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SUSAN M. SPRAYL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:)	BAP No.	CC-13-1229-PaTaD
TRACHT GUT, LLC,)	Bk. No.	SV 12-20308-MT
Debtor.)	Adv. No.	SV 12-01433-MT
<hr/>			
TRACHT GUT, LLC,)		
Appellant,)		
v.)	O P I N I O N	
COUNTY OF LOS ANGELES)		
TREASURER AND TAX COLLECTOR;)		
DAVID HAGHAZARZADEH; YURI)		
VOLODINSKY,)		
Appellees.)		

Argued and Submitted on November 22, 2013
at Pasadena, California

Filed - January 3, 2014

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

Honorable Maureen Tighe, U.S. Bankruptcy Judge, Presiding

Appearances: Mark Eugene Goodfriend argued for appellant Tracht
Gut, LLC. Barry S. Glaser argued for appellee
County of Los Angeles Treasurer and Tax Collector.

Before: PAPPAS, TAYLOR and DUNN, Bankruptcy Judges.

1 PAPPAS, Bankruptcy Judge:
2

3 Chapter 11¹ debtor Tracht Gut, LLC ("Debtor") appeals the
4 orders of the bankruptcy court dismissing without leave to amend
5 its adversary complaint against appellees Los Angeles County
6 Treasurer and Tax Collector ("the County"), David Hagnazarzadeh
7 ("Hagnazarzadeh") and Yuri Volodinsky ("Volodinsky") under Rule
8 7012 and Civil Rule 12(b)(6), and denying reconsideration of that
9 order under Rule 9024 and Civil Rule 60(b)(1). We AFFIRM.

10 **FACTS**

11 This appeal concerns Debtor's efforts to avoid the County's
12 prepetition tax sales of two parcels of real property formerly
13 owned by Debtor.

14 The first property is located on Hatteras Street in Tarzana,
15 California (the "Hatteras Property"). Real property taxes owed
16 to the County had not been paid on the Hatteras Property since
17 2008. Pursuant to California tax law, the properties were "tax
18 defaulted" and "subject to [the County's] power to sell" three
19 years after default. Debtor purchased the Hatteras Property from
20 E.R. Financial Services & Development, Inc. ("E&N"), NH Simpson
21 Partnership, OF General Partnership, and EM Partnership on April
22 9, 2012, for \$60,000, subject to three deeds of trust totaling
23 \$920,000. Debtor recorded the grant deed on July 11, 2012.
24

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

1 The second property is located in San Fernando, California
2 (the "San Fernando Property" and together, the "Properties").
3 Taxes on the San Fernando Property also had not been paid since
4 2008. On April 9, 2012, E&N transferred the San Fernando Property
5 to Debtor for "valuable consideration."² The record does not
6 indicate if there were any encumbrances on the San Fernando
7 Property at the time of that sale. Debtor recorded a grant deed
8 on November 26, 2012, one day before filing its bankruptcy
9 petition.

10 On August 31, 2012, the County served a Notice of Auction
11 for a tax sale of the Properties on all interested parties; the
12 sale was set for October 22, 2012. The Notice of Auction was
13 published on that date in the Los Angeles Daily News. The record
14 indicates that Debtor, as record owner of the Hatteras Property,
15 was notified of the auction. Debtor is not on the list of
16 parties given notice concerning the sale of the San Fernando
17 Property, likely because the record owner of the San Fernando
18 Property in August 2012 was still E&N, who received notice.

19 The County conducted the tax sales of the Properties at
20 public auction on October 22, 2012. The Hatteras Property was
21 sold to appellee Haghazarzadeh for \$300,000, subject to the
22 three deeds of trust. The San Fernando Property was sold to
23 appellee Volodinsky for approximately \$100,000.

24 Debtor filed its petition for relief under chapter 11 on
25

26 ² The recorded grant deed, however, also provided that the
27 transfer was a "bona fide gift and grantor received nothing in
28 return." The parties do not dispute that Debtor was the owner of
the San Fernando Property.

1 November 27, 2012. On December 11, 2012, Debtor filed schedules.
2 In Schedule A, Debtor claimed to own both of the Properties and
3 indicated that:

4 A disputed tax sale occurred on or about October 21,
5 2012. The sales price was far less than the market
6 value of this property. Debtor attempted to pay the
7 taxes in full, which the [County] refused to take. As
of the date of this petition, no Tax Deed has been
recorded and Debtor disputes the validity of the
transfer as an avoidable transfer.

8 The tax deeds transferring title of the Hatteras Property to
9 Haghazarzadeh and the San Fernando Property to Volodinsky were
10 both recorded by the County on December 13, 2012.

11 On December 12, 2012, Debtor commenced the adversary
12 proceeding at issue in this appeal. In its complaint against the
13 Appellees, Debtor asked the bankruptcy court to grant relief on
14 five separate claims: (1) to avoid the tax sales as fraudulent
15 transfers; (2) for declaratory judgment; (3) for an injunction;
16 (4) for violation of the automatic stay; and (5) for unjust
17 enrichment.

18 The County filed a motion to dismiss the complaint on
19 January 22, 2013, citing Civil Rule 12(b)(6), made applicable in
20 adversary proceedings by Rule 7012. The County argued that
21 Debtor, on all five counts, had failed to state an adequate claim
22 for relief. According to the County, there were no facts alleged
23 in the complaint to support granting any relief to Debtor on its
24 claims. Additionally, the County argued that the Properties were
25 each sold before bankruptcy was commenced, at a regularly
26 scheduled tax sale with competitive bidding procedures, all in
27 compliance with applicable state law. As a result, the County
28 contended, the purchase price paid by the buyers of the

1 Properties should be conclusively presumed to represent
2 reasonably equivalent value and, therefore, there was no legal
3 basis to avoid the tax sales as fraudulent transfers under
4 § 548(a). Further, since the tax sales occurred prepetition, the
5 County argued that the Properties were not property of the estate
6 under § 541 and thus were not protected by the automatic stay
7 when Debtor's bankruptcy petition was filed. Hagnazarzadeh
8 filed a substantially similar motion to dismiss under Civil Rule
9 12(b)(6) on January 24, 2013.³

10 Debtor responded to the dismissal motions on February 11,
11 2013. It generally repeated its arguments that the sales were
12 not made for reasonably equivalent value and, thus, were
13 avoidable.

14 The hearing on the motions to dismiss was set for February
15 20, 2013. Before the hearing, the bankruptcy court posted a
16 tentative ruling providing, in part:

17 The Complaint is comprised purely of threadbare
18 recitals of the elements of the causes of action and
19 conclusory statements. As it reads, the Complaint and
20 the allegations therein, are not entitled to the
21 assumption of truth. Most of the information
22 surrounding the events in question (dates, relationship
among parties, etc.) is fleshed out solely within the
[motions to dismiss]. . . . For all the reasons stated
above, the Court shall dismiss the Complaint with leave
to amend.

23 The bankruptcy court's tentative ruling also indicated its intent
24 to dismiss Debtor's claims for declaratory relief and an
25 injunction because they were not claims, but merely forms of
26 relief.

27 _____
28 ³ Volodinsky did not actively participate in the bankruptcy
court proceedings.

1 At the hearing on the motions to dismiss on February 20,
2 2013, the bankruptcy court heard arguments from counsel for
3 Debtor, the County and Hagnazarzadeh. The bankruptcy court
4 concluded that the complaint should be dismissed and that
5 amendment of the complaint would be an exercise in futility.

6 Well, I generally allow one amendment . . . but this
7 complaint was unbelievably bad and just clearly was
8 such a placeholder to see if you could stab at some
9 legal theory that might slow things down, but it was
10 shockingly bad, and now I'm thinking about the legal
11 theories that you've really refocused my attention on
12 here at the argument. . . . I agree [with the County]
13 that I don't see what you could plead to get around,
14 and you haven't convinced me, Mr. Brownstein [Debtor's
15 counsel], that you have some theory that can allow you
16 to plead facts which would warrant relief under
17 [§] 548. . . . So I'm going to grant the motion to
18 dismiss with prejudice for the reasons stated in the
19 tentative as supplemented by the argument here today.

20 Hr'g Tr. 10:18-11:12, April 20, 2013.

21 The bankruptcy court entered an order granting the motions
22 to dismiss on March 13, 2013 (the "Dismissal Order"), stating
23 that:

- 24 1. The Debtor can never amend the Complaint to state
25 a viable cause of action as the real properties
26 foreclosed upon at the duly conducted tax sale of
27 the subject properties held on October 22, 2012 as
28 set forth in the Complaint, were and are not
properties of the Debtor's estate for purposes of
11 U.S.C. § 541;
2. [t]he Debtor could not properly allege that the
County's post-petition recording of the deeds
violated the automatic stay in 11 U.S.C. § 362 as
it was solely a ministerial act;
3. [t]he Debtor could not properly allege that the
duly conducted tax sale of the subject properties
could be the basis of an action under 11 U.S.C.
§§ 548 or 549; and
4. [t]he Court thereby dismissed the Complaint, with
prejudice.

1 On March 27, 2013, Debtor filed a motion for reconsideration
2 of the Dismissal Order, arguing that "the judgment/order(s) were
3 entered as a result of surprise, excusable mistake, inadvertence
4 and/or neglect and/or error of law, that good cause exists
5 therefore, and that such relief would be in the interests of
6 justice."⁴ Attached to the reconsideration motion was a proposed
7 First Amended Complaint. The First Amended Complaint contained
8 additional factual allegations for the first claim for avoidance
9 of the tax sales as fraudulent transfers, but simply restated
10 without factual support the second through fifth claims.

11 On May 7, 2013, the bankruptcy court entered a memorandum of
12 decision and an order denying reconsideration. The court also
13 concluded that Debtor's proposed First Amended Complaint was not
14 viable:

15 The fact that Debtor now has a proposed amended
16 complaint is too little too late. . . . Debtor had
17 ample opportunity to address the lack of a viable
18 complaint prior to the filing of the [dismissal
19 motions]. . . . There is no explanation why Debtor did
20 not complete due diligence or amend within the 21 days
21 following the filing of the complaint. Fed. R. Civ. P.
22 15(a)(1)(A). There is also no explanation why Debtor
23 did not complete due diligence and amend in response to
24 the [Civil Rule 12(b)(6) motions] as opposed to filing
25 an Opposition. Fed. R. Civ. P. 15(a). That Debtor's
26 counsel filed an opposition to the [dismissal motions]
27 and now admits that his complaint was conclusory and

23 ⁴ Debtor's motion cites Civil Rules 55, 59 and 60,
24 applicable in adversary proceedings by Rules 7055, 9023 and 9024,
25 as authority for reconsideration, but Debtor only argued under
26 Civil Rule 60(b)(1). The bankruptcy court also analyzed Debtor's
27 motion under that rule. Under these circumstances, Debtor's
28 motion should have been treated as one under Civil Rule 59(e).
Am. Ironworks & Erectors, Inc. v. N. Am. Constr. Corp., 248 F.3d
892, 898-99 (9th Cir. 2001). However, since the outcome of
Debtor's request would be the same under either standard, we also
consider only Debtor's Civil Rule 60(b)(1) arguments.

1 lacked specificity tests the spirit of Rule 11. . . .
2 Debtor failed at every stage of the litigation process
3 to provide the grounds of its entitlement to relief.
4 Debtor's failure to timely conduct due diligence and
5 amend evidences Debtor's intent to merely delay the
6 litigation process. . . . Debtor's failure to present
7 a timely viable complaint was purposeful and a delaying
8 tactic. The Court declines to exercise its discretion
9 in favor of a party whose "gross negligence" has caused
10 the mistake from which relief is sought.

11 Debtor filed a timely appeal of the Dismissal Order and the
12 order denying reconsideration on May 14, 2013.

13 **JURISDICTION**

14 The bankruptcy court had jurisdiction under 28 U.S.C.
15 §§ 1334 and 157(b)(2)(A) and (H).⁵ We have jurisdiction under 28
16 U.S.C. § 158.

17 **ISSUES**

18 Whether the bankruptcy court erred in dismissing Debtor's
19 complaint under Civil Rule 12(b)(6).

20 Whether the bankruptcy court abused its discretion in
21 declining to allow Debtor to file an amended complaint.

22 Whether the bankruptcy court abused its discretion in
23 denying Debtor's motion for reconsideration of the dismissal
24 order.

25 ⁵ This is a proceeding which, in part, involved Debtor's
26 attempt to recover a fraudulent transfer from third parties.
27 Thus, the constitutional power of the bankruptcy court to enter a
28 final judgment resolving such claims may be in doubt for the
reasons discussed in Stern v. Marshall, 131 S. Ct. 2594 (2011)
and Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins.
Agency, Inc.), 702 F.3d 553 (9th Cir. 2011), cert. granted, 133
S. Ct. 2880 (2013). Since none of the parties, either in the
bankruptcy court or this appeal, have questioned the authority of
the bankruptcy court, we also express no opinion concerning that
topic.

1 trial court need not accept as true conclusory allegations in a
2 complaint or legal characterizations cast in the form of factual
3 allegations. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56
4 (2007); Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139
5 (9th Cir. 2003). To avoid dismissal under Civil Rule 12(b)(6), a
6 plaintiff must aver in the complaint "sufficient factual matter,
7 accepted as true, to 'state a claim to relief that is plausible
8 on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
9 (quoting Twombly, 550 U.S. at 570). A dismissal under Civil Rule
10 12(b)(6) may be based on either the lack of a cognizable legal
11 theory or on the absence of sufficient facts alleged under a
12 cognizable legal theory. Johnson v. Riverside Healthcare Sys.,
13 534 F.3d 1116, 1121 (9th Cir. 2008).

14 In deciding to dismiss it, the bankruptcy court described
15 Debtor's original complaint as "unbelievably bad and just clearly
16 was such a placeholder to see if [Debtor] could stab at some
17 legal theory that might slow things down, but it was shockingly
18 bad[.]" Hr'g Tr. 10:18-20, April 20, 2013. We agree.

19 Debtor's first claim for relief in that complaint, which
20 asserted that the tax sales were avoidable fraudulent transfers,
21 consisted of a verbatim recitation of § 548(a)(1)(B), followed by
22 a single sentence:

23 As such, pursuant to 11 U.S.C. Sections 548 and 549, as
24 well as on state law grounds, including, but not
25 limited to, California Civil Code 3275, the tax sales
of the Properties conducted by Defendants should be
avoided and set aside.

26 Simply put, even under the liberal rules referenced above,
27 Debtor's cavalier approach to pleading a claim for relief is
28 inadequate. The complaint plainly fails to allege the facts

1 necessary to state a claim for avoidance of the tax sales.

2 As to Debtor's four other claims for relief, two appear, on
3 their faces, to be legitimate claims (i.e., unjust enrichment and
4 violation of the automatic stay). However, like the claim for
5 fraudulent transfer, they too are cast entirely as conclusory
6 statements, not facts. As to Debtor's "claim" for an injunction
7 and for declaratory relief, while the bankruptcy court correctly
8 noted that injunction and declaratory relief are remedies, the
9 court's dismissal of those claims solely on that basis was likely
10 harmless error. Courts routinely consider injunctive and
11 declaratory relief "claims" as demands for relief, provided that
12 there are other claims and facts asserted in the complaint that
13 would warrant such remedies. Wankowski v. Taylor Bean & Whitaker
14 Mortg. Corp., 2010 WL 5141745, at *3 (D. Nev. Dec. 13, 2010);
15 Infor Global Solutions (Michigan), Inc. v. Hanover Foods Corp.,
16 2009 WL 2778258, at *2 (N.D. Ga. Aug. 28, 2009). In this case,
17 though, there were no facts asserted in the claims for fraudulent
18 transfer, violation of the stay, or unjust enrichment to support
19 injunctive or declaratory relief, so the bankruptcy court's
20 dismissal of those claims simply because they were incorrectly
21 labeled "claims" was harmless error. Further, Debtor did not
22 argue that dismissal of the claims for injunctive relief,
23 declaratory relief, and unjust enrichment was error in its
24 opening brief on appeal, and any such argument is therefore
25 waived. Ore. Natural Desert Ass'n v. Locke, 572 F.3d 610, 614
26 n.3 (9th Cir. 2009) ("this court will not address claims not
27 argued in the opening brief").

28 At bottom, none of Debtor's claims presented "sufficient

1. factual matter, accepted as true, to 'state a claim to relief
2. that is plausible on its face.'" Iqbal, 556 U.S. at 678;
3. Twombly, 550 U.S. at 570. Indeed, even liberally read, Debtor's
4. complaint presented no factual matter to support its prayer for
5. relief. The bankruptcy court's decision to dismiss the complaint
6. was proper.

7. B. The bankruptcy court did not err in dismissing Debtor's
8. claim for violation of the automatic stay.

9. As mentioned above, Debtor did not argue in its opening
10. brief that the bankruptcy court erred in dismissing the other
11. four claims asserted in its original complaint, and we will not
12. ordinarily address matters not argued in the opening brief.
13. Locke, 572 F.3d at 614 n.3. However, since the County has
14. addressed the stay violation claim in its brief, we review it
15. here.

16. In the original complaint, Debtor claimed that its legal
17. title in the Properties was not extinguished until the tax deeds
18. were recorded. Because this occurred postpetition, Debtor argued
19. that the recordings of the deeds violated the automatic stay
20. under § 362(a). There are at least two flaws in Debtor's
21. argument.

22. First, Debtor's right of redemption as to the Properties
23. lapsed the day before the tax sales occurred. Cal. Rev. & Tax
24. Code § 3707. A tax deed subsequently provided to a purchaser
25. "conveys title to the purchaser free of all encumbrances of any
26. kind." Cal. Rev. & Tax Code § 3712.⁶ Under these facts, since
27.

28. ⁶ There is California case law suggesting that a
foreclosure sale induced by fraud or irregularities might be set
aside and, consequently, the power to redeem revived. Luna v.

(continued...)

1 Debtor's interest in the Properties lapsed before it filed for
2 bankruptcy, the Properties never became property of the estate
3 under § 541, and any action by the County concerning those
4 Properties would not run afoul of the automatic stay under
5 § 362(a).

6 Secondly, as the bankruptcy court ruled, the recording of
7 the tax deeds postpetition was a ministerial act and, as such,
8 would not violate the automatic stay. The Ninth Circuit adopted
9 the ministerial act exception to the automatic stay in McCarthy,
10 Johnson & Miller v. North Bay Plumbing, Inc. (In re Pettit), 217
11 F.3d 1072, 1080 (9th Cir. 2000) ("Ministerial acts or automatic
12 occurrences that entail no deliberation, discretion, or judicial
13 involvement do not constitute continuations of such a [judicial]
14 proceeding" for purposes of possible violations of the automatic
15 stay). In Pettit, the court cited with approval to a First
16 Circuit case that extended the ministerial act exception to acts
17 of public officials. Soares v. Brockton Credit Union (In re
18 Soares), 107 F.3d 969, 973-74 (1st Cir. 1997) ("Thus, when an
19 official's duty is delineated by, say, a law or a judicial decree
20 with such crystalline clarity that nothing is left to the
21 exercise of the official's discretion or judgment, the resultant
22 act is ministerial."). Cal. Rev. & Tax Code § 3708.1 provides:
23 "Upon execution [of the tax sale and payment of the purchase
24 price] the tax collector shall immediately record the deed with
25 the county recorder and pay the recording fees." There is no
26 indication in this or related provisions of California law that

27
28 _____
29 ⁶(...continued)

Citibank, N.A., 202 Cal. App.4th 89, 104 (2011). However, Debtor
has not argued either in the bankruptcy court or in this appeal
that there were any irregularities or fraud in the tax sale.

1 the tax collector has any discretion in recording the deed; he
2 instead is commanded to record it.

3 On this record, we conclude that the County's recording of
4 the tax deeds was a ministerial act, and the bankruptcy court did
5 not err in ruling that the recordings did not violate the
6 automatic stay.

7 **II.**

8 **Debtor could not amend the complaint as a matter of right.**

9 On appeal, Debtor apparently concedes that its complaint was
10 deficient factually: "The [bankruptcy] court admittedly did not
11 have the requisite factual allegations to render a decision[.]"
12 Debtor's Op. Br. at 8.⁷ Rather, Debtor's focus on appeal is its
13 contention that the bankruptcy court abused its discretion when
14 it denied Debtor's request to amend the complaint.

15 Debtor's first argument is that, under these facts, it could
16 amend the complaint at any time as a matter of right. To support
17 this contention, Debtor argues that Civil Rule 15(a)⁸ allows a

18 _____
19 ⁷ At oral argument before the Panel, counsel for Debtor
20 again conceded that the bankruptcy court did not err in
21 dismissing the original complaint. He conceded that the First
22 Amended Complaint Debtor attempted to submit with its
23 reconsideration motion was also deficient in pleaded facts.

24 ⁸ Civil] Rule 15(a) provides in relevant part that:

25 Amended and Supplemental Pleadings.

26 (a) Amendments Before Trial.

27 (1) Amending as a Matter of Course. A party may
28 amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive

(continued...)

1 plaintiff to amend a complaint once as a matter of course, and
2 that the rule does not treat a motion to dismiss under Civil Rule
3 12(b)(6) as a "responsive pleading" that would terminate the
4 right to file an amended pleading within 21 days. Debtor cites
5 several cases that, arguably, support its position.⁹

6 Unfortunately for Debtor, the version of Civil Rule 15 upon
7 which it relies in its briefing was amended in 2009, after the
8 cases cited in Debtor's brief were decided. A newly added
9 provision, Civil Rule 15(a)(1)(B), dictates that the right to
10 amend once as a matter of course terminates 21 days after service
11 of a motion under Civil Rule 12(b), (e), or (f). The Advisory
12 Committee Notes to the 2009 Amendments provide instruction
13 regarding the effects of the change:

14 Former Rule 15(a) addressed amendment of a pleading to
15 which a responsive pleading is required by
16 distinguishing between the means used to challenge the
pleading. Serving a responsive pleading terminated the

17 ⁸(...continued)
18 pleading is required, 21 days after service of a
19 responsive pleading or 21 days after service of a
20 motion under Rule 12(b), (e), or (f), whichever is
earlier.

21 (2) Other Amendments. In all other cases, a party may
22 amend its pleading only with the opposing party's written
23 consent or the court's leave. The court should freely give
leave when justice so requires.

24 Civil Rule 15(a) (2013) (emphasis added).

25 ⁹ Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101 (7th
26 Cir. 1984); Kelly v. Del. River Jt. Comm'n, 187 F.2d 93 (3d Cir.
27 1951); McGruder v. Phelps, 608 F.2d 1023 (5th Cir. 1979); Adams
28 v. Campbell City School Dist., 483 F.2d 1351 (10th Cir. 1973);
Smith v. Blackledge, 451 F.2d 1201 (4th Cir. 1971); Nolen v.
Fitzharris, 450 F.2d 958 (9th Cir. 1971); Smith v. Cal., 336 F.2d
530 (9th Cir. 1964).

1 right to amend. Serving a motion attacking the pleading
2 did not terminate the right to amend, because a motion
3 is not a "pleading" as defined in Rule 7. The right to
4 amend survived beyond decision of the motion unless the
5 decision expressly cut off the right to amend.

6 The distinction drawn in former Rule 15(a) is
7 changed [so that] the right to amend once as a matter
8 of course terminates 21 days after service of a motion
9 under Rule 12(b)~~(e)~~(e), or (f). This provision will
10 force the pleader to consider carefully and promptly
11 the wisdom of amending to meet the arguments in the
12 motion. A responsive amendment may avoid the need to
13 decide the motion or reduce the number of issues to be
14 decided, and will expedite determination of issues that
15 otherwise might be raised seriatim. It also should
16 advance other pretrial proceedings.

17 [Civil Rule] 15 Advisory Committee Notes (2009).

18 The County's motion was filed on January 22, 2013. Under
19 the applicable revised version of Civil Rule 15(a)(1), Debtor's
20 right to amend its complaint as a matter of course expired on
21 February 12, 2013. Rather than file an amended complaint within
22 that time, Debtor was instead satisfied to file only an
23 opposition to the motion to dismiss on February 11, 2013. In
24 other words, Debtor's rule and case law authorities are no longer
25 good law.¹⁰

26 III.

27 **The bankruptcy court did not abuse its discretion when it denied
28 Debtor's request to file an amended complaint.**

Since Debtor's right to file an amended complaint as a
matter of course expired on February 12, 2013, under Civil Rule
15(a)(2), Debtor was required either to obtain the County's

¹⁰ It is puzzling why Debtor continues to make this
argument on appeal. In its Memorandum Decision, the bankruptcy
court explicitly cited to Civil Rule 15(a)(1)(B) as an example of
Debtor's complicity in delaying judicial process: "There is also
no explanation why Debtor did not complete due diligence and
amend in response to the [motions to dismiss], as opposed to
filing an opposition. Fed. R. Civ. P. 15(a)(1)(B)."

1 consent or leave of the bankruptcy court to amend its complaint.
2 Here, the County did not consent to Debtor's request to amend its
3 complaint, and Debtor faults the bankruptcy court for refusing to
4 grant leave to amend.

5 Civil Rule 15(a)(2) requires that the trial court freely
6 grant leave to amend "when justice so requires." There is
7 extensive case law examining the relevant considerations for a
8 trial court's decision to grant or deny leave to amend a
9 complaint. The best known, and most frequently cited, precedent
10 is the Supreme Court's decision in Foman v. Davis, 371 U.S. 178
11 (1962). In Foman, the Court considered, among other issues,
12 whether a district court abused its discretion by denying leave
13 to amend a complaint without providing any reasons for its
14 decision. The Court instructed that:

15 In the absence of any apparent or declared reason -
16 such as undue delay, bad faith or dilatory motive on
17 the part of the movant, repeated failure to cure
18 deficiencies by amendments previously allowed, undue
19 prejudice to the appealing party by virtue of allowance
of the amendment, futility of amendment, etc. - the
leave sought should, as the rules require, be "freely
given."

20 Id. at 182. Based on this decision, the exceptions to the policy
21 and rule requiring a liberal approach to requests to amend a
22 complaint have come to be known as the "Foman Factors."

23 The Ninth Circuit has employed the Foman Factors to review
24 whether a trial court properly exercised its discretion in
25 determining whether to grant leave to amend a complaint. Sonoma
26 City. Ass'n of Retired Emples. v. Sonoma City, 708 F.3d 1109,
27 1118 (9th Cir. 2013); Griggs v. Pace Am. Group, Inc., 170 F.3d
28 877, 880 (9th Cir. 1999) (holding that a trial court should

1 decide a motion to amend a complaint by ascertaining the presence
2 of any of four factors: bad faith, undue delay, prejudice to the
3 opposing party, and/or futility). Of the Foman Factors, the
4 Ninth Circuit has held that a trial court's denial of leave to
5 amend for futility, alone, will be upheld if it is clear that the
6 complaint could not be saved by any amendment. Carvalho v.

7 Equifax Info. Servs., LLC, 629 F.3d 876, 892 (9th Cir. 2010).

8 In this case, the bankruptcy court based its decision to deny
9 leave to Debtor to file an amended complaint on two of the Foman
10 Factors, explaining that an amendment would be futile, and
11 concluding that Debtor had engaged in undue delay in proposing
12 the amendment. These reasons constitute an adequate basis to
13 sustain the bankruptcy court's decision. Ecological Rights
14 Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 520 (9th Cir. 2013)
15 (denying leave to amend for futility and undue delay).

16 As to undue delay, the bankruptcy court determined that,

17 There is no explanation why Debtor's counsel did not
18 complete due diligence prior to filing the complaint.
19 Debtor's counsel simply states that he intended to meet
20 and confer with the principal of Debtor and Debtor's
real estate attorney, and then he intended to file an
amended complaint.

21 The bankruptcy court then noted that Debtor could not
22 satisfactorily explain why it did not complete due diligence and
23 seek to amend the complaint (a) within the 21-day period after
24 filing the original complaint, (b) within the 21-day period
25 following the filing of the County's Civil Rule 12(b)(6) motion,
26 (c) instead of, or in conjunction with, filing an opposition to
27 the Civil Rule 12(b)(6) motion, or (d) otherwise prior to the
28 hearing on the County's motion to dismiss. Indeed, Debtor made

1 no attempt to file an amended complaint until the Reconsideration
2 Motion, three months after filing the original complaint. As the
3 bankruptcy court observed,

4 Debtor failed at every stage of the litigation process
5 to provide the grounds of its entitlement to relief.
6 Debtor's failure to timely conduct due diligence and
7 amend evidences Debtor's intent to merely delay the
8 litigation process.

9 Our review of the record confirms that the facts support the
10 bankruptcy court's determination that Debtor engaged in undue
11 delay in attempting to amend the complaint. Thus, at least one
12 Foman Factor supports the court's decision to deny leave to amend
13 the complaint.

14 Another and compelling ground for denying leave to amend
15 Debtor's complaint is futility. Ecological Rights Found., 713
16 F.3d at 520. Indeed, a determination that any amendment would be
17 futile requires the trial court to dismiss the complaint with
18 prejudice. Mirmehdi v. United States, 689 F.3d 975, 985 (9th
19 Cir. 2012) ("However, a party is not entitled to an opportunity
20 to amend his complaint if any potential amendment would be
21 futile. See, e.g., May Dep't Store v. Graphic Process Co., 637
22 F.2d 1211, 1216 (9th Cir. 1980)."); Sanford v. MemberWorks, Inc.,
23 625 F.3d 550, 557 (9th Cir. 2010) (observing that although leave
24 to amend is to be "freely given when justice so requires," denial
25 of a motion to amend is proper if it is clear "that the complaint
26 would not be saved by any amendment.").

27 Here, the bankruptcy court determined that,

28 The Debtor could not properly allege that the duly
conducted tax sale of the subject properties could be
the basis of an action under 11 U.S.C. [§]§ 548 or

1 549.¹¹

2 In other words, the bankruptcy court concluded that any attempt
3 by Debtor to amend the first claim for relief would be futile
4 because a duly conducted tax sale under California law
5 presumptively provides for reasonably equivalent value, and thus
6 the essential condition for avoidance of the sales as fraudulent
7 transfers, i.e., for less than reasonably equivalent value, could
8 not be established. We agree with the bankruptcy court.

9 An analysis of the relationship of tax foreclosure sales to
10 "reasonably equivalent value" for purposes of § 548(a)(1)(B)
11 should begin with a review of the U.S. Supreme Court's opinion in
12 BFP v. Resolution Trust Corp., 511 U.S. 531 (1994). In BFP, the
13 Supreme Court addressed whether a regularly conducted
14 prebankruptcy mortgage foreclosure sale gives rise to a
15 conclusive presumption that the price obtained at that sale was
16 for reasonably equivalent value such that the sale could not
17 later be avoided under § 548(a) as a constructively fraudulent
18 transfer. In that case, BFP held title to a parcel of real
19 property encumbered by a deed of trust. After BFP defaulted on

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22 ¹¹ It was never clear in Debtor's complaint why it referred
23 to § 549, the Code provision dealing with avoidance of
24 unauthorized postpetition transfers, in the context of the first
25 claim for fraudulent transfer, a claim which, by definition,
26 deals solely with prebankruptcy transfers. Perhaps Debtor was
27 conflating the claim for fraudulent transfer with the claim for
28 violation of the automatic stay. As to the other claims for
injunction, declaratory judgment, and unjust enrichment, Debtor
has not discussed these claims in its opening brief and we will
not address them. Ore. Natural Desert Ass'n v. Locke, 572 F.3d
610, 614 n.3 (9th Cir. 2009) ("this court will not address claims
not argued in the opening brief").

1 the loan payments, the creditor properly noticed a foreclosure
2 sale in compliance with applicable California law. At that sale,
3 the property was purchased by a third party for \$433,000. After
4 BFP initiated a chapter 11 case, it filed a complaint to avoid
5 the foreclosure sale and transfer to the third party as a
6 constructively fraudulent transfer under § 548(a), arguing that,
7 as compared to the sale price, the property was actually worth
8 \$725,000 at the time of the sale. The bankruptcy court held that
9 the foreclosure sale was not collusive or fraudulent because it
10 was conducted in compliance with state law, and so the sale could
11 not be avoided. This Panel and the Ninth Circuit affirmed.

12 Id.¹²

13 On appeal, the Supreme Court held that fair market value was
14 not the appropriate measure of "reasonably equivalent value"
15 under § 548(a) because market value, as commonly understood, has
16 no applicability in the forced-sale context; indeed, it is "the
17 very antithesis of forced-sale value." Id. at 537. The Court
18 held that § 548(a) "requires judicial inquiry into whether the
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20 ¹² By its ruling in BFP, the Supreme Court effectively
21 endorsed what was known as the "Madrid Rule," a term attributable
22 to this Panel's decision in Lawyers Title Insurance Corp. v.
23 Madrid (In re Madrid), 21 B.R. 424 (9th Cir. BAP 1982), aff'd,
24 725 F.2d 1197, 1199 (9th Cir. 1982). The Panel reiterated the
25 Madrid Rule in deciding the appeal that eventually led to the
26 Supreme Court's BFP decision. BFP v. Imperial Savings & Loan
27 Ass'n (In re BFP), 132 B.R. 748, 750 (9th Cir. BAP 1991) ("A
28 non-collusive and regularly conducted nonjudicial foreclosure
sale prior to the filing of a bankruptcy case cannot be
challenged as a fraudulent conveyance because the consideration
received in such a sale establishes 'reasonably equivalent value'
as a matter of law."), aff'd, 974 F.2d 1144 (9th Cir. 1992),
aff'd sub nom., BFP v. Resolution Trust Corp., 511 U.S. 531
(1994).

1 foreclosed property was sold for a price that approximated its
2 worth at the time of sale." Id. at 538-39. Recognizing that the
3 state mortgage foreclosure regulatory scheme is designed to
4 achieve just such a result, the Court held that "[a]bsent a clear
5 statutory requirement to the contrary, we must assume the
6 validity of this state-law regulatory background and take due
7 account of its effect." Id. at 539.

8 The Supreme Court then reviewed the history of state
9 foreclosure laws:

10 Foreclosure laws typically require notice to the
11 defaulting borrower, a substantial lead time before the
12 commencement of foreclosure proceedings, publication of
13 a notice of sale, and strict adherence to prescribed
14 bidding rules and auction procedures. . . . When these
15 procedures have been followed, however, it is "black
16 letter" law that mere inadequacy of the foreclosure
17 sale price is no basis for setting the sale aside,
18 though it may be set aside (under state foreclosure
19 law, rather than fraudulent transfer law) if the price
20 is so low as to "shock the conscience or raise a
21 presumption of fraud or unfairness."

22 Id. at 542. A state's interest in its real estate laws was at
23 the heart of the BFP Court's analysis: "a fair and proper price,
24 or a 'reasonably equivalent value,' for foreclosed property, is
25 the price in fact received at the foreclosure sale, so long as
26 all the requirements of the State's foreclosure law have been
27 complied with." Id. at 545.

28 Many of the elements of the BFP analysis are also applicable
to state tax foreclosure sales. As noted by the Court, federal
courts should pay considerable deference to state law on matters
relating to real estate, and where there has been "notice to the
defaulting party, a substantial lead time before the commencement
of foreclosure proceedings, publication of a notice of sale, and

1 strict adherence to prescribed bidding rules and auction
2 procedures," a tax sale is likely to yield reasonably equivalent
3 value for the foreclosed property. Indeed, numerous other courts
4 have applied the teachings of the Supreme Court in BFP in
5 analyzing whether a conclusive presumption arises that reasonably
6 equivalent value is present as the result of regularly-conducted
7 state tax-defaulted property sales.

8 Notably, two circuit courts have extended BFP's holding to a
9 non-collusive tax sale of real property conducted in accordance
10 with state law. In Kajima v. Girandole Intel Ltd. Lab. Co. (In
11 re Grandote Country Club Co., Ltd.), 252 F.3d 1146 (10th Cir.
12 2001), the Tenth Circuit ruled that:

13 [T]he decisive factor in determining whether a transfer
14 pursuant to a tax sale constitutes "reasonably
15 equivalent value" is a state's procedure for tax sales,
in particular, statutes requiring that tax sales take
place publicly under a competitive bidding procedure.

16 Id. at 1152. The Kajima court compared the requirements set
17 forth in BFP to the Colorado tax sale procedures and found those
18 procedures to be consistent with BFP. The court therefore held
19 that a Colorado tax sale was for reasonably equivalent value.

20 Id.

21 Earlier, the Fifth Circuit had applied the teachings of BFP
22 to tax-defaulted property sales under Oklahoma law. The court
23 determined that not only was BFP applicable to determining
24 reasonably equivalent value under § 548(a) regarding a
25 prepetition tax sale, but also to determining present fair
26 equivalent value under § 549 concerning a post-petition tax sale.
27 T.F. Stone Co. v. Harper (In re T.F. Stone Co.), 72 F.3d 466,
28 468-69 (5th Cir. 1995).

1 Bankruptcy courts have also applied BFP's holding in the tax
2 sale context. Russell-Polk v. Bradley (In re Russell-Polk), 200
3 B.R. 218, 220-22 (Bankr. E.D. Mo. 1996); Golden v. Mercer County
4 Tax Claim Bureau (In re Golden), 190 B.R. 52, 58 (Bankr. W.D. Pa.
5 1995); Holla v. Myers (In re Holla), 184 B.R. 243, 252 (Bankr.
6 M.D.N.C. 1995); Lord v. Neumann (In re Lord), 179 B.R. 429,
7 432-35 (Bankr. E.D. Pa. 1995); McGrath v. Simon (In re McGrath),
8 170 B.R. 78, 82 (Bankr. D.N.J. 1994).

9 Informed by this case law, we conclude that the holding in
10 BFP should be applied to regularly conducted sales of tax-
11 defaulted real property in California, where there is a
12 substantial lead time before the commencement of foreclosure
13 proceedings, there is publication of a notice of the sale, and
14 there is strict adherence to prescribed competitive bidding rules
15 and auction procedures as formulated in the state law. Put
16 another way, based on the procedural requirements of California
17 law, the tax-default sales of the Properties held in this case on
18 October 22, 2012, were for reasonably equivalent value.

19 Cal. Rev. & Tax Code § 3691(a)(1)(A) provides that, after a
20 property has become tax-defaulted, the tax collector shall have
21 the power to sell all or any part of a tax-defaulted property
22 that has not been redeemed. The sale of a non-residential
23 commercial property may take place three years after the tax
24 default. Id. Cal. Rev. & Tax Code § 3691.1, 3691.2 and 3691.4
25 require that when the property becomes available for tax sale,
26 the tax collector must file notice with the county clerk and the
27 notice is recorded. Cal. Rev. & Tax. Code § 3699 requires that
28 the county board of supervisors must approve the tax sale.

1 Debtor has not argued that any of these provisions were not
2 satisfied.

3 Cal. Rev. & Tax Code § 3701 provides that the notice of a
4 tax sale must be given to interested parties no less than 45
5 days, nor more than 120 days, before the proposed sale. The
6 Notice of Auction concerning these sales was dated August 31,
7 2012, 53 days before the date set for the auction, October 22,
8 2012.

9 Cal. Rev. & Tax Code § 3702 requires that the notice of sale
10 be published in a newspaper of general circulation, once a week
11 for three consecutive weeks. Cal. Rev. & Tax Code § 3704
12 requires extensive information in the notice of sale: (a) date,
13 time and place of the sale; (b) location of publicly available
14 computer workstations if the sale allows internet bids; (c)
15 description of the property; (d) name of last assignee of the
16 property; (e) minimum bid; (f) statement that right of redemption
17 ceases day before the sale; (g) statement that parties in
18 interest have right to file claims in excess of liens and costs
19 to be recovered; (h) statement that parties will be notified of
20 any excess proceeds; (i) if property remains unsold after the
21 scheduled sale, date, time, and place of subsequent sale; (j)
22 deposit if required for bidding; (k) if property purchased by
23 credit bid, notice that right of redemption would revive if full
24 payment not made by a date specified [not relevant in this
25 appeal]. In this case, the sale notice was published in the Los
26 Angeles Daily News. Debtor has not challenged that the notice
27 requirements were not satisfied.

28 Cal. Rev. & Tax Code § 3691(a)(3)(A) and Cal. Civ. Code

1 § 2924b(c)(1) require that the notice of the sale be sent by
2 certified mail to all parties in interest, including the
3 defaulting parties, within the 45-120 day period. Debtor has not
4 argued that this notice was not properly given.

5 Finally, Debtor does not challenge that the actual sales
6 were not regularly conducted in compliance with all applicable
7 statutes, including Cal. Rev. & Tax Code § 3693, which requires
8 that all tax sales "shall be at public auction to the highest
9 bidder"; and Cal. Rev. & Tax Code § 3691(a)(1)(A), which provides
10 that "[a]ny person, regardless of any prior or existing lien on,
11 claim to, or interest in the property, may purchase at the sale."

12 In addition, Cal. Rev. & Tax Code § 3701 provides that the
13 property owner's right of redemption expires at the close of
14 business of the last business day preceding the sale. Debtor did
15 not redeem the Properties prior to the sales. Cal. Rev. & Tax
16 Code § 3708 provides that the tax collector shall execute a deed
17 to the purchaser for the property; the recorded tax deeds are in
18 the excerpts of record submitted in this appeal. This is
19 significant, because Cal. Rev. & Tax Code § 3711 provides that
20 the deeds issued by the tax collector are "conclusive evidence of
21 the regularity of all proceedings from the assessment of the
22 assessor to the execution of the deed."

23 Debtor has not argued in the bankruptcy court or this appeal
24 that the tax sales of the Properties did not comply with the
25 applicable state statutes. To the contrary, as noted above, the
26 record supports that there was an appropriate lead time before
27 the commencement of foreclosure proceedings, notice was properly
28 given to the defaulting parties, there was publication of a

1 notice of sale, and there was competitive bidding at a public
2 auction in strict adherence to prescribed competitive bidding
3 rules and auction procedures as clearly formulated in the
4 California statutes. Under BFP and the cases applying the rule
5 in that decision to state tax sales, the transfer of the
6 Properties in this case at the sales on October 22, 2012,
7 resulted in a conclusive presumption that the sales were for
8 reasonably equivalent value. Therefore, the transfers were not
9 subject to avoidance under § 548(a), and the bankruptcy court did
10 not abuse its discretion in declining to allow Debtor an
11 opportunity to file an amended complaint, since any amendment
12 would have been a futile gesture.

13 In sum, the bankruptcy court did not abuse its discretion
14 when it declined to allow Debtor to file an amended complaint.

15 IV.

16 **The bankruptcy court did not abuse its discretion**
17 **in denying reconsideration of its Dismissal Order.**

18 Debtor asked the bankruptcy court to reconsider its
19 Dismissal Order under Civil Rule 60(b)(1), incorporated by Rule
20 9024. That rule provides that, "On motion and just terms, the
21 court may relieve a party or its legal representative from a
22 final judgment, order, or proceeding for the following reasons:
23 (1) mistake, inadvertence, surprise, or excusable neglect[.]" In
24 the bankruptcy court, Debtor argued it should be granted relief
25 based on excusable neglect.

26 A careful review of the motion for reconsideration, and
27 Debtor's brief in this appeal, shows that Debtor does not discuss
28 or identify the "neglect" from which it wishes to be excused.

1 Debtor's arguments are solely directed to alleged errors by the
2 bankruptcy court in dismissing the complaint with prejudice.
3 Debtor likewise does not address the concerns expressed by the
4 bankruptcy court for Debtors' dilatory tactics and failure "at
5 every stage of the litigation process to provide the grounds of
6 its entitlement to relief."

7 The bankruptcy court's Memorandum Decision detailed Debtor's
8 conduct and, based on those actions, found that the Debtor
9 intended to delay the proceedings and, in doing so, abused the
10 bankruptcy process. We therefore find it noteworthy that Debtor
11 began its motion for reconsideration by proclaiming that
12 "[e]xcusable neglect may serve as the basis for relief, provided
13 the moving party has shown diligence in seeking relief, and the
14 opposing party has not suffered prejudice in this interim."
15 While suggesting that the County would not be prejudiced by
16 reconsideration, Debtor never addressed its repeated failures
17 throughout the proceedings to exercise diligence in seeking
18 relief.

19 When faced with a motion for relief from an order under
20 Civil Rule 60(b)(1), a recent Ninth Circuit opinion notes that
21 "[a trial] court may exercise its discretion to deny relief to a
22 defaulting defendant based solely upon a finding of defendant's
23 culpability." Brandt v. Am. Bankers Ins. Co., 653 F.3d 1108,
24 1112 (9th Cir. 2011). Here, the bankruptcy court made extensive
25 findings concerning Debtor's culpability in failing to exercise
26 diligence in seeking to amend its complaint. The bankruptcy
27 court did not abuse its discretion in denying Debtor's motion for
28

1 reconsideration.¹³

2 **CONCLUSION**

3 We conclude that the bankruptcy court did not err in
4 dismissing Debtor's complaint under Civil Rule 12(b)(6) and did
5 not abuse its discretion in denying leave to amend the complaint
6 and reconsideration of the Dismissal Order. We therefore AFFIRM
7 the bankruptcy court's orders.

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21 ¹³ With its motion for reconsideration, Debtor submitted a
22 First Amended Complaint and has suggested repeatedly in both the
23 bankruptcy court and this appeal that by submitting the amended
24 complaint it had satisfied the bankruptcy court's demands that it
25 provide the grounds for its entitlement to relief. However, as
26 the bankruptcy court properly noted, submitting the First Amended
27 Complaint at the reconsideration stage was yet another example of
28 the Debtor's dilatory behavior and was "too little, too late."
Memorandum Decision at 2, May 7, 2013. Further, at oral argument
before the Panel, counsel for Debtor conceded that, even as
amended, the First Amended Complaint was still deficient in the
necessary facts to support the claims.