

JUN 26 2017

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-16-1379-KuFTa
	)		
MARDIROS HAIG MIHRANIAN,	)	Bk. No.	2:13-bk-39026-BR
	)		
Debtor.	)	Adv. No.	2:15-ap-01666-BR
	)		
_____	)		
SAM S. LESLIE, Chapter 7	)		
Trustee,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
MICHAEL MIHRANIAN,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on May 18, 2017  
at Pasadena, California

Filed - June 26, 2017

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

Honorable Barry Russell, Bankruptcy Judge, Presiding

Appearances: Robert Michael Aronson, on brief, for appellant;  
David B. Golubchik of Levene, Neale, Bender, Yoo &  
Brill LLP argued for appellee.

Before: KURTZ, FARIS and TAYLOR, Bankruptcy Judges.

\_\_\_\_\_  
\*This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8024-1.

1 **INTRODUCTION**

2 Chapter 7<sup>1</sup> trustee Sam S. Leslie appeals from an order  
3 dismissing with prejudice his third amended fraudulent transfer  
4 complaint against Michael Mihranian - one of the debtor's sons.

5 The central issue in this appeal is whether Leslie  
6 adequately alleged that the debtor Mardiros Haig Mihranian had an  
7 interest in the funds allegedly transferred to his son Michael.  
8 Unless Leslie alleged sufficient facts that, when taken as true,  
9 plausibly demonstrated Mihranian's interest in the transferred  
10 funds, Leslie failed to state a claim for relief under either  
11 § 544 or § 548.

12 We agree with the bankruptcy court that Leslie did not  
13 allege sufficient facts regarding Mihranian's interest in those  
14 funds. The general "story" in Leslie's complaint informs us that  
15 Mihranian (and his now ex-wife Susan) diverted funds from  
16 Mihranian's wholly-owned incorporated medical practice to the  
17 defendants. Leslie has never posited - in the bankruptcy court  
18 or on appeal - any viable legal theory why funds diverted from  
19 Mihranian's incorporated medical practice plausibly could be  
20 identified as belonging to him as opposed to his corporation.

21 We also agree with the bankruptcy court's decision to  
22 dismiss the third amended complaint with prejudice. In total,  
23 Leslie availed himself of four attempts - four opportunities - to  
24 state adequate fraudulent transfer claims. In addition, Leslie

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25  
26 <sup>1</sup>Unless specified otherwise, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
28 all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037. All "Civil Rule" references are to  
the Federal Rules of Civil Procedure.

1 has admitted that he conducted extensive pre-adversary-proceeding  
2 discovery under Rule 2004, which discovery included both  
3 depositions and document requests, and has not disputed that he  
4 hired professionals who (among other things) were assigned the  
5 task of identifying the source of transferred funds. Yet, in all  
6 of the versions of his complaint, Leslie never stated a coherent  
7 set of facts plausibly identifying Mihranian's pre-transfer  
8 interest in the alleged fraudulently transferred funds. Under  
9 these circumstances, the bankruptcy court did not err in  
10 concluding that Leslie could not or would not plausibly identify  
11 Mihranian's pre-transfer interest in the subject funds, and thus  
12 the court did not abuse its discretion in dismissing the third  
13 amended complaint without leave to amend.

14 Accordingly, we AFFIRM.

#### 15 **FACTS**

16 Leslie's adversary proceeding initially sought to avoid and  
17 recover alleged fraudulent transfers under federal and California  
18 law based on §§ 544 and 548 and Cal. Civ. Code §§ 3439.04 and  
19 3439.05. This is one of four similarly-pled adversary  
20 proceedings. The bankruptcy court dismissed all four with  
21 prejudice, and all four are on appeal on identical grounds. Each  
22 complaint names a different individual defendant who allegedly  
23 received a different series of fraudulently-transferred funds.

24 The history of complaints and responses informs our  
25 analysis. Leslie filed his first amended complaint against  
26 Michael, without any prompting from the bankruptcy court, within  
27 several weeks of the commencement of the adversary proceeding.  
28 Michael responded to the first amended complaint by filing a

1 Civil Rule 12(b)(6) motion to dismiss. Michael pointed out that  
2 Leslie's fraudulent transfer allegations did little more than  
3 state in conclusory fashion the elements for fraudulent transfer  
4 claims and did nothing to advise Michael of the specific  
5 transactions Leslie claimed constituted fraudulent transfers.

6 The bankruptcy court in large part granted the motion to  
7 dismiss. The bankruptcy court dismissed without prejudice  
8 Leslie's fourth claim for relief seeking an accounting and fifth  
9 claim for relief seeking disallowance of any proof of claim filed  
10 by Michael. The bankruptcy court also dismissed without  
11 prejudice Leslie's first and second claims for relief to the  
12 extent they alleged actual fraudulent transfers. To the extent  
13 the first and second claims for relief alleged constructive  
14 fraudulent transfers, the bankruptcy court's order on the motion  
15 to dismiss merely required more specificity, as follows:

16 On the first and second causes of action in the  
17 Complaint for constructive fraud, the claims shall be  
18 amended to be pled with more specificity, including,  
19 without limitation, the source of the alleged  
transfer(s), the identity of the alleged transferor(s),  
the date(s) of the alleged transfer(s), and the amount  
of the respective transfer(s) . . . .

20 Order re Motion to Dismiss (Apr. 14, 2016) at p. 2. We do not  
21 know the reasons the bankruptcy court offered for its ruling  
22 because neither party provided us with the transcript of the  
23 March 29, 2016 hearing on the motion to dismiss.<sup>2</sup>

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24  
25 <sup>2</sup>Michael's motion did not address Leslie's third claim for  
26 relief seeking to recover the alleged fraudulent transfers for  
27 the benefit of the estate under §§ 550 and 551. Nor did the  
28 bankruptcy court's April 14, 2016 order. On its face, this claim  
for recovery of avoided transfers has no independent effect in  
(continued...)

1 Leslie's second amended complaint contained more detail. It  
2 alleged that Mihranian and his spouse Susan<sup>3</sup> engaged in a scheme  
3 to divert earnings from their shared medical practice to the  
4 various third-party defendants - including Michael - for the  
5 purpose of keeping their earnings away from their judgment  
6 creditors, two of whom are specifically identified in the  
7 complaint.

8 On one hand, the second amended complaint alleged that  
9 Mihranian and Susan practiced medicine through a California  
10 professional medical corporation known as Medical Clinic &  
11 Surgical Specialties of Glendale, Inc. ("MCSSG"). On the other  
12 hand, the complaint perhaps suggested that Mihranian and Susan  
13 sometimes provided medical services on their own account and not  
14 through MCSSG. The second amended complaint did not specify  
15 which funds transferred originally were payments for services  
16 provided through MCSSG and which (if any) were payments for  
17 services provided by the two doctors individually.

18 Instead, the second amended complaint, in conclusory  
19

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20 <sup>2</sup>(...continued)  
21 the absence of a viable claim to avoid the transfers.

22 <sup>3</sup>Michael asserts that Mihranian and Susan separated in 1998,  
23 divorced in 2015, and did not accrue any community property after  
24 the 1998 separation date pursuant to Cal. Fam. Code § 771(a).  
25 Leslie alleged that Mihranian and Susan did not really separate  
26 in 1998, that the couple continued to work together and live  
27 together after 1998, and that the couple only feigned separation  
28 for the purpose of furthering their scheme to keep Mihranian's  
assets away from his creditors. The bankruptcy court ultimately  
ruled that Leslie had alleged sufficient facts challenging the  
purported separation, and Michael did not cross-appeal this  
ruling. We further discuss the issue concerning the couple's  
marital status near the end of this decision.

1 fashion, identified an aggregate amount of money - \$109,700.00 -  
2 that "debtor" allegedly transferred to Michael. It is impossible  
3 to tell from the complaint what portion of this amount originally  
4 was payment for services provided through MCSSG and what portion  
5 of this amount (if any) originally was payment for services  
6 provided by the two doctors individually - or who held these  
7 funds before they allegedly were transferred to Michael.

8 After he received the second amended complaint, Michael  
9 contacted Leslie and urged Leslie to provide more specificity  
10 regarding the alleged fraudulent transfers. Michael pointed out  
11 that the second amended complaint did not specify "the source of  
12 the alleged transfer(s), the identity of the alleged  
13 transferor(s), the date(s) of the alleged transfer(s), and the  
14 amount of the respective transfer(s)" as directed in the  
15 bankruptcy court's April 14, 2016 order. In response, Leslie  
16 filed his third amended complaint.

17 There were only one or two significant differences between  
18 the second amended complaint and the third amended complaint.  
19 Most notably, the third amended complaint added an exhibit  
20 providing some detailed information regarding each of the alleged  
21 fraudulent transfers. The exhibit - Exhibit A - was entitled  
22 "544 Transfers" and itemized in two columns the "Date" of each  
23 alleged transfer and the "Deposit" amount of each alleged  
24 transfer. Exhibit A did not identify the source of each alleged  
25 transfer or the identity of the alleged transferor. Nor is there  
26 any way to tell who provided the services generating these

1 funds.<sup>4</sup>

2 The only other potentially significant change to the third  
3 amended complaint concerned the underlying fraudulent transfer  
4 statutes on which Leslie relied. Leslie no longer attempted to  
5 state a claim for relief against Michael based on § 548.

6 Michael moved to dismiss the third amended complaint.  
7 Michael asserted that the third amended complaint did not satisfy  
8 the specificity requirement of the bankruptcy court's April 14,  
9 2016 order and also did not satisfy the requirements for pleading  
10 claims for relief under Civil Rules 8(a) and 9(b), Ashcroft v.  
11 Iqbal, 556 U.S. 662 (2009), and Bell Atlantic Corp. v. Twombly,  
12 550 U.S. 544 (2007).

13 At the hearing on the motion to dismiss the third amended  
14 complaint, the bankruptcy court primarily focused on one issue.  
15 According to the court, it directed Leslie both at the March 29,  
16 2016 dismissal motion hearing and in its April 14, 2016 order to  
17 specifically identify the transferor of each transfer. The court  
18 explained that it made a big difference whether the source of the  
19 fraudulently transferred funds was Mihranian, his former wife  
20 Susan, MCSSG, or some other person or entity. The following  
21 statement is representative of the court's comments:

22 I was very specific last time we were here. I wanted  
23 you to be specific. Now who actually physically made  
24 the transfer at that moment? Was it the Debtor, was it  
the ex-wife? And that was -- was that -- did you not  
understand that that was the whole purpose of my order?

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25  
26 <sup>4</sup>Michael argued that Exhibit A incorrectly identified the  
27 "deposit" dates instead of the transfer dates, but this argument  
28 reads the Exhibit in an overly narrow manner. In any event, the  
bankruptcy court did not adopt this argument when it dismissed  
Leslie's third amended complaint.

1 Hr'g Tr. (Sept. 27, 2016) 10:24-11:3.

2 Similarly, the court later on made it clear that it was  
3 dismissing the third amended complaint because Leslie did not  
4 provide the specific information regarding who was the  
5 transferor:

6 THE COURT: But the difference is I have ordered you  
7 twice, I think,<sup>5</sup> to be more specific as to the Debtor,  
8 the ex-wife, now ex-wife, the business. I ordered you,  
and you didn't do it. I can't figure out why, but you  
didn't do it.

9 MR. ARONSON: Your Honor, I thought that I complied with  
10 the Court's order.

11 THE COURT: You're a bright guy. Good lord. I can't  
12 imagine that you actually -- if you did, it's tunnel  
vision, and you really should have asked somebody else.

13 I am going to grant the motion. This is, you know, you  
14 -- I made it absolutely clear. You didn't do it. And  
I am going to dismiss it.

15 Hr'g Tr. (Sept. 27, 2016) 30:24-31:11.

16 On October 17, 2016, the bankruptcy court entered its order  
17 dismissing with prejudice Leslie's third amended complaint, and  
18 Leslie timely appealed.

19 **JURISDICTION**

20 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
21 §§ 1334 and 157, and we have jurisdiction under 28 U.S.C. § 158.

22 **ISSUE**

23 Did the bankruptcy court commit reversible error when it  
24 dismissed Leslie's third amended complaint without leave to  
25 amend?

26 \_\_\_\_\_

27 <sup>5</sup>The record reflects that the court only issued one order  
28 requiring Leslie to provide more specific information regarding  
the alleged fraudulent transfers - the April 14, 2016 order.





1 all of his fraudulent transfer claims on the theory that  
2 Mihranian and his then-wife Susan improperly diverted funds from  
3 the couple's shared medical practice. (3rd Am. Compl. at ¶¶ 7,  
4 14, 18.) That is what Leslie said in his third amended  
5 complaint, and that is what Leslie repeatedly said in his opening  
6 appellate brief. (Aplt. Opn. Br. at pp. 10-11, 26-28.) Leslie  
7 has not advanced on appeal any alternate theories or arguments  
8 underlying his fraudulent transfer claims, and we decline to look  
9 beyond what Leslie actually has argued. See Christian Legal  
10 Soc'y v. Wu, 626 F.3d 483, 487-88 (9th Cir. 2010) (declining to  
11 address matters not specifically and distinctly discussed in the  
12 appellant's opening brief); Brownfield v. City of Yakima,  
13 612 F.3d 1140, 1149 n.4 (9th Cir. 2010) (same). With this  
14 limitation on our review in mind, we will turn our attention to  
15 the so-called errors Leslie has attributed to the bankruptcy  
16 court's decision.

17 **A. Civil Rule 8(a) and Civil Rule 9(b) Pleading Requirements**

18 Civil Rule 8(a) requires pleadings to set forth "a short and  
19 plain statement of the claim showing that the pleader is entitled  
20 to relief." A claim is the "aggregate of operative facts which  
21 give rise to a right enforceable in the courts." Bautista v. Los  
22 Angeles Cty., 216 F.3d 837, 840 (9th Cir. 2000) (citing Original  
23 Ballet Russe, Ltd. v. Ballet Theatre, Inc., 133 F.2d 187, 189  
24 (2d Cir. 1943)).

25 As the Supreme Court has explained:

26 a complaint must contain sufficient factual matter,  
27 accepted as true, to state a claim to relief that is  
28 plausible on its face. . . . A claim has facial  
plausibility when the plaintiff pleads factual content  
that allows the court to draw the reasonable inference

1 that the defendant is liable for the misconduct  
2 alleged. . . . Threadbare recitals of the elements of  
3 a cause of action, supported by mere conclusory  
statements, do not suffice.

4 Iqbal, 556 U.S. at 678 (citations and internal quotation marks  
5 omitted). The Ninth Circuit Court of Appeals has observed that  
6 the Supreme Court has not always applied this plausibility  
7 standard consistently. Starr v. Baca, 652 F.3d 1202, 1215-16  
8 (9th Cir. 2011). In light of this perceived inconsistency, the  
9 Ninth Circuit has refined the standard for determining when a  
10 complaint meets the minimum requirements of Civil Rule 8(a),  
11 stating as follows:

12 First, to be entitled to the presumption of truth,  
13 allegations in a complaint or counterclaim may not  
14 simply recite the elements of a cause of action, but  
15 must contain sufficient allegations of underlying facts  
16 to give fair notice and to enable the opposing party to  
17 defend itself effectively. Second, **the factual  
allegations that are taken as true must plausibly  
suggest an entitlement to relief**, such that it is not  
unfair to require the opposing party to be subjected to  
the expense of discovery and continued litigation.

18 Id. at 1216 (emphasis added). Accord Merritt v. Countrywide Fin.  
19 Corp., 759 F.3d 1023, 1032-33 (9th Cir. 2014). At bottom, the  
20 plausibility analysis is context specific and requires the court  
21 to draw upon its experience and common sense. Levitt, 765 F.3d  
22 at 1135.

23 One of the fraudulent transfer elements Leslie needed to  
24 allege was that property of the debtor was transferred to the  
25 defendants. A transfer of the **debtor's** property that otherwise  
26 would have been property of the estate is a prerequisite for a  
27 fraudulent transfer action under § 544. See Geltzer v. Barish  
28 (In re Starr), 502 B.R. 760, 767-68 (Bankr. S.D.N.Y. 2013)

1 (holding that trustee sufficiently alleged debtor's property  
2 interest); Serra v. Salven, 2011 WL 4627576, at \*12 (E.D. Cal.  
3 Oct. 3, 2011) (holding that trustee failed to prove for summary  
4 judgment purposes that debtor had an interest in the property  
5 transferred); see also Wyle v. Rider (In re United Energy Corp.),  
6 944 F.2d 589, 593-94 (9th Cir. 1991) (generally stating property  
7 interest requirement); Greenspan v. Orrick, Herrington &  
8 Sutcliffe LLP (In re Brobeck, Phleger & Harrison LLP), 408 B.R.  
9 318, 337 (Bankr. N.D. Cal. 2009) ("both the 'property' and  
10 'transfer' elements apply whether the claim is one for actual or  
11 constructive fraudulent transfer").

12 Leslie alleged that Mihranian and his then-wife Susan  
13 diverted to third parties payments for medical services they  
14 provided. If the allegedly diverted medical service fees were  
15 owed either to Mihranian or his alleged wife, then Mihranian  
16 transferred his interest in those payments by diverting them.  
17 See In re Brobeck, Phleger & Harrison LLP, 408 B.R. at 338  
18 (holding that debtor law firm's waiver of potential profits from  
19 unfinished legal work constituted a transfer of the law firm's  
20 property within meaning of fraudulent transfer statutes).

21 However, Leslie also alleged that Mihranian and Susan  
22 operated through a shared medical practice - an incorporated  
23 medical practice - MCSSG. There are no facts alleged in the  
24 complaint from which it would be plausible to infer that the fees  
25 for services earned by the medical practice would belong to  
26 either Mihranian or Susan individually; rather, they would be  
27 property of MCSSG. To hold otherwise would ignore the legal  
28 separateness of MCSSG. See generally Sonora Diamond Corp. v.

1 Superior Court, 83 Cal. App. 4th 523, 538 (2000) (“a corporation  
2 is regarded as a legal entity, separate and distinct from its  
3 stockholders, officers and directors, with separate and distinct  
4 liabilities and obligations.”).

5 Leslie argues on appeal that any fees for services owed to  
6 MCSSG actually were owed to Mihranian – MCSSG’s sole owner – and  
7 that he alleged sufficient facts in his third amended complaint  
8 to justify piercing the corporate veil. The bankruptcy court  
9 disagreed with Leslie’s alter ego argument, and this alter ego  
10 argument is the only ground Leslie has advanced in the bankruptcy  
11 court or on appeal to explain why MCSSG’s funds should be treated  
12 as if they were Mihranian’s property.

13 Generally, to pierce the corporate veil, a plaintiff must  
14 allege and prove: (1) “such unity of interest and ownership that  
15 the separate personalities of the corporation and the individual  
16 no longer exist”; and (2) “if the acts are treated as those of  
17 the corporation alone, an inequitable result will follow.”

18 Mesler v. Bragg Mgmt. Co., 39 Cal. 3d 290, 300 (1985). There is  
19 no single set of underlying facts that always must be alleged to  
20 plausibly demonstrate these two criteria; instead, a variety of  
21 case-specific facts must be considered to establish the  
22 principal’s domination and control over the corporation and to  
23 show that immunizing the principal from the corporation’s  
24 liability would work an injustice. Id.; see also Lebastchi v.  
25 Superior Court, 33 Cal. App. 4th 1465, 1470 (1995).

26 Alter ego has been described as “an extreme remedy,  
27 sparingly used,” Sonora Diamond Corp., 83 Cal. App. 4th at 539,  
28 and it is to be imposed “cautiously” and “reluctantly.” Highland

1 Springs Conference & Training Ctr. v. City of Banning, 244 Cal.  
2 App. 4th 267, 281 (2016). More importantly, when imposed, the  
3 separateness of the corporate entity is not disregarded for all  
4 purposes but only for the purpose and under the circumstances of  
5 the case in which it is asserted. Lebastchi, 33 Cal. App. 4th at  
6 1470; see also Mesler, 39 Cal. 3d at 301 ("under certain  
7 circumstances a hole will be drilled in the wall of limited  
8 liability erected by the corporate form; for all purposes other  
9 than that for which the hole was drilled, the wall still  
10 stands").

11 Ordinarily, the alter ego doctrine only is invoked to enable  
12 a plaintiff to impose corporate liability upon the corporation's  
13 principal(s). See Sonora Diamond Corp., 83 Cal. App. 4th at 538.  
14 In fact, at least one California Court of Appeal has held that  
15 California law does not permit "outside reverse piercing of the  
16 corporate veil" - piercing in order to make the corporation's  
17 assets liable for the debts of the individual shareholder(s).  
18 Postal Instant Press, Inc. v. Kaswa Corp. 162 Cal. App. 4th 1510,  
19 1522 (2008). That is precisely what Leslie is attempting to do  
20 here: claim the assets of MCSSG as if they belonged to Mihranian  
21 individually and his bankruptcy estate.

22 Postal Instant Press is carefully reasoned and persuasive.  
23 Moreover, we must follow the law of California's intermediate  
24 appellate courts on this point unless we are convinced that the  
25 California Supreme Court would decide the issue differently.  
26 Goodrich v. Briones (In re Schwarzkopf), 626 F.3d 1032, 1038 (9th  
27 Cir. 2010). We are not persuaded that the California Supreme  
28 Court would decide this issue differently. Thus, allegations of

1 alter ego do not aid Leslie; he cannot establish plausibility  
2 through such allegations. Consistent with this fact, Leslie did  
3 not adequately plead alter ego.

4 As mentioned above, alter ego is the only legal ground  
5 Leslie has advanced to explain why fees for medical services  
6 belonging to MCSSG should have been considered Mihranian's  
7 property for fraudulent transfer purposes. To the extent Leslie  
8 could have advanced other grounds to support this contention,  
9 Leslie abandoned them by not raising them in the bankruptcy court  
10 or on appeal. See, e.g., United Student Aid Funds, Inc. v.  
11 Espinosa, 559 U.S. 260, 270 n.9 (2010) ("We need not settle that  
12 question, however, because the parties did not raise it in the  
13 courts below"); Mayor v. Wolkowitz (In re Cinevision Int'l,  
14 Inc.), 2016 WL 638729, \*7-8 (Mem. Dec.) (9th Cir. BAP Feb. 16,  
15 2016) (declining to consider issue that appellants raised for the  
16 first time in their reply brief on appeal).

17 In short, fees for medical services owed to MCSSG did not  
18 belong to Mihranian - and were not his property - for fraudulent  
19 transfer purposes.

20 Leslie's third amended complaint arguably suggested that, at  
21 least some of the time, Mihranian and Susan accrued earnings on  
22 their own account. But no factual allegations in the third  
23 amended complaint tie these accrued earnings (if any) to the  
24 specific alleged fraudulent transfers identified in the  
25 complaint. The bankruptcy court attempted to explain to Leslie  
26 that the complaint should have identified the alleged source of  
27 all fraudulent transfers. Given the other facts Leslie alleged  
28 regarding the corporate status of Mihranian's and Susan's medical

1 practice, we agree with the bankruptcy court and hold that Leslie  
2 did not state plausible fraudulent transfer claims in the absence  
3 of alleged facts plausibly demonstrating that either Mihranian or  
4 Susan had a property interest in the specific funds allegedly  
5 transferred.

6 In sum, under Civil Rule 8(a), Leslie needed to allege facts  
7 which, if accepted as true, plausibly could have lead to the  
8 following inferences: (1) that **the funds transferred to Michael**  
9 were funds in which Mihranian personally had a property interest  
10 before they were transferred to Michael; and (2) that Mihranian  
11 relinquished to Michael his property interest in those funds by  
12 way of those transfers. Leslie did not allege facts that  
13 plausibly could support these inferences. Accordingly, the third  
14 amended complaint failed to state any viable fraudulent transfer  
15 claims.

16 Meanwhile, Civil Rule 9(b) requires fraud to be pled with  
17 particularity. Under Civil Rule 9(b), the plaintiff's  
18 allegations must include "the who, what, when, where, and how of  
19 the misconduct charged." United States v. United Healthcare  
20 Ins. Co., 848 F.3d 1161, 1180 (9th Cir. 2016) (quoting Ebeid ex  
21 rel. United States v. Lungwitz, 616 F.3d 993, 998 (9th Cir.  
22 2010)).

23 A number of bankruptcy courts have acknowledged that Civil  
24 Rule 9(b) does not apply to constructive fraudulent transfers.  
25 See, e.g., Seror v. Stone (In re Automated Fin. Corp.), 2011 WL  
26 10502417, at \*4-5 (Bankr. C.D. Cal. Jan. 25, 2011); Angell v. Day  
27 (In re Caremerica, Inc.), 415 B.R. 200, 208 (Bankr. E.D.N.C.  
28 2009); Official Comm. of Unsecured Creditors. v. Am. Tower Corp.



1 (In re Verestar, Inc.), 343 B.R. 444, 459-60 (Bankr. S.D.N.Y.  
2 2006)); see also Sunnyside Dev. Co. LLC v. Cambridge Display  
3 Tech. Ltd., 2008 WL 4450328, at \*8-9 (N.D. Cal. Sept. 29,  
4 2008) (district court ruling holding same). These same decisions  
5 hold, however, that Civil Rule 9(b) applies to actual fraudulent  
6 transfers because such claims sound in fraud. We question  
7 whether all actual fraudulent transfer claims sound in fraud,  
8 because the controlling fraudulent transfer statutes state in the  
9 disjunctive that an actual fraudulent transfer occurs when the  
10 debtor makes a transfer with the actual intent to hinder, delay  
11 **or** defraud. See § 548(a)(1)(A); Cal. Civ. Code § 3439.04; see  
12 also Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 232 (9th  
13 Cir. BAP 2007), aff'd in part and adopted, 551 F.3d 1092 (9th  
14 Cir. 2008). We do not see why harboring an intent to hinder or  
15 delay your creditors would sound in fraud.

16 That being said, it is unnecessary for us to resolve the  
17 issue of when, if ever, Civil Rule 9(b) should be applied to  
18 actual fraudulent transfer claims. As a practical matter, under  
19 the circumstances of this particular case, what Civil Rule 8(a)  
20 requires and what Civil Rule 9(b) would require largely overlap.  
21 Put another way, in this instance, the Civil Rule 8(a) standard  
22 articulated in Merritt, 759 F.3d at 1033, and the Civil Rule 9(b)  
23 standard articulated in United Healthcare Insurance Co., 848 F.3d  
24 at 1180, lead to similar pleading requirements.

25 In any event, we already have held that none of the  
26 fraudulent transfer claims satisfy the Civil Rule 8(a) standard.  
27 Thus, it is unnecessary to determine here whether Civil Rule 9(b)  
28 also applies and has been satisfied.

1 **B. The Bankruptcy Court's Requirement That Leslie Plead His**  
2 **Fraudulent Transfer Claims With Greater Specificity**

3 Leslie's next contention concerns the bankruptcy court's  
4 April 14, 2016 order and its direction that Leslie must re-plead  
5 his constructive fraudulent transfer claims with more  
6 specificity, "including, without limitation, the source of the  
7 alleged transfer(s), the identity of the alleged transferor(s),  
8 the date(s) of the alleged transfer(s), and the amount of the  
9 respective transfer(s)."

10 The April 14, 2016 order only stated this requirement as to  
11 the constructive fraudulent transfer claims. Even so, when the  
12 order is read in conjunction with the court's comments at the  
13 final hearing, it becomes reasonably clear that, when the court's  
14 April 14, 2016 order dismissed without prejudice Leslie's actual  
15 fraudulent transfer claims, the court expected any re-pleading of  
16 the actual fraudulent transfer claims to include at least the  
17 same level of specificity as the constructive fraudulent transfer  
18 claims. Neither party has suggested any other interpretation of  
19 the court's April 14, 2016 order, nor has Leslie argued that he  
20 did not realize that the bankruptcy court's specificity  
21 requirement applied to both the actual fraudulent transfer claims  
22 and the constructive fraudulent transfer claims.

23 As we have already explained, the third amended complaint  
24 did not allege sufficient facts to support a plausible inference  
25 that Mihranian transferred any of his own property interests to  
26 Michael. The bankruptcy court's required statement of transfers  
27 identifying (among other things) the source of each transfer  
28 reasonably was aimed at rectifying this deficiency. Typically,

1 identifying the source of the transfer(s) and the identity of the  
2 transferor(s) would provide facts from which a court plausibly  
3 could infer whether the debtor held a property interest in funds  
4 before their transfer. See, e.g., In re Geltzer, 502 B.R. at  
5 767-68; In re Caremerica, Inc., 415 B.R. at 208.

6 We acknowledge that Leslie might have employed other methods  
7 besides the bankruptcy court's specificity requirement to satisfy  
8 the pleading requirements of Civil Rule 8(a) for purposes of  
9 alleging Mihranian's interest in the alleged fraudulently  
10 transferred funds. Even so, Leslie did not in fact plausibly  
11 allege Mihranian's interest in the transferred funds in any way,  
12 and the bankruptcy court's specificity requirement reasonably was  
13 aimed at rectifying this deficiency in Leslie's pleading.

14 Therefore, we conclude that the bankruptcy court did not commit  
15 reversible err when it imposed the specificity requirement on  
16 Leslie in the April 14, 2016 order.

### 17 **C. Dismissal Without Leave To Amend**

18 Leslie also contends on appeal that the bankruptcy court  
19 should have granted him leave to amend his complaint. Generally  
20 speaking, courts should not deny leave to amend unless the court  
21 determines that amendment would be futile. See Ebner v. Fresh,  
22 Inc., 838 F.3d 958, 963 (9th Cir. 2016); Lacey v. Maricopa Cty.,  
23 693 F.3d 896, 926 (9th Cir. 2012) (en banc).<sup>7</sup>

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24  
25 <sup>7</sup>To be clear, different standards (other than futility)  
26 apply when the bankruptcy court dismisses with prejudice an  
27 adversary proceeding as a sanction based on plaintiff's  
28 noncompliant or dilatory conduct. See generally Lee v.  
Roessler-Lobert (In re Roessler-Lobert), 567 B.R. 560, 568-73  
(continued...)

1 That being said, the trial court has broad discretion in  
2 deciding whether to grant leave to amend, especially when (as  
3 here) the plaintiff already has been given multiple opportunities  
4 to amend its complaint. See Gonzalez, 759 F.3d at 1116 (citing  
5 Miller v. Yokohama Tire Corp., 358 F.3d 616, 622 (9th Cir.  
6 2004)).

7 Gonzalez is instructive. There, the Ninth Circuit Court of  
8 Appeals affirmed the district court's dismissal of Gonzalez's  
9 third amended complaint without leave to amend. Id. In the  
10 process of holding that the district court did not abuse its  
11 discretion in denying leave to amend, the Court of Appeals relied  
12 on two things: (1) Gonzalez's failed multiple attempts to state  
13 viable claims for relief; and (2) the fact that certain  
14 attachments to Gonzalez's complaint "defeated the plausibility of  
15 his allegations." Id.

16 Similarly, here, Leslie's focus in his complaint on the  
17 alleged diversion of funds from an incorporated medical practice  
18 undermined the plausibility of his allegations that Mihranian had  
19 a property interest in the allegedly fraudulently transferred  
20 funds.

21 Furthermore, Leslie, like Gonzalez, had a history of  
22 multiple failed attempts to state viable claims for relief.  
23 Leslie's third amended complaint was his fourth attempt to state  
24 his fraudulent transfer claims. Leslie has not disputed that he

25 \_\_\_\_\_  
26 <sup>7</sup>(...continued)  
27 (9th Cir. BAP 2017) (describing other standards). Here, however,  
28 Michael did not request dismissal of Leslie's complaint as a  
sanction, nor did the bankruptcy court consider sanctions as a  
ground for dismissal without leave to amend.

1 filed his first amended complaint and his third amended complaint  
2 after discussions with the defendants regarding the insufficiency  
3 of his fraudulent transfer allegations. Additionally, the  
4 bankruptcy court reviewed two of Leslie's four complaints, and  
5 the court correctly determined that neither stated plausible  
6 fraudulent transfer claims. After the first of the bankruptcy  
7 court's two reviews, the court ordered Leslie to allege more  
8 specific facts regarding the subject transfers, which order  
9 reasonably was aimed at identifying whether Mihranian plausibly  
10 had an interest in the alleged fraudulently transferred funds.  
11 Nonetheless, Leslie did not comply with the court's order, nor  
12 did Leslie otherwise adequately address the court's concern  
13 regarding identification of Mihranian's interest in the  
14 transferred funds.

15 Leslie's failure to do so is particularly inexplicable here  
16 because he admitted to conducting extensive pre-litigation  
17 discovery in the form of Rule 2004 examinations - consisting of  
18 both depositions and voluminous document production requests -  
19 focusing on the transfers in question. Nor has Leslie disputed  
20 Michael's assertion that Leslie hired professionals who (among  
21 other things) were assigned the task of identifying the source of  
22 the transferred funds. Simply put, this is not a situation where  
23 the plaintiff lacked an opportunity to obtain sufficient  
24 information to plead his claims with more specificity.

25 Under these circumstances, the bankruptcy court did not err  
26 when it determined that Leslie either could not or would not  
27 plausibly allege Mihranian's interest in the transferred funds.  
28 Accordingly, dismissal without leave to amend was not an abuse of

1 discretion.

2 **D. Other Issues: Community Property, Statute of Limitations**  
3 **and Request to Supplement The Record**

4 There are a few additional issues we should address. First,  
5 Michael claims that Leslie did not sufficiently allege  
6 Mihranian's community interest in any funds Susan received on  
7 account of medical services Susan provided on her own account.  
8 To the extent Mihranian had a community interest in funds in  
9 which Susan held a right to payment, the receipt of those funds  
10 by Michael could have constituted a transfer of the debtor's  
11 interest in property for fraudulent transfer purposes. See  
12 In re Beverly, 374 B.R. at 233.

13 Ultimately, the bankruptcy court seemed to decide this issue  
14 in favor of Leslie, and Michael did not cross-appeal from this  
15 ruling. Regardless, under California law, whether Mihranian and  
16 Susan actually were separated in and after 1998 as Michael claims  
17 was a question of fact necessary to determine whether and when  
18 they ceased to accrue community property under Cal. Fam. Code  
19 § 771(a). See In re Marriage of Manfer, 144 Cal. App. 4th 925,  
20 930 (2006). Leslie effectively alleged that Mihranian and Susan  
21 continued to work together, that they continued to live together  
22 in the same residence, and that neither intended a permanent and  
23 final cessation of their marriage; rather, according to Leslie,  
24 the couple feigned separation in 1998 as part of a scheme to keep  
25 Mihranian's assets away from his creditors. These facts were  
26 sufficient to allege that Mihranian and Susan were not, in fact,  
27 separated and continued to accrue community property in and after  
28 1998. See generally id.

1 Even so, under the circumstances of this appeal, the issue  
2 of whether the fees for services were Susan's property or  
3 Mihranian's property largely is a red herring. The more  
4 important questions - questions that Leslie never answered -  
5 were: (1) why funds allegedly diverted from the couple's shared  
6 medical practice were property of the debtor as opposed to  
7 property of MCSSG; and (2) how the so-called sham separation  
8 advanced Mihranian's and Susan's diversion scheme when Leslie's  
9 complaint indicated that **both** Mihranian and Susan were judgment  
10 debtors to one or more of the judgment creditors named in  
11 Leslie's complaint.

12 Another issue we should address concerns the statute of  
13 limitations applicable to actual fraudulent transfers under  
14 California law. The applicable statute provides in relevant  
15 part:

16 (a) Under paragraph (1) of subdivision (a) of  
17 Section 3439.04, not later than four years after the  
18 transfer was made or the obligation was incurred or, if  
19 later, not later than **one year after the transfer or  
obligation was or could reasonably have been discovered  
by the claimant.**

20 Cal. Civ. Code § 3439.09(a) (emphasis added).

21 The bankruptcy court opined that, to the extent Leslie  
22 sought to avail himself of § 3439.09(a)'s "discovery rule,"  
23 Leslie should have alleged that the fraudulent nature of the  
24 transfers reasonably could not have been discovered earlier.

25 Leslie's opening appeal brief does not mention let alone  
26 address the statute of limitations issue. On this basis alone,  
27 we could decline to address this issue. Christian Legal Soc'y,  
28 626 F.3d at 487-88; Brownfield, 612 F.3d at 1149 n.4.

1 In any event, for purposes of this appeal, suffice it to say  
2 that Leslie could not have properly invoked this discovery rule  
3 unless he alleged facts plausibly tending to demonstrate that the  
4 fraudulent nature of the transfers was not discovered earlier and  
5 reasonably could not have been discovered earlier. See Denholm  
6 v. Houghton Mifflin Co., 912 F.2d 357, 362 (9th Cir. 1990); Sun  
7 'n Sand, Inc. v. United Cal. Bank, 21 Cal. 3d 671, 701-02 (1978);  
8 see also Ezra v. Seror (In re Ezra), 537 B.R. 924, 933 (9th Cir.  
9 BAP 2015) (“the one-year period under Cal. Civ. Code  
10 § 3439.09(a)’s discovery rule does not commence until the  
11 plaintiff has reason to discover the fraudulent nature of the  
12 transfer.”)

13 The final issue we should address concerns Michael’s request  
14 to supplement the record on appeal. In this request, Michael  
15 asked us to consider on appeal documents that were not part of  
16 this adversary proceeding but rather were part of Leslie’s  
17 contemporaneous motion to substantively consolidate Mihranian’s  
18 bankruptcy estate with MCSSG and the four fraudulent transfer  
19 defendants. Even if we were to assume that these materials were  
20 sufficiently “before” the bankruptcy court to be considered part  
21 of the adversary proceeding record (which they were not),  
22 consideration of their contents as evidence for purposes of  
23 resolving Michael’s Civil Rule 12(b)(6) dismissal motion likely  
24 would have converted the defendants’ dismissal motion into a  
25 summary judgment motion. See Civil Rule 12(d). We decline on  
26 appeal to consider materials that would have converted this  
27 matter into a summary judgment proceeding when the bankruptcy  
28 court did not do so.



