NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-06-1339-MoPaBr
SEDONA CULTURAL PARK, INC.,	Bk. No. 04-18409
Debtor.	Adv. No. 05-00558
WILLIAM PIERCE, Chapter 7 Trustee,	
Appellant,	
v.	**M E M O R A N D U M**[1]
OLLIE HOWARD,	
Appellee.	

Argued and Submitted on March 23, 2007
at Phoenix, Arizona

Filed - April 13, 2007

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Redfield T. Baum, Sr., Chief Bankruptcy Judge, Presiding

Before: MONTALI, PAPPAS and BROWN,[2] 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. Trish M. Brown, United States Bankruptcy Judge for the District of Oregon, sitting by designation.

Debtor Sedona Cultural Center, Inc. ("Debtor") owns a condominium townhouse subject to a life estate, pursuant to a recorded quitclaim deed. An unrecorded agreement requires Debtor to reconvey the property if Debtor's mission changes substantially. The bankruptcy court ruled that Debtor's mission had changed substantially, that Debtor therefore holds only bare legal title to the property under Section 541(d),[3] and that the equitable interest created by the unrecorded agreement cannot be avoided by Chapter 7 Trustee, William Pierce ("Trustee"), using his strong-arm powers in Section 544(a)(3). We REVERSE and REMAND.

I. FACTS

Debtor is a nonprofit corporation. Appellee Ollie M. Howard and her husband (now deceased) Eugene S. Munson, as Trustee of the Eugene S. Munson Trust dated June 20, 1984 (collectively, "Donors"), owned a condominium townhouse in Yavapai County, Arizona (the "Property"). On November 13, 1997, they executed a quitclaim deed assigning "All right, title, or interest" in the Property to Debtor, subject to their retention of a life estate so long as one or both of them is living. The deed was recorded with the Yavapai County Recorder on November 28, 1997.

Appellee and her husband also executed an Endowment Agreement with Debtor on November 13, 1997. That agreement, which was never

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 ("BAPCPA"), because the case from which this appeal arises was filed before its effective date (generally October 17, 2005).

recorded, provides:

> If, at any time in the future, substantial changes in the mission of [Debtor] occur . . . thereby making the purpose as designated by the Donors no longer applicable, then in such event the Endowment asset herein established shall be distributed to Donors, if living . . . . [Emphasis added.]

On October 9, 2003, Appellee wrote a letter to Debtor demanding a return of the Property under this provision. She alleged that Debtor was no longer in business, had laid off nearly all of its employees, and had cancelled the remaining programs scheduled for the fall season for 2003.

The Endowment Agreement also provides, contrary to the quitclaim deed which grants Debtor unrestricted ownership after Donors' death, that Debtor is instead required at that time to sell the Property, invest the proceeds, and retain only "ten percent (10%) of the income of the principal." The remaining ninety percent (90%) of the income is to be distributed to Donors' children until their deaths, when their interests pass to Debtor.

Debtor filed its voluntary Chapter 7 petition on October 20, 2004 (the "Petition Date"). On July 25, 2005, Appellee filed a complaint praying for a declaratory judgment that Debtor's bankruptcy estate holds no interest in the Property and directing its reconveyance to Appellee. Trustee filed an Answer and Counterclaim seeking to avoid Appellee's unrecorded interest in the Property under the Endowment Agreement pursuant to Section 544. Trustee filed a motion for summary judgment (the "Trustee MSJ"), Appellee filed a combined response and cross-motion for summary judgment (the "Appellee MSJ"), and after a reply by Trustee the matter was heard on June 12, 2006. Thereafter the

bankruptcy court issued a minute order stating in relevant part:

> [Trustee] asserts a superior claim to the property under Section 544 because the endowment agreement was not recorded. [Appellee] claims that [Trustee] and the estate are bound by the terms of the endowment agreement.
>
> Section 541(d) of the Code provides, in part, "Property in which the debtor holds . . . only legal title and not an equitable interest, . . ., becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold". The debtor had legal title when the case was filed. However, it appears that was all the debtor held, i.e., legal title. [Appellee] held the equitable interests, namely the life estates and the right to return of the property if the charitable/cultural mission changed substantially, which it did with the filing of the chapter 7. See: Begier v. [I.R.S.], 496 U.S. 53, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990) (It is well settled principle that debtors do not own an equitable interest in property . . . they hold in trust for another).
>
> Such view is further supported by new Section 541(f)[4] which provides that property transferred by a debtor/trustee of a non-profit entity may only occur "under the same conditions as would apply if the debtor had not filed a case."

Based on this reasoning the bankruptcy court issued an order denying the Trustee MSJ, granting the Appellee MSJ, and directing reconveyance of the Property to Appellee. The bankruptcy court later issued a judgment for Appellee and against Trustee on the Complaint and Counterclaim, directing reconveyance of the Property, and dismissing the Counterclaim. Trustee filed timely notices of appeal from both the order and the judgment.

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[4] Section 541(f) was added by BAPCPA, and is therefore inapplicable to this case (see footnote 3 above) but the bankruptcy court was apparently referring to it as an indication of Congress' intent regarding the meaning of Section 541 generally.

II. ISSUE

Under Arizona law, does Trustee, asserting the rights and powers of a hypothetical bona fide purchaser of real property under Section 544(a)(3), take subject to an unrecorded agreement for reconveyance?[5]

III. STANDARD OF REVIEW

We review de novo the bankruptcy court's grant and denial of cross-motions for summary judgment. N.W. Envtl. Advocates v. Nat'l Marine Fisheries Serv., 460 F.3d 1125, 1132 (9th Cir. 2006).

IV. DISCUSSION

The recorded quitclaim deed conveys all right, title, and interest in the Property to Debtor, subject only to a life estate in Donors. The unrecorded Endowment Agreement nevertheless obligates Debtor to reconvey the Property to Donors. Trustee asserts that he can avoid Appellee's unrecorded interest in the Property using his so-called strong arm powers under Section 544(a)(3):

> § 544. Trustee as lien creditor and as successor to certain creditors and purchasers
>
> (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by --
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> * * *

[5] At oral argument we questioned Trustee's attorney whether, even if Trustee prevails on this appeal, he will be able to realize any value from the Property given that Appellee has a life estate in it. Trustee's attorney confirmed that Trustee intends to sell the remainder interest in the Property. We are satisfied that this appeal presents a genuine case or controversy and do not speculate further as to the ultimate fate of the Property.

> (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C. § 544(a)(3) (emphasis added).

At oral argument before us there was some discussion whether the Endowment Agreement creates any "transfer" within the meaning of the statute. But it is not essential that there be any transfer: "Although [Section 544(a)(3)] empowers the trustee to avoid transfers, by its terms it also applies if no transfer has taken place." In re Seaway Express Corp., 912 F.2d 1125, 1128-30 (9th Cir. 1990). State law governs the extent to which Trustee's rights and powers as a hypothetical bona fide purchaser under Section 544(a)(3) will defeat the obligations under the Endowment Agreement. See id.

It is well established that Trustee's rights as a hypothetical bona fide purchaser under Section 544(a)(3) are limited by any constructive or inquiry notice that such a purchaser would have under state law. In re Deuel, ___ B.R. ___, 2006 WL 4010577 (9th Cir. BAP 2006). In this case a hypothetical purchaser from Debtor would be on notice that Appellee was occupying the Property. But as Trustee argues, that is consistent with the recorded quitclaim deed which reserves a life estate in the Property for Donors, and would not give inquiry notice of Debtor's obligations under the Endowment Agreement.

A hypothetical purchaser would also be on notice that Debtor is a charitable institution, and perhaps that would lead such a

purchaser to suspect that Debtor has unrecorded commitments to its donors. Nevertheless, we are not aware of any Arizona authority that purchasers must be especially wary of potential unrecorded interests when purchasing real property from charities. We will not assume that there is any such rule, which might interfere with charities' ability to sell property and purchasers' ability to obtain title insurance. In any event, Appellee has not raised this argument. For purposes of this discussion we assume that Trustee's status as a hypothetical bona fide purchaser is not defeated by the fact that Debtor is a charitable institution.

According to Appellee, the Endowment Agreement created a trust under which Debtor was obliged to reconvey its interest in the Property, that trust failed, and she is the beneficiary of a resulting trust under Arizona law. The Endowment Agreement (p. 4) describes Debtor as "trustee of this Endowment" and also refers (pp. 2, 6, and 7) to Debtor's Board of Directors as trustees. We assume without deciding that Appellee is the beneficiary of a resulting trust[6] and holds what the bankruptcy court described as an equitable interest in the Property. See Restatement (Second) of Trusts, § 401(1) and Comment (c). See also In re Estate of

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[6] As stated by one case, discussed below, "In our opinion, it is irrelevant whether the trust was an express trust or a resulting trust . . . ." Blalak v. Mid Valley Transp., 175 Ariz. 538, 540; 858 P.2d 683, 685 (1993). The important thing is that "the world was not placed on notice that a trust relationship existed, whether that trust arose from an express trust or a resulting trust." Id.

Appellee has not alleged that any other form of trust existed, such as a charitable trust, and we express no opinion whether the outcome would be different in that circumstance. But see In re Roman Catholic Archbishop of Portland in Oregon, 335 B.R. 868, 878 (Bankr. D. Or. 2005) (rejecting argument that property said to be held by debtor in unrecorded charitable or express trust was excluded from property of bankruptcy estate).

Harber, 99 Ariz. 323, 327; 409 P.2d 31, 35 (1965) (following Restatement (Second) of Trusts); In re Washburn & Roberts, Inc., 795 F.2d 870, 872 (9th Cir. 1986) (holding that under Washington law and the Restatement (Second) of Trusts, "A resulting trust may arise . . . [w]here a private or charitable trust fails in whole or in part.") (citations omitted).

Trustee argues that any such unrecorded trust or equitable interest is subject to Arizona's recording statutes:

> § 33-412. Invalidity of unrecorded instruments as to bona fide purchaser or creditor
>
> A. All bargains, sales and other conveyances whatever of lands, tenements and hereditaments, whether made for passing an estate of freehold or inheritance or an estate for a term of years, and deeds of settlement upon marriage, whether of land, money or other personal property, and deeds of trust and mortgages of whatever kind, shall be void as to creditors and subsequent purchasers for valuable consideration without notice, unless they are acknowledged and recorded in the office of the county recorder as required by law.
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> B. Unrecorded instruments, as between the parties and their heirs, and as to all subsequent purchasers with notice thereof, or without valuable consideration, shall be valid and binding.

Ariz. Rev. Stat. § 33-412(A) (emphasis added).

Arizona law also provides,

> § 33-411. Invalidity of unrecorded instrument as to bona fide purchaser; acknowledgment required for proper recording; recording of instruments acknowledged in another state; exception
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> * * *
>
> A. No instrument affecting real property gives notice of its contents to subsequent purchasers or encumbrance holders for valuable consideration without notice, unless recorded as provided by law in the office of the county recorder of the county in which the property is located.

Ariz. Rev. Stat. § 33-411(A).

Some Arizona cases have interpreted these statutes as voiding only legal interests and not equitable interests, but other Arizona cases question this interpretation, at least as against a bona fide purchaser. The earliest case on this issue cited by the parties is Valley Nat'l Bank v. Hay, 13 Ariz.App. 39, 474 P.2d 46, reh'g denied, 13 Ariz.App. 180, 475 P.2d 9 (1st Div. 1970), which involved a judicial lien creditor, not a bona fide purchaser, and which states:

> Although generally American courts construe recording laws as requiring and authorizing the recording of equitable as well as legal interests, 45 Am.Jur. Records and Recording Laws § 49 (1943), Arizona appears to have confined the operation of A.R.S. § 33-412 to legal interests in land. Luke v. Smith, 13 Ariz. 155, 108 P. 494 (1910); Jarvis v. Chanslor & Lyon Co., 20 Ariz. 134, 177 P. 27 (1919). . . .

Hay, 13 Ariz.App. at 43, 474 P.2d at 50.

On a motion for rehearing the Hay court limited its prior statements in several ways:

> . . . The amicus curiae memorandum advances the position that our opinion is overly broad in its statement that Arizona appears to have confined the operation of A.R.S. § 33-412 to legal interests in land. We agree.
>
> Our holding is limited to the facts with which we were presented. The opinion insofar as it relates to Arizona's recording laws should be read to hold only that a resulting trust, in order to be enforceable against a creditor, need not be recorded under the provisions of A.R.S. § 33-412.

Hay, 13 Ariz.App. at 181, 475 P.2d at 10 (emphasis added).

A later opinion, by a different panel of the same court that decided Hay, addressed whether Hay should be expanded to cover not just resulting trusts but also express trusts. Blalak, 175 Ariz. 538, 858 P.2d 683. For purposes of this appeal we agree with

Blalak that the difference between these two types of trust is immaterial (see footnote 5, above). In reaching this conclusion, however, Blalak broadly reaffirmed Hay's initial conclusion -- that Arizona Revised Statutes section 33-412(A) voids only legal interests and not equitable interests -- without always distinguishing between creditors and bona fide purchasers, even though Blalak involved only the former:

> A creditor is entitled to execute only on the interest its debtor holds in property. Thus, property held by a debtor in trust is not subject to attachment for the debtor's debts. . . . This is the rule in absence of a recording statute requiring a different result. . . . In Arizona at least since 1910, the recording statutes have not required that an equitable interest in land be recorded to be valid against creditors or third party bona fide purchasers.
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> As was held in Luke v. Smith, 13 Ariz. 155, 108 P. 494 (1910), aff'd, 227 U.S. 379, 33 S.Ct. 356, 57 L.Ed. 558 (1913), the recording statutes making all conveyances of land void as to creditors and subsequent purchasers for value, unless acknowledged and recorded, do not cover equitable liens, which need not be recorded to prevail over judgment creditors of the actual titleholder. See also Jarvis v. Chanslor & Lyon Co., 20 Ariz. 134, 177 P. 27 (1919).
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> * * *
>
> We therefore hold, as did Hay, that A.R.S. § 33-412(A) does not, standing alone, affect the validity of unrecorded equitable liens as against creditors or purchasers for value without notice of the liens.

Blalak, 175 Ariz. at 686, 858 P.2d at 541 (emphasis added).

Both Blalak and Hay have been distinguished by a later case. Hunnicutt Constr., Inc. v. Stewart Title & Trust, 187 Ariz. 301, 928 P.2d 725 (2d Div. 1996). Hunnicutt is different from our case in several respects but it is still instructive. The "bona fide purchaser" in Hunnicutt was a lender, not a trustee in bankruptcy

as in this case. Id., 187 Ariz. at 302-03, 928 P.2d at 726-27. The equitable interest was a constructive trust, not a resulting trust such as Appellee asserts. Finally, the constructive trust arose because the property owner persuaded a contractor not to obtain a mechanics' lien, and one of Hunnicutt's three grounds for distinguishing Blalak was that "where a legal remedy such as a statutory [mechanic's or materialman's] lien exists, but has not been utilized, a claimant should not be permitted to substitute an equitable remedy." Hunnicutt, 187 Ariz. at 304-05, 928 P.2d at 728-29. Despite these differences between Hunnicutt and the case before us, it faced the same issue of whether an unrecorded equitable interest has priority over a later bona fide purchaser for value, and its comments about Blalak are useful in this case.

First, Hunnicutt suggests that Blalak's statements about bona fide purchasers are dicta, because the case involved a judgment creditor not a bona fide purchaser. Hunnicutt, 187 Ariz. at 304, 928 P.2d at 728. See also Kaufmann v. M & S Unlimited, L.L.C., 211 Ariz. 314, 317 n. 6; 121 P.3d 181, 184 n. 6 (2d App. Div., 2005) (describing Blalak's conclusions as "questionable").

Second, Hunnicutt explains why bona fide purchasers are different from judgment creditors like the one in Blalak:

> . . . Blalak and the other Arizona cases on which it relied involved the superiority of an unrecorded equitable interest over a judgment creditor's lien. See Jarvis v. Chanslor & Lyon Co., 20 Ariz. 134, 177 P. 27 (1919); Luke v. Smith, 13 Ariz. 155, 108 P. 494 (1910), aff'd, 227 U.S. 379, 33 S.Ct. 356, 57 L.Ed. 558 (1913); Valley National Bank v. Hay, 13 Ariz.App. 39, 474 P.2d 46 (1970). "Judgment liens are derived from statutes which create them. Unless otherwise provided by statute, a judgment lien is subordinate to prior conveyances even when these are not recorded." Rowe v. Schultz, 131 Ariz. 536, 538, 642 P.2d 881,

883 (App.1982). Unlike a BFP or lender for value, a judgment creditor has not relied on the recorded title in purchasing or extending credit on the property. Therefore,

> a bona fide purchaser's rights have always been held superior to prior equitable interests . . . . The same rationale does not have equal validity when applied to judgment creditors . . . . A judgment creditor possessing a statutory lien on property does not occupy a position equivalent to that of a purchaser for value.

Osin v. Johnson, 243 F.2d 653, 657 (D.C. Cir. 1957).

In other words,

> Where a person holds property subject to a constructive trust, his creditors are not purchasers for value and are subject to the constructive trust . . . . So also, a creditor who attaches the property or obtains and records a judgment or levies execution upon the property is not a bona fide purchaser, although he had no notice of the constructive trust.

Restatement (First) of Restitution § 173 cmt. j (1937). See also 4 Scott, The Law of Trusts § 308.1 at 194 (4th ed. 1989) ("A judgment creditor is not a purchaser for value.").

Hunnicutt, 187 Ariz. at 305, 928 P.2d at 729.

Finally, Hunnicutt explains that its distinction of Blalak is consistent with other jurisdictions, including the one cited by Blalak:

> . . . Blalak relied on Texas authority in reaching its conclusion, because Arizona's recording act was adopted from the Texas statute. The court in Blalak cited a Texas case which had held that an equitable interest need not be recorded to prevail over a subsequent judgment lien because the recording act did not apply to equitable interests. Johnson v. Darr, 114 Tex. 516, 272 S.W. 1098 (1925). The Texas court, however, "clearly distinguishe[d] between the positions of a bona fide purchaser for value and a creditor." Id. at 525, 272 S.W. at 1101. Similarly, more recent Texas cases have held that a

> BFP, unlike a judgment lienholder, does not take subject to an equitable lien. See Henry I. Siegel Co., Inc. v. Holliday, 663 S.W.2d 824, 828 (Tex. 1984); Gordy v. Morton, 624 S.W.2d 705 (Tex. App. 1981). Courts in other states are in agreement. See Lewis v. Superior Court, 30 Cal.App.4th 1850, 1879, 37 Cal.Rptr.2d 63, 82 (1994); Kolker v. Gorn, 193 Md. 391, 398, 67 A.2d 258, 261 (1949) ("it is well established that a judgment creditor is not in the position of a bona fide purchaser, and his claim is subject to prior, undisclosed equities."); Aberdeen Federal Savings & Loan Ass'n v. Empire Manufactured Homes, Inc., 36 Wash.App. 81, 85, 672 P.2d 409, 411 (1983).

Hunnicutt, 187 Ariz. at 305, 928 P.2d at 729 (footnote omitted).

Appellee claims that Hunnicutt's analysis "failed to even address the wealth of Arizona case law holding that equitable liens are not subject to the recording statutes irrespective of the nature of the interest later obtained." We do not understand this argument. Our extensive quotations above from Hunnicutt squarely address that case law, and distinguish all of it as involving creditors rather than bona fide purchasers.

Appellee characterizes Hunnicutt's rejection of Blalak as dictum. We disagree. It is true that Hunnicutt had multiple grounds for distinguishing Blalak, but it relied on all three grounds and no single one of them is dictum. Moreover, although this case does not involve the statutory remedy of mechanics' or materialmen's liens as in Hunnicutt, Donors had their own statutory remedy of simply recording the Endowment Agreement.

The other factual differences in Hunnicutt are not material and its distinction of the cases cited in Blalak is persuasive. A bona fide purchaser for value relies on the record title, whereas a judgment creditor generally does not.

We believe that Arizona courts would follow Hunnicutt as the latest and most persuasive authority regarding bona fide purchasers, and would view it as being more applicable to our situation than the dicta in Blalak. The Hunnicutt interpretation of Arizona's recording statutes also reconciles Arizona law with that of other jurisdictions. As stated by one treatise:

> The lien of a judgment does not attach to the mere legal title to property existing in the judgment debtor, when the equitable and beneficial title is in another, as where land is . . . subject to a parol agreement to reconvey, ...
>
> However, it has been held that the beneficial owner may be estopped to assert title against the lien of a judgment obtained by one who extended credit to the holder of the legal title without knowledge of the equities.

50 C.J.S. Judgments § 578 (emphasis added, footnotes omitted).

Trustee more closely resembles the latter category of one who extended credit without knowledge of the equities. As a hypothetical bona fide purchaser, he is deemed to have extended credit to Debtor in reliance on the record title and without knowledge of Donors' equitable interest under the unrecorded Endowment Agreement. In re Gurs, 27 B.R. 163, 165 (9th Cir. BAP 1983).

Another treatise suggests that Hunnicutt is also consistent with the law of trusts:

> Equitable liens and trusts are both subject to the application of the bona fide purchaser rule. Both the interest of the equitable lienor and the cestui are cut off by a transfer of the legal estate to a bona fide purchaser.

George G. Bogert et al., The Law Of Trusts And Trustees § 32 (Rev. 2d ed. 2006), text accompanying n. 21 (citing, inter alia, Blalak).

The approach in Hunnicutt also seems more consistent with the usual application of Arizona's recording statutes. There is no dispute that a bona fide purchaser can acquire title free and clear of an unrecorded legal interest, such as a quitclaim deed. This means that Trustee would prevail if Debtor had reconveyed the Property to the Donors by a quitclaim deed that was never recorded. It would be anomalous if the Donors could change the outcome by making the reconveyance instrument a trust document instead of a quitclaim deed.

We are persuaded that under Arizona law a hypothetical bona fide purchaser would not be forced to reconvey the Property to Donors even if Debtor held the Property in a (secret) express or resulting trust for Donors. Nor would a hypothetical bona fide purchaser be bound by the other limitations on ownership contained in the unrecorded Endowment Agreement. Trustee prevails under Arizona law and Section 544(a)(3).

The bankruptcy court nevertheless held that Debtor's interest in the Property is limited to bare legal title under Section 541(d).[7] That conclusion is at odds with the case law in this

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[7] Section 541(d) provides, in full:

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 541(d).

circuit. "[T]he majority rule is that § 541(d) does not limit the trustee's powers over real property under § 544(a)(3)" and the Ninth Circuit follows the majority rule. Seaway, 912 F.2d at 1128-30 (following In re Tleel, 876 F.2d 769, 772-74 (9th Cir. 1989)).

Under the majority rule Sections 541 and 544 are complementary, not conflicting, sources of Trustee's rights and powers. "Section 541(d) does not have anything to say about the effects of § 544(a)(3). It forbids including property in the debtor's estate 'under subsection (a) of this section' and does not address whether property may be included under some other part of the Code." Belisle v. Plunket, 877 F.2d 512, 515 (7th Cir. 1989) (cited with approval in Seaway, 912 F.2d at 1128). See generally In re Great Plains W. Ranch Co., Inc., 38 B.R. 899 (Bankr. C.D. Cal. 1984) (explaining theory of Sections 541 and 544(a)(3)) (cited with approval in Seaway, 912 F.2d 1125, passim).

We recognize that Seaway and Tleel involved constructive trusts whereas Appellee claims to be the beneficiary of a resulting trust. See generally In re Markair, Inc., 172 B.R. 638, 641-42 (9th Cir. BAP 1994) (explaining difference between constructive and resulting trusts); In re Golden Triangle Capital, Inc., 171 B.R. 79 (9th Cir. BAP 1994) (same). Theoretically that could make a difference. In Markair and Golden Triangle, neither of which involved real property or any recording statutes, we recognized that property held in trust can be excluded from the bankruptcy estate. In Markair we added, "[a] resulting trust can defeat the trustee's strong arm powers under § 544." 172 B.R. at 642 (emphasis added). That is so, but whether a resulting trust

actually does defeat the trustee's strong arm powers in any given case depends on state law. This case involves real property in Arizona and Section 544(a)(3) vests Trustee with the rights and powers of a hypothetical bona fide purchaser of real property under Arizona law. As we have held above, such a purchaser takes free and clear of any unrecorded and undisclosed trust obligation in the Endowment Agreement.

If we had any doubt that the Bankruptcy Code applies state law under Section 544(a)(3) notwithstanding the existence of a resulting trust, such doubt would be resolved by Tleel itself, which explicitly recognized "the possibility that under certain circumstances the corpus of a valid resulting trust may become estate property upon exercise of section 544(a)(3)'s avoidance powers." Tleel, 876 F.2d at 772 (emphasis added) (distinguishing Matter of Torrez, 63 B.R. 751 (9th Cir. BAP 1986), aff'd, 827 F.2d 1299 (9th Cir.1987)). See also Roman Catholic Archbishop, 335 B.R. at 878 (rejecting argument that Tleel does not apply to charitable or express trusts because "it was not the character of the trust [in Tleel] that determined whether the interest was avoidable, but whether there was constructive notice of that interest at the time of bankruptcy"); In re Loewen Group Int'l, Inc., 292 B.R. 522, 527 (Bankr. D. Del. 2003) ("the differences between a constructive trust and a resulting trust are immaterial in this § 544(a)(3) context"); Burns v. Creech, 350 B.R. 24, 31 (Bankr. M.D.N.C. 2006) ("Even if the Court had imposed a resulting trust, Section 544(a)(3) and North Carolina law combine to provide that the rights of a bona fide purchaser are superior to those of a beneficiary of a resulting trust.").

The bankruptcy court's reliance on Begier is misplaced. That case involved so-called trust fund taxes that had been paid to the Internal Revenue Service. Those payments were retroactively deemed to have been held in trust, even though no separate account had been established by the debtor, because that is how the Supreme Court interpreted federal law. Because the taxes were held in trust they were not property of the debtor that had been transferred pre-petition and were not subject to avoidance under Section 547. See Begier, 496 U.S. at 59-67. This case is entirely different because it involves real property, not personal property, Debtor held record title to the Property, and Arizona law as we have interpreted it requires an equitable interest in real property to be recorded, even if that equitable interest is the corpus of a resulting or express trust. Because the Endowment Agreement was not recorded and there was no other notice of Donors' alleged trust or equitable interest in the Property, those equitable interests are void as against Trustee under Arizona Revised Statutes section 33-411(A) and 33-412(A).

The bankruptcy court found further support in Section 541(f), which states in full:

> (f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

11 U.S.C. § 541(f).

We are not persuaded. Section 541(f), which does not apply here in any event (see footnote 4, above), says nothing about

Trustee's powers under Section 544(a)(3).

For all of these reasons, Trustee as a hypothetical bona fide purchaser of the Property without notice of the Endowment Agreement takes free and clear of its obligations.

V. CONCLUSION

There are no material facts in dispute. Under the recorded quitclaim deed Debtor appears to have all right, title, and interest to the Property subject only to a life estate in the Donors. Section 544(a)(3) vests Trustee with the rights and powers of a hypothetical bona fide purchaser of the Property from Debtor. We are persuaded that under Arizona law such a purchaser takes free and clear of Appellee's asserted right to have the Property reconveyed to her and the other provisions of the unrecorded Endowment Agreement. Nothing in Section 541(d) changes that result.

The bankruptcy court's judgment in favor of Appellee is REVERSED and REMANDED with directions to enter judgment against Appellee and in favor of Trustee on his cross-motion for summary judgment.