

DEC 03 2008

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP Nos. CC-07-1436-MoDK
) CC-08-1024-MoDK
 EDWARD WILLIAMS CUTTER, II,) CC-08-1025-MoDK
)
 Debtor.) Bk. No. SV 05-14744-KT
)
) Adv. No. SV 06-01249-KT
 EDWARD WILLIAMS CUTTER, II,)
 an individual; EDWARD WILLIAMS)
 CUTTER, II, Trustee of The)
 Edward Williams Cutter, 2nd)
 Inter Vivos Trust dated)
 May 23, 1989,)
)
 Appellant/Cross-Appellee,)
)
 v.) **A M E N D E D**
) **O P I N I O N¹**
)
 DAVID SEROR, Chapter 7)
 Trustee,)
)
 Appellee/Cross-Appellant,)
)
 v.)
)
 ZORAN VUJIC, Executor of the)
 Estate of Alberta Patricia)
 McNamara, Deceased,)
)
 Appellee.)

Submitted Without Oral Argument on July 25, 2008

Filed - September 4, 2008
Amended - December 3, 2008

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

Hon. Kathleen H. Thompson, Bankruptcy Judge, Presiding

Before: MONTALI, DUNN, and KLEIN, Bankruptcy Judges.

¹ We issued our initial opinion on September 4, 2008, and the appellee/cross-appellant filed a timely petition for rehearing. We revise the initial opinion to correct a factual error and to adjust the legal analysis accordingly.

1 MONTALI, Bankruptcy Judge:

2
3 These appeals involve a failed asset protection scheme. We
4 publish to call attention to a fundamental fallacy inherent in
5 that scheme. The cornerstone of the scheme is a self-settled
6 trust that identifies only unnamed "surviving" descendants of the
7 trustor as beneficiaries (whose interests vest only after the
8 trustor's death), but leaves in the trustor/trustee the power to
9 deplete the trust of all of its assets for his own benefit.

10 The bankruptcy court correctly determined by partial summary
11 judgment that where the debtor was in effect a beneficiary of a
12 self-settled spendthrift trust by virtue of the power to use the
13 trust assets for his own benefit, certain real property titled in
14 the debtor as trustee of that trust could be reached by the
15 debtor's creditors under California law and, hence, was property
16 of the estate. The debtor appealed after the court directed
17 entry of judgment against him. The trustee cross-appealed the
18 court's simultaneous denial of partial summary judgment as to a
19 different issue regarding the estate's ownership of other real
20 property. We AFFIRM the partial summary judgment against the
21 debtor but REVERSE and REMAND for entry of summary judgment in
22 favor of the trustee determining that debtor's bankruptcy estate
23 is entitled to recover an additional fractional interest in real
24 property that is part of the trust corpus. We deny leave to
25 appeal and DISMISS as interlocutory the balance of the trustee's
26 cross-appeal.

1 **I. FACTS**

2 A. Introduction

3 Appellant Edward Williams Cutter II ("Debtor") filed for
4 relief under chapter 7² on July 12, 2005. Appellee David Seror
5 ("Trustee") is the trustee for Debtor's bankruptcy estate.³

6 As of the petition date, Debtor, as the trustee of The
7 Edward Williams Cutter, 2nd Inter-Vivos Trust dated May 23, 1989
8 (the "Trust"), held title to the following real property: a
9 condominium on Dickens Street in Sherman Oaks, California (the
10 "Dickens Street Condo"); certain undeveloped property in Los
11 Angeles County (the "Undeveloped Property"); a two-thirds
12 interest in property located on Whipple Street in North
13 Hollywood, California (the "Whipple Street Property"); and
14 property located on Wilkinson Street in North Hollywood,
15 California ("Wilkinson Street Property").

16 As discussed later, the bankruptcy court found as a matter
17 of undisputed fact that Debtor contributed all of these
18 properties to the Trust, except for a one-third share (the
19 "Ermatinger Third") of the Whipple Street Property that was
20 conveyed to the Trust by John J. Ermatinger ("Ermatinger"). With
21 the exception of the Ermatinger Third, the above-described
22

23 ² Unless otherwise indicated, all chapter, section and rule
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
25 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
26 enacted and promulgated prior to the effective date of The
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, 119 Stat. 23.

27 ³ Zoran Vujic ("Vujic"), the executor of the estate of
28 Alberta Patricia McNamara, is also named as an appellee, although
Vujic has not filed a brief in this appeal.

1 properties are collectively referred to as the "Trust
2 Properties."⁴

3 In addition, as of the petition date, "Edward W. Cutter, A
4 Single Man" held title to property located on Thurston Circle in
5 Los Angeles, California (the "Thurston Circle Property").

6 On September 6, 2006, Trustee and Vujic (collectively,
7 "Plaintiffs") filed a complaint against Debtor for (1) denial of
8 discharge; (2) revocation of discharge; (3) quiet title; (4)
9 declaratory relief; (5) accounting, turnover and/or damages; and
10 (6) a determination of dischargeability of debt under section
11 523. Plaintiffs named Debtor as defendant, both individually and
12 in his capacity as trustee for the Trust. Plaintiffs did not
13 assert claims directly against any other party.

14 On January 24, 2007, John F. Cutter, as Guardian Ad Litem
15 ("Guardian") of Debtor's son, Edward W. Cutter III ("Trip"),
16 filed a complaint in intervention asserting that Trip held actual
17 title to the Thurston Circle Property. Guardian also disputed
18 Trustee's claims that the bankruptcy estate had an ownership
19 interest in the corpus of the Trust.

20
21

⁴ In other words, only the one-third interest conveyed by
22 Debtor to the Trust is included in the references to "Trust
23 Properties," not the Ermatinger Third. As discussed later,
24 California Probate Code section 15304(b) allows creditors to
25 reach the maximum amount payable to a settlor of a self-settled
26 trust, but restricts such recovery to amounts contributed by the
27 settlor to the trust. Relying on that section, the bankruptcy
28 court held that all of the corpus of the Trust except the
Ermatinger Third was property of the estate. For the reasons
set forth in Part V, we agree with Trustee that as a matter of
law, the bankruptcy court should have entered summary judgment
declaring that all of the Trust corpus (including the Ermatinger
Third) is property of Debtor's estate.

1 On March 27, 2007, Plaintiffs filed a motion for summary
2 judgment against Debtor, arguing that, inter alia, title to the
3 Thurston Circle Property and the Trust Properties should be
4 quieted to Trustee pursuant to section 544.⁵ In particular,
5 Plaintiffs argued that the Trust was a self-settled, irrevocable
6 spendthrift trust designed to benefit Debtor (as settlor/trustor,
7 trustee and unnamed beneficiary) and that Trust Properties were
8 property of the chapter 7 estate under California law and under
9 sections 544 and 541. Plaintiffs also argued that Debtor held
10 title to the Thurston Circle Property.

11 The bankruptcy court agreed with Plaintiffs that the Trust
12 Properties belonged to the estate and granted partial summary
13 judgment in favor of Trustee. It denied summary judgment as to
14 the Ermatinger Third and as to the Thurston Circle Property,
15 because there were genuine issues of material fact remaining for
16 trial.

17 B. The Trust Properties

18 **1. The Trust**

19 On May 23, 1989, Debtor as trustor created the Trust. He
20 named himself as trustee of the Trust. Paragraph 2.00 of the
21 Trust Agreement and Declaration of Trust ("Trust Agreement")
22 provides that the "primary beneficiaries of the [T]rust are the
23 surviving issue of the trustor, if any, and the lineal
24 descendants of non-surviving issue of the settlor, if any on the
25

26
27 ⁵ Plaintiffs also argued that the bankruptcy court should
28 enter summary judgment denying or revoking Debtor's discharge.
The court did not grant summary judgment on these claims, and
they are not the subject of this appeal.

1 principle of representation.”⁶ If the Debtor had died without
2 surviving lineal descendants, the Trust was to be maintained for
3 the benefit of his mother.

4 Even though Debtor did not specifically identify himself as
5 a primary beneficiary, Paragraph 5.00 of the Trust Agreement
6 provides that he (as trustee) could make distributions from the
7 trust to benefit himself (as trustor):

8 No distributions shall be made out of the trust except
9 in the sole discretion of the trustee, in an amount to
10 provide for the health, the education, or the support
11 and maintenance in the customary manner of living of
12 the trustor, prior to the death of the trustor. At the
13 time of the death of the trustor, outright
14 distributions shall be made to the beneficiaries of the
15 trust subject to the limitation in Paragraph 6.^[7]

16 Paragraph 7.13 additionally grants Debtor (as trustee) authority
17 to invade the Trust property “for emergencies related to the
18 health, education, support and/or maintenance” of Debtor and
19 “other beneficiaries” of the Trust. Notwithstanding the
20 provisions of Paragraphs 5.00 and 7.13, Paragraph 8.00 purports
21 to prohibit Debtor (as trustee) “from exercising any powers
22 vested in him primarily for the benefit of the trustor rather
23 than for the benefit of the beneficiaries.”

24 Paragraph 4.00 of the Trust Agreement provides that the
25 Trust is irrevocable. Paragraph 17.00 contains a spendthrift
26 clause: “No interest in the principal or income of any trust
27

28 ⁶ At the time the Trust was created, Debtor did not have
any lineal descendants. Trip is Debtor’s lineal descendent, but
is not entitled to trust income or principal until after Debtor’s
death, as the identified beneficiaries are Debtor’s “surviving”
descendants.

⁷ Paragraph 6 prohibits outright distributions to minors.

1 created under this instrument shall be anticipated, assigned,
2 encumbered, or subjected to creditor's claim or legal process
3 before actual receipt by the beneficiary."

4 Because Paragraph 5.00 permits Debtor as Trustee to make
5 distributions to himself as Trustor (with no limitation on the
6 amount of principal or income that he could use) to maintain
7 Debtor's customary standard of living, the bankruptcy court ruled
8 that the "Debtor is a primary beneficiary of the Trust
9 notwithstanding the absence of a designation as such in the Trust
10 instrument." See page 14 of Findings and Conclusions In Support
11 of Ruling on Plaintiffs' Motion for Partial Summary Adjudication
12 entered on November 5, 2007 ("Findings"). The court further
13 stated:

14 Because the strictures of Paragraph 8.00 are
15 substantially inconsistent with the provisions of
16 Paragraphs 5.00, 7.00, and 7.13 which expressly allow
17 the Debtor, as trustee, to make distributions for his
own benefit, in his sole discretion, the Debtor is a
primary beneficiary of the Trust.

18 Id. The court therefore concluded that the Trust was a self-
19 settled, irrevocable spendthrift trust:

20 Pursuant to the provisions of the Trust, unlimited
21 distributions can be made to the Debtor in the sole
22 discretion of the trustee for, among other things, the
23 support and maintenance of the Debtor. Access to trust
24 assets for the Debtor's benefit is not restricted to
25 trust income. The trustee also is authorized to invade
26 trust property for emergencies related to the support
27 and maintenance of the Debtor and has the authority and
28 discretion to designate the nature of a "qualifying"
emergency. This is enough to make self-settled assets
of the Trust vulnerable to the claims of creditors and
accessible to the Trustee. In this case, of course,
the Debtor himself was the trustee for the Trust prior
to the appointment of a receiver for the Trust in this
bankruptcy proceeding and able to exercise all of these
powers directly for his own benefit.

Id. at 24.

1 **2. The Dickens Street Condo**

2 On June 21, 1993, a quitclaim deed was recorded which
3 conveyed the Dickens Street Condo to "Edward Williams Cutter,
4 Trustee of the Edward Williams Cutter, 2nd Intervivos Trust dated
5 May 23, 1989." Debtor does not dispute that he conveyed the
6 Dickens Street Condo to the Trust.⁸

7 **3. The Undeveloped Property**

8 On June 21, 1993, a quitclaim deed was recorded which
9 conveyed the Undeveloped Property to "Edward Williams Cutter,
10 Trustee of the Edward Williams Cutter, 2nd Intervivos Trust dated
11 May 23, 1989." Debtor does not dispute that he conveyed the
12 Undeveloped Property to the Trust.

13 **4. The Whipple Street Property**

14 In opposing the Trustee's motion for summary judgment,
15 Debtor filed the declaration of Ermatinger, Trip's godfather.
16 According to Ermatinger, Debtor purchased the Whipple Street
17 Property in 1987 and then deeded it to himself and Ermatinger as
18 joint tenants. In 1992, Debtor and Ermatinger purportedly
19 transferred a one-third interest in the Whipple Street Property
20 to Trip, the Ermatinger Third to Ermatinger and the final one-
21 third interest to Debtor as trustee for the Trust. In 1994,
22 Ermatinger transferred the Ermatinger Third to the Trust.

23 The bankruptcy court found as a matter of undisputed fact
24 that the one-third interest conveyed by Debtor to the Trust was
25 property of his bankruptcy estate. The court additionally found

26
27 ⁸ Debtor did note that the transferor named on the
28 quitclaim deeds for the Dickens Street Condo and the Undeveloped
Property was Edward W. Cutter (without the "II"), but did not
argue that the transferor was anyone other than Debtor.

1 that Trustee, in his capacity as successor trustee of the Trust,
2 has the power to sell, use or lease the Ermatinger Third.⁹

3 **5. The Wilkinson Street Property**

4 On January 28, 2002, a grant deed was recorded which
5 conveyed the Wilkinson Street Property to "Edward Williams
6 Cutter, Trustee of the Edward Williams Cutter, 2nd Intervivos
7 Trust dated May 23, 1989." The grant deed identifies Debtor's
8 brother, Matthew J. Cutter ("Matthew") as the grantor.

9 Thereafter, Matthew's ex-girlfriend filed a state court action to
10 avoid as fraudulent the transfer of the Wilkinson Street Property
11 to the Trust. The state court found that Debtor had provided
12 adequate consideration for the transfer. Debtor does not dispute
13 that he (as opposed to the Trust) paid the consideration for the
14 transfer of the Wilkinson Street Property from Matthew to the
15 Trust. The bankruptcy court therefore found, as a matter of
16 undisputed fact, that Debtor contributed the Wilkinson Street
17 Property to the Trust when he had Matthew execute the grant deed
18 in favor of the Trust.¹⁰

19
20 ⁹ The bankruptcy court found that Debtor's powers under the
21 Trust included "the sole discretion to use the Trust assets for
22 his own benefit," and that the exclusion of section 541(b)
23 (excluding from property of the estate any power that a debtor
24 may exercise solely for the benefit of any entity other than the
25 debtor) therefore did not apply. Notwithstanding its finding
that Trustee could sell or lease the Ermatinger Third, the
bankruptcy court stopped short of finding that the Ermatinger
Third was property of the estate.

26 ¹⁰ On July 1, 2008, the bankruptcy court entered an order
27 approving a sale of the Wilkinson Street Property by Trustee. We
28 do not know the status of that sale. If the sale has closed,
this appeal may be moot, at least as to that property.

1 C. The Thurston Circle Property

2 In a grant deed dated September 4, 2003, Ermatinger
3 transferred the Thurston Circle Property to "Edward W. Cutter, A
4 Single Man." Both Ermatinger and Debtor filed declarations
5 stating that Ermatinger conveyed the Thurston Circle Property to
6 Trip and that Trip is the "Edward W. Cutter, A Single Man"
7 identified in the grant deed.

8 Plaintiffs contended in the motion for summary judgment that
9 Debtor (not Trip) was the owner of the property, providing
10 evidence that Debtor had executed documents as the borrower
11 against and buyer of the Thurston Street Property. Plaintiffs
12 asserted that the Thurston Circle Property was therefore property
13 of the estate under section 541, or, alternatively, Trustee could
14 obtain title to the Thurston Circle Property pursuant to section
15 544(a)(3). The bankruptcy court held that it could not grant
16 summary judgment on the Plaintiffs' claim to recover the Thurston
17 Circle Property, as "the question of who is the legal owner of
18 the [property] appears to be a question of both fact and law
19 which is a matter for trial." Findings at page 10.

20 D. The Bankruptcy Court's Ruling

21 Debtor does not and did not dispute that he is the trustee
22 and trustor of the Trust. Based on the language of the Trust
23 Agreement itself, the bankruptcy court concluded that Debtor was
24 a beneficiary, albeit not specifically identified as such. The
25 court also found, as a matter of undisputed fact, that Debtor had
26 contributed the Dickens Street Condo, the Undeveloped Property,
27 the Wilkinson Street Property and one-third of the Whipple Street
28 Property to the Trust and that these Trust Properties therefore

1 constituted self-settled assets of the Trust.

2 Based on the foregoing, the bankruptcy court concluded as a
3 matter of law and undisputed fact that the Trust Properties were
4 property of Debtor's bankruptcy estate. The court based its
5 conclusion on the "interaction of [section] 544(a)(1) and (2)
6 with California law governing self-settled trust assets."

7 Findings at page 24.

8 [Section] 544(a)(1) gives the Trustee the status of a
9 creditor with a judicial lien on all property on which
10 a creditor on a simple contract could have obtained.
11 [Section] 544(a)(2) gives the Trustee the status of a
12 creditor with an execution against the Debtor that is
13 returned as unsatisfied. California Probate Code
14 § 15304 allows such creditors to reach the maximum
15 amount that the trustee of the Debtor's Trust could pay
16 out to or for the benefit of the settlor.

13 Id. The court further concluded that the Trustee "succeeds to
14 the Debtor's position as trustee of the Trust." Id. at page 25.

15
16 The Debtor's powers under the Trust include the
17 sole discretion to use the Trust assets for his own
18 benefit. Section 541(a)(1) provides that the
19 bankruptcy estate "is comprised of . . . all legal or
20 equitable interests of the debtor in property as of the
21 commencement of the case." Therefore, the Debtor's
22 legal and equitable interests in and power to act for
23 the Trust are property of the bankruptcy estate, not
24 within the exclusion of [section] 541(b) which states
25 that "[p]roperty of the estate does not include-(1) any
26 power that the debtor may exercise solely for the
27 benefit of any entity other than the debtor."

22 Id. (emphasis in original).

23 On November 5, 2007, the bankruptcy court entered an order
24 granting the motion for summary judgment on certain claims,
25 ordering that the Trust Properties were property of the
26 bankruptcy estate which Trustee may sell, use, or lease pursuant
27 to section 363 and that title to the Trust Properties "shall be
28 vested in the name of the Chapter 7 Trustee." In paragraph 3 of

1 the order, the court stated that "there is no just reason for
2 delay as to the finality of the relief granted . . . and that the
3 interests of the parties on both sides of this controversy are
4 better served by immediate access for appellate review." The
5 court therefore directed that, with respect to the Trust
6 Properties, judgment be entered in the quiet title and
7 declaratory relief claims pursuant to Rule 7054. The court
8 denied summary judgment on the remaining causes of action,
9 including the Plaintiffs' denial of discharge and revocation of
10 discharge claims. Debtor filed a notice of appeal of the order
11 granting partial summary judgment on November 15, 2007, giving
12 rise to BAP No. 07-1436.

13 On January 8, 2008, the bankruptcy court entered its
14 "Judgment on Certain Claims" based on its order granting the
15 motion for summary judgment.¹¹ The court stated that "[t]his is
16 a final judgment entered pursuant to Rule 54, Federal Rules of
17 Civil Procedure. Other issues in this adversary proceeding
18 remain pending and will be separately adjudicated." Debtor filed
19 a notice of appeal of the judgment on January 16, 2008 (BAP No.
20 08-1024), and Trustee filed a notice of cross-appeal on January
21 22, 2008 (BAP No. 08-1025).¹² The appeals were submitted without
22

23 ¹¹ Among other things, the judgment expressly vested in
24 Trustee title to a one-third interest in the Whipple Street
Property; it does not mention the Ermatinger Third.

25 ¹² Because BAP No. 07-1436 is an appeal from the order
26 granting summary judgment on certain claims, and BAP No. 08-1024
27 is an appeal from the subsequently entered judgment on the same
28 claims, we entered an order consolidating the appeals. Our
decision to affirm the grant of partial summary judgment disposes
(continued...)

1 oral argument on July 25, 2008.

2
3 **II. ISSUES**

4 1. Do we have jurisdiction over Debtor's main appeal and
5 Trustee's cross-appeal?

6 2. Did the bankruptcy court err in (1) granting summary
7 judgment declaring that the Trust Properties are property of
8 Debtor's bankruptcy estate and (2) not granting summary judgment
9 with respect to the Ermatinger Third?

10
11 **III. STANDARD OF REVIEW**

12 We review de novo the bankruptcy court's ruling on a motion
13 for summary judgment. Woodworking Enters., Inc. v. Baird (In re
14 Baird), 114 B.R. 198, 201 (9th Cir. BAP 1990). Viewing the
15 evidence in a light most favorable to the non-moving party (i.e.,
16 Debtor), we determine whether the bankruptcy court correctly
17 found that there are no genuine issues of material fact and that
18 the moving party is entitled to judgment as a matter of law.
19 Id.; Carolco Television Inc. v. Nat'l Broad. Co. (In re De
20 Laurentiis Entm't Group Inc.), 963 F.2d 1269, 1271-72 (9th Cir.
21 1992).

22
23
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25
26 ¹²(...continued)
27 of both of these appeals. With respect to the cross-appeal (BAP
28 No. 08-1025), we reverse and remand the denial of summary
judgment as to the Ermatinger Third and dismiss the balance of
the appeal as interlocutory.

1 **IV. JURISDICTION**

2 A. Debtor's Appeal of the Partial Summary Judgment Regarding
3 the Trust Properties

4 The summary judgment was entered on fewer than all of the
5 claims asserted by Plaintiffs against Debtor. Ordinarily, an
6 appeal from such a judgment would be interlocutory, but the
7 bankruptcy court determined that the partial summary judgment was
8 final pursuant to Rule 7054 (incorporating Federal Rule of Civil
9 Procedure ("FRCP") 54(b)). In actions involving multiple claims
10 or multiple parties, FRCP 54(b) permits a court to direct entry
11 of a final judgment as to one or more (but fewer than all) of the
12 claims or parties, but "only if the court expressly determines
13 there is no just reason for delay." Fed. R. Civ. Pro. 54(b).

14 The judgment regarding the Trust Properties, therefore, is
15 final because it disposed of a discrete yet significant issue:
16 the bankruptcy estate's entitlement to the Trust Properties. The
17 legal and factual issues raised in conjunction with the Trust
18 Properties are different from those raised in conjunction with
19 the Thurston Street Property or the other claims against Debtor
20 (viz., the revocation or denial of discharge). An appeal on the
21 other issues and claims would not require an appellate court to
22 re-examine the issues and facts supporting the partial summary
23 judgment. Because the judgment underlying Debtor's appeal is
24 final, we have jurisdiction over his appeal pursuant to 28 U.S.C.
25 § 158 (and the bankruptcy court had jurisdiction under 28 U.S.C.
26 §§ 1334 and 157(b)(2)(A), (E) and (H)).

27 B. Trustee's Cross-Appeal of the Denial of Summary Judgment
28 Regarding the Ermatinger Third

In his cross-appeal, Trustee asserts an alternate basis for

1 quitclaiming to the estate the Trust Properties and the
2 Ermatinger Third. For the reasons set forth in section IV(C)
3 below, we do not believe that the bankruptcy court's Rule 54(b)
4 determination covered its denial of summary judgment and thus
5 does not cover Trustee's cross-appeal. Therefore, Trustee's
6 cross-appeal of the denial of summary judgment as to the
7 Ermatinger Third is interlocutory. Jones-Hamilton Co. v. Beazer
8 Mats. & Servs., Inc., 973 F.2d 688, 693-94 (9th Cir. 1992)
9 ("Denial of a motion for summary judgment is generally not a
10 final order, and is therefore not appealable.").

11 Nevertheless, we have jurisdiction to entertain an
12 interlocutory appeal by leave and will do so as to the Ermatinger
13 Third. 28 U.S.C. § 158(a)(3). Granting leave to appeal is left
14 to the discretion of the panel. Roderick v. Levy (In re Roderick
15 Timber Co.), 185 B.R. 601, 604 (9th Cir. BAP 1995). Granting
16 leave is appropriate when, as here, an appeal would materially
17 advance resolution of the dispute and minimize further litigation
18 expenses. Id. We can treat a timely notice of appeal as a
19 motion for leave to appeal when an order is interlocutory and no
20 motion for leave to appeal has been filed. Id.; Fed. R. Bankr.
21 P. 8003(c).

22 Here, the purely legal issues raised with respect to the
23 Ermatinger Third apply equally to the Trust Properties: to the
24 extent Debtor possessed such dominion and control over the Trust
25 corpus as of the petition date that he could have invaded it in
26 its entirety for his support and maintenance, is the entire Trust
27 corpus property of his bankruptcy estate under section 541(a)?
28 An affirmative answer to this purely legal question as to which

1 there is no genuine issue of material fact means that the
2 bankruptcy court's summary judgment should have incorporated the
3 Ermatinger Third when it vested title to the Trust Properties in
4 the Trustee. Therefore, the issues presented in that portion of
5 the cross-appeal pertaining to the Ermatinger Third are
6 inextricably intertwined with and implicate issues raised in the
7 main appeal. We will therefore exercise jurisdiction over that
8 particular aspect of the cross-appeal pertaining to assets of the
9 Trust.

10 C. Trustee's Cross-Appeal of the Denial of Summary Judgment
11 Regarding the Thurston Circle Property

12 The bankruptcy court's Rule 54(b) determination does not
13 reach the issues and matters raised in the cross-appeal; the
14 order denying summary judgment as to the Thurston Circle Property
15 remains interlocutory. The bulk of the cross-appeal pertains to
16 the Thurston Circle Property and involves completely separate
17 legal and factual issues from those pertaining to the Trust
18 Properties (the subject of the partial summary judgment).

19 In particular, the theory supporting the partial summary
20 judgment (that the Trust Properties were assets of an
21 irrevocable, self-settled spendthrift trust and thus property of
22 the estate) is irrelevant and inapplicable to the issue of
23 whether Trip or Debtor owns the Thurston Circle Property. The
24 judgment does not mention the Thurston Circle Property at all; it
25 does not even mention that the court was denying summary judgment
26 as to the Thurston Circle Property or the discharge claims.
27 Because the partial summary judgment granted Trustee relief only
28 as to the Trust Properties, the Rule 54(b) certification did not

1 relate to the Thurston Circle Property claims and thus does not
2 cover the cross-appeal.¹³ Thus, we do not have jurisdiction over
3 the cross-appeal of the denial of summary judgment with respect
4 to that property. See Durkin v. Shea & Gould, 92 F.3d 1510,
5 1514-15 (9th Cir. 1996) (appellate court lacks jurisdiction to
6 consider issues not covered by the Rule 54(b) certification);
7 Jones-Hamilton, 973 F.2d at 693-94 (9th Cir. 1992) (denial of
8 summary judgment is not final and appealable of right).

9 Although we have discretionary authority to entertain
10 interlocutory appeals from judgments that are not final (see 28
11 U.S.C. § 158(a)(3) and Wolkowitz v. Beverly (In re Beverly), 374
12 B.R. 221, 231-32 (9th Cir. 2007)), we will not exercise such
13 authority here, other than as to the Ermatinger Third. We agree
14 with the bankruptcy court that material factual issues regarding
15 ownership of Thurston Circle are disputed. Debtor presented two
16 declarations stating that the intended grantee was Trip, his son,
17 who is also named Edward W. Cutter. As the name on the title is
18 simply "Edward W. Cutter, a single man" and not Debtor's full
19 name ("Edward W. Cutter, II"), Debtor presented a disputed issue
20 of fact. While the bankruptcy court may ultimately find after
21 trial that Debtor's position is not credible and that the
22 preponderance of evidence favors Trustee, resolving disputed
23

24 ¹³ The order granting summary judgment also contained a
25 Rule 54(b) determination as to "the relief granted [on the quiet
26 title and declaratory judgment]" claims. That determination,
27 however, was only as to the "relief granted" and the "relief
28 granted" pertained only to the Trust Properties. A separate
paragraph of the order states that summary judgment "on the
remaining causes of action" is denied. Therefore, the Rule 54(b)
determination did not apply to the denial of relief as to the
Thurston Circle Property.

1 questions of fact and weighing of evidence is inappropriate in
2 the context of a summary judgment motion. Anderson v. Liberty
3 Lobby, Inc., 477 U.S. 242, 249 (1986) (“[A]t the summary judgment
4 stage the judge’s function is not . . . to weigh the evidence and
5 determine the truth of the matter but to determine whether there
6 is a genuine issue for trial.”).

7 We also disagree with Trustee that, as a matter of law, the
8 bankruptcy court should have granted summary judgment in his
9 favor under section 544(a) (3) with respect to the Thurston Circle
10 Property, as a genuine issue of material fact appears to exist as
11 to whether a bona fide purchaser could have defeated Trip’s
12 ownership interest, if any.¹⁴ Given the existence of these
13

14 ¹⁴ In light of the ambiguity in the recorded deed, and the
15 fact that the name on the title does not reflect that Edward W.
16 Cutter II is the owner, a factual issue may exist as to whether a
17 purchaser would have constructive or inquiry notice of a
18 potential defect in the title or of the possibility that another
19 Edward Cutter may claim title. If so, that constructive or
20 inquiry notice could possibly defeat Trustee’s right to avoid the
21 transfer as a hypothetical bona fide purchaser. Grover v. Gulino
22 (In re Gulino), 779 F.2d 546, 550-51 (9th Cir. 1985) (“Under
23 California law, a bona fide purchaser must have purchased in good
24 faith and for valuable consideration and must have no knowledge
or notice of prior rights.”) (emphasis in original); see also
Chbat v. Tleel (In re Tleel), 876 F.2d 769, 772 (9th Cir. 1989)
25 (“The powers of a bona fide purchaser for purposes of section
26 544(a) are defined by state law. . . . In California, a purchaser
27 for value of real estate without actual or constructive notice of
28 a prior interest is given bona fide purchaser status.”).

The Ninth Circuit has held that constructive/actual notice
is a question of fact and not a question of law. “Whether the
circumstances are sufficient to require inquiry as to another’s
interest in property for the purposes of [California Civil Code]
section 19 is a question of fact, even where there is no dispute
over the historical facts.” Robertson v. Peters (In re Weisman),
5 F.3d 417, 421 (9th Cir. 1993) (interpreting California’s Civil
Code section governing constructive/inquiry/actual notice). The

(continued...)

1 factual issues, and our deference to the bankruptcy court's
2 management of its cases, we decline to exercise jurisdiction over
3 the portion of the interlocutory cross-appeal pertaining to the
4 Thurston Circle Property. We therefore DISMISS that portion of
5 the cross-appeal as interlocutory.

6 **V. DISCUSSION**

7 A. General Principles Governing Section 541 and Trusts

8 The bankruptcy estate includes "all legal or equitable
9 interests of the debtor in property as of the commencement of the
10 case." 11 U.S.C. § 541(a)(1). It does not include, however,
11 "any power that the debtor may exercise solely for the benefit"
12 of another," 11 U.S.C. § 541(b)(1), nor does it include
13 "[p]roperty in which the debtor holds . . . only legal title and
14 not an equitable interest." 11 U.S.C. § 541(d). Similarly, the
15 estate does not include property containing "[a] restriction on
16 the transfer of a beneficial interest of the debtor in a trust
17 that is enforceable under applicable nonbankruptcy law." 11
18 U.S.C. § 541(c)(2).

19 Therefore, "something held in trust by a debtor for another
20 is neither property of the bankruptcy estate under section
21 541(d), nor property of the debtor" for purposes of avoidance
22 actions. Mitsui Mfrs. Bank. v. Unicom Computer Corp. (In re
23 Unicom Computer Corp.), 13 F.3d 321, 324 (9th Cir. 1994), citing
24 Begier v. I.R.S., 496 U.S. 53, 58 (1990) (property that a debtor
25 holds in trust for another is not property of the estate under
26 section 541 nor is it "property of the debtor" under section

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28 ¹⁴(...continued)
court did not err in declining to resolve this question of fact
in the context of a summary judgment motion.

1 547); see also Foothill Capital Corp. v. Clare's Food Market,
2 Inc. (In re Coupon Clearing Service, Inc.), 113 F.3d 1091, 1099
3 (9th Cir. 1997) (property held in trust by debtor for another is
4 not estate property).

5 That said, while assets transferred to a trust do not
6 ordinarily become property of the bankruptcy estate of the
7 trust's trustee, powers that a debtor who is trustee of a trust
8 may exercise for his or her own benefit become property of the
9 estate. Askanase v. LivingWell, Inc., 45 F.3d 103, 106 (5th Cir.
10 1995). Moreover, to the extent a debtor holds a beneficial
11 interest in a trust, that beneficial interest becomes property of
12 the estate, unless it is protected by a valid spendthrift
13 provision. 11 U.S.C. § 541(a)(1) and (c)(2). "Assets
14 transferred to an irrevocable trust do not become part of a
15 bankruptcy estate unless the transfer or the trust is invalid."
16 United States v. Lawrence, 189 F.3d 838, 845 (9th Cir. 1999).

17 Debtor held title to the Trust Properties and the Ermatinger
18 Third as trustee of the Trust, not as an individual. Therefore,
19 under section 541(d), the corpus of the Trust would not be
20 property of Debtor's estate, unless he held an equitable interest
21 in the Trust and its assets, or unless he could exercise powers
22 over the corpus of the Trust for his own benefit. Here, the
23 bankruptcy court, interpreting the undisputed and unambiguous
24 language of the Trust Agreement as to which there is no material
25 issue of fact, held as a matter of law that Debtor did hold an
26 equitable interest in the Trust as a beneficiary.¹⁵ Debtor has

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28 ¹⁵ Ninth Circuit law permits a court to interpret
unambiguous contracts in the context of a motion for summary
(continued...)

1 not disputed this finding or conclusion on appeal.¹⁶ Moreover,
2 Debtor has not disputed on appeal that Debtor contributed the
3 Trust Properties to the Trust.

4 We agree with the bankruptcy court's conclusion. Debtor had
5 access to potentially all of the Trust's assets and income in
6 order to maintain his standard of living. Debtor possessed the
7 power to "invade" the corpus of the Trust for emergencies
8 relating to his health, education, support and/or maintenance.
9 See ¶ 7.13 of the Trust. Debtor possessed the right, at his sole
10 discretion, to make distributions in order to provide for his
11 health, education, or "support and maintenance in [his] customary
12 standard of living." See ¶ 5.00 of the Trust.

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14
15 ¹⁵ (...continued)
16 judgment. Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 990
17 (9th Cir. 2006), citing S. Cal. Gas Co. v. City of Santa Ana, 336
18 F.3d 885, 888-89 (9th Cir. 2003) ("We may grant summary judgment
19 motions touching upon contract interpretation when the agreement
20 is unambiguous. . . . Ambiguity is a question of law for the
21 court.").

22 ¹⁶ On appeal, Debtor argues that the bankruptcy court was
23 required to issue findings regarding his intent to hinder
24 creditors by transferring the Trust Properties to the Trust.
25 Citing section 548 and a Ninth Circuit case involving an appeal
26 of a conviction for bankruptcy fraud (United States v. Lawrence,
27 189 F.3d 838 (9th Cir. 1999)), Debtor contends that such a
28 finding is required to invalidate the Trust. Trustee, however,
has not pled a fraudulent transfer cause of action in this case,
nor has he raised any such issue in his cross-appeal. To void
the transfer of the Trust Properties, Trustee does not have to
show that the transfer was fraudulent; as discussed in the text,
under California law, simply contributing assets to a self-
settled trust is sufficient to expose those assets to collection
by the creditors of the settlor/beneficiary. Therefore, Debtor's
argument that the bankruptcy court erred by not making findings
regarding his fraudulent intent is misplaced.

1 B. The Bankruptcy Court Did Not Err In Applying California Law
2 on Self-Settled Spendthrift Trusts

3 Debtor had a beneficial and equitable interest in the Trust
4 which became property of the estate under section 541(a).
5 California law invalidating efforts of a settlor from using a
6 trust to shield property from his or her creditors applies "even
7 where the settlor is not a nominal beneficiary, as where a
8 settlor attempts to create a spendthrift trust for the benefit of
9 his or her minor children, to be managed by the settlor and
10 revocable at his or her pleasure." 60 Cal. Jur. 3d Trusts § 134
11 (2008) (emphasis added), citing Sheean v. Michel, 6 Cal.2d 324, 57
12 P.2d 127 (1936).

13 To the extent Debtor was the trustor and beneficiary of the
14 Trust, it is a self-settled trust. While California law
15 recognizes the validity of spendthrift trusts,¹⁷ any spendthrift
16 provisions are invalid when the settlor is a beneficiary.

17
18 ¹⁷ See Neuton v. Danning (In re Neuton), 922 F.2d 1379,
19 1383 (9th Cir. 1990) ("[T]rust provisions forbidding the
20 voluntary or involuntary transfer of a beneficiary's interest in
21 trust income or principal are enforceable under California law .
22 . . . However, California has placed restrictions on the
23 trustor's power to create a spendthrift trust."). Citing Neuton,
24 Debtor argues that the bankruptcy court erred in not determining
25 to what extent the Trust assets were necessary for Debtor's
26 support. Debtor misconstrues Neuton. In Neuton, unlike here,
27 the trust was not self-settled. Unlike Trustee here, the Neuton
28 bankruptcy trustee was seeking to recover 25 percent of a
debtor's income from a spendthrift trust pursuant to California
Probate Code section 15306.5 (whereby a creditor may obtain an
order allowing it to recover up to 25 percent of payments to
which a debtor may be entitled from a spendthrift trust, unless
and to the extent that amount is necessary for the debtor's
support). Id. at 381-83. Trustee is not seeking to recover
Trust income pursuant to California Probate Code section 15306.5,
so Neuton is inapplicable.

1 Brooks-Hamilton v. City of Oakland (In re Brooks-Hamilton), 348
2 B.R. 512, 521 (Bankr. N.D. Cal. 2006); see also Restatement
3 (Third) of Trusts § 58(2) (2003) ("A restraint on the voluntary
4 and involuntary alienation of a beneficial interest retained by
5 the settlor of a trust is invalid."). As noted by the Ninth
6 Circuit:

7 The critical inquiry in determining whether a
8 spendthrift trust is valid under California law is
9 whether the trust's beneficiaries exercise excessive
10 control over the trust. See In re Witwer, 148 B.R.
11 930, 937 (Bankr. C.D. Cal. 1992). California law does
not allow a participant with excessive control over his
or her trust to shield that trust with an
anti-alienation provision lacking true substance.

12 Ehrenberg v. S. Cal. Permanente Med. Group (In re Moses), 167
13 F.3d 470, 473 (9th Cir. 1999) (emphasis added).

14 As the Ninth Circuit observed in Moses, citing California
15 Probate Code section 15304(a), "under California law, a settlor
16 of a spendthrift trust cannot also act as beneficiary of that
17 trust (i.e., California law prohibits 'self-settled' trusts)."

18 Id. "California law voids self-settled trusts to prevent
19 individuals from placing their property beyond the reach of their
20 creditors while at the same time still reaping the bounties of
21 such property." Id., citing Nelson v. California Trust Co., 33
22 Cal.2d 501, 202 P.2d 1021 (Cal. 1949). The Nelson court
23 succinctly described why California law prohibits a trustor from
24 benefitting from trust property he is attempting to shield from
25 creditors:

26 It is against public policy to permit a man to tie up
27 his property in such a way that he can enjoy it but
28 prevent his creditors from reaching it, and where the
settlor makes himself a beneficiary of a trust any

1 restraints in the instrument on the involuntary
2 alienation of his interest are invalid and ineffective.

3 Nelson, 202 P.2d at 1021.

4 The California Legislature confirmed the rule of Nelson in
5 Probate Code section 15304(a):

6 If the settlor is a beneficiary of a trust created by
7 the settlor and the settlor's interest is subject to a
8 provision restraining the voluntary or involuntary
9 transfer of the settlor's interest, the restraint is
invalid against transferees or creditors of the
settlor. The invalidity of the restraint on transfer
does not affect the validity of the trust.

10 Cal. Prob. C. § 15304(a) (emphasis added). Moreover, subsection
11 (b) of Probate Code section 15304 states that if the settlor is
12 the beneficiary of a trust that he created and the trust
13 instrument provides that a trustee may or shall pay income or
14 principal for the support of the settlor, a creditor of that
15 settlor can reach "the maximum amount that the trustee could pay
16 to or for the benefit of the settlor under the trust instrument,
17 not exceeding the amount of the settlor's proportionate
18 contribution to the trust." Cal. Prob. C. § 15304(b).

19 Under the Trust Agreement, Debtor as Trustee could
20 potentially use all of the Trust's principal and income to
21 maintain his standard of living; no limitation is placed on the
22 amount that he can use for that purpose. Thus, under California
23 Probate Code section 15304(b), a creditor of Debtor could reach
24 all of the Trust assets contributed by Debtor.¹⁸ Therefore,
25 under California law, Trustee (as a hypothetical lien creditor)

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27 ¹⁸ The court found, and Debtor does not dispute, that
28 Debtor contributed the Trust Properties to the Trust.

1 can likewise recover those assets under section 544(a)(1). The
2 court did not err in holding that the Trust Properties were
3 property of the estate.

4 C. The Bankruptcy Court Should Have Granted Summary Judgment As
5 to the Entire Trust Corpus, Including the Ermatinger Third

6 While the bankruptcy court correctly vested title to the
7 Trust Properties in Trustee pursuant to section 544(a)(1) and
8 California Probate Code section 15304(b), it could have held, as
9 a matter of law, that the entire Trust corpus was property of the
10 estate by virtue of section 541 alone. Ordinarily, if only a
11 portion of a spendthrift trust's corpus is contributed by a
12 beneficiary-debtor, only that portion becomes property of the
13 beneficiary-debtor's estate. Osherow v. Porras (In re Porras),
14 312 B.R. 81, 131 (Bankr. W.D. Tex. 2004). If, however, the trust
15 agreement allows the debtor-beneficiary to exercise control over
16 and reach trust property contributed by others, the estate is
17 entitled to the maximum amount that the trust could pay or
18 distribute to the debtor-beneficiary. Id. at n.30. Therefore,
19 the bankruptcy court could have, and should have, granted summary
20 judgment granting Trustee title to all of the Trust corpus.

21 As trustee of the Trust, Debtor had the sole discretion to
22 use Trust assets and income for his benefit. Under paragraph
23 5.00, Debtor had the power, as trustee, to make distributions
24 from the Trust to himself in order to maintain his customary
25 standard of living. Under paragraph 7.13, he had the power to
26 invade the Trust corpus for "emergencies related to [his] health,
27 education, support and/or maintenance." Debtor had unfettered
28 access to and dominion and control over the Trust and its assets;

1 he could use the Trust income and corpus for whatever he deemed
2 necessary for his support and maintenance.

3 Consequently, under section 541(a)(1) itself, Debtor's
4 beneficial interest in all of the Trust corpus became property of
5 the estate and Debtor's power to use Trust assets for his benefit
6 became property of the estate. See Askanase, 45 F.3d at 106
7 ("what comes to the bankruptcy estate is not only the property
8 in which debtor has an interest, but also, the powers the debtor
9 can exercise for its own benefit over property regardless of the
10 title debtor may be acting under"), quoting and citing In re
11 Gifford, 93 B.R. 636, 638-40 (Bankr. N.D. Ind. 1988) (observing
12 public policy "against allowing anyone to place their assets in
13 trust, for their own benefit, and simultaneously shielding them
14 from the claims of their creditors" and holding that where debtor
15 had authority to exercise dominion over trust assets for his own
16 benefit, the bankruptcy trustee assumes that authority and can
17 acquire access to the funds for the benefit of creditors).¹⁹ See
18 also Robbins v. Webster (In re Robbins), 826 F.2d 293, 295 (4th
19 Cir. 1987) (where trust trustee was authorized to apply entire
20 corpus of trust for support and maintenance of settlors, entire
21 corpus was property of estate which debtors could not exempt);
22 Miller v. Lincoln Nat'l Bank & Trust Co. (In re Cook), 43 B.R.
23 996, 1001 (N.D. Ind. 1984) (where debtor had present access to
24

25 ¹⁹ Cf. Neely v. United States, 775 F.2d 1092, 1094 (9th
26 Cir. 1985) (applying the Internal Revenue Code, the Ninth Circuit
27 held that the transfer of title of assets to a trust while the
28 individual taxpayers retained their use and enjoyment was a sham
transaction, without economic substance, that will not be
recognized for tax purposes); Hanson v. Commissioner, 696 F.2d
1232 (9th Cir. 1983) (same).

1 trust corpus for hardship purposes such as health or education,
2 the debtor's right of withdrawal and his interest in the trust
3 became property of the estate).

4 In summary, to the extent Debtor was the trustee of the
5 Trust, he possessed the power (at his sole discretion) to invade
6 the corpus and make distributions from the Trust for his own
7 benefit. The entire corpus, including the Ermatinger Third, is
8 therefore property of the estate. The bankruptcy court should
9 have granted summary judgment in favor of Trustee as to the
10 entire trust corpus.²⁰

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12 ²⁰ In his cross-appeal, Trustee also argues that --
13 pursuant to section 544(a)(3) -- the bankruptcy court could have
14 entered summary judgment awarding to the estate the Trust
15 Properties and the Ermatinger Third. Section 544(a)(3) allows a
16 trustee to avoid a transfer which could have been avoided by a
17 bona fide purchaser of real property. In essence, Trustee argues
18 that a bona fide purchaser could have bought the Trust Properties
19 from Debtor acting as trustee of the Trust prior to bankruptcy
20 and that this in and of itself permits Trustee to recover those
21 assets on behalf of the estate.

22 Trustee is wrong. Any purchaser of the Trust Properties
23 would have been placed on notice by the quitclaim deeds that the
24 Trust held an interest in those properties and that Debtor was
25 conveying them in the capacity of trustee of the Trust. In other
26 words, a purchaser would have been placed on actual notice of the
27 Trust's interests prior to purchase and would not have obtained
28 the status of "bona fide" purchaser as against the Trust.
Gulino, 779 F.2d at 550-51. Section 544(a)(3) is thus
inapplicable.

Under Trustee's interpretation of section 544(a)(3), the
estate could obtain title to the Trust Properties simply because
Debtor (as trustee of the Trust) could have conveyed or
transferred legal title to a purchaser. If Trustee were
correct, anytime a trustee of any trust (such as a charitable
trust) filed bankruptcy, his or her estate could obtain title to
the corpus or assets of the trust under section 544(a)(3), simply
because third party purchasers could have obtained valid title to
those assets from the debtor (as trustee of the trust)

(continued...)

1 **VI. CONCLUSION**

2 For the foregoing reasons, we AFFIRM the partial summary
3 judgment on the Trust Properties (in Debtor's main appeal) and
4 REVERSE denial of summary judgment as to the Ermatinger Third and
5 REMAND for entry of summary judgment vesting title in the
6 Ermatinger Third in Trustee. We DISMISS as interlocutory
7 Trustee's cross-appeal with respect to the Thurston Circle
8 Property.

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²⁰ (...continued)
24 prepetition. Such a reading of section 544(a)(3) circumvents
25 section 541(b)(1)'s explicit exclusion from estate "any power
26 that the debtor may exercise solely for the benefit of an entity
27 other than the debtor" and section 541(d)'s provision that
28 property to which a debtor holds only legal title becomes
property of the estate only to the extent of such legal title
"but not to the extent of any equitable interest in such property
that the debtor does not hold."