UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Fredrick E. Clement
Bankruptcy Judge

2500 Tulare Street
Department A, Courtroom 11
Fresno, California

WEDNESDAY

JUNE 17, 2015

2:00 P.M. CHAPTER 11 ADVERSARY PROCEEDINGS

PRE-HEARING DISPOSITIONS

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

MATTERS RESOLVED BEFORE HEARING

If the court has issued a final ruling on a matter and the parties directly affected by a matter have resolved the matter by stipulation or withdrawal of the motion before the hearing, then the moving party shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter to be dropped from calendar notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860.

ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 52(b), 59(e) or 60, as incorporated by Federal Rules of Bankruptcy Procedure, 7052, 9023 and 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

1. 10-12709-A-11 ENNIS COMMERCIAL PROPERTIES, LLC
15-1010 ENNIS COMMERCIAL PROPERTIES, LLC ET AL V. HERITAGE OAKS
MICHAEL GOMEZ/Atty. for pl.

CONTINUED STATUS CONFERENCE RE: COMPLAINT
1-23-15 [1]

No tentative ruling.

2. 10-12709-A-11 ENNIS COMMERCIAL PROPERTIES, LLC KYL-1
15-1010 ENNIS COMMERCIAL PROPERTIES, LLC ET AL V. HERITAGE OAKS
STACEY GARRETT/Atty. for mv.
RESPONSIVE PLEADING

CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
3-25-15 [12]

Tentative Ruling

Motion: Dismiss Under Rule 12(b)(6)
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied, Heritage Oaks Bancorp to file responsive pleading not later than 14 days after service of the civil minute order
Order: Civil minute order

Plaintiff Ennis Commercial Properties, LLC ("Plaintiffs" or "Ennis Commercial Properties" or "ECP") and Chapter 11 Plan Administrator David Stapleton brought an action against Heritage Oaks Bancorp ("Defendant" or "Heritage Oaks") for declaratory relief as to plaintiff's right to proceed as the representative of the estate under 11 U.S.C. § 1123(b)(3)(B), and for relief avoiding fraudulent transfers. According to Plaintiff, three distinct acts form the basis of the fraudulent transfer action (1) Plaintiff's guaranty of Ennis Land Development's debts, e.g., TriCounties Bank Note #2 and TriCounties Bank Note #3, on or about June 12, 2008; (2) Ennis Commercial Properties' execution and recordation of a First Deed of Trust encumbering 634 N. Westwood, Porterville, California ("real property"), in favor of TriCounties Bank, on or about June 18, 2008; and (3) Ennis Commercial Properties' execution and recordation of a Second Deed of Trust encumbering the real property, in favor of Visalia Community Bank, on or about August 27, 2008.

Defendant Heritage Oaks moves under Rule 12(b)(6) to dismiss the adversary proceeding filed by Ennis Commercial Properties and Stapleton. Ennis Commercial Properties and Stapleton are the assignees of the rights, if any, of Rabobank, N.A. and Citizens Business Bank and have filed an adversary proceeding alleging state statutory and common law fraudulent transfer claims. Heritage Oaks prays dismissal, arguing the action is barred by (1) the inability of the bankruptcy court to enter final orders and judgments, *Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency)*, 702 F.3d 553, 558 (9th Cir. 2012); (2) mootness; (3) lack of controversy; (4) statute of limitations; (5) failure to state a cause of action under transferee liability; (6) lack of standing; (7) insufficiency of pleadings as to reasonably equivalent value; (8) failure to state a cause of action for damages; and (9) inability to recover attorney's fees. The motion will be denied.

LEGAL STANDARDS

Rule 12(b)(6) motions

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121–22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curium) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

DISCUSSION

Constitutional Power to Adjudicate Finally This Action

Heritage Oaks prays dismissal of Stapleton's complaint against it, citing the bankruptcy court's inability to enter a final judgment against it in a fraudulent transfer action. Heritage Oaks argues that the withdrawal of its Claim No. 3 renders it a nonclaimant having the status of a party who never filed a claim. From such withdrawal of its proof of claim, Heritage Oaks suggests an inference that this action is not integrally related to the claims-allowance process and that the claims in this action are therefore properly characterized as *Stern* claims (statutorily core but constitutionally non-core) that the bankruptcy court lacks power to adjudicate finally.

To be sure, fraudulent transfer actions against a nonclaimant are constitutionally non-core matters that the bankruptcy court may not finally adjudicate. *See Executive Benefits Ins. Agency v. Arkison (In re Bellingham Ins.)*, 702 F.3d 553 (9th Cir. 2012), *aff'd on other grounds*, 134 S. Ct. 2165 (2014). And whether the defendant to an avoidance action brought during the bankruptcy case has filed a proof of claim can affect the question whether the resolution of the avoidance action is integral to the claims-allowance process and thus

whether it is an action in which the bankruptcy court may enter final judgment. *See id.* at 563-64.

But the court need not decide at this time whether Heritage Oaks is appropriately classified as a nonclaimant based on the withdrawal of its proof of claim. Even if Heritage Oaks is a nonclaimant and the claims in this adversary proceeding are *Stern* claims, it does not follow that the bankruptcy court must dismiss the adversary proceeding. Rather, the appropriate procedure in such instances--at least where a final order or judgment will be entered in an action related to the bankruptcy case--is for the bankruptcy court to issue proposed findings of fact and conclusions of law to the district court for de novo review. *Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency)*, 134 S. Ct. 2165 (2014); *see also* 28 U.S.C. § 157(c)(1). As a result, a constitutional prohibition on entry of final judgment in this action does not serve as a basis for dismissal of the action. Fed. R. Civ. P. 12(b)(1) and(6), *incorporated by* Fed. R. Bankr. P. 7012.

Mootness

Heritage Oaks argues that the fraudulent transfer claim arising from Ennis Commercial Properties' guaranty is moot because either (1) the guaranty was discharged upon plan confirmation; or (2) it withdrew its claim.

The court disagrees. Initially, as a matter of procedure, a Rule 12(b)(6) motion will not lie to challenge only specific allegations, rather than the entire claim. *Thompson v. Paul*, 657 F.Supp.2d 1113, 1119 (D. Az. 2009) (treating 12(b)(6) motion as 12(f) motion). Here, the complaint asserts three separate factual basis of the fraudulent transfer claims: (1) Ennis Commercial Properties' Guaranty of Ennis Land Development's debt (TCB Note # 2 and TCB #3 associated with Bakersfield subdivision) to TriCounties Bank; (2) First Ennis Commercial Properties' Deed of Trust (securing TCB Note #2 and TCB Note #3 associated with Bakersfield subdivision) to TriCounties Bank; and (3) Second Ennis Commercial Properties' Deed of Trust securing Ennis Family Investments to Visalia Community Bank. Complaint ¶¶ 22, 23 & 28, filed January 23, 2015, ECF #1. Because a finding for the movant solely on the guaranty question would not resolve the fraudulent transfer claims as to the execution of the First and Second Deeds of Trust, the motion is more properly styled as a motion to strike under Rule 12(f).

The guaranty and the deeds of trust, moreover, are related to one another and are both integral to the claim to recover a fraudulent transfer that occurred in the past. Any present unenforceability of the guaranty (given the withdrawal of the proof of claim) would not negate the factual grounds of a past fraudulent transfer based on that guaranty and on security for the guaranty that was later realized through foreclosure.

Rule 12(f) authorizes the court to strike from a pleading "an insufficient defense" or "any redundant, immaterial, impertinent, or scandalous matter." "Immaterial matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc. v. Fogerty,* 984 F.2d 1524, 1527 (9th Cir.1993), *reversed on other grounds*, 1130 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994) (quoting 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1382 at 706–07 (1990)). "'Impertinent' matter consists of statements that do not pertain, and

are not necessary to the issues in question." *Id.,* quoted in *Thompson*, 657 F.Supp.2d at 1129-30.

That is not the case here. First, the guaranty described in paragraph 22 of the complaint explains Ennis Commercial Properties' actions in executing and delivering the "First ECP Deed of Trust." Complaint at ¶ 23. This is consistent with Rule 8, which requires a "short and plain statement of the claim." Second, the court is not yet convinced that the guaranty itself may not independently form the basis for relief under state statutory law or common law of fraudulent transfers. Heritage Oaks bears the burden of proof on the issue of mootness. *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979).

The movant assumes that this debt was discharged when the plan in this case was confirmed and cites § 1141(d)(1)(A)(i). But the court cannot say that a discharge has, or will, occur. The subsection cited by the movant beings with the words "[e]xcept as otherwise provided in this subsection." *See* 11 U.S.C. § 1141(d)(1); *compare* 11 U.S.C. § 1141(d)(3)(denying discharge for liquidating Chapter 11 debtors), *with* Order Confirming Chapter 11 Plan V(D),(F), filed June 25, 2013, ECF #961 (providing for the liquidation of the debtor's assets). The court is unable to say whether the debtor has engaged "in business after consummation of the plan" but does not believe it has or will do so. In any event, the question whether the debtor has engaged in business after consummation of the plan is a factual issue raised by the movant that is not appropriate for resolution on a motion to dismiss. But more to the point, the withdrawal of the Proof of Claim, even with prejudice, invokes the voluntary cessation of conduct rules applicable to mootness. For the question to be moot in such instances it must be "absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 221 (2000); *see also, Already, LLC v. Nike, Inc.*, -- U.S.--, 133 S.Ct. 721, 727-39 (2013). Like the plaintiff, the court believes a claim under Federal Rule of Bankruptcy Procedure 3002(c)(3) could conceivably lie. As a result, the court does not find that the movant has sustained it burden of proof to show dismissal of the claims are warranted based on mootness.

Lack of Controversy

Heritage Oaks argues that there is no case or controversy as to the cause of action for declaratory relief, i.e., David Stapleton's right to act as the estate representative under 11 U.S.C. § 1123(b)(3)(B), because the complaint fails on other grounds. As set forth below, the court disagrees that the complaint fails on other grounds, so this argument fails.

Statute of Limitations

Time Limitations Applicable to State Law Fraudulent Transfers

California recognizes statutory and common law causes of action for fraudulent transfers. Cal. Civ. Code § 3439.01; Cal. Civ. Code 3439.10; *Fidelity Nat'l Title Ins. Co. v. Schroeder*, 179 Cal. App. 4th 834, 849 (2009). Whether created by statute or arising from common law, each such cause of action is subject to two different time limitations: (1) the statute of limitations, i.e., Cal. Civ. Code § 3439.09(a) (4 years or 1 year after discovery of transfer or obligation if later), § 3439.09(b) (4 years), Cal. Civ. Proc. Code § 338(d) (3 years); and (2) a statute of repose, *see* Cal. Civ. Code § 3439.09(c) (7 years); *Macedo v. Bosio Revocable Trust*, 86 Cal. App.

4th 1044, 1051 (2001); *In re JMC Telecom LLC*, 416 B.R. 738, 743 (Bankr. C.D. Cal. 2009) (statute of repose applies to common law fraudulent transfer claims).

Statutes of limitations may be tolled, and thus extended; statutes of repose are not tolled, and thus serve as maximum periods of time in which an action may be commenced. *Id.* Moreover, in appropriate circumstances, the time within which an action must be brought may be further shortened under the doctrine of laches to periods otherwise within the applicable statutes of limitations and repose. Cal. Civ. Code § 3939.10.

Statute of Repose

Defendant has not argued that the action is barred by the statute of repose, nor could it do so. The transfers were made in June and August 2008, and the present adversary proceeding was filed January 23, 2015, about six and one-half years after such transfers. Since the statute of repose is operative only after seven years, the statute of repose is inapplicable. Rather, this dispute focuses on the applicable statutes of limitations.

Statutes of Limitations

Actions under Civil Code §§ 3439.04(a)(2), 3439.05

California Civ. Code § 3439.09(b) sets a four-year statute of limitations for constructive fraudulent transfers under California's version of the Uniform Fraudulent Transfer Act. It provides: "A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought . . . (b) Under paragraph (2) of subdivision (a) of Section 3439.04 or Section 3439.05, within four years after the transfer was made or the obligation was incurred." Cal. Civ. Code § 3439.09(b); *see also Monastra v. Konica Bus. Machines, U.S.A., Inc.*, 43 Cal. App. 4th 1628, 1645 (1996).

For the Guaranty, the statute of limitations began to run on the date it was given, which was June 12, 2008. For the deeds of trust, the statute of limitations began to run, on the recordation dates. *See* Cal. Civ. Code § 3439.06(a)(1). As pled, the recordation dates were June 18, 2008, for the First ECP Deed of Trust and August 27, 2008 for the Second ECP Deed of Trust. Compl. ¶ 22, filed January 23, 2015, ECF #1. As a result, absent tolling, the statute of limitations expired June 18, 2012 for the First ECP Deed of trust, August 27, 2012 for the Second ECP Deed of Trust, and June 12, 2012 for the Guaranty.

But on March 16, 2010, prior to the expiration of the statute of limitations, Ennis Commercial Properties filed its petition under Chapter 11. And by doing so, it tolled the running of the statute of limitations on the statutory constructive fraudulent transfer cause of actions. That tolling is expressed in both federal and state law. 11 U.S.C. § 108(c) provides, "Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of--(1) the end of such period, including

any suspension of such period occurring on or after the commencement of the case; or (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim." California law provides, "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." Cal. Civ. Proc. Code § 356. California state courts have long understood this to apply to the stay imposed by 11 U.S.C. § 362(a). *See Hoff v. Funkenstein*, 54 Cal. 233 (1880); *Union Collection Co. v. Soule*, 141 Cal. 99, 100 (1903); *Schumacher v. Worcester*, 55 Cal. App. 4th 376, 379-80 (1997).

Cal. Civ. Proc. Code § 356 applies independently to the facts of this case, but it also works together with § 108(c) of the Bankruptcy Code. Paragraph (1) of § 108(c) includes within any applicable statute of limitations period "any suspension of such period occurring on or after the commencement of the case." *See* 11 U.S.C. § 108(c)(1). Section 356 of the California Code of Civil Procedure suspends any statutory limitations period for commencing an action during any period in which an injunction or statutory prohibition stays the commencement of an action. *See* Cal. Civ. Proc. Code § 356. California law recognizes that the automatic stay is a statutory prohibition within the meaning of § 356 of the California Code of Civil Procedure. *See Schumacher v. Worcester*, 55 Cal. App. 4th 376, 380 (1997). Because section 356 of the California Code of Civil Procedure suspends the applicable state statutes of limitations period in this case during the time the automatic stay was in effect, and because the bankruptcy petition was filed well before the statute of limitations period expired, the period described in § 108(c)(1) is the later of the two periods described in § 108(c). *See* 11 U.S.C. § 108(c)(1)–(2). Assuming notice of termination of the automatic stay was given with respect to the claims assigned to Plaintiffs on the same date that the automatic stay was terminated, 30 days after such date, *see* 11 U.S.C. § 108(c)(2), is not later than the date when the four-year statute of limitations under Cal. Civ. Code § 3439.09(b) expired when accounting for the tolling effected by federal and state law.

Here, Rabobank and Citizens Business Bank, the then-holders of these claims, were impeded by the automatic stay from prosecution of an action to avoid a fraudulent transfer of Guaranty and the two ECP Deeds of Trust from the petition date on March 16, 2010, to the Effective Date of the Plan on July 10, 2013. *See* Order Confirming Plan IB (effective date), VC (vesting of property); see Compl. ¶¶ 35-37, filed January 23, 2015, ECF # 1; see also, 11 U.S.C. § 362(c)(1)(stay terminates as to property of the estate when that property is no longer property of the estate). This impediment lasted 1,212 days or approximately 3 years, 3 months and 27 days. Extending the four-year statute of limitations by 1212 days (or approximately 3 years, 3 months and 27 days) would extend the date to file such an action to the following dates: (i) for the Guaranty, October 7, 2015; (ii) for the First ECP Deed of Trust, October 13, 2015; (iii) for the Second ECP Deed of Trust, December 22, 2015. This adversary was filed on January 23, 2015, well within the four-year statute of limitations under Cal. Civ. Code section 3439.09(b) including tolling.

While a defendant might argue that the stay did not trigger the tolling provisions of § 108(c) or § 356 because filing the bankruptcy merely changed the identity of the party entitled to bring the fraudulent transfer action, such an argument would not be well taken.

The rights of a trustee under the Bankruptcy Code to avoid a transfer under § 544(b) based on state fraudulent transfer law should not be conflated with the rights of a creditor to avoid a transfer based on fraudulent transfer law. "A trustee or debtor in possession's right to bring a state-law fraudulent transfer action under § 544(b) is a creation of the Bankruptcy Code; it is not an action to assert an independent state law created right." *Rund v. Bank of Am. Corp*. (In re EPD Inv. Co., LLC), 523 B.R. 680, 685 (B.A.P. 9th Cir. 2015). Furthermore, if a state-law fraudulent transfer claim is still viable on the petition date, state statutes of limitations cease to have any effect and the statute of limitations for bringing a federal claim under § 544(b) based on state law is the federal statute of limitations provided in § 546(a). *Id.* at 686.

As a consequence, the petition in the underlying bankruptcy case did not merely transfer to the debtor in possession the right to bring a state-law fraudulent transfer action from creditors to the debtor in possession. Instead, it gave the debtor in possession a distinct federal right to bring a § 544(b) claim for fraudulent transfer that incorporates state fraudulent transfer laws.

At different points in time, moreover, two distinct parties have the right to pursue relief that is based on state fraudulent transfer law: (1) the trustee or the debtor in possession exercising the rights and powers of a trustee, 11 U.S.C. §§ 544(b) and 1107(a), Cal. Civ. Code § 3439.07; and (2) injured creditors, most notably Rabobank, N.A. and Citizens Business Bank in this case, Cal. Civ. Code § 3439.07. During the bankruptcy and until the property is abandoned by the estate, the debtor in possession/trustee has exclusive standing to pursue the action and that standing precludes other creditors from exercising their right to do so. *Estate of Spirtos v. One San Bernardino Cnty. Superior Court Case No. SPR 02211*, 443 F.3d 1172, 1175-76 & n.3 (2006) (debtor's ex-wife did not have standing to pursue RICO actions belonging to the estate). And though the trustee may authorize others to bring suit on his or her behalf, the decision to do so belongs to trustee. *Avalanche Mar., Ltd. v. Parkekh (In re Parmetex, Inc.)*, 199 F.3d 1029, 1031 (9th Cir. 1999) But such an authorization by the trustee permits the creditors to bring the federal avoidance actions *on the trustee's behalf*. *See id.* (holding that creditors had standing to bring avoidance actions "where the trustee stipulated that the Creditors could sue on his behalf and the bankruptcy court approved that stipulation."). Once the trustee fails to avail the estate of the applicable federal avoidance power, that right evaporates, *Trimble v. Woodhead*, 102 U.S. (12 Otto) 647, 649-50 (1880), and by extension, reinstates the creditors' right to do so under applicable state law. *See Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc.*, 29 Cal.App.4th 1828, 1844-45 (1994)(apparently applying California fraudulent transfer law).

Common Law Fraudulent Transfers

California common law fraudulent transfers are subject to a three year statute of limitations. "Within three years…(d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." Cal. Civ. Proc. Code § 338(d).

Defendant reasons that Plaintiffs, and their assignors, were on notice in June 2008, and again in August 2008, when the First ECP Deed of Trust and the Second ECP Deed of Trust were recorded. And that under

either scenario the 3-year statute of limitations expired prior to the filing of the adversary proceeding on January 23, 2015.

Defendant's argument does not fully account for the fact that neither the recordation of the deed of trust, nor the motion for stay relief clearly and unequivocally put Plaintiffs' assignors on notice of both the injury and the cause, i.e., the existence of a constructively fraudulent transfer. This court is mindful of the teaching of *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206-07 (1995), which states: "Because the applicability of the equitable tolling doctrine often depends on matters outside the pleadings, it "is not generally amenable to resolution on a Rule 12(b)(6) motion." *Cervantes v. City of San Diego*, 5 F.3d 1273, 1276 (9th Cir.1993). A motion to dismiss based on the running of the statute of limitations period may be granted only "if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir.1980). In fact, a complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim. *Id.* (citing *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957)). For this reason, we have reversed dismissals where the applicability of the equitable tolling doctrine depended upon factual questions not clearly resolved in the pleadings. *See Cervantes*, 5 F.3d at 1277; *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1199 (9th Cir.1988); *Donoghue v. Orange Cnty.*, 848 F.2d 926, 931 (9th Cir.1987)." Plaintiffs' assignors' discovery from these events of the alleged facts constituting the fraud is not so beyond doubt that the court will dismiss the adversary under Rule 12(b)(6). What creditors knew or reasonably should have known are questions of fact and, absent the most unequivocal of facts, should be resolved at trial.

If the court used the earliest dates suggested by Defendant for the commencement of the statute of limitations (the date of the Guaranty's execution on June 12, 2008, the date of recordation of the deeds of trust on June 18, 2008, and August 27, 2008), Ennis Commercial Properties' bankruptcy on March 16, 2010, tolled the statute of limitations until late 2014. See 11 U.S.C. § 108(c); Cal. Civ. Proc. Code § 356. Rabobank and Citizens Business Bank, the holders of these fraudulent-transfer claims at the time, were impeded from prosecution of an action against Defendant from the petition date on March 16, 2010, to the Effective Date of the Plan on July 10, 2013. See Order Confirming Plan IB (effective date), VC (vesting of property); see Compl. ¶¶ 34, 35, filed Jan. 23, 2015, ECF # 1; see also, 11 U.S.C. § 362(c)(1)(stay terminates as to property of the estate when that property is no longer property of the estate). The impediment lasted 1,212 days or approximately 3 years, 3 months and 27 days. Extending the statute by 1212 days (or approximately 3 years, 3 months and 27 days) would extend the date to file such an action to the following dates: (i) October 6, 2014 for the Guaranty; (ii) October 12, 2014 for the First ECP Deed of Trust; and (iii) December 21, 2014 for the Second ECP Deed of Trust. And since the complaint was filed January 2015, the timeliness of the common law fraudulent transfer claim could be a factual issue for resolution later in the proceedings.

But the statute does not commence running until judgment (which has not occurred in this case) or later, where the fraud is belatedly discovered, *Cortez v. Vogt*, 52 Cal. App. 4th 917, 932-33 (1997); *Estate of Myers*, 139 Cal. App. 4th 434, 440 (2006); Adams v. Bell, 5 Cal.2d 697, 703 (1936). No judgment has been obtained. And when discovery occurred is a factual question to be resolved at summary

judgment or trial. As a result, the court cannot infer from the pleadings that the application of the statute of limitations as a bar to this action is sufficiently clear to dismiss this claim.

11 U.S.C. § 546

Heritage Oaks asserts the two year statute of limitations described in 11 U.S.C. § 546, which limits the time the trustee has to assert actions under 11 U.S.C. §§ 544, 545, 547, 548 or 553. It reliance on this provision is misplaced. Plaintiffs are not asserting rights under § 544(b), a statute providing an independent federal right that incorporates state law. Rather, they are asserting rights based on state laws entirely distinct from § 544(b) and as the assignee of two of Ennis Commercial Properties' creditors. And those entities are not bound by the time limitations of § 546. Rather the time limitations applicable to those rights are specified by state, not federal, law.

Heritage Oaks argues in its Reply that the automatic stay expired prior to the effective date of the plan in this case. It bases its argument on *In re Tribune Co. Fraudulent Conveyance Litig.*, 499 B.R. 310, 321 (S.D.N.Y. 2013). From this premise, Heritage Oaks concludes that any tolling caused by the bankruptcy petition ceased after the two-year limitations period of § 546 expired and the trustee had not brought the fraudulent transfer claims as the estate representative. The court is unpersuaded by this argument as it assumes that once a creditor regains standing to bring a state-law fraudulent transfer action, the automatic stay automatically expires. No provision of § 362 is offered in support of this assumption. In any event, the court will not decide this issue at this time. These new arguments based on § 546 appear to be raised only in Heritage Oaks' Reply, the court will not consider them. Arguments raised for the first time in a reply brief need not be considered by the trial court. *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (citing *Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003)).

Transferee Liability

Heritage Oaks contends that Plaintiffs have failed to allege that Heritage Oaks is a transferee subject to liability under the UFTA. Mem. P. & A. Supp. Def.'s Mot. Dismiss Pl.'s Compl. At 12-13. The complaint alleges that Heritage Oaks is the assignee of TriCounties Bank and of Visalia Community Bank. Compl. ¶¶ 30, 36, 38. It also alleges that Heritage Oaks' predecessors in interest received fraudulent transfers. Complaint ¶¶ 22, 23 & 28.

Rule 8(a) provides, "A pleading that states a claim for relief must contain:(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief." Fed. R. Civ. P. 8, incorporated by Fed. R. Bankr. P. 7008.

Plaintiffs have pleaded allegations regarding an assignment from Central Valley Community Bank (successor to Visalia Community Bank) to Heritage Oaks of the "Loan Documents," Compl. ¶ 38. From this allegation, Plaintiffs would be able to prove a conceivable set of facts showing that Heritage Oaks has assumed liability as a transferee of a fraudulent transfer. However, the allegations lack detail and clarity about how Heritage Oaks is a transferee subject to liability

for the value of the assets alleged to have been fraudulently transferred. *See* Cal. Civ. Proc. Code § 3439.08(b). Plaintiffs will have the burden to prove that Heritage Oaks is a transferee subject to liability for the value of the asset transferred. Presumably, Plaintiffs would need to show that Heritage Oaks assumed such liability as part of the assignment. California case law discusses the standards governing when an assignee assumes liability when an asset has been assigned. *See Recorded Picture Co. v. Nelson Entm't, Inc.*, 61 Cal. Rptr. 2d 742, 748-49 (Ct. App. 1997); *see also Citizens Suburban Co. v. Rosemont Dev. Co.*, 53 Cal. Rptr. 551, 557-58 (Ct. App. 1966); *SCM Corp. v. Berkel, Inc.*, 140 Cal. Rptr. 559, 563 (Ct. App. 1977).

Nevertheless, for purposes of this motion, and construing all inferences in favor of the non-movant, Plaintiffs have provided the short and plain statement mandated by Rule 8(a), and the court will not resolve this issue at this procedural stage of the proceedings. And Heritage Oaks' argument that Stapleton was unable to substantiate Heritage Oaks' claims by documentation—and that this inability proves something about the nature of the rights and liabilities of Heritage Oaks--is beyond the scope of a Rule 12(b)(6) motion.

Lack of Standing

Heritage Oaks argues that Rabobank and Citizens Business Bank lacked any right as creditors to look to the subject real property at the time the deeds of trust were given. From this assertion, they conclude that a cause of action under the Uniform Fraudulent Transfers Act will not lie.

As a general proposition, the Uniform Fraudulent Transfer Act only applies to property that is subject to enforcement of a money judgment. Ahart, California Practice Guide: Enforcing Judgments and Debts, Prejudgment Collection § 3:317 (Rutter Group 2014). That means the Act does not apply to property that is exempt or encumbered. Id. And this is particularly true where the property is over-encumbered. The debtor is a corporation and, therefore, not entitled to claim exemptions. 11 U.S.C. § 522(b)(1). At the time of the transfers, the real property was encumbered. But the court is unable to ascertain whether the property had equity such that the property might be available for payment of creditors. Given the procedural posture of this case, i.e., a Rule 12(b)(6) motion, the court is unwilling to find that the complaint has failed to state a cause of action upon which relief can be granted based on Heritage Oaks' standing argument.

Reasonably Equivalent Value

Heritage Oaks argues that Plaintiffs have failed to plead the lack of reasonably equivalent value, citing the benefit to other Ennis entities under the authority of *Hasso v. Hapke*, 227 Cal. App. 4th 107, 155 (2014). But *Hasso* was predicated on application of the alter ego doctrine, which has not been pled here.

Damages

Heritage Oaks argues that the Uniform Fraudulent Transfer Act will not support a damages remedy. Heritage Oaks is mistaken. Section 3439.08(b) expressly provides for a money judgment for either the value of the asset transferred or the amount necessary to satisfy the creditor's claim, whichever amount is less. Cal. Civ. Proc. Code § 3439.08(b).

Furthermore, one commentator mentions that, in appropriate cases, "compensatory and possibly punitive damages against the debtor, subject to applicable equity principles and the judgment amount[,]" may be available. Hon. Alan M. Ahart, *California Practice Guide: Enforcing Judgments and Debts* ¶ 3:349.1, at 3-108 (rev. 2014). As a consequence, a money judgment could lie and a damages remedy could be appropriate.

Attorney's Fees

Effective December 1, 2014, a request for attorney fees need not be pleaded. Fed. R. Bankr. P. 7054(b)(2). In this case they were. Heritage Oaks' motion is made under Rule 12(b)(6). Rule 12(b)(6) may not be used to attack less than an entire cause of action. *Thompson v. Paul*, 657 F.Supp.2d 1113, 1119 (D. Ariz. 2009). More importantly, if they are available to a party under applicable law, attorney's fees may be awarded even if not pleaded.

REQUEST FOR JUDICIAL NOTICE

The court takes judicial notice that Exhibits 1-11 have been filed, recorded in the records of the Tulare County Recorder and California Secretary of State. But judicial notice is not taken as to the truth of the representations therein.

AN ORDER DENYING A MOTION TO DISMISS IS INTERLOCUTORY

Bankruptcy courts do not have the power to render final judgment in non-core proceedings without the consent of all parties. 28 U.S.C. § 157(c)(1); *In re Mann*, 907 F.2d 923, 925-26 (9th Cir. 1990). The bankruptcy court may enter interlocutory orders. *In re Castro*, 919 F.2d 107, 108-109 (9th Cir. 1990). An order denying a Rule 12(b)(6) is not a final order or judgment, *Chelsea Neighborhood Ass'ns v. United States Postal Serv.*, 516 F.2d 378, 390 (2nd Cir. 1975), and, therefore, this court may enter an order denying the motion.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Heritage Oaks Bancorp's motion to dismiss under Rule 12(b)(6) has been presented to the court and for the reasons stated in the civil minutes for the hearing,

IT IS ORDERED that: (1) the motion is motion is denied; (2) Heritage Oaks Bancorp shall file a responsive pleading not later than 14 days from service of the civil minute order hereon; (3) absent order of this court, the parties shall not enlarge the time for filing a responsive pleading; and (4) if Heritage Oaks Bancorp does not file a timely responsive pleading, Plaintiffs shall forthwith and without delay seek entry of Heritage Oaks Bancorp's default.