NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-09-1277-MoPaB
KENNETH S. BAILEY,	Bk. No. SA 03-18477 ES
Debtor.	Adv. No. SA 04-01208 ES
KENNETH S. BAILEY,	
Appellant,	
v.	**M E M O R A N D U M**[1]
ROBERT ASSIL; GEORGE ELIAS; HELENE PRETKSY,	
Appellees.	

Argued and Submitted on March 19, 2010
at Pasadena, California

Filed - April 9, 2010

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

Hon. Erithe A. Smith, Bankruptcy Judge, Presiding.

Before: MONTALI, PAPPAS and BRANDT,[2] Bankruptcy Judges.

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[1]This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2]Hon. Philip H. Brandt, Bankruptcy Judge for the Western District of Washington, sitting by designation.

Prior to the petition date, the U.S. Marshal conducted two execution sales of certain contract rights and stock in which the judgment debtor held an interest. After the debtor filed for bankruptcy, he brought a fraudulent transfer action against the corporation that purchased the contract rights and the stock through credit bids and against certain shareholders of that corporation. Following a multi-day hearing, the court entered a judgment against the debtor, finding that he had not satisfied the burden of demonstrating that the transfer was consummated for less than reasonably equivalent value. We AFFIRM.

I. FACTS

Appellant Kenneth S. Bailey ("Debtor") patented an invention allowing mobile, point-of-sale credit card purchases involving cell phones. Virtual Fonlink, Inc. v. Bailey, 164 F. App'x 606, 2006 WL 172071 (9th Cir. 2006) ("VFI v. Bailey"). In June 2000, Debtor formed appellee Virtual Fonlink, Inc. d/b/a Creditel ("VFI") and assigned his patent to it. He approached appellee Mansfield Partners LLC ("Mansfield") to provide capital to VFI. Mansfield agreed to invest in VFI and the parties agreed to share ownership and control of the company. VFI v. Bailey, 164 F. App'x at 607.

In January 2001, Debtor attempted to remove Mansfield and appellees Helene Pretsky ("Pretsky"), Georges Elias ("Elias"), and Robert Assil ("Assil") from management of VFI (collectively. the "Management Team"). The Management Team sued Debtor and others in state court; the action was removed to federal court and Debtor answered the complaint and filed counterclaims.

On April 30, 2001, the parties entered a settlement

agreement ("Settlement Agreement") granting Debtor certain contract rights, including a $25,000 monthly payment.[3] The Management Team was obligated to make that monthly payment only "so long as [Debtor] and VFI are not in default of their obligations hereunder." Debtor agreed that he would have no further right or authority to act as a director, officer, or agent of VFI. The Management Team thereafter contended that Debtor failed to perform his obligations under the Settlement Agreement.

On June 27, 2002, the United States District Court for the Central District of California entered a judgment against Debtor for declaratory and injunctive relief ("Injunction Judgment") enjoining Debtor from, inter alia, interfering with the management or attempting to transfer assets of VFI. The district court found that Debtor had breached the Settlement Agreement, even though the Management Team had "performed their part of the covenants."

> On or about April 30, 2001, defendant [Debtor] and plaintiffs [the Management Team] entered into a settlement agreement and mutual general releases which confirmed the rights set forth therein, and included various covenants of the parties. Plaintiffs [the Management Team] have performed their part of the covenants, including payments made to [Debtor] over the next six months; however, beginning in or about October and early November, 2001, [Debtor] violated the terms of the settlement agreement and resumed his attempts to interfere with [the Management Team's] management of [VFI], to misappropriate to himself the intellectual property of [VFI], and ultimately to destroy the company in order to take control of its assets. Since the entry of the preliminary injunction, and since the filing of the Pretrial Conference Order, such conduct has continued, including attempts by [Debtor] to

[3]These contract rights were sold at an execution sale which is a subject of the underlying fraudulent transfer action now on appeal.

> interfere with the business communications of [VFI] with Qualcomm, Inc., and by [Debtor] purporting to enter [into] an agreement on behalf of [VFI] with Qualcomm, Inc., to pay substantial license fees to that company, to the detriment of [the Management Team and VFI].

The district court stated that as to the counterclaims of Debtor, "judgment is granted in favor of all counterdefendants." Several months later (on September 4, 2002), in a different action filed by VFI for damages relating to Debtor's breach of the Settlement Agreement, the same district court judge entered a default money judgment (the "Money Judgment") in the amount of $805,175.79 in favor of VFI against Debtor.[4]

A writ of execution was issued with respect to the money judgment in September 2002. On November 16, 2002, the U.S. Marshal conducted an execution sale of all of Debtor's contract rights in the Settlement Agreement. VFI purchased the contract rights on a partial credit bid of $100,000.00. On January 25, 2003, the U.S. Marshal conducted a second execution sale; VFI purchased Debtor's five million shares in VFI for a $100,000 credit bid.

On November 14, 2003, Debtor filed his chapter 11[5] petition.

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[4]More than a year later, Debtor filed motions to set aside both the Injunction Judgment and the Money Judgment, which the district court denied. The Ninth Circuit affirmed, holding that the "record supports the district court's determination that Bailey was either complicit in, or had contracted for, his attorney's unprofessional tactics." VFI v. Bailey, 164 F. App'x at 607.

[5]Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").

On March 12, 2004, he filed a complaint against VFI, Mansfield, Assil, Elias, Pretsky, Joseph Wakil, Thomas O'Dell and James Wohl (collectively, "Defendants") to recover fraudulent transfers, to recover damages for breach of contract and for declaratory and injunctive relief. On April 13, 2005, Debtor filed an amended complaint against Defendants to recover fraudulent transfers, for disallowance or equitable subordination, to recover damages for breach of contract, for fraud in purchase of securities, for civil violations of 18 U.S.C. § 1962(c) and (d), for breach of fiduciary duties and aiding and abetting, to determine alter ego liability, and for declaratory and injunctive relief and demand for a jury. Neither the complaint nor the amended complaint is available on the bankruptcy court's electronic docket, and Debtor did not provide them in his excerpts notwithstanding Rule 8009(b)(2).[6]

The bankruptcy court conducted a four-day trial in October and November 2008; the trial centered on the issue of whether the two execution sales constituted constructively fraudulent transfers under section 548. Defendants submitted into evidence a letter dated February 25, 2002, to fellow shareholders in VFI

[6]The bankruptcy court's findings address only the section 548 claims. According to the docket sheet of the underlying adversary proceeding, Defendants filed a motion to dismiss the amended complaint. The docket entry at number 25 (dated July 16, 2004) indicates that the bankruptcy court "would grant summary judgment in favor of [D]efendants on noncore claims 4, 8, 9, 10 & 11, as collateral estoppel applies and these issues have already been decided." The court further concluded that the third claim for relief was "an impermissible collateral attack upon a final judgment." The court directed Defendants to file promptly a mandatory withdrawal motion as to claims 5, 6 and 7. Without having access to the complaint or the amended complaint, we assume that claims 1 and 2 relate solely to the fraudulent transfer claims.

in which Debtor characterized the shares in VFI as "worthless." On cross-examination, he stated that a pending lawsuit impeded his ability to liquidate shares. Defendants also submitted evidence that Debtor's shares were encumbered by a proxy agreement and a voting agreement.

Debtor introduced into evidence a capitalization table in support of his contention that the value of his stock in VFI at the time of the execution sale (January 2003) was 50 cents a share. Elias, president and director of VFI, testified about the information contained in the capitalization table: that the three individuals buying stock in June 2002 bought the stocks with warrants (at "two hundred percent coverage"), that another round shown on the capitalization table was a sale of convertible debt, and that the shares were never available on the public market.

The court announced its ruling on May 18, 2009. The court concluded that Debtor had not sustained his burden of establishing that the two execution sales resulted in transfers for less than reasonably equivalent value:

> Moving on to whether or not the sale either of the contract rights or of the shares of stock were for less than reasonable equivalent value within the meaning of Section 548. With respect to the contract rights, it's the [Debtor's] position that under the settlement agreement of April 30, 2001 that he was entitled to certain rights under the agreement, including payment of $25,000 a month.
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> * * *
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> With respect to the contract rights, I found the evidence submitted by the [Debtor] to be speculative in terms of what the actual value of the contract rights were. I spent some time going through the record trying to substantiate the argument and figure out what the value would have been regarding the contract rights to which [Debtor] would have been entitled to at the time that the sale occurred and was simply not able to pin down anything

definitive.

Accordingly, I found that [Debtor] did not meet his burden of proof with respect to the sale of the contract rights. With respect to the sale of the shares of stock, the evidence was somewhat equivocal but ultimately not very helpful. There was of course evidence that was submitted of [Debtor's] own statements I believe some time in February 2002 that the value of the stock was worthless. I did pay attention and considered the evidence that was presented regarding the -- this is a capitalization table. There was one exhibit that was Exhibit 15 regarding the -- it was listed as the shareholders first round, second round, third round, fourth round that included investment amounts as well as share price or exercise price per share. This relates to the Debtor's argument the shares were at least worth 50 cents per share.

Again, I spent quite a long time going over this one. The problem I had with the evidence here was that there really was no evidence, and I'm not quite sure that the [Debtor] could have -- it's regarding the fair market value of these shares. Since they weren't really being traded, the evidence pointed to the fact that -- and I think Mr. Truer in one of his declarations had indicated there was a certain price that was attached to these shares for "accounting purposes."

Also there were investors who had made certain loans to the company that the Debtor [sic] which was convertible at a certain price but I really wasn't convinced that this established the fair market value or any particular value of the stock as of the date of the sale because the evidence also showed that it did not appear that anyone actually paid 50 cents or any amount, 50 cents, or 60 cents or 77 cents a share for the stock.

Given the other evidence that was going on at the time the sales occurred with respect to the financial difficulties the company was having at the time, given the fact that the Defendants -- there's evidence that the Defendants were actually out of pocket with respect to not receiving salary and other unreimbursed expenses and given, again, [Debtor's] own possible admission that the stock was not -- did not have any value I could not make a finding that the stock was worth more than $100,000 at the time of the execution sale and, therefore, found that [Debtor] had not met his burden of proof with respect to the sale of the stock either.

The court also rejected Debtor's argument that he did not receive sufficient notice of the execution sales and concluded that much of Debtor's argument constituted an improper attempt to

revisit the district court judgment:

> I focused on whether [Debtor] had satisfied his burden of proof in establishing fraudulent transfer under Section 548 as to those two sales. I know there was a lot of argument as to whether or not the judgment should have been entered at all.
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> I really did not place a lot of stock in those arguments because as far as I'm concerned those are final orders of the district court and unless reversed or otherwise set aside, those orders are what they are and they provide what they provide and whether [or] not they should have been entered or not is really in my view irrelevant for purposes of this adversary proceeding.

On August 13, 2009, the bankruptcy court entered a judgment in favor of Assil, Elias and Pretsky and against Debtor. On August 21, 2009, Debtor filed a timely notice of appeal. On February 17, 2010, this panel issued an Order Re Jurisdictional Issue. The panel observed that three of the individual defendants had been dismissed from the adversary proceeding prior to trial, that the judgment was entered in favor of the other three individual defendants (Assil, Elias and Pretsky), but that the judgment did not dispose of the claims against Mansfield and VFI. Consequently, the judgment on appeal appeared interlocutory. Slimick v. Silva (In re Slimick), 928 F.2d 304, 307 (9th Cir. 1990).

On March 2, 2010, the bankruptcy court entered an amended judgment expressly determining under FRCP 54(b) that there is no just reason for delay and directing entry of a final judgment on fewer than all parties.[7]

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[7]Debtor filed his reply brief on Friday, February 26 (as permitted by an order dated February 10, 2010). Between the time of filing his opening brief and his reply brief, he ordered a transcript of the multi-day trial before the bankruptcy court. His supplemental excerpts contain a partial transcript. In his reply, he provided citations to trial testimony. Appellees did (continued...)

II. ISSUE

Did the bankruptcy court err in denying Debtor's claims that the execution sales were constructively fraudulent transfers under section 548?

III. JURISDICTION

As Debtor has obtained an amended judgment in accordance with this panel's order dated February 17, 2010, we will treat the judgment as final even though it does not dispose of claims against all of the defendants. The bankruptcy court had jurisdiction under 28 U.S.C. § 157(b)(2)(H) and § 1334. We have jurisdiction under 28 U.S.C. § 158.

IV. STANDARDS OF REVIEW

We review de novo the bankruptcy court's conclusions of law and review for clear error its findings of fact. McDonald v. Checks-N-Advance, Inc. (In re Ferrell), 539 F.3d 1186, 1189 (9th Cir. 2008).

V. DISCUSSION

Section 548 establishes the powers of a trustee or debtor-in-possession to avoid fraudulent transfers. Under this section, a bankruptcy court can set aside "not only transfers infected by actual fraud but certain other transfers as well[,] so-called constructively fraudulent transfers." BFP v. Resolution Trust Corp., 511 U.S. 531, 535 (1994). Section 548(a)(1)(B) permits avoidance of constructively fraudulent transfers of an interest of a debtor in property. To obtain relief under this subsection,

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[7](...continued)
not have an opportunity to respond to these citations, to provide countering citations, or to provide missing portions of the transcript.

Debtor had to demonstrate "(1) that [Debtor] had an interest in property; (2) that a transfer of that interest occurred within one year of the filing of the bankruptcy petition;[8] (3) that [Debtor] was insolvent at the time of the transfer or became insolvent as a result thereof; and (4) that [Debtor] received 'less than a reasonably equivalent value in exchange for such transfer.'" Id. Only one of these elements is at issue in this appeal: whether Debtor received less than a reasonably equivalent value in exchange for the credits given at the execution sales of his contract rights in the Settlement Agreement and of his 5,000,000 shares of stock.

A. Value of Transfers

1. The Contract Rights

The contract rights at issue were Debtor's rights under the Settlement Agreement; Debtor contends that the value of those rights was at least $850,000, which was the amount purportedly remaining due to him under that agreement. That contention is unavailing, however, as the district court found in the Injunction Judgment that Debtor had breached the Settlement Agreement and that the Management Team (i.e., the Appellees) had performed their obligations under the Settlement Agreement. The district court dismissed all of the Debtor's counterclaims against the Management Team. The Injunction Judgment is final, and the Ninth Circuit has affirmed the denial of Debtor's motion to vacate it.

In light of the district court's findings and Injunction

[8]In cases filed after the enactment of BAPCPA, the time period is two years.

Judgment, we are not persuaded by Debtor's contention that the value of his contract rights in the Settlement Agreement exceeded the $100,000 bid price at the execution sale. The bankruptcy court did not clearly err in holding that Debtor had failed to satisfy his burden of demonstrating that the contract rights were sold for less than reasonably equivalent value.

Moreover, Debtor's arguments about the value of his rights under the Settlement Agreement are essentially attacks on the Injunction Judgment; the bankruptcy court correctly concluded that it could not revisit the district court's findings and conclusions. Bugna v. McArthur (In re Bugna), 33 F.3d 1054, 1057-58 (9th Cir. 1994) (a bankruptcy court errs if it permits relitigation of issues fully and fairly decided by another court). In addition, while we are not deciding the issue of whether the price obtained at an execution sale provides conclusive proof of value,[9] we do believe the price obtained at a publicly noticed sale conducted by a U.S. Marshal is one factor to consider in determining value. In this case, that factor weighs in favor of Appellees.

2. The Shares of Stock

The bankruptcy court likewise correctly determined that Debtor had not established that his shares of stock were sold for less than reasonably equivalent value. The record contains

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[9]Because we are affirming the bankruptcy court's findings as to the value of Debtor's contract rights and VFI shares, we need not decide whether, as a matter of law, a conclusive presumption exists that the price received at a noncollusive and regularly conducted execution sale of personal property constitutes reasonably equivalent value. See BFP, 511 U.S. at 531 (holding that the price received at a mortgage foreclosure sale conclusively established "reasonably equivalent value" of the mortgaged property).

sufficient support for the bankruptcy court's finding.[10] First, Debtor himself stated in a letter to other shareholders that VFI's shares were worthless. Second, Debtor admitted in testimony that he encountered difficulty liquidating his stock because of pending litigation. Third, at least some of the VFI stock sold at 50 cents a share contained warrants or were convertible debt. Thus, those shares had more value than Debtor's common stock shares, which were encumbered by a voting agreement.

The bankruptcy court did not clearly err in determining that the Debtors' shares were not equivalent in value to those shown on the capitalization table. And, as with the execution sale of the contract rights, the price obtained at the publicly noticed execution sale is one indicator of value, and that factor weighs in favor of Appellees.

B. Liability of Appellees for Transfers

Even though we have affirmed the bankruptcy court's conclusion that no fraudulent transfers occurred, we will address an equally important issue that would compel us to affirm the decision of the bankruptcy court even if the execution sales were

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[10]Debtor argues that the bankruptcy court erred in stating that no one "actually paid 50 cents or any amount, 50 cents, or 60 cents or 77 cents a share." Debtor is placing undue weight on this statement, particularly as the court did not say that its determination of value was based solely on this finding. Rather, the court made this statement in the context of weighing other evidence: debtor's statement of zero value, the financial difficulties of the company, and the dissimilar nature of the sales reflected on the capitalization table to that of the shares owned by Debtor (e.g., convertible debt vs. equity). Moreover, as noted previously, Debtor's stock was sold without warrants and thus had less value than the stock sold with warrants; Debtor's stock was also encumbered by a voting agreement, rendering the value of the stock less than stock sold without such encumbrances.

in fact fraudulent transfers. As Appellees were not initial or subsequent transferees and were not the persons for whose benefit the initial transfer was made, they would not be liable for the transfer.

Section 550 authorizes the trustee or debtor-in-possession to recover a transfer avoided under section 548 made to an initial transferee and any secondary transferee, as well as from any person for whose benefit the initial transfer was made. Danning v. Miller (In re Bullion Reserve of N. Am.), 922 F.2d 544, 547 (9th Cir. 1991). Debtor does not contend that Appellees were initial or subsequent transferees of the contract rights and the shares. VFI was the transferee and nothing was transferred by VFI to Appellees. Thus, Appellees would be liable for a fraudulent transfer only if the they were persons for whose benefit the transfer was made. That Appellees enjoyed some indirect, unquantifiable benefit upon VFI's acquisition of Debtor's shares and contract rights is not sufficient to establish their liability under section 550(a). See Reily v. Kapila (In re Int'l Mgmt. Ass'n), 399 F.3d 1288, 1292-93 (11th Cir. 2005) (observing that the "paradigm case of a benefit under § 550(a) is the benefit to a guarantor by the payment of the underlying debt of the debtor," the Eleventh Circuit held the mere fact that a fraudulent transfer resulted in the defendant's complete control over the debtors' assets "does not give rise to a quantifiable benefit or one bearing the 'necessary correspondence to the value of the property transferred or

received.'").[11]

In contending that the execution sales were conducted for the benefit of Appellees, Debtor cited two cases in which the courts concluded that a shareholder of a transferee corporation was "the entity for whose benefit such transfer was made." In the case of von Gunten v. Neilson (In re Slatkin), 243 F. App'x 255 (9th Cir. 2007), the Ninth Circuit held that the sole shareholder, director and officer of a transferee corporation was the beneficiary or the person "for whose benefit such transfer was made." Slatkin is distinguishable from the case on appeal, as Appellees here are not the sole shareholders of VFI; Debtor's letter to other shareholders and his Exhibit 15 demonstrate that other shareholders exist.

The second case cited by Debtor, Join-In Int'l (U.S.A.) Ltd. v. N.Y. Distrib. Corp. (In re Join-In Int'l (U.S.A.) Ltd.), 56 B.R. 555 (Bankr. S.D.N.Y. 1986), is likewise distinguishable. In that case, the court held that direct and indirect benefits conferred on the debtor should be considered in determining whether a transfer occurred for "reasonably equivalent value." It did not hold that the recipient of an indirect benefit is "the

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[11]In holding that a shareholder who acquired complete control of a debtor by virtue of a fraudulent transfer was not an "entity for whose benefit" the transfer was made, the Eleventh Circuit stated:

> There is no direct benefit to Reily in a transaction that reduced the assets under his control by $100,000 but increased to an unquantifiable extent the concentration of his control or ownership of that shrunken asset base. The only "benefit" cited by the bankruptcy court was the winning of 100% control over depleted assets. This is not a tangible or a quantifiable benefit.

399 F.3d at 1293.

entity for whose benefit such transfer was made."

Because Appellees were neither transferees nor entities for whose benefit the transfers were made, they would not be liable for the transfers of Debtor's contract rights and stock, even if the execution sales did constitute fraudulent transfers (which, as discussed previously, they did not).

VI. CONCLUSION

For the foregoing reasons, we AFFIRM.