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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP Nos. SC-11-1052-PaMkCa
	)	
EUGENE DUGGER, JR.; MARIANNE	)	Bankr. No. 05-00024-LA7
FRANCIS DUGGER,	)	
	)	Adv. No. 08-90002
Debtors.	)	
<hr/>		
GREGORY A. AKERS, Chapter 7	)	
Trustee,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>M E M O R A N D U M</b> <sup>1</sup>
	)	
MARY ANN MATTEI; EUGENE DUGGER,	)	
SR.,	)	
	)	
Appellees.	)	
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Argued and Submitted on January 19, 2012  
at Pasadena, California

Filed - June 8, 2012

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

Honorable Louise DeCarl Adler, Bankruptcy Judge, Presiding

Appearances: Nannette Farina argued for appellant Gregory A. Akers; Ajay Gupta argued for appellee Eugene Dugger, Sr.

Before: PAPPAS, MARKELL and CASE,<sup>2</sup> Bankruptcy Judges.

<sup>1</sup> 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

<sup>2</sup> The Honorable Charles G. Case, II, Bankruptcy Judge for the District of Arizona, sitting by designation.

1 Chapter 7<sup>3</sup> trustee Gregory A. Akers ("Trustee") appeals from  
2 an order of the bankruptcy court entered in this adversary  
3 proceeding granting a summary judgment dismissing Trustee's claims  
4 against Mary Ann Mattei ("Mattei"), and an order denying Trustee's  
5 motion for a default judgment as to his claims against Eugene  
6 Dugger, Sr. ("Senior")<sup>4</sup> and, instead, entering a judgment against  
7 Trustee dismissing all claims against Senior. We AFFIRM the  
8 bankruptcy court's order granting summary judgment to Mattei.  
9 However, we VACATE the judgment in favor of Senior and we REMAND  
10 this matter to the bankruptcy court for further proceedings  
11 consistent with this decision.

#### 12 **FACTS**

13 Eugene Dugger, Jr. ("Junior") and Marianne Francis Dugger  
14 (together, "Debtors") filed a petition under chapter 13 on  
15 January 4, 2005. David L. Skelton was appointed chapter 13  
16 trustee ("Skelton").

17 In declarations subsequently submitted to the bankruptcy  
18 court in the adversary proceeding giving rise to this appeal,  
19 Skelton explains that he acted diligently in performing his duties  
20 as chapter 13 trustee. In particular, Skelton states that he

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23 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as  
25 enacted and promulgated prior to the effective date (October 17,  
26 2005) of the relevant provisions of the Bankruptcy Abuse  
Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,  
April 20, 2005, 119 Stat. 23, and to the Federal Rules of  
Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil  
Procedure are referred to as "Civil Rules."

27 <sup>4</sup> Like the bankruptcy court and parties, in this decision,  
28 for clarity, we refer to Mr. Duggar, Sr. as "Senior," and to his  
son as "Junior." No disrespect is intended.

1 carefully reviewed the Debtors' petition, schedules and statement  
2 of financial affairs ("SOFA"), and verified their income by  
3 reference to tax returns, profit and loss statements, and Debtors'  
4 responses in a business questionnaire. Skelton also questioned  
5 Debtors at the § 341(a) meeting of creditors, and he attached his  
6 notes from that meeting to his declaration. Those notes show that  
7 Skelton inquired about Debtors' purchase of any real property  
8 within one year of the petition date.

9 Skelton also expressed in his declaration his opinion that  
10 Debtors' counsel had done a "horrible job" in preparing their  
11 bankruptcy papers. In his view, the errors and omissions Skelton  
12 perceived in these papers were the result of carelessness and  
13 incomplete examination of the papers by Debtors' counsel. Nothing  
14 in the bankruptcy papers suggested to Skelton that Debtors had  
15 made any transfers of real property more than two years before the  
16 petition.<sup>5</sup>

17 Debtors' chapter 13 plan was confirmed by the bankruptcy  
18 court on May 25, 2005. After two years, Debtors were unable to  
19 make their payments under the plan and, on August 22, 2007,  
20 Debtors voluntarily converted the case to chapter 7. Trustee was  
21 appointed to serve as chapter 7 trustee.

22 A § 341(a) meeting of creditors in the chapter 7 case was  
23 held on May 24, 2007. During that meeting, a creditor,

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24  
25 <sup>5</sup> On May 6, 2011, the National Association of Chapter 13  
26 Trustees ("NACTT") submitted an amicus curiae letter to the Panel  
27 for this appeal. The letter discussed the ordinary business  
28 practices of chapter 13 trustees, noting that "Chapter 13 trustees  
rarely conduct intensive investigations of debtor's prepetition  
assets or transfers." NACTT Letter at 1. The letter did not  
address the specific facts of this case. The amicus letter of  
NACTT is hereby ACCEPTED. See Fed. R. App. P. 29.

1 Mrs. Greeniaus, and her daughter, Mrs. McKee, informed Trustee  
2 that Junior had told them that he owned real property in Seguin,  
3 Texas (the "Guadalupe Property") that was not listed in Debtors'  
4 bankruptcy schedules. In response, Junior indicated that he had  
5 transferred his ownership interest in the Guadalupe property to  
6 his father, Senior, "about ten years ago." Trustee continued the  
7 meeting to obtain additional information about the property and  
8 other assets.

9 In a declaration submitted later, Deb Brodie, a real estate  
10 agent in Texas, stated that she had been contacted by a San Diego  
11 real estate agent in approximately Summer 2006. Brodie was  
12 informed that a "Pete" Dugger<sup>6</sup> and his wife, Marianne, wanted to  
13 sell a 21-acre property in Texas. Ms. Brodie declared that she  
14 had several telephone conversations with Junior in which he  
15 discussed the terms of sale. It was her understanding that while  
16 Senior was the owner of the Guadalupe Property, Junior was making  
17 the payments on the Contract for Deed by which the land had been  
18 acquired. As it turned out, on October 15, 2007, Senior sold the  
19 Guadalupe Property, deeding it to Rodger and Joseph Wein.

20 At the continued § 341(a) meeting in Debtors' chapter 7 case  
21 held on November 20, 2007, Debtors presented what Trustee  
22 described as "partial and disorganized paperwork" regarding the  
23 Guadalupe Property. The information they supplied included copies  
24 of a Contract for Deed executed by Junior and Cynthia<sup>7</sup> Dugger on  
25

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26 <sup>6</sup> It is undisputed that Junior also goes by the name "Pete."  
27

28 <sup>7</sup> Cynthia is Junior's former wife. It appears that Junior  
married Marianne, his current wife and co-debtor, in 2000.

1 July 13, 1994;<sup>8</sup> an assignment of Junior's rights in the contract  
2 to Senior dated October 9, 2001; and a deed conveying the  
3 Guadalupe Property from Junior to Senior dated October 15, 2007.  
4 There is nothing in these documents to show if any of them had  
5 been recorded. The paperwork also provided no information  
6 concerning whether there were debts owed on the Guadalupe Property  
7 at the time of the transfers. Debtors did not inform Trustee that  
8 the Guadalupe Property had been sold by Senior during the pendency  
9 of Debtors' bankruptcy case.

10 Trustee ordered a title search on the Guadalupe Property in  
11 December 2007. The search ultimately disclosed the October 15,  
12 2007 sale of the Property by Senior. Trustee's investigations  
13 also uncovered the existence of another property that had been  
14 allegedly owned by Junior, a one-acre tract in Cibolo, Texas (the  
15 "Bexar Property"). Apparently, a warranty deed had been issued to  
16 Junior for the Bexar property on October 1, 1995. On April 12,  
17 2002, Junior executed a quitclaim deed to the Bexar Property to  
18 Senior, for the alleged consideration of \$3,000. Then, on  
19 July 24, 2003, Senior signed a quitclaim deed conveying the  
20 property to Mattei, who is Senior's daughter and Junior's sister.  
21 It is undisputed that Mattei paid no consideration for the 2003  
22 transfer, which Senior later described as a "Christmas gift."

23 Based on what he had learned, on January 2, 2008, Trustee  
24 commenced this adversary proceeding against Senior and Mattei; he  
25 filed an amended complaint on April 8, 2008. In the amended

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27 <sup>8</sup> The Contract for Deed provided for monthly installment  
28 payments of \$153.12, until the purchase price of \$22,000 (at 8  
percent interest) was paid, at which time the seller agreed to  
issue a deed to the property to the buyer.

1 complaint, Trustee asserted claims seeking the following relief:  
2 (1) First Claim, avoidance of transfer of the Guadalupe Property  
3 against Senior pursuant to §§ 544(a) and (b) and 550; (2) Second  
4 Claim, for declaratory relief against Senior and GHK Enterprises,  
5 LP,<sup>9</sup> finding that GHK holds bare legal title to the Guadalupe  
6 Property, and that it is property of the estate within the meaning  
7 of § 541(a);<sup>10</sup> (3) Third Claim, to avoid the 2007 post-petition  
8 transfer of the Guadalupe Property against Senior under § 549;  
9 (4) Fourth Claim, to sell the Guadalupe Property under §363(b) and  
10 (h) against Senior; (5) Fifth Claim, to avoid various transfers of  
11 the Bexar Property under § 544(b) against Mattei and Senior; and  
12 (6) Sixth Claim, to sell the Bexar Property under §363(b) and (h)  
13 against Mattei and Senior. Implicitly recognizing that the  
14 applicable statute of limitations for avoidance actions may have  
15 expired, Trustee alleged in the amended complaint that the  
16 doctrine of equitable tolling should be applied in this case to  
17 excuse any tardy filing of the action.<sup>11</sup>

18 \_\_\_\_\_  
19 <sup>9</sup> GHK was the original owner of the Guadalupe Property, and  
20 the seller under the Contract for Deed with Junior. GHK is not a  
party to this appeal.

21 <sup>10</sup> Within the Second Claim, Trustee asserted that Senior  
22 "knowingly receiv[ed] title into his name of the debtor(s)'  
ownership interest in the Guadalupe County Property and Bexar  
23 County Property," and that Mattei knowingly received "title into  
her name of the debtor(s) ownership interest in the Bexar County  
24 Property." This assertion would form the basis for Trustee' later  
argument that a "resulting trust" arose such that the properties  
were property of the bankruptcy estate on the petition date.

25 <sup>11</sup> Debtors were granted a discharge on November 27, 2007.  
26 However, as the result of his investigations, Trustee discovered  
that Debtors had concealed other bankruptcy estate property,  
27 including equipment and vehicles, a business bank account, and a  
Palm Springs timeshare. Trustee commenced another adversary

28 (continued...)

1 On January 16, 2009, Mattei filed a motion for summary  
2 judgment concerning the two claims targeting her in Trustee's  
3 amended complaint. The foundation for Mattei's summary judgment  
4 motion was that, (1) Trustee's claims against her were barred by  
5 the § 546(a) statute of limitations; (2) the statute was not  
6 equitably tolled; and (3) Trustee was not a successor to any  
7 unsecured creditor in existence at the time of commencement of the  
8 case, as required for application of § 544(b) and state law.

9 Trustee opposed the motion for summary judgment on  
10 February 17, 2009. He asserted that: (1) Trustee had standing to  
11 prosecute the action because there was at least one qualifying  
12 creditor with a claim on the date of transfer; (2) under the  
13 facts, the § 546(a) statute of limitations should be equitably  
14 tolled; and (3) reasonably equivalent value was not given in  
15 exchange for the transfers.

16 The summary judgment hearing took place on March 5, 2009.  
17 The bankruptcy court first struck seven of the affidavits  
18 submitted by Trustee<sup>12</sup> because they only related to the Guadalupe  
19 Property (while only the transfers of the Bexar Property were at  
20 issue on Mattei's summary judgment motion) and were irrelevant, or

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21  
22 <sup>11</sup>(...continued)  
23 proceeding seeking revocation of the Duggers' discharge under  
24 §727(d)(1), (2) and (3) on November 25, 2008. On December 24,  
25 2008, Trustee filed a motion for summary judgment. Debtors filed  
26 an answer and opposition to the summary judgment motion, generally  
27 arguing that the property that they had allegedly concealed was  
28 worthless. After a January 29, 2009 hearing, the bankruptcy court  
granted Trustee's motion, and on February 9, 2009, entered a  
summary judgment revoking Debtors' discharge under § 727(d)(1).  
That judgment was not appealed.

<sup>12</sup> Greeniaus, McKee, Brodie, Myers, Wein, Kane, and DeLuca.

1 that they merely tended to establish that Junior was a braggart  
2 and liar.<sup>13</sup> After hearing the parties' arguments, the bankruptcy  
3 court granted summary judgment to Mattei because:

4 - The § 546(a) statute of limitations for avoidance actions  
5 in this case expired on January 4, 2007, and Trustee's complaint  
6 was time-barred as a matter of law.

7 - There was no basis for equitably tolling the limitations  
8 statute, in that there was no evidence showing wrongful conduct or  
9 fraud by the Debtors, or any other extraordinary circumstances  
10 that would justify equitable tolling.

11 - Trustee had not established he had standing to pursue the  
12 § 544(b) claims, since he could not show that there was an  
13 existing creditor with some amount owing on the date of transfer.

14 The bankruptcy court entered an order granting summary  
15 judgment on March 11, 2009. Trustee appealed, but this Panel  
16 dismissed the appeal as interlocutory. Akers v. Mattei (In re  
17 Dugger), Case no. SC-09-1095 (9th Cir. BAP, June 18, 2009).

18 Trustee then turned his attention to the claims against  
19 Senior. After several unsuccessful attempts to obtain responses  
20 to written discovery, Trustee filed a motion on October 1, 2009,  
21 for an order deeming his requests for admission admitted, to  
22 compel interrogatory responses and production of documents, and  
23 for attorney's fees ("Motion to Compel"). After a hearing on  
24 Trustee' Motion to Compel, the bankruptcy court determined that

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26 <sup>13</sup> The bankruptcy court indicated it needed no additional  
27 proof concerning Junior's credibility: "THE COURT: The Court  
28 doesn't really have to be convinced of that. Mr. Dugger Jr. is a  
liar and braggart, no question about it." Hr'g Tr. 32:6-9,  
March 5, 2009.



1 Senior's discovery answers were insufficient in fifteen areas and  
2 directed him to respond and to provide additional responses and  
3 copies of documents no later than November 16, 2009. The court  
4 entered an order memorializing these directions on November 18,  
5 2009.

6 Because he determined that Senior's responses were still  
7 inadequate, on January 21, 2010, Trustee filed a motion for  
8 terminating sanctions against Senior (the "Terminating Sanctions  
9 Motion"). He sought an order striking Senior's answer to the  
10 complaint, and entering a default judgment against him for willful  
11 and bad faith violation of the bankruptcy court's November 18  
12 order and continued discovery abuses. The hearing on the  
13 Terminating Sanctions Motion was held on February 18, 2010.  
14 Trustee was represented by counsel and Senior appeared pro se.  
15 After hearing from the parties, the court took the motion under  
16 submission.

17 On May 4, 2010, the bankruptcy court entered a detailed  
18 seventeen-page Memorandum of Decision concerning the Terminating  
19 Sanctions Motion. The court detailed the history of the disputes  
20 between Trustee and Senior, noting Senior's numerous failures to  
21 comply with discovery requests and orders of the court, and  
22 frequent self-contradictory statements. The court was  
23 particularly concerned about the declaration Senior had submitted  
24 in opposition to the Terminating Sanctions Motion, in which he  
25 proclaimed:

26 ["I asked my son Eugene Dugger, Jr. and he told me it  
27 was none of my business. That is why I answer I DO NOT  
28 KNOW. . . ."] Dugger Senior still did not state what  
it is he asked the Debtor; when he made the inquiry; or  
which of the RFA or ROG questions he was referring to.

1 Memorandum Decision at 11. The court applied the five-part test  
2 for imposing terminating sanctions under Civil Rule 37(b)(2).  
3 Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d  
4 1091, 1096 (9th Cir. 2007). While finding most of the factors for  
5 terminating sanctions were satisfied, the bankruptcy court noted  
6 that Senior had appeared pro se, and therefore, the court should  
7 treat him more leniently than a party represented by counsel.  
8 Instead of entering a default judgment against him at that time,  
9 the court directed Trustee to schedule a hearing to prove up his  
10 entitlement to default judgment. Specifically, the court  
11 indicated that, at hearing,

12 Trustee must identify an actual creditor of Debtor with  
13 a debt owed at the time of the transfers to Dugger  
14 Senior, and he must explain why he is continuing to  
15 prosecute this action against Dugger Senior given the  
16 Court's summary adjudication that the § 546(a) statute  
of limitations has expired. Dugger Senior shall be  
permitted to present arguments on the statute of  
limitations issue, but nothing further shall be  
considered.

17 Memorandum Decision at 10.<sup>14</sup>

18 The default judgment prove-up hearing took place on  
19 January 6, 2011. Senior appeared through newly-retained counsel.  
20 Before the hearing, the bankruptcy court provided a detailed  
21 tentative ruling indicating its intent to deny entry of default  
22 judgment and enter judgment in favor of Senior on all counts.  
23 Among the points emphasized in the tentative ruling were:

24 - Contrary to his assertion, Trustee was not entitled to a  
25 judgment simply because the court had stricken his answer and

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26 <sup>14</sup> Trustee sought reconsideration of the bankruptcy court's  
27 decision, requesting that the requirement of a prove-up hearing be  
28 deleted. On July 1, 2010, the court denied the reconsideration  
motion.

1 entered a default against Senior; entry of default judgment is  
2 within the broad discretion of the bankruptcy court.

3 - The amended complaint was not well pled, in that the  
4 allegations were in some respects contradictory, and in conflict  
5 with the evidence, which was also contradictory; and that the  
6 § 546 statute of limitations had expired on January 4, 2007.

7 - Trustee had not addressed the First Claim for relief  
8 against Senior. Because it was an avoidance claim, Trustee had  
9 not met his burden to show that the complaint was timely-filed,  
10 nor had he shown he was in fact a BFP with no constructive or  
11 inquiry notice of Senior's competing ownership rights in the  
12 Guadalupe Property.

13 - The statute of limitations was not equitably tolled.

14 - The Second Claim asserted that the Guadalupe property was  
15 property of the estate on the petition date, but the claim was not  
16 well pled. The complaint recognizes that Kothman/GHK was record  
17 holder on the petition date and that Junior transferred his  
18 equitable interest to Senior many years prior to the petition  
19 date.

20 - The Third and Fourth Claims are premised on Junior's  
21 equitable ownership of the Guadalupe Property on the petition  
22 date. Trustee has not established that it was property of the  
23 estate on the petition date.

24 - The Fifth and Sixth Claims relate only to the Bexar  
25 Property. These claims against Senior are subject to the same  
26 statute of limitations defense as were the claims against Mattei.  
27 There was no evidence to support equitable tolling.

28 After hearing lengthy arguments from the parties, the

1 bankruptcy court adopted its tentative ruling. It denied entry of  
2 default judgment against Senior, and instead, ordered the entry of  
3 judgment in favor of Senior. Trustee's request to again amend the  
4 complaint was denied.

5 The bankruptcy court entered an Order Denying Trustee's  
6 Request for Default Judgment on April 11, 2011. In that order,  
7 the court also entered judgment against Trustee on all claims  
8 against Senior.

9 Trustee filed this timely appeal of the grant of summary  
10 judgment to Mattei and denial of default judgment on April 12,  
11 2011.

#### 12 **JURISDICTION**

13 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
14 and 157(b)(2)(A), (E), (H), (N) and (O). The Panel has  
15 jurisdiction under 28 U.S.C. § 158.

#### 16 **ISSUES**

17 Whether the bankruptcy court erred in granting summary  
18 judgment to Mattei.

19 Whether the bankruptcy court abused its discretion in denying  
20 default judgment in favor of Trustee against Senior, and in  
21 entering judgment in favor of Senior against Trustee.

22 Whether the bankruptcy court abused its discretion in failing  
23 to grant Trustee's request to amend the complaint.

#### 24 **STANDARDS OF REVIEW**

25 We review the bankruptcy court's decision to grant summary  
26 judgment de novo. Viewing the evidence in the light most  
27 favorable to the nonmoving party, we must determine whether there  
28 are any genuine issues of material fact and whether the court

1 correctly applied the relevant substantive law. Fichman v. Media  
2 Ctr., 512 F.3d 1157, 1159 (9th Cir. 2008).

3 The denial of a motion for a default judgment is reviewed for  
4 an abuse of discretion. Quarre v. Saylor (In re Saylor), 178 B.R.  
5 209, 211 (9th Cir. BAP 1995). Likewise, the denial of a motion to  
6 amend the pleadings is reviewed for abuse of discretion.

7 AmerisourceBergen Corp. v. Dialysist W., Inc., 465 F.3d 946, 949  
8 (9th Cir. 2005).

9 In applying an abuse of discretion test, we first "determine  
10 de novo whether the [bankruptcy] court identified the correct  
11 legal rule to apply to the relief requested." United States v.  
12 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). If the  
13 bankruptcy court identified the correct legal rule, we then  
14 determine whether its "application of the correct legal standard  
15 [to the facts] was (1) illogical, (2) implausible, or (3) without  
16 support in inferences that may be drawn from the facts in the  
17 record." Id. (internal quotation marks omitted). If the  
18 bankruptcy court did not identify the correct legal rule, or its  
19 application of the correct legal standard to the facts was  
20 illogical, implausible, or without support in inferences that may  
21 be drawn from the facts in the record, then the bankruptcy court  
22 has abused its discretion. Id.

## 23 DISCUSSION

### 24 I.

#### 25 **The bankruptcy court did not err in granting summary judgment to Mattei.**

26 Summary judgment may be granted "if the pleadings, the  
27 discovery and disclosure materials on file, and any affidavits  
28 show that there is no genuine issue as to any material fact and

1 that the movant is entitled to judgment as a matter of law."  
2 Civil Rule 56(c)(2), incorporated by Rule 7056. Barboza v. New  
3 Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir. 2008).  
4 The trial court does not weigh evidence in resolving such motions,  
5 but rather determines only whether a material factual dispute  
6 remains for trial. Covey v. Hollydale Mobilehome Estates,  
7 116 F.3d 830,ext 834 (9th Cir. 1997).

8 A dispute is genuine if there is sufficient evidence for a  
9 reasonable fact finder to hold in favor of the non-moving party  
10 and a fact is "material" if it might affect the outcome of the  
11 case. Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 992 (9th Cir.  
12 2001) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242,  
13 248-49 (1986)). The initial burden of showing there is no genuine  
14 issue of material fact rests on the moving party. Margolis v.  
15 Ryan, 140 F.3d 850, 852 (9th Cir. 1998). If the non-moving party  
16 bears the ultimate burden of proof on an element at trial, that  
17 party must make a showing sufficient to establish the existence of  
18 that element in order to survive a motion for summary judgment.  
19 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

20 Summary judgment dismissing a claim is appropriate where the  
21 claim is barred by an applicable statute of limitations and  
22 equitable tolling cannot be applied. Congrejo Invs., LLC v. Mann  
23 (In re Bender), 586 F.3d 1159, 1165 (9th Cir. 2009) ("If we were  
24 to agree . . . that the trustee's complaint is untimely and not  
25 entitled to equitable tolling, the litigation would indeed end;  
26 this, however, is essentially always true of statute of  
27 limitations defenses.").

28 Mattei sought entry of a summary judgment on Trustee's Fifth

1 and Sixth<sup>15</sup> Claims for relief against her. The Fifth Claim asserts  
2 that Junior transferred his ownership interest in the Bexar  
3 Property to Senior on July 17, 2002, and Senior transferred his  
4 ownership interest to Mattei on July 24, 2003. Trustee alleges  
5 that both transfers are avoidable under § 544(b).<sup>16</sup> Mattei posed  
6 two affirmative defenses to this claim: that the statute of  
7 limitations applicable to avoidance actions in § 546(a) bars any  
8 action or proceeding under § 544 commenced after the earlier of  
9 "two years after entry of the order for relief; or one year after  
10 the appointment or election of the first trustee under . . .  
11 section 1302 of this Title"<sup>17</sup>; and that Trustee lacked standing to  
12 assert the claims because Trustee could not show there was an  
13 existing creditor on the petition date that was also a creditor at  
14 the time of the transfers. The bankruptcy court agreed with  
15

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16  
17 <sup>15</sup> The Sixth Claim, for sale of the Bexar Property, assumes  
18 that the Fifth Claim is granted. We affirm the bankruptcy court's  
19 decision to dismiss both claims.

20 <sup>16</sup> **§ 544. Trustee as lien creditor and as successor to**  
21 **certain creditors and purchasers . . .** (b)(1) Except as provided  
22 in paragraph (2), the trustee may avoid any transfer of an  
23 interest of the debtor in property or any obligation incurred by  
24 the debtor that is voidable under applicable law by a creditor  
25 holding an unsecured claim that is allowable under section 502 of  
26 this title or that is not allowable only under section 502(e) of  
27 this title.

28 <sup>17</sup> **§ 546. Limitations on avoiding powers**

(a) An action or proceeding under section 544 . . . may not be  
commenced after the earlier of--

(1) the later of--

(A) 2 years after the entry of the order for relief; or

(B) 1 year after the appointment or election of the first  
trustee under section 702, 1104, 1163, 1202, or 1302 of this  
title if such appointment or such election occurs before the  
expiration of the period specified in subparagraph (A); or

(2) the time the case is closed or dismissed.

1 Mattei on these points, and we affirm the bankruptcy court's  
2 decision.

3       The Statute of Limitations Defense. This adversary  
4 proceeding was commenced on January 2, 2008. Because § 301(b)  
5 instructs that an "order for relief" is deemed entered when  
6 Debtors' voluntary bankruptcy petition was filed on January 4,  
7 2005, there can be no dispute in this appeal that the  
8 § 546(a)(1)(A) two-year limitations period concerning avoiding  
9 action expired on January 4, 2007.<sup>18</sup> Therefore, Trustee's action  
10 against Mattei was not timely filed, and unless the limitations  
11 statute was equitably tolled, summary judgment on the claim is  
12 required. In re Bender, 586 F.3d at 1165.

13       The two-year limitations period in § 546(a)(1) is subject to  
14 equitable tolling. Ernst & Young v. Matsumoto (In re United Ins.  
15 Mgmt., Inc. v. Ernst & Young), 14 F.3d 1380, 1384 (9th Cir. 1994).  
16 However, the case law of this circuit instructs that equitable  
17 tolling is rarely applied and disfavored. "The threshold for  
18 obtaining equitable tolling is very high," Townsend v. Knowles,  
19 562 F.3d 1200, 1205 (9th Cir. 2009). Equitable tolling is  
20 "unavailable in most cases." Miles v. Prunty, 187 F.3d 1104, 1107  
21 (9th Cir. 1999). See Cal. Franchise Tax Bd. v Kendall (In re  
22 Jones), 657 F.3d 921, 926 (9th Cir. 2011) (holding that equitable  
23 tolling is applied "only sparingly" because "Congress must be  
24 presumed to draft limitations periods in light of equitable  
25 tolling principles which generally apply to statutes of

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26  
27       <sup>18</sup> Indeed, the "earlier" alternative limitations period  
28 provided in §546(a)(1)(B), i.e., one year from the appointment of  
the first trustee, Skelton, expired on January 4, 2006.



1 limitations." ). Indeed, in cautioning against unjustified tolling  
2 of statutes of limitation, the Ninth Circuit has warned, "We  
3 should not trivialize the statute of limitations by promiscuous  
4 application of tolling doctrines." Santa Maria v. P. Bell,  
5 202 F.3d 1170, 1179 (9th Cir. 2000) (quoting Cada v. Baxter  
6 Healthcare Corp., 920 F.2d 446, 453 (7th Cir. 1990)).

7 The equitable tolling doctrine held in its original  
8 formulation that the limitations period does not run while a party  
9 is unaware of a wrong without any fault or lack of diligence on  
10 his part. Id. As the doctrine of equitable tolling evolved, the  
11 additional requirement that some extraordinary circumstance stood  
12 in its way and prevented timely filing took on equal and in some  
13 ways greater significance. Holland v. Fla., 130 S.Ct. 2549, 2553  
14 (2010); Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005).

15 Trustee, as proponent of equitable tolling, bears the burden  
16 of proving its should be applied. Hinton v. Pac. Enters., 5 F.3d  
17 391, 395 (9th Cir. 1993) ("the burden to plead facts which would  
18 give rise to equitable tolling falls upon the plaintiff"); Roberts  
19 v. Marshall, 627 F.3d 768, 772 (9th Cir. 2010) ("A litigant seeking  
20 equitable tolling bears the burden of establishing two elements:  
21 (1) that he has been pursuing his rights diligently, and (2) that  
22 some extraordinary circumstance stood in his way."). Trustee has  
23 not carried that burden in this case because he failed to  
24 adequately address the second prong of the required elements for  
25 equitable tolling, whether there were extraordinary circumstances  
26 that stood in the way of his filing a timely complaint.

27 In fact, the only clear reference to the extraordinary  
28 circumstances prong appears in Trustee's Reply Brief at 3:

1 Because [Trustee] did not know the basis of claims upon  
2 which to sue, and particularly under the facts and  
3 circumstances of this case, these also constitute  
"extraordinary circumstances," additionally supporting  
equitable tolling.

4 That Trustee did not "know the basis of claims upon which to sue,"  
5 is not grounds for applying equitable tolling. Equitable tolling  
6 does not apply simply because a party was unaware of the claim;  
7 it must be shown that some obstacle to the timely commencement of  
8 an action stood in the party's way. Irwin, 498 U.S. at 96.<sup>19</sup>

9 Trustee explicitly downplayed the importance of the second  
10 prong and the need to prove extraordinary circumstances that stood  
11 in the way of timely filing. He argues that extraordinary  
12 circumstances "merely provide[] an alternative basis for finding  
13 equitable tolling." Reply Br. at 3 n.4.

14 By neglecting his responsibility to prove the existence of  
15 extraordinary circumstances, Trustee failed in his burden of proof  
16 and his equitable tolling argument must fail.

17 Trustee argued in the bankruptcy court, and in this appeal,  
18 that all he needed show to warrant application of the equitable  
19 tolling doctrine to these facts was that the chapter 13 trustee  
20 had acted diligently:

21 Where the party has been injured by fraud, and "remains

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22  
23 <sup>19</sup> Trustee never makes clear what he means by the "facts and  
24 circumstances of the case" that would support equitable tolling or  
25 specifically what extraordinary circumstances "stood in the way"  
26 of Trustee's filing a timely complaint. What "facts" we are able  
27 to glean from Trustee's argument include the affidavits concerning  
28 property details or Junior's character. The court properly  
rejected those affidavits as either irrelevant, or probative of a  
character with which the court was well aware. The other facts  
related to Junior's ex-wife, which the bankruptcy court dismissed  
as too remote. And as discussed below, none of those facts were  
probative of extraordinary circumstances that stood in the way of  
Trustee's timely filing.

1 in ignorance of it without any fault or want of  
2 diligence or care on his part, the bar of the statute  
3 does not begin to run until the fraud is discovered,  
4 though there be no special circumstances or efforts on  
5 the part of the party committing the fraud to conceal it  
6 from the knowledge of the other party. Bailey v.  
7 Glover, 88 U.S. (21 Wall) 342, 348 (1875).  
8 Holmberg v. Armbrecht, 327 U.S. 392, 396 (1949). Tr. Op. Br. at  
9 24. Trustee then quotes the bankruptcy court's statement, "It's  
10 not the fault, if you will, necessarily of the Chapter 13  
11 Trustee." Tr. Op. Br. at 31. Trustee concludes that, based on  
12 the bankruptcy court's statement, "the statute of limitations was  
13 equitably tolled as a matter of law." Tr. Reply Br. at 3  
14 (emphasis in original).

15 Trustee's argument that due diligence of a trustee is the  
16 only requirement for applying equitable tolling is simply not  
17 current law. He relies on outdated and superseded case law.  
18 While he cites it in passing, Trustee does not address the Supreme  
19 Court's decision in Pace v. DiGuglielmo, 544 U.S. 408 (2005).  
20 Pace clarified prior case law that due diligence alone was  
21 insufficient to require equitable tolling, and makes clear that  
22 "extraordinary circumstances" are also necessary to invoke the  
23 doctrine:

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

Id. at 418. In short, the modern burden of proof to invoke  
equitable tolling requires that Trustee show both due diligence  
and the presence of extraordinary circumstances. Contrary to  
Trustee's position, extraordinary circumstances are not an

1 "alternative" ground for relief; their existence is a mandatory  
2 element:

3 A "petitioner" is "entitled to equitable tolling" if he  
4 shows "(1) that he has been pursuing his rights  
5 diligently, and (2) that some extraordinary circumstance  
6 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.

7 Holland, 130 S.Ct. at 2553 (emphasis added).

8 The Holland decision also indicates a slight shift in the  
9 balance to be accorded these factors. Holland envisions that a  
10 fairly modest showing of diligence is required to satisfy the  
11 first requirement for invoking equitable tolling: "The diligence  
12 required for equitable tolling purposes is 'reasonable diligence'  
13 not 'maximum feasible diligence.'" 130 S.Ct. at 2565. In  
14 contrast, the second factor requiring a showing of "extraordinary  
15 circumstances" is of heightened emphasis. Id.

16 The amicus brief advocates that a chapter 13 trustee's  
17 failure to inquire of the debtors about property transfers made up  
18 to four years before bankruptcy does not reflect a lack of  
19 reasonable diligence. While there is evidence to show that  
20 Skelton was diligent in his examination of the Debtors during the  
21 chapter 13 case, even though he did not uncover the target  
22 transfers, the bankruptcy court was not particularly interested in  
23 this aspect of Trustee's equitable tolling argument:

24 TRUSTEE'S COUNSEL: Are you finding that Skelton . . .  
25 did not act with reasonable diligence because -

26 THE COURT: Why would I have to find that? Why would I  
27 have to find that?

28 COUNSEL: What other basis is there?

THE COURT: Even if there weren't a trustee, the

1 statute's run. What I'm saying is it makes no  
2 difference. It makes no difference. I don't have to  
3 find that Skelton is negligent. All I can find is that  
4 he didn't ask the question.

4 Hr'g Tr. 27:22-28:9<sup>20</sup> As can be seen from this colloquy, and  
5 contrary to Trustee's argument in his briefs, the bankruptcy court  
6 did not rule against Trustee on the first prong of the equitable  
7 tolling argument. However, the bankruptcy court did specifically  
8 conclude that there was no evidence of extraordinary  
9 circumstances:

10 There is no evidence of wrongful conduct or fraud by the  
11 debtor or any other extraordinary circumstances during  
12 the relevant time period which justify equitable  
13 tolling. Debtor did not schedule the [Bexar or  
14 Guadalupe] property because he was not the record owner.  
15 The property was transferred by deed recorded 7/12/02;  
16 the SOFA question was answered accurately as there were  
17 no transfers within the 1 year of filing his Ch. 13.

18 Minute Order, March 5, 2009 at ¶1(B).

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19 <sup>20</sup> Although the bankruptcy court did not consider the  
20 chapter 13 trustee's diligence in its analysis, much of the  
21 information in the NACTT amicus brief actually supports the  
22 bankruptcy court's decision that the chapter 13 trustee's actions  
23 were not relevant. The chapter 13 system is focused on the  
24 debtor's repayment of debts through future income, not from assets  
25 of the bankruptcy estate. Olick v. Parker & Parsley Petroleum  
26 Co., 145 F.3d 513, 516 (2d Cir. 1998). Although chapter 13  
27 trustees have authority to investigate the prepetition estate, §§  
28 1302 (b)(1), 704(a)(4) (investigate the financial affairs of the  
debtor) and §§ 544, 547, 548 (avoidance of certain prepetition  
transfers), it is very rare for the chapter 13 trustee to conduct  
independent searches for undisclosed assets. And although the  
Bankruptcy Code technically requires surrender of the records  
related to property of the estate, § 521(a)(4), this duty is not  
usually enforced in a typical chapter 13 case. As a leading  
treatise observes, "It is doubtful that much purpose is served by  
the turnover of more financial information than is specifically  
required to answer the questions in Official Forms Nos. 6 and  
7." 7 William L. Norton, Jr., NORTON BANKRUPTCY LAW & PRACTICE  
§ 145:2 (West Publishing Co., 3d ed., 2011). The Official Forms  
do not require disclosure of transfers of assets more than two  
years (one year at the time of filing this bankruptcy case) before  
the petition date.

1 Like the bankruptcy court, we conclude that Trustee failed to  
2 sustain his burden of proof to establish both that there was due  
3 diligence and existence of extraordinary circumstances that would  
4 equitably toll the statute of limitations in § 546(a)(1)(A). The  
5 bankruptcy court decided that the second prong was absent in that  
6 there were no extraordinary circumstances present in this case.  
7 Therefore, the bankruptcy court correctly ruled that § 546(a)  
8 barred the Fifth Claim against Mattei in the amended complaint for  
9 avoidance of the transfer to her of the Bexar Property. As a  
10 result, summary judgment was also appropriate as to the Sixth  
11 Claim, wherein Trustee sought the right to sell that property.  
12 In re Bender, 586 F.3d at 1165.

13 Trustee's standing to assert the § 544(b) avoidance claims.

14 That Trustee's avoidance claims are barred by the applicable  
15 statute of limitations is alone sufficient to support entry of a  
16 summary judgment against Trustee. Nevertheless, as an alternative  
17 ground to support summary judgment in favor of Mattei, the  
18 bankruptcy court determined that Trustee did not have standing to  
19 assert avoidance claims under § 544(b) because he did not  
20 establish the existence of a creditor owed a debt on both the  
21 transfer date and the petition date. Based on our review of the  
22 facts, law and procedural posture in this case, we conclude that  
23 the bankruptcy court erred in this alternative ruling. Instead,  
24 in our view, where, as here, a trustee seeks to avoid a transfer  
25 under § 544(b)(1) by applying a state law implementation of the  
26 Uniform Fraudulent Transfer Act ("UFTA"), Section 4, the trustee  
27 need not establish the existence of an actual creditor on the  
28 transfer date.

1 A trustee must allege the existence of an unsecured creditor  
2 as of the petition date. That is always the case under  
3 § 544(b)(1) ("trustee may avoid any transfer of an interest of the  
4 debtor in property or any obligation incurred by the debtor that  
5 is voidable under applicable law by a creditor holding an  
6 unsecured claim that is allowable under section 502 of this title  
7 . . . ."). But nonbankruptcy state law determines whether the  
8 creditor must also have held a claim as of the time of the  
9 transfer attacked. Here, under the theory pled by Trustee, there  
10 was no need for him to allege that there was a creditor as of the  
11 petition date who also held a claim as of the transfer date.

12 Trustee sought relief under the Texas version of the UFTA,  
13 Tex. Bus. & Com. Code § 24.001 et seq. ("TUFTA"), but did not  
14 specify which provision of TUFTA. We presume Trustee relies on  
15 either TUFTA § 24.005(a)<sup>21</sup> or § 24.006(a).<sup>22</sup> The correct source of

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17 <sup>21</sup> § 24.005. Transfers Fraudulent As to Present and Future  
18 Creditors

19 (a) A transfer made or obligation incurred by a debtor  
20 is fraudulent as to a creditor, whether the creditor's  
21 claim arose before or within a reasonable time after the  
22 transfer was made or the obligation was incurred, if the  
23 debtor made the transfer or incurred the obligation:

24 (1) with actual intent to hinder, delay, or defraud any  
25 creditor of the debtor; or (2) without receiving a  
26 reasonably equivalent value in exchange for the transfer  
27 or obligation, and the debtor: (A) was engaged or was  
28 about to engage in a business or a transaction for which  
the remaining assets of the debtor were unreasonably  
small in relation to the business or transaction; or (B)  
intended to incur, or believed or reasonably should have  
believed that the debtor would incur, debts beyond the  
debtor's ability to pay as they became due.

26 <sup>22</sup> § 24.006. Transfers Fraudulent As to Present Creditors

27 (a) A transfer made or obligation incurred by a debtor is  
28 fraudulent as to a creditor whose claim arose before the  
transfer was made or the obligation was incurred if the

(continued...)

1 Trustee's state law rights matters, however. If it is TUFTA  
2 § 24.006, then Trustee failed to plead and prove the claim for  
3 relief. Section 24.006 mirrors Section 5 of the UFTA, which  
4 allows creditors of an insolvent debtor to avoid transactions made  
5 by an insolvent debtor for less than a reasonably equivalent  
6 value. Under UFTA § 5, and TUFTA § 24.006, the creditor must have  
7 held creditor status as of the time of the transfer.

8 But Trustee did not allege Junior was insolvent at the time  
9 of either of the challenged transactions. His complaint thus must  
10 have encompassed relief under TUFTA § 24.005, which in turn  
11 mirrors § 4 of the UFTA.<sup>23</sup> UFTA § 4 preserves centuries of  
12 fraudulent transfer law by extending standing to future creditors  
13 for three types of fraudulent transfers. These are: (1) transfers  
14 made with the actual intent to hinder, delay, or defraud – UFTA  
15 § 4(a)(1); (2) transfers made by a debtor in business which were  
16 for less than a reasonably equivalent value and which left the  
17 debtor with unreasonably small assets – UFTA § 4(a)(2)(I); and  
18 (3) transfers made which were for less than a reasonably  
19 equivalent value and after which the debtor actually or reasonably  
20 believed he or she would incur debts beyond the debtor's ability  
21 to pay as they became due – UFTA § 4(a)(2)(ii). Section 4 states  
22 that, "A transfer made or obligation incurred by a debtor is

23 \_\_\_\_\_  
24 <sup>22</sup>(...continued)  
25 debtor made the transfer or incurred the obligation without  
26 receiving a reasonably equivalent value in exchange for the  
27 transfer or obligation and the debtor was insolvent at that  
time or the debtor became insolvent as a result of the  
transfer or obligation.

28 <sup>23</sup> With minor modifications not relevant here, TUFTA  
§ 25.006 mirrors UFTA § 5, and TUFTA § 25.005 mirrors UFTA § 4.



1 fraudulent as to a creditor, whether the creditor's claim arose  
2 before or after the transfer was made or the obligation was  
3 incurred, if the debtor made the transfer or incurred the  
4 obligation . . . ." UFTA § 4 (emphasis added). As a consequence,  
5 for transfers that otherwise fit within § 4, Trustee only needed  
6 to identify a creditor that, as of the petition date, could have  
7 pursued the UFTA action. And since neither UFTA § 4 nor TUFTA  
8 § 24.005 require such a creditor to also have been a creditor at  
9 the time of the transfer, neither does § 544(b).

10 Professor Alan Resnick, co-editor-in-chief of Collier on  
11 Bankruptcy, recently summarized the relevant law:

12 Under both the UFTA and the UFCA, a transfer made with  
13 actual intent to hinder, delay, or defraud any creditor  
14 of the debtor is a fraud on both present and future  
15 creditors. Therefore, if a debtor makes a transfer with  
16 the intent of putting assets out of the reach of  
creditors, a future creditor whose claim did not exist  
when the transfer was made would have standing to bring  
a fraudulent conveyance action to avoid the transfer and  
recover the assets from the transferee.

17 The UFTA and UFCA also give future creditors  
18 standing to avoid a constructive fraudulent conveyance,  
19 but only if the action is based on the debtor's receipt  
20 of less than reasonably equivalent value for the  
21 transferred property when the debtor was left with  
22 unreasonably small capital or when the debtor intended  
23 or believed it would incur debts beyond its ability to  
24 pay as they mature. If the claim of constructive  
fraudulent conveyance is based on the insolvency of the  
debtor, it is a fraud only against existing creditors.  
A future creditor does not have the right to bring a  
fraudulent conveyance claim based on the allegation that  
the debtor received less than reasonably equivalent  
value in connection with the transfer and was insolvent  
or rendered insolvent by the transfer.

25 Alan N. Resnick, Finding the Shoes That Fit: How Derivative Is the  
26 Trustee's Power to Avoid Fraudulent Conveyances under Section  
27 544(b) of the Bankruptcy Code?, 31 CARDOZO L. REV. 205, 209-10  
28 (2009)(footnotes omitted).

1 For these reasons, we conclude that the bankruptcy court  
2 erred in holding that Trustee lacked standing to prosecute the  
3 § 544(b) avoidance claims under TUFTA, and consequently, that  
4 summary judgment should be entered in favor of Mattei and against  
5 Trustee. Again, however, because Trustee's claims were time-  
6 barred under § 546(a), the court's error was harmless.<sup>24</sup>

7 **II.**

8 **The bankruptcy court abused its discretion in denying**  
9 **Trustee's request to amend the complaint and in granting**  
10 **judgment dismissing Trustee's claims against Senior.**

11 At the prove-up hearing, the bankruptcy court declined to  
12 enter a default judgment against Senior and, without warning to  
13 Trustee, granted judgment to Senior on all claims asserted against  
14 him. This approach to concluding this action is problematic. The  
15 Panel has held that, under most circumstances, a bankruptcy court  
16 may not enter a dispositive judgment against the non-defaulting  
17 party in connection with a Civil Rule 55 prove-up hearing:

18 While a trial court has great discretion in considering  
19 issues and evidence in a hearing pursuant to  
20 Rule 55(b)(2), we find no authority that would allow a  
21 trial court to enter judgment in favor of the defaulting  
22 party following such a hearing. To enter such a  
23 judgment against the non-defaulting party because of the  
24 failure of that party to sustain its burden of proof  
25 would make the hearing under Rule 55(b)(2) the same as a

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26 <sup>24</sup> Trustee also argues that the bankruptcy court erred by  
27 entering a summary judgment when Trustee had requested time for  
28 additional discovery pursuant to Civil Rule 56(f). Although  
Trustee's counsel discussed the need to do more discovery at the  
motion hearing, Trustee never filed a motion under Rule 56(f) or  
the required affidavit that he could not present facts essential  
to justify its opposition. Trustee also did not clearly  
demonstrate that the additional evidence he sought to discover  
existed, and that it would prevent summary judgment. Because  
Trustee did not comply with the rules, the bankruptcy court  
therefore did not abuse its discretion in declining to grant  
Trustee an opportunity for additional discovery. Chance v. Pac-  
Tel Teletrac, Inc., 242 F.3d 1151, 1161 n.6 (9th Cir. 2001).

1 trial on the merits.  
2 Valley Oak Credit Union v. Villegas (In re Villegas), 132 B.R.  
3 742, 746-47 (9th Cir. BAP 1991); see also Franchise Tax Bd. v  
4 Rowley (In re Rowley), 208 B.R. 942, 944 (9th Cir. BAP 1997)  
5 (holding that this Panel is bound by its published decisions).

6 The stated purpose for the Villegas rule is to avoid forcing  
7 the non-defaulting party "to trial without having the benefit of  
8 the procedural protections offered by the Federal Rules of Civil  
9 Procedure, including the opportunity to conduct discovery . . . ."  
10 In re Villegas, 132 B.R. at 746-47. At a minimum, though,  
11 Villegas clearly signals that a bankruptcy court should proceed  
12 cautiously before dismissing actions in the context of default  
13 proceedings. Here, the impact of the bankruptcy court's decision  
14 immediately to enter judgment in favor of Senior was particularly  
15 severe, since Senior had been sanctioned by the bankruptcy court  
16 for his repeated, willful failures to cooperate with Trustee's  
17 discovery efforts. Dismissal of Trustee's claims for lack of  
18 proof in connection with the prove-up hearing was therefore  
19 inappropriate, and that aspect of the bankruptcy court's judgment  
20 must be vacated.

21 We also believe that the bankruptcy court abused its  
22 discretion in denying Trustee's request to amend the pleadings  
23 and, in particular, the amended complaint, to conform to the proof  
24 that was submitted in connection with Trustee's request for entry  
25 of a default judgment against Senior as to Claims Two and Three.<sup>25</sup>

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27 <sup>25</sup> Claim Two asserted that the Guadalupe Property was property  
28 of the estate within the meaning of § 541(a). Claim Three sought  
(continued...)

1 In particular, at the prove-up hearing, Trustee requested  
2 permission from the bankruptcy court to amend the complaint to  
3 conform to the proof Trustee had submitted regarding the existence  
4 of a so-called "resulting trust." Hr'g Tr. 33:21-24, January 6,  
5 2011. The bankruptcy court responded:

6 And the court's not entertaining the Trustee's request  
7 to do yet another amended complaint. A default's  
8 already been entered on this amended complaint, and this  
9 amended complaint is the platform on which the trustee's  
10 action against Dugger Sr. stands or falls. And so  
11 there's not going to be a second bite or third bite at  
12 the apple. This amended complaint was filed in 2008.  
13 It's time.

10

11 Hr'g Tr. 37:3-10, January 6, 2011.

12 We understand the bankruptcy court's statement to mean that  
13 it was denying Trustee's request to amend the pleadings based upon  
14 undue delay for which Trustee was responsible. However, in our  
15 view, the facts do not support an inference that Trustee was to  
16 blame for any delay in properly pleading a resulting trust claim.  
17 Senior, not Trustee, was principally responsible for the undue  
18 delay in the prosecution of this action. Indeed, the bankruptcy  
19 court had recently imposed drastic sanctions for the long delays  
20 in these proceedings caused by the antics of Senior. Under these  
21 circumstances, it was not appropriate to penalize Trustee for any  
22 delay occasioned by Senior's bad conduct. Instead, the facts of  
23 this case clearly favor allowing Trustee an opportunity to amend  
24 the complaint. Given the strong public policy in the Ninth  
25 Circuit favoring amendment, the bankruptcy court's denial of

26

27 <sup>25</sup>(...continued)  
28 avoidance under § 549 of the alleged post-petition transfer of the  
Guadalupe Property.

1 Trustee's request to further amend the complaint was an abuse of  
2 discretion. C.F. v. Capistrano Unified Sch. Dist., 654 F.3d 975,  
3 986 (9th Cir. 2011) ("Absent prejudice, or a strong showing of any  
4 of the remaining Foman [v. Davis, 371 U.S. 178 (1962)] factors,  
5 there exists a presumption under Rule 15(a) in favor of granting  
6 leave to amend.") (emphasis in original);<sup>26</sup> Chudacoff v. Univ. Med.  
7 Ctr., 649 F.3d 1143, 1152 (9th Cir. 2011) (leave to amend a  
8 party's pleadings under Civil Rule 15(a) "should [be] freely  
9 give[n] . . . when justice so requires," and "generally shall be  
10 denied only upon showing of bad faith, undue delay, futility, or  
11 undue prejudice to the opposing party.").

12 The Second Claim asserts that GHK Enterprises, LP holds only  
13 legal title to the Guadalupe Property; this claim sought to avoid  
14 the various transfers of that property among the Dugger family  
15 members. Of course, these allegations were shown to be incorrect  
16 as of the time of the prove-up hearing, because the Guadalupe  
17 Property had been sold to the Weins<sup>27</sup> during the bankruptcy case,  
18 and Senior had received the proceeds of that sale. The bankruptcy  
19 court ruled that Trustee failed to adequately plead this claim.

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21 <sup>26</sup> The "Foman" factors are "undue delay, bad faith or dilatory  
22 motive on the part of the movant." Foman, 371 U.S. at 182  
23 (emphasis added). We note that the Foman factors relate to the  
24 dilatory conduct of the movant as grounds for denial of amendment.  
25 Here clearly the dilatory conduct was Senior's, not the movant  
26 Trustee's. In commenting on those factors, the Supreme Court made  
27 it very clear that failure to allow amendment without one of those  
28 factors present and "outright refusal to grant the leave without  
any justifying reason appearing for the denial is not an exercise  
of discretion; it is merely abuse of that discretion and  
inconsistent with the spirit of the Federal Rules." Id.

<sup>27</sup> The parties apparently agree that the Weins were bona fide  
purchasers for value without knowledge of the adversary proceeding  
disputes over entitlements to this property.

1 While, as of the prove-up hearing, there was no longer an  
2 avoidance question, Trustee could assert a claim for turnover of  
3 the funds received from the post-bankruptcy sale of the property  
4 from Senior. To do so would of course require a change to the  
5 allegations in the complaint.

6 The Trustee's Third Claim against Senior asserted his right  
7 to avoid the post-petition transfer from Senior to the Weins in  
8 2007. But as noted above, at the time the complaint was filed,  
9 Trustee was not aware that the property had been transferred to  
10 BFPs for value and without knowledge of the disputes. The Third  
11 Claim was premised on Debtor's equitable ownership of the  
12 Guadalupe Property on the petition date, and the court ruled that  
13 Trustee had not established that it was property of the estate on  
14 the petition date. The Third Claim would need to be amended to  
15 reflect that Trustee was not seeking avoidance of a post-petition  
16 transfer and recovery of the proceeds, but rather some sort of  
17 action directly against Senior for turnover of alleged estate  
18 funds.

19 It is fairly clear that Trustee was seeking to modify Claims  
20 Two and Three because the court had ruled against it on the  
21 avoidance issues. Trustee argued that it had not relied  
22 exclusively on the avoidance claims, but he was also attempting to  
23 recover the proceeds from the sale of the Guadalupe Property from  
24 Senior because the Guadalupe Property was property of the estate  
25 under § 541(a). It is also clear that Trustee wanted to conform  
26 the pleadings to the proof to allow Trustee to develop the  
27 resulting trust theory. Although this argument was obliquely made  
28 in the briefs, Trustee's counsel raised it at both the summary

1 judgment hearing and the prove-up hearing. Hr'g Tr. 6:18-7:4,  
2 March 5, 2009; Hr'g Tr. 11:22-12:19, January 6, 2011. Counsel for  
3 Mattei and Senior also addressed it. Hr'g Tr. 28:21-25,  
4 January 6, 2011.

5 According to Trustee, a resulting trust arises in equity, and  
6 is implied by operation of state common law. Morrison v. Farmer,  
7 210 S.W. 245 (Tex. Ct. App. 1949). In determining whether such a  
8 trust exists, courts look primarily to who paid the consideration  
9 for the acquisition of the property; this is also known as the  
10 "equitable doctrine of consideration." In re Torres, 827 F.2d  
11 1299, 1300 (9th Cir. 1987). If Trustee's arguments are correct  
12 that Junior paid for the Guadalupe Property, but that Senior  
13 received all benefit from that transaction, then, arguably, a  
14 resulting trust may have existed whereby Senior held the property  
15 in trust for Junior. Even if the property was later transferred  
16 by Senior, the proceeds of that transaction representing the value  
17 of the Guadalupe Property may constitute property of Junior's  
18 bankruptcy estate under § 541(a), without regard to any avoidance  
19 issues.

20 We make no assumptions concerning the ability of Trustee to  
21 prevail on a resulting trust theory. Nevertheless, the seeds of  
22 such a theory are sufficiently embodied in the Second and Third  
23 Claims in the amended complaint such that, under the  
24 circumstances, Trustee's request to amend the complaint – to  
25 conform to the facts as shown by his proof submitted to the  
26 bankruptcy court – was appropriate.

#### 27 CONCLUSION

28 We AFFIRM the bankruptcy court's grant of summary judgment to

1 Mattei as to Trustee's claims against her. However, we VACATE the  
2 bankruptcy court's entry of judgment in favor of Senior dismissing  
3 this action, and REMAND this action to the bankruptcy court with  
4 instructions to allow Trustee to amend the complaint.

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