

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement  
Bakersfield Federal Courthouse  
510 19<sup>th</sup> Street, Second Floor  
Bakersfield, California

**PRE-HEARING DISPOSITIONS**

**DAY: WEDNESDAY**  
**DATE: NOVEMBER 4, 2015**  
**CALENDAR: 10:30 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS**

**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.

**COURT'S 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 60(a), as incorporated by Federal Rules of Bankruptcy Procedure 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. [12-11008](#)-A-7     RAFAEL ALONSO  
[15-1044](#)  
GORSKI V. CAMACHO  
PHILLIP GILLET/Atty. for pl.

STATUS CONFERENCE RE: AMENDED  
COMPLAINT  
9-28-15 [[29](#)]

**No tentative ruling.**

2. [12-11008](#)-A-7     RAFAEL ALONSO  
[15-1044](#)             DMG-2  
GORSKI V. CAMACHO  
D. GARDNER/Atty. for mv.

MOTION TO DISMISS ADVERSARY  
PROCEEDING/NOTICE OF REMOVAL  
10-19-15 [[31](#)]

### **Tentative Ruling**

**Motion:** Dismiss Second Amended Complaint

**Notice:** LBR 9014-1(f)(2); no written opposition required

**Disposition:** Granted

**Order:** Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

### **LEGAL STANDARDS FOR A RULE 12(b)(6) MOTION**

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 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 curiam) (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**

In his second amended complaint, the trustee has brought claims under §§ 548, 547, 544 (incorporating Cal. Civ. Code § 3439 et seq.), 550, and 549 of the Bankruptcy Code. Defendant Alejandra Camacho moves to dismiss the complaint in this adversary on several grounds. Her

primary argument for dismissal is that these claims are time barred by the applicable statute of limitations under § 546(a) and § 549(d) of the Code.

### Inconsistency in Pleadings

Camacho first notes an inconsistency between paragraphs 24 and 26 on the one hand and paragraph 33 on the other hand. Paragraphs 24 and 26 indicate that the trustee was notified by a creditor in the middle of 2014 to late 2014. Paragraph 33 states that debtor or anyone else did not notify the trustee of the transfers. The court rejects this argument. Pleadings are permitted to contain inconsistency. See, e.g., Fed. R. Civ. P. 7(d)(2)-(3). Such technical arguments do not present a sufficient basis for dismissal.

### Equitable Tolling and Diligence

The petition in this case was filed on February 6, 2012. Claims brought under §§ 548, 547, 544 of the Code must be brought within 2 years after the earlier of the petition date (the order for relief in a voluntary case), or the time the case is closed or dismissed. § 546(a). The case has not been closed or dismissed, so the first period of time under § 546(a) is applicable in this case—two years after the petition date. (The court notes that statutory 1-year period under § 546(a)(1)(B) starting after appointment of the first trustee under section 702 is inapplicable to this case. That date occurred before the end of the 2-year period after the petition date, and between these two periods, the one ending later applies. See § 546(a)(1)(A)-(B). The trustee was appointed on April 4, 2012 after the first meeting of creditors, § 702(d), and one year after that date was April 2, 2013.)

As to the § 549 claim, the postpetition transfer by check occurred on February 9, 2012. Two years after this date is February 9, 2014. (The other postpetition transfer, good will and going concern value, lacks a date. Second Am. Compl. ¶ 37.)

Absent a reason to delay the running of the statute, the second amended complaint on its face is time barred by the applicable statutes of limitation of §§ 546(a) and 549(d). And since the claim under § 550 depends on the validity of the avoidance claims, it too fails if the other claims fail under the statutes of limitation.

However, equitable tolling, if applicable, delays the running of a federal statute of limitations. "Under the equitable tolling doctrine, where a party remains in ignorance of [a wrong] without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the 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. As a general rule, [t]his equitable doctrine is read into every federal statute of limitation." *In re United Ins. Mgmt., Inc.*, 14 F.3d 1380, 1384-85 (9th Cir. 1994) (alterations in original) (citations omitted) (internal quotation marks omitted).

However, a prerequisite to the application of this doctrine is the plaintiff's diligence. "[W]hen application of equitable tolling turns on the plaintiff's diligence in discovering a cause of action, courts may hold, as a matter of law, that the doctrine does not apply." *Id.* at 1385.

The Ninth Circuit has applied the concept of diligence specifically to the context of a chapter 7 trustee's invocation of the equitable tolling doctrine:

"Because a chapter 7 trustee has a statutory obligation to "investigate the financial affairs of the debtor[, ...] collect and reduce to money the property of the estate ..., and close such estate as expeditiously as is compatible with the best interests of parties in interest," 11 U.S.C. §§ 704(1), (4), equitable tolling's requirement of diligence is particularly acute in the bankruptcy context. Included within a trustee's statutory obligations are the duty to examine the debtor's books and records, see *In re Island Amusement, Inc.*, 74 B.R. 18, 20 (Bankr.D.P.R.1987), and to investigate and litigate potential lawsuits that might be brought on behalf of the debtor, see *Mele v. First Colony Life Ins. Co.*, 127 B.R. 82, 86 (D.D.C.1991). Failure to perform these duties expeditiously subjects the trustee to removal, see *Island Amusement*, 74 B.R. at 20, forfeiture of fees, see *Estes & Hoyt v. Crake (In re Riverside-Linden Inv. Co.)*, 925 F.2d 320, 322 (9th Cir.1991), or liability for damages, see *Hall v. Perry (In re Cochise College Park, Inc.)*, 703 F.2d 1339, 1357 (9th Cir.1983). *Id.* at 1386 (9th Cir. 1994).

In the case *In re United Ins. Mgmt., Inc.*, the court further held that "[t]he failure to perform these duties also nullifies the trustee's ability to invoke the doctrine of equitable tolling. *Id.*

Here, the issue is whether the amended complaint's allegations show sufficient diligence by the trustee to permit application of the equitable tolling doctrine. Camacho argues that the claims in the complaint fail because they do not plead the trustee's diligence. The court agrees that diligence has not been pleaded sufficiently. The only allegation of diligence is paragraph 30 of the complaint. Merely reviewing the financial information provided by the debtor is not sufficient to show the trustee's diligence. Some debtors conceal information, a fact that should require a trustee to look beyond information provided. (In fact, the complaint alleges concealment of the transfers by the debtor and the defendant. Am. Compl. ¶)

Thus, as discussed by the Ninth Circuit in *In re United Ins. Mgmt., Inc.*, the trustee's duties extend beyond reviewing documents provided by a debtor. Further, the trustee is to expeditiously undertake his duties.

The diligence required before equitable tolling may be applied extends to the time period *after* the trustee discovers the fraud or the transfers. The Ninth Circuit Bankruptcy Appellate Panel, in the case *In re Hosseinpour-Esfahani*, considered whether the trustee's lack of diligence after discovering the claim precluded application of the equitable tolling doctrine. *In re Hosseinpour-Esfahani*, 198 B.R. 574, 579 (B.A.P. 9th Cir. 1996). "The issue before the Panel is whether the bankruptcy court abused its discretion in refusing to apply the doctrine of equitable tolling when the trustee was dilatory *after* discovering the existence of a claim." *Id.* In this case, the court upheld the bankruptcy court's refusal to apply equitable tolling because the trustee had waited three months after discovering the basis for the claim to commence an avoidance action. *Id.* at 579-80. The panel further held that "[d]espite the trustee's alleged diligence in discovering the alleged fraud before the statute of limitations

lapsed, we cannot conclude that this obviates the need for the trustee to act diligently and in a timely manner once he has this knowledge." *Id.* at 579.

Here, the latest time the trustee discovered the basis for the avoidance actions was "mid- to late-2014" after the trustee was notified by a creditor. Second Am. Compl. ¶ 24, 26. No plausible factual allegations have been provided as to why the trustee waited until April 14, 2015 to file this complaint. Thus, the complaint on its face does not state plausible factual allegations that would allow the court to independently conclude the trustee was diligent *after* discovering the basis for the claims.

Accordingly, the complaint does not plausibly allege facts that would allow the bar of the statutes of limitations to be delayed by equitable tolling. In any future complaint, the trustee should allege a more specific date on which he was notified of the transfers to be avoided. In pleading amended claims, the trustee could rely on the due diligence standards set forth in *In re Withrow*, 391 B.R. 217, 228 (Bankr. D. Mass 2008) (describing debtor's attorney's duties of diligence).

Moreover, the complaint does not plead sufficiently what actions the trustee took that reflect his diligence in performing, expeditiously, his duties, which should reasonably have uncovered the basis for the transfers sooner (absent the concealment or other factors). Such duties include the duty to investigate the debtor's financial affairs, the duty collect and reduce to money the property of the estate, the duty to examine the debtor's books and records, and the duty to investigate and litigate potential lawsuits, such as these.

Without diligence, both before discovery, and after discovery, the equitable tolling doctrine will not apply.

Lastly, the trustee does not plead any facts regarding what was discussed regarding fraudulent transfers at the § 341 creditor's meetings. In the future complaint, the trustee should reference any discussion of fraudulent transfers that took place in the creditors' meetings and the actions of the trustee in response to such information.

#### Failure to State a Claim

As to the claim for avoidance of the postpetition transfers (Count V), Camacho argues that the claim fails to state a claim upon which relief can be granted because no connection is made between Summer Fresh Company and Camacho. The court rejects this argument. Accepting the allegations as true and construing in them in the light most favorable to the non-movant, the allegations make plain what connection Camacho had to the business Summer Fresh Company. Second Am. Compl. ¶ 14-17.

#### Section 549 Claim and the Statute of Limitations

The statute under § 549(d) does not apply on its face to one of the two transfers supporting the § 549(a) claim. The relevant transfer was of goodwill and going concern value of a business. See Second Am. Compl. ¶ 59. The postpetition transfer alleged does not include a date on which it occurred. An approximate date should be given for this transfer, or at least a date range during which it was likely to

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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 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**

In his second amended complaint, the trustee has brought claims under §§ 548, 547, 544 (incorporating Cal. Civ. Code § 3439 et seq.), 550, and 549 of the Bankruptcy Code. Defendant Jenny Angulo moves to dismiss the complaint in this adversary on several grounds. Her primary argument for dismissal is that these claims are time barred by the applicable statute of limitations under § 546(a) and § 549(d) of the Code.

### Inconsistency in Pleadings

Angulo first notes an inconsistency between paragraphs 26 and 28 on the one hand and paragraph 35 on the other hand. Paragraphs 26 and 28 indicate that the trustee was notified by a creditor in the middle of 2014 to late 2014. Paragraph 35 states that debtor or anyone else did not notify the trustee of the transfers. The court rejects this argument. Pleadings are permitted to contain inconsistency. See, e.g., Fed. R. Civ. P. 7(d)(2)-(3). Such technical arguments do not present a sufficient basis for dismissal.

### Equitable Tolling and Diligence

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Absent a reason to delay the running of the statute, the §§ 544, 547, and 548 claims of the second amended complaint on their face are time barred by the applicable statute of limitation of §§ 546(a). And since the claim under § 550 depends on the validity of the avoidance claims, it too fails if the other claims fail under the statutes of

limitation.

However, equitable tolling, if applicable, delays the running of a federal statute of limitations. "Under the equitable tolling doctrine, where a party remains in ignorance of [a wrong] without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the 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. As a general rule, [t]his equitable doctrine is read into every federal statute of limitation." *In re United Ins. Mgmt., Inc.*, 14 F.3d 1380, 1384-85 (9th Cir. 1994) (alterations in original) (citations omitted) (internal quotation marks omitted).

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Without diligence, both before discovery, and after discovery, the equitable tolling doctrine will not apply.

Lastly, the trustee does not plead any facts regarding what was discussed regarding fraudulent transfers at the § 341 creditor's meetings. In the future complaint, the trustee should reference any discussion of fraudulent transfers that took place in the creditors' meetings and the actions of the trustee in response to such information.

### Section 549 Claim and the Statute of Limitation

As to the § 549 claim for avoidance of a postpetition transfer, the statute under § 549(d) does not clearly apply because the postpetition transfer alleged does not include a date on which it occurred. An approximate date should be given for this transfer, or at least a date range during which it was likely to have occurred, unless the trustee does not believe that there is evidentiary support for any date or date range chosen.

### **CIVIL MINUTE ORDER**

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

The court's reasons for its ruling on the motion are stated in the civil minutes for the hearing.

Defendant Jenny Angulo's motion to dismiss the plaintiff's second amended complaint has been presented to the court. Having considered the motion, and any oppositions, responses and replies, and having heard oral argument, if any, presented at the hearing,

IT IS ORDERED that the motion is granted. The plaintiff shall have 21 days after service of the order on this motion to file an amended complaint. The time to respond to the complaint will be governed by the Federal Rules of Bankruptcy Procedure and applicable Civil Rules.

5. [12-11008](#)-A-7      RAFAEL ALONSO  
[15-1050](#)  
GORSKI V. MELENDEZ  
PHILLIP GILLET/Atty. for pl.

STATUS CONFERENCE RE: COMPLAINT  
9-28-15 [[22](#)]

**No tentative ruling.**