United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Thursday, October 8, 2020 **Hearing Room 5B**

10:00 AM
8: - **Chapter**

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10:00 AM
CONT... **Chapter**

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Docket 0

Tentative Ruling:

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Thursday, October 8, 2020 **Hearing Room 5B**

10:00 AM

CONT... **Chapter**

- NONE LISTED -

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Thursday, October 8, 2020 **Hearing Room 5B**

10:00 AM

8:17-10976 Zia Shlaimoun **Chapter 7**

Adv#: 8:19-01045 Thomas H. Casey, Trustee of the Zia Shlaimoun Ch. v. Shlaimoun et al

#1.00 STATUS CONFERENCE RE: Chapter 7 Trustee's Complaint Against Heyde Management, LLC For: 1) Avoidance of a Transfer of Property Pursuant to Section 547(b); 2) Avoidance of a Transfer of Property Pursuant to 11 U.S.C. Section 548; 3) Avoiance of a Tranfer of Property Pursuant to 11 U.S.C. Section 549; 4) Recovery of Avoided Transfer Pursuant to 11 U.S.C. Section 550
(Con't from 7-23-20)

Docket 1

Tentative Ruling:

Tentative for 10/8/20:
Status on answers/defaults?

Tentative for 7/23/20:
Status?

Tentative for 3/5/20:
What is status of answer/default?

Tentative for 11/7/19:
Why no status report?

Party Information

Debtor(s):

Zia Shlaimoun — Represented By Charles Shamash

Defendant(s):

Zumaone LLC, a California limited — Pro Se

10:00 AM

CONT... Zia Shlaimoun **Chapter 7**

New Era Valet LLC, a limited	Pro Se
Jensen Investment Group LLC, a	Pro Se
Goldstar Laboratories Missouri	Pro Se
Goldstar Laboratories LLC, a	Pro Se
Gold Star Health, LLC, a limited	Pro Se
Gold Star Group, LLC, a Delaware	Pro Se
40355 La Quinta Palmdale LLC, a	Pro Se
328 Bruce LLC, a limited liability	Pro Se
Aksel Ingolf Ostergard Jensen	Pro Se
Oussha Shlaimoun	Pro Se
Nico Aksel Leos Shlaimoun	Pro Se
Helen Shlaimoun	Pro Se
Go Gum, LLC, a Delaware limited	Pro Se

Plaintiff(s):

Thomas H. Casey, Trustee of the Zia	Represented By Michael J Lee

Trustee(s):

Thomas H Casey (TR)	Represented By Thomas H Casey Kathleen J McCarthy Michael Jason Lee Sunjina Kaur Anand Ahuja

United States Bankruptcy Court
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Thursday, October 8, 2020 **Hearing Room 5B**

10:00 AM

8:18-11154 i.i. Fuels, Inc. **Chapter 7**

Adv#: 8:20-01088 Marshack v. Interstate Oil Company

#2.00 STATUS CONFERENCE RE: Complaint for (1) Avoidance of Preferential Transfers; (2) Recovery of Preferential Transfers; (3) Preservation of Preferential Transfers; and (4) Disallowance of Claims
(cont'd from 8-06-20)

Docket 1

***** VACATED *** REASON: CONTINUED TO 10-29-20 AT 10:00 A.M. - ANOTHER SUMMONS ISSUED 8-13-20**

Tentative Ruling:

Tentative for 8/6/20:
What is status of answer? Continue?

Party Information

Debtor(s):

i.i. Fuels, Inc.	Represented By Leonard M Shulman

Defendant(s):

Interstate Oil Company	Pro Se

Plaintiff(s):

Richard A. Marshack	Represented By Robert P Goe

Trustee(s):

Richard A Marshack (TR)	Represented By Robert P Goe

10:00 AM

8:17-11082 Hutton Douglas Michael Brown **Chapter 7**

Adv#: 8:17-01234 Brown v. U.S. Department of Education et al

#3.00 PRE-TRIAL CONFERENCE RE: Second Amended Complaint For: Determination that Student Loan Debt is Dischargeable Pursuant to 11 U.S.C. Section 523(a)(8)

(con't from 8-06-20 per order approving joint stip. to cont. entered 8-04-20)

Docket 12

***** VACATED *** REASON: OFF CALENDAR - ORDER APPROVING STIPULATION FOR ENTRY OF JUDGMENT AND SETTLEMENT AGREEMENT RE: ADVERSARY COMPLAINT ENTERED 10-01-20**

Tentative Ruling:

Tentative for 2/27/20:
Where is the joint pre-trial stipulation? What is status? Should case be dismissed for failure to prosecute?

Tentative for 4/12/18:
Deadline for completing discovery: September 1, 2018
Last date for filing pre-trial motions: September 24, 2018
Pre-trial conference on: October 4, 2018 at 10:00 a.m.
Joint pre-trial order due per local rules.

Party Information

Debtor(s):

Hutton Douglas Michael Brown	Represented By Christine A Kingston

Defendant(s):

U.S. Department of Education	Pro Se
Wells Fargo Education Financial	Pro Se
Nel Net Loan Services	Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Thursday, October 8, 2020 **Hearing Room 5B**

10:00 AM

CONT... Hutton Douglas Michael Brown **Chapter 7**

Plaintiff(s):

Hutton Douglas Michael Brown	Represented By Christine A Kingston

Trustee(s):

Karen S Naylor (TR)	Pro Se

10:00 AM
8:12-17406 Matthew Charles Crowley **Chapter 7**
Adv#: 8:19-01073 Crowley v. Navient Solutions, LLC

#4.00 PRE-TRIAL CONFERENCE RE: Complaint for: Determination that Student Loan Debt is Dischargeable Pursuant to 11 U.S.C. Section 523(a)(8)
(cont'd from 9-03-20 per order on stip. to continue pre-trial conf. entered 8-17-20)

Docket 1
***** VACATED *** REASON: CONTINUED TO 11-12-20 AT 10:00 A.M. PER ORDER ON PRE-TRIAL CONFERENCE ENTERED 9-22-20**

Tentative Ruling:

Tentative for 7/11/19:
Deadline for completing discovery: November 30, 2019
Last date for filing pre-trial motions: December 16, 2019
Pre-trial conference on: January 9, 2020 at 10:00AM
Joint pre-trial order due per local rules.

Party Information

Debtor(s):

Matthew Charles Crowley — Represented By Christine A Kingston

Defendant(s):

Navient Solutions, LLC — Pro Se

Plaintiff(s):

Matthew C Crowley — Represented By Christine A Kingston

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Thursday, October 8, 2020 **Hearing Room 5B**

10:00 AM

8:19-11359 Ronald E. Ready **Chapter 7**

Adv#: 8:19-01154 Paramount Residential Mortgage Group Inc v. Ready

#5.00 PRE-TRIAL CONFERENCE RE: Complaint for Nondischargeability of Debt Pursuant to 11 U.S.C. Section 523(a)(2) and 11 U.S.C. Section 523(a)(6) **(con't from 8-6-2020 at 10:00 a.m. per order appr. stip. to con't ent. 6-18-2020)**

Docket 1

***** VACATED *** REASON: CONTINUED TO 12-03-20 AT 10:00 A.M. PER ORDER APPROVING THE STIPULATION TO CONTINUE PRE-TRIAL CONFERENCE AND DISCOVERY CUTOFF AND MOTION CUTOFF DATE ENTERED 10-07-20**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Ronald E. Ready	Represented By Joseph A Weber Fritz J Firman

Defendant(s):

Ronald E Ready	Represented By Fritz J Firman

Plaintiff(s):

Paramount Residential Mortgage	Represented By Shawn N Guy

Trustee(s):

Jeffrey I Golden (TR)	Pro Se

11:00 AM
8:10-10310 Robert A. Ferrante **Chapter 7**
Adv#: 8:19-01131 Estate of William L. Seay et al v. Thomas H. Casey

#6.00 Motion To Dismiss Second Amended Adversary Complaint

Docket 67

Tentative Ruling:

Tentative for 10/8/20:

Defendant Thomas H. Casey ("Trustee" or "Defendant"), chapter 7 trustee for the estate of debtor, Robert Ferrante ("Debtor"), brings this motion to dismiss the Second Amended Complaint ("SAC") filed by the Estate of William L. Seay ("Seay" or "Plaintiff") pursuant to Fed. R. Civ. P. 12(b)(6). Seay opposes the motion.

1. FRCP 12(b)(6) Standards

FRCP 12(b)(6) requires a court to consider whether a complaint fails to state a claim upon which relief may be granted. When considering a motion under FRCP 12(b)(6), a court takes all the allegations of material fact as true and construes them in the light most favorable to the nonmoving party. *Parks School of Business v. Symington,* 51 F.3d 1480, 1484 (9th Cir. 1995). A complaint should not be dismissed unless a plaintiff could prove no set of facts in support of his claim that would entitle him to relief. *Id*. Motions to dismiss are viewed with disfavor in the federal courts because of the basic precept that the primary objective of the law is to obtain a determination of the merits of a claim. *Rennie & Laughlin, Inc. v. Chrysler Corporation,* 242 F.2d 208, 213 (9th Cir. 1957). There are cases that justify, or compel, granting a motion to dismiss. The line between totally unmeritorious claims and others must be carved out case by case by the judgment of trial judges, and that judgment should be exercised cautiously on such a motion. *Id*.

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-556, 127 S. Ct. 1955, 1964-65 (2007) A complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) citing *Twombly*. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard asks for more than a sheer possibility that a defendant has acted unlawfully. The tenet that a court must accept as true all factual allegations is not applicable to legal conclusions. *Id*. Threadbare recital of elements supported by conclusory statements is not sufficient. *Id*.

2. Brief Background

The following is a condensed summary of the relevant factual and procedural background. On May 4, 2004, Col. Seay obtained a judgment against Debtor in the principal amount of $2,471,057.16 ("Judgment"). The Judgment was perfected against real property assets of the Debtor in Orange County by the recording of an abstract of judgment with the Orange County Recorder's Office on May 20, 2004 ("Seay Lien"). The Judgment was unanimously affirmed in the Second District Court of Appeal in 2005. Under California law, the Seay Lien attached to all real property interests of the Debtor in Orange County whether existing on the date of recordation or acquired in the future, whether legal or equitable, fixed or contingent. Code of Civ. Proc. § 697.340(a). The Seay Lien gained and continues to gain interest at the rate of 10% per annum, may be renewed every five years and must be renewed every ten years. When renewed, the accrued interest is added to principal to create a new principal amount, which amount then gains interest at 10% per annum until the next renewal. The Seay Judgment was always timely renewed. Thus, on the petition date, the Judgment had grown to $3.877

million.

Although Debtor claimed only $500 in assets in his schedules, Defendant decided to pursue the case as an asset case based upon evidence received from attorney Thomas Vogele ("Vogele"). Trustee employed Vogele's law firm to act as his counsel. Third party Remar Investments LP ("Remar") is a Nevada limited partnership which held a $2 million trust deed recorded in second position (or perhaps third behind Seay) against the Property located at 518 Harbor Island Drive, Newport Beach, CA 92660 ("the Property" or "518 Property") on December 27, 2010. (See generally, 8:16-cv-00337-MWF ("Remar Appeal"), Sept. 13, 2016 Order affirming Judgment, Dkt. 23).) The 2010 note and trust deed, executed by Debtor's ex father-in-law Oscar Chacon as trustee of the 518 Harbor Island Drive Trust, "took out" a 2009 note and trust deed of $1.5 million recorded on September 25, 2009. *Id*. In a consolidated adversary action both Defendant Trustee and Col. Seay alleged that Remar was Debtor's confederate and coconspirator in a scheme to enter into bogus transactions in order to defeat creditor claims and place artificially high encumbrances on the 518 Property.

Third party 518 Harbor Island Drive Trust ("Trust I") was a defectively formed Qualified Personal Residence Trust ("QPRT") created by Debtor on September 16, 1994 to hold title to the 518 Property. At the time of its formation, Debtor was in a separate Chapter 7 proceeding filed in December 1993. Debtor was the settlor, sole trustee and residual beneficiary of the Trust I. Trust I held nominal title to the Property from 1994 to 2001, and again from 2006 to 2014. (Remar Appeal, Dkt. 23.) The BAP ruled, however, that Trust I terminated in December 1998 at which time it reverted to Debtor individually. (*In re Ferrante*, 2015 WL 5064807 (9th Cir. B.A.P. Aug. 26, 2015) (unpublished), also at 9th Cir. Case No. 14- 1222, Dkt. 49.). Trust I was revoked by Trustee on April 7, 2014, at which time the Residence formally became an asset of the estate. But the asset was fully encumbered and had no equity. It can be argued that the property was already owned at that time by Debtor by reason of the BAP's finding, as described above, and thus the

revocation of Trust I was unnecessary, or title had become entangled under yet further trusts, as described below.

Third party 518 Harbor Island Drive Trust III ("Trust III") is a separate and expressly revocable trust self-settled by Debtor on or about March 23, 2001. Trust III continuously held record title to the 518 Property from 2001 through September 29, 2006, including on May 20, 2004 when the Seay Judgment was recorded in Orange County, California. Both the Bankruptcy Court and District Court have ruled that because Trust III was expressly revocable, the Seay Judgment attached to the 518 Property on the date of recordation, despite ostensibly different record title.

Thomas Vogele is a lawyer who practices in Orange County, California, through his law firm Thomas Vogele & Associates APC ("TVA"). On the petition date, TVA represented creditor W&W Properties. In September of 2010, TVA entered into an agreement with Defendant to act as Special Litigation Counsel to the insolvent estate on a contingent fee basis to initiate litigation to recover money and property of Debtor (and hence of the estate) that was undeclared in the Schedules.

On April 7, 2014, the Trustee and Seay entered into a fully integrated written contract structured as a "Carve Out" agreement (the "Compromise Agreement" or the "Agreement"). The contract was executed four years after the petition and more than three years after appointment of Vogele as special litigation counsel. The Agreement expressly provided that Col. Seay would defer 50% of the sums to which he was entitled under his lien to be later recouped from recoveries in the Trustee’s Adversary Action. The Agreement obligated the estate to pay Col. Seay the deferred amount, plus fees and costs of every kind and nature, plus all remaining amounts under his judgment lien, from the proceeds of litigation recoveries. One of the items in contention is the corresponding obligation of Defendant to actively litigate the Adversary Action in order to obtain sufficient recovery to pay back the sums Seay carved

out and subordinated under the Compromise Agreement. Defendant Trustee can point to ¶ 2.1.8 which reserves to the Defendant the right to discontinue any litigation the Trustee thought to be unproductive and offers Seay the right of first refusal in purchase of any such right of action.

On June 19, 2017, well over three years after the Agreement was executed, the Trustee filed the Motion to Abandon "Certain Assets." Trustee researched the value of the Remaining Assets and determined that "the assets are burdensome to the Estate or of inconsequential value and benefit to the Estate." Prior to filing the Motion to Abandon, Trustee attempted to sell these Remaining Assets to Seay. The Remaining Assets were ultimately sold to Seay as authorized by Court order.

On July 3, 2019, Plaintiff filed a Complaint, commencing the above captioned action (the "Action"). On August 2, 2019, the Trustee filed a Motion to Dismiss the Adversary Complaint (the "original Motion to Dismiss") on several grounds, including that Plaintiffs' claims were barred by the doctrines of quasi-judicial immunity, and constituted collateral attacks on the properly entered orders of the Bankruptcy Court. In response, on August 22, 2019, Plaintiff filed the First Amended Complaint ("FAC"). The Trustee filed a second motion to dismiss the FAC. On June 10, 2020, the Court dismissed the FAC and granted the Seay Estate leave to amend. Tentative Ruling at Page 12. The court's rationale was set forth in the court's Tentative Ruling, which was adopted by the court in its final ruling. The court ruled that the Trustee is entitled to quasi-judicial immunity in his individual capacity and may only be sued in his representative capacity. *Id*. The court further ruled that certain of Plaintiff's allegations, such as those related to undue influence, duress, and menace, were barred by judicial estoppel. The court dismissed the FAC to allow the Seay Estate to amend the FAC to clarify that the Trustee is named in his representative capacity only. *Id*. The court also ruled that Plaintiff's capacity to sue as estate representative must be amended as required by California law, a defect that applies equally to this Motion. *Id*. On August 9, 2020, Plaintiff filed the SAC.

In the SAC, like the FAC, Plaintiff alleges three claims for relief:

(1) Restitution of Benefits Conferred After Unilateral Rescission;

(2) Common Count for Money Had and Received;

(3) Declaratory and Injunctive Relief Regarding the Proceeds in the Segregated Account

3. The First Claim for Relief

Plaintiff's first claim for relief seeks restitution following alleged unilateral rescission. Rescission results in extinguishment of an underlying contract. Cal. Civ. Code §1688. If successful, the party seeking rescission is freed of his/her obligations under the contract. *Larsen v. Johannes*, 7 Cal. App. 3d 491, 501 (1970). As relevant here, unilateral rescission is permissible where: (1) the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party; (2) the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the counterparty; (3) the consideration for the obligation of the rescinding party, before it is rendered to him, fails in a material respect from any cause; or (4) the public interest will be prejudiced by permitting the contract to stand. *See* Cal. Civ. Code §1689(b)(1).

Plaintiff seeks rescission on the grounds that: (1) "Col. Seay's consent to the contract was obtained by duress, menace, fraud and undue influence exercised by [the Trustee];" (2) "the consideration for Seay's promise failed in whole or part, through the fault of [the Trustee];" (3) "the consideration for Seay's promise failed from any cause before it was rendered to him;" (4) "the contract was entered into due to a mistake of material fact and law by the

parties concerning Trust I;" and (5) "the contract is against public policy . . . because the Property was fully encumbered." For reasons explained below, none of these theories withstand scrutiny.

In this court's June 10, 2020 tentative ruling, the court stated:

"As noted above, in the motion to approve the Agreement, both parties agreed that the negotiations, though tense, were conducted in good faith. Plaintiff filed papers in support of the motion to approve the Agreement. It is not clear why duress or undue influence were not argued when the court approved the Agreement. If Plaintiff felt that he was being forced to accept the Agreement against his will or better judgment, it should have been raised at the time. It was not, but instead the court was specifically urged to approve the Agreement by Plaintiff." (Tentative Ruling, p. 9-10).

The tentative ruling continued:

"Perhaps the better part of valor is to grant the motion or strike portions of the FAC to the extent that they are based on duress or undue influence at the inception, because even though they appear to be properly pled, under judicial estoppel doctrines should have been brought to the court's attention at the time the Agreement was approved. Instead, at that time, Plaintiff apparently took the opposite position, and so cannot be heard now to argue this point." *Id*. at 10.

The court sees no reason to revisit the allegation that the Compromise Agreement was the product of duress, menace, or undue influence. No facts, and certainly no new facts are given in the SAC suggesting any of these factors existed, nor dealing with the judicial estoppel implicit in urging one thing upon the court to approve the Compromise Agreement, and now taking the opposition position.

However, in dismissing the FAC, the court did not close the door on Plaintiff's fraud claim, but simply stated that the allegations were pled with insufficient particularity to comport with the requirement from Rule 9(b). Allegations of fraud are subject to a heightened pleading standard. Fed. R. Civ. P. 9(b) ("Rule 9(b)"). In all averments of fraud or mistake, the circumstances constituting fraud shall be stated "with particularity." Fed. R. Civ. P. 9(b); *Desaigoudar v. Meyercord*, 223 F3d 1020, 1022-1023 (9th Cir. 2000). Even though the substantive elements of a state law fraud cause of action are determined by state law, those elements must be pleaded with particularity as required by Rule 9(b) when brought in federal court. *Vess v. Ciba-Geigy Corp. USA*, 317 F3d 1097, 1103 (9th Cir. 2003). Although malice, intent, knowledge, and other conditions of a person's mind may be alleged generally, such allegations must still meet the plausibility standard. *Iqbal*, 556 U.S. 686-87. Rule 9(b) demands that the circumstances constituting the alleged fraud "be specific enough to give defendants notice of the particular misconduct ... so that they can defend against the charge and not just deny that they have done anything wrong." *Kearns v. Ford Motor Company*, 567 F.3d 1120, 1124 (9th Cir. 2009) (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)) (ellipsis in original). "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Kearns*, 567 F. 3d at 1124. Fraud averments failing to meet the Rule 9(b) "particularity" standard are disregarded, and the remaining allegations evaluated to see if a valid claim has been stated. *Vess*, 317 F3d at 1105. Plaintiff also asserts, citing *Wong v. Stoler*, 237 Cal. App. 4th 1375 (2015), that rescission is an available remedy for misstatements of any kind, whether intentional, negligent or innocent by a fiduciary if the statements caused plaintiff to enter into the contract.

Here, Trustee asserts, and the court is inclined to agree, that Plaintiff has not asserted facts, taken as true, that would tend to demonstrate that Trustee or any of his associates, intentionally misled, misrepresented, or otherwise acted with fraudulent intent in obtaining Plaintiff's consent to the Agreement at the time the Agreement was signed and approved by the court.

Plaintiff does take portions from various emails sent between and among the parties that, taken together, form a mosaic from which a picture of fraudulent behavior could arguably be gleaned. The emails suggest that Trustee and Vogele used "high-pressure" tactics upon Plaintiff to get him to sign onto the Compromise Agreement, but again, missing from the SAC is anything that suggests fraudulent intent at the time the Compromise Agreement came into existence. As Trustee argues, the closest Plaintiff really comes to clearly articulating a fraud claim against Trustee is found in paragraph 47 of the SAC, which states:

> "Plaintiff alleges on information and belief that Defendant lacked the intent to comply with the estate's contractual obligations from the start. At all times Defendant had intended to cause Col. Seay to rely on his assurance to his detriment. Col. Seay reasonably relied on the Trustee's express promises in the contract and on Vogele's assurances as set forth in the "hammer and tong" email in executing the agreement. Col. Seay was induced to enter into the contract, a recognized basis for rescission, by Vogele's verbal and written misrepresentations that the estate would fulfill its obligations under the contract, actively litigate adversary claims to completion, bring millions of dollars into the estate and repay the deferred sale proceeds to Col. Seay. The truth was that neither Vogele nor Casey intended to litigate the Adversary claims for any period longer than it took to sell the 518 Property and to soak up the sale proceeds by their billings. At no time did Vogele or Casey have any intent to repay the Seay advance."

As noted, the paragraphs preceding the quoted passage, even taken as true, do not form a clear picture of fraud in the inducement. Indeed, as Trustee points out the quoted passage from the SAC is mainly conclusory and appears to just presume ill-intent rather than actually showing any facts supporting it. Conclusory statements of fraud and misrepresentation—or, as is the case here, unsupported statements of Defendant's purported intent on the basis of information and belief—are likely insufficient. *See Shelton v.*

Ocwen Loan Servicing, LLC, 2019 WL 4747669 at *7-8 (S.D. Cal. Sept. 20, 2019). Plaintiff must clearly set out the precise circumstances that constitute fraud, or such allegations must be disregarded. *Vess*, 317 F3d at 1105. Regarding the *Wong* case cited by Plaintiff, Trustee persuasively argues that *Wong* is not as broad as Plaintiff asserts. Rather, Trustee notes that the *Wong* court observed, "[u]nder California law, negligent misrepresentation is a species of actual fraud and a form of deceit ... [and] a single misstatement as to a material fact, knowingly made with intent to induce another into entering the contract, will, if believed and relied on by that other, afford a complete ground for rescission[.]" *Wong*, 237 Cal. App. 4th at 1388. Trustee also notes that in *Wong*, the trial court expressly found that the seller had made misrepresentations and did so with reckless disregard. *Id*. As noted above, the court does not see any allegations of clear-cut misrepresentation, or even of negligent misrepresentations much less statements made with reckless disregard, whether by Trustee or any of his associates. All the court sees is an agreement that, for various reasons, went bad and Plaintiff did not receive what he hoped he would get. After all, there are no guarantees in litigation, everybody knows that, and especially parties well-represented by counsel such as in the Compromise Agreement's negotiation and approval. Moreover, Trustee was expressly permitted to abandon the adversary proceeding if he felt it was wise to do so. Paragraph 2.1.8, in describing the Trustee's duties under the agreement, provides:

> Actively litigate all remaining claims in the Adversary and seek recovery of all available property for the Chapter 7 Estate, including but not limited to trial, post-trial motions and prosecution of any appeals arising out of the decision of the Court, **to the extent Trustee determines such litigation will likely result in reasonable recovery to the Chapter 7 Estate**. In the event Trustee decides to abandon any cause of action or litigation, Col Seay shall have first right of refusal to purchase all right, title and interest in said claim to pursue said litigation on his own behalf in his sole discretion, subject to further Court approval which shall include appropriate overbid procedures. (emphasis added)
>
> This is exactly the sort of provision the court would expect from a

trustee. Certainly, it cannot be reasonably argued that a trustee would be compelled to pursue any and all theories however far-fetched or however remote might be the prospect of monetary recovery, nor would the court approve such a thing. Indeed, as recognized throughout these pleadings, this administration proved to be extraordinarily expensive and the litigation was hard fought. The intricate defenses and evasions erected by Ferrante with assistance of others proved difficult to overcome, and the chances of recovering back the amounts expended in pursuit were close questions. The Trustee did the prudent thing in not digging a deeper hole when not warranted by the prospects of monetary recovery. Moreover, Seay ended up owning *all of* these claims for $1, a prospect he never could have expected but for the Compromise Agreement. Implicit in Plaintiff's argument is that somehow Seay was denied the benefit of his bargain. But that holds no water either. Seay bargained for and obtained things he had no other right to expect such as Trustee revocation of Trust I (that it might arguably have been unnecessary is also beyond the point), employment of the Trustee's avoiding powers in an attempt to augment the estate, resistance to Remar and others who sought to foreclose on the Harbor Island property, and recognition of the validity of Seay's lien. All of this consideration was undeniably received as bargained for. That Plaintiff feels disappointed by this outcome is understandable, but a cause of action for fraud in the inducement, even by negligent misrepresentation, is just not made on these alleged facts.

Trustee also appears to be correct when he asserts that Plaintiff has failed to adequately support a claim for rescission based on failure of the consideration pursuant to the Compromise Agreement. Trustee persuasively argues this leg of Plaintiff's argument is merely an expression of frustration at not getting what he hoped he had bargained for. The court notes that this same argument was put forth in the FAC, and the court found it lacking support then, and maintains that opinion. Indeed, the court noted that the decision not to pursue certain claims owned by the estate did not render the consideration illusory. On the contrary, the court noted that there was express provision in the Agreement that contemplated such an outcome. The court stated in its tentative ruling:

> "According to Plaintiff, the basic terms of the Agreement were that Col. Seay agreed to 'defer' receipt of $1.6 million (half) attributable to his lien from the sale of the Property ('Deferred Seay Proceeds') to enable the insolvent estate the liquidity to pursue Debtor and third parties for recovery of damages and undeclared assets. In this characterization the Deferred Seay Proceeds were to be later paid back out of recoveries from litigation by Trustee along with additional fees, costs and interest which accrued. But the Agreement provides for at least a subordination, and, as it developed, there was nothing left with which to pay the subordinated half of the proceeds. The Trustee was given express authority in the Agreement not to administer assets he deemed not worthwhile or feasible to administer (as any competent trustee would) and Seay was given the express option to first acquire them, which he ultimately did for $1 (on each of two separate occasions)[.] The court approved the Agreement by Order entered on June 18, 2014 at a hearing after notice to creditors in which Seay actively joined in support of the Agreement." (Tentative Ruling, p. 5-6)

Thus, it appears that, again, Plaintiff has failed to plead facts that would tend to show a failure of consideration as to the Compromise Agreement that would support the cause of action for rescission.

Next Plaintiff argues that the cause of action for rescission is viable because Plaintiff has asserted facts that would tend to show that the compromise agreement was the result of a mistake of law and/or fact. A mistake of law is when a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts. See, e.g., *In re Marriage of Mansell*, 217 Cal.App.3d 219, 234 (1989). A mistake of law exists only when (1) all parties think they know and understand the law but all are mistaken in the same way, or (2) when one side misunderstands the law at the time of contract and the other side knows it, but does not rectify that misunderstanding. Cal. Civ. Code § 1578. In paragraph 81 of SAC, Plaintiff

alleges that there was the misimpression "that unless the facially irrevocable Trust I was revoked, the Seay lien was unenforceable. Vogele was able to induce Seay to execute the agreement by holding revocation hostage and refusing to revoke Trust I unless Seay signed. The misrepresentations of the law and fact by Vogele are grounds for rescission[.]"

Plaintiff alleges further in paragraphs 82 through 84 that:

"Only in 2015 did facts emerge which showed that Trust I was irrelevant to the enforceability of the Seay lien for two reasons. First, Col. Seay subpoenaed documents from Bank of America which revealed that Trust I did not own the asset when the Seay judgment was recorded in 2004. Instead the expressly revocable Trust III held record title from 2001- 2006 including the date the Seay judgment was recorded. Because Trust III was revocable the Seay lien immediately attached to the Residence under Probate Code § 18200. The discovery of Trust III led directly to the entry of the February 2016 judgment establishing Seay's priority and an order affirming the judgment in District Court in September 2016. If the parties had known of Trust III's ownership on the date of recordation the contract would not have been entered into by Col. Seay and the Vogele threats would have had no force. Second, on August 26, 2015 the BAP ruled that Trust I terminated in 1998 for failure to comply with IRS regulations and reverted to Debtor individually. The BAP opinion is now final. Therefore, as a matter of law the property was owned by Debtor individually at all times from 1998 forward and Debtor was the judgment debtor under the Seay judgment. Even though the Trustee now knows that Trust I did not exist since 1998, he continues to mischaracterize the effect of his revocation of Trust I. He insists that the Seay lien only attached to the 518 Property when he revoked Trust I. In fact the Seay lien attached to the 518 Property a full ten years before the Trustee revoked, on May 20, 2004, when the judgment was recorded and the asset was owned by the expressly revocable Trust III."

Trustee argues that the court should disregard these allegations of mistake of fact and law, and cites *Alevy v. Seneca Ins. Co. Inc*., 2012 WL 13012460 at *13 (C.D. Cal. 2012), where the court rejected a theory of mistake of law, where among other things, "[p]laintiff was represented by… counsel who bore the responsibility of making himself familiar with all pertinent aspects of the policy… and "[p]laintiff's counsel simply failed to take advantage of that opportunity to argue [the alleged mistake of law]." Trustee then points out that during the lengthy and tense negotiations, Plaintiff was at all times represented by counsel and that fact is acknowledged in the Agreement itself. Furthermore, Trustee also points out that the Agreement specifically acknowledges numerous factual and legal disputes in existence at the time of contracting, and resolution of such issues without the necessity of litigation was a material part of the benefit of the bargain, which seems logical as this type of Agreement is usually aimed at reducing or eliminating the need for litigation. Finally, Trustee points out that in the Plaintiff's papers in supporting the Agreement, Plaintiff acknowledged a dispute over the continued validity of the Seay lien and argued that approval of the Agreement would settle that question. Thus, Trustee persuasively argues, Plaintiff should be estopped from arguing mistake of law or fact because the dispute was known at the time of the Agreement's formation and it was Plaintiff's express desire to not engage in further litigation. As stated above, the revocation of Trust I was only part of the global arrangement, even it was Trust III that held title as determined by the BAP, that would still have required the Trustee's revocation, and the parties decided to make common cause against Ferrante and his confederates.

Plaintiff's last argument asserts that the Agreement is offends public policy because the property was fully encumbered and Trustee's administration of such an asset violates the Justice Department Guidelines and public policy as promulgated by the Office of the United States Trustee unless the agreement returns a meaningful dividend to unsecured creditors. Again, the June 10, 2020 Tentative Ruling speaks to this issue, where the

court stated on page 12:

"Regrettably, this kind of very expensive administration where unsecured creditors end up with nothing is not even unusual, and every case must be evaluated in its own light. This was an extremely difficult case. The facts presented to the Trustee and his lawyers at the time of the Agreement were very daunting, and the Trustee is not to be faulted for making a calculated effort."

Trustee then cites *In re Mednet*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000) where the court explained that there is no requirement that "services result in a material benefit to the estate in order for the professional to be compensated; the applicant must demonstrate only that the services were 'reasonably likely' to benefit the estate at the time the services were rendered." That is almost precisely the sentiment given by the court in its June 10 tentative ruling. Defendant made calculated efforts but from what the court can see the problem was that many of the defendants proved too evanescent or impecunious to be responsible in monetary recovery, or at least compared to the expense of chasing them. The court sees nothing in the SAC that would change that opinion, and so public policy is not offended.

For the reasons stated, Plaintiff's SAC has not shown the existence of facts, accepted as true, that would support a cause of action for effective rescission (and hence restitution) because both persuasive counter authority and ample evidence in the record, including many of Plaintiff's own statements and representations to the court, severely undercut the *Iqbal* and *Twombly* requirements for plausibility.

4. The Second Claim for Relief

Trustee asserts that the second claim, Common Count for Money Had and Received, is entirely dependent on the viability of the first cause of action.

Quoting paragraph 96 of the SAC, Trustee argues that ("Under California law, a party to a contract may plead a cause of action for restitution after unilateral rescission by way of a common count for money had and received, and hereby does so." But as discussed above, Plaintiff's asserted justifications for unilateral rescission are largely unsupported by law and fact, and non-existent.

5. The Third Claim for Relief

Plaintiff's Third Claim for Relief for Declaratory Judgment also fails. Plaintiff seeks an order declaring that the Carve-Out in the Agreement constitutes "cash collateral" entitled to "adequate protection" which requires Plaintiff to prevail on the claim for rescission. Pursuant to the Agreement, Col. Seay agreed to Carve-Out 50% of the proceeds of the sale of the Property to be disbursed to the estate. The Agreement provided that the balance of his claim will be unsecured and subordinated to other unsecured and administrative claims. As the Court has expressed in its July 21, 2020 adopted Tentative Ruling: "[w]ithout a lien, Seay cannot now be heard to argue about cash collateral or adequate protection, as those concepts are only appropriate in the context of a secured claim." See Tentative Ruling on Plaintiff's Motion for Order Requiring Accounting, Restoration of Unauthorized Payments, And Adequate Protection at 24-25. As such, Plaintiff's declaratory judgment claim for adequate protection cannot stand without the rescission claim, and Plaintiff has, again, failed to state a claim pursuant to Rule 12(b)(6).

6. Conclusion

Although Plaintiff's SAC contains more factual detail than the FAC, it makes little difference because many of the arguments are simply arguments that the court has heard and rejected before. Plaintiff marshals facts as best he is able, but in the end, does not quite paint the picture that Plaintiff would

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like the court to see. Furthermore, Trustee has convincingly presented counter authority and evidence in the record that casts serious doubt upon the allegations, but more importantly, on whether the allegations can support any of the asserted causes of actions within the *Iqbal* and Twombly standards. As the court has opined in the past, this was an extremely difficult case and any trustee would have encountered some or all of the same issues as Trustee did here.

The remaining question is whether Plaintiff should be given further leave to amend. Trustee persuasively argues that this is Plaintiff's third bite (maybe fourth depending on how counted) at the apple and that if this motion is granted it is extremely unlikely that Plaintiff will be able to make any new arguments that would move the needle. The court has already expressed its skepticism that there is really anything here besides a bitterly disappointed plaintiff. Thus, in keeping with the spirit of the original Compromise Agreement that spawned this litigation, further litigation seems both unnecessary and undesirable. Further leave to amend will be denied.

Grant without leave to amend

Party Information

Debtor(s):

Robert A. Ferrante — Represented By
Richard M Moneymaker - SUSPENDED -
Arash Shirdel
Ryan D O'Dea

Defendant(s):

Thomas H. Casey — Represented By
Cathrine M Castaldi
Honieh H Udenka

Plaintiff(s):

Nancy Klein — Represented By
Natasha Riggs

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Thursday, October 8, 2020 **Hearing Room 5B**

11:00 AM

CONT... Robert A. Ferrante **Chapter 7**

Estate of William L. Seay

Represented By
Brian Lysaght
Natasha Riggs

Trustee(s):

Thomas H Casey (TR)

Represented By
Thomas H Casey
Thomas A Vogele
Brendan Loper
Cathrine M Castaldi