justifiable reliance by the creditor on  
4 the debtor's statement or conduct; and (5) damage to the  
5 creditor proximately caused by its reliance on the debtor's  
6 statement or conduct.'" Oney v. Weinberg (In re Weinberg),  
7 410 B.R. 19, 35 (9th Cir. BAP 2009) (quoting Turtle Rock Meadows  
8 Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081, 1085  
9 (9th Cir. 2000)). All five elements must be asserted in the  
10 creditor's complaint for an exception to discharge; the creditor  
11 bears the burden of proving each element by a preponderance of  
12 the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991);  
13 In re Weinberg, 410 B.R. at 35.

14 While the SAC is poorly drafted, the Panel agrees with the  
15 bankruptcy court's tentative ruling that the SAC contained  
16 sufficient facts as to the first, second, and third claims to  
17 "'nudge [them] across the line from conceivable to  
18 plausible[,]'" Eclectic Props. E., LLC v. Marcus & Millichap  
19 Co., 751 F.3d 990, 997 (9th Cir. 2014) (quoting Twombly,  
20 550 U.S. at 570), as Civil Rule 8(a) requires. Likewise, we  
21 agree with the bankruptcy court that Morrissey pleaded those  
22 claims with just enough particularity to apprise Debtor of what  
23 he must defend. The Ninth Circuit, in Yourish v. California  
24 Amplifier, 191 F.3d 983, 993 (9th Cir. 1999), phrased the Civil  
25 Rule 9(b) particularity requirement thusly: "[t]he plaintiff  
26 must set forth what is misleading about a statement, and why it  
27 is false. In other words, the plaintiff must set forth an  
28 explanation as to why the statement or omission complained of

1 was false or misleading.”

2 For each claim, Morrissey sets forth in corresponding,  
3 albeit identical, paragraphs why it believes Debtor  
4 intentionally misrepresented his financial condition to  
5 Morrissey. Morrissey alleges that, at the time the parties  
6 entered into the loan agreements, Debtor had previously  
7 defaulted on other loans he had personally guaranteed, that  
8 several of the entities he controlled had filed for bankruptcy  
9 and that the security for the various promissory notes was  
10 worthless. Morrissey also alleges Debtor knew of these facts  
11 when he entered the written agreements with Morrissey, i.e.,  
12 Morrissey alleged generally Debtor’s state of mind. See Civil  
13 Rule 9(b). Application of Civil Rule 12(b)(6) requires us to  
14 hold these factual allegations as true. Moreover, Morrissey’s  
15 alleged facts are just particular enough to put Debtor on notice  
16 of what he will have to defend.

17 Because the first, second, and third claims for relief in  
18 Morrissey’s SAC met both the plausibility and particularity  
19 requirements of Civil Rules 8(a) and 9(b), respectively, it was  
20 error for the bankruptcy court to dismiss those claims under  
21 Civil Rule 12(b)(6).

## 22 **VI. CONCLUSION**

23 For the foregoing reasons, we AFFIRM the dismissal of the  
24 Third Amended Complaint, VACATE the dismissal of the three  
25 claims under § 523(a)(2)(A) in the Second Amended Complaint, and  
26 REMAND for further proceedings consistent with this Memorandum.

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