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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-07-1077-MoDBa
)		
SOUHILL ACHI,)	Bk. No.	SA 04-17523-RK
)		
Debtor.)	Adv. No.	SA 05-01226-RK
)		
BCHARA ACHI,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM ¹	
)		
THOMAS H. CASEY, Chapter 7)		
Trustee,)		
)		
Appellee.)		

Argued on November 28, 2007
at Pasadena, California

Submitted on December 6, 2007

Filed - January 3, 2008

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

Honorable Robert N. Kwan, Bankruptcy Judge, Presiding

Before: MONTALI, DUNN and BAUM,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. Redfield T. Baum, Sr., Chief Judge of the U.S. Bankruptcy Court for the District of Arizona.

1 After trial, the bankruptcy court entered a judgment
2 avoiding a deed of trust lien as a fraudulent transfer pursuant
3 to 11 U.S.C. § 544³ and California Civil Code section 3439 ("CC
4 § 3439") et seq., holding that the debtor executed the deed of
5 trust with actual intent to hinder, delay or defraud his
6 creditors. After the judgment was entered and while this appeal
7 was pending, the trustee abandoned the property encumbered by the
8 deed of trust and also abandoned the estate's interest in the
9 judgment and the avoided transfer. In light of this abandonment,
10 and for the reasons discussed below, we VACATE the judgment.

11 I. FACTS

12 On or about September 22, 1988, Debtor Souhill Z. Achi
13 ("Debtor") acquired fee title to certain real property located in
14 Buena Park, California (the "Property"). In March 2000, Debtor
15 purportedly prepared (but did not sign or have notarized) a deed
16 of trust (the "Bchara DOT") encumbering the Property in favor of
17 his brother, appellant Bchara Achi ("Appellant").

18 On December 13, 2004, Debtor filed his chapter 7 petition.
19 Appellee Thomas S. Casey was appointed as the trustee ("Trustee")
20 of Debtor's estate. Trustee filed a complaint against Appellant
21 to avoid the Bchara DOT and to preserve the avoided lien for the
22 benefit of the estate.

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³Unless 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 1001-9037, as
28 enacted and promulgated prior to the effective date of The
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 On January 12, 2007, the bankruptcy court held the trial in
2 the adversary proceeding. Four days later, the court issued an
3 oral ruling setting forth its findings and conclusions and
4 indicating that it would issue a judgment avoiding the Bchara DOT
5 on the grounds of actual fraud (CC § 3439.04(a)(1)) but not on
6 the grounds of constructive fraud (CC § 3439.04(a)(2)). On
7 February 16, 2007, the bankruptcy court entered its judgment
8 avoiding the Bchara DOT and preserving it for the benefit of
9 Debtor's estate. Appellant filed his timely notice of appeal on
10 February 23, 2007.

11 While the appeal was pending, Trustee filed a motion to
12 abandon the Property and the judgment. The bankruptcy court
13 entered an order granting this motion on December 6, 2007. The
14 bankruptcy court's order authorizes abandonment of not only the
15 Property, but also the "cause of action to avoid trust deed."

16 Trustee also filed a motion for waiver of appearance at the
17 oral argument before us, stating that if the judgment is
18 affirmed, "the Bchara [DOT], as an interest of the Bankruptcy
19 Estate, will be abandoned to [Debtor]."

20 **II. DISCUSSION**

21 In light of the order abandoning the Property, we will
22 vacate the judgment because (1) upon abandonment, property of the
23 estate reverts in the debtor with all of the rights and
24 obligations existing prior to the petition date and (2) allowing
25 the debtor to benefit personally from the lien avoidance
26 circumvents both the Bankruptcy Code and California state law,
27 which do not allow a transferor who participated voluntarily in a
28 transfer to avoid or attack that transfer.

1 A. Effect of Abandonment

2 "Upon abandonment, the debtor's interest in the property is
3 restored nunc pro tunc as of the filing of the bankruptcy
4 petition." Catalano v. Comm'r of Internal Revenue, 279 F.3d 682,
5 685 (9th Cir. 2002) (emphasis added). While the Ninth Circuit
6 did not describe the ramifications of this retroactive
7 application of abandonment, other courts and commentators have
8 stated that "[u]pon abandonment, property of the estate reverts
9 in the debtor with all of the rights and obligations existing
10 prior to the bankruptcy filing, or as if the property had never
11 been held by the trustee as part of the estate." 8A Corpus Juris
12 Secundum Bankruptcy § 651 (updated November 2007), citing White
13 v. Coon (In re Purco), 76 B.R. 523 (Bankr. W.D. Pa. 1987) ("The
14 effect of abandonment is that ownership and control of the asset
15 is reinstated in the debtor with all rights and obligations as
16 before filing a petition in bankruptcy."); The Huntington Nat'l
17 Bank v. Hunter (In re Hunter), 76 B.R. 117, 118 (Bankr. S.D. Ohio
18 1987) ("if the property has been abandoned in accordance with the
19 applicable provisions of the Bankruptcy Code and Rules, the title
20 to the property reverts back to the debtor as if it had never
21 been held by the trustee.").

22 Because, upon abandonment, the Property is revested nunc pro
23 tunc to the petition date with all obligations that existed as of
24 that date, the Bchara DOT (an obligation on the Property that
25 existed as of the petition date) must exist post-abandonment. We
26 therefore VACATE the judgment to return the Property to its
27 status as of the petition date.

1 B. Debtor Should Not Benefit From Avoidance of the Bchara
2 Deed of Trust

3 Trustee admitted that, following abandonment, only Debtor
4 would benefit, if at all, from the avoidance of the Bchara DOT.
5 And while the abandonment order purports to permit abandonment of
6 "a cause of action to avoid trust deed," a debtor lacks standing
7 to pursue such an action, as discussed below. Allowing the
8 Debtor to benefit from the avoidance of the Bchara DOT or to
9 recover Trustee's right to pursue a "cause of action to avoid"
10 the Bchara DOT is contrary to the spirit of both the Bankruptcy
11 Code and California law, which do not allow a transferor who
12 acted voluntarily to attack a transfer as fraudulent. Tognazzi
13 v. Wilhelm, 6 Cal.2d 123, 125, 56 P.2d 1227, 1228 (1936). ("'[H]e
14 who executes a conveyance of property for the purpose of
15 hindering, delaying, or defrauding his creditors cannot by an
16 action in equity obtain a reconveyance from his grantee, nor can
17 anyone claiming under him, except an innocent purchaser.'"); see
18 also Jones v. Re-Mine Oil Co., 47 Cal.App. 832, 842, 119 P.2d 219
19 (1941) (one who has transferred his property to defraud his
20 creditors cannot thereafter recover from his grantee that which
21 he has conveyed).

22 It is also contrary to the spirit of section 544(b) and CC
23 § 3439, the statutes upon which the judgment is based. Section
24 544(b) confers on Trustee the power to avoid transfers of an
25 interest of the debtor that is voidable under state law by a
26 creditor holding an allowable unsecured claim. 11 U.S.C.
27 § 544(b); Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 232
28 (9th Cir. BAP 2007). California state law permits creditors

1 (present and future) to seek avoidance of actually fraudulent
2 transfers. Cal. Civ. Code § 3439.04(a)(1). Debtor -- the only
3 entity who would now benefit from the judgment -- is not a
4 "creditor" and would, under ordinary circumstances, be denied
5 standing to pursue such a judgment.

6 Moreover, while section 522(h) allows a debtor under certain
7 circumstances to avoid a transfer that would otherwise be
8 avoidable by a trustee under section 544, a debtor can only
9 exercise that power if he could have exempted the property under
10 section 522(g). Here, Debtor would not be able to exempt the
11 property under section 522(g) because the transfer was a
12 voluntary transfer by him. Thus Debtor cannot take advantage of
13 section 522(h), and should not be able to reap its benefits
14 because of Trustee's abandonment. We construe the December 6
15 order approving abandonment of the cause of action as approval of
16 Trustee's decision to give up any attempt to monetize it, nothing
17 more.

18 **III. CONCLUSION**

19 In light of the foregoing, we are entering an order that the
20 bankruptcy court's judgment entered on February 16, 2007,
21 avoiding the Bchara DOT be VACATED without prejudice to any
22 creditor pursuing whatever avoidance actions it may have with
23 respect to the Bchara DOT under state law and in state court.