

APR 27 2006

NOT FOR PUBLICATION

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

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

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In re:)	BAP No.	CC-05-1347-PaKMa
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EDLEEN STAPLETON,)	Bk. No.	SA 02-16993-JR
)		
Debtor,)	Adv. No.	SA 04-01016-JR
)		
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RICHARD A. MARSHACK, Chapter 7)		
Trustee,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
MICHAEL A GRIFFIN and)		
KATHLEEN GRIFFIN,)		
)		
Appellees.)		
)		
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Argued and Submitted on March 23, 2006
at Pasadena, California

Filed - April 27, 2006

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

Honorable John E. Ryan, Bankruptcy Judge, Presiding.

Before: PAPPAS, KLEIN and MARLAR, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

1 This is an appeal from an order entered in an adversary
2 proceeding by the bankruptcy court denying a pretrial motion to
3 amend a trustee's complaint to add a claim for avoidance of
4 fraudulent transfer under § 548(a)(1)(B).² The order became
5 appealable upon entry of the final judgment in the adversary
6 proceeding on August 4, 2005. We AFFIRM.

7 **FACTS³**

8 This is a dispute concerning a single family residence in
9 Garden Grove, California (the "Property").

10 In June 1983, Michael Griffin ("Griffin") purchased the
11 Property in his own name and that of his wife at the time,
12 Patricia Griffin. In April 1984, Patricia Griffin deeded her one-
13 half interest in the Property to Griffin. The precise date is not
14 clear from the record, but at some point in 1983-84, Michael and
15 Patricia Griffin were divorced.

16 From 1982 through 1994, Edleen Stapleton ("Stapleton") and
17 Griffin maintained a personal relationship. From 1983 to 1994,
18 Stapleton and Griffin lived together at the Property. On December
19 31, 1987, Griffin executed a grant deed conveying the Property to
20 Griffin and Stapleton as joint tenants.

21
22 ² Unless otherwise indicated, all chapter, section, and
23 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
24 1330 and to the Federal Rules of Bankruptcy Procedure, Rules
25 1001-9036, in effect prior to the effective date of the Bankruptcy
Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"),
Pub.L. 109-8, 119 Stat. 23 (Apr. 20, 2005).

26 ³ These facts have been gleaned from information in the
27 record that the parties either acknowledge to be correct, or that
28 they do not controvert. To the extent that factual disputes
exist, they do not appear material to the issue in this appeal:
whether the bankruptcy court abused its discretion in denying
Trustee's motion to amend his complaint to include a claim for
avoidance of a fraudulent transfer.

1 Griffin moved out of the Property in November 1994.
2 Stapleton continued to live at the Property until November 2001.
3 On December 29, 2001, while hospitalized, Stapleton executed
4 a grant deed transferring her interest in the Property to Griffin.
5 The tax section of the deed indicates that this was a "Gift Deed"
6 for which there was "no consideration." Stapleton alleges that
7 Griffin offered to give Stapleton \$40,000 from the proceeds of
8 refinancing the Property, and one-half of sale proceeds, in
9 exchange for her transfer of her interest in the Property to him.
10 Griffin alleges that Stapleton gave him⁴ the Property in exchange
11 for help in locating a care facility where Stapleton could stay
12 and for payment of Stapleton's hospital bills.

13 On September 10, 2002, Stapleton filed a petition for relief
14 under chapter 7 of the Bankruptcy Code. Appellant Richard A.
15 Marshack ("Trustee") was appointed trustee.

16 On January 12, 2004, Trustee commenced an adversary
17 proceeding against Appellees Griffin and Kathleen Griffin ("the
18 Griffins") by filing a complaint (the "Original Complaint") in
19 which he asserted claims for (1) quiet title; (2) partition;
20 (3) breach of contract; (4) dissolution of partnership and
21 accounting; (5) fraud and deceit; (6) constructive fraud; (7)
22 breach of fiduciary duty; (8) constructive trust; (9) cancellation
23 of cloud on title; and (10) cancellation of instrument. The
24 Griffins denied any liability to Trustee in their answer to the
25 complaint, filed on January 24, 2004.

26

27 ⁴ Sometime before 2001, Griffin married Kathleen Griffin.
28 There is a dispute among the parties whether, or to what extent,
Kathleen Griffin was a party to the 2001 transfer. However, this
dispute is not at issue in this appeal.

1 On March 23, 2004, the bankruptcy court conducted a status
2 conference with the parties at which it set August 31, 2004, as
3 the discovery cutoff date. Because of various scheduling
4 problems, Trustee and the Griffins agreed to "waive" the discovery
5 cutoff date so that Griffin could be deposed by Trustee, and
6 Stapleton could be deposed by the Griffins, after the cutoff date.
7 There is no indication in the record that the bankruptcy court was
8 consulted about or approved this arrangement.

9 On January 14, 2005, the parties filed a Joint Status Report
10 pursuant to Local Bankruptcy Rule 7016-1(a)(2), in which they
11 stated that they expected to complete discovery by March 1, 2005.
12 There is no indication in the Joint Status Report or in the
13 adversary proceeding docket that the bankruptcy court approved the
14 Joint Status Report, or in particular, any extension of discovery
15 to March 1, 2005.

16 On February 4, 2005, Trustee filed a motion to amend the
17 Original Complaint to add a claim for avoidance of the transfer
18 from Stapleton to Griffin as fraudulent under § 548(a)(1)(B).⁵
19 Trustee justified his request to add the fraudulent transfer claim
20 as follows:

21 The addition of the eleventh cause of action
22 for avoidance of a fraudulent transfer is a
23 simple housekeeping matter. The facts have
24 already been pled for a § 548(a)(1)(B) claim,
25 so there is no reason why Plaintiff should not
26 be able to seek relief under this specific
27 code section. And although Plaintiff has
28 grounds for causes of action for breach of
contract, fraud, and related claims, the
requirements of a § 548(a)(1)(B) claim provide

⁵ There were also other changes to the Original Complaint in
the proposed Amended Complaint that are not relevant in this
appeal.

1 for a more streamlined means of compelling
2 Defendants to return the bankruptcy estate's
interest in the property. . . .

3 Trustee further elaborated:

4 Adding a § 548(a)(1)(B) claim to the complaint
5 does not change Plaintiff's objective,
6 although it makes it easier for him to prove
7 his case. § 548(a)(1)(B) only requires that
8 Plaintiff show that Defendants did not give
fair consideration in exchange for the
property, which he does not believe will be a
problem.

9 The Griffins refused to stipulate with Trustee to the
10 amendment to the Original Complaint. Instead, the Griffins filed
11 an opposition to the Trustee's motion. The Griffins argued that
12 the motion was untimely in that Trustee was aware of all alleged
13 facts necessary to plead a fraudulent transfer claim at the time
14 of filing the Original Complaint thirteen months earlier. They
15 contended that no evidence had been discovered in those thirteen
16 months that would support a claim of surprise or otherwise justify
17 a delay in raising the fraudulent transfer claim. Further, they
18 asserted, the issue of reasonably equivalent value was not
19 material to the defense of the claims stated in the Original
20 Complaint, and they had not explored this issue in their
21 discovery. Thus, the Griffins argued, it would be unfair and
22 prejudicial to have to defend against a new claim without first
23 having an opportunity to conduct appropriate discovery.

24 On March 1, 2005, the bankruptcy court conducted a hearing
25 concerning Trustee's motion for leave to amend the complaint. The
26 court agreed with the positions advanced by the Griffins that the
27 motion was untimely, not supported by good cause, and that an
28 amendment would be prejudicial to the Griffins.

1 [T]his is very late in the process and under
2 these circumstances, it seems to me the
3 Plaintiff needs to establish some good cause
4 for allowing an amendment at this stage. I
5 didn't see any good cause. There are no new
6 facts that came out of the discovery process
7 that would justify the amendment. It's
8 strictly a [§]548 addition, but the problem is
9 that that involves reasonably equivalent
10 value.

11 The Defendant has not undertaken any
12 discovery with respect to reasonably
13 equivalent value in terms of the exchange and
14 I'm not sure whether you [Trustee] have. The
15 discovery phase has ended. We're into the
16 pretrial phase and for those reasons, I think
17 it would be prejudicial, under the
18 circumstances, and again, there's no good
19 cause for adding a cause of action that could
20 have been part of the original complaint.

21 So, for those reasons the motion is
22 denied.

23 On April 12, 2005, the bankruptcy court conducted a pretrial
24 conference in the adversary proceeding and set trial for July 14,
25 2005. Before the pretrial conference, on July 1, 2005, Trustee
26 submitted a Joint Pretrial Order that included three disputed
27 issues of law regarding: reasonably equivalent value, insolvency
28 on the date Stapleton transferred her interest in the Property to
Griffin, and fraudulent transfer under § 548(a)(1)(B). Although
the court signed the Pretrial Order on July 12, 2005, it struck
the three fraudulent transfer issues.

The bankruptcy court held a one-day trial on July 14, 2005.
During the trial, Trustee again moved to add the fraudulent
transfer claim "to conform to the evidence." The court denied
Trustee's motion.

The bankruptcy court took the issues under submission. The
proceedings were reconvened telephonically on July 15, 2005, at
which time the bankruptcy court announced that it would enter

1 judgment in favor of the Griffins on all of Trustee's claims.
2 Trial Tr. 1-7, July 15, 2005. Judgment was entered on August 4,
3 2005. Trustee timely filed a notice of appeal challenging both
4 the March 1, 2005, order denying Trustee's motion for leave to
5 amend the complaint and the Judgment of August 4, 2006.⁶

6 JURISDICTION

7 The bankruptcy court had jurisdiction of this action under 28
8 U.S.C. § 1334 and § 157(b) (2). Our jurisdiction is based upon 28
9 U.S.C. § 158(b) (1).

10 ISSUE

11 Whether the bankruptcy court abused its discretion in denying
12 Trustee's motion for leave to amend the Original Complaint to
13 include a claim against the Griffins for avoidance of a fraudulent
14 transfer under § 548(a) (1) (B).

15 STANDARD OF REVIEW

16 A trial court's denial of a motion to amend a complaint is
17 reviewed for an abuse of discretion. Gerber v. Hickman, 291 F.3d
18 617, 623 (9th Cir. 2002) (en banc). In reviewing a denial of a
19 motion to amend a complaint under an abuse of discretion standard,
20 the appellate panel cannot reverse unless it has a definite and
21 firm conviction that the trial court committed a clear error of
22 judgment in the conclusion it reached upon a weighing of the
23 relevant factors. Solomon v. N. Am. Life & Cas. Ins. Co., 151
24 F.3d 1132, 1138-39 (9th Cir. 1998).

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28 ⁶ Although the Trustee appealed the Judgment, the arguments
in his briefs on appeal address only the March 1, 2005, order by
the bankruptcy court denying leave to amend the complaint.

1 **DISCUSSION**

2 FED. R. CIV. P. 15(a), made applicable in bankruptcy adversary
3 proceedings by FED. R. BANKR. P. 7015, governs amendments to
4 pleadings. It provides:

5 A party may amend the party's pleading once as
6 a matter of course at any time before a
7 responsive pleading is served or, if the
8 pleading is one to which no responsive
9 pleading is permitted and the action has been
10 placed upon the trial calendar, the party may
11 so amend it at any time within 20 days after
12 it is served. Otherwise a party may amend the
13 party's pleading only by leave of the court or
14 by written consent of the adverse party; and
15 leave shall be freely given when justice so
16 requires. . . .

17 In this appeal, Trustee moved to amend the Original Complaint
18 to add a claim against the Griffins to avoid a fraudulent
19 conveyance. A responsive pleading had been filed by the Griffins.
20 In addition, the Griffins would not consent to Trustee's motion to
21 amend. Therefore, Trustee could only amend the complaint by leave
22 of the bankruptcy court. The Rule instructs that such leave
23 should be "freely given when justice so requires." Based upon
24 this record, we conclude that the bankruptcy court did not abuse
25 its discretion in finding that justice did not require that leave
26 to amend be granted to Trustee.

27 There is extensive case law examining the grounds for
28 granting or denying leave to amend pleadings. The best known, and
still the most frequently cited, precedent is the Supreme Court's
decision in Foman v. Davis, 371 U.S. 178 (1962). In Foman, the
Court considered, among other issues, whether a district court
abused its discretion by denying leave to amend a complaint
without providing any reasons for its decision. The Court

1 criticized the district court for its approach, observing that an
2 outright refusal to grant leave without any justifying reason "is
3 not an exercise of discretion; it is merely abuse of that
4 discretion and inconsistent with the spirit of the Federal Rules."
5 Foman, 371 U.S. at 182. But in doing so, the Court referred to
6 several factors courts could use to justify refusal to grant leave
7 to amend:

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

17 Id. The list provided by the Court was non-inclusive as indicated
18 by its use of the term "etc." These reasons for denying an
19 amendment have come to be known as the "Foman Factors."

20 The Ninth Circuit has employed the Foman Factors in
21 determining whether a trial court properly granted or denied leave
22 to amend pleadings. Johnson v. Buckley, 356 F.3d 1067, 1077 (9th
23 Cir. 2004) (listing five factors taken into account to assess the
24 propriety of a motion for leave to amend: bad faith, undue delay,
25 prejudice to opposing party, futility of amendment and whether
26 plaintiff has previously amended the complaint); Chodos v. West
27 Publ'g Co., 292 F.3d 992, 1003 (9th Cir. 2002) (instructing that
28 when considering a motion for leave to amend complaint, court must
consider undue delay, bad faith, prejudice to opposing party or
dilatory tactics by movant); Griggs v. Pace Am. Group, Inc., 170
F.3d 877, 880 (9th Cir. 1999) (holding that a district court
determines the propriety of a motion to amend a complaint by

1 ascertaining the presence of any of four factors: bad faith, undue
2 delay, prejudice to the opposing party, and/or futility).

3 Although the Ninth Circuit has stressed that trial courts
4 should consider all, or most, Foman Factors before granting or
5 denying leave to amend a pleading, it has only required that trial
6 courts base their decision on one or more of the factors. Brass v.
7 County of Los Angeles, 328 F.3d 1192, 1197 (9th Cir. 2003)
8 (decision to allow late attempt to expand complaint lies within
9 the discretion of the district court); Acri v. Int'l Ass'n of
10 Machinists & Aerospace Workers, 781 F.2d 1393, 1398 (9th Cir.
11 1986) ("Late amendments [to complaint] to assert new theories are
12 not reviewed favorably when the facts and the theory have been
13 known to the party seeking amendment since the inception of the
14 cause of action."), quoted in Royal Ins. Co. Of Am. v. Sw. Marine,
15 194 F.3d 1009, 1017 (9th Cir. 1999); Solomon, 151 F.3d at 1139
16 (affirming denial of motion to amend on grounds of undue delay and
17 prejudice where allowing the motion would have required reopening
18 discovery); W. Shoshone Nat'l Council v. Molini, 951 F.2d 200, 204
19 (9th Cir. 1991) (holding that denial of leave to amend was
20 justified because of undue delay, prejudice to adverse party, and
21 movant had filed multiple amendments to complaint); M/V Am. Queen
22 v. San Diego Marine Const. Corp., 708 F.2d 1483, 1492 (9th Cir.
23 1991) (holding that denial was justified by undue delay, no new
24 facts were alleged, and there was prejudice to opposing party);
25 Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387-89 (9th Cir.
26 1990) (sustaining denial of motion for leave to amend because of
27 prejudice to opposing party, undue delay or futility); Kates v.
28 Crocker Nat'l Bank, 776 F.2d 1396, 1398 (9th Cir. 1985) (observing

1 that court did not abuse discretion in denying motion to amend,
2 where motion was made late in proceedings and plaintiff gave no
3 reason for delay).

4 In this appeal, the bankruptcy court based its decision to
5 deny leave to amend the complaint on two of the most frequently
6 cited Foman Factors: that an amendment would prejudice the
7 Griffins; and that Trustee was guilty of undue delay in proposing
8 the amendment. These reasons constitute an adequate basis to
9 sustain the bankruptcy court's decision.

10 The Ninth Circuit has held that prejudice to the opposing
11 party is the most significant of the Foman Factors. Eminence
12 Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir.
13 2003) ("Not all of the [Foman] factors merit equal weight. As this
14 circuit and others have held, it is the consideration of prejudice
15 to the opposing party that carries the greatest weight.") Accord
16 Lone Star Ladies Inv. Club v. Schlotzsky's Inc., 238 F.3d 363, 368
17 (5th Cir. 2001) ("Prejudice is the 'touchstone of the inquiry under
18 [R]ule 15(a).'").

19 The bankruptcy court made a specific finding that the
20 Griffins would be prejudiced by the addition of a fraudulent
21 transfer claim to Trustee's Original Complaint. It reasoned that
22 a fraudulent transfer claim under § 548(a)(1)(B) implicates, among
23 other issues, the question of whether the debtor obtained
24 reasonably equivalent value in exchange for the property that was
25 allegedly transferred. The court noted:

26 The Defendant has not undertaken any discovery
27 with respect to reasonably equivalent value in
28 terms of the exchange and I'm not sure whether
you [Trustee] have. The discovery phase has
ended. We're into the pretrial phase and for

1 those reasons, I think it would be
2 prejudicial, under the circumstances.

3 Hr'g Tr. 2:16-20, March 1, 2005. The court agreed with the
4 Griffins that it would be unfair and prejudicial to the Griffins
5 to have to defend against a new claim without first being able to
6 conduct appropriate discovery. Defending against a fraudulent
7 transfer claim, and in particular the determination of reasonably
8 equivalent value, is not a simple process. Determination of
9 reasonably equivalent value was not material to the original
10 causes of action under state law alleging fraud or breach of
11 contract to convey real property, and neither party had engaged in
12 the discovery needed to determine the value of the interest, if
13 any, transferred by Stapleton to the Griffins as of the date of
14 that transfer. In addition, assuming the transfer was not a
15 "gift," there was also an issue concerning the value of the
16 consideration given to Stapleton by the Griffins.

17 In Solomon, 151 F.3d at 1139, the Court of Appeals decided
18 prejudice to the opposing party was present when, if an amendment
19 was allowed, it would be necessary to reopen discovery. Lockheed
20 Martin Corp. v. Network Solutions, Inc., 194 F.3d 980, 986 (9th
21 Cir. 1999) reaches the same conclusion: "[A] need to reopen
22 discovery and delay the proceedings supports a district court's
23 finding of prejudice from a delayed motion to amend the
24 complaint."

25 Trustee argues that the Griffins did not need to perform
26 further discovery to defend against a \$ 548 claim:

27 [T]he only additional evidence appellees
28 needed for trial was evidence that they gave
 debtor Edleen Stapleton reasonably equivalent

1 value for the subject matter property.
2 However, appellees already had this evidence
3 when appellant filed his motion. . . . [A]ny
4 evidence supporting appellees' claim that they
5 gave debtor reasonable value was in their
6 control exclusively. Only appellees would
7 know the value of the "compensation" they gave
8 the debtor for the property.

6 We disagree with Trustee's contention. To determine reasonably
7 equivalent value, the parties would need to discover more than the
8 value of what the Griffins gave Stapleton in exchange for the deed
9 to the Property. To litigate Trustee's claim, the parties would
10 also need to explore the value of Stapleton's undivided interest
11 in the Property at the time it was transferred. Because Stapleton
12 and Griffin were joint tenants, this analysis could require an
13 accounting of the financial investments and returns of both
14 Stapleton and Griffin as to the Property. For example, it is not
15 at all clear from this record how much Stapleton and Griffin each
16 paid before and after 1997 toward satisfaction of the mortgages on
17 the Property. There could be an issue about how much Stapleton
18 and Griffin each contributed over the years toward payment of
19 expenses associated with the Property. There is evidence that
20 Stapleton collected rent during the period before 2001 that she
21 did not share with the Griffins, but there is no record of how
22 much or when it was collected. There are also inconsistencies
23 between the trial testimony of Griffin and the deposition
24 testimony of Stapleton concerning the number and amount of loans
25 taken out against the property, and concerning which owner may
26 have benefitted more from them. Neither Stapleton nor the
27 Griffins have had access to each other's tax returns, which could
28 show income and expenses related to the Property or potential tax

1 liabilities that might attach to the Property. Finally, there is
2 no conclusive evidence showing the market value of Stapleton's
3 interest in the Property at the time of the transfer.

4 In short, contrary to Trustee's suggestion, there may be
5 several significant factual issues involving information and
6 evidence not in the Griffins' possession that they may need to
7 discover in order to properly prepare a defense to a charge that
8 Stapleton did not receive reasonably equivalent value for the
9 transfer of the Property. It can be reasonably assumed that
10 discovery would be necessary in the effort to obtain that
11 information.

12 For this reason alone, the bankruptcy court did not abuse its
13 discretion in deciding that reopening discovery would prejudice
14 the Griffins.⁷

15 The second basis articulated by the bankruptcy court for
16 denying Trustee's motion for leave to amend the complaint was that
17 Trustee had unduly delayed in submitting the proposed amended
18 complaint. The bankruptcy court found that:

19 [T]his is very late in the process and under
20 these circumstances, it seems to me the
21 Plaintiff needs to establish some good cause

22 ⁷ Although the court focused on the "reasonably equivalent
23 value" issue in deciding that allowing the proposed amendment to
24 the complaint would prejudice the Griffins, there was another
25 issue that would seemingly require further investigation or
26 discovery by the Griffins to defend against a fraudulent transfer
27 claim. There is no evidence in the record before the Panel
28 showing that Stapleton was insolvent at the time the transfer
occurred, or that she was rendered insolvent as a result of the
transfer. Proof of insolvency is required to avoid a transfer
under § 548(a)(1)(B)(ii). Moreover, the Original Complaint
contains no allegation concerning Stapleton's insolvency. For
that reason, Trustee's assurance that "[t]he facts have already
been pled [before the filing of the amended complaint] for a
§ 548(a)(1)(B) claim," is not accurate.

1 for allowing an amendment at this stage. I
2 didn't see any good cause. There are no new
3 facts that came out of the discovery process
4 that would justify the amendment. . . .
[T]here's no good cause for adding a cause of
action that could have been part of the
original complaint.

5 Hr'g Tr. 2:5-10 & 20.

6 We agree with the bankruptcy court that Trustee's delay in
7 seeking to amend the complaint in this case was egregious.⁸
8 Thirteen months elapsed after commencement of the action before
9 Trustee moved to amend the complaint, even though Trustee
10 acknowledges in the motion that he was aware of the presence of
11 the elements of a possible fraudulent transfer issue at the time
12 of filing the Original Complaint:

13 The addition of the eleventh cause of action
14 for avoidance of a fraudulent transfer is a
15 simple housekeeping matter. The facts have
16 already been pled for a § 548(a)(1)(B) claim,
so there is no reason why Plaintiff should not
be able to seek relief under this specific
code section. (Emphasis added.)

17 Far from justifying the addition of a late amendment to the
18 Original Complaint, this statement serves to emphasize the tardy
19 nature of Trustee's proposed amendment.

20 Trustee's approach runs afoul of the Ninth Circuit's
21 admonition in Sw. Marine, 194 F.3d at 1016-17, that late
22 amendments to a complaint are not reviewed favorably when the
23 facts and the theory have been known to the party seeking
24 amendment since the inception of the action.

25
26 ⁸ We note the warning in Bowles v. Reade, 198 F.3d 752 (9th
27 Cir. 1999), that undue delay is not sufficient alone to justify
28 denial of leave to amend a complaint. Here, Trustee's undue delay
was not the only, nor perhaps even the most important, of the
Foman Factors considered by the bankruptcy court.

1 Trustee was presumably aware of the possibility that an
2 avoidable conveyance had taken place for purposes of
3 § 548(a)(1)(B) well before the filing of the Original Complaint.
4 Stapleton's bankruptcy schedules filed in September 2002 disclose
5 the "disputed" transfer of her interest in the Property to
6 Griffin. This information should have alerted Trustee to inquire
7 further, and if appropriate, to seek to avoid the transfer.⁹

8 Trustee disputes he is guilty of "undue delay" for two
9 reasons. First, he contends there was no trial to be "unduly
10 delayed" at the time he filed his motion for leave to amend
11 because the trial date had not yet been set. Second, according to
12 Trustee, discovery was still pending at the time he filed the
13 motion.

14 Regarding both arguments, the bankruptcy court found that
15 "[t]he discovery phase has ended. We're into the pre-trial
16 phase." Hr'g Tr. 2:16-17. The court's finding is amply supported
17 by the record. Under the bankruptcy court's scheduling order,
18 discovery had closed on August 31, 2004. Trustee admits that
19 "[a]s defendants point out, the discovery cutoff date in this case
20 was August 31, 2004." Although it appears that by agreement of
21 the parties, some discovery was conducted after this date, the
22 bankruptcy court had never authorized an extension of its
23 discovery deadline. In addition, it appears all of the discovery
24 conducted after August 31, 2004, was either planned before August

25
26 ⁹ The bankruptcy petition and schedules were not a part of
27 the original record on appeal supplied by the parties in their
28 excerpts. Ironically, it was Trustee, in a motion filed during
the briefing period, who requested they be added to the record.
The Panel granted Trustee's request by order entered March 3,
2006.

1 31, 2004, or authorized by the court at the April 12, 2005,
2 pretrial conference. Finally, the fact that a trial had not been
3 scheduled at the time of filing of Trustee's motion for leave to
4 amend is not germane. To the bankruptcy court, it was the
5 lateness in the course of the proceedings that militated against
6 granting leave to amend, not the imminence of the trial. See
7 Kates, 776 F.2d at 1396 (finding no abuse of discretion in denying
8 plaintiff's motion to amend complaint, where motion was made late
9 in the proceedings and plaintiff gave no reason for the delay).

10 The bankruptcy court's decision to deny leave to amend based
11 on prejudice to the Griffins and on Trustee's undue delay in
12 seeking to amend the Original Complaint did not constitute an
13 abuse of its discretion. The court did not apply an incorrect
14 legal standard. Nor did it operate under a clearly erroneous view
15 of the facts. Nor, regardless of what we may individually have
16 done as trial judges in this situation, can we say that we have a
17 definite and firm conviction that there was a clear error of
18 judgment.¹⁰

19 CONCLUSION

20 For the above reasons, we **AFFIRM** the order of the bankruptcy
21 court denying the Trustee's motion for leave to amend the
22 complaint.

24
25 ¹⁰ There is also a serious concern in this action whether
26 Trustee's proposed new claim, raised some five months after
27 expiration of the two-year statute of limitations of
28 § 546(a)(1)(A), is time-barred. Because we have concluded that
the bankruptcy court did not abuse its discretion in denying
Trustee's motion to amend for other reasons, we need not address
whether the proposed amendment should have been denied based upon
another Foman Factor, futility.