NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NC-07-1128-KDCa
NORTHPOINT COMMUNICATIONS GROUP, INC., et al.	Bk. No. 01-30127
Debtors.	Adv. No. 03-03051
E. LYNN SCHOENMANN, Trustee,	
Appellant,	
v.	**MEMORANDUM**[*]
BCCI CONSTRUCTION CO., aka BRENT CONSTRUCTION	
Appellee.	

Argued and Submitted on October 26, 2007
at Sacramento, California

Filed – November 7, 2007

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

Honorable Thomas E. Carlson, Bankruptcy Judge, Presiding

Before: KLEIN, DUNN and CARROLL,[**] Bankruptcy Judges.

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[*]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.

[**]Hon. Peter H. Carroll, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

This is an appeal from a judgment ruling that a putatively avoidable transfer of $204,532 was not recoverable from appellee as a preferential transfer because the appellee was a "mere conduit" and not a "transferee" under 11 U.S.C. § 550(a)(1). We AFFIRM.

FACTS

Debtor NorthPoint Communications Group, Inc. was a nationwide internet service provider. Appellee BCCI Construction Co., aka Brent Construction, was debtor's general contractor for the debtor's tenant improvements on leased properties in the San Francisco Bay area.

In late November 2000, Verizon cancelled a pending merger with NorthPoint, causing NorthPoint to begin discussions on early termination of some of its leases. Debtor requested that appellee, as its general contractor, provide it with a summary of all amounts that were owed to all the contractors on debtor's Bay Area projects. The summary provided included the debt amounts to three other entities ("Third Parties"), which were not subcontractors of appellee, but rather, had contracted directly with debtor to provide services on the same construction projects on which appellee was working.[1]

In mid-December 2000, debtor asked appellee to obtain from the Third Parties payment amounts due and lien releases so that any mechanics liens or other liens could be cleared from the

[1]The three entities were: Cole Project Management, which provided project management services; the Smith Group, which provided architectural services; and FACS, which provided furniture and installation services.

various properties. On behalf of debtor, appellee obtained from the Third Parties the amounts due, which totaled $204,532, and agreements that appellee would forward payments to the Third Parties upon receipt of funds from debtor.

On December 19, 2000, appellee sent debtor a $1,469,176 invoice that included the $204,532 owed to the Third Parties.

Debtor paid the $1,469,176 in three installments. On December 28, 2000, debtor wired appellee $750,000. On January 12, 2001, debtor paid appellee $304,577.90 by check drawn on debtor's payroll account. On March 16, 2001, debtor wired appellee the $414,599 balance.[2] The first two payments covered multiple invoices and obligations to both the appellee and the Third Parties.

On January 5, 2001, from the first funds received, appellee transmitted the $204,532 to the Third Parties.[3]

On January 16, 2001, debtor filed for bankruptcy relief under chapter 11, which case was later converted to chapter 7.[4]

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[2]The $414,599 was wired to appellee after the bankruptcy filing and while debtor remained in possession; however, trustee does not seek to recover this transfer because the pre-petition nature of the payment was not discovered within two years of filing bankruptcy.

[3]Invoice number 389, dated December 28, 2000, specifies the payments to be made to the Third Parties:

Cole (project manager):	$9,633.50
FACS (furniture):	$91,485.50
Smith Group (architect):	$103,412.50
Total	$204,531.50

[4]Debtor, along with three of its affiliates, filed separate voluntary petitions for chapter 11 relief on January 16, 2001. The cases were ordered converted to cases under chapter 7 on June 12, 2001.

Appellant E. Lynn Schoenmann was appointed as trustee of the debtor's estate. Debtor immediately moved to sell substantially all of its operating assets. By order entered on March 22, 2001, those assets were sold to AT&T for $135 million.

On July 25, 2006, appellant filed the underlying adversary proceeding,[5] which sought to recover payments totaling $1,054,578 that debtor made to appellee in December 2000 and January 2001. In particular, appellant sought to recover the $204,532 that appellee had received on behalf of, and transmitted to, the Third Parties as constructively fraudulent transfers ("Third Party Payments") and the remaining $850,046 as preferential transfers.[6]

After trial on November 28, 2006, the court published an Opinion that contained findings of fact and conclusions of law, Schoenmann v. BCCI Constr. Co. (In re NorthPoint Commc'ns Group, Inc.), 361 B.R. 149 (Bankr. N.D. Cal. 2007), and entered Judgment on February 12, 2007.

In the portion of the judgment that is not questioned on appeal, the trial court concluded that appellee had established an "ordinary course of business" defense for $811,689 of the

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[5]Trustee initially commenced a large number of adversary proceedings on January 8, 2003 to recover alleged preferential transfers made by debtor. After it was discovered that recovery was sought against appellee, as BCCI Construction Co. and Brent Construction, in two separate adversary proceedings, the proceedings were consolidated by stipulation.

[6]The issue of debtor's solvency during the preference period was tried separately in a proceeding involving several of the defendants in different preference actions. The court determined that debtor would be considered to have been insolvent during the entire ninety days prior to bankruptcy for all purposes in all NorthPoint preference and fraudulent conveyance action adversary proceedings.

$850,046 in allegedly preferential payments under 11 U.S.C. § 547(c)(2)(C) (transfer must have been made "according to ordinary business terms") and awarded the appellant $38,357 plus pre-judgment interest for the portion of the funds in which appellee had not established an "ordinary course" defense to the allegations of preference.

In addition, as relevant to this appeal, the court also determined that appellant could not recover the $204,532 in Third Party Payments as fraudulent conveyances. The court held that appellant did not establish that appellee was a "transferee" of those payments under 11 U.S.C. § 550(a) and did not establish that debtor did not receive reasonably equivalent value for those payments pursuant to 11 U.S.C. § 548(a)(1)(B). It concluded that appellee was a "mere conduit" and not a "transferee" from whom a trustee may recover because appellee received the Third Party Payments subject to a contractual obligation to transfer the funds to the Third Parties. Moreover, the court concluded that debtor had received reasonably equivalent value for the Third Party Payments, because the payments were promptly transferred to the Third Parties in satisfaction of debtor's obligations to those Third Parties.

Appellant then moved for reconsideration on the alternative ground that the $204,532 in Third Party Payments were preferential transfers.

The appellant asserted that the court applied the incorrect legal standard for determining that appellee was a "mere conduit" rather than a "transferee." She contended that Universal Serv. Admin. Co. v. Post-Confirmation Comm. of Unsecured Creditors of

Incomnet Commc'ns Corp. (In re Incomnet, Inc.), 463 F.3d 1064 (9th Cir. 2006), aff'g Incomnet Comm. Corp. v. Universal Serv. Administ. Co. (In re Incomnet, Inc.), 299 B.R. 574 (9th Cir. BAP 2003) ("Incomnet"), rather than Danning v. Miller (In re Bullion Reserve of North Am.), 922 F.2d 544 (9th Cir. 1991) ("Bullion Reserve"), governed the "transferee" issue. The appellant also asserted that the evidence did not support the trial judge's factual finding that appellee was under a contractual duty to pay the Third Parties the $204,532 received from debtor.

The court, ruling that the precise theory of avoidance was immaterial to § 550(a)(1), denied trustee's motion for reconsideration on March 28, 2007, again ruling that the appellee was a "mere conduit" and not a "transferee" of the Third Party Payments. The court held that Incomnet was inapplicable because it did not involve a two-step transaction, unlike the present case. Because the court ruled that appellee was not a "transferee," the court concluded appellant could not recover the Third Party Payments, regardless of whether appellant's theory for avoidance was preferential transfer or fraudulent conveyance.

This appeal, focusing only on whether appellee qualified as an "initial transferee" under 11 U.S.C. § 550(a)(1), which would entitle appellant to recover the $204,532 in payments disbursed to the Third Parties, ensued.[7]

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[7]Appellant notes that she is not appealing the bankruptcy court's finding that the Third Party Payments were not fraudulent transfers. Her only basis of appeal is that the court erred on the issue of whether appellee was a transferee of these funds and whether those transfers constituted preferential transfers.

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334. We have jurisdiction under 28 U.S.C. § 158(a)(1).

ISSUE

Whether the court erred in holding that the $204,532 in funds appellee received from debtor and disbursed to the Third Parties were not recoverable by the appellant as preferential transfers because appellee was a "mere conduit" rather than an "initial transferee" of the Third Party Payments under 11 U.S.C. § 550(a)(1).

STANDARD OF REVIEW

We review findings of fact for clear error and issues of law de novo. Hoopai v. Countrywide Home Loans, Inc. (In re Hoopai), 369 B.R. 506, 509 (9th Cir. BAP 2007). We review mixed questions of law and fact de novo. Murray v. Bammer (In re Bammer), 131 F.3d 788, 792 (9th Cir. 1997). A mixed question exists when the facts are established, the rule of law is undisputed, and the issue is whether the facts satisfy the legal rule. Id. Mixed questions require consideration of legal concepts and the exercise of judgment about the values that animate legal principles. Id. Whether an entity is a "transferee" or a "mere conduit" is such a question.

DISCUSSION

The narrow issue before us is whether, under § 550(a)(1), the court erred in determining the mixed question of law and fact

that appellee qualified for the "mere conduit" exception to "transferee" status with respect to the $204,532 disbursed to the Third Parties. Case law construing the meaning of the statutorily undefined term "transferee" has developed a "mere conduit" exception to "transferee" status, which we describe before discussing its application to this case.

I

If a transfer is avoidable under one of the enumerated trustee avoiding powers, including preferential and fraudulent transfers, § 550(a)(1) authorizes the trustee to recover from the "initial transferee" or "the entity for whose benefit such transfer was made."[8] 11 U.S.C. § 550(a)(1).

The general rule is that the party who receives a transfer of property directly from the debtor is the initial transferee. Incomnet, 299 B.R. at 578. This applies to one-step transaction cases. See Incomnet, 299 B.R. at 580-81 (transfer was one-step transaction in which party determined to be "transferee" did not collect funds as agent for third party).

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[8]Pursuant to § 550(a), a preferential transfer is recoverable only if the entity qualifies as a "transferee." To the extent that a transfer is avoided:

> the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property from --
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
>
> (2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(a).

However, in cases in which a two-step transaction exists (A transfers property to B as agent for C), the "conduit" rule, which is an equitable exception to the general rule, has emerged. Under this line of cases, courts have developed two standards to determine whether a party is an "initial transferee" or a "mere conduit": the "dominion test" and the "control test."

Although courts have at times confused the terms, the Ninth Circuit and this Panel have consistently applied the dominion test where appropriate, and have declined to adopt the control test. Incomnet, 463 F.3d at 1064 (affirming Panel holding dominion test did not apply to this one-step transaction case); Abele v. Modern Fin. Plans Servs., Inc. (In re Cohen), 300 F.3d 1097, 1102 n.2 (9th Cir. 2002); Bullion Reserve, 922 F.2d at 548 (adopting test from Seventh Circuit in leading case in this area, Bonded Fin. Servs., Inc. v. European Am. Bank, 838 F.2d 890, 893 (7th Cir. 1988)); Incomnet, 299 B.R. at 580-81; McCarty v. Richard James Enters., Inc. (In re Presidential Corp.), 180 B.R. 233, 237-38 (9th Cir. BAP 1995).

Under the dominion test, a "transferee" is one who has "dominion over the money or other asset, the right to put the money to one's own purposes. When A gives a check to B as agent for C, then C is the 'initial transferee'; the agent may be disregarded." Bullion Reserve, 922 F.2d at 548. The dominion test focuses on whether the recipient of the funds has legal title to them and the ability to use the money as it sees fit. Incomnet, 463 F.3d at 1070-71.

In contrast, the Eleventh Circuit applies the control test, which "simply requires courts to step back and evaluate a

transaction in its entirety to make sure that their conclusions are logical and equitable."[9] Nordberg v. Societe Generale (In re Chase & Sanborn Corp.), 848 F.2d 1196, 1199 (11th Cir. 1988).

II

Appellant now seeks recovery under § 550(a) of the $204,532 received and transmitted by the appellee as preferential transfers under § 547. The court ruled that, regardless of whether the payments were preferences or fraudulent transfers, the appellant could not recover the Third Party Payments from appellee because appellee was not a "transferee" under § 550(a). It determined that appellee was a "mere conduit" in a two-step transaction with a contractual duty to disburse the funds to the Third Parties, as set forth in Bullion Reserve, 922 F.2d at 549. Because the court decided that appellee was not a "transferee" in the first place, the court determined it was immaterial whether

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[9]The Ninth Circuit has explained the difference between the two tests:

> While the two inquiries are similar, they are not indistinguishable: The dominion test focuses on whether the recipient of funds has legal title to them and the ability to use them as he sees fit. See Bonded Fin. Servs., 838 F.2d at 893-94. The control test takes a more gestalt view of the entire transaction to determine who, in reality, controlled the funds in question. In re Chase & Sanborn Corp., 848 F.2d at 1199. Since we have explicitly adopted the "'more restrictive 'dominion test,'" set out in Bonded Fin. Servs., In re Cohen, 300 F.3d at 1102 n.2, we take care not to apply the more lenient "control test" put forth in In re Chase & Sanborn Corp.

Incomnet, 463 F.3d at 1071.

the Third Party Payments were avoidable, either as preferential transfers or fraudulent conveyances.

Appellant, on the other hand, contends that the court applied the incorrect legal standard in its "conduit" analysis, arguing that the appellee is a "transferee" under Incomnet because the appellee did not fall within the line of cases in which the "conduit" rule applied. See Incomnet, 299 B.R. at 578.

We hold that the court was correct in determining that the appellee was not a "transferee" from whom the appellant could recover the $204,532 under § 550(a)(1). The court correctly applied the dominion test by deeming the transfer to be a two-step transaction. Debtor transferred the funds to appellee who then had a legal obligation to disburse the payments to the Third Parties. Evidence submitted at trial and ample oral testimony supports the court's findings and judgment.

In Bullion Reserve, the court concluded that the defendant had no dominion over the money and could not put the money to his own purposes because he was under a contractual duty immediately to transfer the property to the third party. Bullion Reserve, 922 F.2d at 549. Similarly, the appellee had no dominion over the money nor could it use the money for its own purposes because of its legal obligation to disburse the money to the Third Parties.

As appellee argues, a valid contract was created in writing and by the conduct of the parties. Letters from each of the Third Parties to appellee set forth the specific amounts due and acknowledged the agreement that appellee would be responsible to forward payment to the Third Parties upon receipt of funds from

debtor.[10] In addition, testimony during trial established that an oral agreement had been formed among the parties to the transaction. The bankruptcy court explained:

> Bryce Mason (of Northpoint) testified that he asked Defendant to determine the amounts owed the Third Parties, to include those amounts in the invoices submitted by Defendant to Northpoint, to receive payment from Northpoint of the sums due the Third Parties, and to forward that payment from Northpoint to the Third Parties. Michael Scribner (of Defendant BCCI) testified that he agreed with Mason to perform this role for Northpoint, and that he also reached agreement with each of the Third Parties (Cole, FACS, and the Smith Group) to perform this role on their behalf. Robert Middleton (of Cole) testified that he agreed to this arrangement. The assent of FACS and the Smith Group is evidenced in Exhibit O.

(Ct.'s Mem. re Pl.'s Mot. for Reconsideration at 2:18-28.) It is apparent that the trial court believed that testimony.

Furthermore, the December 28, 2000, invoice that appellee sent to debtor specified the same three payments, totaling $204,532, that the Third Parties had referenced in their letters. And, after appellee received the first bulk payment at the end of December from debtor, appellee immediately made the payments to the Third Parties on January 5, 2001, totaling $204,532.

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[10]Each of the letters stated:

> [Third Party] fully acknowledges that on behalf of NorthPoint Communications . . . and said company that BCCI has agreed to help expedite the final payment process for all work related to the NorthPoint projects. [Third Party] agrees to hold BCCI harmless for all cause of action for payments or monies owed over and above payment . . . amount. . . . The undersigned acknowledges this document as an Unconditional Waiver and Release upon final payment [of] amount.

(Pl.'s Request for Admis. Set One Ex. S, T, U at 113-15.)

Although the appellant contends that the funds went into appellee's general account and were subject to levy,[11] the court concluded that the evidence of the oral agreements was sufficient to establish that appellee was the agent of both NorthPoint and the Third Parties with respect to the payments in question. We agree. The court did not err in determining that appellee was not a "transferee" under § 550(a)(1), but was merely a "conduit" that disbursed the funds received from debtor to the Third Parties.

The facts in Incomnet are distinguishable because that case did not involve a two-step transaction. Incomnet, 299 B.R. at 580. Both the Panel and the Ninth Circuit decisions in Incomnet held that defendant did not demonstrate a two-step transaction to which the dominion test could be applied, and that defendant qualified as a "transferee" because it did not establish any binding legal relationship between the defendant and any of its payment recipients that would operate to make it a "conduit;" nor could it identify any specific beneficiaries. Incomnet, 463 F.3d at 1075; Incomnet, 299 B.R. at 577 n.6 & 580. In addition, the defendant in Incomnet had the ability and authority to decide if, when, and how it disbursed the funds. Incomnet, 463 F.3d at 1076. In other words, if there had been a second step, it is apparent that the dominion test would have precluded the finding of a "conduit."

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[11]Appellant's subject-to-levy argument fallaciously assumes a conclusion that a court would not have ordered that the $204,532 be released from levy because it was not the levied person's property. See Cal. Civ. Proc. Code § 695.040 (property not subject to enforcement of money judgment may not be levied upon, and if levied upon, the property may be released pursuant to claim of exemption procedure prescribed by California law).

In contrast, here there is a two-step transaction as to which a binding legal relationship between appellee and the Third Parties was established by the three letters and the understanding of the financial arrangement among the parties to the transaction. Also, specific beneficiaries are identified in that the Third Parties and the exact amounts owed to each of them were specified. Moreover, unlike the defendant in Incomnet, the appellee was under a legal obligation to disburse the funds to the Third Parties upon receipt of the payments from debtor and, thus, did not have the freedom (without incurring liability) to decide if, when, and how it disbursed the funds.[12]

Accordingly, we agree with the bankruptcy court that the applicable dominion test reveals that appellee was a "mere conduit" of the $204,532 transferred from debtor to the Third Parties, and that Incomnet does not compel a contrary conclusion. As such, appellant is not entitled to recover $204,532 because appellee is not an "initial transferee" within the meaning of § 550(a)(1).

CONCLUSION

The court did not err in holding that the $204,532 in funds appellee received from debtor and disbursed to the Third Parties were not recoverable by the appellant as preferential transfers because appellee was a "mere conduit" rather than an "initial transferee" of the Third Party Payments under 11 U.S.C. § 550(a)(1). We AFFIRM.

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[12]In fact, the $204,532 was transmitted from the first funds received.