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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	SC-07-1298-DCMo
)		
7	COMMERCIAL MONEY CENTER, INC.,)	Bk. No.	02-09721
)		
8	Debtor.)	Adv. No.	03-90331
)		
9	_____)		
)		
10	FEDERAL DEPOSIT INSURANCE)		
	CORPORATION,)		
)		
11	Appellant,)		
)		
12	v.)	O P I N I O N	
)		
13	RICHARD M. KIPPERMAN, Chapter)		
	7 Trustee,)		
14)		
	Appellee.)		
15	_____)		

Argued and Submitted on June 20, 2008
at Pasadena, California

Filed - August 4, 2008

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

Hon. John J. Hargrove, Bankruptcy Judge, Presiding¹

Before: DUNN, CARROLL² and MONTALI, Bankruptcy Judges.

¹ Judge Hargrove was the presiding judge at the time of the summary judgment proceedings concerned in this appeal. He has since retired. This case has been reassigned to Judge Peter W. Bowie.

² Hon. Peter H. Carroll, Bankruptcy Judge for the Central District of California, sitting by designation.

1 DUNN, Bankruptcy Judge:

2
3 The Federal Deposit Insurance Corporation ("FDIC"), as
4 receiver for NetBank, FSB ("NetBank"),³ appeals the bankruptcy
5 court's grant of summary judgment in favor of the chapter 7
6 trustee, avoiding NetBank's security interest in rights to future
7 payments due under various leases ("lease payments") and in
8 contract rights under the surety bonds guaranteeing the lease
9 payments.⁴ At issue in the appeal before us is whether NetBank
10 perfected its security interests in the lease payments and the
11 surety bonds so as to withstand the trustee's avoidance powers
12 under §§ 544 and 547(b).

13 For the reasons set forth below, we AFFIRM.

14
15 **I. FACTS**

16 A. Events Prior to the Bankruptcy

17 The present appeal is the second appeal in the underlying
18 adversary proceeding. Although we set forth substantial factual
19 background in NetBank, FSB v. Kipperman (In re Commercial Money
20 Center, Inc.), 350 B.R. 465 (9th Cir. BAP 2006) ("Commercial

21
22 ³ On September 28, 2007, the Office of Thrift Supervision
23 closed NetBank and appointed the FDIC as receiver. Appellant's
24 Opening Brief at 3. On November 1, 2007, we issued an order
substituting the FDIC for NetBank as the appellant.

25 ⁴ Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
28 enacted and promulgated prior to the effective date (October 17,
2005) of most of the provisions of the Bankruptcy Abuse
Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,
April 20, 2005, 119 Stat. 23.

1 Money Center I"), we reiterate certain pertinent facts here for
2 convenience of reference.

3
4 1. Sale and Servicing Agreement between CMC and NetBank
5 Commercial Money Center, Inc. ("CMC") engaged in the
6 business of originating commercial equipment leases. CMC
7 purchased equipment and leased it to consumer end-users with sub-
8 prime credit. CMC then grouped these leases together into "lease
9 pools" and assigned the lease payments (but not the leases
10 themselves) to third-party investors. To enhance the
11 marketability of the lease pools, CMC obtained surety bonds
12 guaranteeing the lease payments and assigned its rights under the
13 surety bonds to the investors.

14 Between March 18, 1999 and September 6, 2000, NetBank paid
15 CMC approximately \$47 million for seven lease pools.⁵ With
16 respect to each of the seven lease pools, CMC, NetBank and Amwest
17 Surety Insurance Company ("Amwest") entered into a separate Sale
18 and Servicing Agreement ("SSA").⁶ Amwest initially issued the
19 surety bonds, but its successor, Royal Indemnity Company
20 ("Royal"), issued its own surety bonds to replace them.

21 Under the SSA, CMC assigned to NetBank its rights to and
22 interests in the lease payments and its rights under the surety
23 bonds, among other things (collectively, "transferred assets").
24 SSA, Article II, § 2.1(a)(i)-(iv). As security for the lease

25
26 ⁵ NetBank paid CMC a total of approximately \$123 million for
27 seventeen lease pools, but only seven lease pools were at issue
in the underlying adversary proceeding.

28 ⁶ Each SSA included in the record before us is identical.

1 payments, CMC granted NetBank a security interest in a bundle of
2 assets, including the leases themselves, the equipment, insurance
3 policies, and all items contained in the lease files, and any
4 other documents relating to the leases kept on file pursuant to
5 CMC's customary procedures (collectively, "lease assets") -- but
6 not the surety bonds. SSA, Article II, § 2.1(b)(i).

7 At the time CMC assigned the transferred assets and granted
8 the security interest in the lease assets to NetBank, CMC
9 represented that all filings and other actions required to give
10 NetBank a first priority perfected lien or ownership interest in
11 the leases and the transferred assets had been accomplished,
12 including filings of Uniform Commercial Code ("UCC") financing
13 statements. SSA, Article II, § 2.4(n). CMC also agreed that it
14 would take all actions necessary to maintain and/or preserve, in
15 NetBank's favor, a first priority perfected security interest in
16 the lease assets and the transferred assets. SSA, Article II,
17 § 3.13(b)-(c); Article VI, § 6.5; Article X, § 10.2(a). Neither
18 CMC nor NetBank filed any UCC financing statements with respect
19 to the lease assets or the transferred assets.

20 Pursuant to the SSA, Royal was appointed as servicer, and
21 CMC was appointed as sub-servicer. SSA, Article I, § 1.1.

22 As sub-servicer, CMC assumed all responsibility, as agent
23 for and on behalf of the servicer, to perform the servicer's
24 duties under the SSA, although the servicer was not relieved of
25 any of its obligations under the SSA. SSA, Article I, § 1.1;
26 Article III, § 3.7. NetBank agreed to deal directly with CMC for
27 as long as it served as sub-servicer. SSA, Article III, § 3.7.
28 CMC later formed Commercial Servicing Corporation ("CSC") to

1 service the lease pools. CSC was a wholly-owned subsidiary of
2 CMC.

3 The servicer and/or sub-servicer acted as NetBank's agent.
4 SSA, Article II, § 2.2(a); Article III, § 3.1. As agent, the
5 servicer and/or sub-servicer was to manage the leases and collect
6 and distribute the lease payments, among other things. SSA,
7 Article III, § 3.1; Article III, § 3.2(a).

8 The servicer and/or sub-servicer also acted as NetBank's
9 custodian of documents and instruments relating to the leases.
10 SSA, Article II, § 2.2(a). Specifically, the servicer and/or
11 sub-servicer was to be in possession and maintain custody of the
12 original leases, all documents relating to the leases and copies
13 of all of the surety bonds, among other things. SSA, Article II,
14 § 2.2(a)(i)-(iv); Article II, § 2.2(c)(i)-(iii). CMC was to hold
15 and maintain the lease files in its offices in Escondido,
16 California. SSA, Article II, § 2.2(b). Royal agreed to deliver
17 the original lease files to CMC as sub-servicer, though CMC was
18 to deliver the original surety bonds to NetBank. SSA, Article
19 II, § 2.7(a)-(b).

20 CMC retained physical possession of the lease files at its
21 offices. NetBank actually had physical possession of the surety
22 bonds.

23 24 2. District Court proceedings

25 In late 2001 and early 2002, CMC failed to distribute the
26 payments owed to NetBank under the SSAs. NetBank demanded
27 compensation from Royal as surety for the defaulted payments;
28 Royal complied.

1 On February 1, 2002, Royal initiated an action against CMC
2 in the United States District Court for the Southern District of
3 California ("District Court Action"),⁷ seeking to freeze certain
4 bank accounts of CMC, remove CMC as sub-servicer and obtain an
5 order requiring CMC to provide an accounting of the books and
6 financial records of the Royal bonded leases.

7 On the same day, Royal obtained a temporary restraining
8 order ("TRO") against CMC, requiring CMC to "make available to
9 Royal all books, records, and accounts related to Royal bonded
10 leases." CMC also was prohibited from withdrawing or
11 transferring any Royal bonded lease payments.

12 Between February 11, 2002 and March 26, 2002, Royal and CMC
13 stipulated to several amendments to the TRO,⁸ all of which
14 required CMC to "make reasonably available" to Royal, beginning
15 on February 6, 2002, all books, records and accounts related to
16 Royal's bonded leases. Royal initially did not seek possession
17 of the lease files, but rather access to them.

18 The amendments to the TRO further prohibited CMC from: (1)
19 withdrawing any lease payments from certain accounts related to
20 the Royal bonded lease pools; (2) removing any leases from Royal
21 bonded lease pools without Royal's consent; (3) depositing any
22

23 ⁷ The District Court Action later was transferred to the
24 United States District Court for the Northern District of Ohio
25 and consolidated with other lawsuits initiated by various
sureties and third-party investors against CMC.

26 ⁸ The District Court entered a total of four stipulated
27 amendments to the TRO. The first stipulation was entered on
28 February 11, 2002. The second stipulation was entered on
February 13, 2002. The third stipulation was entered on March 5,
2002. The fourth stipulation was entered on March 26, 2002.

1 Royal bonded lease payments into accounts other than those
2 related to the Royal bonded lease pools; (4) instructing lessees
3 in the Royal bonded lease pools to deposit or transfer lease
4 payments into bank accounts other than those related to Royal;
5 (5) depositing any proceeds from any collection activities
6 related to any Royal bonded leases into bank accounts other than
7 those related to Royal; (6) transferring any payments from leases
8 that had been removed from the Royal bonded lease pools ("removed
9 leases") and placed into non-Royal accounts; and (7) selling or
10 transferring any of the removed leases or any payments derived
11 from the removed leases without Royal's consent.

12 On February 26, 2002, the magistrate judge in the District
13 Court Action entered an order requiring CMC to produce an
14 electronic copy of all lease accounting data maintained by CMC
15 with respect to the Royal bonded leases by March 4, 2002
16 ("February 26 order"). CMC also was required to produce or
17 provide access to "the removed lease files bonded by the
18 respective sureties" by March 6, 2002. On March 4, 2002, CMC
19 provided compact discs containing lease accounting data and
20 copies of some electronic files to counsel for Royal.

21 On March 8, 2002, counsel for CMC directed Royal and the
22 other sureties by letter to retrieve their respective lease files
23 from CMC's offices on March 11, 2002. When James Patterson,
24 counsel for Royal, arrived at CMC's offices, the offices were
25 vacated and closed. On the same day, by a faxed letter, counsel
26 for CMC informed Royal and the other sureties that the lease
27 files would be available for retrieval the next day. Mr.

28

1 Patterson retrieved the lease files on March 12, 2002.⁹

2 On March 19, 2002, the district court approved a stipulation
3 between CMC, Royal and the other sureties ("March 19
4 stipulation")¹⁰ whereby CMC resigned as sub-servicer. CMC also
5 would make available for retrieval by Royal, beginning March 12,
6 2002, all of the original files related to its bonded leases.
7 CMC was obligated to make all of the lease files available to
8 Royal until it was able to inventory the files and verify that
9 CMC indeed had made available all the necessary files. CMC
10 further agreed to preserve and maintain and make reasonably
11 available to Royal, for inspection and copying, all documents and
12 records not previously made available to Royal, "however stored
13 or maintained and wherever located, now in [CMC's] possession or
14 under [its] control related to the business or activities of
15 CMC/CSC."

16
17
18 B. Context of the Present Appeal

19 1. The prior appeal

20 On May 30, 2002, CMC filed a voluntary chapter 11
21
22

23 ⁹ Although Mr. Patterson has asserted in various
24 declarations that he retrieved the lease files from CMC's offices
25 on March 12, 2002, in the reply declaration in support of an
26 order to show cause regarding contempt, he asserted that he
27 retrieved the lease files on March 11, 2002. The bankruptcy
28 court explicitly found, however, that it was "undisputed that
Royal did not obtain actual possession of the leases until March
12, 2002."

¹⁰ The stipulation superseded the TRO.

1 petition,¹¹ which case later was converted to chapter 7 on July
2 12, 2002.¹²

3 More than a year after the petition date, the trustee
4 commenced an adversary proceeding against NetBank.¹³ The trustee
5 sought declaratory relief characterizing the transfers of the
6 lease assets and transferred assets as secured loans, rather than
7 true sales, and determining that NetBank did not perfect its
8 interests therein. Assuming that NetBank perfected its security
9 interest by taking possession of the lease assets and transferred
10 assets pursuant to the March 19 stipulation, the trustee sought
11

13 ¹¹ Approximately two weeks later, CSC filed its own
14 voluntary chapter 11 petition.

15 ¹² CMC filed its chapter 11 petition in the United States
16 Bankruptcy Court for the Southern District of Florida. The case
17 was transferred to the United States Bankruptcy Court for the
18 Southern District of California on September 18, 2002.

18 ¹³ In his complaint, the trustee asserted numerous claims
19 for relief, of which only the following appeared to be at issue
20 in the Partial Summary Judgment Motions: (1) Declaratory Relief
21 that Transactions Involving CMC-N Purportedly Transferred Assets
22 and CMC-N Collateral Did Not Constitute a "True Sale" and that
23 NetBank Did Not Perfect Any Interest Therein - 11 U.S.C. § 541
24 and F.R.B.P. 7001(9); (2) Alternative Declaratory Relief that
25 Even If Transactions Involving CMC-N Purportedly Transferred
26 Assets and CMC-N Collateral Constituted a "True Sale," For Such
27 Sale to Be Effective, NetBank Was Required to, But Did Not,
28 Perfect Its Interest Therein - 11 U.S.C. § 541 and F.R.B.P.
7001(9); (3) Order Directing NetBank to Turn Over Estate Assets -
11 U.S.C. §§ 542, 550 and 551; (5) Judgment Voiding 90-Day
Preferential Transfer - 11 U.S.C. § 547; (6) Judgment Avoiding
Unperfected Interests in CMC-N Purportedly Transferred Assets and
CMC-N Collateral - 11 U.S.C. §§ 544 and 551; (7) Recovery of
Avoidable Transfers - 11 U.S.C. § 550; and (10) Avoidance and
Recovery of Unauthorized Postpetition Transfers - 11 U.S.C.
§§ 549 and 550.

1 to avoid the transfers as preferential pursuant to § 547(b).¹⁴
2 With respect to any unperfected security interests in the lease
3 assets or transferred assets, the trustee sought to avoid the
4 transfers using his strong-arm powers pursuant to §§ 544 and
5 551.¹⁵

6
7 ¹⁴ Section 547(b) provides:

8 Except as provided in subsection (c) of this section, the
9 trustee may avoid any transfer of an interest of the debtor in
10 property -

- 11 (1) to or for the benefit of a creditor;
- 12 (2) for or on account of an antecedent debt owed by the
13 debtor before such transfer was made;
- 14 (3) made while the debtor was insolvent;
- 15 (4) made -
 - 16 (A) on or within 90 days before the date of the filing
17 of the petition; or
 - 18 (B) between ninety days and one year before the date of
19 the filing of the petition, if such creditor at the
20 time of such transfer was an insider; and
- 21 (5) that enables such creditor to receive more than such
22 creditor would receive if -
 - 23 (A) the case were a case under chapter 7 of this title;
 - 24 (B) the transfer had not been made; and
 - 25 (C) such creditor received payment of such debt to the
26 extent provided by the provisions of this title.

27
28 ¹⁵ Section 544(a) provides:

29 The trustee shall have, as of the commencement of the case,
30 and without regard to any knowledge of the trustee or of any
31 creditor, the rights and powers of, or may avoid any transfer of
32 property of the debtor or any obligation incurred by the debtor
33 that is voidable by -

- 34 (1) a creditor that extends credit to the debtor at the time
35 of the commencement of the case, and that obtains, at such
36 time and with respect to such credit, a judicial lien on all
37 property on which a creditor on a simple contract could have
38 obtained such a judicial lien, whether or not such a
39 creditor exists;
- 40 (2) a creditor that extends credit to the debtor at the time
41 of the commencement of the case, and obtains, at such time

(continued...)

1 NetBank filed a motion for partial summary judgment, to
2 which the trustee filed a cross-motion (collectively, "Partial
3 Summary Judgment Motions"). In its motion for partial summary
4 judgment, NetBank asserted that, contrary to the trustee's
5 argument, the transfers of the lease payments under the SSAs were
6 true sales.

7 NetBank further contended that it held a perfected security
8 interest in both the lease payments and the surety bonds.
9 According to NetBank, the lease payments were payment intangibles
10 within the meaning of Nevada Revised Statutes ("N.R.S.")
11 § 104.9102.¹⁶ Pursuant to N.R.S. § 104.9309, a security interest

13 ¹⁵(...continued)

14 and with respect to such credit, an execution against the
15 debtor that is returned unsatisfied at such time, whether or
16 not such a creditor exists; or
17 (3) a bona fide purchaser of real property, other than
18 fixtures, from the debtor, against whom applicable law
19 permits such transfer to be perfected, that obtains the
20 status of a bona fide purchaser and has perfected such
21 transfer at the time of the commencement of the case,
22 whether or not such a purchaser exists.

23 Section 551 provides:

24 Any transfer avoided under section 522, 544, 545, 547, 548,
25 549, or 724(a) of this title, or any lien void under section
26 506(d) of this title, is preserved for the benefit of the estate
27 but only with respect to property of the estate.

28 ¹⁶ Article X, § 10.3 of the SSA provided for the application
of Nevada law.

"'Payment intangible' means a general intangible under which
the account debtor's principal obligation is a monetary
obligation." N.R.S. § 104.9102(1)(hhh) (2005).

"'General intangible' means any personal property, including
things in action, other than accounts, chattel paper, commercial
tort claims, deposit accounts, documents, goods, instruments,
(continued...)"

1 in a payment intangible automatically perfects upon sale.¹⁷ As
2 its security interest in the lease payments was automatically
3 perfected upon sale, NetBank argued, the trustee could not avoid
4 it.

5 NetBank contended that the sale of the lease payments also
6 perfected its security interest in the surety bonds. NetBank
7 characterized the surety bonds as supporting obligations for the
8 lease payments. Under N.R.S. § 104.9308(4), perfection of a
9 security interest in subject collateral also perfects a security
10 interest in the supporting obligation for the collateral.
11 Because its security interest in the lease payments was
12 automatically perfected upon sale, NetBank contended its security
13 interest in the surety bonds also was perfected.

14 In his cross-motion, the trustee disagreed with NetBank's
15 characterization of the transfers as true sales, but agreed with
16 NetBank's characterization of the surety bonds as supporting
17 obligations.

18 After a hearing on December 20, 2004, the bankruptcy court
19 issued a memorandum decision in favor of the trustee. Analyzing
20 the relevant statutes, official commentary and case law, the

21
22 ¹⁶(...continued)
23 investment property, letter-of-credit rights, letters of credit,
24 money, and oil, gas or other minerals before extraction. The
term includes payment intangibles and software." N.R.S.
§ 104.9102(1)(pp) (2005).

25 ¹⁷ N.R.S. § 104.9309 provides:

26 "The following security interests are perfected when they
27 attach:

28 . . .

3. A sale of a payment intangible"

1 bankruptcy court found that the lease payments constituted
2 chattel paper. As such, NetBank had to perfect its security
3 interest in the lease payments by filing a financing statement,
4 which NetBank did not do. The bankruptcy court did not expressly
5 determine whether NetBank perfected its security interest in the
6 surety bonds.

7 The bankruptcy court also went on to find that, upon
8 examining the "four corners of the SSA," the transfers were
9 secured loans, rather than true sales.

10 On February 28, 2005, the bankruptcy court entered its
11 order, granting the trustee's cross-motion for partial summary
12 judgment ("Partial Summary Judgment Order") in its entirety. On
13 May 20, 2005, the bankruptcy court entered final judgment as to
14 certain claims for relief asserted by the trustee in his
15 complaint.¹⁸ NetBank appealed the Partial Summary Judgment
16 Order.

17 On appeal, in a published opinion, we affirmed in part and
18 reversed in part.¹⁹ Commercial Money Center I, 350 B.R. at 469.

19 We agreed with the bankruptcy court that the transfers of
20 the lease assets and the transferred assets under the SSAs

21
22 ¹⁸ According to the amended final judgment, the bankruptcy
23 court entered partial summary judgment in favor of the trustee on
24 the first, second, third, fifth and sixth claims for relief
25 stated in his complaint. Amended Final Judgment Pursuant to Fed.
26 R. Bankr. P. 7054(b), in Favor of Chapter 7 Trustee on the First,
27 Second, Third, Fifth and Sixth Claims for Relief Stated in the
28 Trustee's Complaint against Defendant NetBank, FSB, docket #145.

¹⁹ The bankruptcy court had ruled on cross-motions for
partial summary judgment and had made an express determination of
finality under Fed. R. Civ. P. 54(b) (incorporated by Rule 7054).
See 350 B.R. at 473 & n.5.

1 constituted secured loans, not true sales, as they “[bore] far
2 more hallmarks of a loan than a sale.” Id. at 483.

3 We disagreed with the bankruptcy court’s characterization of
4 the lease payments as chattel paper, however. Id. at 469.

5 Although the leases themselves were chattel paper, id., based on
6 our analysis of applicable Nevada law,²⁰ we determined that
7 “[lease payments] stripped from the underlying leases are not
8 records that evidence monetary obligations - they are monetary
9 obligations.” Id. at 476 (emphasis in original). As such, the
10 lease payments were payment intangibles.

11 We determined that genuine issues of material fact and legal
12 issues still remained as to whether NetBank could perfect its
13 security interest in the lease payments by possession of the
14 leases through an agent and whether NetBank in fact had
15 possession thereby. Id. at 487-88. We thus remanded to the
16 bankruptcy court for further determinations. Id. at 488.

17
18 2. The present appeal

19 On September 6, 2006, the bankruptcy court issued a notice
20 of a hearing regarding the remand (“Remand Hearing”), setting the
21 hearing for November 17, 2006. Notice of Hearing on Remand re:
22 Appeal #2, docket #177. Four days before the Remand Hearing, the
23 trustee filed a motion for summary judgment as to the issues
24

25 ²⁰ “‘Chattel paper’ means a record or records that evidence
26 both a monetary obligation and a security interest in or a lease
27 of specific goods As used in this paragraph, ‘monetary
28 obligation’ means a monetary obligation secured by the goods or
owed under a lease of the goods” N.R.S. § 104.9102(1)(k)
(2005).

1 remanded to the bankruptcy court in the prior appeal ("Summary
2 Judgment Motion").²¹ NetBank opposed.

3 After the April 26, 2007 hearing on the Summary Judgment
4 Motion, the bankruptcy court took the matter under submission.
5 Thereafter, the bankruptcy court issued its memorandum decision,
6 again in favor of the trustee.

7 The bankruptcy court first found that, as a matter of law,
8 NetBank could perfect its security interest in the lease payments
9 only by filing a financing statement. According to the
10 bankruptcy court, N.R.S. § 104.9313(1) enumerated only certain
11 kinds of property with respect to which a security interest can
12 be perfected by possession; neither general intangibles nor
13 payment intangibles were included.²²

14 Even if NetBank could perfect its security interest by
15 possession through Royal, the bankruptcy court continued, Royal
16 itself did not take possession. Citing to Commercial Money
17 Center I, 350 B.R. at 486, the bankruptcy court reasoned that
18 NetBank, as the secured party, could not perfect its security
19 interest in the lease payments by constructive possession where

20
21 ²¹ The trustee and NetBank did not provide a number of
22 documents in the record on appeal. These documents were docketed
23 and imaged by the bankruptcy court. We have reviewed these
24 documents on the bankruptcy court's electronic docket and take
judicial notice of them. See Atwood v. Chase Manhattan Mortgage
Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

25 ²² "Except as otherwise provided in subsection 2, a secured
26 party may perfect a security interest in tangible negotiable
27 documents, goods, instruments, money or tangible chattel paper by
28 taking possession of the collateral. A secured party may perfect
a security interest in certificated securities by taking delivery
of the certificated securities under [N.R.S.] 104.8301." N.R.S.
§ 104.9313(1) (2005).

1 the debtor, CMC, had actual possession of the leases at all
2 relevant times.

3 Examining the TRO and the amendments thereto, the bankruptcy
4 court further determined that Royal did not have such possession
5 of the leases as to provide sufficient notice that NetBank had a
6 security interest in the lease payments. Moreover, the
7 bankruptcy court found, the TRO and its amendments only provided
8 Royal with access to the lease files; neither the TRO nor the
9 amendments directed CMC to turn over the leases or otherwise
10 grant Royal possession or control of the leases. The bankruptcy
11 court noted that it was undisputed that Royal did not take actual
12 possession of the leases until March 12, 2002, which fell within
13 the 90-day preference period.²³

14 For the first time, NetBank contended that some of the
15 surety bonds were not supporting obligations, but instruments
16 within the meaning of N.R.S. § 104.9102(1)(tt).²⁴ Because
17 NetBank had actual possession of those surety bonds outside the
18

19 ²³ As CMC filed its chapter 11 petition on May 30, 2002, the
20 90-day preference period began running on approximately March 1,
21 2002.

22 ²⁴ N.R.S. § 104.9102(1)(tt) provides:

23 "Instrument" means a negotiable instrument or any other
24 writing that evidences a right to the payment of a
25 monetary obligation, is not itself a security agreement
26 or lease, and is of a type that in ordinary course of
27 business is transferred by delivery with any necessary
28 endorsement or assignment. The term does not include
investment property, letters of credit or writings that
evidence a right to payment arising out of the use of a
credit or charge card or information contained on or
for use with the card.

1 preference period, NetBank argued that it held a perfected
2 security interest in them.

3 The bankruptcy court applied the law of the case doctrine to
4 determine this issue. The bankruptcy court pointed out that, in
5 its partial summary judgment motion, NetBank argued that the
6 surety bonds were supporting obligations with respect to the
7 lease payments. Consequently, NetBank argued its security
8 interests in both the surety bonds and lease payments were
9 automatically perfected on sale of the lease payments. In
10 addition, in opposition to NetBank's partial summary judgment
11 motion and in his cross-motion for partial summary judgment, the
12 trustee agreed that the bonds were supporting obligations.
13 Accordingly, when the Partial Summary Judgment Motions were
14 argued before the bankruptcy court, both parties were asserting
15 that the bonds were supporting obligations. The bankruptcy court
16 believed it implicitly determined that the surety bonds were
17 supporting obligations by finding that NetBank did not perfect
18 its security interest in the lease payments and that the trustee
19 was entitled to summary judgment avoiding NetBank's security
20 interest in all of the transferred assets, including the surety
21 bonds.

22 On July 2, 2007, the bankruptcy court entered an order
23 granting the trustee's motion for summary judgment in its
24 entirety ("Summary Judgment Order").²⁵ Order Granting Trustee's

25
26 ²⁵ One month after the bankruptcy court entered the Summary
27 Judgment Order, the trustee and NetBank agreed to dismiss the
28 remaining claims for relief in the trustee's complaint. Pursuant
to a global settlement agreement entered on May 31, 2005, the
(continued...)

1 Motion for Summary Judgment, docket #204. The following day, it
2 entered final judgment in favor of the trustee as to the claims
3 for relief encompassed in his Summary Judgment Motion.

4 The FDIC appeals.²⁶

6 **II. JURISDICTION**

7 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
8 §§ 1334 and 157(b)(2)(B) and (F). We have jurisdiction pursuant
9 to 28 U.S.C. § 158.

11 **III. ISSUES**

12 (1) Whether NetBank perfected its security interest in the
13 lease payments.

14 (2) Whether the law of the case doctrine bars NetBank from
15 arguing that the surety bonds are instruments, rather than

17 ²⁵(...continued)

18 trustee and NetBank agreed to dismiss the Fourth, Ninth and
19 Eleventh claims for relief without prejudice and to dismiss the
20 Eighth and Tenth Claims for Relief with prejudice. The trustee
21 also agreed to dismiss the Seventh Claim for relief without
22 prejudice, as he believed that the Partial Summary Judgment Order
rendered it moot. Stipulation to Dismiss Fourth, Seventh,
Eighth, Ninth, Tenth, and Eleventh Claims for Relief Pursuant to
Federal Rule of Civil Procedure 41(a)(1), docket #213.

23 The bankruptcy court entered an order granting the
24 stipulation. Order Granting Stipulation to Dismiss Fourth,
25 Seventh, Eighth, Ninth, Tenth and Eleventh Claims for Relief
Pursuant to Federal Rule of Civil Procedure 41(a)(1), docket
#216.

26 ²⁶ As in the prior appeal, the trustee and NetBank
27 stipulated to an extension of time to allow NetBank to appeal the
28 Summary Judgment Order. Pursuant to an order on the stipulation
to extend the deadline to appeal, NetBank had until August 2,
2007 to file its notice of appeal.

1 supporting obligations.

2 (3) If not, whether the surety bonds are instruments.

3
4 **IV. STANDARDS FOR REVIEW**

5 We review de novo the bankruptcy court's grant of summary
6 judgment. Balint v. Carson City, 180 F.3d 1047, 1050 (9th Cir.
7 1999). Viewing the evidence in the light most favorable to the
8 non-moving party, we must determine whether any genuine issues of
9 material fact exist, and whether the bankruptcy court correctly
10 applied relevant substantive law. Id. We may neither "weigh the
11 evidence [nor] determine the truth of the matter, but only
12 determine[] whether there is a genuine issue for trial." Id. at
13 1054. "We may affirm a grant of summary judgment on any ground
14 supported by the record." Simo v. Union of Needletrades, 322
15 F.3d 602, 610 (9th Cir. 2003).

16 Summary judgment may be appropriate when a mixed question of
17 fact and law involves undisputed underlying facts. Citicorp Real
18 Estate, Inc. v. Smith, 155 F.3d 1097, 1103 (9th Cir. 1998).
19 Summary judgment is inappropriate, however, if any material
20 factual issues exist for trial. Id.

21 We review conclusions of law and questions of statutory
22 interpretation de novo. Abele v. Modern Fin. Plans Servs., Inc.
23 (In re Cohen), 300 F.3d 1097, 1101 (9th Cir. 2002).

24 We review the bankruptcy court's application of the law of
25 the case doctrine for an abuse of discretion. Milgard Tempering,
26 Inc. v. Selas Corp. of America, 902 F.2d 703, 715 (9th Cir.
27 1990).

28 Whether a writing is properly characterized as an instrument

1 under the UCC is a question of law that we review de novo. See
2 Omega Envtl., Inc. v. Valley Bank NA (In re Omega Envtl., Inc.),
3 219 F.3d 984, 986 n.4 (9th Cir. 2000) (per curiam).

4 5 **V. DISCUSSION**

6 A. NetBank's Security Interest in the Lease Payments

7 The FDIC contends that the bankruptcy court erred in
8 granting summary judgment in favor of the trustee because a
9 security interest in lease payments can be perfected by
10 possession of the underlying leases, as reasoned in Gray v.
11 Jefferson Loan & Inv. Bank (In re Commercial Management Serv.,
12 Inc.), 127 B.R. 296 (Bankr. D. Mass. 1991) ("Commercial
13 Management").

14 Arguably, NetBank could have perfected its security interest
15 either by filing a financing statement or by possession of the
16 leases, as decided in Commercial Management. Based on the record
17 before us, however, NetBank did neither.

18 19 1. No perfection by filing a financing statement

20 The filing of a financing statement is "by far the most
21 common and important method" by which to perfect a security
22 interest. White & Summers, *Uniform Commercial Code*, § 31-4 (5th
23 ed. 2002). It is undisputed, however, that NetBank did not file
24 any financing statements with respect to the transferred assets
25 or the lease assets; in its answer to the trustee's complaint,
26 NetBank conceded that it did not file any financing statements,
27 and no financing statements were filed in its behalf, in either
28 Nevada or California. NetBank thus did not perfect its security

1 interest in either the transferred assets or the lease assets by
2 filing.

3
4 2. No perfection by possession

5 Relying on the reasoning of Commercial Management, the FDIC
6 argues that NetBank perfected its security interest in the lease
7 payments by constructive possession of the leases through Royal,
8 its third-party agent.

9 In Commercial Management, the bankruptcy court held that the
10 assignee, Jefferson Loan and Investment Bank ("Jefferson")
11 perfected its security interest in lease payments by taking
12 physical possession of the underlying leases, even though it did
13 not file any financing statements as to the lease payments. 127
14 B.R. at 304.

15 The bankruptcy court in Commercial Management acknowledged
16 that pre-revision UCC § 9-305 did not specifically provide that
17 the transfer of chattel paper transferred the underlying
18 obligation, nor did it specifically provide that perfection of a
19 security interest in the chattel paper by possession perfected a
20 security interest in the obligation. Id. at 302 (quoting Boss,
21 Lease Chattel Paper: Unitary Treatment of a "Special" Kind of
22 Commercial Specialty, 1983 Duke L.J. 69, 92 (1983)). The
23 bankruptcy court believed, however, that possession of the
24 chattel paper itself would be rendered meaningless unless the
25 transfer of the chattel paper operated to transfer the rights
26 embodied therein. Commercial Management, 127 B.R. at 302
27 (quoting Boss, 1983 Duke L.J. at 92-94).

28 We reviewed Commercial Management as part of our analysis in

1 Commercial Money Center I. In light of certain provisions of the
2 UCC and the reasoning of Commercial Management, we suggested that
3 "a perfected interest in chattel paper [may] include[] the
4 associated [lease payments]," possibly as proceeds. Commercial
5 Money Center I, 350 B.R. at 479.

6 However, even if we determined that the holding of
7 Commercial Management applied in the appeal before us, we
8 conclude that NetBank did not effectually take possession of the
9 leases through Royal for perfection purposes outside of the
10 preference period.

11
12 a. Royal did not have actual possession of the leases

13 As one commentator has noted, "[p]ossession is a notoriously
14 plastic idea." White & Sommers, Uniform Commercial Code, § 31-
15 8(b) (5th ed. 2002). Accordingly, the drafters of Article 9 of
16 the UCC declined to define "possession." Id. See also UCC § 9-
17 313 cmt. 3 (2007).

18 The Nevada version of UCC § 9-313 also does not define
19 "possession."²⁷ See N.R.S. § 104.9313 (2005). Under N.R.S.
20 § 104.9313(3), a secured party takes actual possession of chattel
21 paper through an agent possessing the collateral in its behalf.²⁸

22
23 ²⁷ Nevada has adopted the UCC. See Walker Bank & Trust Co.
24 v. Smith, 501 P.2d 639, 641 (Nev. 1972). N.R.S. § 104.9313
25 mirrors UCC § 9-313, save for minor changes in numbering and
wording. Compare N.R.S. § 104.9313 (2005) with UCC § 9-313
(2007).

26 ²⁸ N.R.S. § 104.9313 provides, in relevant part:

27 3. With respect to collateral other than certificated
28 (continued...)

1 See N.R.S. § 104.9313(3) (2005); see also UCC § 9-313 cmt. 3
2 (2007). The commentary to UCC § 9-313 suggests that the agent
3 cannot be the debtor, an agent of the debtor or any other person
4 or entity "so closely connected to or controlled by the debtor
5 that the debtor has retained effective possession" ²⁹ UCC

6
7 ²⁸ (...continued)
8 securities and goods covered by a document, a secured party takes
9 possession of collateral in the possession of a person other than
10 the debtor, the secured party or a lessee of the collateral from
11 the debtor in the ordinary course of the debtor's business, when:
12 (a) The person in possession authenticates a record
13 acknowledging that it holds possession of the
14 collateral for the secured party's benefit; or
15 (b) The person takes possession of the collateral after
16 having authenticated a record acknowledging that it
17 will hold possession of collateral for the secured
18 party's benefit.

19 ²⁹ In its opposition to the Summary Judgment Motion, NetBank
20 argued that it perfected its security interest in the lease
21 payments by possession of the leases through CSC. According to
22 the bankruptcy court, NetBank failed to present evidence to show
23 that CSC was an agent for NetBank. Memorandum Decision, 11:24
24 n.11. The bankruptcy court found that the SSAs provided that CMC
25 would maintain possession of the leases. Memorandum Decision,
26 11:24-25 n.11. Assuming that CSC did take possession of the
27 leases, the bankruptcy court concluded, it was on behalf of CMC,
28 the debtor. Memorandum Decision, 11:26-28 n.11. Neither the
trustee nor NetBank mention this issue in the appeal before us.

We agree with the bankruptcy court that NetBank cannot take
possession of the leases through CSC because it is an affiliate
and/or wholly-owned subsidiary of CMC; CMC had formed CSC for the
purpose of servicing the lease pools. See UCC § 9-313 cmt. 3
(2007) ("[A] person in possession [may be] so closely connected
to or controlled by the debtor that the debtor has retained
effective possession, even though the person may have agreed to
take possession on behalf of the secured party."). Cf. Heinicke
Instruments Co. v. Republic Corp., 543 F.2d 700, 702 (9th Cir.
1976) ("The notice function of U.C.C. § 9-305 [precursor to
current UCC § 9-313] would be defeated if the debtor, or a person
under the debtor's control, were left in possession of the
collateral; therefore, perfection will not occur under those

(continued...)

1 § 9-313 cmt. 3 (2007).

2 Within the Ninth Circuit, the agent must have actual
3 possession of the collateral in order for the secured party to
4 have a perfected security interest pursuant to UCC § 9-313.

5 Heinicke, 543 F.2d at 701-02; Huffman v. Wikle (In re Staff
6 Mortgage & Inv. Corp.), 550 F.2d 1228, 1230 (9th Cir. 1977).³⁰

7 See also Fogler v. Casa Grande Cotton Finance Co. (In re Allen),

8 134 B.R. 373, 376 n.5 (9th Cir. BAP 1991). A secured party or

9 its agent takes actual possession when the collateral is

10 physically transferred to the secured party or its agent. Raiton

11 v. G&R Props. (In re Raiton), 139 B.R. 931, 936 (9th Cir. BAP

12 1992) (defining "possession" under former Cal. Com. Code § 9-

13 305). By having the agent take actual possession of the

14 collateral, notice is provided to prospective third-party

15 creditors that the debtor "no longer has unfettered use of [the

16 secured party's] collateral.'" Heinicke, 543 F.2d at 702

17 (quoting In re Copeland, 391 F. Supp. 134, 151 (D. Del. 1975));

18 Huffman, 550 F.2d at 1230.

19 The leases were not physically transferred to Royal outside
20 the preference period. According to the declarations of Mr.

21 _____

22 ²⁹(...continued)
circumstances, even if the creditor makes the debtor his agent or
23 his bailee.").

24 ³⁰ Heinicke and Huffman deal with O.R.S. § 79.3050 and Cal.
25 Com. Code § 9305, respectively, the Oregon and California
26 versions of former UCC § 9-305, the predecessor of UCC § 9-313.
27 See UCC § 9-313 cmt. 1 (2007) (former UCC § 9-305 is source of
UCC § 9-313); Heinicke, 543 F.2d at 701 n.1 (referring to UCC
28 § 9-305 throughout the opinion to refer to O.R.S. § 79.3050);
Huffman, 550 F.3d at 1229 (referring parenthetically to UCC § 9-
305).

1 Patterson and William Hibberd, an actuary for Royal, Royal did
2 not obtain physical possession of any of the original lease files
3 until March 12, 2002. Given the uncontroverted declarations of
4 Mr. Patterson and Mr. Hibberd, the FDIC does not contest this
5 point.

6
7 b. The TRO and the amendments did not give Royal control
8 of the leases

9 The FDIC instead advances a two-pronged argument to
10 establish that NetBank perfected its security interest in the
11 lease payments by possession of the leases through Royal outside
12 the preference period: (1) that Royal gained control over the
13 leases through the TRO and the amendments thereto; and (2) that
14 CMC held the leases in constructive trust for Royal.

15 The FDIC first argues that the TRO and its amendments
16 provided Royal with sufficient control over the leases as to
17 constitute possession. According to the FDIC, the TRO and the
18 amendments "limited CMC's control over the [l]eases to such a
19 degree" as to notify third-parties that CMC no longer had
20 "unqualified 'possession'" of the leases and that Royal did.
21 Appellant's Reply Brief at 7.

22 As the bankruptcy court pointed out, however, neither the
23 TRO nor the amendments to it provided Royal with control of the
24 leases. The TRO and the amendments only required CMC and/or CSC
25 to "make available" to Royal all the books, records and accounts
26 related to the leases. The other provisions of the TRO and its
27 amendments simply prohibited and restricted CMC and/or CSC from
28 removing the lease payments and the leases from Royal accounts

1 and Royal bonded lease pools and from transferring the lease
2 payments and leases to non-Royal entities and accounts. The TRO
3 and its amendments did not by their terms enable Royal to exert
4 or gain control over the leases, and thus provide the notice to
5 third-party creditors that is the *raison d'être* for perfection
6 requirements under the UCC. In fact, Royal was not specifically
7 authorized "to retrieve" the leases and lease files by order of
8 the district court until the March 19 stipulation.

9 The record also shows that Royal had no intention of
10 obtaining physical possession or control of the leases through
11 the TRO and its amendments. As indicated by Mr. Patterson in his
12 deposition testimony on December 7, 2006, Royal was not seeking
13 possession of the lease files at the time it applied for the TRO.
14 Rather, Royal's objective "was to obtain access to this
15 information." In a letter to counsel for CMC, dated March 26,
16 2002, drafted by Mr. Patterson, Royal only sought access to the
17 lease files so that it could "conduct a proper audit of the lease
18 files." The declaration of Mr. Hibberd in support of the TRO
19 also demonstrates that Royal sought access to, not physical
20 possession or control of, the leases.³¹

21 CMC was not required to make all of the lease files
22 available to Royal for retrieval until CMC and Royal entered the
23 March 19 stipulation. Unlike the March 19 stipulation, the TRO

24
25 ³¹ The FDIC contends that the February 26 order also
26 transferred control of the leases to Royal. Even assuming that
27 the February 26 order was intended to transfer control sufficient
28 to constitute possession (and we do not), we note that CMC
provided compact discs in response to the February 26 order on
approximately March 4, 2002, which was within the preference
period.

1 and its amendments did not mention retrieval. Notably, the March
2 19 stipulation made the date of Royal's retrieval of the lease
3 files retroactive to March 12, 2002.

4 Based on the record before us, we conclude that Royal did
5 not gain such control over the leases through the TRO and its
6 amendments as to constitute actual possession outside the
7 preference period. NetBank therefore did not take constructive
8 possession of the leases, at least during any period relevant for
9 purposes of this appeal.

10
11 c. Royal did not have a constructive trust over the leases

12 The FDIC argues in the alternative that Royal had possession
13 of the leases because CMC held the leases in constructive trust
14 for Royal when the TRO and its amendments divested CMC of control
15 over the leases.

16 We reject this argument. The FDIC, in effect, is using a
17 back-door approach to establish perfection through possession by
18 CMC. By arguing that CMC held the leases in constructive trust
19 for Royal, the FDIC is attempting to characterize CMC as its
20 agent indirectly.

21 As we explained in Commercial Money Center I, CMC cannot be
22 the agent of NetBank for UCC Article 9 purposes, as a matter of
23 law. Commercial Money Center I, 350 B.R. at 486-87. See also
24 Huffman, 550 F.2d at 1230; Heinicke, 543 F.2d at 702. The
25 debtor's lack of possession and the creditor's actual possession
26 of collateral serve to notify third-party creditors that the
27 debtor "no longer has unfettered use" of the collateral.
28 Heinicke, 543 F.2d at 702. To conclude otherwise would defeat the

1 notice function of perfection by possession under UCC § 9-313.

2 See id.

3 Even assuming that CMC could be an agent for purposes of
4 perfection by possession, the FDIC cannot establish that a
5 constructive trust should be imposed.

6 Property held in trust by the debtor for another generally
7 is not property of the estate. Torres v. Eastlick (In re N. Am.
8 Coin & Currency, Ltd.), 767 F.2d 1573, 1575 (9th Cir.), amended
9 by 774 F.2d 1390 (9th Cir. 1985). We look to state law to
10 determine whether a trust will be imposed on property in a
11 bankruptcy proceeding. Starr v. Bruce Farley Corp. (In re Bruce
12 Farley Corp.), 612 F.2d 1197, 1200 (9th Cir. 1980).

13 A constructive trust is a flexible, equitable remedy.
14 Airwork Corp. v. Markair Express, Inc. (In re Markair, Inc.), 172
15 B.R. 638, 642 (9th Cir. BAP 1994). Although property may be
16 subject to a constructive trust under state law, it is not
17 automatically excluded from the bankruptcy estate. N. Am. Coin &
18 Currency, Ltd., 767 F.2d at 1575. If there is no state court
19 order imposing a constructive trust prepetition, then the right
20 to such a remedy remains inchoate. See Elliott v. Frontier
21 Props. (In re Lewis W. Shurtleff, Inc.), 778 F.2d 1416, 1419 (9th
22 Cir. 1986). We therefore act very cautiously in recognizing a
23 constructive trust in favor of one creditor over another, as one
24 of the strongest policies in bankruptcy law is equality of
25 distributions among like situated creditors. N. Am. Coin &
26 Currency, Ltd., 767 F.2d at 1575. Besides, "[b]ecause it is a
27 remedy, a constructive trust cannot affect rights in the res
28

1 until it is imposed." Taylor Assocs. v. Diamant (In re Advent
2 Mgmt. Corp.), 178 B.R. 480, 488 (9th Cir. BAP 1995) (emphasis in
3 original). To date, no constructive trust has been imposed in
4 favor of Royal or the FDIC on the leases.

5 In Nevada, a constructive trust arises when the holder of
6 property is determined to be a trustee of that property for the
7 benefit of another who in good conscience is entitled to it.
8 Locken v. Locken, 650 P.2d 803, 804-05 (Nev. 1982) (per curiam).
9 Courts may impose a constructive trust where: (1) there is a
10 confidential relationship between the parties; (2) it would be
11 inequitable to allow the holder to retain the property; and (3)
12 it is essential to the effectuation of justice to impose such a
13 trust. Id. at 805. The party requesting the imposition of a
14 constructive trust must prove these circumstances by clear and
15 convincing evidence. Randono v. Turk, 466 P.2d 218, 222 (Nev.
16 1970).

17 The FDIC claims that all of the circumstances for imposition
18 of a constructive trust exist. We disagree.

19 With respect to the first factor, the FDIC has not shown by
20 clear and convincing evidence that a confidential relationship
21 existed between CMC and Royal. Under Nevada law, "[t]he essence
22 of a . . . confidential relationship is that the parties do not
23 deal on equal terms." Giles v. GMAC, 494 F.3d 865, 881 (9th Cir.
24 2007) (quoting Hoopes v. Hammargren, 725 P.2d 238, 242 (Nev.
25 1986)) (internal quotation marks omitted). By virtue of the
26 trust and confidence placed in and accepted by one party, that
27 party is in such a superior position as to exert a "unique
28 influence" over the dependent party. Giles, 494 F.3d at 881. A

1 confidential relationship exists where “one party gains the
2 confidence of the other and purports to act or advise with the
3 other’s interests in mind.” Id. (quoting Perry v. Jordan, 900
4 P.2d 335, 338 (Nev. 1995) (per curiam)).

5 The FDIC asserts that CMC had a confidential relationship
6 with Royal because CMC was sub-servicer, as provided for in the
7 SSAs. Nothing in the record indicates, however, that Royal had
8 placed such trust and confidence in CMC as to enable CMC to exert
9 a “unique influence” over Royal. Under the SSAs, CMC was no more
10 than an agent for Royal. CMC merely performed Royal’s servicer
11 duties by collecting the lease payments and distributing them to
12 the third-party investors.

13 With respect to the second and third factors, we cannot
14 agree with the FDIC that CMC’s conduct, in light of the effects
15 of the TRO and its amendments, was so inequitable as to require
16 the imposition of a constructive trust. Clear and convincing
17 evidence in the record does not mandate a constructive trust
18 remedy.

19 Moreover, as we pointed out in Commercial Money Center I,
20 NetBank was a sophisticated commercial entity that should have
21 acted further to protect its security interests. Id. at 486.
22 The FDIC has not shown that NetBank was prevented from verifying
23 whether CMC filed financing statements or from taking possession
24 of the leases itself. It is inappropriate to impose a
25 constructive trust where a commercially sophisticated creditor
26 did not take reasonable steps to ensure that its security
27 interests were perfected.

28 Based on the record before us, we conclude that the

1 bankruptcy court did not err in finding that NetBank did not
2 perfect its security interest in the lease payments by filing a
3 financing statement or by taking possession of the leases through
4 Royal. Because the FDIC failed to raise a genuine issue of
5 material fact to support a finding of perfection of its security
6 interest in the lease payments, outside of the preference period,
7 the bankruptcy court properly granted summary judgment to the
8 trustee avoiding the claimed security interest.

9
10 B. NetBank's Security Interest in the Surety Bonds

11 The FDIC asserts that the bankruptcy court erred in granting
12 summary judgment for the trustee because a genuine issue of
13 material fact exists regarding the characterization of surety
14 bonds as purely supporting obligations, or as instruments under
15 the UCC.

16 The FDIC argues that the bankruptcy court applied the law of
17 the case doctrine too broadly when it declined to consider the
18 issue. The law of the case doctrine, the FDIC contends, only
19 precludes the lower court from reconsidering issues decided
20 either explicitly or by necessary implication by the higher
21 court. No explicit or implicit finding was made in the prior
22 appeal as to whether the surety bonds constituted instruments or
23 supporting obligations. To the extent that the bankruptcy court
24 implicitly determined that the surety bonds were supporting
25 obligations, the FDIC adds, our partial reversal and remand in
26 the prior appeal effectively "unmade" that determination. The
27 bankruptcy court thus was free, the FDIC concludes, to address
28 the issue on remand.

1 We believe that the law of the case doctrine does not apply
2 to the issue. Under the law of the case doctrine, a court is
3 barred from reconsidering an issue that already has been decided
4 in the same court or in a higher court in the same case. Milgard
5 Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703, 715 (9th
6 Cir. 1990). For the law of the case doctrine to apply, the issue
7 must have been decided, either expressly or by necessary
8 implication. Id. However, even if the law of the case doctrine
9 applies, a court may decide, in its discretion, to revisit the
10 issue if: "(1) the first decision was clearly erroneous and would
11 result in manifest injustice; (2) an intervening change in the
12 law has occurred; or (3) the evidence on remand [is]
13 substantially different." Id.

14 We did not make any determination as to this issue in the
15 prior appeal. Our determinations were limited to the issues of
16 whether the transfers under the SSAs constituted sales or secured
17 loans and whether the lease payments constituted payment
18 intangibles.

19 As to the bankruptcy court, it neither expressly nor
20 implicitly decided whether the surety bonds were instruments or
21 supporting obligations in its memorandum decision on the Partial
22 Summary Judgment Motions. The bankruptcy court simply assumed
23 that the surety bonds were supporting obligations because both
24 NetBank and the trustee argued that the surety bonds were
25 supporting obligations and determined that NetBank did not have a
26 perfected security interest in the lease payments.

1 C. The Surety Bonds Are Supporting Obligations and Not
2 Instruments

3 The FDIC contends that a triable issue of material fact
4 remains as to whether at least some of the surety bonds are
5 instruments rather than purely supporting obligations. We
6 disagree.

7 The FDIC argued that even if the surety bonds are supporting
8 obligations, that characterization is not necessarily exclusive,
9 and the surety bonds could be instruments as well. At oral
10 argument, counsel for the trustee conceded that at least
11 theoretically, collateral for a loan could be both a supporting
12 obligation and an instrument, but denied that the surety bonds in
13 this case could appropriately be characterized as instruments.

14 "The question of whether a particular document qualifies as
15 an instrument under the U.C.C. is a question of law." Coral
16 Petroleum, Inc. v. Banque Paribas (In re Coral Petroleum), 50
17 B.R. 830, 837 (Bankr. S.D. Tex. 1985). See also Omega Envtl.,
18 Inc., 219 F.3d at 986 & n.4 (determining whether a certificate of
19 deposit is an instrument within the meaning of Va. Code § 8.9-
20 105(1)(i)).

21 N.R.S. § 104.9102(1)(xxx) defines a "supporting obligation"
22 as a letter-of-credit right or secondary obligation that supports
23 the payment or performance of a general intangible. N.R.S.
24 § 104.9102(1)(tt) defines an "instrument" for UCC Article 9
25 purposes (it is defined differently in UCC Article 3), as:

26 a negotiable instrument or any other writing that
27 evidences a right to the payment of a monetary
28 obligation, is not itself a security agreement or
lease, and is of a type that in ordinary course of
business is transferred by delivery with any necessary

1 endorsement or assignment.

2 By their terms, the surety bonds are assignable.³² In fact,
3 CMC purported to transfer all rights under the surety bonds to
4 NetBank under Article II, § 2.1(a)(iii) of the SSAs. However,
5 the surety bonds are not transferred by delivery in the ordinary
6 course of any party's business independent of the underlying
7 equipment leases and lease payments. In fact, at oral argument,
8 counsel for both parties confirmed that there is no "market" for
9 the surety bonds.

10 In determining whether particular written documents are
11 "instruments," "most courts defer to the realities of the
12 marketplace rather than narrowly looking to the form of the
13 writing." McFarland v. Brier, 850 A.2d 965, 975 (R.I. 2004)
14 (quoting In re Omega Env't'l, Inc., 219 F.3d at 987) (internal
15 quotation marks omitted). In this case, the reality is that the
16 surety bonds have no meaningful existence independent of the
17 equipment leases they support for security purposes. Indeed,
18 numbered section 1 of the surety bonds provides that "[i]f all
19 payments required by the Lease are made in accordance with the
20 Lease provisions, then this obligation shall be void"

22 ³² The record only contains copies of two lease bonds issued
23 by Royal. Both lease bonds set forth the same terms, though each
24 relates to a different lease. One lease bond concerns a lease
25 known as Frontier Amwest Replacement 2001-1 Series 1 - 9809322,
26 with the bond number FM999091 ("Frontier Amwest lease bond").
27 The other lease bond concerns a lease known as Lakeland 2001-3
28 Series 1 - K120561. There are multiple copies of the Frontier
Amwest lease bond in the record.

The record also includes a lease bond issued by AmWest,
which appears substantially similar to the lease bonds issued by
Royal.

1 Accordingly, the surety bonds do not represent absolute
2 rights "to the payment of a monetary obligation." They do not
3 provide for the payment of any sum certain. Rather, payments
4 under the surety bonds are contingent on the existence of payment
5 default(s) under the particular equipment leases to which they
6 relate.³³ As stated in numbered section 2 of the surety bonds,
7 "[t]his Lease Bond and the Surety's obligation constitute an
8 unconditional and absolute guarantee of payment, not collection."

9 The surety bonds list CMC (and its successors and assigns)
10 as the obligee and Royal as the surety. Reviewing a copy of a
11 surety bond issued by Royal, we note that the surety bond was
12 issued for Royal to underwrite the leases and to remedy any
13 default in the lease payments. Specifically, the surety bond
14 states in its preamble that Royal, as surety, "agrees to pay to
15 the Obligee any amounts due and owing by the principal with
16 regards to the lease." The surety bond further states that Royal
17 "is responsible to Obligee for the individual underwriting of
18 each lessee and Lease, including, but not limited to . . . the
19 accurate and timely performance by any sub-servicer designated by
20 [Royal]." The record does not include any surety bonds with
21 varying language.

22 An audit letter dated January 8, 2001 from Laura Moon, chief
23

24 ³³ Numbered section 5 of the surety bonds provides: "If the
25 Obligee fails to receive a payment under the Lease from the
26 Surety, as servicer or from any sub-servicer, on the scheduled
27 due date, default under the Lease occurs. Upon such default, the
28 Surety shall have thirty (30) days to cause the default to be
remedied. The Surety shall make payment on this Bond to Obligee
upon receipt of written demand from Obligee, within this 30 day
period."

1 accounting officer for NetBank, to Charles Deyo, senior vice-
2 president underwriting facility manager of Royal, further
3 indicates that the surety bonds constitute supporting
4 obligations, rather than instruments. Per the January 8, 2001
5 letter, Ms. Moon asked that Mr. Deyo confirm that the surety
6 bonds guarantee payment by Royal to NetBank of all lease payments
7 and any defaults thereon.³⁴ The January 8, 2001 letter included
8 a document titled, "Request for Confirmation" ("confirmation
9 form"). The confirmation form asked that Royal verify whether
10 the information regarding each surety bond was correct. At the
11 October 8, 2003 deposition of Ms. Moon, she testified that she
12 understood the purpose of the January 8, 2001 letter was "to
13 confirm the arrangement [she] believed was in place with Royal."
14 At a deposition on August 20, 2003, Mr. Deyo testified that he
15 verified the surety bonds in question and signed the confirmation

16
17 ³⁴ The January 8, 2001 letter specifically states:

18 In connection with an audit of our financial
19 statements, please confirm the following information as
20 of January 2, 2001 related to the attached listing of
21 surety bonds and return the signed confirmation in the
22 accompanying self-addressed envelope. Please confirm
23 that the attached listing of surety bonds correctly
24 states surety bonds that have been underwritten and
25 validly issued by Royal Indemnity Company to NetBank
26 (Purchaser) on leases sold by Commercial Money Center,
27 Inc. (Seller); that Royal Indemnity Company is the
28 servicer of each lease (Servicer); that the surety
bonds covering each lease are for the remaining term of
each lease; that all of the surety bonds guarantee
payment by Royal Indemnity Company to the Purchaser of
all scheduled lease payments; and that all of the
surety bonds cover all forms of default and fraud by
the related lessee, Seller, Servicer and any
subservicer (emphasis added).

1 form.

2 By their terms, the surety bonds fundamentally are not
3 instruments. They are supporting obligations provided for
4 security purposes. The surety bonds guarantee lease payments up
5 to a maximum amount in the event of default, but they do not
6 stand independent of the underlying leases as monetary payment
7 obligations. The surety bonds are not bought, sold, transferred
8 or assigned as such. Based on the record before us, it appears
9 that NetBank and Royal themselves understood and characterized
10 the surety bonds as supporting obligations. As NetBank did not
11 perfect its security interest in the lease payments, it did not
12 perfect its security interest by possession of the supporting
13 obligation surety bonds. Although the bankruptcy court did not
14 make its decision on these grounds, there was no error in
15 granting summary judgment in favor of the trustee avoiding
16 NetBank's security interest in the surety bonds.³⁵

17
18 **VI. CONCLUSION**

19 Based on the record before us, NetBank did not properly
20 perfect its security interest in either the lease payments or the
21 surety bonds outside the preference period. The bankruptcy court
22 did not err in granting summary judgment in favor of the trustee
23 avoiding NetBank's security interest in the lease payments and
24 the surety bonds. Therefore, we AFFIRM.

25
26
27

28 ³⁵ As noted above, we can affirm on any basis supported by
the record. Simo, 316 F.3d at 980.