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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NOT FOR PUBLICATION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.	NC-07-1128-KDCa
)		
7	NORTHPOINT COMMUNICATIONS)	Bk. No.	01-30127
	GROUP, INC., et al.)		
8)	Adv. No.	03-03051
	Debtors.)		
9	_____)		
)		
10	E. LYNN SCHOENMANN, Trustee,)		
)		
11	Appellant,)		
)		
12	v.)	MEMORANDUM*	
)		
13	BCCI CONSTRUCTION CO., aka)		
	BRENT CONSTRUCTION)		
14)		
	Appellee.)		
15	_____)		

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.

*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.

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

6
7 FACTS

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

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

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

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

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

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

7 Debtor paid the \$1,469,176 in three installments. On
8 December 28, 2000, debtor wired appellee \$750,000. On January
9 12, 2001, debtor paid appellee \$304,577.90 by check drawn on
10 debtor's payroll account. On March 16, 2001, debtor wired
11 appellee the \$414,599 balance.² The first two payments covered
12 multiple invoices and obligations to both the appellee and the
13 Third Parties.

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

16 On January 16, 2001, debtor filed for bankruptcy relief
17 under chapter 11, which case was later converted to chapter 7.⁴

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

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

24	Cole (project manager):	\$9,633.50
25	FACS (furniture):	\$91,485.50
26	<u>Smith Group (architect):</u>	<u>\$103,412.50</u>
	Total	\$204,531.50

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

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

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

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

17 In the portion of the judgment that is not questioned on
18 appeal, the trial court concluded that appellee had established
19 an "ordinary course of business" defense for \$811,689 of the
20

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

25 ⁶The issue of debtor's solvency during the preference period
26 was tried separately in a proceeding involving several of the
27 defendants in different preference actions. The court determined
28 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.

1 \$850,046 in allegedly preferential payments under 11 U.S.C.
2 § 547(c)(2)(C) (transfer must have been made "according to
3 ordinary business terms") and awarded the appellant \$38,357 plus
4 pre-judgment interest for the portion of the funds in which
5 appellee had not established an "ordinary course" defense to the
6 allegations of preference.

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

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

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

1 Incomnet Commc'ns Corp. (In re Incomnet, Inc.), 463 F.3d 1064
2 (9th Cir. 2006), aff'g Incomnet Comm. Corp. v. Universal Serv.
3 Administ. Co. (In re Incomnet, Inc.), 299 B.R. 574 (9th Cir. BAP
4 2003) ("Incomnet"), rather than Danning v. Miller (In re Bullion
5 Reserve of North Am.), 922 F.2d 544 (9th Cir. 1991) ("Bullion
6 Reserve"), governed the "transferee" issue. The appellant also
7 asserted that the evidence did not support the trial judge's
8 factual finding that appellee was under a contractual duty to pay
9 the Third Parties the \$204,532 received from debtor.

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

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

26 ⁷Appellant notes that she is not appealing the bankruptcy
27 court's finding that the Third Party Payments were not fraudulent
28 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.

1 JURISDICTION

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

4
5 ISSUE

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

12
13 STANDARD OF REVIEW

14 We review findings of fact for clear error and issues of law
15 de novo. Hoopai v. Countrywide Home Loans, Inc. (In re Hoopai),
16 369 B.R. 506, 509 (9th Cir. BAP 2007). We review mixed questions
17 of law and fact de novo. Murray v. Bammer (In re Bammer), 131
18 F.3d 788, 792 (9th Cir. 1997). A mixed question exists when the
19 facts are established, the rule of law is undisputed, and the
20 issue is whether the facts satisfy the legal rule. Id. Mixed
21 questions require consideration of legal concepts and the
22 exercise of judgment about the values that animate legal
23 principles. Id. Whether an entity is a "transferee" or a "mere
24 conduit" is such a question.

25
26 DISCUSSION

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

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

7
8 I

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

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

20
21 ⁸Pursuant to § 550(a), a preferential transfer is
22 recoverable only if the entity qualifies as a "transferee." To
the extent that a transfer is avoided:

23 the trustee may recover, for the benefit of the estate,
24 the property transferred, or, if the court so orders,
the value of such property from --

25 (1) the initial transferee of such transfer or the
entity for whose benefit such transfer was made;

26 or

27 (2) any immediate or mediate transferee of such
initial transferee.

28 11 U.S.C. § 550(a).

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

7 Although courts have at times confused the terms, the Ninth
8 Circuit and this Panel have consistently applied the dominion
9 test where appropriate, and have declined to adopt the control
10 test. Incomnet, 463 F.3d at 1064 (affirming Panel holding
11 dominion test did not apply to this one-step transaction case);
12 Abele v. Modern Fin. Plans Servs., Inc. (In re Cohen), 300 F.3d
13 1097, 1102 n.2 (9th Cir. 2002); Bullion Reserve, 922 F.2d at 548
14 (adopting test from Seventh Circuit in leading case in this area,
15 Bonded Fin. Servs., Inc. v. European Am. Bank, 838 F.2d 890, 893
16 (7th Cir. 1988)); Incomnet, 299 B.R. at 580-81; McCarty v.
17 Richard James Enters., Inc. (In re Presidential Corp.), 180 B.R.
18 233, 237-38 (9th Cir. BAP 1995).

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

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

1 transaction in its entirety to make sure that their conclusions
2 are logical and equitable.”⁹ Nordberg v. Societe Generale (In re
3 Chase & Sanborn Corp.), 848 F.2d 1196, 1199 (11th Cir. 1988).
4

5 II

6 Appellant now seeks recovery under § 550(a) of the \$204,532
7 received and transmitted by the appellee as preferential
8 transfers under § 547. The court ruled that, regardless of
9 whether the payments were preferences or fraudulent transfers,
10 the appellant could not recover the Third Party Payments from
11 appellee because appellee was not a “transferee” under § 550(a).
12 It determined that appellee was a “mere conduit” in a two-step
13 transaction with a contractual duty to disburse the funds to the
14 Third Parties, as set forth in Bullion Reserve, 922 F.2d at 549.
15 Because the court decided that appellee was not a “transferee” in
16 the first place, the court determined it was immaterial whether
17

18 ⁹The Ninth Circuit has explained the difference between the
19 two tests:

20 While the two inquiries are similar, they are not
21 indistinguishable: The dominion test focuses on whether
22 the recipient of funds has legal title to them and the
23 ability to use them as he sees fit. See Bonded Fin.
24 Servs., 838 F.2d at 893-94. The control test takes a
25 more gestalt view of the entire transaction to
26 determine who, in reality, controlled the funds in
27 question. In re Chase & Sanborn Corp., 848 F.2d at
28 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.

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

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

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

16 In Bullion Reserve, the court concluded that the defendant
17 had no dominion over the money and could not put the money to his
18 own purposes because he was under a contractual duty immediately
19 to transfer the property to the third party. Bullion Reserve,
20 922 F.2d at 549. Similarly, the appellee had no dominion over
21 the money nor could it use the money for its own purposes because
22 of its legal obligation to disburse the money to the Third
23 Parties.

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

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

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

18 (Ct.'s Mem. re Pl.'s Mot. for Reconsideration at 2:18-28.)

19 It is apparent that the trial court believed that testimony.

20 Furthermore, the December 28, 2000, invoice that appellee
21 sent to debtor specified the same three payments, totaling
22 \$204,532, that the Third Parties had referenced in their letters.
23 And, after appellee received the first bulk payment at the end of
24 December from debtor, appellee immediately made the payments to
25 the Third Parties on January 5, 2001, totaling \$204,532.

26 ¹⁰Each of the letters stated:

27 [Third Party] fully acknowledges that on behalf of
28 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.)

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

10 The facts in Incomnet are distinguishable because that case
11 did not involve a two-step transaction. Incomnet, 299 B.R. at
12 580. Both the Panel and the Ninth Circuit decisions in Incomnet
13 held that defendant did not demonstrate a two-step transaction to
14 which the dominion test could be applied, and that defendant
15 qualified as a "transferee" because it did not establish any
16 binding legal relationship between the defendant and any of its
17 payment recipients that would operate to make it a "conduit;" nor
18 could it identify any specific beneficiaries. Incomnet, 463 F.3d
19 at 1075; Incomnet, 299 B.R. at 577 n.6 & 580. In addition, the
20 defendant in Incomnet had the ability and authority to decide if,
21 when, and how it disbursed the funds. Incomnet, 463 F.3d at
22 1076. In other words, if there had been a second step, it is
23 apparent that the dominion test would have precluded the finding
24 of a "conduit."

25
26 ¹¹Appellant's subject-to-levy argument fallaciously assumes
27 a conclusion that a court would not have ordered that the
28 \$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).

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

12 Accordingly, we agree with the bankruptcy court that the
13 applicable dominion test reveals that appellee was a "mere
14 conduit" of the \$204,532 transferred from debtor to the Third
15 Parties, and that Incomnet does not compel a contrary conclusion.
16 As such, appellant is not entitled to recover \$204,532 because
17 appellee is not an "initial transferee" within the meaning of
18 § 550(a)(1).

19
20 CONCLUSION

21 The court did not err in holding that the \$204,532 in funds
22 appellee received from debtor and disbursed to the Third Parties
23 were not recoverable by the appellant as preferential transfers
24 because appellee was a "mere conduit" rather than an "initial
25 transferee" of the Third Party Payments under 11 U.S.C.
26 § 550(a)(1). We AFFIRM.

27 _____
28 ¹²In fact, the \$204,532 was transmitted from the first funds
received.