

JUL 24 2007

HAROLD S. MARENUS, CLERK
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NOT FOR PUBLICATION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.	NC-06-1398-KSD
)		
KENNETH DOOLITTLE and)	Bk. No.	05-55696
MARILYN A. DOOLITTLE,)		
)	Adv. No.	06-05036
Debtors.)		
)		
_____)		
)		
KENNETH DOOLITTLE,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
MADILYN CLIFFT,)		
)		
Appellee.)		
_____)		

Argued and Submitted on June 22, 2007
at San Francisco, California

Filed - July 24, 2007

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

Honorable Marilyn Morgan, Bankruptcy Judge, Presiding

Before: KLEIN, SMITH and DUNN, Bankruptcy Judges.

*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.

1 A judgment debtor on a money judgment issued by the
2 bankruptcy court appeals the judgment enforcement order requiring
3 funds held in a bank account to be delivered by the sheriff to
4 the appellee, judgment creditor. We AFFIRM.

5
6 FACTS

7 On September 12, 2005, the appellant/debtor, Kenneth
8 Doolittle, filed a voluntary chapter 7 bankruptcy petition in the
9 Northern District of California.

10 The debtor is a financial advisor and licensed real estate
11 broker who sold used mobile homes and serviced deeds of trust on
12 mobile homes by accepting principal and interest payments from
13 buyers and making the payments to the seller clients who financed
14 the sales.

15 The debtor also solicited and managed investments in trust
16 deeds. From 1992 to 2002, the appellee, Madilyn Clifft,
17 entrusted more than \$200,000.00 to the debtor to invest on her
18 behalf. The debtor, however, used the appellee's funds to pay
19 his expenses. The appellee obtained a \$265,501.88 judgment
20 against the debtor from the bankruptcy court, which debt the
21 court determined to be nondischargeable under 11 U.S.C.
22 § 523(a)(2).

23 On August 29, 2006, pursuant to a writ of execution, the
24 appellee levied on six of the debtor's bank accounts at Coast
25 Commercial Bank ("Bank") in Aptos, California. Funds in four of
26 the accounts were not remitted to the sheriff by the Bank because
27 they were expressly designated as trust accounts, which are not
28

1 subject to levy in California.¹ A fifth account, held jointly
2 by the debtor with his spouse, was levied upon in the amount of
3 \$9.75.

4 The disputed account, which was expressly designated as
5 "Mobile Home Service Account," was levied upon in the approximate
6 amount of \$70,000.00 ("Funds").

7 On September 7, 2006, the debtor filed a claim of exemption,
8 asserting that the "Mobile Home Service Account" is a trust
9 account that by statute is not subject to enforcement of a money
10 judgment because it is not assignable or transferable. Cal. Civ.
11 Proc. Code § 695.030(a).

12 The debtor contended that his Mobile Home Service Account
13 was used to service trust deeds on mobile homes that represented
14 seller carryback financing. The debtor stated that he would
15 collect and deposit mobile home buyers' principal and interest
16 payments into the account and make the payments to the trust deed
17 owners in the same amounts, deducting only his service fee. In a
18 further brief, the debtor added that the Funds in the account
19 were his clients' money, and not his. The debtor also attested
20 that he voluntarily conformed his handling of the accounts to
21 service seller carryback financing loans on the mobile homes to
22 real estate brokers trust account regulations.

23 The evidentiary hearing regarding the judgment enforcement
24 dispute was held on October 19, 2006, and an order was entered on
25 October 26, 2006. At the hearing and in opposition papers, the

26
27 ¹The names of the accounts were as follows: "Real Estate
28 Trust Account," "Broker Real Estate Trust Acct. II," "Mobile Home
Escrow Trust Account," and "Mobile Home Trust Account."

1 appellee contended that the debtor's "Mobile Home Service
2 Account" did not constitute a legal trust fund for funds held by
3 a licensed real estate broker under Cal. Bus. & Prof. Code
4 § 10145(a)(1). Appellee also presented evidence that the debtor
5 had paid her \$537.35 from the disputed account, even though her
6 investment was not maintained in that account. As such, the
7 appellee argued that the Funds in the disputed account were
8 assignable or transferable, hence, subject to execution.

9 The bankruptcy court ruled that the Funds in the mobile home
10 service account "are subject to levy because the account was not
11 properly set up as a trust account" and ordered the sheriff to
12 deliver the funds to the appellee.² The court reasoned that what
13 constitutes a trust account is strictly construed under
14 applicable California law.³ The court was not persuaded that the
15 debtor's mobile home service account was a trust account and not
16 the debtor's personal account. It took particular note that
17 funds from that account had been transferred to the appellee,
18 even though her investment was not serviced through that account.

19 After the debtor timely appealed, on January 9, 2007, we
20 granted a stay pending appeal to maintain the status quo with
21

22 ²With respect to the balance of the bank accounts levied,
23 the bankruptcy court ordered that the proceeds of the joint
24 account in the amount of \$9.75 be remitted to the levying officer
25 and delivered to the appellee; and ordered that the funds in the
26 remaining four accounts, which were found properly set up as
27 trust fund accounts, be released from levy and returned to the
28 debtor.

³The court based its ruling on Cal. Civ. Proc. Code
§ 695.010(a) and § 695.030(a), Cal. Fin. Code § 17410(a), Cal.
Bus. & Prof. Code § 10145(a), 10 Cal. Code Reg. § 2832(a), and 1
Res. Mort. Lend. State Reg. Man. West Cal. § 2:35.

1 respect to the Funds on the conditions that a procedural defect
2 be corrected and the debtor post a bond in the amount of
3 \$7,000.00, or deposit \$7,000.00 in the bankruptcy court registry,
4 sufficient to cover the monetary loss that appellee will likely
5 suffer as a result of the issuance of the stay, plus costs on
6 appeal.⁴

7
8 JURISDICTION

9 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
10 We have jurisdiction under 28 U.S.C. § 158.

11
12 ISSUE

13 Whether the Funds held in the debtor's "Mobile Home Service
14 Account" in the approximate amount of \$70,000.00 are funds that
15 cannot be assigned or transferred, and thus, are not subject to
16 enforcement of a money judgment.

17
18 STANDARD OF REVIEW

19 The question of whether money in a bank account is not
20 assignable or transferable, and thus, not subject to enforcement
21 of a money judgment is a mixed question of law and fact that is
22 reviewed de novo. See Murray v. Bammer, 131 F.3d 788, 792 (9th
23 Cir. 1997).

24
25
26
27 ⁴The bankruptcy court docket does not reflect whether a
28 \$7,000.00 bond was posted or \$7,000.00 was deposited in the
bankruptcy court registry.

1 DISCUSSION

2 Before discussing whether the debtor's Funds in his "Mobile
3 Home Service Account" are property subject to enforcement of a
4 money judgment, we canvas the procedure for enforcing a judgment
5 of the federal court for the payment of money.

6
7 I

8 Federal money judgments are enforced through the procedures
9 prescribed by state law. Fed. R. Civ. Proc. 69. California
10 judgment enforcement law is followed when enforcing a money
11 judgment rendered by a federal court sitting in California,
12 except to the extent a federal statute applies or enforcement is
13 stayed under Fed. R. Civ. Proc. 62.⁵ Cal. Prac. Guide Enf. J. &
14 Debt Ch. 6A-2. Judgment creditors who have obtained a writ of
15 execution from a federal court may use state law procedures to
16 collect debts under Fed. R. Civ. Proc. 69(a). Id. In the case
17 before us, the appellee obtained a writ of execution from the
18 bankruptcy court. Accordingly, California law applies to the
19 appellee's ability to enforce her money judgment against the
20 debtor.

21 The correct method to contest whether the debtor's account
22 is exempt from levy is the claim of exemption procedure

23
24

⁵Federal Rule of Civil Procedure 69(a) provides:

25 The procedure on execution . . . in proceedings on and
26 in aid of execution shall be in accordance with the
27 practice and procedure of the state in which the
28 district court is held, existing at the time the remedy
is sought, except that any statute of the United States
governs to the extent that it is applicable.

1 prescribed by Cal. Civ. Proc. Code § 695.040: "Property that is
2 not subject to enforcement of a money judgment may not be levied
3 upon," and if levied upon, "the property may be released pursuant
4 to the claim of exemption procedure provided in Article 2
5 (commencing with Section 703.510) of Chapter 4." Property that
6 is not subject to enforcement of a money judgment is exempt
7 without making a claim. Cal. Civ. Proc. Code § 704.210. At a
8 hearing on a claim of exemption, the exemption claimant has the
9 burden of proof. Cal. Civ. Proc. Code § 703.580(b).

10 Specific California code provisions provide the framework
11 for whether the debtor's Funds are the type of property subject
12 to enforcement. Section 695.010(a) states that, "Except as
13 otherwise provided by law, all property of the judgment debtor is
14 subject to enforcement of a money judgment." Cal. Civ. Proc.
15 Code § 695.010(a). "Property of the judgment debtor that is not
16 assignable or transferable is not subject to enforcement of a
17 money judgment." Cal. Civ. Proc. Code § 695.030(a).

18 Moreover, Cal. Fin. Code § 17410(a) provides that "trust
19 funds are not subject to enforcement of a money judgment arising
20 out of any claim against the licensee or person acting as escrow
21 agent."

22 These statutes reflect the long-established rule that in
23 California, trust property is not the subject of seizure and sale
24 under judgment and execution against the trustee. See Townsend
25 v. Greeley, 72 U.S. 326, 337 (1866) (applying California law).

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28 //

1 II

2 Whether the Funds in debtor's mobile home service account
3 constitute property in a trust account, that is not assignable or
4 transferable, is the key issue. The outcome will determine
5 whether the Funds in this account are subject to enforcement of
6 the appellee's money judgment against the debtor under California
7 law.

8 In California, no particular words, such as "trust" or
9 "trustee," are necessary to create a trust.⁶ See Placerville
10 Fruit Growers' Ass'n v. Irving, 287 P.2d 793, 797 (Cal. Ct. App.
11 1955). However, the requirements are stricter for brokers
12 dealing with real estate transactions. Section 2.35 of the
13 Residential Mortgage Lending State Regulation Manual dated April
14 2007, addressing trust fund accounting in connection with loan
15 servicing practices, states that Cal. Bus. & Prof. Code
16 § 10145(a)(1) and the related provision in the California
17 Administrative Code require that a "trust account must be
18 designated as such in the name of the . . . licensee as
19 trustee."⁷ 1 Res. Mort. Lend. State Reg. Man. West Cal. § 2:35.

21 ⁶The five elements required to create an express trust are:
22 1) a competent trustor, 2) trust intent, 3) trust property, 4)
23 trust purpose, and 5) a beneficiary. See Keitel v. Heubel, 103
Cal. App. 4th 324, 337 (Ct. App. 2002).

24 ⁷Section 10145(a)(1) of the California Business and
25 Professional Code provides:

26 A real estate broker who accepts funds belonging to
27 others in connection with a transaction subject to this
28 part shall deposit all those funds that are not
immediately placed into a neutral escrow depository or
(continued...)

1 If there is not an adequate writing, as in the account now
2 in issue, then any trust would have to be an oral trust. By
3 California statute, proof of "the existence and terms of an oral
4 trust of personal property may be established only by clear and
5 convincing evidence." Cal. Prob. Code § 15207(a). Furthermore,
6 "the oral declaration of the settlor, standing alone, is not
7 sufficient evidence of the creation of a trust of personal
8 property." Cal. Prob. Code § 15207(b).

9 By statute, the exemption claimant has the burden of proof
10 to establish the claimed exemption. Cal. Civ. Proc. Code
11 § 703.580(b).

12 The debtor did not expressly designate the account as a
13 "trust" account, but merely designated it as "Mobile Home Service
14 Account." Thus, under California law, the debtor has the burden
15

16 ⁷(...continued)

17 into the hands of the broker's principal, into a trust
18 fund account maintained by the broker in a bank or
19 recognized depository in this state. All funds
20 deposited by the broker in a trust fund account shall
21 be maintained there until disbursed by the broker in
22 accordance with instructions from the person entitled
23 to the funds.

24 Cal. Bus. & Prof. Code § 10145(a)(1).

25 Section 2832(a), Title 10 of the California Administrative Code
26 provides:

27 Compliance with Section 10145 of the Code requires that the
28 broker place funds accepted on behalf of another into the
hands of the owner of the funds, into a neutral escrow
depository or into a trust fund account in the name of the
broker, . . . as trustee. . . .

10 Cal. Code Reg. § 2832(a) (emphasis added).

1 to prove, by clear and convincing evidence, that the Funds in the
2 "Mobile Home Service Account" qualify as personal property held
3 in an oral trust, not assignable or transferable, and
4 accordingly, exempt from enforcement of a money judgment.

5 The debtor contends that the account constitutes a trust
6 account because of the way he uses the Funds, even though it is
7 not expressly designated as a trust account. He maintains that
8 he uses the "Mobile Home Service Account" to service mobile home
9 trust deeds by depositing buyers' principal and interest payments
10 into the account and making payments to the owners of the trust
11 deeds in the same amounts, minus his service fee. Thus, he
12 argues that the money is not his money and not subject to
13 enforcement under Cal. Civ. Proc. Code § 695.030(a).

14 In opposition, the appellee contends that the debtor's
15 "Mobile Home Service Account" does not constitute a trust account
16 for California judgment enforcement purposes, because it is not
17 properly identified as such, as is required for the activities of
18 a licensed real estate broker under Cal. Bus. & Prof. Code
19 § 10145(a)(1). The appellee further argues that the debtor set
20 up the account in his name, for his own business purposes, and is
21 free to take funds at any time. If the debtor can assign and
22 transfer the Funds from this account at his discretion, then the
23 appellee argues that the Funds qualify as property subject to
24 enforcement.

25 If California real estate laws and regulations apply to the
26 debtor's account, then the "Mobile Home Service Account" does not
27 comply with the requirements of a trust account because it was
28 not expressly designated as such.

1 Furthermore, the debtor had four other accounts in the same
2 Bank, which he specifically designated as "trust" accounts. The
3 debtor's omission to state explicitly that the "Mobile Home
4 Service Account" was a trust account indicates that the debtor
5 had the ability freely to assign and transfer the Funds.
6 Property that is freely assignable and transferable is subject to
7 enforcement of a money judgment under California law. See Cal.
8 Civ. Proc. § 690.010(a) and § 690.030(a).

9 The debtor contends, however, that California law and
10 regulations for real estate brokers do not apply when the loans
11 supposedly being serviced are for the purchase of personal
12 property (i.e., mobile homes not on foundations), not real
13 property.⁸

14 The flaw in this argument is that the debtor nonetheless
15 submits that he conforms his practice for servicing mobile home
16 trust deeds to the requirements of real estate trust deeds. It
17 follows that, if the debtor truly conformed his business of
18 servicing mobile home trust deeds to the requirements of real
19 estate trust deeds, as he claims, then the debtor would have
20 explicitly created the mobile home service account to be a
21 "trust" account, especially in light of the evidence that he
22 expressly created four other trust accounts at the same bank. By
23 not doing so, it is reasonable to infer that the debtor was not
24 binding himself to hold the Funds in trust. If the Funds are not
25 held in a trust account, then the Funds are not protected against

26
27 ⁸Miller & Starr California Real Estate Section 31:3 states
28 that a mobile home not installed on a foundation is personal
property. 11 Cal. Real Est. § 31:3 (3d ed. 2007).

1 enforcement of a money judgment.

2 Even if we were to accept that the debtor was not required
3 to hold himself to the regulations of real estate brokers in his
4 mobile home service business, the debtor would still have to
5 prove by clear and convincing evidence that an oral trust of the
6 Funds had been created and that money in that account had not
7 been freely assigned or transferred at his discretion. The
8 bankruptcy court was not convinced. We cannot say that this was
9 error.

10 The evidence submitted by the debtor himself is not
11 sufficiently comprehensive or conclusive as to the details of
12 transfers and daily use of the account. As the appellee
13 contends, the fact that debtor only submitted one bank statement
14 from the disputed account, one deposit receipt, and one summary
15 of monies deposited to the account on one day, all with differing
16 dates, is persuasive, and tends to corroborate the position that
17 the account was not set up as a trust account in the first place.

18 The appellee also argues that the debtor's lack of
19 explanation for two telephone transfers of funds out of the
20 disputed account in the amounts of \$9,000.00 and \$15,000.00 on
21 August 14, 2006 and August 15, 2006, indicate the debtor removed
22 these funds for some purpose other than the putative trust
23 purpose.

24 In addition, what the bankruptcy court described as "the
25 most compelling factor" supporting its conclusion that the
26 debtor's mobile home service account was not a trust account, was
27 the appellee's declaration testimony indicating that the debtor
28 had previously made a \$537.35 payment to the appellee from the

1 disputed account, although her investment was not maintained in
2 that account. The bankruptcy court's inference in this regard
3 was correct.

4 Taken altogether, we are persuaded that the bankruptcy court
5 correctly concluded that the debtor did not meet his burden of
6 proof by clear and convincing evidence. The evidence supports
7 the conclusion that the Funds in the mobile home service account
8 could be freely assigned and transferred, which is consistent
9 with the appellee's testimony, documenting an actual use contrary
10 to the purported trust. As such, the Funds are subject to
11 enforcement of appellee's money judgment under California law.

12
13 III

14 Where an account is not specifically labeled as a "trust"
15 account, courts sometimes may imply a trust so as to prevent
16 unjust enrichment and to ensure that legal formalities do not
17 frustrate the original intent of the transacting parties. A
18 resulting trust or a constructive trust may be imposed as an
19 equitable remedy. See generally Ins. Co. of the West v. Simon
20 (In re Foam Sys. Co.), 92 B.R. 406, 409 (9th Cir. BAP 1988);
21 Burlesci v. Peterson, 68 Cal. App. 4th 1062, 1069 (Ct. App.
22 1998); 13 Witkin, Summary of Cal. Law, Trusts, § 311 (10 ed.
23 2005); 76 Am. Jur. 2d Trusts § 135 (West 2007). The court's
24 ability to impose a constructive trust is also codified in
25 California statutes. See Cal. Civ. Code §§ 2223 and 2224.⁹

26
27 ⁹Section 2223 provides that, "One who wrongfully detains a
28 thing is an involuntary trustee thereof, for the benefit of the
owner." Cal. Civ. Code § 2223.

(continued...)

1 The debtor argues that a resulting trust should be imposed
2 by the court for the benefit of the third parties whose money is
3 held in his "Mobile Home Service Account." In contrast, the
4 appellee contends that the debtor should not be afforded the
5 remedy of any "constructive" type trusts, either resulting trust
6 or constructive trust, because the debtor has cited no authority
7 for his proposition, and the debtor is not in the position to
8 make his claim of exemption on behalf of unidentified third
9 parties who have made no claim themselves.¹⁰

10 Because resulting trusts and constructive trusts are
11 equitable remedies imposed by the court, it makes sense for the
12 court to consider whether implying a trust by law comports with
13

14 ⁹(...continued)
15 Section 2224 provides:

16 One who gains a thing by fraud, accident, mistake,
17 undue influence, the violation of a trust, or other
18 wrongful act, is, unless he or she has some other and
19 better right thereto, an involuntary trustee of the
20 thing gained, for the benefit of the person who would
21 otherwise have had it.

22 Cal. Civ. Code § 2224.

23 ¹⁰The appellee contends that, if any third parties had a
24 claim to these Funds, they should have appeared in the trial
25 court after levy. A constructive trust compels the transfer of
26 property from the person wrongfully holding it to the rightful
27 owner. Burlesci, 68 Cal. App. 4th at 1069. For a court to
28 impose a constructive trust, the following three conditions must
be satisfied: 1) the existence of a trust res (property or some
interest in property); 2) the right of a complaining party to
that res; and 3) some wrongful acquisition or detention of the
res by another party who is not entitled to it. Id. The
appellee argues that the debtor should not be protected against
execution by creditors because the third prong has not been
satisfied, and the debtor is not the person who can raise this
claim on behalf of these unidentified third parties.

1 public policy. The bankruptcy court reasoned that the purpose
2 and objective of real estate regulations was to protect the
3 public from the damages and loss incident to dealing with an
4 incompetent or untrustworthy real estate practitioner. As the
5 debtor himself stated that he conformed his mobile home financial
6 servicing practice to that of real estate transactions, the
7 bankruptcy court concluded that, "Allowing the debtor to operate
8 using an account that is not a formal trust account subjects his
9 clients to risks for which there is no expedient remedy. Here,
10 there are no safeguards to insure that the debtor does not use
11 the mobile home service account at his sole discretion."

12 (Hearing Tr. 9:21-25, Oct. 19, 2006.) We agree.

13 The mobile home service account does not merit the remedy of
14 imposing a constructive trust or a resulting trust. Thus, the
15 Funds in debtor's mobile home service account is property subject
16 to enforcement of appellee's money judgment.

17 18 CONCLUSION

19 The debtor has failed to prove by clear and convincing
20 evidence that the Funds held in the debtor's "Mobile Home Service
21 Account" were not freely assignable or transferable. Thus, the
22 approximate \$70,000.00 held in the account is subject to
23 enforcement of the appellee's money judgment. AFFIRMED.