

JUN 26 2017

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NOT FOR PUBLICATION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

In re:	)	BAP No.	CC-16-1380-KuFTa
	)		
MARDIROS HAIG MIHRANIAN,	)	Bk. No.	2:13-bk-39026-BR
	)		
Debtor.	)	Adv. No.	2:15-ap-01667-BR
	)		
_____	)		
SAM S. LESLIE, Chapter 7	)		
Trustee,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
SUSAN CHOBANIAN,	)		
	)		
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 Susan Chobanian - debtor's former wife and a  
5 medical doctor with whom the debtor shared a medical practice.

6 The central issue in this appeal is whether Leslie  
7 adequately alleged that the debtor Mardiros Haig Mihranian had an  
8 interest in the funds allegedly transferred to Susan. Unless  
9 Leslie alleged sufficient facts that, when taken as true,  
10 plausibly demonstrated Mihranian's interest in the transferred  
11 funds, Leslie failed to state a claim for relief under either  
12 § 544 or § 548.

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

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

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

15 Accordingly, we AFFIRM.

#### 16 **FACTS**

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

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

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

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

17 On the first and second causes of action in the  
18 Complaint for constructive fraud, the claims shall be  
19 amended to be pled with more specificity, including,  
20 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) . . . .

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

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25  
26 <sup>2</sup>Susan's motion did not address Leslie's third claim for  
27 relief seeking to recover the alleged fraudulent transfers for  
28 the benefit of the estate under §§ 550 and 551. Nor did the  
bankruptcy court's April 14, 2016 order. On its face, this claim  
(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 Susan - 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.

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19 <sup>2</sup>(...continued)  
20 for recovery of avoided transfers has no independent effect in  
21 the absence of a viable claim to avoid the transfers.

22 <sup>3</sup>Susan asserts that she and Mihranian 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 Susan did not cross-appeal this ruling.  
We further discuss the issue concerning the couple's marital  
status near the end of this decision.

1           The second amended complaint then sets forth several  
2 paragraphs of allegations stating that some \$2 million in  
3 payments for the two doctors' medical services were shuttled back  
4 and forth between Susan and Haig Leo Mihranian - one of her sons.  
5 However, none of these allegations clarify who held the medical  
6 service payments before Susan began shuttling them back and  
7 forth, nor do they clarify who "owned" the right to the payments  
8 at the time the medical services were paid for.

9           The second amended complaint then, in conclusory fashion,  
10 identifies the \$2 million as money "debtor" allegedly transferred  
11 to Susan. But it is impossible to tell from the complaint what  
12 portion of this amount originally was payment for services  
13 provided through MCSSG and what portion of this amount (if any)  
14 originally was payment for services provided by the two doctors  
15 individually - or who held these funds before they allegedly were  
16 transferred to Susan.

17           After she received the second amended complaint, Susan  
18 contacted Leslie and urged Leslie to provide more specificity  
19 regarding the alleged fraudulent transfers. Susan pointed out  
20 that the second amended complaint did not specify "the source of  
21 the alleged transfer(s), the identity of the alleged  
22 transferor(s), the date(s) of the alleged transfer(s), and the  
23 amount of the respective transfer(s)" as directed in the  
24 bankruptcy court's April 14, 2016 order. In response, Leslie  
25 filed his third amended complaint.

26           There were only two significant differences between the  
27 second amended complaint and the third amended complaint. Most  
28 notably, the third amended complaint added two exhibits providing

1 some detailed information regarding each of the alleged  
2 fraudulent transfers. Exhibit A was entitled "Detail Of 544  
3 Transfers" and itemized in two columns the "Date" of each alleged  
4 transfer and the "Deposit" amount of each alleged transfer.  
5 Exhibit A did not identify the source of each alleged transfer or  
6 the identity of the alleged transferor. Nor is there any way to  
7 tell who provided the services generating these funds.  
8 Furthermore, Leslie's third amended complaint never explained the  
9 relationship or connection (if any) between the \$319,981.58 in  
10 transfers identified in Exhibit A and the \$2 million in funds  
11 allegedly shuttled back and forth between Susan and her son Haig.

12 Exhibit B was entitled "Detail Of 548 Transfers" and set  
13 forth specific information regarding dates and deposit amounts in  
14 the same format as Exhibit A.<sup>4</sup>

15 The other significant change between the second amended  
16 complaint and the third amended complaint concerned the aggregate  
17 amount of fraudulent transfers alleged. Whereas the second  
18 amended complaint alleged an aggregate amount of roughly  
19 \$2 million in alleged fraudulent transfers to Susan, the third  
20 amended complaint only alleged an aggregate amount of  
21 \$319,981.58 in such transfers.

22 Susan moved to dismiss the third amended complaint. Susan  
23 asserted that the third amended complaint did not satisfy the  
24 specificity requirement of the bankruptcy court's April 14, 2016

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25  
26 <sup>4</sup>Susan argued that Exhibits A and B incorrectly identified  
27 the "deposit" dates instead of the transfer dates, but this  
28 argument reads the Exhibits 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 order and also did not satisfy the requirements for pleading  
2 claims for relief under Civil Rules 8(a) and 9(b), Ashcroft v.  
3 Iqbal, 556 U.S. 662 (2009), and Bell Atlantic Corp. v. Twombly,  
4 550 U.S. 544 (2007).

5 At the hearing on the motion to dismiss the third amended  
6 complaint, the bankruptcy court primarily focused on one issue.  
7 According to the court, it directed Leslie both at the March 29,  
8 2016 dismissal motion hearing and in its April 14, 2016 order to  
9 specifically identify the transferor of each transfer. The court  
10 explained that it made a big difference whether the source of the  
11 fraudulently transferred funds was Mihranian, his former wife  
12 Susan, MCSSG, or some other person or entity. The following  
13 statement is representative of the court's comments:

14 I was very specific last time we were here. I wanted  
15 you to be specific. Now who actually physically made  
16 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?

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

18 Similarly, the court later on made it clear that it was  
19 dismissing the third amended complaint because Leslie did not  
20 provide the specific information regarding who was the  
21 transferor:

22 THE COURT: But the difference is I have ordered you  
23 twice, I think,<sup>5</sup> to be more specific as to the Debtor,  
24 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.

25 MR. ARONSON: Your Honor, I thought that I complied with

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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 the Court's order.

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

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

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

7 On October 14, 2016, the bankruptcy court entered its order  
8 dismissing with prejudice Leslie's third amended complaint, and  
9 Leslie timely appealed.

#### 10 JURISDICTION

11 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
12 §§ 1334 and 157, and we have jurisdiction under 28 U.S.C. § 158.

#### 13 ISSUE

14 Did the bankruptcy court commit reversible error when it  
15 dismissed Leslie's third amended complaint without leave to  
16 amend?

#### 17 STANDARDS OF REVIEW

18 We review de novo orders dismissing complaints for failure  
19 to state a claim. See Levitt v. Yelp! Inc., 765 F.3d 1123, 1126  
20 (9th Cir. 2014).

21 Denial of leave to amend is reviewed for an abuse of  
22 discretion. See Gonzalez v. Planned Parenthood of L.A., 759 F.3d  
23 1112, 1114 (9th Cir. 2014).

24 The bankruptcy court abuses its discretion if it applies an  
25 incorrect legal standard or its findings of fact are clearly  
26 erroneous. Fear v. U.S. Tr. (In re Ruiz), 541 B.R. 892, 896 (9th  
27 Cir. BAP 2015).

1 **DISCUSSION**

2 Leslie contends that the bankruptcy court erred in several  
3 different ways when it dismissed his third amended complaint with  
4 prejudice. Leslie asserts that the bankruptcy court erroneously  
5 determined that the third amended complaint did not satisfy the  
6 requirements of Civil Rules 8(a) and 9(b). Leslie further  
7 maintains that the bankruptcy court erroneously required greater  
8 specificity regarding each of the alleged fraudulent transfers  
9 than either of those Civil Rules require. Leslie also contends  
10 that the bankruptcy court erroneously denied him leave to amend.  
11 We will address each of these asserted errors in turn.<sup>6</sup>

12 As a threshold matter, it is important to note Leslie based  
13 all of his fraudulent transfer claims on the theory that  
14 Mihranian and his then-wife Susan improperly diverted funds from  
15 the couple's shared medical practice. (3rd Am. Compl. at ¶¶ 7,  
16 14, 18.) That is what Leslie said in his third amended  
17 complaint, and that is what Leslie repeatedly said in his opening  
18 appellate brief. (Aplt. Opn. Br. at pp. 10-11, 26-28.) Leslie  
19 has not advanced on appeal any alternate theories or arguments  
20 underlying his fraudulent transfer claims, and we decline to look  
21 beyond what Leslie actually has argued. See Christian Legal  
22 Soc'y v. Wu, 626 F.3d 483, 487-88 (9th Cir. 2010) (declining to  
23 address matters not specifically and distinctly discussed in the

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24  
25 <sup>6</sup>In his opening appellate brief, Leslie purported to  
26 identify an additional argument challenging the bankruptcy  
27 court's decision: that the bankruptcy erred in determining that  
28 his third amended complaint did not satisfy the bankruptcy  
court's heightened specificity requirements. Our discussion of  
the first two arguments set forth above addresses and disposes of  
this additional argument.

1 appellant's opening brief); Brownfield v. City of Yakima,  
2 612 F.3d 1140, 1149 n.4 (9th Cir. 2010) (same). With this  
3 limitation on our review in mind, we will turn our attention to  
4 the so-called errors Leslie has attributed to the bankruptcy  
5 court's decision.

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

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

14 As the Supreme Court has explained:

15 a complaint must contain sufficient factual matter,  
16 accepted as true, to state a claim to relief that is  
17 plausible on its face. . . . A claim has facial  
18 plausibility when the plaintiff pleads factual content  
19 that allows the court to draw the reasonable inference  
20 that the defendant is liable for the misconduct  
21 alleged. . . . Threadbare recitals of the elements of  
22 a cause of action, supported by mere conclusory  
23 statements, do not suffice.

24 Iqbal, 556 U.S. at 678 (citations and internal quotation marks  
25 omitted). The Ninth Circuit Court of Appeals has observed that  
26 the Supreme Court has not always applied this plausibility  
27 standard consistently. Starr v. Baca, 652 F.3d 1202, 1215-16  
28 (9th Cir. 2011). In light of this perceived inconsistency, the  
Ninth Circuit has refined the standard for determining when a  
complaint meets the minimum requirements of Civil Rule 8(a),  
stating as follows:

First, to be entitled to the presumption of truth,

1 allegations in a complaint or counterclaim may not  
2 simply recite the elements of a cause of action, but  
3 must contain sufficient allegations of underlying facts  
4 to give fair notice and to enable the opposing party to  
5 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.

6 Id. at 1216 (emphasis added). Accord, Merritt v. Countrywide  
7 Fin. Corp., 759 F.3d 1023, 1032-33 (9th Cir. 2014). At bottom,  
8 the plausibility analysis is context specific and requires the  
9 court to draw upon its experience and common sense. Levitt,  
10 765 F.3d at 1135.

11 One of the fraudulent transfer elements Leslie needed to  
12 allege was that property of the debtor was transferred to the  
13 defendants. A transfer of the **debtor's** property that otherwise  
14 would have been property of the estate is a prerequisite for a  
15 fraudulent transfer action under either § 544 or § 548. See  
16 Geltzer v. Barish (In re Starr), 502 B.R. 760, 767-68 (Bankr.  
17 S.D.N.Y. 2013) (holding that trustee sufficiently alleged  
18 debtor's property interest); Serra v. Salven, 2011 WL 4627576, at  
19 \*12 (E.D. Cal. Oct. 3, 2011) (holding that trustee failed to  
20 prove for summary judgment purposes that debtor had an interest  
21 in the property transferred); see also Gaughan v. Edward Dittlof  
22 Revocable Tr. (In re Costas), 555 F.3d 790, 792-93 (9th Cir.  
23 2009) (generally stating property interest requirement); Wyle v.  
24 Rider (In re United Energy Corp.), 944 F.2d 589, 593-94 (9th Cir.  
25 1991) (same); Greenspan v. Orrick, Herrington & Sutcliffe LLP (In  
26 re Brobeck, Phleger & Harrison LLP), 408 B.R. 318, 337 (Bankr.  
27 N.D. Cal. 2009) ("both the 'property' and 'transfer' elements  
28 apply whether the claim is one for actual or constructive

1 fraudulent transfer").

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

11 However, Leslie also alleged that Mihranian and Susan  
12 operated through a shared medical practice - an incorporated  
13 medical practice - MCSSG. There are no facts alleged in the  
14 complaint from which it would be plausible to infer that the fees  
15 for services earned by the medical practice would belong to  
16 either Mihranian or Susan individually; rather, they would be  
17 property of MCSSG. To hold otherwise would ignore the legal  
18 separateness of MCSSG. See generally Sonora Diamond Corp. v.  
19 Superior Court, 83 Cal. App. 4th 523, 538 (2000) ("a corporation  
20 is regarded as a legal entity, separate and distinct from its  
21 stockholders, officers and directors, with separate and distinct  
22 liabilities and obligations.").

23 Leslie argues on appeal that any fees for services owed to  
24 MCSSG actually were owed to Mihranian - MCSSG's sole owner - and  
25 that he alleged sufficient facts in his third amended complaint  
26 to justify piercing the corporate veil. The bankruptcy court  
27 disagreed with Leslie's alter ego argument, and this alter ego  
28 argument is the only ground Leslie has advanced in the bankruptcy

1 court or on appeal to explain why MCSSG's funds should be treated  
2 as if they were Mihranian's property.

3 Generally, to pierce the corporate veil, a plaintiff must  
4 allege and prove: (1) "such unity of interest and ownership that  
5 the separate personalities of the corporation and the individual  
6 no longer exist"; and (2) "if the acts are treated as those of  
7 the corporation alone, an inequitable result will follow."

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

16 Alter ego has been described as "an extreme remedy,  
17 sparingly used," Sonora Diamond Corp., 83 Cal. App. 4th at 539,  
18 and it is to be imposed "cautiously" and "reluctantly." Highland  
19 Springs Conference & Training Ctr. v. City of Banning, 244 Cal.  
20 App. 4th 267, 281 (2016). More importantly, when imposed, the  
21 separateness of the corporate entity is not disregarded for all  
22 purposes but only for the purpose and under the circumstances of  
23 the case in which it is asserted. Lebastchi, 33 Cal. App. 4th at  
24 1470; see also Mesler, 39 Cal. 3d at 301 ("under certain  
25 circumstances a hole will be drilled in the wall of limited  
26 liability erected by the corporate form; for all purposes other  
27 than that for which the hole was drilled, the wall still  
28 stands").

1 Ordinarily, the alter ego doctrine only is invoked to enable  
2 a plaintiff to impose corporate liability upon the corporation's  
3 principal(s). See Sonora Diamond Corp., 83 Cal. App. 4th at 538.  
4 In fact, at least one California Court of Appeal has held that  
5 California law does not permit "outside reverse piercing of the  
6 corporate veil" - piercing in order to make the corporation's  
7 assets liable for the debts of the individual shareholder(s).  
8 Postal Instant Press, Inc. v. Kaswa Corp. 162 Cal. App. 4th 1510,  
9 1522 (2008). That is precisely what Leslie is attempting to do  
10 here: claim the assets of MCSSG as if they belonged to Mihranian  
11 individually and his bankruptcy estate.

12 Postal Instant Press is carefully reasoned and persuasive.  
13 Moreover, we must follow the law of California's intermediate  
14 appellate courts on this point unless we are convinced that the  
15 California Supreme Court would decide the issue differently.  
16 Goodrich v. Briones (In re Schwarzkopf), 626 F.3d 1032, 1038 (9th  
17 Cir. 2010). We are not persuaded that the California Supreme  
18 Court would decide this issue differently. Thus, allegations of  
19 alter ego do not aid Leslie; he cannot establish plausibility  
20 through such allegations. Consistent with this fact, Leslie did  
21 not adequately plead alter ego.

22 As mentioned above, alter ego is the only legal ground  
23 Leslie has advanced to explain why fees for medical services  
24 belonging to MCSSG should have been considered Mihranian's  
25 property for fraudulent transfer purposes. To the extent Leslie  
26 could have advanced other grounds to support this contention,  
27 Leslie abandoned them by not raising them in the bankruptcy court  
28 or on appeal. See, e.g., United Student Aid Funds, Inc. v.

1 Espinosa, 559 U.S. 260, 270 n.9 (2010) (“We need not settle that  
2 question, however, because the parties did not raise it in the  
3 courts below”); Mayor v. Wolkowitz (In re Cinevision Int'l,  
4 Inc.), 2016 WL 638729, \*7-8 (Mem. Dec.) (9th Cir. BAP Feb. 16,  
5 2016) (declining to consider issue that appellants raised for the  
6 first time in their reply brief on appeal).

7 In short, fees for medical services owed to MCSSG did not  
8 belong to Mihranian - and were not his property - for fraudulent  
9 transfer purposes.

10 Leslie’s third amended complaint arguably suggested that, at  
11 least some of the time, Mihranian and Susan accrued earnings on  
12 their own account. But no factual allegations in the third  
13 amended complaint tie these accrued earnings (if any) to the  
14 specific alleged fraudulent transfers identified in the  
15 complaint. The bankruptcy court attempted to explain to Leslie  
16 that the complaint should have identified the alleged source of  
17 all fraudulent transfers. Given the other facts Leslie alleged  
18 regarding the corporate status of Mihranian’s and Susan’s medical  
19 practice, we agree with the bankruptcy court and hold that Leslie  
20 did not state plausible fraudulent transfer claims in the absence  
21 of alleged facts plausibly demonstrating that either Mihranian or  
22 Susan had a property interest in the specific funds allegedly  
23 transferred.

24 In sum, under Civil Rule 8(a), Leslie needed to allege facts  
25 which, if accepted as true, plausibly could have lead to the  
26 following inferences: (1) that **the funds transferred to Susan**  
27 were funds in which Mihranian personally had a property interest  
28 before they were transferred to Susan; and (2) that Mihranian



1 relinquished to Susan his property interest in those funds by way  
2 of those transfers. Leslie did not allege facts that plausibly  
3 could support these inferences. Accordingly, the third amended  
4 complaint failed to state any viable fraudulent transfer claims.

5         Meanwhile, Civil Rule 9(b) requires fraud to be pled with  
6 particularity. Under Civil Rule 9(b), the plaintiff's  
7 allegations must include "the who, what, when, where, and how of  
8 the misconduct charged." United States v. United Healthcare  
9 Ins. Co., 848 F.3d 1161, 1180 (9th Cir. 2016) (quoting Ebeid ex  
10 rel. United States v. Lungwitz, 616 F.3d 993, 998 (9th Cir.  
11 2010)).

12         A number of bankruptcy courts have acknowledged that Civil  
13 Rule 9(b) does not apply to constructive fraudulent transfers.  
14 See, e.g., Seror v. Stone (In re Automated Fin. Corp.), 2011 WL  
15 10502417, at \*4-5 (Bankr. C.D. Cal. Jan. 25, 2011); Angell v. Day  
16 (In re Caremerica, Inc.), 415 B.R. 200, 208 (Bankr. E.D.N.C.  
17 2009); Official Comm. of Unsecured Creditors. v. Am. Tower Corp.  
18 (In re Verestar, Inc.), 343 B.R. 444, 459-60 (Bankr. S.D.N.Y.  
19 2006)); see also Sunnyside Dev. Co. LLC v. Cambridge Display  
20 Tech. Ltd., 2008 WL 4450328, at \*8-9 (N.D. Cal. Sept. 29,  
21 2008) (district court ruling holding same). These same decisions  
22 hold, however, that Civil Rule 9(b) applies to actual fraudulent  
23 transfers because such claims sound in fraud. We question  
24 whether all actual fraudulent transfer claims sound in fraud,  
25 because the controlling fraudulent transfer statutes state in the  
26 disjunctive that an actual fraudulent transfer occurs when the  
27 debtor makes a transfer with the actual intent to hinder, delay  
28 **or** defraud. See § 548(a)(1)(A); Cal. Civ. Code § 3439.04; see

1 also Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 232 (9th  
2 Cir. BAP 2007), aff'd in part and adopted, 551 F.3d 1092 (9th  
3 Cir. 2008). We do not see why harboring an intent to hinder or  
4 delay your creditors would sound in fraud.

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

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

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

20 Leslie's next contention concerns the bankruptcy court's  
21 April 14, 2016 order and its direction that Leslie must re-plead  
22 his constructive fraudulent transfer claims with more  
23 specificity, "including, without limitation, the source of the  
24 alleged transfer(s), the identity of the alleged transferor(s),  
25 the date(s) of the alleged transfer(s), and the amount of the  
26 respective transfer(s)."

27 The April 14, 2016 order only stated this requirement as to  
28 the constructive fraudulent transfer claims. Even so, when the

1 order is read in conjunction with the court's comments at the  
2 final hearing, it becomes reasonably clear that, when the court's  
3 April 14, 2016 order dismissed without prejudice Leslie's actual  
4 fraudulent transfer claims, the court expected any re-pleading of  
5 the actual fraudulent transfer claims to include at least the  
6 same level of specificity as the constructive fraudulent transfer  
7 claims. Neither party has suggested any other interpretation of  
8 the court's April 14, 2016 order, nor has Leslie argued that he  
9 did not realize that the bankruptcy court's specificity  
10 requirement applied to both the actual fraudulent transfer claims  
11 and the constructive fraudulent transfer claims.

12 As we have already explained, the third amended complaint  
13 did not allege sufficient facts to support a plausible inference  
14 that Mihranian transferred any of his own property interests to  
15 Susan. The bankruptcy court's required statement of transfers  
16 identifying (among other things) the source of each transfer  
17 reasonably was aimed at rectifying this deficiency. Typically,  
18 identifying the source of the transfer(s) and the identity of the  
19 transferor(s) would provide facts from which a court plausibly  
20 could infer whether the debtor held a property interest in funds  
21 before their transfer. See, e.g., In re Geltzer, 502 B.R. at  
22 767-68; In re Caremerica, Inc., 415 B.R. at 208.

23 We acknowledge that Leslie might have employed other methods  
24 besides the bankruptcy court's specificity requirement to satisfy  
25 the pleading requirements of Civil Rule 8(a) for purposes of  
26 alleging Mihranian's interest in the alleged fraudulently  
27 transferred funds. Even so, Leslie did not in fact plausibly  
28 allege Mihranian's interest in the transferred funds in any way,

1 and the bankruptcy court's specificity requirement reasonably was  
2 aimed at rectifying this deficiency in Leslie's pleading.  
3 Therefore, we conclude that the bankruptcy court did not commit  
4 reversible err when it imposed the specificity requirement on  
5 Leslie in the April 14, 2016 order.

6 **C. Dismissal Without Leave To Amend**

7 Leslie also contends on appeal that the bankruptcy court  
8 should have granted him leave to amend his complaint. Generally  
9 speaking, courts should not deny leave to amend unless the court  
10 determines that amendment would be futile. See Ebner v. Fresh,  
11 Inc., 838 F.3d 958, 963 (9th Cir. 2016); Lacey v. Maricopa Cty.,  
12 693 F.3d 896, 926 (9th Cir. 2012) (en banc).<sup>7</sup>

13 That being said, the trial court has broad discretion in  
14 deciding whether to grant leave to amend, especially when (as  
15 here) the plaintiff already has been given multiple opportunities  
16 to amend its complaint. See Gonzalez, 759 F.3d at 1116 (citing  
17 Miller v. Yokohama Tire Corp., 358 F.3d 616, 622 (9th Cir.  
18 2004)). Gonzalez is instructive. There, the Ninth Circuit Court  
19 of Appeals affirmed the district court's dismissal of Gonzalez's  
20 third amended complaint without leave to amend. Id. In the  
21 process of holding that the district court did not abuse its  
22

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23 <sup>7</sup>To be clear, different standards (other than futility)  
24 apply when the bankruptcy court dismisses with prejudice an  
25 adversary proceeding as a sanction based on plaintiff's  
26 noncompliant or dilatory conduct. See generally Lee v.  
27 Roessler-Lobert (In re Roessler-Lobert), 567 B.R. 560, 568-73  
28 (9th Cir. BAP 2017) (describing other standards). Here, however,  
Susan 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 discretion in denying leave to amend, the Court of Appeals relied  
2 on two things: (1) Gonzalez's failed multiple attempts to state  
3 viable claims for relief; and (2) the fact that certain  
4 attachments to Gonzalez's complaint "defeated the plausibility of  
5 his allegations." Id.

6 Similarly, here, Leslie's focus in his complaint on the  
7 alleged diversion of funds from an incorporated medical practice  
8 undermined the plausibility of his allegations that Mihranian had  
9 a property interest in the alleged fraudulently transferred  
10 funds.

11 Furthermore, Leslie, like Gonzalez, had a history of  
12 multiple failed attempts to state viable claims for relief.  
13 Leslie's third amended complaint was his fourth attempt to state  
14 his fraudulent transfer claims. Leslie has not disputed that he  
15 filed his first amended complaint and his third amended complaint  
16 after discussions with the defendants regarding the insufficiency  
17 of his fraudulent transfer allegations. Additionally, the  
18 bankruptcy court reviewed two of Leslie's four complaints, and  
19 the court correctly determined that neither stated plausible  
20 fraudulent transfer claims. After the first of the bankruptcy  
21 court's two reviews, the court ordered Leslie to allege more  
22 specific facts regarding the subject transfers, which order  
23 reasonably was aimed at identifying whether Mihranian plausibly  
24 had an interest in the alleged fraudulently transferred funds.  
25 Nonetheless, Leslie did not comply with the court's order, nor  
26 did Leslie otherwise adequately address the court's concern  
27 regarding identification of Mihranian's interest in the  
28 transferred funds.

1 Leslie's failure to do so is particularly inexplicable here  
2 because he admitted to conducting extensive pre-litigation  
3 discovery in the form of Rule 2004 examinations - consisting of  
4 both depositions and voluminous document production requests -  
5 focusing on the transfers in question. Nor has Leslie disputed  
6 Susan's assertion that Leslie hired professionals who (among  
7 other things) were assigned the task of identifying the source of  
8 the transferred funds. Simply put, this is not a situation where  
9 the plaintiff lacked an opportunity to obtain sufficient  
10 information to plead his claims with more specificity.

11 Under these circumstances, the bankruptcy court did not err  
12 when it determined that Leslie either could not or would not  
13 plausibly allege Mihranian's interest in the transferred funds.  
14 Accordingly, dismissal without leave to amend was not an abuse of  
15 discretion.

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

18 There are a few additional issues we should address. First,  
19 Susan claims that Leslie did not sufficiently allege  
20 Mihranian's community interest in any funds Susan received on  
21 account of medical services Susan provided on her own account.  
22 To the extent Mihranian had a community interest in funds in  
23 which Susan held a right to payment, the transfer of those funds  
24 could have constituted a transfer of the debtor's interest in  
25 property for fraudulent transfer purposes. See In re Beverly,  
26 374 B.R. at 233.

27 Ultimately, the bankruptcy court seemed to decide this issue  
28 in favor of Leslie, and Susan did not cross-appeal from this

1 ruling. Regardless, under California law, whether Mihranian and  
2 Susan actually were separated in and after 1998 as Susan claims  
3 was a question of fact necessary to determine whether and when  
4 they ceased to accrue community property under Cal. Fam. Code  
5 § 771(a). See In re Marriage of Manfer, 144 Cal. App. 4th 925,  
6 930 (2006). Leslie effectively alleged that Mihranian and Susan  
7 continued to work together, that they continued to live together  
8 in the same residence, and that neither intended a permanent and  
9 final cessation of their marriage; rather, according to Leslie,  
10 the couple feigned separation in 1998 as part of a scheme to keep  
11 Mihranian's assets away from his creditors. These facts were  
12 sufficient to allege that Mihranian and Susan were not, in fact,  
13 separated and continued to accrue community property in and after  
14 1998. See generally id.

15 Even so, under the circumstances of this appeal, the issue  
16 of whether the fees for services were Susan's property or  
17 Mihranian's property largely is a red herring. The more  
18 important questions - questions that Leslie never answered -  
19 were: (1) why funds allegedly diverted from the couple's shared  
20 medical practice were property of the debtor as opposed to  
21 property of MCSSG; and (2) how the so-called sham separation  
22 advanced Mihranian's and Susan's diversion scheme when Leslie's  
23 complaint indicated that **both** Mihranian and Susan were judgment  
24 debtors to one or more of the judgment creditors named in  
25 Leslie's complaint.

26 Another issue we should address concerns the statute of  
27 limitations applicable to actual fraudulent transfers under  
28 California law. The applicable statute provides in relevant

1 part:

2 (a) Under paragraph (1) of subdivision (a) of  
3 Section 3439.04, not later than four years after the  
4 transfer was made or the obligation was incurred or, if  
5 later, not later than **one year after the transfer or  
6 obligation was or could reasonably have been discovered  
7 by the claimant.**

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

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

13 Leslie's opening appeal brief does not mention let alone  
14 address the statute of limitations issue. On this basis alone,  
15 we could decline to address this issue. Christian Legal Soc'y,  
16 626 F.3d at 487-88; Brownfield, 612 F.3d at 1149 n.4.

17 In any event, for purposes of this appeal, suffice it to say  
18 that Leslie could not have properly invoked this discovery rule  
19 unless he alleged facts plausibly tending to demonstrate that the  
20 fraudulent nature of the transfers was not discovered earlier and  
21 reasonably could not have been discovered earlier. See Denholm  
22 v. Houghton Mifflin Co., 912 F.2d 357, 362 (9th Cir. 1990); Sun  
23 'n Sand, Inc. v. United Cal. Bank, 21 Cal. 3d 671, 701-02 (1978);  
24 see also Ezra v. Seror (In re Ezra), 537 B.R. 924, 933 (9th Cir.  
25 BAP 2015) ("the one-year period under Cal. Civ. Code  
26 § 3439.09(a)'s discovery rule does not commence until the  
27 plaintiff has reason to discover the fraudulent nature of the  
28 transfer.")

The final issue we should address concerns Susan's request  
to supplement the record on appeal. In this request, Susan asked



1 us to consider on appeal documents that were not part of this  
2 adversary proceeding but rather were part of Leslie's  
3 contemporaneous motion to substantively consolidate Mihranian's  
4 bankruptcy estate with MCSSG and the four fraudulent transfer  
5 defendants. Even if we were to assume that these materials were  
6 sufficiently "before" the bankruptcy court to be considered part  
7 of the adversary proceeding record (which they were not),  
8 consideration of their contents as evidence for purposes of  
9 resolving Susan's Civil Rule 12(b)(6) dismissal motion likely  
10 would have converted the defendants' dismissal motion into a  
11 summary judgment motion. See Civil Rule 12(d). We decline on  
12 appeal to consider materials that would have converted this  
13 matter into a summary judgment proceeding when the bankruptcy  
14 court did not do so.

15 Therefore, Susan's motion seeking to supplement the record  
16 with the materials from the substantive consolidation proceeding  
17 is hereby ORDERED DENIED.<sup>8</sup>

#### 18 CONCLUSION

19 For the reasons set forth above, the bankruptcy court's  
20 order dismissing with prejudice Leslie's third amended complaint

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22 <sup>8</sup>On the day of oral argument, this Panel delayed the start  
23 of oral argument in this appeal by roughly 30 minutes because, at  
24 the time this appeal first was called for hearing, counsel for  
25 Leslie was not present. After the 30-minute delay, the Panel  
26 proceeded with oral argument. Only counsel for Susan appeared;  
27 no one appeared for Leslie. The Panel effectively submitted  
28 Leslie's position on his appellate briefs and on the record on  
appeal. Shortly after the completion of oral argument, the Panel  
received from Leslie's counsel an informal telephonic request to  
continue oral argument. That request is hereby ORDERED DENIED.  
The request was untimely and was not presented in a procedurally  
proper format. See Rule 8013(a).

1 is AFFIRMED.

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