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

ORDERED PUBLISHED

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

In re:)	BAP No.	CC-15-1180-FCTa
)		
CHARLENE M. MILBY,)	Bk. No.	9:11-14487-PC
)		
Debtor.)	Adv. No.	9:14-01132-PC
)		

PATRICIA A. TEMPLETON and
G. CRESSWELL TEMPLETON III,
individuals on behalf of
the Bankruptcy Estate of
Debtor Charlene M. Milby, and
derivatively on behalf of
Charlene's Transportation,
Inc.,
Appellants,

v.

OPINION

JON A. MILBY; D&J TRUCKING
CO.; SANDRA HOLDER MILBY;
SANJON, INC.; 5TH ST CONDO,
LLC; CHARLENE M. MILBY;
CHARLENE'S TRANSPORTATION,
INC.,
Appellees.

Argued and Submitted on January 21, 2016
at Pasadena, California

Filed - February 24, 2016

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

Honorable Peter Carroll, Bankruptcy Judge, Presiding

Appearances: Daniel Joseph McCarthy of Hill, Farrer & Burrill,
LLP argued on behalf of Appellants Patricia A.
Templeton and G. Cresswell Templeton III; Karen L.
Grant argued on behalf of Appellees Jon A. Milby,
D&J Trucking Company, Sandy Holder Milby, Sanjon,

1 Inc., 5th St. Condo, LLC, Charlene M. Milby, and
2 Charlene's Transportation, Inc.

3 Before: FARIS, CORBIT*, and TAYLOR, Bankruptcy Judges.
4

5 FARIS, Bankruptcy Judge:
6

7 **INTRODUCTION**

8 Appellants Patricia A. Templeton and G. Cresswell Templeton
9 III initiated an adversary proceeding on behalf of themselves and
10 Debtor Charlene M. Milby's bankruptcy estate to avoid fraudulent
11 transfers. Appellees Jon A. Milby, D&J Trucking Company, Sandy
12 Holder Milby, Sanjon, Inc., 5th St. Condo, LLC, Charlene M.
13 Milby, and Charlene's Transportation, Inc. moved for summary
14 judgment on the ground that the claims were untimely by virtue of
15 the two-year statute of limitations under § 546(a)(1).¹ The
16 bankruptcy court agreed with Appellees that certain of the
17 Templetons' claims were untimely, holding that, while chapter 7
18 trustee Sandra K. McBeth was diligent and could not have
19 discovered the causes of actions earlier, she did not diligently
20 pursue the claims after discovery. The court thus granted
21 summary judgment and dismissed those claims pursuant to
22 § 546(a)(1)(A).
23

24 * Honorable Frederick P. Corbit, Chief United States
25 Bankruptcy Judge for the Eastern District of Washington, sitting
by designation.

26 ¹ Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037, and all "Civil Rule" references are
to the Federal Rules of Civil Procedure, Rules 1-86.

1 We hold that the bankruptcy court erred in its application
2 of equitable tolling to the two-year statute of limitations. We
3 affirm other decisions of the bankruptcy court in a separate
4 memorandum entered concurrently with the entry of this opinion.
5 Accordingly, we AFFIRM IN PART and VACATE IN PART the bankruptcy
6 court's order granting summary judgment; VACATE the court's order
7 denying reconsideration; and REMAND this action for further
8 proceedings consistent with our opinion.

9 **FACTUAL BACKGROUND²**

10 The Debtor is a materials hauling broker who conducts
11 certain business operations through a wholly-owned company,
12 Charlene's Transportation, Inc. ("CTI"). The Debtor filed for
13 chapter 7 bankruptcy on September 22, 2011, and the Trustee was
14 appointed to administer her estate. The Templetons filed a proof
15 of claim in the amount of \$2,756,077.21.

16 The Debtor has an adjudicated history of concealment and
17 refusal to produce relevant information. The Templetons
18 initiated an adversary proceeding to deny discharge under § 727
19 and determine the dischargeability of the Debtor's debts to the
20 Templetons under § 523. The Templetons argued that, under § 727,
21 the court should deny the Debtor's discharge because she
22 knowingly made false and deceptive statements in her schedules
23 and testimony, failed to disclose assets, failed to produce
24 documents requested by the Trustee, and was unable to explain the

25
26 ² The Templetons' excerpts of record are incomplete and
27 make reference to certain documents on the bankruptcy court's
28 docket without including the actual document. We have exercised
our discretion to review the bankruptcy court's docket, as
appropriate. See Woods & Erickson, LLP v. Leonard (In re AVI,
Inc.), 389 B.R. 721, 725 n.2 (9th Cir. BAP 2008).

1 loss of assets. The Templetons further requested that the court
2 deny discharge of the Debtor's debt to them under § 523(a),
3 because the Debtor had fraudulently induced them to co-purchase
4 real property by making certain false representations. The
5 Debtor and CTI failed to respond to discovery requests and defied
6 the court's discovery orders. As a discovery sanction, the
7 bankruptcy court entered a default judgment against the Debtor,
8 denied the Debtor's discharge pursuant to § 727(a)(4) and (5),
9 and awarded the Templetons \$349,623.54 pursuant to § 523(a)(2).

10 In the meantime, the Trustee and the Templetons both
11 investigated and began to assert additional claims against the
12 Debtor and her affiliates. The Trustee was able to negotiate an
13 early compromise of an insider preference claim against the
14 Debtor's father, Jon A. Milby, and Mr. Milby's business, D&J
15 Trucking, Co., Inc., receiving \$7,500 in settlement of a claim
16 based on an undisclosed \$10,000 payment from the Debtor's bank
17 account to Mr. Milby or D&J Trucking.

18 The normal deadline (absent tolling) to commence actions to
19 recover avoidable transfers was two years after the bankruptcy
20 filing, or September 22, 2013. Not surprisingly, there was
21 significant activity just before that deadline.

22 On September 5, 2013, the Templetons' counsel provided the
23 Trustee with "a binder consisting of descriptions of assets and
24 transfers that the Templetons believed might be recoverable for
25 the benefit of the estate, as well as some supporting
26 documentation" On September 17, the Trustee requested
27 further documentation from the Templetons' counsel regarding one
28 of the transfers. The next day, counsel provided the requested

1 information.

2 On September 19, 2013, three days before the statute of
3 limitations was set to expire, the Trustee brought an adversary
4 proceeding (the "Trustee's Avoidance Action") against the
5 Debtor's father and one of his companies to avoid and recover
6 fraudulent transfers, preferential transfers, and unauthorized
7 post-petition transfers. The Trustee's Avoidance Action did not
8 state claims based on the transfers identified by the Templetons;
9 the Trustee later explained that, when she filed the Trustee's
10 Avoidance Action, she did not have adequate documentation or
11 supporting evidence about those transfers and was concerned about
12 the Debtor's track record of non-cooperation in discovery and the
13 potential litigation costs to the estate.³

14 The Trustee negotiated a settlement of the Trustee's
15 Avoidance Action. The Templetons objected to the settlement
16 agreement, arguing that the release should cover only the
17 transfers alleged in the complaint and not other transfers. The
18 Trustee, the Templetons, and the settling defendants resolved
19 this dispute by stipulating to narrow the scope of the releases
20 to the transfers alleged in the Trustee's Avoidance Action; thus,
21 the Trustee preserved all other claims. The bankruptcy court
22 approved the settlement agreement with the narrowed releases.

23 In August 2014, while the motion to approve the settlement
24 of the Trustee's Avoidance Action was pending, the Templetons
25 approached the Trustee and discussed the possibility of being

26
27 ³ The Trustee also filed a second adversary proceeding to
28 compel the Debtor, the Debtor's husband, Rex Rossoll, and
Mr. Rossoll's company, Double R Cutting Horse LLC, to turn over
assets that the Debtor had not disclosed in her schedules.

1 appointed to pursue the fraudulent transfer claims that they had
2 brought to the Trustee's attention in September 2013. The
3 Trustee agreed, and the bankruptcy court approved the
4 appointment.

5 A few days later, on September 17, 2014, the Templetons
6 initiated the adversary proceeding from which this appeal arises.
7 They asserted claims on behalf of themselves and the Debtor's
8 estate, including derivative claims for CTI. The Templetons
9 alleged claims for (1) actual fraud under § 544(b) and California
10 Civil Code § 3439.04(a)(1); (2) constructive fraud under § 544(b)
11 and California Civil Code §§ 3439.04(a)(2) and 3439.05;
12 (3) aiding and abetting fraudulent transfers; and (4) unjust
13 enrichment. They alleged that CTI is the Debtor's alter ego.

14 Among other things, the Templetons challenged transfers from
15 certain bank accounts allegedly owned by the various Appellees.
16 They claimed that the Debtor owned three bank accounts ending in
17 -0242, -2368, and -0449. (As to account -0449, the Templetons
18 alleged that the account was opened "under the name 'Milby,
19 Charlene dba Charlene's Transportation.'") The Templetons stated
20 that CTI owned a bank account ending in -0526. They claimed that
21 Mr. Milby and D&J Trucking had a bank account ending in -0589.
22 Finally, the Templetons alleged that Sanjon, Inc. had a bank
23 account ending in -9226.

24 In November 2014, Appellees filed summary judgment motions
25 on the basis of the two-year statute of limitations in
26 § 546(a)(1). They argued that equitable tolling did not apply,
27 despite the Trustee's diligence, because there were no
28 extraordinary circumstances that prevented her from bringing suit

1 within two years after the Debtor filed for bankruptcy, i.e., by
2 September 22, 2013.

3 In response, the Templetons argued that the Debtor's
4 misconduct and evasion were "extraordinary circumstances"
5 hindering the Trustee; the two-year limitations period had been
6 tolled until September 2013; and the Templetons' adversary
7 complaint was filed within one year of that date. In support of
8 the Templetons' opposition, the Trustee stated that the Debtor
9 failed to disclose the transfers at issue in the adversary
10 proceeding; the Debtor failed to cooperate with the Trustee's
11 investigation; the Trustee first learned of the allegedly
12 fraudulent transfers in September 2013 from the Templetons'
13 attorney; and, at that time, she did not have sufficient evidence
14 of the fraudulent transfers.

15 On March 2, 2015, the bankruptcy court granted the
16 Appellees' motions. The court began by analyzing which of the
17 Templetons' claims were brought under § 544(b) and were therefore
18 actually subject to the limitations period of § 546(a)(1)(A).
19 Because § 544(b) refers to "transfer[s] of an interest of the
20 debtor in property[,]" the court held that only the transfers
21 from the Debtor's bank accounts (the transfers identified in
22 paragraph 30 of the complaint and related to account -0449) were
23 covered by § 544(b). The court ruled that the transfers from the
24 other Appellees' bank accounts (described in paragraphs 31
25 through 35 of the complaint) "are not subject to avoidance under
26 § 544(b) as fraudulent . . . because they do not involve a
27 'transfer of an interest of the debtor in property' by the terms
28 of the complaint." The court held that the Templetons'

1 allegations did not state a plausible claim. However, the court
2 stated that it "is not convinced that a plausible claim for
3 avoidance of the alleged transfers cannot be pled by amendment
4 under a different theory" and dismissed with leave to amend the
5 first three counts to the extent they were based on paragraphs 31
6 through 35.⁴

7 Having determined which claims were subject to
8 § 546(a)(1)(A), the court next turned to the timeliness of the
9 claims to avoid the transfers from the Debtor's accounts (alleged
10 in paragraph 30 of the complaint). The court found that the
11 Trustee had been diligent and "[t]here is no significantly
12 probative evidence in the record that [the Trustee] discovered,
13 or could have discovered, the Subject Transfers earlier than
14 September 2013, when she had only three days to evaluate the
15 Subject Transfers before expiration of the limitations period."
16 Nevertheless, the court held that the Trustee "was dilatory in
17 seeking relief after discovering facts regarding the Subject
18 Transfers and ultimately made a conscious decision not to pursue
19 the transfers on behalf of the estate." The court dismissed with
20 prejudice the First, Second, and Third Claims for Relief (to the
21 extent they concerned paragraph 30) as barred by the statute of
22 limitations.⁵

23 After the bankruptcy court denied their motion for
24 reconsideration, the Templetons gave notice that they would not

26 ⁴ We address this portion of the bankruptcy court's
27 decision in a separate memorandum.

28 ⁵ The court dismissed Count 4 for unjust enrichment without
leave to amend on the ground that it did not state an independent
cause of action. The Templetons do not challenge this ruling.

1 amend the complaint and instead filed a timely notice of appeal.

2 The Templetons also filed their designation of excerpts of
3 record, but Appellees moved to strike nine items that were not
4 before the bankruptcy court in its consideration of the motions
5 for summary judgment. The bankruptcy court granted the motion.

6 The Templetons requested that this Panel take judicial
7 notice of the stricken items or permit enlargement of the record.
8 The motions panel denied the motion without prejudice.

9 **JURISDICTION**

10 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
11 §§ 1334, 157(b)(1), and 157(b)(2)(F) and (H). We have
12 jurisdiction under 28 U.S.C. § 158.

13 **ISSUES**

14 (1) Whether the bankruptcy court erroneously applied the
15 doctrine of equitable tolling when it granted summary judgment
16 and dismissed the First, Second, and Third Claims for Relief (to
17 the extent they are based on fraudulent transfers alleged in
18 paragraph 30 of the complaint) as untimely under § 546(a)(1)(A).

19 (2) Whether this Panel should consider excerpts of record
20 stricken by the bankruptcy court.

21 **STANDARDS OF REVIEW**

22 We review de novo the bankruptcy court's decision to grant
23 or deny summary judgment. Boyajian v. New Falls Corp. (In re
24 Boyajian), 564 F.3d 1088, 1090 (9th Cir. 2009).

25 The bankruptcy court has latitude in granting relief from a
26 strict construction of a statute of limitations and reaches its
27 determination on a case-by-case analysis. See Scholar v. Pac.
28 Bell, 963 F.2d 264, 267-68 (9th Cir. 1992). Thus, we review for

1 abuse of discretion the bankruptcy court's decision that the
2 trustee could not invoke the doctrine of equitable tolling. See
3 Baldwin Cty. Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984) (per
4 curiam); see also Scholar, 963 F.2d at 267.

5 Similarly, we review for abuse of discretion the denial of a
6 motion for reconsideration. See N. Alaska Env'tl. Ctr. v. Lujan,
7 961 F.2d 886, 889 (9th Cir. 1992). Under an abuse of discretion
8 standard, a reviewing court cannot reverse unless it has "a
9 definite and firm conviction that the [court below] committed a
10 clear error of judgment" in the conclusion it reached upon a
11 weighing of the relevant factors. Marchand v. Mercy Med. Ctr.,
12 22 F.3d 933, 936 (9th Cir. 1994).

13 DISCUSSION

14 **A. The bankruptcy court incorrectly applied the doctrine of**
15 **equitable tolling to the statute of limitations under**
§ 546(a) (1) (A).

16 The primary issue on appeal concerns the bankruptcy court's
17 application of equitable tolling. We hold that the bankruptcy
18 court erred when it dismissed the § 544(b) claims as untimely
19 because of the Trustee's alleged lack of diligence after
20 discovery of the fraudulent transfers.⁶

21 **1. Section 546(a) (1) (A)'s two-year statute of limitations**
22 **is subject to equitable tolling.**

23 Section 546(a) (1) (A) provides a two-year statute of
24 limitations for avoidance actions:

25 (a) An action or proceeding under section 544, 545,
26 547, 548, or 553 of this title may not be commenced

27 ⁶ Our discussion herein considers and disposes of arguments
28 raised in conjunction with both the Appellees' motions for
summary judgment and the Templetons' motion for reconsideration.

1 after the earlier of -

2 (1) the later of -

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

5 (B) 1 year after the appointment or election
6 of the first trustee under section 702, 1104,
7 1163, 1202, or 1302 of this title if such
8 appointment or such election occurs before
9 the expiration of the period specified in
10 subparagraph (A); or

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

12 § 546(a).

13 The statute of limitations period under § 546(a)(1)(A) may
14 be subject to equitable tolling. Gladstone v. U.S. Bancorp.,
15 No. 13-55773, --- F.3d ----, 2016 WL 142469 at *8 (9th Cir. Jan.
16 8, 2016) (citing Ernst & Young v. Matsumoto (In re United Ins.
17 Mgmt., Inc.), 14 F.3d 1380, 1387 (9th Cir. 1994)); see Young v.
18 United States, 535 U.S. 43, 49 (2002). "Congress must be
19 presumed to draft limitations periods in light of this background
20 principle. . . . That is doubly true when it is enacting
21 limitations periods to be applied by bankruptcy courts, which are
22 courts of equity and apply the principles and rules of equity
23 jurisprudence." Young, 535 U.S. at 49-50 (internal citations,
24 quotation marks, and alteration omitted). "Under the equitable
25 tolling doctrine, where a party 'remains in ignorance of [a
26 wrong] without any fault or want of diligence or care on his
27 part, the bar of the statute does not begin to run until the
28 fraud is discovered, though there be no special circumstances or
efforts on the part of the party committing the fraud to conceal
it from the knowledge of the other party.'" In re United Ins.
Mgmt., Inc., 14 F.3d at 1384 (quoting Lampf, Pleva, Lipkind,

1 Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991)).

2 **2. The Ninth Circuit applies equitable tolling without**
3 **regard to a trustee's diligence in pursuing claims**
4 **after discovery.**

5 The Templetons contend that, based on equitable tolling, the
6 adversary complaint filed in September 2014 was timely.

7 Appellees contend that the Trustee was dilatory after the
8 discovery of the fraudulent transfers, such that she should be
9 denied the benefit of equitable tolling. We agree with the
10 Templetons and hold that the bankruptcy court misapplied Ninth
11 Circuit law.

12 In Socop-Gonzalez v. Immigration & Naturalization Service,
13 272 F.3d 1176 (9th Cir. 2001), the Ninth Circuit, sitting en
14 banc, considered whether a limitations period was subject to
15 equitable tolling. An immigrant seeking to challenge an order of
16 deportation (initially on the basis of asylum) asked an
17 Immigration and Naturalization Service ("INS") officer how to
18 submit a petition to immigrate based on his recent marriage to an
19 American citizen. Id. at 1181. The INS officer instructed the
20 appellant to withdraw his asylum appeal and file an application
21 for adjustment of status with the INS. Unfortunately, the
22 information provided by the INS officer was incorrect. The
23 Bureau of Immigration Appeals ("BIA") terminated his asylum
24 appeal and returned the case to the immigration court, which made
25 the deportation order immediately effective as of May 5, 1997.
26 Id.

27 On July 7, 1997, the appellant received a letter from the
28 INS, instructing him to report for deportation. This was the
first time he was alerted to a problem in his attempt to adjust

1 his status. Shortly thereafter, while processing the appellant's
2 application for adjustment of status, the INS informed the
3 appellant that he was eligible to receive his employment
4 authorization card. Concerned by the INS's conflicting posture,
5 on August 11, the appellant moved to reopen his case and to
6 reinstate the asylum appeal. The BIA denied the motion on the
7 ground, *inter alia*, that the motion to reopen was untimely
8 because it was not filed within ninety days of the BIA's May 5
9 deportation order. Id. at 1182.

10 On appeal, the appellant argued that the BIA should have
11 equitably tolled the ninety-day limitations period between May 5
12 (the entry of the deportation order) and July 7 (the notice to
13 report for deportation), because he did not know that the INS
14 officer's erroneous advice had caused him to follow the wrong
15 procedure. Id. at 1183. The Ninth Circuit agreed. It concluded
16 that equitable tolling was applicable to the filing deadline for
17 a motion to reopen. Id. at 1187-89. It then considered
18 "whether, despite due diligence, [the appellant] was prevented
19 during this period, by circumstances beyond his control . . .
20 from discovering that his order of deportation had become
21 effective" Id. at 1194. It held that "[b]etween May 5,
22 1997 and July 7, 1997, [the appellant] had no reason to believe
23 that his deportation order had become effective. In fact, he had
24 every reason to believe that he had followed the correct
25 procedure for adjusting his status." Id. The court thus held
26 that the period from May 5 through July 7 should not have counted
27 toward the ninety-day period. Id.

28 The court noted that, at the time the appellant was put on

1 notice by the deportation notice, he still had twenty-seven days
2 in which he could have filed a motion to reopen. Id. The court
3 held that this was irrelevant. It overruled the Ninth Circuit
4 panel decision in Santa Maria v. Pacific Bell, 202 F.3d 1170 (9th
5 Cir. 2000), which stood for the proposition that "courts should
6 not apply equitable tolling in situations where a plaintiff
7 discovers the existence of a claim before the end of a
8 limitations period and the court believes that the plaintiff
9 could have been expected to bring a claim within the remainder of
10 the limitations period." Socop-Gonzalez, 272 F.3d at 1194. The
11 court stated that, "[i]n tolling statutes of limitations, courts
12 have typically assumed that the event that 'tolls' the statute
13 simply **stops the clock** until the occurrence of a later event that
14 permits the statute to resume running." Id. at 1195 (emphasis in
15 original). It held that the Santa Maria decision does away with
16 "the relative certainty and uniformity with which a statutory
17 period may be calculated and applied"; was explicitly rejected by
18 the Supreme Court; and "trumps what is arguably Congress'
19 intended policy objectives in setting forth a statute of
20 limitations period - to permit plaintiffs to take a specified
21 amount of time . . . to further investigate their claim and
22 consider their options before deciding whether to file suit."
23 Id. at 1195-96. It thus concluded by stating that,

24 we reject the approach to tolling adopted in Santa
25 Maria, and **we need not inquire whether [the appellant]**
26 **could have filed his motion to reopen within the**
27 **twenty-seven days remaining in the limitations period**
28 after he received [notice of deportation]. . . .
Instead, **we need only ask whether [the appellant] filed**
within the limitations period after tolling is taken
into account. [The appellant] had until ninety days
after July 7 to file a motion to reopen, or until

1 October 5, 1997.

2 Id. at 1196 (emphases added).

3 The holding of Socop-Gonzalez is still good law in this
4 circuit. See Mangum v. Action Collection Serv., Inc., 575 F.3d
5 935, 947 (9th Cir. 2009) (O’Scannlain, J., concurring). There is
6 no reason to think that the Ninth Circuit would apply equitable
7 tolling in a different fashion under § 546(a)(1).

8 Very recently, the Ninth Circuit again indicated that
9 equitable tolling simply extends the statute of limitations
10 period by the length of time the plaintiff could not discover the
11 injury. In Gladstone, the court held that the trustee’s
12 avoidance action was subject to § 546(a)(1)(A). 2016 WL 142469
13 at *8. It quoted United Insurance Management for the proposition
14 that, “where a party ‘remains in ignorance of [a wrong] without
15 any fault or want of diligence or care on his part, the bar of
16 the statute does not begin to run until the fraud is discovered
17” Id. (quoting In re United Ins. Mgmt., Inc., 14 F.3d at
18 1384). The court did not inquire whether the trustee was
19 thereafter diligent, but merely held that “the statute of
20 limitations was tolled until the fraudulent transfers were
21 revealed to the Trustee’s attorney” Id. at *9. The
22 court’s language implies that a plaintiff would receive the
23 benefit of the full statutory period after the discovery of the
24 fraudulent transfer.

25 Appellees and the bankruptcy court relied heavily upon
26 Taylor v. Hosseinpour-Esfahani (In re Hosseinpour-Esfahani), 198
27 B.R. 574 (9th Cir. BAP 1996), a pre-Socop-Gonzalez BAP decision
28 that considered an issue identical to that posed in this appeal.

1 In that case, the "issue before the Panel [was] whether the
2 bankruptcy court abused its discretion in refusing to apply the
3 doctrine of equitable tolling when the trustee was dilatory **after**
4 discovering the existence of a claim." In re Hosseinpour-
5 Esfahani, 198 B.R. at 579 (emphasis in original). The panel held
6 that "[d]espite the trustee's alleged diligence in discovering
7 the alleged fraud before the statute of limitations lapsed, we
8 cannot conclude that this obviates the need for the trustee to
9 act diligently and in a timely manner once he has this
10 knowledge." Id. (internal citations omitted); see also Gladstone
11 v. Michaelis (In re QualityBuilt.com), Bkr. no. 09-12113-PB7,
12 2014 WL 5089040, at *3 (Bankr. S.D. Cal. Apr. 14, 2014)
13 (determining that "the Trustee was indeed dilatory after
14 discovering the facts underlying the Avoidance Claims, and that
15 there [were] no extreme circumstances which warrant equitable
16 tolling to save the Trustee from the time limitations").

17 Appellees urge us to ignore the Ninth Circuit's explicit
18 ruling in Socop-Gonzalez in favor of our own earlier decision in
19 Hosseinpour-Esfahani. We decline to do so. After Socop-
20 Gonzalez, Hosseinpour-Esfahani is no longer good law. A court
21 should not look at the trustee's post-discovery diligence when
22 considering whether equitable tolling should be applied. If the
23 trustee was diligent in discovering the claims, then he should
24 receive the benefit of the full limitations period after
25 discovery of the fraudulent transfers.

26 We note that Socop-Gonzalez's "stop-clock" rule is
27 consistent with bankruptcy policy for several reasons.

28 First, the rule advocated by the Appellees would create

1 uncertainty about the length of the limitations period. An ad
2 hoc standard eliminates the certainty and sense of repose that a
3 statute of limitations is meant to provide. At oral argument,
4 the Panel asked Appellees' counsel to state a standard of
5 timeliness that bankruptcy courts could apply in lieu of the
6 "stop clock" rule. Counsel had no answer.

7 Second, an unguided case-by-case standard would require
8 parties to bear the expense of litigating a fact-intensive
9 inquiry into a trustee's post discovery diligence. This would
10 tend to increase the expense of bankruptcy cases, to the
11 detriment of all creditors.

12 Third, Appellees' rule would encourage debtors to obstruct
13 the trustee's investigation or to hide assets and documents. If
14 debtors anticipate a reward for disobeying the trustee, they are
15 more likely to attempt to run out the statute of limitations
16 without cooperating. The fairer course is to allow the trustee
17 the full statutory period after discovery of the cause of action.

18 Finally, the rule of Hosseinpour-Esfahani has an ironic and
19 unjust consequence. For example, if the limitations period is
20 two years, the plaintiff's suit is timely if filed within the
21 two-year period, even if the plaintiff easily could have filed
22 suit in less than two years. Under Hosseinpour-Esfahani, a
23 plaintiff entitled to equitable tolling has to bear the
24 additional burden of showing that the plaintiff filed suit as
25 promptly as was reasonably possible. In this respect, a
26 plaintiff entitled to equitable tolling is worse off than a
27 plaintiff who is not. This is both ironic and unjust since
28 equitable tolling is often available because the defendant

1 concealed the claim or is guilty of some other misconduct. Thus,
2 the rule of Hosseinpour-Esfahani confers benefits on undeserving
3 defendants.

4 The bankruptcy court also said that the Trustee "made a
5 conscious decision" not to pursue the claims identified by the
6 Templetons. This is irrelevant. Prior to the expiration of the
7 limitations period (absent tolling), a plaintiff is perfectly
8 free to change her mind about whether to file suit. The
9 application of equitable tolling is not a reason to deprive a
10 plaintiff of that privilege.

11 The bankruptcy court found that the Trustee acted
12 diligently until she learned of the claims. The Templetons
13 (acting on behalf of the estate) asserted those claims within two
14 years thereafter. The bankruptcy erred in holding that the
15 claims were untimely.⁷

16 **B. The bankruptcy court's findings do not support the**
17 **application of equitable estoppel.**

18 The Templetons urge the Panel to reverse on the alternate
19 basis of equitable estoppel.

20 Ordinarily, we consider only arguments that the parties
21

22 ⁷ The Templetons argue that the bankruptcy court erred by
23 failing to grant them summary adjudication on the statute of
24 limitations defense. However, the Templetons never noticed or
25 filed a cross-motion for summary judgment and only raised this
26 request in their opposition to the motions for summary judgment.
27 Moreover, at the hearings on the motions for summary judgment,
28 counsel for the Templetons conceded that they did not file any
cross-motion, and the court was hesitant to grant relief without
giving "the parties reasonable opportunity to be heard." The
court did not rule on the supposed cross-motion, and we decline
to do so for the first time on appeal.

1 first presented to the bankruptcy court. The Templetons barely
2 mentioned the equitable estoppel theory in the bankruptcy court.
3 But the Ninth Circuit, in the Socop-Gonzalez decision, held that
4 a party who relied on equitable estoppel in the lower court can
5 argue an equitable tolling theory on appeal, because "there is
6 'clearly some overlap' between equitable tolling and estoppel,
7 and . . . the two can be difficult to distinguish." Socop-
8 Gonzalez, 272 F.3d at 1185. This case involves the reverse
9 situation; the Templetons relied almost entirely on equitable
10 tolling in the bankruptcy court and want to argue equitable
11 estoppel on appeal. Nevertheless, the considerations that
12 motivated the Ninth Circuit in Socop-Gonzalez apply here. Thus,
13 although the Templetons did not explicitly raise equitable
14 estoppel in the bankruptcy court, we may consider that doctrine
15 on appeal.

16 "Equitable estoppel focuses primarily on the actions taken
17 by the defendant in preventing a plaintiff from filing
18 suit Equitable estoppel may be invoked if the defendant
19 takes active steps to prevent the plaintiff from suing in time,
20 such as by misrepresenting or concealing facts necessary to the
21 . . . claim." Coppinger-Martin v. Solis, 627 F.3d 745, 751 (9th
22 Cir. 2010) (internal citations and quotation marks omitted).
23 Equitable estoppel thus "focuses on the actions of the
24 defendant." Socop-Gonzalez, 272 F.3d at 1184 (citation omitted).
25 There must be "affirmative misconduct," which means a "deliberate
26 lie" or "a pattern of false promises." Id. (citations omitted).

27 Equitable estoppel also requires that: "(1) the party to be
28 estopped must know the facts; (2) the party to be estopped must

1 either intend that its conduct will be acted upon or act in a
2 manner that the party asserting estoppel has a right to believe
3 it is so intended; (3) the party asserting estoppel must be
4 ignorant of the true facts; and (4) the party asserting estoppel
5 must rely on the conduct to its injury." Alary Corp. v. Sims (In
6 re Associated Vintage Grp., Inc.), 283 B.R. 549, 567 (9th Cir.
7 BAP 2002) (citations omitted).

8 In the present case, there are some indications that
9 equitable estoppel might apply. The Debtor must have known about
10 the fraudulent transfers that were drawn from her bank account.
11 The bankruptcy court highlighted "Debtor's egregious conduct,
12 including but not limited to, the failure to schedule assets,
13 false oaths in the schedules and in response to questions at
14 creditors' meetings, the failure to turn over documents and
15 cooperate with the trustee" Finally, the court found
16 that the Trustee did not and could not have known of the
17 fraudulent transfers and, thus, did not bring suit on those
18 transfers.

19 The court did not, however, make comparable findings of
20 misconduct against the Appellees other than the Debtor. It did
21 not find that the Debtor's misconduct was attributable to the
22 other Appellees. In the absence of such findings, we cannot say
23 that the bankruptcy court erred in its failure to apply the
24 equitable estoppel doctrine.

25 **C. The Panel declines to consider items not before the**
26 **bankruptcy court and will not take judicial notice of the**
Templetons' supplemental documents.

27 Finally, the Templetons urge us to take judicial notice of
28 supplemental documents that were not before the bankruptcy court

1 during its consideration of the underlying summary judgment
2 motions. We will not do so.

3 In the first place, the Templetons acknowledged at oral
4 argument that they offered the additional documents only to show
5 that the Trustee acted diligently after discovering the
6 transfers. Because we have decided that the Trustee's post-
7 discovery diligence is irrelevant, the supplemental documents are
8 unnecessary.

9 In any event, except in rare cases where "'the interests of
10 justice demand it,' an appellate court will not consider evidence
11 not presented to the trial court[.]" Graves v. Myrvang (In re
12 Myrvang), 232 F.3d 1116, 1119 n.1 (9th Cir. 2000) (quoting Dakota
13 Indus., Inc. v. Dakota Sportswear, Inc., 988 F.2d 61, 63 (8th
14 Cir. 1993); citing Kirshner v. Uniden Corp. of Am., 842 F.2d
15 1074, 1077 (9th Cir. 1988)). An appellate court is "concerned
16 only with the record before the trial judge **when his decision was**
17 **made.**" Kirshner, 842 F.2d at 1077 (citation omitted) (emphasis
18 in original).

19 In the present case, it is undisputed that the bankruptcy
20 court did not consider the supplemental documents.⁸ The
21 Templetons have not presented the Panel with any extraordinary
22 circumstances that would justify our consideration of the
23 supplemental documents. Nor do they show "error or accident"
24
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26
27 ⁸ Appellees also point out that the bankruptcy court struck
28 Item 3 in the excerpts of record. We have considered this
document to the extent necessary to understand the relevant
factual background.

1 under Rule 8009.⁹ We thus decline to take judicial notice of the
2 supplemental documents.

3 **CONCLUSION**

4 For the reasons set forth above, we conclude that the
5 bankruptcy court erroneously applied the doctrine of equitable
6 tolling when it granted the summary judgment and dismissed the
7 Templetons' remaining claims as untimely under § 546(a)(1)(A)
8 because the Trustee was dilatory after discovery of the
9 fraudulent transfers. For the reasons stated in our separate
10 memorandum, we find no other error in the bankruptcy court's
11 decisions. Accordingly, we AFFIRM IN PART and VACATE IN PART the
12 bankruptcy court's order granting summary judgment; VACATE the
13 order denying reconsideration; and REMAND for further proceedings
14 consistent with this opinion and the accompanying memorandum.

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26 ⁹ Rule 8009(e) states, in relevant part: "If anything
27 material to either party is omitted from or misstated in the
28 record by error or accident, the omission or misstatement may be
corrected, and a supplemental record may be certified and
transmitted . . . by the court where the appeal is pending."