

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NOT FOR PUBLICATION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-16-1378-KuFTa
	)		
MARDIROS HAIG MIHRANIAN,	)	Bk. No.	2:13-bk-39026-BR
	)		
Debtor.	)	Adv. No.	2:15-ap-01665-BR
	)		
_____	)		
SAM S. LESLIE, Chapter 7	)		
Trustee,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
TAKOUHIE BARTAMIAN,	)		
	)		
Appellee.	)		
	)		
_____	)		

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

Filed - June 29, 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 Takouhie Bartamian - a nurse, office manager  
5 and employee of the debtor's 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 Bartamian. 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 Bartamian, without any prompting from the bankruptcy court,  
28 within several weeks of the commencement of the adversary

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

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

18 On the first and second causes of action in the  
19 Complaint for constructive fraud, the claims shall be  
20 amended to be pled with more specificity, including,  
21 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) . . . .

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

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26  
27 <sup>2</sup>Bartamian's motion did not address Leslie's third claim for  
28 relief seeking to recover the alleged fraudulent transfers for  
(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 Bartamian - 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

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17  
18 <sup>2</sup>(...continued)  
19 the benefit of the estate under §§ 550 and 551. Nor did the  
20 bankruptcy court's April 14, 2016 order. On its face, this claim  
for recovery of avoided transfers has no independent effect in  
the absence of a viable claim to avoid the transfers.

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

1 services provided by the two doctors individually.

2       Instead, the second amended complaint identified an  
3 aggregate amount of money - \$1,858,090.00 - that allegedly was  
4 fraudulently transferred to Bartamian: "In all, between 2009 and  
5 2013, the Debtor, either directly, or through Susan and MCSSG  
6 transferred what is estimated by the Trustee to be \$1,858,090.00  
7 to Bartamian, either directly, or through Bartamian's DBA  
8 account." Second Amended Complaint (April 18, 2016) at ¶ 22. It  
9 is impossible to tell from the complaint what portion of this  
10 amount originally was payment for services provided through MCSSG  
11 and what portion of this amount (if any) originally was payment  
12 for services provided by the two doctors individually - or who  
13 held these funds before they allegedly were transferred to  
14 Bartamian.

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

24       There was only one notable difference between the second  
25 amended complaint and the third amended complaint: the third  
26 amended complaint added two exhibits providing some detailed  
27 information regarding each of the alleged fraudulent transfers.  
28 Exhibit A was entitled "Detail Of 544 Transfers" and itemized in

1 two columns the "Date" of each alleged transfer and the "Deposit"  
2 amount of each alleged transfer. Exhibit A did not identify the  
3 source of each alleged transfer or the identity of the alleged  
4 transferor. Nor is there any way to tell who provided the  
5 services generating these funds. Exhibit B was entitled "Detail  
6 Of 548 Transfers" and set forth specific information regarding  
7 dates and deposit amounts in the same format as Exhibit A.<sup>4</sup>

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

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

24 I was very specific last time we were here. I wanted

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25  
26 <sup>4</sup>Bartamian argued that Exhibits A and B incorrectly  
27 identified the "deposit" dates instead of the transfer dates, but  
28 this 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 you to be specific. Now who actually physically made  
2 the transfer at that moment? Was it the Debtor, was it  
3 the ex-wife? And that was -- was that -- did you not  
understand that that was the whole purpose of my order?

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

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

9 THE COURT: But the difference is I have ordered you  
10 twice, I think,<sup>5</sup> to be more specific as to the Debtor,  
11 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.

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

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

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

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

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

## 22 JURISDICTION

23 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
24 §§ 1334 and 157, and we have jurisdiction under 28 U.S.C. § 158.

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25  
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 **ISSUE**

2 Did the bankruptcy court commit reversible error when it  
3 dismissed Leslie's third amended complaint without leave to  
4 amend?

5 **STANDARDS OF REVIEW**

6 We review de novo orders dismissing complaints for failure  
7 to state a claim. See Levitt v. Yelp! Inc., 765 F.3d 1123, 1126  
8 (9th Cir. 2014).

9 Denial of leave to amend is reviewed for an abuse of  
10 discretion. See Gonzalez v. Planned Parenthood of L.A., 759 F.3d  
11 1112, 1114 (9th Cir. 2014).

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

16 **DISCUSSION**

17 Leslie contends that the bankruptcy court erred in several  
18 different ways when it dismissed his third amended complaint with  
19 prejudice. Leslie asserts that the bankruptcy court erroneously  
20 determined that the third amended complaint did not satisfy the  
21 requirements of Civil Rules 8(a) and 9(b). Leslie further  
22 maintains that the bankruptcy court erroneously required greater  
23 specificity regarding each of the alleged fraudulent transfers  
24 than either of those Civil Rules require. Leslie also contends  
25 that the bankruptcy court erroneously denied him leave to amend.

1 We will address each of these asserted errors in turn.<sup>6</sup>

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

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

20 Civil Rule 8(a) requires pleadings to set forth "a short and  
21 plain statement of the claim showing that the pleader is entitled  
22 to relief." A claim is the "aggregate of operative facts which  
23 give rise to a right enforceable in the courts." Bautista v. Los

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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 Angeles Cty., 216 F.3d 837, 840 (9th Cir. 2000) (citing Original  
2 Ballet Russe, Ltd. v. Ballet Theatre, Inc., 133 F.2d 187, 189  
3 (2d Cir. 1943)).

4 As the Supreme Court has explained:

5 a complaint must contain sufficient factual matter,  
6 accepted as true, to state a claim to relief that is  
7 plausible on its face. . . . A claim has facial  
8 plausibility when the plaintiff pleads factual content  
9 that allows the court to draw the reasonable inference  
10 that the defendant is liable for the misconduct  
11 alleged. . . . Threadbare recitals of the elements of  
12 a cause of action, supported by mere conclusory  
13 statements, do not suffice.

14 Iqbal, 556 U.S. at 678 (citations and internal quotation marks  
15 omitted). The Ninth Circuit Court of Appeals has observed that  
16 the Supreme Court has not always applied this plausibility  
17 standard consistently. Starr v. Baca, 652 F.3d 1202, 1215-16  
18 (9th Cir. 2011). In light of this perceived inconsistency, the  
19 Ninth Circuit has refined the standard for determining when a  
20 complaint meets the minimum requirements of Civil Rule 8(a),  
21 stating as follows:

22 First, to be entitled to the presumption of truth,  
23 allegations in a complaint or counterclaim may not  
24 simply recite the elements of a cause of action, but  
25 must contain sufficient allegations of underlying facts  
26 to give fair notice and to enable the opposing party to  
27 defend itself effectively. Second, **the factual**  
28 **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.

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

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

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

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

13           Leslie argues on appeal that any fees for services owed to  
14 MCSSG actually were owed to Mihranian - MCSSG's sole owner - and  
15 that he alleged sufficient facts in his third amended complaint  
16 to justify piercing the corporate veil. The bankruptcy court  
17 disagreed with Leslie's alter ego argument, and this alter ego  
18 argument is the only ground Leslie has advanced in the bankruptcy  
19 court or on appeal to explain why MCSSG's funds should be treated  
20 as if they were Mihranian's property.

21           Generally, to pierce the corporate veil, a plaintiff must  
22 allege and prove: (1) "such unity of interest and ownership that  
23 the separate personalities of the corporation and the individual  
24 no longer exist"; and (2) "if the acts are treated as those of  
25 the corporation alone, an inequitable result will follow."  
26 Mesler v. Bragg Mgmt. Co., 39 Cal. 3d 290, 300 (1985). There is  
27 no single set of underlying facts that always must be alleged to  
28 plausibly demonstrate these two criteria; instead, a variety of

1 case-specific facts must be considered to establish the  
2 principal's domination and control over the corporation and to  
3 show that immunizing the principal from the corporation's  
4 liability would work an injustice. Id.; see also Lebastchi v.  
5 Superior Court, 33 Cal. App. 4th 1465, 1470 (1995).

6 Alter ego has been described as "an extreme remedy,  
7 sparingly used," Sonora Diamond Corp., 83 Cal. App. 4th at 539,  
8 and it is to be imposed "cautiously" and "reluctantly." Highland  
9 Springs Conference & Training Ctr. v. City of Banning, 244 Cal.  
10 App. 4th 267, 281 (2016). More importantly, when imposed, the  
11 separateness of the corporate entity is not disregarded for all  
12 purposes but only for the purpose and under the circumstances of  
13 the case in which it is asserted. Lebastchi, 33 Cal. App. 4th at  
14 1470; see also Mesler, 39 Cal. 3d at 301 ("under certain  
15 circumstances a hole will be drilled in the wall of limited  
16 liability erected by the corporate form; for all purposes other  
17 than that for which the hole was drilled, the wall still  
18 stands").

19 Ordinarily, the alter ego doctrine only is invoked to enable  
20 a plaintiff to impose corporate liability upon the corporation's  
21 principal(s). See Sonora Diamond Corp., 83 Cal. App. 4th at 538.  
22 In fact, at least one California Court of Appeal has held that  
23 California law does not permit "outside reverse piercing of the  
24 corporate veil" - piercing in order to make the corporation's  
25 assets liable for the debts of the individual shareholder(s).  
26 Postal Instant Press, Inc. v. Kaswa Corp. 162 Cal. App. 4th 1510,  
27 1522 (2008). That is precisely what Leslie is attempting to do  
28 here: claim the assets of MCSSG as if they belonged to Mihranian

1 individually and his bankruptcy estate.

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

12 As mentioned above, alter ego is the only legal ground  
13 Leslie has advanced to explain why fees for medical services  
14 belonging to MCSSG should have been considered Mihranian's  
15 property for fraudulent transfer purposes. To the extent Leslie  
16 could have advanced other grounds to support this contention,  
17 Leslie abandoned them by not raising them in the bankruptcy court  
18 or on appeal. See, e.g., United Student Aid Funds, Inc. v.  
19 Espinosa, 559 U.S. 260, 270 n.9 (2010) ("We need not settle that  
20 question, however, because the parties did not raise it in the  
21 courts below"); Mayor v. Wolkowitz (In re Cinevision Int'l,  
22 Inc.), 2016 WL 638729, \*7-8 (Mem. Dec.) (9th Cir. BAP Feb. 16,  
23 2016) (declining to consider issue that appellants raised for the  
24 first time in their reply brief on appeal).

25 In short, fees for medical services owed to MCSSG did not  
26 belong to Mihranian - and were not his property - for fraudulent  
27 transfer purposes.

28 Leslie's third amended complaint arguably suggested that, at

1 least some of the time, Mihranian and Susan accrued earnings on  
2 their own account. But no factual allegations in the third  
3 amended complaint tie these accrued earnings (if any) to the  
4 specific alleged fraudulent transfers identified in the  
5 complaint. The bankruptcy court attempted to explain to Leslie  
6 that the complaint should have identified the alleged source of  
7 all fraudulent transfers. Given the other facts Leslie alleged  
8 regarding the corporate status of Mihranian's and Susan's medical  
9 practice, we agree with the bankruptcy court and hold that Leslie  
10 did not state plausible fraudulent transfer claims in the absence  
11 of alleged facts plausibly demonstrating that either Mihranian or  
12 Susan had a property interest in the specific funds allegedly  
13 transferred.

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

24 Meanwhile, Civil Rule 9(b) requires fraud to be pled with  
25 particularity. Under Civil Rule 9(b), the plaintiff's  
26 allegations must include "the who, what, when, where, and how of  
27 the misconduct charged.'" United States v. United Healthcare  
28 Ins. Co., 848 F.3d 1161, 1180 (9th Cir. 2016) (quoting Ebeid ex



1 rel. United States v. Lungwitz, 616 F.3d 993, 998 (9th Cir.  
2 2010)).

3 A number of bankruptcy courts have acknowledged that Civil  
4 Rule 9(b) does not apply to constructive fraudulent transfers.  
5 See, e.g., Seror v. Stone (In re Automated Fin. Corp.), 2011 WL  
6 10502417, at \*4-5 (Bankr. C.D. Cal. Jan. 25, 2011); Angell v. Day  
7 (In re Caremerica, Inc.), 415 B.R. 200, 208 (Bankr. E.D.N.C.  
8 2009); Official Comm. of Unsecured Creditors. v. Am. Tower Corp.  
9 (In re Verestar, Inc.), 343 B.R. 444, 459-60 (Bankr. S.D.N.Y.  
10 2006)); see also Sunnyside Dev. Co. LLC v. Cambridge Display  
11 Tech. Ltd., 2008 WL 4450328, at \*8-9 (N.D. Cal. Sept. 29, 2008)  
12 (district court ruling holding same). These same decisions hold,  
13 however, that Civil Rule 9(b) applies to actual fraudulent  
14 transfers because such claims sound in fraud. We question  
15 whether all actual fraudulent transfer claims sound in fraud,  
16 because the controlling fraudulent transfer statutes state in the  
17 disjunctive that an actual fraudulent transfer occurs when the  
18 debtor makes a transfer with the actual intent to hinder, delay  
19 **or** defraud. See § 548(a)(1)(A); Cal. Civ. Code § 3439.04; see  
20 also Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 232 (9th  
21 Cir. BAP 2007), aff'd in part and adopted, 551 F.3d 1092 (9th  
22 Cir. 2008). We do not see why harboring an intent to hinder or  
23 delay your creditors would sound in fraud.

24 That being said, it is unnecessary for us to resolve the  
25 issue of when, if ever, Civil Rule 9(b) should be applied to  
26 actual fraudulent transfer claims. As a practical matter, under  
27 the circumstances of this particular case, what Civil Rule 8(a)  
28 requires and what Civil Rule 9(b) would require largely overlap.

1 Put another way, in this instance, the Civil Rule 8(a) standard  
2 articulated in Merritt, 759 F.3d at 1033, and the Civil Rule 9(b)  
3 standard articulated in United Healthcare Insurance Co., 848 F.3d  
4 at 1180, lead to similar pleading requirements.

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

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

11 Leslie's next contention concerns the bankruptcy court's  
12 April 14, 2016 order and its direction that Leslie must re-plead  
13 his constructive fraudulent transfer claims with more  
14 specificity, "including, without limitation, the source of the  
15 alleged transfer(s), the identity of the alleged transferor(s),  
16 the date(s) of the alleged transfer(s), and the amount of the  
17 respective transfer(s)."

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

1 requirement applied to both the actual fraudulent transfer claims  
2 and the constructive fraudulent transfer claims.

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

15 We acknowledge that Leslie might have employed other methods  
16 besides the bankruptcy court's specificity requirement to satisfy  
17 the pleading requirements of Civil Rule 8(a) for purposes of  
18 alleging Mihranian's interest in the alleged fraudulently  
19 transferred funds. Even so, Leslie did not in fact plausibly  
20 allege Mihranian's interest in the transferred funds in any way,  
21 and the bankruptcy court's specificity requirement reasonably was  
22 aimed at rectifying this deficiency in Leslie's pleading.  
23 Therefore, we conclude that the bankruptcy court did not commit  
24 reversible error when it imposed the specificity requirement on  
25 Leslie in the April 14, 2016 order.

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

27 Leslie also contends on appeal that the bankruptcy court  
28 should have granted him leave to amend his complaint. Generally

1 speaking, courts should not deny leave to amend unless the court  
2 determines that amendment would be futile. See Ebner v. Fresh,  
3 Inc., 838 F.3d 958, 963 (9th Cir. 2016); Lacey v. Maricopa Cty.,  
4 693 F.3d 896, 926 (9th Cir. 2012) (en banc).<sup>7</sup>

5 That being said, the trial court has broad discretion in  
6 deciding whether to grant leave to amend, especially when (as  
7 here) the plaintiff already has been given multiple opportunities  
8 to amend its complaint. See Gonzalez, 759 F.3d at 1116 (citing  
9 Miller v. Yokohama Tire Corp., 358 F.3d 616, 622 (9th Cir.  
10 2004)).

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

20 Similarly, here, Leslie's focus in his complaint on the  
21 alleged diversion of funds from an incorporated medical practice  
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,  
Bartamian 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 undermined the plausibility of his allegations that Mihranian had  
2 a property interest in the alleged fraudulently transferred  
3 funds.

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

22 Leslie's failure to do so is particularly inexplicable here  
23 because he admitted to conducting extensive pre-litigation  
24 discovery in the form of Rule 2004 examinations - consisting of  
25 both depositions and voluminous document production requests -  
26 focusing on the transfers in question. Nor has Leslie disputed  
27 Bartamian's assertion that Leslie hired professionals who (among  
28 other things) were assigned the task of identifying the source of

1 the transferred funds. Simply put, this is not a situation where  
2 the plaintiff lacked an opportunity to obtain sufficient  
3 information to plead his claims with more specificity.

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

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

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

20 Ultimately, the bankruptcy court seemed to decide this issue  
21 in favor of Leslie, and Bartamian did not cross-appeal from this  
22 ruling. Regardless, under California law, whether Mihranian and  
23 Susan actually were separated in and after 1998 as Bartamian  
24 claims was a question of fact necessary to determine whether and  
25 when they ceased to accrue community property under Cal. Fam.  
26 Code § 771(a). See In re Marriage of Manfer, 144 Cal. App. 4th  
27 925, 930 (2006). Leslie effectively alleged that Mihranian and  
28 Susan continued to work together, that they continued to live

1 together in the same residence, and that neither intended a  
2 permanent and final cessation of their marriage; rather,  
3 according to Leslie, the couple feigned separation in 1998 as  
4 part of a scheme to keep Mihranian's assets away from his  
5 creditors. These facts were sufficient to allege that Mihranian  
6 and Susan were not, in fact, separated and continued to accrue  
7 community property in and after 1998. See generally id.

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

19 Another issue we should address concerns the statute of  
20 limitations applicable to actual fraudulent transfers under  
21 California law. The applicable statute provides in relevant  
22 part:

23 (a) Under paragraph (1) of subdivision (a) of Section  
24 3439.04, not later than four years after the transfer  
25 was made or the obligation was incurred or, if later,  
26 not later than **one year after the transfer or  
obligation was or could reasonably have been discovered  
by the claimant.**

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

28 The bankruptcy court opined that, to the extent Leslie

1 sought to avail himself of § 3439.09(a)'s "discovery rule,"  
2 Leslie should have alleged that the fraudulent nature of the  
3 transfers reasonably could not have been discovered earlier.

4 Leslie's opening appeal brief does not mention let alone  
5 address the statute of limitations issue. On this basis alone,  
6 we could decline to address this issue. Christian Legal Soc'y,  
7 626 F.3d at 487-88; Brownfield, 612 F.3d at 1149 n.4.

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

20 The final issue we should address concerns Bartamian's  
21 request to supplement the record on appeal. In this request,  
22 Bartamian asked us to consider on appeal documents that were not  
23 part of this adversary proceeding but rather were part of  
24 Leslie's contemporaneous motion to substantively consolidate  
25 Mihranian's bankruptcy estate with MCSSG and the four fraudulent  
26 transfer defendants. Even if we were to assume that these  
27 materials were sufficiently "before" the bankruptcy court to be  
28 considered part of the adversary proceeding record (which they



1 were not), consideration of their contents as evidence for  
2 purposes of resolving Bartamian's Civil Rule 12(b)(6) dismissal  
3 motion likely would have converted the defendants' dismissal  
4 motion into a summary judgment motion. See Civil Rule 12(d). We  
5 decline on appeal to consider materials that would have converted  
6 this matter into a summary judgment proceeding when the  
7 bankruptcy court did not do so.

8 Therefore, Bartamian's motion seeking to supplement the  
9 record with the materials from the substantive consolidation  
10 proceeding is hereby ORDERED DENIED.<sup>8</sup>

11 **CONCLUSION**

12 For the reasons set forth above, the bankruptcy court's  
13 order dismissing with prejudice Leslie's third amended complaint  
14 is AFFIRMED.

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21  
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 Bartamian  
27 appeared; no one appeared for Leslie. The Panel effectively  
28 submitted 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).