

APPENDIX "A"

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAY 26 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ALBERT M. KUN,

No. 20-15115

Appellant,

D.C. No. 3:19-cv-05783-RS
Northern District of California,
San Francisco

v.

STATE BAR OF CALIFORNIA;
FRANCHISE TAX BOARD,

ORDER

Appellees.

Before: FERNANDEZ, BYBEE, and BADE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. Civ. P. 35.

Kun's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 28) are denied.

Non-party Lukashin's request for publication (Docket Entry No. 32) is denied.

No further filings will be entertained in this closed case.

APPENDIX "B"

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 23 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ALBERT M. KUN,

Appellant,

v.

STATE BAR OF CALIFORNIA;
FRANCHISE TAX BOARD,

Appellees.

No. 20-15115

D.C. No. 3:19-cv-05783-RS

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, District Judge, Presiding

Submitted February 17, 2021**

Before: FERNANDEZ, BYBEE, and BADE, Circuit Judges.

Chapter 7 debtor Albert Kun appeals pro se from the district court's order dismissing his bankruptcy appeal for failure to prosecute. We have jurisdiction under 28 U.S.C. §§ 158(d) and 1291. We review for an abuse of discretion. *Ash v. Cvetkov*, 739 F.2d 493, 495 (9th Cir. 1984). We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

The district court did not abuse its discretion by dismissing Kun's appeal after Kun failed to file the documents required by Federal Rule of Bankruptcy Procedure 8009 in a timely manner. *See Pagtalunan v. Galaza*, 291 F.3d 639, 640-43 (9th Cir. 2002) (discussing factors to be considered before dismissing a case for failure to prosecute; a district court's dismissal should not be disturbed absent "a definite and firm conviction" that it "committed a clear error of judgment" (citations and internal quotation marks omitted)); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992) (this court may review the record independently if the district court does not make explicit findings to show its consideration of the factors).

The district court did not abuse its discretion by denying Kun's motion for rehearing because Kun failed to demonstrate any basis for relief. *See Fed. R. Bankr. P.* 8022(a)(2); *United States v. Fowler (In re Fowler)*, 394 F.3d 1208, 1214-15 (9th Cir. 2005) (setting forth standard of review and requiring a movant to state with particularity each point of law or fact a court overlooked).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments or allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

Kun's motion for a stay of execution (Docket Entry No. 17) is denied.

AFFIRMED.

APPENDIX "C"

Molly Dwyer, Clerk of the Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

April 29, 2021

Re: *Albert M. Kun v. State Bar of California and
Franchise Tax Board*
Case No. 20-15115

Dear Ms. Dwyer:

Appellant joins *Amici* Igor Lukashin's request for publication under Circuit Rule 36-2(a) and (d). In addition, Appellant requests publication under Circuit Rule 36-2(b).

Appellant further wishes to bring to this court's attention a Supreme Court case filed on April 22, 2021, *AMG Capital Management LLC v. FTC* 19-508, where the Court unanimously held that Section 13(b) of the Federal Trade Commission Act does not authorize Federal courts to award equitable relief such as disgorgement or restitution. Similarly, in the case at bar, FRBP 8009 does not authorize for any sanction such dismissal; therefore, the District Court erred to dismiss on that ground.

Very truly yours,

Albert M. Kun

Albert M. Kun
(415) 362-4000

Cc:

Cara M. Porter
Deputy Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-700

James J. Chang
Office of the General Counsel
State Bar of California
180 Howard Street
San Francisco, CA 94105

APPENDIX "D"

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALBERT KUN,

Plaintiff,

v.

STATE BAR OF CALIFORNIA, et al.

Defendants.

Case No. 19-cv-05783-RS

ORDER DISMISSING APPEAL

I. INTRODUCTION

Appellant Albert Kun appeals the Bankruptcy Court's dismissal of his adversary action against Appellees, the State Bar of California and the Franchise Tax Board. Kun was a practicing attorney until he was disbarred by the California Supreme Court for misappropriating \$460 in client funds. In connection with those disciplinary proceedings, Kun was charged approximately \$40,000 in costs pursuant to California Business & Professions Code § 6086.10. Kun sued seeking a declaratory judgment that this debt was discharged in his prior Chapter 7 bankruptcy. The Bankruptcy Court dismissed the case with prejudice after finding that the Ninth Circuit's holding in *In re Findley*, 593 F.3d 1048, 1054 (9th Cir. 2010) that § 6086.10 "render[s] attorney discipline costs imposed by the California State Bar Court non-dischargeable in bankruptcy" was dispositive. The Bankruptcy Court also agreed with Defendants that Kun failed to cite any support for the existence of a hardship exception. On appeal, Kun argues the discipline costs constitute an unconstitutionally excessive fine and tries to distinguish *Findley*.

II. DISCUSSION

2 The Court need not reach the merits of Kun’s claims and the Bankruptcy Court’s dismissal
3 because Kun failed to perfect his appeal in accordance with Federal Rule of Bankruptcy Procedure
4 8009. Specifically, Bankruptcy Rule 8009(a)(1)(B) requires an appellant to file a designation of
5 items to be included in the record on appeal and a statement of the issues to be presented within 14
6 days of filing the notice of appeal. Because Kun’s notice of appeal was received on September 16,
7 2019 (as reflected in both the docket for this case and the docket for the bankruptcy court
8 proceeding), Kun’s additional filings were due on September 30, 2019. Kun missed this deadline.
9 His failure to perfect his appeal in time led Bankruptcy Judge Montali to issue a recommendation
10 to this Court to dismiss Kun’s appeal. *See* B.L.R. 8009-1(b)(2) (“The Bankruptcy Court may, on
11 its own motion, transmit the notice of appeal to the District Court with a recommendation that the
12 appeal be dismissed.”). This recommendation was dated and filed October 3, 2019. It appeared
13 on the bankruptcy court docket that day but did not appear on the docket for this case until
14 October 8, 2019.

15 On October 9, 2019, Kun filed his opening brief, but not until October 16, 2019 (i.e. 16
16 days *after* the close of the 14-day window) did Kun file his statement of issues and his designation
17 of contents for inclusion in the record on appeal. He also included in this October 16 filing his
18 opposition to the Bankruptcy Court's recommendation to dismiss the appeal. The various excuses
19 offered in Kun's opposition are unavailing. First, as a former lawyer and frequent litigant even
20 following his disbarment, Kun is well aware of the importance of filing timely appeals and of
21 meeting procedural deadlines generally. Second, by Kun's own admission, he was provided the
22 case number for this case on September 17, 2019. In fact, Kun acknowledges, that just two days
23 later, he checked the docket at this courthouse and was handed the Scheduling Order, the second
24 sentence of which referenced the need for the parties to "perfect[] the record on appeal in
25 accordance with the federal and local bankruptcy rules." (Dkt. 2 at 1.) Instead of acknowledging
26 that it was his responsibility to perfect his appeal within the 11 days remaining, Kun offers various
27 excuses, such as mistakes by the Clerk's Office, and he dismisses the Bankruptcy Court's

1 recommendation as being based "entirely on a procedural matter." (Dkt. 5 at 2.)

2 Procedural though it may be, Bankruptcy Rule 8009(a)(1)(B) set a September 30, 2019
3 deadline which Kun failed to meet. Because he did not perfect the appeal until October 16, 2019,
4 the Court adopts the Bankruptcy Judge's recommendation and the appeal is dismissed.

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6 **IT IS SO ORDERED.**

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8 Dated: December 16, 2019

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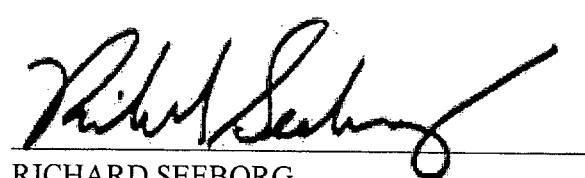
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RICHARD SEEBORG
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KUN,
Plaintiffs,
v.

Case No.: 19-cv-05783-RS

CERTIFICATE OF SERVICE

STATE BAR OF CALIFORNIA,
Defendants.

I, the undersigned, hereby certify that:

(1) I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California; and

(2) On 12/16/2019, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an interoffice delivery receptacle located in the Clerk's office.

Albert Miklos Kun
517 Green Street
San Francisco, CA 94133

Dated: 12/16/2019

Susan Y. Soong
Clerk, United States District Court
By: Corinne Lew
Corinne Lew, Deputy Clerk to
the Honorable Richard Seeborg

APPENDIX "E"

Entered on Docket
August 29, 2019
EDWARD J. EMMONS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



1 VANESSA L. HOLTON (111613)
2 ROBERT G. RETANA (148677)
3 JAMES J. CHANG (287008)
4 OFFICE OF GENERAL COUNSEL
5 THE STATE BAR OF CALIFORNIA
6 180 Howard Street
7 San Francisco, CA 94105-1639
8 Tel: (415) 538-2381
9 Fax: (415) 538-2321
10 Email: james.chang@calbar.ca.gov

Signed and Filed: August 28, 2019

Dennis Montali
DENNIS MONTALI
U.S. Bankruptcy Judge

8 Attorneys for Defendant The State Bar of California

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In Re:

Case No. 15-31382
Chapter 7

ALBERT MIKLOS KUN,

Debtor.

ALBERT MIKLOS KUN,

Adv. Proceeding Case No. 3:19-ap-03022

Plaintiff,

ORDER DISMISSING PLAINTIFF'S
ADVERSARY COMPLAINT WITHOUT
LEAVE TO AMEND

v.

STATE BAR OF CALIFORNIA;
FRANCHISE TAX BOARD,

Defendants.

1 Defendant The State Bar of California's Motion to Dismiss (Doc. 17) came on for
2 hearing on August 9, 2019. James J. Chang appeared on behalf of Defendant The State Bar of
3 California. Cara M. Porter appeared on behalf of Defendant Franchise Tax Board. Plaintiff
4 Albert Miklos Kun appeared *pro se*.

5 For the reasons stated on the record, Defendant The State Bar of California's Motion to
6 Dismiss is **GRANTED**. Plaintiff's Adversary Complaint is **DISMISSED WITH PREJUDICE**
7 **AND WITHOUT LEAVE TO AMEND.**

8 | Approved as to form:

10 /s/ Albert Miklos Kun
11 Albert Miklos Kun
Plaintiff, *Pro Se*

13 /s/ Cara M. Porter
14 Cara M. Porter
Attorney for Defendant Franchise Tax Board

END OF ORDER

COURT SERVICE LIST

Albert M. Kun
517 Green Street
San Francisco, CA 94133
Tel. (415) 362-4000
Albert_kun@hotmail.com

Notice Recipients

District/Off: 0971-3

Case: 19-03022

User: lparada

Form ID: pdfeoapc

Date Created: 8/29/2019

Total: 1

Recipients submitted to the BNC (Bankruptcy Noticing Center):

pla Albert Miklos Kun 517 Green Street San Francisco, CA 94133

TOTAL: 1



1 XAVIER BECERRA
2 Attorney General of California
3 KAREN W. YIU
4 Supervising Deputy Attorney General
5 CARA M. PORTER
6 Deputy Attorney General
7 State Bar No. 266045
8 455 Golden Gate Avenue, Suite 11000
9 San Francisco, CA 94102-7004
10 Telephone: (415) 510-3508
11 Fax: (415) 703-5480
12 E-mail: Cara.Porter@doj.ca.gov
13 Attorneys for Defendant Franchise Tax Board

Signed and Filed: August 27, 2019

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

13 ALBERT MIKLOS KUN,

14 Debtor.

CASE NO. 15-31382

15 Chapter 7

16 Adversary No. 19-03022

17 ALBERT MIKLOS KUN,

18 Plaintiff

19 ORDER DISMISSING PLAINTIFF'S
20 ADVERSARY COMPLAINT WITHOUT
21 LEAVE TO AMEND

22 Hearing: August 9, 2019
23 Time: 10:30 a.m.
24 Place: Courtroom 17
25 Judge: The Honorable Dennis J.
26 Montali

27 STATE BAR OF CALIFORNIA;
28 FRANCHISE TAX BOARD,

Defendants.

29
30 Defendant California Franchise Tax Board's ("FTB") Motion to Dismiss (Dkt. No. 20)
31 came on for hearing on August 9, 2019 at 10:30 a.m. in Courtroom 17 of the above-entitled court.
32 Deputy Attorney General Cara M. Porter appeared on behalf of FTB. James J. Chang appeared
33 on behalf of defendant The State Bar of California. Plaintiff Albert Miklos Kun ("plaintiff"), who
34 represents himself, appeared.

1 The Court considered FTB's motion concurrently with the motion to dismiss of defendant
2 The State Bar of California (Dkt. No. 17). The Court considered the motion papers of both
3 parties, plaintiff's oppositions, defendants' replies, and the arguments from counsel. For the
4 reasons stated on the record and good cause appearing, IT IS HEREBY ORDERED THAT FTB's
5 Motion to Dismiss is GRANTED. Plaintiff's Adversary Complaint is DISMISSED WITHOUT
6 LEAVE TO AMEND AND WITH PREJUDICE.

7 Approved as to form:

9 /s/ Albert Miklos Kun
10 Albert Miklos Kun
Plaintiff, *Pro Se*

12 /s/ James J. Chang
James J. Chang
Attorney for Defendant The State Bar of California

END OF ORDER

COURT SERVICE LIST

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APPENDIX "F"

FILED

JUN 04 2019

UNITED STATES BANKRUPTCY COURT
SAN FRANCISCO, CA

Albert M. Kun SB# 55820
517 Green Street
San Francisco, CA 94133
Tel. (415) 362-4000
albert_kun@hotmail.com

In Pro Se

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In Re:) Case No. 15-31382
) Chapter 7
ALBERT MIKLOS KUN,)
)
Debtor)

)
ALBERT MIKLOS KUN,)
) Adversary No.
Plaintiff,)
)
vs.)
)
STATE BAR OF CALIFORNIA;)
FRANCHISE TAX BOARD,)
)
Defendants.)

)

COMPLAINT

Plaintiff alleges:

1. On November 5, 2015 Plaintiff Debtor filed for Chapter 11 Bankruptcy protection in

this court to prevent his and his co-tenants' eviction from 381 Bush Street #200, San Francisco, California 94104, where they had practiced law for some 30 years.

2. Defendant State Bar of California, was named in the Bankruptcy petition, and thus was aware of the proceedings.
3. Defendant State Bar is a California Public Corporation acting as the administrative arm of the California Supreme Court.
4. Defendant Franchise Tax Board is a department of the State of California.
5. The disciplinary cost bill in Case No. 14-0-05418 was filed by the clerk of the Stat Bar Court on May 24, 2017. On October 8, 2017 plaintiff listed it in the Chapter 11 proceeding as an unsecured debt. On or about October 19, 2017, as State Bar attorney, James Chang, appeared at a hearing before this court and did not challenge the propriety of the credit.
6. While the Chapter 11 case was pending, the State Bar brought 2 additional cases against plaintiff, Cases Nos. 15-0-14554 and 16-0-12726. On November 14, 2016 the cases were tried together before Judge Miles, who has since retired from the Bench. Plaintiff was completely exonerated in Case No. 16-0-12726, which entitles him to costs under Rule 5.131 of the State Bar. Plaintiff, however, has not been given credit for these costs.
7. The Chapter 11 case continued until March 29, 2018 when it was converted to Chapter 7. On June 30, 2018 all debts were discharged.
8. On October 17, 2018 the disciplinary costs in Case No. 15-0-14554 were filed by the clerk of the State Bar Court after the discharge date; however, this case was based on conduct that had occurred in 2013 and August 14, 2015--prior to the bankruptcy filing on November 5, 2015. Therefore, the Discharge Order applies to the disciplinary cost debt unless the debt is excepted under 11 U.S.C. 523(a)(7). See *Papadakis v. Zelis* 66 F. 3d 205-209 (9th Circuit

1995): "A debt arises for purposes of discharge in bankruptcy when the act giving rise to the liability occurs."

9. On February 5, 2019 plaintiff filed a timely Petition for Writ of Certiorari and Motion to Proceed in Forma Pauperis in the United States Supreme Court in Case No. 15-0-14554. On April 29, 2019 the Petition was denied (see Exhibit 1A).
10. On April 30, 2019 the Franchise Tax Board issued a "Demand for Payment—Court Ordered Debt Collection: (see Exhibit 1B). The Franchise Tax Board admittedly receives 15% of the awards so collected.
11. As yet there has been no response by the State Bar to Exhibit 1.
12. Jurisdiction—Jurisdiction is proper in this court because the main case and all relevant events occurred here, and the defendants are properly before this court.
13. The Franchise Tax Board may not enforce the subject penalties that are unconstitutionally excessive. *Timbs v. Indiana* U.S. Supreme Court (April 2019). For someone living on Social Security in San Francisco, a \$40,000 penalty is unconstitutionally excessive.
14. The State Bar expressly waived the non-dischargeability of the debt in open court.
15. The State Bar impliedly waived the non-dischargeability of the debt.
16. By assigning the debt—if there was an assignment at all—the State Bar waived the non-dischargeability; this would be similar to a case where child support or alimony debt is assigned to a third party.
17. The Franchise Tax Board is not a "governmental unit" as defined by 11 U.S.C. 101(27).
18. The State Bar is not a "governmental unit" as defined by 11 U.S.C. 101(27).

19. California Revenue and Taxation Code Section 706.074 is inapplicable since plaintiff has been self-employed for 45 years (see reverse side of Exhibit "1B") and this is not a Criminal or Vehicle Code fine.
20. CCP Section 706.074 is inapplicable since the 90 days provided by it have not expired (see General Information in Exhibit "1B").
21. The language of 11 U.S.C. 523(a)(7) is not clear enough as applied in this case. "We require clearer language in Section 523(a)(7) before we can enforce such an incremental yet horizontal approach . . ." *In Re Scheerer* (9th Circuit 2016).

WHEREFORE,

1. Plaintiff prays that the court declare the subject debts dischargeable;
2. Reinstate the automatic stay;
3. Preliminarily and permanently enjoin the Franchise Tax Board from collection activities;
4. Order the Franchise Tax Board to repay any monies it may have collected;
5. Provide for any further relief the court deems just.

June 4, 2019


Albert M. Kun
Albert M. Kun
In Pro Se