

MAY 31 2016

NOT FOR PUBLICATION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

6	In re:	)	BAP No.	NV-14-1517-FBD
		)		
7	PETER SZANTO,	)	Bk. No.	3:13-51261-GWZ
		)		
8	Debtor.	)	Adv. No.	3:13-05038-GWZ
		)		
9	_____	)		
		)		
10	PETER SZANTO,	)		
		)		
11	Appellant,	)		
		)		
12	v.	)	<b>MEMORANDUM*</b>	
		)		
13	VICTOR SZANTO; ANTHONY SZANTO,	)		
		)		
14	Appellees.	)		
		)		
	_____	)		

Argued and Submitted on May 19, 2016  
at Las Vegas, Nevada

Filed - May 31, 2016

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

Honorable Bruce T. Beesley, Chief Bankruptcy Judge, and  
Honorable Gregg W. Zive, Bankruptcy Judge, Presiding

Appearances: Appellant Peter Szanto argued pro se; John S.  
Bartlett argued for Appellees Victor Szanto and  
Anthony Szanto.

\* 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 Before: FARIS, BARASH,\*\* and DUNN, Bankruptcy Judges.

2 **INTRODUCTION**

3 Appellant/chapter 11<sup>1</sup> debtor Peter Szanto appeals from the  
4 bankruptcy court's order dismissing his complaint for failure to  
5 state a claim. The bankruptcy court abused its discretion when  
6 it denied leave to file an amended complaint. But this error was  
7 harmless. The court dismissed the underlying bankruptcy case,  
8 and it did not abuse its discretion when it declined to retain  
9 jurisdiction over the adversary proceeding. Accordingly, we  
10 AFFIRM.

11 **FACTUAL BACKGROUND<sup>2</sup>**

12 **A. The adversary complaint**

13 Mr. Szanto<sup>3</sup> initiated his chapter 11 bankruptcy on June 25,  
14 2013 and later commenced an adversary proceeding against his  
15 brothers, the appellees in this appeal. Mr. Szanto claimed that  
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17 <sup>\*\*</sup> Hon. Martin R. Barash, United States Bankruptcy Judge for  
18 the Central District of California, sitting by designation.

19 <sup>1</sup> Unless specified otherwise, all chapter and section  
20 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all  
21 "Rule" references are to the Federal Rules of Bankruptcy  
22 Procedure, Rules 1001-9037, and all "Civil Rule" references are  
23 to the Federal Rules of Civil Procedure, Rules 1-86.

24 <sup>2</sup> Mr. Szanto presents us with a limited record. We have  
25 exercised our discretion to review the bankruptcy court's docket,  
26 as appropriate. See Woods & Erickson, LLP v. Leonard (In re AVI,  
27 Inc.), 389 B.R. 721, 725 n.2 (9th Cir. BAP 2008).

28 <sup>3</sup> Mr. Szanto is a serial litigant. The bankruptcy court  
noted that there are seventy-six cases nationwide involving a  
party named Peter Szanto, and Mr. Szanto acknowledged that he was  
a party to at least fifteen or twenty of those cases. At oral  
argument, Mr. Szanto acknowledged that the California state court  
found him to be a vexatious litigant.

1 Appellees are fraudulently concealing or withholding  
2 approximately \$3,200,000 in trust assets.

3 **B. The motion to dismiss**

4 Appellees moved to dismiss the adversary proceeding ("Motion  
5 to Dismiss"). Appellees argued (among other things) that  
6 Mr. Szanto failed to allege facts sufficient to meet the pleading  
7 standards of Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555  
8 (2007), and Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

9 The bankruptcy court held that the complaint did not satisfy  
10 the standards of Twombly and Iqbal. Mr. Szanto does not  
11 challenge this decision on appeal. He does challenge the  
12 bankruptcy court's denial of an opportunity to file an amended  
13 complaint.

14 The court explained that he would have to file a new  
15 complaint and pay a new filing fee: "I mean, this is not even  
16 close to Iqbal and Twombly, so you need to re-file a complaint.  
17 It's not a first amended complaint. It is a new complaint. You  
18 have to allege facts. You have to reserve it and we'll go  
19 forward from there."

20 **C. The motion for reconsideration**

21 Mr. Szanto filed a motion for reconsideration ("Motion for  
22 Reconsideration"), arguing that the court should have allowed him  
23 leave to amend the complaint. The hearing on the Motion for  
24 Reconsideration was delayed for fifteen months because Mr. Szanto  
25 claimed he was too ill to appear.

26 **D. Dismissal of the bankruptcy case**

27 In the meantime, the bankruptcy court dismissed Mr. Szanto's  
28 bankruptcy case. The chapter 11 trustee moved to dismiss the

1 case or convert it to chapter 7 because Mr. Szanto failed timely  
2 under § 1112(b)(4)(J) to file a disclosure statement. The court  
3 granted the motion and dismissed the bankruptcy case with a six-  
4 month bar on re-filing any bankruptcy petition.

5 The district court affirmed the bankruptcy court's order of  
6 dismissal. Mr. Szanto appealed the district court's decision to  
7 the Ninth Circuit, and that appeal is currently pending.

#### 8 **E. Ruling on the Motion for Reconsideration**

9 The bankruptcy court denied the Motion for Reconsideration  
10 for two reasons. First, it determined that granting leave to  
11 amend would be an excise in futility, since Mr. Szanto failed to  
12 "propose any amendments to his complaint that would cure the  
13 deficiencies to allege any facts upon which a claim can be stated  
14 against defendants."

15 Second, the bankruptcy court noted that, during the fifteen  
16 months that the Motion for Reconsideration was pending, the court  
17 had dismissed the underlying bankruptcy case, and Mr. Szanto had  
18 neither requested nor received a stay of the order dismissing the  
19 bankruptcy case. Applying Carraher v. Morgan Electronics, Inc.  
20 (In re Carraher), 971 F.2d 327, 328 (9th Cir. 1992), the court  
21 held that it would not retain jurisdiction over the adversary  
22 proceeding.

#### 23 **JURISDICTION**

24 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
25 §§ 1334 and 157(b)(1). Mr. Szanto's notice of appeal was  
26 premature because he filed it before the bankruptcy court decided  
27 his Motion for Reconsideration. Now that the bankruptcy court  
28 has denied the Motion for Reconsideration, the bankruptcy court's

1 order has become final, and we have jurisdiction under 28 U.S.C.  
2 § 158.

3 **ISSUE**

4 Whether the bankruptcy court erred in dismissing  
5 Mr. Szanto's adversary complaint without leave to amend.

6 **STANDARDS OF REVIEW**

7 We review de novo the bankruptcy court's decision to dismiss  
8 a complaint under Civil Rule 12(b)(6). See Movsesian v. Victoria  
9 Versicherung AG, 670 F.3d 1067, 1071 (9th Cir. 2012) (en banc).

10 In contrast, we review for abuse of discretion the  
11 bankruptcy court's decision whether to grant leave to amend the  
12 complaint. See, e.g., Zadrozny v. Bank of N.Y. Mellon, 720 F.3d  
13 1163, 1167 (9th Cir. 2013); Reddy v. Litton Indus., Inc.,  
14 912 F.2d 291, 296 (9th Cir. 1990). Appellate courts should  
15 "review strictly a . . . court's exercise of discretion denying  
16 leave to amend." Albrecht v. Lund, 845 F.2d 193, 195 (9th Cir.  
17 1988), amended, 856 F.2d 111 (9th Cir. 1988).

18 Similarly, we review for abuse of discretion the court's  
19 decision to decline to exercise jurisdiction over an adversary  
20 proceeding. In re Carraher, 971 F.2d at 328.

21 We also review for abuse of discretion the denial of a  
22 motion for reconsideration. See N. Alaska Env'tl. Ctr. v. Lujan,  
23 961 F.2d 886, 889 (9th Cir. 1992).

24 To determine whether the bankruptcy court has abused its  
25 discretion, we conduct a two-step inquiry: (1) we review de novo  
26 whether the bankruptcy court "identified the correct legal rule  
27 to apply to the relief requested" and (2) if it did, whether the  
28 bankruptcy court's application of the legal standard was

1 illogical, implausible, or "without support in inferences that  
2 may be drawn from the facts in the record." United States v.  
3 Hinkson, 585 F.3d 1247, 1262-63 & n.21 (9th Cir. 2009) (en banc).  
4 "If the bankruptcy court did not identify the correct legal rule,  
5 or its application of the correct legal standard to the facts was  
6 illogical, implausible, or without support in inferences that may  
7 be drawn from the facts in the record, then the bankruptcy court  
8 has abused its discretion." USAA Fed. Sav. Bank v. Thacker  
9 (In re Taylor), 599 F.3d 880, 887-88 (9th Cir. 2010) (citing  
10 Hinkson, 585 F.3d at 1261-62).

11 We may affirm on any ground supported by the record. Diener  
12 v. McBeth (In re Diener), 483 B.R. 196, 202 (9th Cir. BAP 2012).

### 13 DISCUSSION

#### 14 **A. The propriety of dismissal is not before us.**

15 As a preliminary matter, we note that Mr. Szanto is not  
16 appealing the bankruptcy court's decision to dismiss his  
17 complaint. We only consider whether the court should have  
18 allowed Mr. Szanto leave to amend his complaint.

#### 19 **B. The bankruptcy court abused its discretion in denying** 20 **Mr. Szanto an opportunity to amend his adversary complaint.**

21 Civil Rule 15(a), made applicable through Rule 7015,  
22 provides that if an amendment is not allowed as a matter of  
23 course, "a party may amend its pleading only with the opposing  
24 party's written consent or the court's leave. The court should  
25 freely give leave when justice so requires." Civil  
26 Rule 15(a)(2). The Ninth Circuit has "stressed Rule 15's policy  
27 of favoring amendments, and [it has] applied this policy with  
28 liberality." Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149,

1 1160 (9th Cir. 1989).

2 In determining whether to grant leave to amend, we follow  
3 the United States Supreme Court's dictate in Foman v. Davis,  
4 371 U.S. 178 (1962), which instructed that:

5 In the absence of any apparent or declared reason -  
6 such as undue delay, bad faith or dilatory motive on  
7 the part of the movant, repeated failure to cure  
8 deficiencies by amendments previously allowed, undue  
9 prejudice to the opposing party by virtue of allowance  
of the amendment, futility of amendment, etc. - the  
leave sought should, as the rules require, be freely  
given.

10 Id. at 182; see Tracht Gut, LLC v. Cty. of L.A. Treasurer & Tax  
11 Collector (In re Tracht Gut, LLC), 503 B.R. 804, 814 (9th Cir.  
12 BAP 2014) (relying on the "Foman Factors").

13 "[A] determination that any amendment would be futile  
14 requires the trial court to dismiss the complaint with  
15 prejudice." In re Tracht Gut, LLC, 503 B.R. at 815 (citing  
16 Mirmehdi v. United States, 689 F.3d 975, 985 (9th Cir. 2012);  
17 Sanford v. MemberWorks, Inc., 625 F.3d 550, 557 (9th Cir. 2010)).  
18 "Amendment is futile when 'allegation of other facts consistent  
19 with the challenged pleading could not possibly cure the  
20 deficiency.'" Van Zandt v. Mbunda (In re Mbunda), 484 B.R. 344,  
21 356 (9th Cir. BAP 2012), aff'd, 604 F. App'x 552 (9th Cir. 2015)  
22 (quoting Albrecht, 845 F.2d at 195).

23 The Ninth Circuit has cautioned that "[d]ismissal without  
24 leave to amend is improper unless it is clear, upon de novo  
25 review, that the complaint could not be saved by any amendment."  
26 Intri-Plex Techs., Inc. v. Crest Group, Inc., 499 F.3d 1048, 1056  
27 (9th Cir. 2007) (quoting Sparling v. Daou (In re Daou Sys.,  
28 Inc.), 411 F.3d 1006, 1013 (9th Cir. 2005)).

1           **1. The bankruptcy court erroneously denied leave to amend**  
2           **based on the insufficiency of the original complaint.**

3           The court abused its discretion by not allowing Mr. Szanto  
4 to amend his complaint. The court apparently denied leave to  
5 amend because it thought the complaint was very far from meeting  
6 the Twombly and Iqbal standards. This was an error. When  
7 deciding whether to grant leave to amend, the degree of  
8 insufficiency of the original complaint is irrelevant. Rather,  
9 the primary question is whether the plaintiff **could** file an  
10 adequate complaint.

11           Further, in its ruling on the Motion to Dismiss, the court  
12 did not rely on any of the Foman factors in its decision to deny  
13 leave to amend. Thus, the court applied the incorrect legal  
14 standard.

15           **2. The court erred in determining that any amendment would**  
16           **be futile.**

17           In ruling on the Motion for Reconsideration, the court  
18 properly identified the Foman factors, but held that futility of  
19 amendment justified denying leave to amend under Civil  
20 Rule 15(a). It said that, because Mr. Szanto did not offer any  
21 amendments to his complaint that would cure the deficiency,  
22 "granting leave to plaintiff to file an amended complaint would  
23 be an exercise in futility in the complete absence of any showing  
24 by plaintiff he has a factual basis upon which a claim against  
25 defendants can be stated."

26           The record does not support the view that amendment would be  
27 futile. For example, the court pointed out that Mr. Szanto did  
28 not identify the "assets" referenced in the complaint; however,

1 Mr. Szanto said that the "assets" at issue are those listed in  
2 his Schedule B.<sup>4</sup> Mr. Szanto could solve that problem simply by  
3 identifying and adequately describing those assets in his amended  
4 complaint. Similarly, the court faulted Mr. Szanto for not  
5 referencing the trusts at issue; in his Motion for  
6 Reconsideration, he identified the three trusts. Mr. Szanto  
7 could incorporate this information in an amended complaint. In  
8 other words, it is not apparent to us "that the complaint could  
9 not be saved by any amendment." See Intri-Plex Techs., Inc.,  
10 499 F.3d at 1056; see also In re Tracht Gut, LLC, 503 B.R. at  
11 814; cf. In re Mbunda, 484 B.R. at 356-57 (concluding that  
12 amendment would be futile because the appellant conceded he could  
13 not present additional facts).

14 The court faulted Mr. Szanto for not describing the  
15 amendments he would make to the complaint. But this puts the  
16 cart before the horse. A plaintiff does not have to file an  
17 amended complaint, or say what an amended complaint would allege,  
18 until after the court has dismissed the original complaint. The  
19 court cannot deny leave to amend because the plaintiff has failed  
20 to describe the proposed amendments, as long as there is reason  
21 to believe that the plaintiff could construct a viable complaint.

22 **C. The bankruptcy court properly declined to retain**  
23 **jurisdiction over the adversary proceeding, so its error in**  
**refusing to grant leave to amend is harmless.**

24 Even though the court erred in denying Mr. Szanto leave to  
25 amend, such error was harmless. The bankruptcy court dismissed  
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28 <sup>4</sup> Schedule B generally identifies a "[f]amily trust  
entitlement" valued at \$3,200,000.

1 the underlying bankruptcy case. It subsequently determined that  
2 it would not exercise jurisdiction over the adversary complaint.  
3 Mr. Szanto did not appeal this decision or otherwise address it  
4 in his appellate briefs, and we find no error.

5 We follow the Ninth Circuit's four-part test set forth in  
6 Carraher to determine whether a court should retain jurisdiction  
7 over an adversary proceeding after the underlying bankruptcy case  
8 has been dismissed. The Ninth Circuit stated:

9 In considering what standards govern the  
10 bankruptcy court's discretion in determining whether to  
11 retain a related case after dismissal of the underlying  
12 bankruptcy case, we, like other courts, turn for  
13 guidance to cases considering the authority of federal  
14 district courts to retain pendent state claims after  
15 the federal claims have been dismissed. The Supreme  
16 Court has held that where a federal district court  
17 dismisses federal claims, **the court must consider**  
18 **economy, convenience, fairness and comity** in deciding  
19 whether to retain jurisdiction over pendent state  
20 claims.

21 In re Carraher, 971 F.2d at 328 (emphasis added) (internal  
22 citations omitted); see also Linkway Investment Co., Inc. v.  
23 Olsen (In re Casamont Investors, Ltd.), 196 B.R. 517, 523 (9th  
24 Cir. BAP 1996) ("retention of jurisdiction was found to have been  
25 **improper** when the initiation of the dispute was recent, no action  
26 had been taken prior to the dismissal and the dispute concerned  
27 issues of probate law, in which the state courts had more  
28 expertise" (emphasis in original)); Zegzula v. JPMorgan Chase  
Bank, N.A. (In re Zegzula), BAP No. WW-14-1119-JuKiF, 2015 WL  
5786572 (9th Cir. BAP Oct. 2, 2015) (holding that the bankruptcy  
court did not abuse its discretion in declining to retain  
jurisdiction over the adversary proceeding when it had previously  
dismissed the underlying bankruptcy case and found that

1 considerations of judicial economy and fairness did not support  
2 the court's retention of jurisdiction over the adversary  
3 proceeding).

4 Mr. Szanto's opening brief fails to discuss the bankruptcy  
5 court's decision not to retain jurisdiction of the adversary  
6 proceeding. Nor did he address this issue in his reply brief,  
7 even when specifically argued by Appellees in their answering  
8 brief. We thus deem this issue waived for the purposes of  
9 appeal.<sup>5</sup> See Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999)  
10 ("on appeal, arguments not raised by a party in his opening brief  
11 are deemed waived").

12 Even if Mr. Szanto had not waived the issue, we would  
13 conclude that the bankruptcy court did not err in dismissing the  
14 adversary proceeding. The bankruptcy court properly identified  
15 the Carraher test as the correct legal standard and applied that  
16 test to the facts of the case. We find no error in the court's  
17 conclusions.

18 First, judicial economy does not favor retention of the  
19 adversary proceeding. As the bankruptcy court properly noted,  
20 the adversary proceeding had not progressed beyond the initial  
21 pleading stage. Although the case had been pending for nearly  
22 two years, the delay was largely caused by Mr. Szanto and his  
23 failures to appear at the hearings on his Motion for

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25 <sup>5</sup> At oral argument, the Panel questioned Mr. Szanto about  
26 the effect of the dismissal of the underlying bankruptcy case.  
27 Mr. Szanto failed to provide any substantive answer (or explain  
28 why he did not raise that issue in this appeal) and only stated  
that, because the dismissal order is currently on appeal to the  
Ninth Circuit, the effect "remains to be seen" as he is "charting  
new law."

1 Reconsideration. Moreover, the issues raised by the adversary  
2 complaint are state law issues that can be resolved expeditiously  
3 in state court. See In re Carraher, 196 B.R. at 524. As such,  
4 judicial economy does not support retention of the adversary  
5 proceeding.

6 Second, none of the parties would be inconvenienced by the  
7 dismissal of the case. The bankruptcy court stated that there is  
8 ongoing litigation in California state court, which could  
9 potentially involve the present parties, most of whom are  
10 California residents.<sup>6</sup> See id.

11 Third, it would not be unfair to require Mr. Szanto to  
12 assert his claims in state court. Mr. Szanto fails to explain  
13 why he could not assert his state law claims in state court.<sup>7</sup>

14 Finally, comity favors refusing jurisdiction over the  
15 adversary complaint. We agree with the bankruptcy court that the  
16 fraud-based claims are grounded in state law and should be  
17 decided in state court.

18 Therefore, the bankruptcy court did not err in refusing to  
19 retain jurisdiction over the adversary proceeding after the  
20 underlying bankruptcy case had been dismissed.

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22 <sup>6</sup> Mr. Szanto says that, if his complaint is dismissed, the  
23 statute of limitations would bar his claims. He offers no  
24 explanation for this statement, so we cannot say that the  
25 bankruptcy court's refusal to retain jurisdiction would be unfair  
to him.

26 <sup>7</sup> At oral argument, Mr. Szanto stated that he cannot present  
27 his claims in the California state courts because he has been  
28 declared a vexatious litigant in California. The fact that a  
party apparently has abused the state court system does not  
require the federal courts to hold their doors open.

1 **CONCLUSION**

2 The bankruptcy court abused its discretion in dismissing the  
3 complaint without leave to amend. However, the bankruptcy court  
4 has dismissed the underlying bankruptcy case, and Mr. Szanto has  
5 not appealed the court's decision to decline to exercise  
6 jurisdiction over the adversary proceeding. Moreover, the court  
7 correctly declined jurisdiction under the Carraher analysis.  
8 Accordingly, the bankruptcy court's error was harmless, and we  
9 AFFIRM.

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