Bankruptcy Circuit Update

Featuring cases from June 2014

First Circuit

***Zullo v. Lombardo (In re Lombardo),* ___F. 3d___, 2014 WL 2620958 (June 13, 2014)**

The Bankruptcy Court dismissed the plaintiff's ("Zullo") adversary proceeding and denied him leave to amend his complaint, which the Court of Appeals for the First Circuit affirmed. Zullo sued the debtor to determine the debt to him was not discharged, per 11 U.S.C. §523(a)(6), which provision excepts from discharge any debt for willful and malicious injury by the debtor to another entity or to the property of another entity.

Pre-petition, the debtor had represented to Zullo that the debtor was a licensed professional to do plumbing work, which he was not, and the resultant work required more money for Zullo to fix the substandard work.

Post-petition, in his adversary proceeding against the debtor, Zullo moved for summary judgment, and the Bankruptcy Court concluded that there was no evidence before it to support the theory that the debtor had injured Zullo's property willfully. The Bankruptcy Court averred that Zullo's adversary proceeding might have fared better if it had been brought under §523(a)(2)(A). Zullo moved to amend his complaint, which the court denied.

The sole issue on appeal was whether the Bankruptcy Court erred in denying Zullo leave to amend his complaint, which is reviewed under an "abuse of discretion" standard. Since there was 17 months between the filing of the complaint and the motion to amend, discovery had concluded, a trial date had been set, and with the request to amend no real reason had been articulated for the delay, the denial of leave to amend was affirmed as a reasonable exercise of discretion by the Bankruptcy Court.

Circuit Judge Thompson dissented, finding that the ruling was in tension with the liberal standard afforded leave to amend. Judge Thompson failed to see what burden would have been placed on the debtor or the Bankruptcy Court in allowing leave to amend, as the facts appeared settled and no additional discovery was requested.

***DeBenedictis v. Brady-Zell, (In re Karen Brady-Zell),* ___F. 3d___ 2014 WL 2872224 (June 25, 2014)**

Pre-petition, the debtor incurred a large debt to her matrimonial attorney for unpaid legal fees. After filing for bankruptcy, the attorney sued the debtor to determine the debt was not discharged, per 11 U.S.C. §523(a)(2)(A), under the theory that the debtor never intended to pay the legal fees. After trial, the Bankruptcy Court issued an opinion in which the court concluded that the attorney had not carried her burden of proving either false pretenses or a false representation and dismissed the adversary proceeding.

The Bankruptcy Appellate Panel issued a written opinion and affirmed the lower court. The Bankruptcy Court found that the attorney had not proven the first two elements, i.e., it found that the attorney had not proven by a preponderance of the evidence that the debtor's promise to pay was either knowingly false when made or intended to deceive. Upon further appeal, the First Circuit affirmed as well, agreeing that the attorney had indeed failed to prove by a preponderance of evidence the six elements required to prevail under 11 U.S.C. §523(a)(2)(A).

The attorney argued that the debtor was dishonest and not trustworthy at the hearing below, which lack of candor should undermine the Bankruptcy Court's fact finding. Even if lack of veracity was taken into

account, a finding of nondischargeability requires the attorney to have met her burdens of proof on all of the necessary elements, which she failed. Although the Bankruptcy Court opined that the weight of evidence was "split about even," when the weight of evidence is in "equipoise," the attorney cannot be said to have prevailed by preponderance.

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United States Court of Appeals,
First Circuit.

In re Karen A. BRADY–ZELL, Debtor.
Danielle E. deBenedictis, Creditor, Appellant,
v.
Karen A. Brady–Zell, Debtor, Appellee.

No. 13–9014. | June 25, 2014.

Appeal from the Bankruptcy Appellate Panel for the First Circuit.

Attorneys and Law Firms

Danielle E. deBenedictis and deBenedictis, Miller & Blum, P.A. on brief for appellant.

Logan A. Weinkauf and Benner & Weinkauf, P.C. on brief for appellee.

Before HOWARD, SELYA and THOMPSON, Circuit Judges.

Opinion

SELYA, Circuit Judge.

***1** Faced with the grim prospect of a crumbling marriage, Karen A. Brady–Zell (the debtor) engaged Danielle E. deBenedictis (the attorney) to act as her counsel. The debtor paid the attorney an up-front retainer of $25,000. After the representation ended, the attorney billed the debtor for additional fees and expenses of roughly $62,000. The debtor balked, and the attorney filed a state-court collection action.

The debtor then petitioned for bankruptcy protection, effectively staying the pending state-court action. *See* 11 U.S.C. § 362(a). She listed the balance due to the attorney among her scheduled debts. Left holding what appeared to be an empty bag (or nearly so), the attorney instituted an adversary proceeding in the bankruptcy court under, inter alia, 11 U.S.C. § 523(a)(2)(A).[1] She asserted that the debt had been incurred through false and fraudulent representations and under false pretenses and was, therefore, nondischargeable.

Following a bench trial, the bankruptcy court wrote a thoughtful rescript in which it concluded that the attorney had not carried her burden of proving either false pretenses or a false representation and proceeded to dismiss the adversary proceeding. *See deBenedictis v. Brady–Zell* (*In re Brady–Zell*), No. 10–1119, 2013 WL 1342479, at *8–9 (Bankr.D.Mass. Apr. 2, 2013). On an intermediate appeal, the Bankruptcy Appellate Panel (BAP) upheld the bankruptcy court's ukase. It, too, offered a closely reasoned explanation of its ruling. *See deBenedictis v. Brady–Zell* (*In re Brady–Zell*), 500 B.R. 295, 301–05 (B.A.P. 1st Cir.2013).

Unwilling to take "no" for an answer, the attorney appealed the BAP's decision. After careful consideration, we affirm.

We need not tarry. Having scrutinized the papers in the case and surveyed the applicable law, we discern no principled basis for disturbing the findings and conclusions of the lower courts. With this in mind, we can be brief; after all, we have explained before that when lower courts have supportably found the facts, applied the appropriate legal standards, articulated their reasoning clearly, and reached a correct result, a reviewing court ought not to write at length merely to hear its own words resonate. *See, e.g.*, *Vargas–Ruiz v. Golden Arch Dev., Inc.*, 368 F.3d 1, 2 (1st Cir.2004); *Lawton v. State Mut. Life Assur. Co.*, 101 F.3d 218, 220 (1st Cir.1996); *Ayala v. Union de Tronquistas, Local 901*, 74 F.3d 344, 345 (1st Cir.1996); *Holders Capital Corp. v. Cal. Union Ins. Co.* (*In re San Juan Dupont Plaza Hotel Fire Litig.*), 989 F.2d 36, 38 (1st Cir.1993). Accordingly, we affirm the judgment for substantially the reasons previously elucidated by the bankruptcy court and the BAP, pausing only to add a few embellishments.

First: The attorney's principal claim is that, at the start of the lawyer-client relationship, the debtor falsely promised to pay her fees. In other words, she alleges that the debtor made a commitment to pay whatever fees thereafter might accrue without the slightest intention of honoring that commitment.

***2** To prove that the debt is nondischargeable under 11 U.S.C. § 523(a)(2)(A), the attorney qua creditor had to complete a six-step march. This march required her to show that the debtor (i) made a knowingly false representation, (ii) intending to deceive the creditor, and (iii) to induce the creditor to rely upon the false promise; with the result that (iv) the creditor relied upon the false promise, and (v) justifiably so, so that (vi) damage resulted. *See McCrory v. Spigel* (*In*

re Spigel), 260 F.3d 27, 32 (1st Cir.2001); *Palmacci v. Umpierrez*, 121 F.3d 781, 786 (1st Cir.1997).

The burden of proving the elements underlying each of these six steps by a preponderance of the evidence rests with the party seeking nondischargeability. *See McCrory*, 260 F.3d at 32. A creditor arguing for an exception to nondischargeability must prove all six elements; if her proof falls short on any element, her quest for nondischargeability fails. *See id.*

Here, the bankruptcy court went no further than the first two elements. It found that the attorney had not proven by preponderant evidence that the promise to pay was either knowingly false when made or intended to deceive. *See deBenedictis*, 2013 WL 1342479, at *8. The court premised this determination squarely on the burden of proof: it painstakingly reviewed the record and concluded that the weight of the evidence was "split about even." *Id.*

Given this fully supportable assessment, we can find no fault with the court's determination that the attorney failed to carry her burden of proof. When the weight of the evidence is in equipoise, a party cannot plausibly be said to have carried the devoir of persuasion. *See Toye v. O'Donnell* (*In re O'Donnell*), 728 F.3d 41, 45 (1st Cir.2013).

Second: The attorney labors to cast the relevant events in a light more flattering to her theory of the case. Stripped of rhetorical flourishes, this amounts to an invitation for us to reweigh the evidence and balance the decisional scales differently. We decline this invitation.

At this stage of bankruptcy litigation, the task of an appellate court is not to find the facts anew but, rather, to assay the bankruptcy court's factfinding for clear error.[2] *See Boroff v. Tully* (*In re Tully*), 818 F.2d 106, 109 (1st Cir.1987). While the evidence as a whole is capable of supporting the inference of knowing falsity drawn by the attorney, it likewise is capable of supporting the inference of inconclusiveness drawn by the bankruptcy court. That ends this aspect of the matter: it is apodictic that where the facts can support two plausible but conflicting interpretations of a body of evidence, the factfinder's choice between them cannot be clearly erroneous. *See Gannett v. Carp* (*In re Carp*), 340 F.3d 15, 25 (1st Cir.2003); *see also United States v. Romain*, 393 F.3d 63, 69 (1st Cir.2004).

Third: The attorney argues pejoratively that the debtor was shown to be a liar and that the debtor's "dishonest and untrustworthy" testimony undermines the bankruptcy court's factfinding. This argument is wide of the mark. The bankruptcy court did not rest its decision on any illusions about the debtor's veracity. To the contrary, the bankruptcy court found much of her testimony to be self-serving and not deserving of credence. *See deBenedictis*, 2013 WL 1342479, at *2.

***3** Taking this lack of veracity into account, however, it proceeded to find that the attorney's proof was not preponderant. *See id.* at * 7–8. We are not aware of any rule that *mandates* a finding of nondischargeability against a party simply because her testimony lacks candor. Although we do not countenance untruthful testimony, a finding of nondischargeability requires more than a showing that the debtor exhibited a serious character flaw. The attorney, who had the burden of proof, made no such additional showing here.

We need go no further. The Bankruptcy Code is designed to give debtors a fresh start, and exceptions to this principle should be narrowly construed. *Rutanen v. Baylis* (*In re Baylis*), 313 F.3d 9, 17 (1st Cir.2002).

In this instance, the attorney did not carry her burden of proving her entitlement to such an exception. The courts below explained at length why the attorney's arguments (including arguments not mentioned above) were unavailing, and it would serve no useful purpose to repastinate that well-plowed ground. It suffices to say that the attorney's appeal, though full of sound and fury, is lacking in substance.

Affirmed.

Parallel Citations

59 Bankr.Ct.Dec. 181

Footnotes

1 With exceptions not relevant here, 11 U.S.C. § 523(a)(2)(A) provides that a discharge in bankruptcy "does not discharge an individual debtor from any debt ... to the extent obtained by ... false pretenses, a false representation, or actual fraud."

2 Our standard of review is not affected by the fact that this is a second-tier appeal. Because our review of the BAP's decision is de novo, *see Smith v. Pritchett (In re Smith),* 586 F.3d 69, 73 (1st Cir.2009), we look through that decision and directly review the bankruptcy court's findings of fact for clear error, *see id.; see also* Fed. R. Bankr.P. 8013.

2014 WL 2620958
United States Court of Appeals,
First Circuit.

In re David Allen LOMBARDO, Debtor.
John F. Zullo, Appellant,
v.
David Allen Lombardo, Appellee.

No. 13–9004. | June 13, 2014.

Synopsis

Background: Homeowner that had hired Chapter 7 debtor to perform plumbing work of home based on debtor's express representation that he was president of plumbing company and licensed to perform such work, when, in fact, he was only an apprentice, brought adversary proceeding to except debt from discharge on "willful and malicious injury" theory. The Bankruptcy Court denied creditor's motion for leave to amend complaint to assert claim under fraud-based dischargeability exception just one week before trial was to begin, and creditor appealed. The United States Bankruptcy Appellate Panel for the First Circuit affirmed. Creditor appealed.

[Holding:] The Court of Appeals, Justice Souter, sitting by designation, held that bankruptcy court did not abuse its discretion in denying homeowner's motion to amend nondischargeability complaint 17 months after it was filed and one week prior to trial.

Affirmed.

Appeal from the Bankruptcy Appellate Panel for the First Circuit.

Attorneys and Law Firms

Dean C. Brunel, with whom Erica C. Mirabella and Law Offices of Dean C. Brunel were on brief, for appellant.

Richard S. Ravosa for appellee.

Before THOMPSON, Circuit Judge, SOUTER, * Associate Justice, and STAHL, Circuit Judge.

Opinion

SOUTER, Associate Justice.

***1** This appeal is from the bankruptcy court's dismissal on summary judgment of John Zullo's adversary proceeding against debtor David Lombardo, after denying Zullo leave to amend his complaint. We affirm.

In September 2010, Lombardo filed for Chapter 7 bankruptcy. In December, Zullo began an adversary proceeding in the bankruptcy court, alleging that Lombardo's debt to him was nondischargeable under 11 U.S.C. § 523(a)(6). [1] That provision excepts from bankruptcy discharge "any debt ... for willful and malicious injury by the debtor to another entity or to the property of another entity."

Lombardo's debt to Zullo was for the amount of a Massachusetts state court judgment antedating Lombardo's bankruptcy and resting on the following facts. In 2006, Zullo paid Lombardo for services under a contract to perform plumbing and other work on Zullo's house. Lombardo had represented that he was the president of a plumbing company and was licensed to perform the necessary procedures. In fact, Lombardo was an apprentice, lacking the master plumber's license required by Massachusetts law to make any such agreement as the one with Zullo. Unsurprisingly, Lombardo's work turned out to be inadequate, and Zullo incurred additional expense to have it fixed.

After filing the adversary proceeding, Zullo's counsel withdrew in June 2011. In January 2012, Zullo retained a successor who, in March, moved for summary judgment on the 11 U.S.C. § 523(a)(6) claim, alleging nondischargeability because the debt on the state court judgment arose from Lombardo's willful and malicious injury to Zullo's property.

The bankruptcy court held a hearing on the motion in May 2012. At that point, seventeen months had passed since the complaint had been filed, the period for discovery had closed, and trial was scheduled to start the following week. The court indicated that there was no evidence before it to support the theory that Lombardo had injured Zullo's property willfully, as required by subsection (6) of § 523(a). The court explained that Zullo's adversary proceeding might properly have been brought not under that provision, but rather under subsection (2)(A), which excepts from discharge "any debt for money ... obtained by false pretenses, a false representation, or actual fraud." Zullo's counsel argued to the

contrary, but also made an oral request for leave to amend the complaint by adding a count under subsection (2)(A). The court denied it and ultimately granted summary judgment not for the movant, Zullo, but for Lombardo. *See* Fed. R. Bankr.P. 7056; Fed.R.Civ.P. 56(f)(1). Zullo appealed to the Bankruptcy Appellate Panel (BAP), which affirmed.

[1] [2] [3] The sole issue is whether the bankruptcy court erred in denying Zullo leave to amend his complaint.[2] We review the bankruptcy court's decision directly, according no deference to the BAP's affirmance. *See Brandt v. Repco Printers & Lithographics, Inc. (In re Healthco Int'l, Inc.),* 132 F.3d 104, 107 (1st Cir.1997). The standard of review is "only for abuse of discretion." *Noonan v. Rauh (In re Rauh),* 119 F.3d 46, 52 n. 10 (1st Cir.1997). Such an abuse may consist of, among other things, mistakes of law, *see Todisco v. Verizon Commc'ns, Inc.,* 497 F.3d 95, 98 (1st Cir.2007), or clearly erroneous findings of fact, *see Young v. City of Providence ex rel. Napolitano,* 404 F.3d 33, 38 (1st Cir.2005).

***2 [4] [5]** Under the rules governing adversary proceedings, the bankruptcy court should freely give a party leave to amend his complaint when justice so requires. *See* Fed. R. Bankr.P. 7015; Fed.R.Civ.P. 15(a)(2). While the rules thus reflect a liberal amendment policy, we defer to the bankruptcy court's denial of leave to amend if supported by an apparent, adequate reason, *see Grant v. News Grp. Bos., Inc.,* 55 F.3d 1, 5 (1st Cir.1995), and under this court's precedent, undue delay in moving to amend, even standing alone, may be such an adequate reason. *See Acosta–Mestre v. Hilton Int'l of P.R., Inc.,* 156 F.3d 49, 51–52 (1st Cir.1998); *see also Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (listing "undue delay" as a reason for denying leave to amend).[3]

[6] [7] In any event, we have repeatedly said that when "considerable time has elapsed between the filing of the complaint and the motion to amend, the movant has [at the very least] the burden of showing some 'valid reason for his neglect and delay.' " *Stepanischen v. Merchs. Despatch Transp. Corp.,* 722 F.2d 922, 933 (1st Cir.1983) (quoting *Hayes v. New Eng. Millwork Distribs., Inc.,* 602 F.2d 15, 20 (1st Cir.1979)). And we have previously labeled as "considerable time," warranting explanation, periods of fourteen months, *see Grant,* 55 F.3d at 6, fifteen months, see *Acosta–Mestre,* 156 F.3d at 52, and seventeen months, *see Stepanischen,* 722 F.2d at 933. We have also held that in assessing whether delay is undue, a court will take account of what the movant "knew or should have known and what he did or should have done." *Invest Almaz v. Temple–Inland Forest Prods. Corp.,* 243 F.3d 57, 72 (1st Cir.2001) (quoting *Leonard v. Parry,* 219 F.3d 25, 30 (1st Cir.2000)).

[8] Here, Zullo has provided no explanation for the seventeen-month delay between filing the complaint and seeking leave to amend. His change of counsel is obviously no justification, as his second lawyer did not try to amend until four months after taking the case and over one month after moving for summary judgment on the apparently ill-pleaded claim. And even then Zullo's counsel ultimately requested leave only because the court informed him that a claim under a different statutory subsection might have fared better than the claim actually made. That reason carries no implication favorable to Zullo under the *Invest Almaz* standard of giving consideration to what a lawyer should have known and done: this is not a case where the movant sought to amend upon learning previously undiscoverable information, nor one in which the law took some surprising turn. On the contrary, all of the relevant facts had been settled since the time of the Massachusetts state court proceedings (concluded before the adversary proceeding had begun in the bankruptcy court), and the law had not changed since this case's inception.

Zullo consequently misses the point when he contends that the delay between the filing of his complaint and the hearing on his summary judgment motion was largely attributable to Lombardo's dilatory tactics during discovery. Whatever the reason for the proceedings' protraction, the point is that Zullo had ample time to seek leave to amend and had no reasonable basis in fact or law for waiting until seventeen months after filing the adversarial complaint.

***3** This case brings into relief the tension that lurks between different policies of judicial practice. The system favors liberal amendment of pleadings to ensure that litigants' claims are resolved on their merits. But by the time discovery has ended and trial is imminent, that same concern for a fair and reliable trial process recognizes value in finality and certainty about the case that may be tried. Counsel facing an adversary given to sudden second thoughts should not be put on the spot to prepare to meet a new legal theory on the verge of trial, and courts straining to accommodate their case loads need to minimize the risk of continuances in order to provide dependable dockets serving efficient management and fairness to waiting litigants. *See Acosta–Mestre,* 156 F.3d at 53 ("Rule 15(a)'s liberal amendment policy seeks to serve justice, but does not excuse a lack of diligence that imposes

additional and unwarranted burdens on an opponent and the courts.").

We are not implying that it would have been error for the bankruptcy court to grant Zullo leave to amend. But we cannot say that the court abused its discretion in denying his request, filed as an act of desperation when the case as prepared for imminent trial began to look ill-pleaded after the passage of seventeen months to ponder it. It is enough to say that the judge's action fell within the zone of reasonable judgment.

The bankruptcy court's denial of Zullo's request for leave to amend is **AFFIRMED.**

THOMPSON, Circuit Judge, dissenting.

***3** While I am cognizant of the deferential nature of our review, I nonetheless cannot agree with the result reached by the majority.

Federal Rule of Civil Procedure 15(a) reflects a liberal standard, *see Torres–Alamo v. Puerto Rico*, 502 F.3d 20, 25 (1st Cir.2007), one that requires the court to "freely give leave when justice so requires." Fed.R.Civ.P. 15(a)(2); *see also* Fed. R. Bankr.P. 7015. Here, we know little about the court's rationale for denying Zullo's oral motion to amend as the court did not explain its reasons (or articulate that it was denying the motion). Whatever the rationale was, I think the bankruptcy court got it wrong.

A plaintiff's delay'[4] in filing the motion to amend is undoubtedly part of the equation, and indeed a good deal of time passed between Zullo's filing the complaint and his spur of the moment attempt to amend it at the summary judgment hearing. However, it seems clear that a primary reason we are concerned with protracted delay in filing a motion to amend is the "attendant burdens on the opponent and the court" that it can create. *Somascam, Inc. v. Philips Med. Sys. Nederland, B.V.*, 714 F.3d 62, 64 (1st Cir.2013) (per curiam); *see, e.g., Frappier v. Countrywide Home Loans, Inc.*, No. 13–1774, 2014 WL 1688917, at *3 (1st Cir. Apr.30, 2014) (noting concern that additional discovery would likely be required based on the proposed amendment); *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 57 (1st Cir.2008) (explaining that the plaintiffs' wait and see approach to filing complaints "would impose unnecessary costs and inefficiencies on both the courts and party opponents").

***4** In this case, I fail to see what burden would have been placed on Lombardo or the bankruptcy court should Zullo's motion to amend have been granted. Everyone (the majority, the parties, the bankruptcy judge) agree that the relevant facts were already settled. The factual underpinnings were fully litigated, and adjudicated by a jury, in the state court proceeding that Zullo filed against Lombardo, and ultimately emerged victorious from. Discovery had been completed in the adversary proceeding and the relevant witnesses had been identified.

Further, the legal theory Zullo initially sought to proceed under, 11 U.S.C. § 523(a)(6) (precludes discharge in the event of willful and malicious injury by the debtor), is not strikingly different from the one which he hoped to include in an amended complaint, *id.* § 523(a)(2)(A) (prevents discharge when the debtor has engaged in fraud or false pretenses and representations).[5] *See, e.g, Old Republic Nat'l Title Ins. Co. v. Levasseur (In re Levasseur)*, 737 F.3d 814, 817–19 (1st Cir.2013) (finding that the debtor's actions prohibited discharge under both 11 U.S.C. § 523(a)(2)(A) and § 523(a)(6)). And neither subsection embodies a cause of action so different from the claims already alleged by Zullo in state court, e.g., fraud, breach of contract.

In other words, it seems highly unlikely that Lombardo would have had to engage in additional discovery, explore new legal theories, or mount a previously unthought of defense should Zullo's proposed amendment have gone forward. For those very reasons, it is questionable whether the court would have felt it necessary to continue the upcoming trial. The potential prejudice to Lombardo, or burden on the court, should the motion to amend have been granted, seems very lacking to me. It is for these reasons that I think the bankruptcy court abused its discretion and failed to do justice. I respectfully dissent.

Parallel Citations

59 Bankr.Ct.Dec. 161

Footnotes

* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

1 The complaint had other counts as well, but they have since dropped out of the litigation.

2 Zullo's brief frames the issue as whether the bankruptcy court was required to "find for" him under subsection (2)(A), but his argument properly focuses on the amendment issue.

3 In support of the proposition that delay alone is insufficient, Zullo cites two cases from other circuits: *Cornell & Co. v. Occupational Safety & Health Review Comm'n,* 573 F.2d 820, 823 (3d Cir.1978), and *Mercantile Trust Co. Nat'l. Ass'n v. Inland Marine Prods. Corp.,* 542 F.2d 1010, 1012 (8th Cir.1976). Even assuming these cases reflect the law in those circuits, they do not bear on our analysis.

4 Though the bankruptcy judge's reason for denial is unknown, I (like the majority) will focus on the delay factor. Given the chronology of events here, and the substance of Lombardo's oral objection to the motion to amend, it is the most logical focal point. Besides undue delay, other common grounds for a court's denial of a motion to amend are futility, bad faith, and dilatory motive on the movant's part. *See Hatch v. Dep't for Children, Youth & Their Families,* 274 F.3d 12, 19 (1st Cir.2001). None of the other grounds are a good fit here. There is no allegation that Zullo acted in bad faith or had a dilatory motivation. A claim of futility would be a tough one to make given that Lombardo, who admits that he hooked up improper plumbing in Zullo's home, entered into a consent agreement with the applicable state board conceding unlicensed practice and agreeing to a fine and probation. On top of that, a jury found him liable for double damages based on an illegal contract performance, which was a willful and knowing violation of Massachusetts law.

5 It seems the difference relates to where the debtor's intent lay. *See Sharfarz v. Goguen (In re Goguen),* 691 F.3d 62, 66 n. 1 (1st Cir.2012) (discussing the debtor's reliance on sections (a)(2)(A) and (a)(6) and explaining that 11 U.S.C. § 523(a)(6) requires a deliberate or intentional injury, not just a deliberate or intentional act that led to injury (citing *Kawaauhau v. Geiger,* 523 U.S. 57, 61, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998))).