

SEP 22 2015

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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-14-1563-KuPeTa
	)		
DORON EZRA; NAVA TOMER EZRA,	)	Bk. No.	1:11-12168-MT
	)		
Debtors.	)	Adv. No.	1:12-01001-MT
_____	)		
	)		
SHOSHANA EZRA,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>OPINION</b>	
	)		
DAVID SEROR, Chapter 7	)		
Trustee,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on July 23, 2015  
at Pasadena, California

Filed - September 22, 2015

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

Honorable Maureen A. Tighe, Bankruptcy Judge, Presiding

Appearances: \_\_\_\_\_

Shalem Shem-Tov of Netzah & Shem-Tov, Inc. argued  
for appellant Shoshana Ezra; Richard D. Burstein  
of Ezra Brutzkus Gubner LLP argued for appellee  
David Seror, chapter 7 trustee.

\_\_\_\_\_

Before: KURTZ, PERRIS\* and TAYLOR, Bankruptcy Judges.

\_\_\_\_\_

\* Hon. Elizabeth L. Perris, United States Bankruptcy Judge  
for the District of Oregon, sitting by designation.

1 KURTZ, Bankruptcy Judge:  
2

3 **INTRODUCTION**

4 Shoshana Ezra appeals from the bankruptcy court's judgment  
5 avoiding as fraudulent transfers two deeds of trust the debtors  
6 Doron Ezra and Nava Tomer-Ezra executed in her favor. Shoshana<sup>1</sup>  
7 contends that at least some of the avoidance claims brought  
8 against her by the chapter 7<sup>2</sup> trustee David Seror were time  
9 barred, that there was insufficient evidence the debtors made the  
10 transfers with the intent to hinder, delay or defraud their  
11 creditors, and that there was no evidence of the debtors'  
12 insolvency.

13 We disagree with Shoshana's position on intent. As for the  
14 specific limitations defense she discusses in her opening appeal  
15 brief, it differs from the statute of repose issue she raised in  
16 the bankruptcy court. We decline to address the limitations  
17 defense on appeal because it was not sufficiently raised in the  
18 bankruptcy court for the bankruptcy court to decide it. As for  
19 her statute of repose issue, she did not raise it in her opening  
20 appeal brief; she only raised it in her appellate reply brief.  
21 This is improper, and we similarly decline to address it. On  
22 these grounds, we AFFIRM.

23  
24 \_\_\_\_\_  
25 <sup>1</sup> For the sake of clarity, we refer to the Ezras by their  
26 first names. No disrespect is intended.

27 <sup>2</sup> Unless specified otherwise, all chapter and section  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037.

1 **FACTS**

2 Doron and Nava purchased their residence in 1996. Since  
3 then, the residence has been the subject of several transactions  
4 involving various Ezra family members. On October 17, 2001,  
5 Doron quitclaimed his interest in the residence to Nava in her  
6 name alone, but a week later Nava executed a new quitclaim deed  
7 transferring title to the residence back to her and Doron as  
8 husband and wife. In January 2010, Doron once again quitclaimed  
9 his interest to Nava in her name alone. At the time of their  
10 joint bankruptcy filing in February 2011, Nava still held title  
11 to the residence in her name alone.

12 In addition to the title transfers, four deeds of trust were  
13 of record at the time of the commencement of the debtors'  
14 bankruptcy case. Of these four, the first and third deeds of  
15 trust were held by banks and were not contested by Seror in the  
16 debtors' bankruptcy case. The other two deeds of trust of record  
17 were both held by Shoshana and are described as follows:

- 18 1. A second deed of trust recorded in April 2004 in favor of  
19 Doron's mother Shoshana, as beneficiary, purportedly securing a  
20 debt in the amount of \$500,000; and
- 21 2. A fourth deed of trust recorded in June 2009 in favor of  
22 Shoshana, as beneficiary, purportedly securing a debt in the  
23 amount of \$500,000.

24 In January 2012, Seror filed his complaint seeking to avoid  
25 as fraudulent transfers the 2004 and 2009 deeds of trust in favor  
26 of Shoshana. He also sought to recover the transfers for the  
27 benefit of the estate pursuant to § 550(a). In relevant part,  
28 Seror alleged that the debtors did not receive reasonably

1 equivalent value in exchange for the 2009 deed of trust and that  
2 the debtors were insolvent at the time or that the 2009 deed of  
3 trust rendered them insolvent. Seror further alleged that, at  
4 the time both transfers were made, the debtors faced "demands  
5 and/or potential or pending litigation" and that the debtors made  
6 the transfers for the purpose of shielding from creditors any  
7 equity in their residence. Based on these and other allegations,  
8 Seror asserted that he was entitled to avoid the 2009 deed of  
9 trust as an actual and constructive fraudulent transfer either  
10 under § 548(a)(1)(A) and (B) or under § 544(b) and Cal. Civ. Code  
11 §§ 3439.04(a) and 3439.05. Seror further claimed that he was  
12 entitled to avoid the 2004 deed of trust as an actual fraudulent  
13 transfer under § 544(b) and Cal. Civ. Code § 3439.04(a).

14 Shoshana filed a summary judgment motion seeking dismissal  
15 of Seror's lawsuit. Shoshana primarily argued that Seror's  
16 claims seeking avoidance of the 2004 deed of trust under  
17 California law were time barred under the seven year statute of  
18 repose set forth in Cal. Civ. Code § 3439.09(c), which states:

19 (c) Notwithstanding any other provision of law, a cause  
20 of action with respect to a fraudulent transfer or  
21 obligation is extinguished if no action is brought or  
levy made within seven years after the transfer was  
made or the obligation was incurred.

22 Cal. Civ. Code § 3439.09(c).<sup>3</sup> According to Shoshana, because  
23 more than seven years had elapsed between the recording of the

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24  
25 <sup>3</sup> Recently, the California legislature amended the  
26 California Uniform Fraudulent Transfer Act. The amendments make  
27 relatively minor changes to the Act, and none of those changes  
28 affect our analysis in this appeal. Moreover, the amendments  
generally do not apply to transfers made before the effective  
date of the amendments. See 2015 Cal. Legis. Serv. Ch. 44 (S.B.  
161).

1 (April) 2004 deed of trust and Seror's January 2012 filing of his  
2 complaint, Seror's fraudulent transfer claims arising from the  
3 2004 deed of trust had been extinguished by operation of law.  
4 The bankruptcy court denied Shoshana's summary judgment motion,  
5 holding that the seven years provided by California's statute of  
6 repose had not been exceeded because the debtors had commenced  
7 their February 2011 bankruptcy case within seven years of the  
8 transfer.

9 Presumably because the statute of repose issue under Cal.  
10 Civ. Code § 3439.09(c) was decided as a matter of law in the  
11 summary judgment motion, Shoshana did not raise any factual or  
12 legal issues regarding this defense in the pretrial stipulation  
13 or in her trial documents. Nor did she raise during the pretrial  
14 or trial proceedings any issue related to the statute of  
15 limitations defense set forth in Cal. Civ. Code § 3439.09(a),  
16 which provides:

17 A cause of action with respect to a fraudulent transfer  
18 or obligation under this chapter is extinguished unless  
19 action is brought pursuant to subdivision (a) of  
20 Section 3439.07 or levy made as provided in subdivision  
21 (b) or (c) of Section 3439.07:

22 (a) Under paragraph (1) of subdivision (a) of Section  
23 3439.04, within four years after the transfer was made  
24 or the obligation was incurred or, if later, within one  
25 year after the transfer or obligation was or could  
26 reasonably have been discovered by the claimant.

27 Cal. Civ. Code § 3439.09(a).<sup>4</sup>

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28 <sup>4</sup> Shoshana's answer to Seror's complaint included an  
affirmative defense alleging that Seror's claims were barred  
under the "applicable statute of limitations." Nonetheless, the  
(continued...)

1 At the conclusion of trial, the bankruptcy court stated  
2 its findings of fact and conclusions of law on the record. The  
3 court found not credible Doron's testimony that his mother  
4 Shoshana and his (now) deceased father Shlomo expected repayment  
5 of amounts Doron and Nava spent on family trips to Israel and on  
6 groceries while in Israel and that the two deeds of trust secured  
7 repayment of those amounts. According to the court, Doron's  
8 testimony was both bizarre and inconsistent regarding whether  
9 these amounts were gifts or loans. The court further found that  
10 Doron's "gifts and Israel" explanation did not jibe with Doron's  
11 alternate story that his parents lent him the money for various  
12 real estate transactions. In fact, the court explained, Doron's  
13 vague and inconsistent testimony about the bank accounts he used  
14 to partially fund some of his real estate transactions led the  
15 court to conclude that all of the accounts Doron referenced  
16 effectively belonged to Doron - even those bank accounts he  
17 claimed belonged to his parents. As the bankruptcy court put it:

18 . . . he just used those accounts of his parents for  
19 his own purposes and they were effectively his accounts  
20 and was not clear that the money coming out of the  
21 accounts was even from the parents or something that he  
22 had put in earlier. There was no attempt to show the  
23 funds supplied by the parents. The statements all came  
24 to [Doron's] address, either the home or the business  
25 address.

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23 <sup>4</sup>(...continued)

24 parties' pretrial stipulation, approved by the court, did not  
25 reference this defense, and the stipulation explicitly provided  
26 that it superseded the pleadings and was to govern the course of  
27 trial. See Patterson v. Hughes Aircraft Co., 11 F.3d 948, 950  
28 (9th Cir. 1993) ("A pretrial order generally supersedes the  
pleadings, and the parties are bound by its contents.").

1 Tr. Trans. (Nov. 3, 2014) at p. 35:10-17.

2 The bankruptcy court also did not believe Doron's statements  
3 that his father Shlomo had kept ledgers and that he (Doron) lost  
4 the two promissory notes memorializing the loans supposedly  
5 secured by the two deeds of trust. As the bankruptcy court  
6 explained, Doron was an experienced businessman who had made a  
7 living engaging in sophisticated real estate transactions. In  
8 light of this background, the court found it exceptionally hard  
9 to believe (and did not believe) in the existence of the ledger  
10 and the notes given Doron's inability to produce them. The court  
11 found that Doron had not credibly reconciled his 20 years of  
12 experience as a real estate investment professional - who owned  
13 interests in and/or partially controlled a number of real estate  
14 investment entities - with his apparently nonchalant attitude  
15 with respect to the financing of one of his family's most  
16 important assets: the family residence.

17 As for the intent to hinder, delay or defraud their  
18 creditors, the court found that the debtors' intent largely was  
19 established by their pattern and practice of: (1) ensuring that  
20 assets of value were kept in the name of other family members,  
21 even though they continued to exercise control over the assets;  
22 and (2) ensuring that any current or future equity the debtors  
23 may have had in their residence was fully encumbered. The court  
24 inferred that the debtors' practice was initially motivated by  
25 Doron's concern over the litigious nature of the business he was  
26 engaged in and later by actual demands and lawsuits the debtors  
27 faced.

28 The bankruptcy court also found that the debtors received

1 less than reasonably equivalent value in exchange for both deeds  
2 of trust. The court further found, with respect to the 2009 deed  
3 of trust, that the debtors were insolvent at the time of the  
4 transaction or were rendered insolvent by the transaction, were  
5 left with insufficient assets in light of the business or  
6 transaction in which they were engaged, and intended to incur or  
7 reasonably should have believed they would incur debts beyond  
8 their ability to pay as they came due. However, the court  
9 answered each of these financial status questions in the negative  
10 with respect to the 2004 deed of trust.

11 Based on these findings, the bankruptcy court entered  
12 judgment against Shoshana avoiding the 2004 deed of trust as an  
13 actual fraudulent transfer under § 544(b) and Cal. Civ. Code  
14 § 3439.04(a)(1) and avoiding the 2009 deed of trust as both an  
15 actual and constructive fraudulent transfer under 11 U.S.C.  
16 §§ 544(b) and 548, as well as Cal. Civ. Code §§ 3439.04(a)(1),  
17 (a)(2)(A), (a)(2)(B) and 3439.05. The bankruptcy court further  
18 ordered both transfers recovered for the benefit of the estate  
19 pursuant to § 550(a). On November 26, 2014, Shoshana timely  
20 filed her notice of appeal.

#### 21 **JURISDICTION**

22 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
23 §§ 1334 and 157(b)(2)(H). We have jurisdiction under 28 U.S.C.  
24 § 158.

#### 25 **ISSUE**

26 Did the bankruptcy court correctly rule that the 2004 and  
27 2009 deeds of trust were fraudulent transfers?  
28





1 trustee to avoid any transfer of property that an unsecured  
2 creditor with an allowable claim could have avoided under  
3 applicable state law.”).

4 To decide whether a transfer is avoidable under California’s  
5 Uniform Fraudulent Transfer Act, we must interpret California  
6 law. In re Beverly, 374 B.R. at 232. We must answer any  
7 questions of law arising from the Act based on how the California  
8 Supreme Court would decide them. Id. If the California Supreme  
9 Court has not yet reached the issue in question, our job is to  
10 predict how the California Supreme Court would decide it.

11 Kekauoha-Alisa v. Ameriquest Mortg. Co. (In re Kekauoha-Alisa),  
12 674 F.3d 1083, 1087-88 (9th Cir. 2012) (citing Sec. Pac. Nat’l  
13 Bank v. Kirkland (In re Kirkland), 915 F.2d 1236, 1239 (9th Cir.  
14 1990)).

15 **B. Intent to Hinder, Delay or Defraud**

16 The Act provides in relevant part that a transfer is  
17 fraudulent as to a creditor, regardless of when the creditor’s  
18 claim arose, if the debtor made the transfer with the actual  
19 intent to hinder, delay, or defraud any creditor. Cal. Civ. Code  
20 § 3439.04(a)(1). Bankruptcy courts examining transfers under  
21 this provision must focus on the debtor’s state of mind. In re  
22 Beverly, 374 B.R. at 235. As long as the debtor had the  
23 requisite intent, a transfer will qualify as actually fraudulent  
24 even if reasonably equivalent value was provided. Id. Because  
25 § 3439.04(a)(1)’s language regarding the debtor’s state of mind  
26 is stated in the disjunctive, intent to defraud a creditor is not  
27 required. Either an intent to hinder or an intent to delay a  
28 creditor also will suffice. Id.

1 As the plaintiff, Seror had the burden of proof to establish  
2 by a preponderance of the evidence the existence of the requisite  
3 state of mind. Id. Because direct evidence regarding the  
4 debtor's fraudulent or obstructive intent rarely is available,  
5 courts typically infer the debtor's intent from the surrounding  
6 circumstances. Id. To facilitate this process, the Act  
7 enumerates eleven non-exclusive "badges of fraud" - factors the  
8 court can consider in deciding whether the requisite intent  
9 existed. Cal. Civ. Code § 3439.04(b). These factors include the  
10 following:

- 11 (1) Whether the transfer or obligation was to an  
insider.
- 12 (2) Whether the debtor retained possession or control  
of the property transferred after the transfer.
- 13 (3) Whether the transfer or obligation was disclosed or  
concealed.
- 14 (4) Whether before the transfer was made or obligation  
was incurred, the debtor had been sued or threatened  
15 with suit.
- 16 (5) Whether the transfer was of substantially all the  
debtor's assets.
- 17 (6) Whether the debtor absconded.
- 18 (7) Whether the debtor removed or concealed assets.
- 19 (8) Whether the value of the consideration received by  
the debtor was reasonably equivalent to the value of  
20 the asset transferred or the amount of the obligation  
incurred.
- 21 (9) Whether the debtor was insolvent or became  
insolvent shortly after the transfer was made or the  
obligation was incurred.
- 22 (10) Whether the transfer occurred shortly before or  
shortly after a substantial debt was incurred.
- 23 (11) Whether the debtor transferred the essential  
assets of the business to a lienholder who transferred  
the assets to an insider of the debtor.

24 Cal. Civ. Code § 3439.04(b).

25 Notwithstanding the inclusion of this list in the statute,  
26 the list does not set in concrete the factors the trier of fact  
27 can or must consider to ascertain the debtor's intent. No single  
28 factor necessarily is determinative, and no minimum or maximum

1 number of factors dictates a particular outcome. As we explained  
2 in In re Beverly, the list should not be applied formulaically.  
3 In re Beverly, 374 B.R. at 236. Instead, the trier of fact  
4 should consider all of the relevant circumstances surrounding the  
5 transfer. Id. (citing Filip v. Bucurenciu, 129 Cal.App.4th 825,  
6 834 (2005)).

7 Shoshana argues on appeal that the bankruptcy court's intent  
8 findings were clearly erroneous. With respect to the 2004 deed  
9 of trust, she states that the evidence regarding value given in  
10 exchange for the 2004 deed of trust might have been equivocal,  
11 but inadequate consideration alone cannot support a finding of  
12 actual intent to hinder, delay or defraud creditors. Shoshana  
13 also points to other "badges of fraud" factors and correctly  
14 notes that there is no evidence in the record that the debtors  
15 were insolvent in 2004 or that they were plagued by pending  
16 lawsuits at that time. In fact, while Shoshana did not mention  
17 it in her appeal brief, we further note that there was no  
18 evidence of concealment of the 2004 deed of trust, no evidence  
19 that the 2004 deed of trust transferred substantially all of the  
20 debtors' assets, and no evidence that the debtors were in the  
21 process of absconding at the time.

22 Even so, Shoshana's intent argument completely (and fatally)  
23 ignores the key findings on which the bankruptcy court based its  
24 intent determination. The bankruptcy court found that the  
25 debtors, particularly Doron, were engaged in a pattern and  
26 practice of shielding their assets from creditors. The court  
27 inferred from the entirety of the debtors' conduct that the  
28 various transfers the debtors made affecting title to and

1 encumbrances against their residence - including the 2004 deed of  
2 trust - were made for the purpose of keeping any equity in their  
3 residence as far away from their creditors as possible. The  
4 bankruptcy court acknowledged the absence of evidence of pending  
5 or imminently threatened litigation at the time of the 2004 deed  
6 of trust. The court nonetheless inferred from all of the  
7 circumstances that Doron realized at the time of the 2004 deed of  
8 trust that he was engaged in lines of business - real estate  
9 lending and real estate investment - that were inherently  
10 litigious and that this generic litigation risk constantly placed  
11 his family's assets at risk. As a result, the court concluded,  
12 this generic litigation risk motivated the debtors to execute and  
13 record the 2004 deed of trust.

14 Shoshana has not offered us any reason why we should  
15 conclude that the bankruptcy court's intent-related findings with  
16 respect to the 2004 deed of trust were illogical, implausible or  
17 without support in the record. Nor are we aware of any such  
18 reasons. Therefore, these intent-related findings were not  
19 clearly erroneous.

20 Shoshana offers even less argument in her opening brief  
21 challenging the bankruptcy court's intent-related findings  
22 pertaining to the 2009 deed of trust. Indeed, her argument is  
23 limited to a single paragraph, as follows:

24 There was likewise no evidence of bad faith as to  
25 the 2009 Deed of Trust. That deed of trust was created  
26 by the Debtor because he erroneously believed that the  
27 2004 Deed of Trust had been reconveyed. For the same  
28 reasons the 2004 Deed of Trust has no indicia of bad  
faith or fraudulent intent, the 2009 Deed of Trust,  
intended merely to replace it, likewise could not have  
been the product of any bad faith or fraudulent intent.

1 Aplt. Opn. Br. at 27 (citation omitted).

2       The bankruptcy court's intent-related findings pertaining to  
3 the 2009 deed of trust generally hinged on the same circumstances  
4 the court relied upon in finding the requisite intent with  
5 respect to the 2004 deed of trust. However, in addition to the  
6 generic litigation risk noted above, the bankruptcy court also  
7 found that, by the time of the 2009 deed of trust, the debtors'  
8 financial condition had deteriorated and the threat of litigation  
9 arising from specific claims had significantly increased, which  
10 only served to reinforce the bankruptcy court's determination  
11 that the debtors executed the 2009 deed of trust for the purpose  
12 of keeping any equity in their residence as far away from their  
13 creditors as possible. For the same reasons we conclude that the  
14 bankruptcy court's intent-related findings with respect to the  
15 2004 deed of trust were not clearly erroneous, we similarly  
16 conclude that its intent-related findings with respect to the  
17 2009 deed of trust were not clearly erroneous.

18 **C. Limitations Defense Under Cal. Civ. Code § 3439.09(a) - Does**  
19 **the One Year Limitation Run from Discovery of the Transfer**  
20 **or Discovery of the Fraud?**

21       The only other challenge of Shoshana's that we need to  
22 discuss concerns the timeliness of Seror's claim under § 544(b)  
23 and Cal. Civ. Code § 3439.04(a)(1) with respect to the 2004 deed  
24 of trust. In her opening appeal brief, Shoshana argues for the  
25 first time that this claim of Seror's was untimely under Cal.  
26 Civ. Code § 3439.09(a).

27       Neither in her summary judgment motion nor at trial did  
28 Shoshana defend against Seror's claim based on Cal. Civ. Code  
§ 3439.09(a). Nor did the parties' pretrial stipulation identify

1 any issue of law or fact that required the bankruptcy court to  
2 address the statute of limitations set forth in Cal. Civ. Code  
3 § 3439.09(a).

4 Ordinarily, federal appellate courts will not consider  
5 issues not properly raised in the trial courts. O'Rourke v.  
6 Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957  
7 (9th Cir. 1989); see also Moldo v. Matsco, Inc. (In re Cybernetic  
8 Servs., Inc.), 252 F.3d 1039, 1045 n.3 (9th Cir. 2001)(stating  
9 that appellate court would not explore ramifications of argument  
10 because it was not raised in the bankruptcy court); Scovis v.  
11 Henrichsen (In re Scovis), 249 F.3d 975, 984 (9th Cir. 2001)  
12 (stating that court would not consider issue raised for first  
13 time on appeal absent exceptional circumstances). An issue only  
14 is "properly raised" if it is raised sufficiently to permit the  
15 trial court to rule upon it. In re E.R. Fegert, Inc., 887 F.2d  
16 at 957.

17 Notwithstanding this general rule, "[a] reviewing court may  
18 consider an issue raised for the first time on appeal if  
19 (1) there are exceptional circumstances why the issue was not  
20 raised in the trial court, (2) the new issue arises while the  
21 appeal is pending because of a change in the law, or (3) the  
22 issue presented is purely one of law and the opposing party will  
23 suffer no prejudice as a result of the failure to raise the issue  
24 in the trial court." Franchise Tax Bd. v. Roberts (In re  
25 Roberts), 175 B.R. 339, 345 (9th Cir. BAP 1994) (internal  
26 quotations omitted) (citing United States v. Carlson, 900 F.2d  
27 1346, 1349 (9th Cir. 1990)).

28 Shoshana has not identified any exceptional circumstances

1 that prevented her from raising the statute of limitations issue  
2 under Cal. Civ. Code § 3439.09(a) in the bankruptcy court. Nor  
3 did a change in law spawn the issue. Nor is the issue "purely"  
4 one of law. The statute of limitations issue raises the  
5 subsidiary question of when the fraudulent transfer "could  
6 reasonably have been discovered." Cal. Civ. Code § 3439.09(a).  
7 According to Shoshana, as a matter of law, because the 2004 deed  
8 of trust was recorded in 2004, any and all creditors of the  
9 debtors reasonably should have discovered **the transfer** within one  
10 year of the 2004 recordation. But we do not read the discovery  
11 provision contained in Cal. Civ. Code § 3439.09(a) as literally  
12 as Shoshana does. We believe that the one-year period under Cal.  
13 Civ. Code § 3439.09(a)'s discovery rule does not commence until  
14 the plaintiff has reason to discover **the fraudulent nature of the**  
15 **transfer**.

16 The California Supreme Court has not yet construed the  
17 discovery provision as set forth in Cal. Civ. Code § 3439.09(a).  
18 Nor have we found any published decisions from the California  
19 Courts of Appeal on this issue.<sup>5</sup> Consequently, as noted above,  
20 we must predict how the California Supreme Court will decide this  
21 issue. In interpreting California's version of the Uniform  
22

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23 <sup>5</sup> We are aware of one unpublished California Court of  
24 Appeal decision, Hu v. Wang, 2009 WL 1919367, at \*6 (Cal. Ct.  
25 App. July 6, 2009), which held in part that Cal. Civ. Code  
26 § 3439.09(a)'s discovery rule means and refers to discovery of  
27 the fraudulent nature of the transfer and not just discovery of  
28 the transfer itself. In predicting the California Supreme  
Court's interpretation of Cal. Civ. Code § 3439.09(a), we do not  
rely upon Hu because it is an unpublished decision, and it may  
not be cited by California state courts. See Cal. Rules of Court  
Rule 8.1115.



1 Fraudulent Transfer Act, the California Supreme Court has said  
2 that courts should primarily focus on the statutory text Mejia  
3 v. Reed, 31 Cal. 4th 657, 663 (2003). As Mejia explained, giving  
4 the text its usual, ordinary and contextual meaning is the first  
5 and most important part of the statutory construction process.

6 Id. As Mejia put it:

7 Because the statutory language is generally the most  
8 reliable indicator of legislative intent, we first  
9 examine the words themselves, giving them their usual  
10 and ordinary meaning and construing them in context.  
11 Every statute should be construed with reference to the  
12 whole system of law of which it is a part, so that all  
13 may be harmonized and have effect.

14 Id. (citations and internal quotation marks omitted). Mejia  
15 further indicated that, when the contextual meaning of the  
16 statutory text is sufficient to answer the statutory construction  
17 question presented, it generally is unnecessary to consider  
18 secondary statutory construction aids like maxims of  
19 construction, legislative history and public policy. Id.

20 Even though the California courts have not addressed the  
21 question of the meaning of the discovery provision set forth in  
22 Cal. Civ. Code § 3439.09(a), we are not working in a vacuum. A  
23 number of courts from other jurisdictions have construed the same  
24 language in their versions of the Uniform Fraudulent Transfer  
25 Act. See Field v. Estate of Kepoikai (In re Maui Indus. Loan &  
26 Fin. Co.), 454 B.R. 133, 137 (Bankr. D. Haw. 2011) (listing  
27 cases). Some of these courts have strictly construed the  
28 statutory text and have held that the literal language of the  
Act's discovery provision requires courts to focus solely on  
discovery of the transfer itself. See id. (listing cases).  
Other courts have more liberally construed the text and have held

1 that a contextual reading of the statute requires courts to focus  
2 on discovery of the fraudulent nature of the transfer; mere  
3 discovery of the transfer itself is not enough. See, e.g.,  
4 Schmidt v. HSC, Inc., 319 P.3d 416, 426-27 (Haw. Ct. 2014);  
5 Freitag v. McGhie, 947 P.2d 1186, 1189-90 (Wash. Ct. 1997).

6 We find the reasoning of the Schmidt-Freitag line of cases  
7 compelling. As explained in detail in Schmidt, a contextual  
8 reading of the statute as well as common sense and the purpose of  
9 the Uniform Fraudulent Transfer Act - to provide relief to  
10 victims of fraudulent transfers - all militate in favor of a  
11 liberal construction of the discovery rule. Schmidt, 319 P.3d at  
12 426-27 (citing Freitag, 47 P.2d at 1189-90).

13 With the exception of different statute numbering, the  
14 Hawaii discovery provision at issue in Schmidt and the Washington  
15 discovery provision at issue in Freitag are identical to  
16 California's discovery provision as set forth in Cal. Civ. Code  
17 § 3439.09(a). Nor do we perceive any material difference in  
18 underlying purpose between California's version of the Uniform  
19 Fraudulent Transfer Act and the versions of the Act codified in  
20 Washington and Hawaii. Compare Schmidt, 319 P.3d at 426 ("the  
21 obvious purpose of the UFTA is to prevent fraud and to provide a  
22 remedy to those who are victims of fraudulent transfers") with  
23 Mejia v. Reed, 31 Cal. 4th 657, 664 (2003) ("This Act, like its  
24 predecessor and the Statute of 13 Elizabeth, declares rights and  
25 provides remedies for unsecured creditors against transfers that  
26 impede them in the collection of their claims.") (quoting Legis.  
27 Comm. Cmt. accompanying Cal. Civ. Code § 3439.01).

28 Furthermore, adoption of the liberal interpretation of Cal.

1 Civ. Code § 3439.09(a) would be consistent with California case  
2 law before the enactment of the Uniform Fraudulent Transfer Act,  
3 which applied the generic fraud discovery rule contained in Cal.  
4 Code Civ. Proc. § 338(4) - now § 338(d) - to pre-Act fraudulent  
5 transfer actions. See Adams v. Bell, 5 Cal.2d 697, 703 (1936)  
6 (citing Cal. Code Civ. Proc. § 338(4) and stating "if the  
7 creditor knows nothing about the fraudulent conveyance, the cause  
8 (in the absence of laches) does not arise **until he discovers the**  
9 **fraud** by which his rights have been invaded.") (emphasis added).

10 Based on the persuasiveness of cases like Schmidt and  
11 Freitag, supra, we predict that the California Supreme Court  
12 ultimately will hold that the one-year period under Cal. Civ.  
13 Code § 3439.09(a)'s discovery rule does not commence until the  
14 plaintiff has reason to discover the fraudulent nature of the  
15 transfer. Thus, any question regarding discovery of the  
16 fraudulent nature of the 2004 deed of trust is a factual  
17 question, and so the exception permitting consideration of  
18 "purely" legal issues raised for the first time on appeal does  
19 not apply here. Accordingly, we decline to resolve Shoshana's  
20 Cal. Civ. Code § 3439.09(a) issue for the first time on appeal.

21 **D. Limitations Defense Under Cal. Civ. Code § 3439.09(c) -**  
22 **Statute of Repose**

23 We acknowledge that Shoshana did argue in the bankruptcy  
24 court, in her summary judgment motion, that the statute of repose  
25 set forth in Cal. Civ. Code § 3439.09(c) barred Seror from  
26 pursuing this claim. However, the statute of repose issue under  
27 Cal. Civ. Code § 3439.09(c) and the statute of limitations issue  
28 under Cal. Civ. Code § 3439.09(a) are factually and legally

1 distinct issues. See Rund v. Bank of Am. Corp. (In re EPD Inv.  
2 Co., LLC), 523 B.R. 680, 685-88 (9th Cir. BAP 2015).

3 Shoshana did not discuss her argument under Cal. Civ. Code  
4 § 3439.09(c) in her opening appeal brief. Instead, she waited  
5 until her reply brief to address the Cal. Civ. Code § 3439.09(c)  
6 statute of repose issue. This would be sufficient grounds for us  
7 to decline to consider the statute of repose issue. See  
8 Christian Legal Soc’y v. Wu, 626 F.3d 483, 487-88 (9th Cir.  
9 2010); Brownfield v. City of Yakima, 612 F.3d 1140, 1149 n.4 (9th  
10 Cir. 2010).

11 In any event, even if we were to consider this issue, this  
12 panel recently held that Cal. Civ. Code § 3439.09(c)’s seven-year  
13 statute of repose does not bar a claim under § 544(b) and Cal.  
14 Civ. Code § 3439.04 so long as the claim arose less than seven  
15 years before the debtor’s bankruptcy filing. In re EPD Inv. Co.,  
16 LLC, 523 B.R. at 691-92. Here, the debtor’s February 2011  
17 bankruptcy case was filed within seven years of the April 2004  
18 deed of trust, so Cal. Civ. Code § 3439.09(c)’s statute of repose  
19 did not bar Seror’s Cal. Civ. Code § 3439.04 claim with respect  
20 to the 2004 deed of trust.

21 **CONCLUSION**

22 For the reasons set forth above, we AFFIRM the bankruptcy  
23 court’s judgment avoiding the 2004 deed of trust and the 2009  
24 deed of trust and recovering those transfers for the benefit of  
25 the estate.