NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-07-1178-NKD
WILLIAM P. BENDER,	Bk. No. 97-13001
Debtor.	Adv. No. 02-00773
CONGREJO INVESTMENTS, LLC,	
Appellant,	
v.	**M E M O R A N D U M**[1]
DIANE M. MANN, Chapter 7 Trustee,	
Appellee.	

Argued and Submitted on October 25, 2007
at Phoenix, Arizona

Filed - November 21, 2007

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Redfield T. Baum, Sr., Chief Bankruptcy Judge, Presiding

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Before: NEITER,[2] KLEIN and DUNN, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Richard M. Neiter, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

This appeal arises from the bankruptcy court's judgment:

(1) Granting summary judgment in favor of Appellee that certain real property located in Kula, Maui, Hawaii ("Lot A3") was property of the estate prior to the transfer to Appellant;

(2) Granting summary judgment in favor of Appellee, in part, that at all relevant times Debtor owned a 1/3 interest in Lot A3, but denying summary judgment as to the remaining 2/3 interest, because the Trustee filed her complaint to avoid the post-petition transfer of said interest after the two year statute of limitation imposed by § 549(d).[3]

(3) Granting judgment, after trial, in favor of the Appellee avoiding the post-petition transfer of Lot A3 and finding that the statute of limitations provided by § 549(d) was equitably tolled so that Appellee's complaint for avoidance of the transfer of Lot A3 was timely filed.

We AFFIRM the determinations regarding limitations and the applicability of equitable tolling, VACATE the order addressing summary judgment in its entirety, and REMAND for trial on whether the alleged trust existed and was effective at the relevant times.

FACTS

William P. Bender ("Debtor"), filed a voluntary chapter 12 petition on September 24, 1997. On May 29, 1998, the case was converted to one under chapter 11. On January 20, 2000, the case

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date (October 17, 2005) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

was converted to one under chapter 7, whereupon Diane M. Mann, the appellee herein ("Appellee" or "Trustee"), was appointed as the chapter 7 Trustee.

Debtor owned Lot A3 in its entirety pre-petition. He had acquired it as part of a larger plot of land located in Kula, Maui, Hawaii in the 1980's. On March 10, 1993, Debtor executed a quitclaim deed, transferring Lot A3 to William P. Bender and Ralph P.L. Bender Jr. as trustees under William Paul Bender Trust (the "Trust"). Although the Trustee requested documentation evidencing the creation of the Trust, Debtor never produced such documentation. Debtor asserts that the beneficiaries of the Trust are Debtor, his brother and his sister.

Debtor did not list any property in Hawaii on his bankruptcy schedules. On his Schedule B, under "interests in partnerships or joint ventures," Debtor listed "Trust" with an unknown value. On February 13, 1999, the Trust transferred Lot A3 to Debtor. Debtor contends this was transferred to him personally and not to him as a representative of his bankruptcy estate. According to Debtor, this was done at the request of the title company to cure a title defect.

On May 31, 2000, while Debtor was in chapter 7 and without court approval, Debtor executed and delivered a quitclaim deed transferring a 100 per cent interest in Lot A3 to Congrejo Investments, LLC, the appellant herein ("Congrejo" or "Appellant"). The members of Congrejo were represented to be the same individuals as were represented as the beneficiaries of the Trust, namely, Debtor, his brother, and his sister. This deed was recorded on June 28, 2000.

Appellee filed her complaint to avoid the transfer to Appellant pursuant to § 549 on June 26, 2002. The parties filed cross motions for summary judgment, which were heard on March 10, 2005 and taken under advisement at that time. The bankruptcy court then issued a minute order on the cross motions on April 20, 2005, in which it held that: (I) Lot A3 was sufficiently rooted in the pre-bankruptcy past of the Debtor that it should not be excluded from property of the bankruptcy estate; (ii) the transfer for purposes of § 549 occurred on May 31, 2000, so that the Trustee's complaint was filed outside of the two-year statute of limitations; and (iii) there were material facts in dispute as to whether there was cause to allow the statute of limitations to be equitably tolled.

To resolve this dispute, the bankruptcy court conducted a bench trial on January 25, 2007. At the conclusion of that trial, the court determined that equitable tolling of the § 549(d) statute of limitations was appropriate under the circumstances described hereafter. As a result, the Trustee's complaint was timely filed. The court then avoided the transfer of Lot A3 from Debtor to Appellant and declared that title to 100 percent of Lot A3 was held by the Trustee. Following the entry of the judgment on April 23, 2007 avoiding the transfer to Congrejo, Appellant filed this timely appeal.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. sections 1334 and 157(b)(1) and (b)(2)(H) and (O). We have jurisdiction under 28 U.S.C. section 158.

ISSUES

(1) Whether the bankruptcy court erred in ruling that 100 percent of Lot A3 was property of the estate.

(2) Whether the bankruptcy court erred in ruling that the Trustee's avoidance complaint was not timely filed when it was filed two years and 26 days after the date of execution and delivery of the quitclaim deed but within two years of the date said deed was recorded.

(3) Whether the bankruptcy court erred in ruling that the statute of limitations prescribed by § 549(d) was equitably tolled.

STANDARD OF REVIEW

A bankruptcy court's summary judgment order is reviewed de novo. Universal Serv. Admin. Co. v. Post-Confirmation Comm. (In re Incomnet, Inc.), 463 F.3d 1064 (9th Cir. 2006). The bankruptcy court's conclusions of law are also reviewed de novo. Elliott v. Four Seasons Props. (In re Frontier Props., Inc.), 979 F.2d 1358, 1362 (9th Cir. 1992). Equitable tolling presents a mixed question of law and fact. We review mixed questions of law and fact de novo. Murray v. Bammer (In re Bammer), 131 F.3d 788, 792 (9th Cir. 1997). A mixed question exists when the facts are established, the rule of law is undisputed, and the issue is whether the facts satisfy the legal rule. Id. Mixed questions require consideration of legal concepts and the exercise of judgment about the values that animate legal principles. Id.

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DISCUSSION

1. Property of the Estate

Section 541(a)(1) provides that the bankruptcy estate includes all legal or equitable interests of the debtor in property, wherever located or by whomever held, as of the commencement of the case.

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
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> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

In finding that Lot A3 was property of the estate, despite the fact that the Trust held record title to Lot A3 at the time the Debtor filed his bankruptcy petition, the bankruptcy court found that Lot A3 was sufficiently rooted in the Debtor's pre-bankruptcy past that it should not be excluded from his estate. The bankruptcy court based this ruling on Rau v. Ryerson (In re Ryerson), 739 F.2d 1423, 1426 (9th Cir. 1984), which cites the Supreme Court case, Segal v. Rochelle, 382 U.S. 375 (1966). Segal v. Rochelle was decided under the Bankruptcy Act of 1898, as amended, the predecessor of the Bankruptcy Code of 1978, the latter being applicable at the time of Debtor's transfer.

In Segal, the debtors obtained loss-carryback tax refunds after the filing of their bankruptcy cases in 1961. The refunds, however, were based on losses that occurred in 1959 and 1960 (before debtors' bankruptcy) to offset net income on which the debtors had paid taxes. Therefore, the Supreme Court concluded that the carryback losses were so "rooted" in the debtors' pre-

bankruptcy past that they should be regarded as property of the debtors' estate.

The Ninth Circuit in Ryerson concluded that payments to which the debtor became entitled upon termination of his employment, some eight months after his bankruptcy filing, were property of the estate pursuant to § 541(a)(1). The court reasoned that the termination payments, to the extent that they were related to pre-bankruptcy services, represented value for years of service completed prior to the bankruptcy. They were not an arbitrary amount arising after bankruptcy. Therefore, the court found that the payments were "sufficiently rooted in the pre-bankruptcy past as to be included in the estate." Ryerson, 739 F.2d at 1436.

In Ryerson, the court pointed out that Segal was decided under the old Bankruptcy Act, and that, "the Code follows Segal insofar as it includes after-acquired property 'sufficiently rooted in the prebankruptcy past' but eliminates the requirement that it not be entangled with the debtor's ability to make a fresh start." Ryerson, 739 F.2d at 1426 citing S. Rep. No. 989, supra at 82, reprinted in 1978 U.S. Code Cong. & Ad. News 5868.

In the case before us, the Debtor owned a 100 percent interest in Lot A3 pre-bankruptcy. Although he transferred Lot A3 to the Trust pre-petition, the validity of the Trust is suspect. Neither Debtor nor Appellant ever produced the instrument creating the Trust. The Trust paid no consideration to Debtor for its purported purchase of Lot A3 and held no assets other than its purported ownership of Lot A3 as of the bankruptcy petition date and thereafter. The Trust transferred Lot A3 to

Debtor for no consideration on February 13, 1999 pursuant to a deed recorded on March 18, 1999.

Appellant contends in its reply brief that the Segal "deeply rooted" concept was replaced by § 541(a)(6), which would bring, at most, 1/3 of Lot A3 into the estate. Debtor admits that he has a 1/3 beneficial interest in the Trust and a 1/3 membership interest in Congrejo. He also contends he is a co-trustee (with his brother) in the Trust and that he is the sole managing member of Congrejo.

Section 541(a)(6) sweeps into the estate post-petition "proceeds, product, [or] offspring" of estate property. The court in Ryerson indicates that § 541(a)(6) codified Segal, as the Senate Report accompanying the enactment of § 541(a)(6) specifically cites Segal. However, some courts have concluded that Segal was superseded by statute. See, e.g., Burgess v. Sikes (In re Burgess), 438 F.3d 493, 498 (5th Cir. 2006) ("although Congress has specifically approved of Segal's result, Segal's 'sufficiently rooted' test did not survive the enactment of the Bankruptcy Code"). Therefore, Appellee's reliance upon the "sufficiently rooted" test is tenuous.

As Appellant argues, the Ninth Circuit has not applied Segal to a situation similar to the facts of this case. Appellant's Reply at 5. It has limited its use of Segal to situations where a debtor received a post-petition benefit pursuant to a pre-petition right or entitlement. Id. As such, we question the applicability of the Segal and Ryerson line of cases to the facts of the case before us. Although the legislative history of § 541(a)(6) includes a citation to Segal, the language of

§ 541(a)(6) does not explicitly adopt Segal. In short, we are not persuaded that the chapter 7 trustee was "entitled to judgment as a matter of law" under the Segal theory, as required by Rule 56(c). Fed. R. Civ. P. 56(c), incorporated by Fed. R. Bankr. P. 7056.

This conclusion does not, however, end the litigation because the record indicates that there is a genuine issue of material fact regarding whether the Trust was valid and enforceable, which issue is appropriate for resolution at trial. The bankruptcy court did not address in its minute orders whether Lot A3 may have been property of the estate because Debtor held an equitable interest (either as owner, beneficiary, trustee, or member of the record owner) in Lot A3, or that Lot A3 was held for Debtor's benefit, ever since he acquired it in the 1980's. This theory is based on the fact that no documentary evidence of the creation of the Trust was ever produced, and as Appellee argues, the Debtor disregarded the Trust as a separate entity from himself. Neither the Trust nor the other beneficiaries gave any consideration for the transfer of Lot A3 to the Trust nor did Congrejo when Lot A3 was transferred to it. Neither did any of them share in any profit from the Trust's 1998 sale of Lot A1 (which was originally acquired by Debtor along with Lots A2[4] and A3). The net proceeds of that sale went to Debtor alone and not to the Trust or its other beneficiaries.

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[4] Lot A2, which is not subject to this appeal, was sold during the pendency of the bankruptcy case. After $100,000.00 of the sale proceeds were paid to the Gummows, the remainder was paid to Debtor as trustee of the Bender Family Trust. Appellant's Reply at 7, note 3.

In support of her argument, Appellee cites Beatrice v. Braunstein (In re Beatrice), 296 B.R. 576, 580 (1st Cir. BAP 2003). In Beatrice, the debtor had established a trust for the benefit of his children, pursuant to which he retained the power to terminate the trust and to add or eliminate beneficiaries. The chapter 7 trustee sought a declaratory judgment that the real property held by the trust was property of the estate pursuant to § 541(a). The trustee also sought a declaratory judgment that the trust was a sham, and, therefore, the property held in trust is property of the estate pursuant to § 541(a). Beatrice, 296 B.R. at 579.

Citing Collier, the Panel in Beatrice explained, "when property of the estate is alleged to be held in trust, the burden rests upon the claimant to establish the original trust relationship." Id. at 580. The trust gave the trustee broad powers to modify the trust, including full and absolute power to sell the real estate, and power to pledge the property to secure his personal debt. Id. at 581. In effect, the debtor had given up neither ownership nor control of the trust property. Accordingly, the Panel found that the trust was property of the debtor's bankruptcy estate. Id.

In the case at bar, Appellant argues that there is uncontroverted evidence that the Trust existed, that it had two trustees whose joint approval was required for any significant actions, and that it had three equal beneficiaries. Appellant's Reply at 6. Appellant distinguishes the present case from Beatrice because in Beatrice, the settlor was the sole trustee who had absolute control. Here, Appellant argues that Debtor was

not the sole trustee; rather, he was a co-trustee with his brother.

Additionally, Appellant argues that the Trustee has raised the issue of whether the Trust existed for the first time on appeal and that the Trustee previously acknowledged the existence of the Trust in various pleadings in the adversary proceeding.

Contrary to Appellant's argument, the record indicates that the chapter 7 trustee questioned the validity of the Trust from the outset of the dispute. A motion for summary judgment based on the position that the Appellee is entitled to judgment as a matter of law as to Lot A3 even if the Trust is valid is not a concession that the Trust is valid for any purpose other than the summary judgment motion. The issue of validity was timely raised in the bankruptcy court and remains to be resolved by trial in the bankruptcy court now that the summary judgment strategy has not succeeded. The bankruptcy court should conduct an inquiry along the lines of the Beatrice case to determine whether the Trust was a sham and whether the property to which the Trust held title was really property of the Debtor at all relevant times. We are mindful that a conclusion that the trust is not valid may enable to trustee to recover more than a 1/3 interest in Lot A3.

2. Equitable Tolling

The principle of equitable tolling applies to Section 549(d), as stated by the Ninth Circuit in Olsen v. Zerbetz (In re Olsen), 36 F.3d 71 (9th Cir. 1994). In Olsen, the debtors owned certain real property prepetition. They listed the property on their schedules and knew it was listed for sale by the trustee. Yet debtors conveyed the property to their son without court

authorization and without notice to the trustee. They also violated their duty to cooperate with the trustee and surrender any recorded information. Olsen, 36 F.3d at 73. Therefore, the court found that the statute was equitably tolled until the date the trustee discovered the debtors' conveyances.

Appellant cites Gardenhire v. IRS (In re Gardenhire), 209 F.3d 1145 (9th Cir. 2000), a Ninth Circuit case wherein the court held that equitable tolling did not apply. In Gardenhire, due to clerical errors, the debtors' Chapter 13 case was dismissed and then reinstated. The claimant's proof of claim in the debtors' case was filed on day 191, outside the 180-day period under § 502(b)(9). The court questioned whether the claimant had been "sufficiently diligent" in filing its proof of claim.

> The [claimant] could have complied with the original 180 day period if it had only tried harder. The [claimant] still had 13 days left in which to file its proof of claim after being notified that the [debtors'] case had been reinstated.

Gardenhire, 209 F.3d at 1151-52.

Appellant likens the present case to Gardenhire in that the Appellee learned of the transfer at least by October 19, 2000, which was approximately nineteen months before the deadline of May 31, 2002. According to Appellant, Trustee had plenty of time to file her avoidance complaint, but instead her lawyer "misdocketed" the deadline on the assumption that the two-year limitations period began to run on the date of recordation of the deed, i.e., June 28, 2000, rather than on the date of execution and delivery of the deed.

The Supreme Court has since come to the opposite conclusion from Gardenhire in United States v. Young, 535 U.S. 43 (2002)

(limitations period begins to run on the date of discovery of the claim, even if discovery occurs within the statutory limitations period). In light of the Young holding, we are compelled to follow the Circuit's holding in the Olsen case. Olsen holds that, in the context of § 549(d), the statute is tolled until the trustee discovers the conveyance. Furthermore, while it appears that the Appellee filed the complaint relying on the incorrect transfer date, this did not shorten the statute of limitations. The two-year period was not reduced because of the "misdocketing" as the Appellant characterizes it.

The bankruptcy court's reasoning as to why the Debtor's conduct equitably tolled the statute of limitations is sound. Debtor failed to disclose any interest in Lot A3 or any property in Hawaii, when he owned at least a beneficial interest in 1/3 of Lot A3 as a beneficiary of the Trust and was a co-trustee thereof on the date of his petition. Furthermore, the Debtor failed to disclose the sizable $663,000.00 outstanding debt he owed to Warren and Rosalie Gummow, who held a trust deed against Debtor's property in Maui.[5] Id. In fact, the Trustee only learned of the Debtor's interest in Lot A3 after receiving correspondence from the Gummows' attorney. Id. In addition, Debtor never updated or amended his schedules or Statement of Financial Affairs to reflect his various interests in Lot A3, even after the Trustee demanded that he do so.

[5] The Gummows' loan was secured by the entire plot of land owned by Debtor, which he later subdivided into lots, including Lot A3.

Throughout the pendency of his bankruptcy case, Debtor failed to produce relevant documents requested by the Trustee or her counsel, while his attorney made efforts to excuse the lack of production. He failed to appear at his 2004 examination scheduled for August 29, 2001, causing the court to issue an order to show cause, which was continued to allow for Debtor's examination and production of documents. A series of discussions and correspondence then ensued until the Trustee filed her avoidance action.

There is no dispute that Debtor did not disclose the transfer of Lot A3 to the Trust, or his reacquisition and subsequent transfer to Congrejo. The finding after trial by the bankruptcy court that he took active steps to conceal his interest in Lot A3 was not clearly erroneous. Therefore, the bankruptcy court was correct in ruling that equitable tolling applied, and the statute of limitations began to run on October 19, 2000. Accordingly, the Trustee's complaint filed on June 26, 2002 was filed within the two-year statute of limitations period of § 549(d) and was timely filed.[6]

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[6] In light of our ruling that equitable tolling applies, we need not discuss in detail whether the bankruptcy court erred in determining that the statute of limitations begins to run at the date of the execution and delivery of the deed. The result remains that the Appellee's complaint is deemed timely filed. However, we agree with the bankruptcy court that because the term "transfer" was undefined by § 549 (but defined for avoidance actions brought under §§ 547 or 548), the definition in § 101(54) of transfer to be used throughout Title 11 should be used in § 549 actions. According to § 101(54) a transfer is "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property...."

CONCLUSION

For the reasons set forth above, we AFFIRM the bankruptcy court's determination that (1) the limitations period began to run upon execution and delivery of the deed from Debtor to Congrejo; and (2) the statute of limitations was equitably tolled due to the Debtor's conduct in concealing the transfer and his various interests in said property; and VACATE and REMAND to the bankruptcy court for further proceedings to determine if the entirety of Lot A3 or any portion thereof was property of the estate.