

MAR 21 2008

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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NOT FOR PUBLICATION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**

| | | | |
|----|---------------------|---|-------------------------------|
| 6 | In re: |) | BAP No. CC-07-1413-BMdK |
| 7 | EDWARD GODFREY, |) | Bk. No. LA 05-18335-TD |
| 8 | Debtor. |) | |
| 9 | <hr/> | | |
| 10 | RICHARD K. DIAMOND, |) | |
| 11 | Chapter 7 Trustee, |) | |
| 12 | Appellant, |) | |
| 13 | v. |) | MEMORANDUM¹ |
| 14 | MOLLY LOMENZO, |) | |
| 15 | Appellee. |) | |

Submitted Without Oral Argument on March 19, 2008
at Pasadena, California

Filed - March 21, 2008

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

Before: BRANDT², MACDONALD³, and KLEIN, Bankruptcy Judges.

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, U.S. Bankruptcy Judge for the Western District of Washington, sitting by designation.

³ Hon. Donald MacDonald, Chief U.S. Bankruptcy Judge for the District of Alaska, sitting by designation.

1 Is a debt based on a promissory note executed pre-petition but
2 funded post-petition allowable as a pre-petition claim? The bankruptcy
3 court answered this question affirmatively, overruling the chapter 7⁴
4 trustee's objection.

5 We REVERSE.
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8 **I. FACTS**

9 Edward Godfrey filed a chapter 7 petition on 18 April 2005, and
10 appellant Richard K. Diamond ("Trustee") was appointed trustee. Mr.
11 Godfrey is now deceased, but his death does not abate the bankruptcy.
12 Rule 1016; In re Eads, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991).

13 Molly Lomenzo, Godfrey's mother, filed a proof of claim which
14 included a debt of \$50,000 plus interest based on a promissory note dated
15 April 2005. Trustee objected to this claim, among others. The
16 documentation attached to the proof of claim indicated that the funds
17 loaned on the 15 April note were wire-transferred to Debtor on 20 April
18 2005, two days after the bankruptcy petition was filed. The trustee
19 argued that the debt was a post-petition debt, not eligible for allowance
20 in the bankruptcy case.

21 Although Lomenzo did not respond or appear at hearing, the
22 bankruptcy court overruled the trustee's objection because, under
23 California law, a note is presumed to be supported by consideration. CCC

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

"CCC" references are to the California Civil Code.

1 § 1614 provides “[a] written instrument is presumptive evidence of a
2 consideration.” Accordingly, although the note was funded post-petition,
3 the court ruled that the note was valid as of the petition date and
4 entitled to allowance. The court entered its order overruling the
5 trustee’s objection on 18 October 2007; the trustee timely appealed.

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7 **II. JURISDICTION**

8 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and
9 § 157(b) (1) and (b) (2) (B), and this panel does under 28 U.S.C. § 158(c).

10
11 **III. ISSUE**

12 Whether the bankruptcy court erred in overruling Trustee’s objection
13 to Lomenzo’s claim.

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15 **IV. STANDARD OF REVIEW**

16 The bankruptcy court’s ruling was based on its interpretation of
17 California law and, implicitly, the Bankruptcy Code. We review issues
18 of statutory construction de novo. In re Simpson, 366 B.R. 64, 70 (9th
19 Cir. BAP 2007).

20
21 **V. DISCUSSION**

22 The bankruptcy court upheld the validity of the promissory note as
23 of the petition date based on California’s statutory presumption of
24 consideration. The trustee argues that this presumption was overcome by
25 the evidence that the funds had not been transferred as of the petition
26 date, which is the operative date for determining the existence of a
27 claim. The trustee cites no case law on point, and we have found no
28 bankruptcy cases dealing with this issue. Nor does case law under CCC

1 § 1614 address the situation presented here: most of the cases involving
2 promissory notes involve a complete absence of consideration, as opposed
3 to delay in the delivery of consideration. See, e.g., Saks v. Charity
4 Mission Baptist Church, 90 Cal.App.4th 1116, 1133 (2001). But we must
5 evaluate the claim as of the petition date, § 502(b), and as the trustee
6 points out, a chapter 7 discharge discharges those debts that arose
7 before the date of the order for relief. 11 U.S.C. § 727(b). Moreover,
8 under California law, a note not supported by consideration is
9 unenforceable. Tracy v. Alvord, 118 Cal. 654, 655 (1897).

10 Although the promissory note existed as of the petition date, it was
11 not then supported by consideration. CCC § 1614 confers the presumption
12 that a duly-executed promissory note is supported by consideration, but
13 that is a rebuttable presumption affecting only the burden of producing
14 evidence, not the burden of proof. Rancho Santa Fe Pharmacy, Inc., v.
15 Seyfert, 219 Cal.App.3d 875, 884 (1990) (not cited by the trustee to
16 bankruptcy court or in his brief to this panel):

17 [W]hen the party against whom such a presumption operates
18 produces some quantum of evidence casting doubt on the truth
19 of the presumed fact, the other party is no longer aided by
20 the presumption. The presumption disappears, leaving it to
the party in whose favor it initially worked to prove the fact
in question.

21 Id. at 882. This is consistent with Federal Rule of Evidence 301, which
22 provides:

23 In all civil actions and proceedings not otherwise provided
24 for by Act of Congress or by these rules, a presumption
25 imposes on the party against whom it is directed the burden of
26 going forward with evidence to rebut or meet the presumption,
but does not shift to such party the burden of proof in the
sense of the risk of nonpersuasion, which remains throughout
the trial upon the party on whom it was originally cast.

1 See also Cal. Evid. Code § 604 (also not cited to the bankruptcy court
2 or in the trustee's brief), which sets forth the effect of a presumption
3 affecting the burden of producing evidence as requiring:

4 the trier of fact to assume the existence of the presumed fact
5 unless and until evidence is introduced which would support a
6 finding of its nonexistence, in which case the trier of fact
shall determine the existence or nonexistence of the presumed
fact from the evidence and without regard to the presumption.

7 Accordingly, the trustee merely needed to show some – any – evidence
8 that there was no consideration at the time the note was executed, or at
9 least by the petition date, to overcome the presumption. As Ms. Lomenzo
10 attached bank records to her sworn proof of claim which indicated the
11 funds were transferred after the bankruptcy petition was filed, the
12 trustee needed only to point that out. Regardless of whether the note
13 was supported by consideration when Mr. Godfrey filed his bankruptcy
14 petition, the amount of the enforceable obligation debt then owed to Ms.
15 Lomenzo was zero, and the claim could not be allowed. 11 U.S.C.
16 § 502(b).

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18

VI. CONCLUSION

19 The bankruptcy court erred in concluding that the 15 April 2005
20 promissory note was enforceable as of the petition date. The presumption
21 that the note was supported by consideration was overcome, and the claim
22 objection should have been sustained.

23 Accordingly, we REVERSE.

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