NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

NORTHERN DIVISION

In re: CHARLENE M. MILBY, Debtor. --- PATRICIA A. TEMPLETON, et al., Plaintiffs, v. JON A. MILBY, et al., Defendants.	Case. No. 9:11-bk-14487-PC Adversary No. 9:14-ap-01132-PC Chapter 7 **MEMORANDUM REGARDING PLAINTIFFS' MOTION FOR PARTIAL RECONSIDERATION OF ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR PARTIAL SUMMARY JUDGMENT** Date: May 7, 2015 Time: 10:00 a.m. Place: United States Bankruptcy Court Courtroom # 201 1415 State Street Santa Barbara, CA 93101

At the above captioned date and time, the court considered the motion filed by Plaintiffs, Patricia A. Templeton, et. al., ("Templetons") for reconsideration of this court's Memorandum Regarding Defendants' Motions for Summary Judgment or, Alternatively, for Partial Summary Judgment ("Memorandum") [Dkt. # 57] and Order Granting Defendants' Motions for Summary

Judgment or, Alternatively, for Partial Summary Judgment ("Order") [Dkt. # 58] pursuant to F.R.Civ.P. 59(e), as incorporated into FRBP 9023.[1] Having considered the Templetons' motion, the response of Defendants, Jon A. Milby, et al. ("Milbys") in opposition thereto, and the reply, the court will deny the Templetons' motion based upon the following findings of fact and conclusions of law made pursuant to F.R.Civ.P. 52(a)(1), as incorporated into FRBP 7052 and applied to contested matters by FRBP 9014(c).

A. Standard for Reconsideration.

FRBP 9023 makes Rule 59(e) of the Federal Rules of Civil Procedure applicable in bankruptcy cases. FRBP 9023. Rule 59(e) authorizes the filing of a motion to alter or amend a judgment not later than 14 days after entry of the judgment. F.R.Civ.P. 59(e). Reconsideration is "an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir. 2003) (citation omitted); Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (citation omitted). In the Ninth Circuit, "'a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.'" Kona Enters., 229 F.3d at 890 (quoting 389 Orange Street Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999)).[2]

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[1] Unless otherwise indicated, all "Code," "chapter" and "section" references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 after its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). "Rule" references are to the Federal Rules of Bankruptcy Procedure ("FRBP"), which make applicable certain Federal Rules of Civil Procedure ("F.R.Civ.P."). "LBR" references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California ("LBR").

[2] Reconsideration under Rule 9023 is not intended to give a litigant a "second bite at the apple." See In re Christie, 222 B.R. 64, 67 (Bankr. D.N.J. 1998) (citation omitted); see also Voelkel v. Gen. Motors Corp., 846 F.Supp. 1482, 1483 (D. Kan. 1994), aff'd, 43 F.3d 1484 (10th Cir. 1994) ("A motion to reconsider is not a second chance for the losing party to make its strongest case or to dress up arguments that previously failed."); U.S. v. Carolina E. Chem. Co., 639 F. Supp. 1420, 1423 (D.S.C. 1986) ("A party who failed to prove his strongest case is not entitled to a second opportunity by moving to amend a finding of fact or a conclusion of law.").

Reconsideration may also be granted "as necessary to prevent manifest injustice." Navajo Nation v. Confederated Tribes & Bands of the Yakima Indian Nation, 331 F.3d 1041, 1046 (9th Cir. 2003).

In this case, the Memorandum and Order were entered on March 2, 2015. Templetons' motion was filed on March 16, 2015 – within 14 days of entry of the Memorandum and Order. Templetons' motion is timely under Rule 9023.

B. Templetons' Grounds for Reconsideration.

Templetons' motion does not allege newly discovered evidence or an intervening change in controlling law. Templetons' motion is premised on clear error and manifest injustice. In granting Defendants' Motions for Summary Judgment or, Alternatively, for Partial Summary Judgment ("Defendants' Motions"), the Templetons complain that the court committed clear error in relying on Taylor v. Hosseinpour-Esfahani (In re Hosseinpour-Esfahani), 198 B.R. 574 (9th Cir. BAP 1996) and its progeny, arguing that "[t]he Taylor court's holding regarding post-discovery diligence . . . is not good law [because] [f]ive years after Taylor, the Ninth Circuit decided Oscar Socop-Gonzalez v. Immigration and Naturalization Service, 272 F.3d 1176 (9th Cir. 2001) ("Socop") . . . [which] is directly contrary to . . . Taylor . . . ."[3] Templetons assert that:

> The law in this Circuit is clear: In applying equitable estoppel, once a court determines that there were extraordinary circumstances standing any [sic] the way of discovering the underlying claims, the court may not then inquire further whether plaintiff was diligent after discovering the claims. Rather, the plaintiff has the full statutory time period after discovery to assert the claims that have been discovered.[4]

Templetons further assert that "[t]he Court's application of Taylor was not only clearly erroneous but it also resulted from [Milbys] materially altering their legal theory from their Motions to their joint reply[,]" and that "[Milbys] advocacy of a new legal theory in their joint

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[3] Plaintiffs' Motion for Partial Reconsideration of Order Granting Defendants' Motions for Summary Judgment or, Alternatively, for Partial Summary Judgment ("Templeton Motion"), 8:1-4.

[4] Id. at 15:8-13 (emphasis in original).

reply, which the Court followed in partially granting Defendants' Motions, was manifestly unjust and denied [Templetons] their due process rights."[5]

The court declines to quibble with the Templetons and Milbys over the issue of whether or not the court's application of Taylor resulted from an alleged change in Milbys' legal theory after Templetons' responded to Defendants' Motions. The court has studied the more significant issue raised by the Templetons, i.e., whether the court committed clear error because, as alleged by the Templetons, Socop effectively overruled Taylor. The court is not convinced that Socop effectively overruled Taylor. In the court's view, Taylor is still good law in the Ninth Circuit.

C. Analysis of the Relevant Cases.

1. Socop-Gonzalez

In reliance on incorrect advice received from an Immigration and Naturalization Service officer, Oscar A. Socop-Gonzalez ("Socop") withdrew his request for asylum and appeal of a deportation order entered on April 4, 1996. Socop-Gonzalez, 272 F.3d at 1181. Socop's appeal having been withdrawn, the Board of Immigration Appeals ("BIA") issued an order dated May 5, 1997, making the deportation order final and immediately effective. Id. Socop then waited until August 11, 1997, to move to reopen his case to reinstate his asylum appeal, having further relied on conflicting information from the BIA regarding the proper procedure to adjust his immigration status. Id. at 1182. The BIA denied Socop's motion to reopen, in part, as untimely because it was not filed within 90 days of the BIA's decision. Id. Socop appealed and the Ninth Circuit reversed and remanded, holding that "[t]he ninety-day period for motions to reopen is subject to equitable tolling, and the facts of [the] case warrant equitable tolling." Id. at 1197. In so holding, the Ninth Circuit sitting en banc rejected the notion that Socop could have filed a motion to reopen in the exercise of due diligence because he had notice of the deportation order 27 days before expiration of the 90-day period, stating:

> [W]e . . . need not inquire whether Socop reasonably could have filed his motion to reopen within the twenty-seven days remaining in the limitations period after he received the 'Bag and Baggage' letter. Instead, we need only ask whether

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[5] Id. at 2:5-7; 25-27.

> Socop filed within the limitations period after tolling is taken into account. Socop had until ninety days after July 7 to file a motion to reopen, or until October 5, 1997. Socop filed his motion to reopen on August 11, 1997, which is well before the October 5 cut-off. Therefore, Socop's motion to reopen was timely filed.

Id. at 1196 (citation omitted).

2. Scholar v. Pacific Bell

Nine years prior to Socop-Gonzalez, the Ninth Circuit decided in Scholar v. Pacific Bell, 963 F.2d 264 (9th Cir. 1992). In that case, Aurelia Scholar, a retired employee of Pacific Bell, filed suit alleging discriminatory employment practices by Pacific Bell after expiration of the applicable 90-day limitations period. Id. at 206. The district court granted summary judgment in favor of Pacific Bell, holding that Scholar's complaint was barred by limitations and that Scholar had failed to establish grounds for equitable tolling. Id. Ninth Circuit affirmed, noting that Scholar learned that the Equal Employment Opportunity Commission had dismissed her claim nearly 83 days before expiration of the 90-day limitation period and that Scholar offered "no explanation as to why this was not sufficient time in which to commence her action." Id. at 268. Citing the Supreme Court's decision in Irwin v. Dept. of Veterans Affairs, 498 U.S. 89 (1990), the Ninth Circuit panel stated:

> A statute of limitations is subject to the doctrine of equitable tolling; therefore, relief from strict construction of a statute of limitations is readily available in extreme cases and gives the court latitude in a case-by-case analysis. The equitable tolling doctrine has been applied by the Supreme Court in certain circumstances, but it has been applied sparingly; for example, the Supreme Court has allowed equitable tolling when the statute of limitations was not complied with because of defective pleadings, when a claimant was tricked by an adversary into letting a deadline expire, and when the EEOC's notice of the statutory period was clearly inadequate. Courts have been generally unforgiving, however, when a late filing is due to claimaint's failure "to exercise due diligence in preserving his legal rights."

Id. at 267-68 (citations omitted). Scholar, which with Irwin formed the basis of the Bankruptcy Appellate Panel's decision in Taylor,[6] has not been expressly overruled by the Ninth Circuit.

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[6] See Taylor, 198 B.R. at 579-80 ("[I]n a case where a party has failed to act diligently to preserve its legal rights, courts have declined to apply the doctrine of equitable tolling. Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 96, 111 S.Ct. 453, 458, 112 L.Ed.2d 435 (1990), reh'g denied, 498 U.S. 1075, 111 S.Ct. 805, 112 L.Ed.2d 865 (1991); Baldwin, 466 U.S. at 151-52,

Nor has Irwin been overruled by the Supreme Court. See Pace v. Digugleilmo, 544 U.S. 408, 420 (2005) ("And not only did petitioner sit on his rights for years before he filed his PCRA petition, but he also sat on them for five more months after his PCRA proceedings became final before deciding to seek relief in federal court. Under long established principles, petitioner's lack of diligence precludes equity's operation[,]" citing "Irwin v. Department of Veterans Affairs, supra, at 96") (emphasis in original). Indeed, Scholar has been followed by panels in the Ninth Circuit since 2002, notwithstanding the Socop-Gonzalez decision. See, e.g., Rhodes v. Raytheon Co., 555 Fed. Appx. 665, 668 (9th Cir. 2014) ("That left Rhodes sixty-six days within which to file suit and Rhodes has not shown why that amount of time was insufficient."); Singh v. Gonzales, 155 Fed. Appx. 290, 291 (9th Cir. 2005) ("Petitioner's claim fails because there were sixty-five days from the decision . . . , until the expiration of his original ninety-day filing period, which allowed him plenty of time to file.") Edman v. Shell Oil Co., 104 Fed. Appx. 629, 630 (9th Cir. 2004) ("[W]hen Edman admittedly received the right-to-sue letter, he still had ample time to file his suit. Consequently, Edman failed to demonstrate the exceptional circumstances requisite to merit this remedy.").

3. Mangum v. Action Collection Serv., Inc.

Five years after Socop-Gonzalez, a Ninth Circuit panel majority followed Socop-Gonzalez in Mangum v. Action Collection Serv., Inc., 575 F.3d 935 (9th Cir. 2009). In that case, Camarie Mangum ("Mangum") discovered on December 15, 2004, that Bonneville Billing & Collections, Inc. ("Bonneville") had disclosed to the City of Pocatello Police Department, without her permission, information regarding claims against her for writing bad checks. Id. at 938. On December 14, 2005, Mangum sued alleging, among other things, a claim against Bonneville under the Fair Debt Collection Practices Act ("FDCPA").[7] Id. The district court granted Bonneville's motion for summary judgment, dismissing Mangum's FDCPA claim

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104 S.Ct. at 1725-26; Scholar, 963 F.2d at 268. Even more applicable to this case is the Supreme Court's admonition that 'the principles of equitable tolling [ ] do not extend to what is at best a garden variety claim of excusable neglect.' Irwin, 498 U.S. at 96, 111 S.Ct. at 458.").

[7] 15 U.S.C. §§ 1692-1692p.

against Bonneville as barred by limitations. Id. Ninth Circuit reversed as to Mangum's claim against Bonneville, holding that Mangum's complaint was timely having been filed within one year of her discovery of the FDCPA claim. Id. at 944. With respect to Mangum's lengthy delay in filing the complaint, the panel cited Socop-Gonzalez in a footnote, stating that "Mangum's long wait after she discovered the disclosure does not affect our decision." Id. at 941 n.19.

In a concurring opinion, Judge Diarmuid F. O'Scannlain specifically declined to concur with the two-judge majority's conclusion "that the discovery rule extends the FDCPA's statute of limitations to permit Mangum's otherwise untimely suit." Id. at 944. In his view, "Socop-Gonzalez . . . was a significant, unwarranted departure from ancient principles of equity . . . [and] wrongly decided." Id. at 945. Judge O'Scannlain then proceeded to explain in detail why, in his opinion, Socop-Gonzalez was wrongly decided.

> It is an age-old principle that "[e]quity always refuses to interfere where there has been gross laches in the prosecution of rights." Thus, equitable tolling permits an otherwise untimely suit only if the plaintiff shows she acted diligently in pursuing her legal rights.
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> Here, it is beyond dispute that Mangum grossly neglected her legal rights. Within one week, she discovered that Bonneville had provided the police department with the bad checks. At that point, she still had fifty-one weeks – ninety-eight percent of the original limitations period – in which to file. Yet, inexplicably, Mangum let the limitations period expire, waiting an additional fifty-two weeks before filing suit. She offers no explanation for the lengthy delay, and her claim accordingly should be time barred.
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> Despite Mangum's manifest failure to act diligently, our decision in Socop-Gonzalez compels me to deem her claim timely. Socop-Gonzalez invented the rule that "when a statute of limitations is tolled, the days during a tolled period simply are not counted against the limitations period." Socop-Gonzalez, 272 F.3d at 1195. In other words, the statute does not begin running until the tolled period ends. Applied here, so long as a plaintiff acts diligently before discovering the violation, the limitations period automatically lengthens by a period equal to the time between the violation and the discovery of the violation. Here, Mangum could not reasonably have known of the violation until the police department told her about it. Accordingly, the week between the violation and the discovery mechanically tacks on to the end of the limitations period. Thus, under Socop-Gonzalez, Mangum timely filed her claim, even though her lengthy fifty-two week delay before filing abundantly demonstrates her lack of diligence.

> In another context, the silliness of the Socop-Gonzalez approach would be obvious. Suppose a college student enrolls in a course with an end of semester paper requirement. She gets sick during the first week of the semester and cannot work on the paper for that week. After she recovers, she spends three and a half months dilly dallying, partying, or otherwise behaving in a non-diligent manner. As December approaches, the paper deadline looms ominously. Seeking an opening, the student reads Socop-Gonzalez and demands a one week extension based on her illness at the beginning of the semester. Should the professor be obligated to grant the extension?
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> Unsurprisingly, we are nearly alone in our permissive attitude toward equitable tolling. Before Socop-Gonzalez, no federal court, in any circuit, had ever concluded that it must turn a blind eye to a litigant's post-discovery lack of diligence. The general rule has always been quite the opposite. Several courts of appeal have also rejected our court's equitable tolling jurisprudence, reasoning persuasively that the plaintiff's post-discovery lack of diligence should matter.
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> The traditional rule makes eminent sense. Equitable tolling, as the name indicates, is an equitable doctrine; it concerns itself with fairness to litigants. It is not fair to extinguish a plaintiff's claim when she could not have discovered the information necessary to file within the limitations period. On the other hand, there is nothing unfair about preventing a litigant from suing in a situation like the one here, where Mangum had ninety-eight percent of the original limitations period in which to file, and yet inexplicably chose not to do so . . . .
>
> Statutes of limitations "protect important social interests in certainty, accuracy, and repose." Congress's adoption of a limitations period reflects a judgment that defendants should not have to worry about stale claims after a certain amount of time has elapsed. Yet our precedent, by turning a blind eye to the defendant's interests, unjustifiably treats statutes of limitations as merely "arbitrary obstacles to the vindication of just claims." This case is a clear example of how Socop-Gonzalez's automatic extension rule, in many circumstances, converts equitable tolling into tolling at will.

Id. at 946-49 (citations omitted).

4. Recent Cases

Last year, a Ninth Circuit panel in Gibbs v. LeGrand, 767 F.3d 879 (9th Cir. 2014) discussed the continued vitality of Socop-Gonzalez's equitable tolling rule in the context of petitions for federal habeus corpus relief, stating:

> We note some tension between examining a petitioner's diligence after the lifting of an obstacle to timely filing, and the stop-clock rule established by an en banc panel of this Court in Socop-Gonzalez. Socop-Gonzalez rejected the approach to equitable tolling wherein courts consider whether a claimant should have been

> expected to file his lawsuit within the amount of time left in the statute of limitations, after an extraordinary circumstance barring filing was lifted. Instead, "the event that 'tolls' the statute simply stops the clock until the occurrence of a later event that permits the statute to resume running.". . .
>
> Courts may, however, consider a petitioner's diligence, after an extraordinary circumstance has been lifted, as one factor in a broader diligence assessment. By requiring those seeking equitable tolling to show they exercised reasonable diligence, we "ensure that the extraordinary circumstances faced by petitioners . . . were the cause of the tardiness of their federal habeus petitions." "[I]f the person seeking equitable tolling has not exercised reasonable diligence in attempting to file, after the extraordinary circumstances began, the link of causation between the extraordinary circumstances and the failure to file is broken."
>
> Because it is most relevant to the causation question, we are primarily concerned with whether a claimant was "diligent in his efforts to pursue his appeal at the time his efforts were being thwarted." In other words, diligence during the existence of an extraordinary circumstance is the key consideration. Also relevant is whether petitioners "pursued their claims within a reasonable period of time before the external impediment . . . came into existence."
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> Diligence after an extraordinary circumstance is lifted may be illuminating as to overall diligence, but is not alone determinative.

Id. at 891-93 (citations omitted).

After Gibbs, a different Ninth Circuit panel in Luna v. Kernan, 2015 WL 1903794 (9th Cir. 2014), discussed the Ninth Circuit's equitable tolling jurisprudence and its conflicting approaches, observing:

> Under a pure stop-clock approach, a petitioner needs to show diligence only during the period he seeks to have tolled – i.e., the period during which the extraordinary circumstances prevented timely filing. There is no need to show diligence after the extraordinary circumstances have ended. . . .
>
> One of our earlier equitable tolling precedents, however, requires a petitioner to show diligence through the time of filing, even after the extraordinary circumstances have ended. . . .
>
> At some point, our circuit may need to decide whether it makes sense to follow the stop-clock approach and at the same time impose a diligence-through-filing requirement.

Id. at *10 (citations omitted).

D. Conclusion.

The Templetons are mistaken in their assertion that "[t]he law in this Circuit is clear" with respect the standard for equitable tolling. It is clear that that "equitable tolling principles are . . . applied 'only sparingly.'" Ca. Franchise Tax Bd. v. Kendall (In re Jones), 657 F.3d 921, 926 (9th Cir. 2001) (quoting Young v. United States, 535 U.S. 43, 40-50 (2012)); see Akers v. Mattei (In re Dugger), 2012 WL 2086562, *7 (9th Cir. BAP 2012) ("[T]he case law of this circuit instructs that equitable tolling is rarely applied and disfavored."). It is also clear that "[t]he doctrine of equitable tolling in our circuit is not entirely settled." Roberts v. Marshall, 627 F.3d 768, 771 n. 5 (9th Cir. 2010); see also Doe v. Busby, 661 F.3d 1001, 1015 (9th Cir. 2011) ("Equitable tolling is not the arena of bright-lines and dates certain; 'determinations ... whether there are grounds for equitable tolling are highly fact-dependent.'" (citation omitted)) . And for the reasons stated, it is clear that Socop-Gonzalez did not effectively overrule or supersede the standard applied in Taylor.

Given the fact that reconsideration is an extraordinary remedy and the Templetons have failed to establish either clear error or manifest injustice warranting relief from the Memorandum Decision and Order, the Templetons' motion will be denied.

A separate order will be entered consistent with this memorandum.

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Date: May 21, 2015

Peter H. Carroll
United States Bankruptcy Judge