

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NOT FOR PUBLICATION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-16-1381-KuFTa
)		
MARDIROS HAIG MIHRANIAN,)	Bk. No.	2:13-bk-39026-BR
)		
Debtor.)	Adv. No.	2:15-ap-01668-BR
)		
_____)		
SAM S. LESLIE, Chapter 7)		
Trustee,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
HAIG LEO 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 7¹ trustee Sam S. Leslie appeals from an order
3 dismissing with prejudice his third amended fraudulent transfer
4 complaint against Haig Leo 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 Haig.
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

25
26 ¹Unless 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 sought to avoid and recover
17 alleged fraudulent transfers under federal and California law
18 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 Haig,
26 without any prompting from the bankruptcy court, within several
27 weeks of the commencement of the adversary proceeding. Haig
28 responded to the first amended complaint by filing a Civil

1 Rule 12(b)(6) motion to dismiss. Haig pointed out that Leslie's
2 fraudulent transfer allegations did little more than state in
3 conclusory fashion the elements for fraudulent transfer claims
4 and did nothing to advise Haig of the specific transactions
5 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 Haig. The bankruptcy court also dismissed without prejudice
11 Leslie's first and second claims for relief to the extent they
12 alleged actual fraudulent transfers. To the extent the first and
13 second claims for relief alleged constructive fraudulent
14 transfers, the bankruptcy court's order on the motion to dismiss
15 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.²

25 ²Haig'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 Susan³ engaged in a scheme
3 to divert earnings from their shared medical practice to the
4 various third-party defendants - including Haig - for the purpose
5 of keeping their earnings away from their judgment creditors, two
6 of whom are specifically identified in the complaint.

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

17 The second amended complaint then sets forth several
18 paragraphs of allegations stating that some \$2 million in
19

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

22 ³Haig 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 Haig did not cross-appeal this ruling.
We further discuss the issue concerning the couple's marital
status near the end of this decision.

1 payments for the two doctors' medical services were shuttled back
2 and forth between Susan and Haig. However, none of these
3 allegations clarify who held the medical service payments before
4 Susan began shuttling them back and forth, nor do they clarify
5 who "owned" the right to the payments at the time the medical
6 services were paid for.

7 The second amended complaint then, in conclusory fashion,
8 identifies \$2.7 million as money "debtor" allegedly transferred
9 to Haig. But it is impossible to tell from the complaint what
10 portion of this amount originally was payment for services
11 provided through MCSSG and what portion of this amount (if any)
12 originally was payment for services provided by the two doctors
13 individually - or who held these funds before they allegedly were
14 transferred to Haig.

15 After he received the second amended complaint, Haig
16 contacted Leslie and urged Leslie to provide more specificity
17 regarding the alleged fraudulent transfers. Haig pointed out
18 that the second amended complaint did not specify "the source of
19 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 were only two significant differences between the
25 second amended complaint and the third amended complaint. Most
26 notably, the third amended complaint added two exhibits providing
27 some detailed information regarding each of the alleged
28 fraudulent transfers. Exhibit A was entitled "Detail Of 544

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

10 Exhibit B was entitled "Detail Of 548 Transfers" and set
11 forth specific information regarding dates and deposit amounts in
12 the same format as Exhibit A.⁴

13 The other significant change between the second amended
14 complaint and the third amended complaint concerned the aggregate
15 amount of fraudulent transfers alleged. Whereas the second
16 amended complaint alleged an aggregate amount of roughly \$2.7
17 million in alleged fraudulent transfers to Haig, the third
18 amended complaint only alleged an aggregate amount of roughly \$2
19 million in such transfers.

20 Haig moved to dismiss the third amended complaint. Haig
21 asserted that the third amended complaint did not satisfy the
22 specificity requirement of the bankruptcy court's April 14, 2016
23 order and also did not satisfy the requirements for pleading
24 claims for relief under Civil Rules 8(a) and 9(b), Ashcroft v.

25
26 ⁴Haig 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 Iqbal, 556 U.S. 662 (2009), and Bell Atlantic Corp. v. Twombly,
2 550 U.S. 544 (2007).

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

12 I was very specific last time we were here. I wanted
13 you to be specific. Now who actually physically made
14 the transfer at that moment? Was it the Debtor, was it
15 the ex-wife? And that was -- was that -- did you not
16 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,⁵ to be more specific as to the Debtor,
24 the ex-wife, now ex-wife, the business. I ordered you,
25 and you didn't do it. I can't figure out why, but you
26 didn't do it.

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

THE COURT: You're a bright guy. Good lord. I can't
imagine that you actually -- if you did, it's tunnel

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

1 vision, and you really should have asked somebody else.

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

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

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

8 JURISDICTION

9 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
10 §§ 1334 and 157, and we have jurisdiction under 28 U.S.C. § 158.

11 ISSUE

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

15 STANDARDS OF REVIEW

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

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

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

26 DISCUSSION

27 Leslie contends that the bankruptcy court erred in several
28 different ways when it dismissed his third amended complaint with

1 prejudice. Leslie asserts that the bankruptcy court erroneously
2 determined that the third amended complaint did not satisfy the
3 requirements of Civil Rules 8(a) and 9(b). Leslie further
4 maintains that the bankruptcy court erroneously required greater
5 specificity regarding each of the alleged fraudulent transfers
6 than either of those Civil Rules require. Leslie also contends
7 that the bankruptcy court erroneously denied him leave to amend.
8 We will address each of these asserted errors in turn.⁶

9 As a threshold matter, it is important to note Leslie based
10 all of his fraudulent transfer claims on the theory that
11 Mihranian and his then-wife Susan improperly diverted funds from
12 the couple's shared medical practice. (3rd Am. Compl. at ¶¶ 7,
13 14, 18.) That is what Leslie said in his third amended
14 complaint, and that is what Leslie repeatedly said in his opening
15 appellate brief. (Aplt. Opn. Br. at pp. 10-11, 26-28.) Leslie
16 has not advanced on appeal any alternate theories or arguments
17 underlying his fraudulent transfer claims, and we decline to look
18 beyond what Leslie actually has argued. See Christian Legal
19 Soc'y v. Wu, 626 F.3d 483, 487-88 (9th Cir. 2010) (declining to
20 address matters not specifically and distinctly discussed in the
21 appellant's opening brief); Brownfield v. City of Yakima,
22 612 F.3d 1140, 1149 n.4 (9th Cir. 2010) (same). With this
23 limitation on our review in mind, we will turn our attention to

24
25 ⁶In 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 the so-called errors Leslie has attributed to the bankruptcy
2 court's decision.

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

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

11 As the Supreme Court has explained:

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

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

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

1 **suggest an entitlement to relief**, such that it is not
2 unfair to require the opposing party to be subjected to
3 the expense of discovery and continued litigation.

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

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

28 Leslie alleged that Mihranian and his then-wife Susan
diverted to third parties payments for medical services they

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

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

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

28 Generally, to pierce the corporate veil, a plaintiff must

1 allege and prove: (1) "such unity of interest and ownership that
2 the separate personalities of the corporation and the individual
3 no longer exist"; and (2) "if the acts are treated as those of
4 the corporation alone, an inequitable result will follow."
5 Mesler v. Bragg Mgmt. Co., 39 Cal. 3d 290, 300 (1985). There is
6 no single set of underlying facts that always must be alleged to
7 plausibly demonstrate these two criteria; instead, a variety of
8 case-specific facts must be considered to establish the
9 principal's domination and control over the corporation and to
10 show that immunizing the principal from the corporation's
11 liability would work an injustice. Id.; see also Lebastchi v.
12 Superior Court, 33 Cal. App. 4th 1465, 1470 (1995).

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

26 Ordinarily, the alter ego doctrine only is invoked to enable
27 a plaintiff to impose corporate liability upon the corporation's
28 principal(s). See Sonora Diamond Corp., 83 Cal. App. 4th at 538.

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

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

19 As mentioned above, alter ego is the only legal ground
20 Leslie has advanced to explain why fees for medical services
21 belonging to MCSSG should have been considered Mihranian's
22 property for fraudulent transfer purposes. To the extent Leslie
23 could have advanced other grounds to support this contention,
24 Leslie abandoned them by not raising them in the bankruptcy court
25 or on appeal. See, e.g., United Student Aid Funds, Inc. v.
26 Espinosa, 559 U.S. 260, 270 n.9 (2010) ("We need not settle that
27 question, however, because the parties did not raise it in the
28 courts below"); Mayor v. Wolkowitz (In re Cinevision Int'l,

1 Inc.), 2016 WL 638729, *7-8 (Mem. Dec.) (9th Cir. BAP Feb. 16,
2 2016) (declining to consider issue that appellants raised for the
3 first time in their reply brief on appeal).

4 In short, fees for medical services owed to MCSSG did not
5 belong to Mihranian - and were not his property - for fraudulent
6 transfer purposes.

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

21 In sum, under Civil Rule 8(a), Leslie needed to allege facts
22 which, if accepted as true, plausibly could have lead to the
23 following inferences: (1) that **the funds transferred to Haig** were
24 funds in which Mihranian personally had a property interest
25 before they were transferred to Haig; and (2) that Mihranian
26 relinquished to Haig his property interest in those funds by way
27 of those transfers. Leslie did not allege facts that plausibly
28 could support these inferences. Accordingly, the third amended

1 complaint failed to state any viable fraudulent transfer claims.

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

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

1 delay your creditors would sound in fraud.

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

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

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

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

24 The April 14, 2016 order only stated this requirement as to
25 the constructive fraudulent transfer claims. Even so, when the
26 order is read in conjunction with the court's comments at the
27 final hearing, it becomes reasonably clear that, when the court's
28 April 14, 2016 order dismissed without prejudice Leslie's actual

1 fraudulent transfer claims, the court expected any re-pleading of
2 the actual fraudulent transfer claims to include at least the
3 same level of specificity as the constructive fraudulent transfer
4 claims. Neither party has suggested any other interpretation of
5 the court's April 14, 2016 order, nor has Leslie argued that he
6 did not realize that the bankruptcy court's specificity
7 requirement applied to both the actual fraudulent transfer claims
8 and the constructive fraudulent transfer claims.

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

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

28 Therefore, we conclude that the bankruptcy court did not commit

1 reversible err when it imposed the specificity requirement on
2 Leslie in the April 14, 2016 order.

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

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

10 That being said, the trial court has broad discretion in
11 deciding whether to grant leave to amend, especially when (as
12 here) the plaintiff already has been given multiple opportunities
13 to amend its complaint. See Gonzalez, 759 F.3d at 1116 (citing
14 Miller v. Yokohama Tire Corp., 358 F.3d 616, 622 (9th Cir.
15 2004)). Gonzalez is instructive. There, the Ninth Circuit Court
16 of Appeals affirmed the district court's dismissal of Gonzalez's
17 third amended complaint without leave to amend. Id. In the
18 process of holding that the district court did not abuse its
19 discretion in denying leave to amend, the Court of Appeals relied
20 on two things: (1) Gonzalez's failed multiple attempts to state
21 viable claims for relief; and (2) the fact that certain
22

23 ⁷To 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,
Haig 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 attachments to Gonzalez's complaint "defeated the plausibility of
2 his allegations." Id.

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

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

26 Leslie's failure to do so is particularly inexplicable here
27 because he admitted to conducting extensive pre-litigation
28 discovery in the form of Rule 2004 examinations - consisting of

1 both depositions and voluminous document production requests -
2 focusing on the transfers in question. Nor has Leslie disputed
3 Haig's assertion that Leslie hired professionals who (among other
4 things) were assigned the task of identifying the source of the
5 transferred funds. Simply put, this is not a situation where the
6 plaintiff lacked an opportunity to obtain sufficient information
7 to plead his claims with more specificity.

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

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

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

24 Ultimately, the bankruptcy court seemed to decide this issue
25 in favor of Leslie, and Haig did not cross-appeal from this
26 ruling. Regardless, under California law, whether Mihranian and
27 Susan actually were separated in and after 1998 as Haig claims
28 was a question of fact necessary to determine whether and when

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

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

23 Another issue we should address concerns the statute of
24 limitations applicable to actual fraudulent transfers under
25 California law. The applicable statute provides in relevant
26 part:

27 (a) Under paragraph (1) of subdivision (a) of
28 Section 3439.04, not later than four years after the
transfer was made or the obligation was incurred or, if

1 later, not later than **one year after the transfer or**
2 **obligation was or could reasonably have been discovered**
3 **by the claimant.**

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

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

8 Leslie's opening appeal brief does not mention let alone
9 address the statute of limitations issue. On this basis alone,
10 we could decline to address this issue. Christian Legal Soc'y,
11 626 F.3d at 487-88; Brownfield, 612 F.3d at 1149 n.4.

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

24 The final issue we should address concerns Haig's request to
25 supplement the record on appeal. In this request, Haig asked us
26 to consider on appeal documents that were not part of this
27 adversary proceeding but rather were part of Leslie's
28 contemporaneous motion to substantively consolidate Mihranian's

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

12 Therefore, Haig's motion seeking to supplement the record
13 with the materials from the substantive consolidation proceeding
14 is hereby ORDERED DENIED.⁸

15 **CONCLUSION**

16 For the reasons set forth above, the bankruptcy court's
17 order dismissing with prejudice Leslie's third amended complaint
18 is AFFIRMED.

21
22 ⁸On 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 Haig appeared; no
27 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).