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OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	CC-13-1041-KiTAD
)		
RONALD A. NEFF,)	Bk. No.	1:11-bk-22424-VK
)		
Debtor.)	Adv. No.	1:12-ap-01027-VK
)		
_____)		
)		
DOUGLAS J. DeNOCE,)		
)		
Appellant,)		
)		
v.)		
)		
RONALD A. NEFF,)		
)		
Appellee.)		
_____)		

O P I N I O N

Submitted Without Oral Argument
on November 21, 2013

Filed - February 4, 2014

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

Honorable Victoria S. Kaufman, Bankruptcy Judge, Presiding

Appearances: Patrick L. Swanstrom, on brief for appellant
Douglas J. DeNoce; Michael D. Kwasigroch on brief,
for appellee Ronald Neff.

Before: KIRSCHER, TAYLOR and DUNN, Bankruptcy Judges.

1 KIRSCHER, Bankruptcy Judge:

2
3 Creditor, Douglas J. DeNoce ("DeNoce"), appeals the orders
4 granting partial summary judgment to chapter 7¹ debtor, Ronald A.
5 Neff ("Neff"), and denying DeNoce's cross-motion for partial
6 summary judgment. Approximately eighteen months before Neff filed
7 the instant chapter 7 case, he had filed the first of two
8 successive chapter 13 cases, both of which were dismissed. During
9 the course of his first chapter 13 case and about seventeen months
10 before he filed the instant chapter 7 case, Neff transferred
11 certain real property to his revocable living trust. DeNoce
12 contended that the transfer was fraudulent and sought to deny
13 Neff's discharge under § 727(a)(2). The bankruptcy court held
14 that Neff's discharge would not be denied, because any alleged
15 fraudulent transfer occurred more than one year before the chapter
16 7 petition was filed, and the one-year "lookback" period was not
17 subject to equitable tolling based on Neff's prior bankruptcies.
18 Accordingly, it granted partial summary judgment to Neff on that
19 issue and denied it as to DeNoce.

20 The issue presented here is a matter of first impression in
21 this circuit: Whether the one-year "lookback" period in
22 § 727(a)(2)(A) is a "statute of limitations" subject to equitable
23 tolling or whether it is a "statute of repose" not subject to
24 equitable tolling. We hold that the one-year period is a statute

25

26 ¹ Unless specified otherwise, all chapter, code and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure will be referred to as "Civil
Rules."

1 of repose, and we AFFIRM.

2 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

3 **A. Events leading to Neff's first bankruptcy case**

4 In 2007, Neff, a former dentist,² treated DeNoce³ with the
5 surgical placement of eight dental implants. It was a major full-
6 day surgery. Within a month or so, each tooth had either fallen
7 out or failed. Neff performed further surgery to correct the
8 eight implants, but, within a couple of months, each fell out or
9 failed again. DeNoce still apparently suffers from the improper
10 implant procedures. In October 2008, DeNoce filed suit against
11 Neff in state court for medical malpractice. Ultimately, DeNoce
12 was awarded a judgment of \$310,000.

13 In March 2008, a few months prior to DeNoce's filing of the
14 medical malpractice action, Neff executed a revocable living trust
15 (the "Retirement Trust"). The trust res consisted solely of
16 certain real property (the "Lake Harbor Property"), which Neff had
17 owned since 1978. According to Neff, after executing the
18 Retirement Trust at his attorney's office, he was sent home to
19 prepare a quitclaim deed transferring the Lake Harbor Property
20 from himself to the Retirement Trust. It is undisputed, however,
21 that the quitclaim deed was not recorded until two years later, on
22 April 7, 2010.

23 **B. The first bankruptcy case**

24 Neff filed his first chapter 13 bankruptcy case on March 4,
25

26 ² Neff's dental license was revoked by the California dental
27 board in January 2010 due to his substance abuse and other issues.

28 ³ DeNoce, a former attorney, was disbarred by the California
State Bar in 1997.

1 2010 (the "First Bankruptcy Case"). It was dismissed on April 9,
2 2010, for Neff's failure to appear at the scheduled § 341(a)
3 meeting of creditors.

4 **C. The second bankruptcy case**

5 Neff filed his second chapter 13 bankruptcy case two months
6 later on June 18, 2010 (the "Second Bankruptcy Case"). In his
7 Schedule B, Neff reported that the Retirement Trust owned the Lake
8 Harbor Property. He did not disclose the recent transfer of it to
9 the Retirement Trust in Question 10 of his Statement of Financial
10 Affairs ("SOFA").

11 During the Second Bankruptcy Case, the bankruptcy court
12 became aware of the transfer of the Lake Harbor Property and the
13 fact that the transfer occurred during the First Bankruptcy Case.
14 Facing resultant dismissal, Neff agreed to record a quitclaim deed
15 transferring the Lake Harbor Property back to himself. He
16 thereafter filed an amended SOFA, reporting both the initial and
17 subsequent transfers.

18 In September 2010, DeNoce moved to dismiss Neff's Second
19 Bankruptcy Case for bad faith, contending, among other things,
20 that the transfer of the Lake Harbor Property to the Retirement
21 Trust during the course of his First Bankruptcy Case was
22 fraudulent.⁴ After four days of evidentiary hearings on the
23 matter, Neff agreed to withdraw his opposition to the motion to
24 dismiss as long as he was not barred from filing a chapter 7 case.

25
26 ⁴ About one year later, on September 27, 2011, the chapter 13
27 trustee also moved to dismiss Neff's Second Bankruptcy Case for a
28 variety of reasons, including an objection to Neff's use of the
Lake Harbor Property as a retirement vehicle and the fact that
Neff had insufficient income to fund a plan.

1 The bankruptcy court accepted his withdrawal and orally granted
2 DeNoce's motion dismissing the Second Bankruptcy Case. It entered
3 the related order on November 14, 2011.

4 While the motion to dismiss the Second Bankruptcy Case was
5 pending, DeNoce had filed a first amended nondischargeability
6 complaint against Neff on July 22, 2011, seeking to except his
7 debt from discharge under § 523(a)(6). However, once Neff's
8 Second Bankruptcy Case was dismissed, DeNoce's § 523 action also
9 was dismissed.

10 **D. Neff's third bankruptcy case and the § 727 action**

11 Neff filed a third bankruptcy case under chapter 7 on October
12 24, 2011 (the "Third Bankruptcy Case"), before the order
13 dismissing the Second Bankruptcy Case was entered on November 14.

14 DeNoce filed a complaint seeking to deny Neff's discharge
15 under § 727(a)(2) (the "727 Complaint"). DeNoce contended that
16 the transfer of the Lake Harbor Property into the Retirement Trust
17 and Neff's acts and schemes to conceal it were fraudulent and done
18 with the intent to avoid paying his creditors' claims. Neff's
19 answer denied the allegations and asserted several affirmative
20 defenses, including that the 727 Complaint failed to state a claim
21 for which relief could be granted and that it was barred by all
22 applicable statutes of limitations.

23 Neff later moved for partial summary judgment on DeNoce's
24 claim under § 727(a)(2)(A) (the "PSJ Motion") on the basis that
25 the transfer of the Lake Harbor Property into the Retirement
26 Trust, which occurred on April 7, 2010, was more than one year
27 prior to the filing of the Third Bankruptcy Case on October 24,
28 2011. Alternatively, the date upon which Neff transferred the

1 Lake Harbor Property back into his name – August 4, 2010 – was
2 still more than one year prior to the filing of the Third
3 Bankruptcy Case. Therefore, argued Neff, DeNoce’s claim could not
4 support a denial of discharge, and he was entitled to discharge
5 notwithstanding § 727(a)(2)(A) as a matter of law.

6 DeNoce opposed the PSJ Motion and filed a cross-motion for
7 partial summary judgment (“PSJ Cross-Motion”), contending he was
8 entitled to judgment on his claims under § 727(a)(2)(A) and (B).
9 DeNoce contended that the one-year limitation did not apply
10 because Neff had filed three consecutive bankruptcy cases, and so
11 the actual bankruptcy “process” started with his First Bankruptcy
12 Case in March 2010. Thus, he argued that the “postpetition”
13 transfer on April 7, 2010, supported a claim under § 727(a)(2)(B).
14 Alternatively he argued that since the transfer occurred within
15 one year prior to his Second Bankruptcy Case filed on June 18,
16 2010, it supported a claim under § 727(a)(2)(A). Finally, DeNoce
17 contended that the one-year limitation did not apply because Neff
18 continued to conceal the transfer, claiming it as an exempt
19 retirement asset up until the day before he filed his PSJ Motion.

20 The bankruptcy court held a hearing on the PSJ Motion on July
21 11, 2012.⁵ After some preliminary argument by the parties, the
22 court ruled that the one-year provision in § 727(a)(2)(A) was a
23 statute of repose and not subject to equitable tolling. Hence,
24 assuming that the transfer occurred when the quitclaim deed
25 transferring the Lake Harbor Property from Neff to the Retirement

26
27 ⁵ Because DeNoce had not properly set the PSJ Cross-Motion
28 for hearing, the bankruptcy court did not hear that motion until
August 22, 2012. It is not entirely clear what happened after
that, but the PSJ Cross-Motion was ultimately denied.

1 Trust was recorded on April 7, 2010, that was more than one year
2 prior to the filing of the Third Bankruptcy Case and could not be
3 the basis for a claim under § 727(a)(2)(A). Therefore, because
4 the initial transfer occurred outside the statutory period, Neff
5 would not be denied a discharge.

6 An order granting the PSJ Motion was entered on August 10,
7 2012 (the "PSJ Order").

8 DeNoce timely filed a motion to reconsider the PSJ Order,
9 which the bankruptcy court denied. The only issue before it was
10 whether the one-year "lookback" period in § 727(a)(2)(A) is a
11 statute of repose or a statute of limitations subject to equitable
12 tolling. Noting the lack of any controlling authority on the
13 matter, the bankruptcy court reviewed Womble v. Pher Partners (In
14 re Womble), 299 B.R. 810 (N.D. Tex. 2003), aff'd on other grounds,
15 108 F. App'x 993 (5th Cir. 2004) ("Womble"), which, relying upon
16 Young v. United States, 535 U.S. 43 (2002), held that the one-year
17 period in § 727(a)(2)(A) is a limitation period that can be
18 equitably tolled, and a Fourth Circuit case, Tidewater Fin. Co. v.
19 Williams (In re Williams), 498 F.3d 249, 257 (4th Cir. 2007)
20 (2-1 decision) ("Tidewater"), which criticized Womble and held
21 that the eight-year lookback period for denial of discharge under
22 § 727(a)(8) is a statute of repose not subject to equitable
23 tolling. The bankruptcy court found Tidewater's analysis more
24 convincing and reasoned that the one-year period in § 727(a)(2)(A)
25 was more akin to the period in § 727(a)(8) than the three-year
26 lookback period in § 523(a)(1)(A) and § 507(a)(8)(A), the statutes
27 at issue in Young. Consequently, the bankruptcy court held that
28 § 727(a)(2)(A) represents a statute of repose that is not subject

1 to equitable tolling.

2 DeNoce's remaining claims for relief on his 727 Complaint
3 were later dismissed without prejudice to his right to appeal the
4 PSJ Order.

5 **II. JURISDICTION**

6 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
7 and 157(b)(2)(J). We have jurisdiction under 28 U.S.C. § 158.⁶

8 **III. ISSUE**

9 Did the bankruptcy court err in granting the PSJ Motion and
10 denying the PSJ Cross-Motion? Specifically, did it err in ruling
11 that the one-year "lookback" period in § 727(a)(2)(A) is a statute
12 of repose not subject to equitable tolling?

13 **IV. STANDARDS OF REVIEW**

14 In an action for denial of discharge, we review: (1) the
15 bankruptcy court's determinations of the historical facts for
16 clear error; (2) its selection of the applicable legal rules under
17 § 727 de novo; and (3) its application of the facts to those rules
18 requiring the exercise of judgments about values animating the

19
20 ⁶ Generally, orders granting partial summary without the
21 certification required by Civil Rule 54(b) are interlocutory
22 orders. Belli v. Temkim (In re Belli), 268 B.R. 851, 856-57 (9th
23 Cir. BAP 2001). "Unlike final orders, interlocutory orders decide
24 merely one aspect of the case without disposing of the case in its
25 entirety on the merits." Thomas J. Salerno & Jordan A. Kroop,
26 Bankruptcy Litigation & Practice: A Practitioner's Guide
27 § 3.16[B], at 3-63 (4th ed. rev'd 2007-2013); see also United
28 States v. 475 Martin Lane, 545 F.3d 1134, 1140 (9th Cir. 2008).
The bankruptcy court granted the PSJ Motion only as to DeNoce's
claim under § 727(a)(2)(A). However, once the bankruptcy court
dismissed the 727 Complaint, the PSJ Order became a final
appealable order. Dannenberg v. Software Toolworks, Inc., 16 F.3d
1073, 1075 (9th Cir. 1994) (judgments whose finality would
normally depend upon a Civil Rule 54(b) certification may be
treated as final and appealable if remaining claims subsequently
have been finally resolved).

1 rules de novo. Searles v. Riley (In re Searles), 317 B.R. 368,
2 373 (9th Cir. BAP 2004), aff'd, 212 F. App'x 589 (9th Cir. 2006).
3 The bankruptcy court's interpretation of § 727(a)(2)(A) is a legal
4 conclusion we review de novo. See B-Real, LLC v. Chaussee (In re
5 Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008).

6 We review an order granting summary judgment de novo and are
7 bound by the same principles as the bankruptcy court. Marciano v.
8 Fahs (In re Marciano), 459 B.R. 27, 35 (9th Cir. BAP 2011), aff'd,
9 708 F.3d 1123 (9th Cir. 2013). Summary judgment is proper when
10 the pleadings, discovery and affidavits show that there is "no
11 genuine dispute as to any material fact and that the movant is
12 entitled to judgment as a matter of law." Civil Rule 56(a),
13 incorporated by Rule 7056. The party moving for summary judgment
14 bears the burden of identifying those portions of the pleadings,
15 discovery and affidavits that demonstrate the absence of a genuine
16 issue of a material fact. Celotex Corp. v. Catrett, 477 U.S. 317,
17 323 (1986).

18 V. DISCUSSION

19 A. Governing law

20 Section 727(a)(2)(A) provides, in relevant part, that the
21 bankruptcy court must deny discharge if, "the debtor, with intent
22 to hinder, delay, or defraud a creditor . . . has transferred,
23 removed, destroyed, mutilated, or concealed . . . (A) property of
24 the debtor, within one year before the date of the filing of the
25 petition." The burden of proof is on the objector to show by a
26 preponderance of the evidence that (1) the debtor transferred or
27 concealed property, (2) the property belonged to the debtor,
28 (3) the transfer occurred within one year of the bankruptcy

1 filing, and (4) the debtor executed the transfer with the intent
2 to hinder, delay or defraud a creditor. Aubrey v. Thomas (In re
3 Aubrey), 111 B.R. 268, 273 (9th Cir. BAP 1990). “[A]cts and
4 intentions occurring prior to this period will be forgiven.”
5 Hughes v. Lawson (In re Lawson), 122 F.3d 1237, 1240 (9th Cir.
6 1997) (citing Rosen v. Bezner, 996 F.2d 1527, 1531 (3d Cir.
7 1993)). Section 727 is to be construed liberally in favor of
8 debtors and strictly against the creditor. First Beverly Bank v.
9 Adeeb (In re Adeeb), 787 F.2d 1339, 1342 (9th Cir. 1986).

10 **B. Statutory language of § 727(a)(2)(A)**

11 We start, as with any other statutory argument, by reviewing
12 the language of the statute. Lamie v. United States Tr., 540 U.S.
13 526, 534 (2004). “[W]hen the statute’s language is plain, the
14 sole function of the courts – at least where the disposition
15 required by the text is not absurd – is to enforce it according to
16 its terms.” Id. (quoting Hartford Underwriters Ins. Co. v. Union
17 Planters Bank, N.A., 530 U.S. 1, 6 (2000)) (other citations
18 omitted). A court must consider “the language itself, the
19 specific context in which that language is used, and the broader
20 context of the statute as a whole.” Robinson v. Shell Oil Co.,
21 519 U.S. 337, 341 (1997).

22 In reviewing the language of § 727(a)(2)(A), it does not
23 expressly provide for tolling as do some other Bankruptcy Code
24 sections, such as § 108, which extends the statutes of limitations
25 for the benefit of trustees and creditors preserving claims
26 impacted by the bankruptcy filing, and § 507(a)(8)(A), which tolls
27
28

1 certain lookback periods for tax claims under § 523(a)(1).⁷
2 Nonetheless, DeNoce argues that not tolling the one-year period in
3 § 727(a)(2)(A) is inequitable, because a debtor could file
4 successive chapter 13 cases, dismiss them, and then file a
5 chapter 7 case once the one-year period has expired to avoid
6 denial of discharge.⁸

7 **C. Statutes of repose versus statutes of limitations**

8 "A statute of limitations creates an affirmative defense
9 where plaintiff failed to bring suit within a specified period of
10 time after his cause of action accrued, often subject to tolling
11 principles." Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
12 597 F.3d 84, 88 n.4 (2d Cir. 2010) (citing Stuart v. Am. Cyanamid
13 Co., 158 F.3d 622, 627 (2d Cir. 1998); P. Stolz Family P'ship v.
14 Daum, 355 F.3d 92, 102-03 (2d Cir. 2004)). "By contrast, a
15 statute of repose extinguishes a plaintiff's cause of action after
16 the passage of a fixed period of time, usually measured from one
17 of the defendant's acts." Id. (citing P. Stolz Family P'ship, 355
18 F.3d at 102-03). In other words, a statute of limitations sets a
19 time limit for bringing an action; a statute of repose sets a time
20 period in which an event giving rise to a claim for relief must
21 occur.

22 A statute of repose "bar[s] any suit that is brought after a
23 specified time since the defendant acted . . . even if this period

25 ⁷ Section 507(a)(8)(A)(ii)(II) was codified in 2005 as a
26 result of the Supreme Court's ruling in Young v. United States,
535 U.S. 43 (2002).

27 ⁸ We note that DeNoce was never precluded from pursuing a
28 nondischargeability action against Neff under § 523 in any of the
three bankruptcy cases, which he did, to no avail.

1 ends before the plaintiff has suffered a resulting injury."

2 BLACK'S LAW DICTIONARY 1451 (8th ed. 2004) (emphasis added).

3 Statutes of repose are not concerned with the plaintiff's

4 diligence; they are concerned with the defendant's peace.

5 Underwood Cotton Co. v. Hyundai Merch. Marine (Am.), Inc., 288

6 F.3d 405, 409 (9th Cir. 2002). "Put more bluntly, there is a time

7 when allowing people to put their wrongful conduct behind them –

8 and out of the law's reach – is more important than providing

9 those wronged with a legal remedy, even if the victims never had

10 the opportunity to pursue one." Lyon v. Aguilar (In re Aguilar),

11 470 B.R. 606, 614 (Bankr. D.N.M. 2012) (quoting In re Exxon Mobil

12 Corp. Sec. Litig., 500 F.3d 189, 200 (3d Cir. 2007)).

13 Equitable tolling applies only to limitations periods. See

14 Young, 535 U.S. at 49; Tidewater, 498 F.3d at 254. A statute of

15 limitations subject to equitable tolling has two common

16 characteristics: (1) the statute provides a plaintiff with a

17 specified period of time within which to pursue a claim to

18 preserve a remedy; and (2) such period begins when the plaintiff

19 has or discovers he has a complete and present claim. Tidewater,

20 498 F.3d at 255-56 (citing Young, 535 U.S. at 47-49); In re

21 Aguilar, 470 B.R. at 615; In re Maas, 416 B.R. 767, 769-70 (Bankr.

22 D. Kan. 2009). "When these two circumstances exist, a court will

23 often toll a period if it concludes that equitable considerations

24 excuse a plaintiff's failure to take the required action within

25 the time period." Tidewater, 498 F.3d at 256 (citing Young, 535

26 U.S. at 50-51). See Tidewater Fin. Co. v. Williams (In re

27 Williams), 341 B.R. 530, 533 (D. Md. 2006) ("The doctrine of

28 equitable tolling 'permits a court to suspend the measuring period

1 for a party to take action during the time the party was unable to
2 act.'") (quoting In re Williams, 333 B.R. 68, 71 (Bankr. D. Md.
3 2005)).

4 Equitable tolling is inconsistent with statutes of repose.
5 Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S.
6 350, 363 (1991). "Statutes of repose do not start to run when the
7 plaintiff has or discovers he has an action. Rather, the statutes
8 set an outside limit as to when the cause of action can accrue in
9 the first place." In re Aguilar, 470 B.R. at 615 (citing In re
10 Maas, 416 B.R. at 771).

11 Section 727(a)(2)(A) does not share either one of the
12 required characteristics of a statute of limitations. It does not
13 provide a creditor with a specified period of time for pursuing a
14 claim to preserve a remedy, and the one-year period is not
15 dependent on the discovery or accrual of a claim. Rather, the
16 one-year period is based on when the debtor files the bankruptcy
17 petition.

18 **D. Analysis**

19 Nonetheless, our inquiry does not stop here, as some courts
20 have found that certain "lookback" periods in the Bankruptcy Code,
21 including the one-year period in § 727(a)(2)(A), are a limitations
22 period that can be tolled for the reasons argued by DeNoce. The
23 only published decision squarely addressing this issue with
24 respect to § 727(a)(2)(A) is Womble.

25 In Womble, the district court affirmed the bankruptcy court's
26 decision to apply equitable tolling to § 727(a)(2)(A) and agreed
27 that Young compelled this outcome. 299 B.R. at 812-13. In Young,
28 which DeNoce contends is controlling, debtors failed to include

1 payment with their 1992 federal income tax return, due and filed
2 on October 15, 1993. 535 U.S. at 44-45. They filed a chapter 13
3 bankruptcy case on May 1, 1996, still owing the bulk of their
4 \$15,000 tax debt. Id. at 45. Debtors moved to dismiss that case
5 on October 23, 1996. One day before the bankruptcy court
6 dismissed it, on March 12, 1997, debtors filed a second bankruptcy
7 case, this time under chapter 7. Debtors received a discharge in
8 June 1997, and the chapter 7 case was closed in September 2007.
9 Upon the IRS's subsequent demand for payment of the 1992 tax debt,
10 debtors moved to reopen their chapter 7 case to have the debt
11 declared discharged. They contended that the tax debt fell
12 outside the three-year lookback period in §§ 507(a)(8)(A)⁹ and
13 523(a)(1)(A),¹⁰ and therefore had been discharged, because it

14
15 ⁹ Section 507(a)(8) provides, in relevant part:

16 The following expenses and claims have priority in the
17 following order:

18 (8) Eighth, allowed unsecured claims of governmental units,
19 only to the extent that such claims are for—

20 (A) a tax on or measured by income or gross receipts for a
21 taxable year ending on or before the date of the filing of
22 the petition—

23 (i) for which a return, if required, is last due,
24 including extensions, after three years before the date
25 of the filing of the petition;

26 (ii) assessed within 240 days before the date of the
27 filing of the petition, exclusive of—

28 (I) any time during which an offer in compromise
with respect to that tax was pending or in effect
during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings
against collections was in effect in a prior case
under this title during that 240-day period, plus
90 days[.]

26 ¹⁰ Section 523(a)(1)(A) provides: "A discharge under section
27 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not
28 discharge an individual debtor from any debt — (1) for a tax or a
customs duty — (A) of the kind and for the periods specified in
(continued...)

1 pertained to a tax return due on October 15, 1993, more than three
2 years before their chapter 7 filing on March 12, 1997. The
3 bankruptcy court reopened the case and ruled for the IRS, holding
4 that the lookback period was "tolled" during the pendency of the
5 prior chapter 13 case and, therefore, the 1992 tax debt was not
6 discharged. The district court and Fifth Circuit agreed. Id.

7 Concluding that the terms of the lookback period created a
8 "loophole" in the law, the Supreme Court held that the three-year
9 period in § 507(a)(8)(A)(i) was a limitations period subject to
10 equitable tolling, "because it prescribe[d] a period within which
11 certain rights (namely, priority and nondischargeability in
12 bankruptcy) may be enforced" by the claimant. Id. at 47. This
13 was true regardless of "whether the [prior] petition was filed in
14 good faith or solely to run down the lookback period." Id. at 50.
15 The Court noted that, like other statutes of limitations, the
16 three-year period at issue "commence[d] when the IRS ha[d] a
17 complete and present cause of action" - i.e., the date the
18 taxpayer's return was due. Id. at 49.

19 In Womble, the debtor filed a chapter 13 bankruptcy case in
20 July 2000 that was converted to chapter 11, then to chapter 12,
21 and ultimately dismissed in November 2001. 299 B.R. at 811. One
22 month after the dismissal, the debtor filed a second bankruptcy
23 case, this time under chapter 7. Contending that certain
24 transfers occurring in June and July 2000 were fraudulent within
25 the meaning of the statute, a judgment creditor sought to deny

26
27 ¹⁰ (...continued)
28 section 507(a)(3) or 507(a)(8) of this title, whether or not a
claim for such tax was filed or allowed."

1 debtor's discharge under § 727(a)(2)(A). Relying on Young, the
2 bankruptcy court ruled in favor of the creditor, holding that the
3 one-year period was "equitably tolled" due to the prior
4 bankruptcy. In affirming the bankruptcy court, the district court
5 reasoned that the "similarities between § 507(a)(8)[A](i) . . .
6 and § 727(a)(2)(A) dictate similar treatment" because "both
7 reference 'the date of the filing of the petition,' and both act
8 as limitations periods, requiring creditors to promptly protect
9 their rights or risk having a debt discharged in bankruptcy." Id.
10 at 812. See also In re Seeber, 2005 WL 4677823 (Bankr. E.D. La.
11 July 5, 2005); In re Riley, 2004 WL 2370640 (Bankr. D. Haw. Apr.
12 20, 2004) (both reviewing the one-year period in § 727(a)(2)(A)
13 and citing Womble with approval).

14 We disagree with Womble. While both statutes contain the
15 phrase "the date of the filing of the petition," their
16 similarities end there. The one-year period in § 727(a)(2)(A)
17 does not apply to any one creditor as do §§ 507(a)(8)(A) and
18 523(a)(1)(A). Further, § 727(a)(2) is not designed to protect the
19 rights of any one creditor or class of creditors. They simply are
20 not the intended beneficiaries of the statute.

21 Sections 523 and 727 serve two entirely different purposes.
22 The purpose of § 523 is to except certain specified debts of a
23 debtor from discharge. The purpose of § 727 is to deny the
24 discharge of all debts based upon a debtor's wrongful conduct in
25 connection with the bankruptcy case. Section 727 is not concerned
26 with protecting an individual creditor's claims from being
27 discharged due to inaction. And, it certainly has nothing to do
28 with priority. Further, claims for nondischargeable debts under

1 § 523 apply to all debtors, regardless of chapter. See 11 U.S.C.
2 § 103(a). Conversely, § 727 applies only to chapter 7 debtors.
3 See 11 U.S.C. § 103(b).

4 In In re Riley, an unpublished decision out of Hawaii, the
5 bankruptcy court, relying on Young and Womble, held that the one-
6 year period in § 727(a)(2) is a limitations period because “it
7 prescribes a period within which certain rights (namely, priority
8 and nondischargeability in bankruptcy) may be enforced.” 2004 WL
9 2370640, at *4 (quoting Young, 535 U.S. at 46). For the reasons
10 stated above, we disagree with In re Riley, and further note its
11 lack of analysis. The same is true for In re Seeber, also an
12 unpublished decision, which engaged in even less analysis and
13 simply cited Womble to hold that “the one year lookback period
14 found in § 727(a)(2)(A) is tolled during the pendency of the
15 period of a previous bankruptcy case.” 2005 WL 4677823, at *4.

16 The Fourth Circuit also has disagreed with Womble and
17 questioned whether Young applies in cases under § 727. In
18 Tidewater, a judgment creditor sought to deny the debtor’s
19 discharge under § 727(a)(8)¹¹ in her latest chapter 7 case on the
20 theory that her intervening and dismissed chapter 13 cases, filed
21 between the dates of her prior chapter 7 discharge order and her
22 latest petition, had equitably tolled the six-year bar on the
23 debtor from filing a chapter 7 case and getting another discharge.
24 498 F.3d at 253. The Fourth Circuit, declining to apply Young as
25 statutorily distinguishable, held that the six-year lookback

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27 ¹¹ Section 727(a)(8) provides, in relevant part: “The court
28 shall grant the debtor a discharge, unless – the debtor has been
granted a discharge under this section . . . in a case commenced
within 8 years before the date of the filing of the petition[.]”

1 period (now eight years) in § 727(a) (8) was not a statute of
2 limitations subject to equitable tolling. Id. at 258.
3 Specifically, the court found that § 727(a) (8) does not contain
4 the two required characteristics for a limitations period – it
5 does not prescribe a period of time within which a plaintiff must
6 pursue a claim, and the time period did not commence when creditor
7 Tidewater had a complete and present claim for relief. Id. at
8 256. The Tidewater court was concerned about the lack of analysis
9 in Womble, particularly, why the language “the date of the filing
10 of the petition” should automatically be interpreted as a
11 limitations provision. Id. at 256 n.7.

12 Although one could argue that § 727(a) (8) and § 727(a) (2)
13 serve different purposes, they do share one important similarity –
14 neither expressly provides for tolling and neither contains the
15 two required characteristics for a limitations period which can be
16 equitably tolled. Therefore, we find the reasoning in Tidewater
17 persuasive and agree that Young does not control the outcome here.
18 We are particularly persuaded by the following discussion from the
19 district court in Tidewater and believe it applies equally to
20 § 727(a) (2) (A) :

21 [I]f equitable tolling were applied to § 727(a) (8), every
22 debt encompassed by a debtor’s Chapter 7 petition – not
23 just the debt of the single creditor seeking equitable
24 tolling – would not be discharged. Thus, potentially
25 numerous creditors would unwittingly and perhaps
26 undeservedly benefit from relief granted to a single
27 creditor. This situation seems inconsistent with
Congress’ determination that specific categories of debt
are excepted from discharge under § 727(b) and § 523, and
effectively “convert[s] the disqualifications of a debtor
from a discharge into a dischargeability test for
particular claims.”

28 341 B.R. at 537-38 (quoting In re Williams, 333 B.R. at 74). In

1 other words, equitable tolling of § 727(a)(2)(A) is "inconsistent
2 with the text of the relevant statute," and thus should not be
3 applied. See Young, 535 U.S. at 49 (quoting United States v.
4 Beggerly, 524 U.S. 38, 48 (1998)).

5 Other support exists for our holding here, but these courts
6 were also short on analysis. See Melancon v. Jones (In re Jones),
7 292 B.R. 555, 560 (Bankr. E.D. Tex. 2003) (post-Young case;
8 holding that creditor could not "reach back" to debtor's prior
9 bankruptcy filing to circumvent the one-year period under
10 § 727(a)(2)(A), because the effect of dismissal of the prior
11 bankruptcy case was to nullify it); U.S. Fid. & Guar. Co. v. Hogan
12 (In re Hogan), 208 B.R. 459, 463 n.3 (Bankr. E.D. Ark. 1997) (pre-
13 Young case; recognizing that no Code provision or nonbankruptcy
14 law "suspended" the one-year period in § 727(a)(2)(A); however,
15 the chapter 7 trustee may still be able to avoid any fraudulent
16 transfers under § 544(b)).

17 DeNoce contends that if courts refuse to apply the equitable
18 tolling doctrine to § 727(a)(2)(A), debtors will inequitably be
19 allowed to take advantage of a "loophole" by filing successive
20 chapter 13 bankruptcy cases, then filing a chapter 7 bankruptcy
21 case after the one-year period has expired. The district court in
22 Tidewater responded best to this argument:

23 Congress decided not to address any alleged 'loophole'
24 with respect to the relation between the serial filing of
25 Chapter 13 cases and the discharge of a second Chapter 7
26 case in its recent restructuring of the Bankruptcy Code.
27 See Bankruptcy Abuse Prevention and Consumer Protection
Act of 2005, Pub.L. No. 109-8 (2005) ["BAPCPA"]. It is not
the role of this Court to override decisions already made
by Congress with respect to the discharge of a Chapter 7
debtor.

28 341 B.R. at 538-39. We agree that if this alleged "loophole" in

1 § 727(a)(2)(A) was of concern to Congress, it would have been
2 addressed with BAPCPA, as was the "loophole" found by the Supreme
3 Court in Young with the codification of § 507(a)(8)(A)(ii)(II).

4 We also disagree with DeNoce's argument that the doctrine of
5 "continuing concealment" applies in this case. Under this
6 doctrine, discharge can be denied under § 727(a)(2)(A), even
7 though the subject transfer occurred more than one year before the
8 debtor filed bankruptcy, if the debtor allowed his or her interest
9 in the property to remain concealed into the year preceding the
10 bankruptcy filing. In re Lawson, 122 F.3d at 1240. "Concealment"
11 in this sense focuses on the debtor's intent to conceal any
12 "interest" in the transferred property into the year before the
13 bankruptcy filing, not whether the debtor intended to conceal "the
14 transfer." Id. Although Neff did not initially disclose the
15 transfer of the Lake Harbor Property in his first two bankruptcy
16 cases, no concealment of his "interest" in it occurred into the
17 year before he filed his Third Bankruptcy Case, thereby triggering
18 the doctrine. Within the year before he filed his third case,
19 title to the Lake Harbor Property was in his name only as a matter
20 of public record. Although the quitclaim deed stated that
21 "Grantee asserts this is an exempt asset under California law as a
22 retirement asset or plan," Neff's failed attempt at trying to
23 preserve the property as an exempt retirement asset did nothing to
24 change the title or his 100% fee interest, as the bankruptcy court
25 correctly noted. As such, no "concealment" occurred within the
26 meaning of the doctrine.

27 Contrary to DeNoce's contention, the "continuing concealment"
28 doctrine is not analogous to an "equitable tolling" of the

1 one-year period in § 727(a)(2)(A), and therefore our decision here
2 is not contrary to In re Lawson. The doctrine is not a “tolling”
3 of the statute. Rather, it applies only when the offending
4 conduct – debtor’s intentional concealment of an interest in
5 transferred property – has been ongoing into the year prior to the
6 debtor’s bankruptcy filing. Thus, nothing is being “tolled” with
7 respect to the one-year period.

8 Because § 727(a)(2)(A) is a statute of repose not subject to
9 equitable tolling, DeNoce could not prove one of the necessary
10 elements to deny Neff’s discharge – that the transfer of the Lake
11 Harbor Property occurred within one year of the filing of Neff’s
12 Third Bankruptcy Case. Accordingly, the bankruptcy court did not
13 err when it determined that no genuine issue of material fact
14 existed and that Neff was entitled to summary judgment as a matter
15 of law. Likewise, because the subject transfer occurred more than
16 one year prior to the filing of Neff’s Third Bankruptcy Case, it
17 obviously could not have occurred postpetition. Hence, DeNoce had
18 no claim under § 727(a)(2)(B), and the bankruptcy court did not
19 err in denying his PSJ Cross-Motion.¹²

20 **VI. CONCLUSION**

21 For the foregoing reasons, we AFFIRM.

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25

26 ¹² We note that even if § 727(a)(2)(A) were subject to
27 equitable tolling, it would be inappropriate to apply that
28 doctrine here because DeNoce relentlessly sought and obtained the
dismissal of Neff’s Second Bankruptcy Case, which forced Neff to
then file a third one.