

NOT FOR PUBLICATION

APR 09 2010

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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.	CC-09-1277-MoPaB
)		
7	KENNETH S. BAILEY,)	Bk. No.	SA 03-18477 ES
)		
8	Debtor.)	Adv. No.	SA 04-01208 ES
)		
9	_____)		
)		
10	KENNETH S. BAILEY,)		
)		
11	Appellant,)		
)		
12	v.)	MEMORANDUM ¹	
)		
13	ROBERT ASSIL; GEORGE ELIAS;)		
	HELENE PRETKSY,)		
)		
14	Appellees.)		
)		
15	_____)		

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.

¹This 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.

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

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

11 I. FACTS

12 Appellant Kenneth S. Bailey ("Debtor") patented an invention
13 allowing mobile, point-of-sale credit card purchases involving
14 cell phones. Virtual Fonlink, Inc. v. Bailey, 164 F. App'x 606,
15 2006 WL 172071 (9th Cir. 2006) ("VFI v. Bailey"). In June 2000,
16 Debtor formed appellee Virtual Fonlink, Inc. d/b/a Creditel
17 ("VFI") and assigned his patent to it. He approached appellee
18 Mansfield Partners LLC ("Mansfield") to provide capital to VFI.
19 Mansfield agreed to invest in VFI and the parties agreed to share
20 ownership and control of the company. VFI v. Bailey, 164 F.
21 App'x at 607.

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

28 On April 30, 2001, the parties entered a settlement

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

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

18 On or about April 30, 2001, defendant [Debtor] and
19 plaintiffs [the Management Team] entered into a
20 settlement agreement and mutual general releases which
21 confirmed the rights set forth therein, and included
22 various covenants of the parties. Plaintiffs [the
23 Management Team] have performed their part of the
24 covenants, including payments made to [Debtor] over the
25 next six months; however, beginning in or about October
26 and early November, 2001, [Debtor] violated the terms
27 of the settlement agreement and resumed his attempts to
28 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

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

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

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

14 A writ of execution was issued with respect to the money
15 judgment in September 2002. On November 16, 2002, the U.S.
16 Marshal conducted an execution sale of all of Debtor's contract
17 rights in the Settlement Agreement. VFI purchased the contract
18 rights on a partial credit bid of \$100,000.00. On January 25,
19 2003, the U.S. Marshal conducted a second execution sale; VFI
20 purchased Debtor's five million shares in VFI for a \$100,000
21 credit bid.

22 On November 14, 2003, Debtor filed his chapter 11⁵ petition.

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

⁵Unless 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").

1 On March 12, 2004, he filed a complaint against VFI, Mansfield,
2 Assil, Elias, Pretsky, Joseph Wakil, Thomas O'Dell and James Wohl
3 (collectively, "Defendants") to recover fraudulent transfers, to
4 recover damages for breach of contract and for declaratory and
5 injunctive relief. On April 13, 2005, Debtor filed an amended
6 complaint against Defendants to recover fraudulent transfers, for
7 disallowance or equitable subordination, to recover damages for
8 breach of contract, for fraud in purchase of securities, for
9 civil violations of 18 U.S.C. § 1962(c) and (d), for breach of
10 fiduciary duties and aiding and abetting, to determine alter ego
11 liability, and for declaratory and injunctive relief and demand
12 for a jury. Neither the complaint nor the amended complaint is
13 available on the bankruptcy court's electronic docket, and Debtor
14 did not provide them in his excerpts notwithstanding Rule
15 8009(b)(2).⁶

16 The bankruptcy court conducted a four-day trial in October
17 and November 2008; the trial centered on the issue of whether the
18 two execution sales constituted constructively fraudulent
19 transfers under section 548. Defendants submitted into evidence
20 a letter dated February 25, 2002, to fellow shareholders in VFI
21

22 ⁶The bankruptcy court's findings address only the section
23 548 claims. According to the docket sheet of the underlying
24 adversary proceeding, Defendants filed a motion to dismiss the
25 amended complaint. The docket entry at number 25 (dated July 16,
26 2004) indicates that the bankruptcy court "would grant summary
27 judgment in favor of [D]efendants on noncore claims 4, 8, 9, 10 &
28 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.

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

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

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

20 Moving on to whether or not the sale either of the
21 contract rights or of the shares of stock were for less than
22 reasonable equivalent value within the meaning of Section
23 548. With respect to the contract rights, it's the
24 [Debtor's] position that under the settlement agreement of
25 April 30, 2001 that he was entitled to certain rights under
26 the agreement, including payment of \$25,000 a month.

27 * * *

28 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

1 definitive.

2 Accordingly, I found that [Debtor] did not meet his
3 burden of proof with respect to the sale of the contract
4 rights. With respect to the sale of the shares of stock,
5 the evidence was somewhat equivocal but ultimately not very
6 helpful. There was of course evidence that was submitted of
7 [Debtor's] own statements I believe some time in February
8 2002 that the value of the stock was worthless. I did pay
9 attention and considered the evidence that was presented
10 regarding the -- this is a capitalization table. There was
11 one exhibit that was Exhibit 15 regarding the -- it was
12 listed as the shareholders first round, second round, third
13 round, fourth round that included investment amounts as well
14 as share price or exercise price per share. This relates to
15 the Debtor's argument the shares were at least worth 50
16 cents per share.

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

26 Also there were investors who had made certain loans to
27 the company that the Debtor [sic] which was convertible at a
28 certain price but I really wasn't convinced that this
29 established the fair market value or any particular value of
30 the stock as of the date of the sale because the evidence
31 also showed that it did not appear that anyone actually paid
32 50 cents or any amount, 50 cents, or 60 cents or 77 cents a
33 share for the stock.

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

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

1 revisit the district court judgment:

2 I focused on whether [Debtor] had satisfied his burden
3 of proof in establishing fraudulent transfer under Section
4 548 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.

5 I really did not place a lot of stock in those
6 arguments because as far as I'm concerned those are final
7 orders of the district court and unless reversed or
8 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.

9 On August 13, 2009, the bankruptcy court entered a judgment
10 in favor of Assil, Elias and Pretsky and against Debtor. On
11 August 21, 2009, Debtor filed a timely notice of appeal. On
12 February 17, 2010, this panel issued an Order Re Jurisdictional
13 Issue. The panel observed that three of the individual
14 defendants had been dismissed from the adversary proceeding prior
15 to trial, that the judgment was entered in favor of the other
16 three individual defendants (Assil, Elias and Pretsky), but that
17 the judgment did not dispose of the claims against Mansfield and
18 VFI. Consequently, the judgment on appeal appeared
19 interlocutory. Slimick v. Silva (In re Slimick), 928 F.2d 304,
20 307 (9th Cir. 1990).

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

25
26 ⁷Debtor filed his reply brief on Friday, February 26 (as
27 permitted by an order dated February 10, 2010). Between the time
28 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...)

1 **II. ISSUE**

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

5 **III. JURISDICTION**

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

12 **IV. STANDARDS OF REVIEW**

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

17 **V. DISCUSSION**

18 Section 548 establishes the powers of a trustee or debtor-
19 in-possession to avoid fraudulent transfers. Under this section,
20 a bankruptcy court can set aside "not only transfers infected by
21 actual fraud but certain other transfers as well[,] so-called
22 constructively fraudulent transfers." BFP v. Resolution Trust
23 Corp., 511 U.S. 531, 535 (1994). Section 548(a)(1)(B) permits
24 avoidance of constructively fraudulent transfers of an interest
25 of a debtor in property. To obtain relief under this subsection,
26

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

1 Debtor had to demonstrate "(1) that [Debtor] had an interest in
2 property; (2) that a transfer of that interest occurred within
3 one year of the filing of the bankruptcy petition;⁸ (3) that
4 [Debtor] was insolvent at the time of the transfer or became
5 insolvent as a result thereof; and (4) that [Debtor] received
6 'less than a reasonably equivalent value in exchange for such
7 transfer.'" Id. Only one of these elements is at issue in this
8 appeal: whether Debtor received less than a reasonably equivalent
9 value in exchange for the credits given at the execution sales of
10 his contract rights in the Settlement Agreement and of his
11 5,000,000 shares of stock.

12 A. Value of Transfers

13 **1. The Contract Rights**

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

26 In light of the district court's findings and Injunction
27

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

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

7 Moreover, Debtor's arguments about the value of his rights
8 under the Settlement Agreement are essentially attacks on the
9 Injunction Judgment; the bankruptcy court correctly concluded
10 that it could not revisit the district court's findings and
11 conclusions. Bugna v. McArthur (In re Bugna), 33 F.3d 1054,
12 1057-58 (9th Cir. 1994) (a bankruptcy court errs if it permits
13 relitigation of issues fully and fairly decided by another
14 court). In addition, while we are not deciding the issue of
15 whether the price obtained at an execution sale provides
16 conclusive proof of value,⁹ we do believe the price obtained at a
17 publicly noticed sale conducted by a U.S. Marshal is one factor
18 to consider in determining value. In this case, that factor
19 weighs in favor of Appellees.

20 **2. The Shares of Stock**

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

24
25 ⁹Because we are affirming the bankruptcy court's findings as
26 to the value of Debtor's contract rights and VFI shares, we need
27 not decide whether, as a matter of law, a conclusive presumption
28 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).

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

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

16 B. Liability of Appellees for Transfers

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

21
22 ¹⁰Debtor argues that the bankruptcy court erred in stating
23 that no one "actually paid 50 cents or any amount, 50 cents, or
24 60 cents or 77 cents a share." Debtor is placing undue weight on
25 this statement, particularly as the court did not say that its
26 determination of value was based solely on this finding. Rather,
27 the court made this statement in the context of weighing other
28 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.

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

5 Section 550 authorizes the trustee or debtor-in-possession
6 to recover a transfer avoided under section 548 made to an
7 initial transferee and any secondary transferee, as well as from
8 any person for whose benefit the initial transfer was made.

9 Danning v. Miller (In re Bullion Reserve of N. Am.), 922 F.2d

10 544, 547 (9th Cir. 1991). Debtor does not contend that Appellees
11 were initial or subsequent transferees of the contract rights and
12 the shares. VFI was the transferee and nothing was transferred
13 by VFI to Appellees. Thus, Appellees would be liable for a
14 fraudulent transfer only if they were persons for whose
15 benefit the transfer was made. That Appellees enjoyed some
16 indirect, unquantifiable benefit upon VFI's acquisition of
17 Debtor's shares and contract rights is not sufficient to
18 establish their liability under section 550(a). See Reily v.
19 Kapila (In re Int'l Mgmt. Ass'n), 399 F.3d 1288, 1292-93 (11th
20 Cir. 2005) (observing that the "paradigm case of a benefit under
21 § 550(a) is the benefit to a guarantor by the payment of the
22 underlying debt of the debtor," the Eleventh Circuit held the
23 mere fact that a fraudulent transfer resulted in the defendant's
24 complete control over the debtors' assets "does not give rise to
25 a quantifiable benefit or one bearing the 'necessary
26 correspondence to the value of the property transferred or

1 received.'").¹¹

2 In contending that the execution sales were conducted for
3 the benefit of Appellees, Debtor cited two cases in which the
4 courts concluded that a shareholder of a transferee corporation
5 was "the entity for whose benefit such transfer was made." In
6 the case of von Gunten v. Neilson (In re Slatkin), 243 F. App'x
7 255 (9th Cir. 2007), the Ninth Circuit held that the sole
8 shareholder, director and officer of a transferee corporation was
9 the beneficiary or the person "for whose benefit such transfer
10 was made." Slatkin is distinguishable from the case on appeal,
11 as Appellees here are not the sole shareholders of VFI; Debtor's
12 letter to other shareholders and his Exhibit 15 demonstrate that
13 other shareholders exist.

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

21 _____
22 ¹¹In holding that a shareholder who acquired complete
23 control of a debtor by virtue of a fraudulent transfer was not an
24 "entity for whose benefit" the transfer was made, the Eleventh
25 Circuit stated:

26 There is no direct benefit to Reily in a transaction
27 that reduced the assets under his control by \$100,000
28 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.

1 entity for whose benefit such transfer was made.”

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

7 **VI. CONCLUSION**

8 For the foregoing reasons, we AFFIRM.

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