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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	) BAP No. AZ-10-1121-PaJuBa) BAP No. AZ-10-1122-PaJuBa
WILLIAM P. BENDER,	) (Related Appeals)
Debtor.	) Bk. No. 97-13001-RTB
WILLIAM P. BENDER,	) Adv. No. 02-00773-RTB
Appellant,	)
v.	) **M E M O R A N D U M**[1]
DIANNE M. MANN, Chapter 7 Trustee; THE WARREN & ROSALIE GUMMOW FAMILY TRUST,	)
Appellee.	)
CONGREJO INVESTMENTS, LLC,	)
Appellant,	)
v.	)
DIANE M. MANN, Chapter 7 Trustee,	)
Appellee.	)

Argued and Submitted on October 22, 2010
at Phoenix, Arizona

Filed - November 15, 2010

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

Hon. Redfield T. Baum, U.S. Bankruptcy Judge, Presiding

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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.

Appearances: Christopher A. LaVoy, LaVoy & Chernoff, PA argued for Appellants William P. Bender and Congrejo Investments, LLC
Bradley D. Pack, Engelman Berger, PC argued for Appellees The Warren and Rosalie Gummow Family Trust and Dianne M. Mann, Chapter 7 Trustee

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Before: PAPPAS, JURY and BAUER,[2] Bankruptcy Judges.

This decision resolves two related appeals. No. AZ-10-1122 is Congrejo Investments, LLC's ("Congrejo") appeal of a judgment in an adversary proceeding avoiding a postpetition transfer of property pursuant to § 549(d). We AFFIRM the decision of the bankruptcy court in No. AZ-10-1122.

No. AZ-10-1121 is Chapter 7[3] debtor William P. Bender's ("Bender") challenge to the bankruptcy court's order in his bankruptcy case overruling Bender's objection to the proof of claim filed by creditor The Warren and Rosalie Gummow Family Trust ("Gummow Trust"). Because the parties agree that this issue need be addressed only if the Panel reverses the avoidance judgment in AZ-10-1122, we DISMISS as MOOT No. AZ-10-1121.

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[2] The Honorable Catherine E. Bauer, United States Bankruptcy Judge for the Central District of California, sitting by designation.

[3] Unless otherwise indicated, all chapter, section and rule references herein are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as enacted and promulgated prior to the effective date (October 17, 2005) of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23.

FACTS RE No. AZ-10-1122

At the heart of this appeal is a parcel of undeveloped land in Maui, Hawaii (the "Property"). Bender acquired the Property in the 1980s. In January 1992, Warren and Rosalie Gummow made a loan to Bender in the original amount of $663,000, evidenced by a Note and secured by a mortgage on the Property.[4] Bender used a portion of the loan proceeds to pay off an existing loan and used the balance to develop the Property. At some point not clear in the record, but before filing his bankruptcy case, Bender subdivided the Property into Lots A-1, A-2 and A-3. Only Lot A-3 is implicated in this appeal.

Bender executed a quitclaim deed purporting to transfer Lot A-3 to the William Paul Bender Trust (the "Bender Trust") on March 10, 1993. The beneficiaries of the Bender Trust are Bender, his brother and sister. Despite numerous requests from the trustee in his bankruptcy, Bender never produced documentation regarding the creation of the Bender Trust, and the parties to this appeal would ultimately stipulate that the Bender Trust was a sham.

Bender filed a chapter 12 petition on September 24, 1997. On May 29, 1998, the case was converted to one under chapter 11, and then on January 20, 2000, it was converted to a chapter 7 case. Bankr. Dkt. no. 92. Diane M. Mann ("Trustee") was appointed chapter 7 trustee.

Bender did not list the Property in his bankruptcy schedules or statement of financial affairs. He listed a "Trust," without

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[4] The Note and Mortgage were later assigned to the Gummow Trust.

explanation or further details, on his Schedule B. In addition, Bender did not list the Gummows or the Gummow Trust as creditors, nor did he list them on the master mailing list so they would have notice of the bankruptcy filing. Bender never amended his schedules or statement of financial affairs to reflect the Bender Trust assets.

On February 13, 1999, Bender as trustee of the Bender Trust purportedly transferred Lot A-3 back to Bender. As a result, Lot A-3 remained titled in Bender's name for the next 16 months while he was in bankruptcy, but he did not amend his schedules to disclose it.

The Gummow Trust's attorney wrote to Trustee on February 4, 2000, informing Trustee of Bender's interest in Lot A-3. On June 26, 2000, Trustee wrote to Bender demanding he amend his schedules to reflect his interest in Lot A-3.

On June 28, 2000, without bankruptcy court approval, Bender recorded a quitclaim deed transferring his interest in Lot A-3 to Congrejo. This deed had purportedly been executed and delivered to Congrejo on May 31, 2000. The members of Congrejo are Bender, his brother and sister or, in other words, the same individuals who were beneficiaries under the Bender Trust. Bender is managing member of Congrejo. Congrejo gave no consideration for this conveyance.

It is agreed by the parties that Trustee first became aware of the conveyance from Bender to Congrejo during the Trustee's Rule 2004 examination of Bender conducted on October 19, 2000. Prior to that examination, Trustee had directed that Bender produce "any and all documents relating to real estate owned by

Mr. Bender or any trusts in which he is or has been a trustor, trustee, settlor or beneficiary . . . including, without limitation, real property located in the state of Hawaii." Bender produced no such documents.

Trustee filed an adversary complaint to avoid the unauthorized postpetition transfer of Lot A-3 by Bender to Congrejo under § 549(a) on June 26, 2002. In its answer, Congrejo argued that Trustee's action was time-barred because it was filed more than two years after the deed to Congrejo was executed and delivered on May 31, 2000, relying upon § 549(d).[5] Trustee countered that, under the doctrine of equitable tolling, her action was timely.

The parties filed cross-motions for summary judgment which were heard by the bankruptcy court on March 10, 2005. After taking the issues under advisement, the bankruptcy court issued a minute order, holding that: (1) prior to its transfer, Lot A-3 was sufficiently "rooted" in the prebankruptcy past of Bender so as to constitute property of his bankruptcy estate; (2) the transfer of the lot 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 under § 549(d); and (3) there were material facts in dispute as to whether this statute of limitations should be equitably tolled.

The bankruptcy court conducted a trial on the question of equitable tolling on January 25, 2007. At the conclusion of

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[5] § 549(d) ("An action or proceeding under this section may not be commenced after the earlier of--(1) two years after the date of the transfer sought to be avoided; or (2) the time the case is closed or dismissed.").

trial, the court ruled that equitable tolling of the § 549(d) statute of limitations was appropriate under the circumstances and in light of Ninth Circuit precedent, Olsen v. Zerbetz (In re Olsen), 36 F.3d 71 (9th Cir. 1994). As a result, the bankruptcy court decided, Trustee's complaint was timely filed, and the transfer of Lot A-3 by Bender to Congrejo could be avoided.

Following entry of a judgment in favor of Trustee avoiding the transfer, on April 23, 2007, Congrejo appealed to the Panel. The issue on appeal, in Congrejo's view, was "Whether the bankruptcy court erred in ruling that the statute of limitations prescribed by § 549(d) was equitable tolled."[6] In re Bender, 385 B.R. 800, 802 (9th Cir. BAP 2007). In its unpublished Memorandum Decision, the Panel devoted considerable attention to the equitable tolling issue. In particular, it examined the three principal cases suggested by the parties. Trustee and the bankruptcy court have relied upon In re Olsen, a § 549 case in which the court considered the debtor's failure to cooperate with the trustee and provide documentation, and where it approved application of equitable tolling. Congrejo, on the other hand, cited to Gardenhire v. IRS (In re Gardenhire), 209 F.3d 1145 (9th Cir. 2000) for support. In that case, the court of appeals held that equitable tolling did not apply to save a late-filed proof of claim where the claimant had not been "sufficiently

[6] Another issue on that appeal was whether the bankruptcy court erred in ruling that 100 percent of Lot A-3 was property of the estate. The Panel reversed on this issue and remanded for trial on the validity of the Bender Trust and whether Lot A-3 was property of the estate. The parties to this appeal stipulated in the bankruptcy court on remand that the Bender Trust was a sham. Consequently, the only disputed issue in the current appeal is equitable tolling.

diligent." Id. at 1151. The Panel also discussed the Supreme Court's decision in Young v. United States, 535 U.S. 43 (2002), finding it opposed to Gardenhire because it held that a limitations period begins to run on the date of discovery of the claim, even if discovery occurs within the statutory limitations period. Id. at 47. Based on its review of Young, the Panel felt compelled to follow Olsen's holding that the statute is tolled, and does not begin to run, until the trustee discovered the conveyance. In re Bender, 385 B.R. at 802.

The Panel highlighted Bender's various efforts to conceal his interest in Lot A-3, and the dilatory tactics of both Bender and his attorney throughout the case. Consequently, the Panel concluded that the bankruptcy court was correct in ruling that equitable tolling applied, that the statute of limitations began to run on Trustee's discovery of the transfer on October 19, 2000, and Trustee's complaint filed on June 26, 2002 was timely filed within the two-year statute of limitations period of § 549(d). The BAP therefore affirmed the bankruptcy court's ruling that the statute of limitations was equitable tolled due to Bender's conduct in concealing the transfer and his various interests in the Property. However, it vacated the bankruptcy court's judgment and remanded for proceedings to determine if the Bender Trust was valid and the extent of Bender's ownership of Lot A-3.

On remand, the parties stipulated that the Bender Trust was a sham, therefore resolving the issue on remand, and asked the bankruptcy court to enter another final judgment avoiding the transfer of Lot A-3. The bankruptcy court entered that judgment on March 31, 2010. Congrejo filed its notice of appeal commencing

this appeal, No. AZ-10-1122, on April 14, 2010.

JURISDICTION

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

ISSUE AND STANDARD OF REVIEW

Congrejo frames as the sole issue on appeal: "Is equitable tolling available to rescue the Trustee's otherwise time-barred § 549 avoidance claim?" While stated slightly differently, we conclude this is the same issue briefed, argued, and decided in the previous appeal to the Panel. Therefore, Congrejo is asking this Panel to overrule the decision made by the prior Panel. As discussed below, we decline to do so.

"Under the 'law of the case doctrine,' a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case." Old Person v. Brown, 312 F.3d 1036, 1039 (9th Cir. 2002); Hegler v. Borg, 50 F.3d 1472, 1475 (9th Cir. 1995) (holding that one panel of an appellate court in this circuit will not reconsider questions that another panel has previously decided in the same case). The doctrine is not a limitation on a tribunal's power but, rather, is a guide to its exercise of discretion whether to depart from a prior decision. Ariz. v. Cal., 460 U.S. 605, 618 (1983). However, the law of the case doctrine is subject to three exceptions that may arise when, "(1) the [prior] decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes

reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." Minidoka Irrigation Dist. v. Dep't of Interior, 406 F.3d 567, 573 (9th Cir. 2005).[7] A second panel's failure to apply the doctrine of the law of the case and the decision of a prior panel absent one of the three requisite conditions may constitute an abuse of discretion. United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997).

Congrejo argues that the earlier Panel's decision was erroneous, would work a manifest injustice, and that a change in intervening controlling authority favors our reconsideration of the equitable tolling issue. Congrejo's arguments lack merit.

DISCUSSION

Congrejo suggests that two of the recognized exceptions to the doctrine of law of the case are available here:

> The first exception is when "intervening controlling authority makes reconsideration appropriate." [Citing Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278, 281 (9th Cir. 1996.)]. Holland, which amplifies the equitable tolling rule announced in Lawrence, qualifies as new authority. The second exception is when the prior ruling "is clearly erroneous and its enforcement would work a manifest injustice. Id. Congrejo respectfully submits that [t]his court's prior equitable tolling ruling was "clearly erroneous" in light of Holland and Lawrence and that adhering to such an erroneous ruling would be unjust.

Bender's Op. Br. at 20; Reply Br. at 13.

The two Supreme Court cases relied on by Congrejo in asserting that "new authority" requires us to depart from the Panel's prior decision are Holland v. Florida, ___ U.S. ___, 130

[7] The third exception cannot apply in this appeal because there was no trial subsequent to the first appeal.

S.Ct. 2549 (2010) and Lawrence v. Florida, 549 U.S. 327, 336 (2007). According to Congrejo, the Supreme Court in Holland held that equitable tolling should only operate where "extraordinary circumstance . . . prevented timely filing" [Holland at 2560] thereby confirming its statement to the same effect in [Lawrence]." Congrejo's Op. Br. at 5 (ellipsis and emphasis in brief but not in original). In other words, Congrejo argues that Holland, in repeating the same phrase in Lawrence, prohibits the bankruptcy court's use of equitable tolling in this case unless some "extraordinary circumstance" caused Trustee to miss her filing deadline.

We disagree with the premise to Congrejo's argument that Holland and Lawrence are "intervening controlling authority that makes reconsideration appropriate." When given a closer reading, it appears that, for the proposition that "extraordinary circumstances" must prevent timely filing for equitable tolling to apply, both Lawrence and Holland cite to the Supreme Court's earlier decision of Pace v. DuGuglielmo, 544 U.S. 408, 418 (2005). This citation references the holding in Pace that "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. See, e.g., Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990)." Id. Because they announce no new rule of law, but instead rely on prior case law, neither Holland nor Lawrence represent new, "intervening controlling authority" for the proposition that extraordinary circumstances must prevent timely compliance with a

statute of limitations. Indeed, since those portions of Holland and Lawrence are premised upon Pace, which in turns cites to Irwin, it seems the rule Congrejo invokes dates back some 20 years.[8]

Congrejo appears to argue that the "new law" that was introduced in Lawrence and "confirmed" by Holland was the addition of the phrase "prevented timely filing" to the rule announced earlier in Pace. Recall, Pace provided:

> Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. See, e.g., Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990).

Pace, 544 U.S. at 418.

The Lawrence court cited to Pace as the controlling law on equitable tolling:

> To be entitled to equitable tolling, Lawrence must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. Id., at 418, 125 S.Ct. 1807 [Pace].

Lawrence, 549 U.S. at 336. Similarly, the Holland court used this phrasing:

> A "petitioner" is "entitled to equitable tolling" if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669.

Holland, 130 S.Ct. at 2553.

Congrejo is correct that both Lawrence and Holland add the

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[8] Although Holland was not published until this year, Lawrence, Pace and Irwin were all available at the time of oral argument before the earlier Panel.

phrase "and prevented timely filing" to the rule announced in Pace. However, we fail to see how this amounts to "new law." In neither Holland nor Lawrence did the Supreme Court indicate that it intended to change the law by adding a requirement that extraordinary circumstances exist and that those circumstances prevent timely filing. The Court did not examine the existing law to explain why such a change would be necessary. And in neither Holland nor Lawrence did the Court examine whether the extraordinary circumstances prevented timely filing. Rather, in both cases, the Court emphasized that the critical focus of inquiry by the trial court considering an equitable tolling claim should be whether the circumstances were extraordinary.[9]

Both Holland and Lawrence examined petitions for writs of habeas corpus. Congress established a one-year statute of limitations for seeking federal habeas corpus relief from a final state court judgment in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2244(d). The AEDPA contains extensive conditions on calculating the beginning date of the limitations period. The appellant in Holland sought habeas

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[9] At oral argument before the Panel, counsel for Congrejo argued that because the Supreme Court only hears cases for a reason, usually to make new law, it must have intended to change the rule announced previously in Pace. However, in Holland, the Court stated why it took the case: "We have not decided whether AEDPA's statutory limitations period may be tolled for equitable reasons. See Lawrence, 549 U.S. at 336; Pace v. DiGuglielmo, 544 U.S. 408, 418, n. 8 (2005). Now, like all 11 Courts of Appeals that have considered the question, we hold that § 2244(d) is subject to equitable tolling in appropriate cases." Holland, 130 S.Ct. at 2560 (some citations omitted). In short, the Supreme Court did not take Holland to make new law by adding a requirement that the extraordinary circumstances prevent timely filing, but rather to clarify the doctrine of equitable tolling as it applied to AEDPA.

review after the one-year statute expired, seeking equitable tolling of the statute because he had received inadequate assistance of counsel. Holland, 130 S.Ct. at 1252. The Supreme Court first struck down Eleventh Circuit case law imposing a very high standard for professional misconduct before equitable tolling would apply. Then, the Court remanded to the Eleventh Circuit to determine whether the facts of the case "constitute extraordinary circumstances sufficient to warrant equitable relief." Id. at 1264. There was no instruction that the court of appeals determine if those circumstances prevented timely filing, which we would expect if the intent of the Supreme Court was to change the law to add that requirement.

Lawrence, too, was a case where a prisoner sought habeas relief long after expiration of the one-year statute of limitations. Again, the petitioner alleged that the circumstance justifying equitable tolling was inadequacy of counsel. The Supreme Court ruled that the facts of the case did not show "extraordinary circumstances necessary to support equitable tolling." Lawrence, 549 U.S. at 336-37. The Supreme Court's inquiry was limited to the nature of the circumstances, ruling that "attorney miscalculation is simply not sufficient to warrant equitable tolling." Id. at 338. The Court made no inquiry whether the circumstances, if true, would have prevented timely filing of a petition.

Congrejo acknowledges that Lawrence was not intervening authority, because obviously it was decided and published before the original Panel's hearing. Congrejo nevertheless suggests that Holland confirmed the addition of the phrase "prevented timely

filing" that appeared in Lawrence. We have read both Holland and Lawrence carefully. Although the phrase appears in both decisions, there is no indication that the Holland Court was attempting to confirm or otherwise bolster the use of that phrase in Lawrence. Holland cites to Pace, not Lawrence, for its ruling. While Holland does cite to Lawrence several times, it is not to confirm any requirement that circumstances prevented timely filing of an action. On the contrary, the one reference to Lawrence in Holland regarding the consequence of extraordinary circumstances appears in Justice Scalia's dissent:

> Where equitable tolling is available, we have held that a litigant is entitled to it only if he has diligently pursued his rights and — the requirement relevant here — if "some extraordinary circumstance stood in his way." Lawrence v. Florida, 549 U.S. 327, 336, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005)).

Holland, 130 S.Ct. at 2571 (Scalia, J., dissenting). We observe that, in this quotation, Justice Scalia states that "the requirement relevant here" is that some extraordinary circumstance "stood in his way." There is no reference to any additional requirement that the extraordinary circumstance "prevented timely filing."

In sum, there is no indication in either Holland or Lawrence that the Supreme Court intended to create new law imposing a specific requirement for application of equitable tolling that there be both extraordinary circumstances and that those circumstances prevented timely filing of an action. Instead, as explained above, the relevant requirement is that the extraordinary circumstances stood in the way, or obstructed, the timely filing, not that they necessarily prevented the timely

filing. In other words, the phrase "prevented timely filing" can be viewed as a gloss on the phrase "stood in the way." The proper inquiry in equitable tolling, as Justice Scalia explains, is whether the alleged conduct obstructed a party's efforts to meet the timing requirements of a statute of limitations. In this, the Court is simply confirming the long-standing rule announced in Pace and Irwin. In our view, then, Lawrence and Holland do not constitute "intervening authority."[10]

Congrejo's other challenge to the earlier Panel's ruling is based on the second exception to law of the case, that "[t]his court's prior equitable tolling ruling was 'clearly erroneous' in light of Holland and Lawrence and that adhering to such an erroneous ruling would be unjust." This challenge is also without merit and is, in fact, merely a variation on its new law challenge. Congrejo's second challenge is based on the premise that Holland and Lawrence require that the circumstances prevented timely tolling. As discussed above, this premise is faulty.

On the contrary, we believe that the earlier Panel's decision is not inconsistent with the teachings of the Supreme Court in Holland. The essence of the Court's holding can be gleaned from these comments, immediately following its citation to Pace:

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[10] Congrejo concedes in its opening brief that the phrase "prevented timely filing" is dictum: "While the Supreme Court pronouncements in Holland and Lawrence that the obstacle must have 'prevented timely filing' for equitable tolling to apply was not strictly necessary to the holding in either case, such statements must nevertheless be followed by this court." Congrejo Op. Br. at 8. Congrejo argues that the phrase was somehow "explicative" or part of the "mode of analysis" of the court's decision and binding on us under stare decisis. But as discussed above, the phrase was not necessary to the holdings or mandates of the Court and the Court did not indicate, directly or indirectly, any intent to modify the existing law.

> A "petitioner" is "entitled to equitable tolling" if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669. . . . Courts must often "exercise [their] equity powers . . . on a case-by-case basis," Baggett v. Bullitt, 377 U.S. 360, 375, 84 S.Ct. 1316, 12 L.Ed.2d 377, demonstrating "flexibility" and avoiding "mechanical rules," Holmberg v. Armbrecht, 327 U.S. 392, 396, 66 S.Ct. 582, 90 L.Ed. 743, in order to "relieve hardships ... aris[ing] from a hard and fast adherence" to more absolute legal rules, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 248, 64 S.Ct. 997, 88 L.Ed. 1250. The Court's cases recognize that equity courts can and do draw upon decisions made in other similar cases for guidance, exercising judgment in light of precedent, but with awareness of the fact that specific circumstances, often hard to predict, could warrant special treatment in an appropriate case.

Holland, 130 S.Ct. at 1252 (emphasis added). As can be seen from this quotation, the Supreme Court rejects a strict interpretation of "extraordinary circumstances" as had been applied by other courts and cautions that equity courts need flexibility in applying such legal precepts. Instead, it specifically ruled in Holland that "we have followed a tradition in which courts of equity have sought to 'relieve hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which, if strictly applied, threaten the 'evils of archaic rigidity.'" Id. at 2563. In short, Holland stands for the proposition that, in equitable tolling decisions, courts are to avoid rigidity and embrace flexibility. That is simply not consistent with Congrejo's position that equitable tolling can only be allowed where the circumstances necessarily prevented timely filing.

Our reading of the case law on equitable tolling is that there must be extraordinary circumstances to allow equitable

tolling, but that those circumstances need not absolutely prevent a timely filing. Based on an analysis of the facts in each case, a bankruptcy judge need only find that extraordinary circumstances "stood in the way" of a timely filing. In short, the inquiry is whether there was obstruction and if the obstruction significantly contributed to the failure to timely file.

There is nothing in the case law that would prevent the bankruptcy court from concluding that Bender's misconduct, as it found, in "going to great lengths to conceal real property in Hawaii from his Arizona chapter 7 trustee" does not constitute an extraordinary circumstance that "stood in the way" and delayed timely compliance with the statute of limitations by Trustee. In this case, the bankruptcy court found that Bender failed to disclose any interest in Lot A-3 or any property in Hawaii in his schedules or SOFA and never amended them, that he failed to state that he was trustee of a trust that admittedly controlled property, that he failed to disclose a sizeable $663,000.00 outstanding debt he owed against his property in Hawaii, and that he went to "great lengths" to conceal his ownership of the Property from Trustee. And that was only Bender's misconduct before Trustee discovered that Bender may have concealed property of the estate.

As discussed earlier, the parties in this appeal agree that Trustee first became aware of the conveyance from Bender to Congrejo during the Trustee's Rule 2004 examination of Bender conducted on October 19, 2000. A review of that examination in the excerpts of record is revealing. Before the examination, Trustee directed Bender to provide any and all documents relating

to real property Bender owned, either directly or in trust. Bender did not provide those documents. In response to a question whether the records concerning Lot A-3 were available, Bender stated that if available they would be in "storage buildings" on Lot A-3.[11] Bender Dep. 26:9-24 (October 19, 2000). In response to Trustee's request that he amend his schedules to reflect, inter alia, any interests in Lot A-3, both Bender and his counsel agreed to provide the amended schedules within 30 days. Bender Dep. at 53:6-8. Trustee informed Bender that he would continue the deposition after Bender amended the schedules and provided other information. Bender Dep. at 53:18-22. Bender never amended his schedules.

Trustee noticed the continuing examination for August 7, 2001. Bender did not appear and filed his objection to appearing on the day of the examination. After numerous delays caused by Bender, Trustee rescheduled the continuing examination for May 20, 2002. At Bender's request, that hearing was continued to June 28 and then July 2. Thus, Bender failed to provide the requested amended schedules or papers requested by Trustee before the May 31, 2002, running of the statute of limitations under § 549(d).

Therefore, the record clearly supports the bankruptcy judge's finding, as affirmed by the earlier Panel, that Bender "went to great lengths to conceal real property in Hawaii from his Arizona chapter 7 trustee." Those acts of concealment began with the filing of the bankruptcy petition and continued in a regular

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[11] Bender's counsel in the bankruptcy proceeding would later inform Trustee that any records in Hawaii would have been lost or indecipherable because they were kept in a "lean to" open to the elements and likely washed away in a severe thunderstorm.

pattern up through and past the running of the statute of limitations on May 31, 2002. Indeed, the last piece of the puzzle, that the Bender Trust was a sham, was not admitted by Bender until shortly before this appeal in 2010.

As counsel for Trustee noted at oral argument, Trustee was required to make a determination that an adversary proceeding was in the interests of the estate. But Trustee was not able to determine the extent of the bankruptcy estate's interest in Lot A-3 at the time of the expiration of the statute, at least in substantial part, due to the failure of Bender to provide documentation regarding the extent or lack of his ownership of Lot A-3. Consequently, we agree with the bankruptcy court and the earlier Panel that Bender's concealment of material facts constituted good grounds for the equitable tolling of the § 549(d) time limit.

Further, the case law is replete with examples where courts have allowed equitable tolling in response to obstructive behavior by a party. The Supreme Court has so held: "In cases where the plaintiff has refrained from commencing suit during the period of limitation because of inducement by the defendant, or because of fraudulent concealment, this Court has not hesitated to find the statutory period tolled or suspended by the conduct of the defendant." Am. Pipe & Const. Co. v. Utah, 414 U.S. 538, 549 (1974). The Irwin case, on which Pace relied, "allowed equitable tolling . . . where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990). And, recall, both the bankruptcy court and the earlier

Panel cited to In re Olsen, a case where equitable tolling was applied because the debtor concealed a postpetition transfer of property from the trustee, such that "the statute did not begin running until he discovered the conveyance." 36 F.3d at 73 (emphasis added). Other cases relied on by Congrejo also recognize that misconduct by a party may justify equitable tolling. Amini v. Oberlin College, 259 F.3d 493, 502 (6th Cir. 2001) ("The case for equitable tolling would be different had Oberlin refused or delayed" the plaintiff's efforts to discover if he had a valid employment discrimination claim.); Dring v. McDonnell Douglas Corp., 58 F.3d 1323, 1329 (8th Cir. 1995)(recognizing that tolling might apply "when a defendant takes active steps to prevent a plaintiff from suing on time").

In its Reply Brief, Congrejo appears to anticipate this argument, by characterizing any misconduct by the debtor as a question of equitable estoppel, not equitable tolling, and thus irrelevant to this appeal. But Congrejo is not consistent, because it stated its original objection to the existence of extraordinary circumstances in terms of debtor misconduct: "Debtor's conduct did not 'prevent timely filing' by the Trustee because she discovered her claim approximately five months before the two-year statute of limitations such that she could and should have sued on time." Congrejo's Op. Br. at 5-6. Regardless, we see no reason why equitable tolling decisions should not take into consideration a party's misconduct. As our court of appeals has observed, there is clearly some overlap between equitable tolling and estoppel, and . . . the two can be difficult to distinguish." Socop-Gonzalez v. I.N.S., 272 F.3d 1176, 1185 (9th Cir. 2001).

And as the courts cited above observed, a party's misconduct can constitute grounds for equitable tolling.

At oral argument, counsel for Congrejo conceded that the delaying tactics and concealment by Bender were "obstreperous," while at the same time reminding us that he was not the attorney for Bender at the time the offensive behavior occurred and would not have allowed it if he had been. We believe the more correct term for Bender's conduct is "obstructive." According to the bankruptcy court, Bender and Bender's former attorney "engaged in a course of conduct of not responding to questions by the trustee, not producing documents ordered to be produced, not fully disclosing the Kula Property, the apparent transfers related thereto, and specifics regarding the transfer to Congrejo." In other words, Bender "stood in the way" of the Trustee's filing of a timely adversary proceeding under § 549.

We conclude that there is no merit in Congrejo's argument that the Panel's earlier decision is clearly erroneous. We also reject Congrejo's argument that "its enforcement would work a manifest injustice." Viewed fairly, there is a greater likelihood of manifest injustice if we do not apply law of the case and agree with Congrejo to reverse the bankruptcy court's judgment avoiding the postpetition transfer. To do so would reward Bender and his related entity, Congrejo, for his bad acts, at the expense of Bender's creditors. We decline to allow Congrejo to protect an interest in property that Bender went to great lengths to conceal from Trustee.[12]

[12] Recall, this appeal immediately followed Congrejo's admission that the Bender Trust, a vehicle Bender had apparently (continued...)

Under these circumstances, we are precluded by the law of the case doctrine from reexamining our sister panel's ruling approving the bankruptcy court's application of equitable tolling, because none of the recognized exceptions to that doctrine apply.

CONCLUSION

In No. AZ-10-1122, we AFFIRM the bankruptcy court's judgment avoiding the postpetition transfer from Bender to Congrejo pursuant to § 549(a).

Because the parties agree that the issues on appeal in No. AZ-10-1121 arise only if the Panel reverses the avoidance of the transfer to Congrejo, we DISMISS the appeal in No. AZ-10-1121 as MOOT.[13]

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[12](...continued)
used to conceal true ownership of Lot A-3 from Trustee, was a sham.

[13] BAP Appeal AZ-10-1121 has as its sole issue whether the Gummow Trust Claim is secured by a mortgage on Lot A-3. Bender appealed the ruling by the bankruptcy court allowing the Gummow secured claim. In Appeal AZ-10-1121, Bender argues that if this Panel reverses the bankruptcy court's avoidance of the transfer of Lot A-3 in AZ-10-1122, then the bankruptcy estate will not hold any interest in Lot A-3 and, it necessarily follows, the Gummow Claim will not be secured by property of the estate. Appellee Gummow Trust examines only its various legal positions if we overturn the avoidance appeal. Consequently, since we do not reverse the bankruptcy court's ruling in AZ-10-1122, there is no dispute between the parties in Appeal 10-1121 and it is moot.