

APR 13 2007

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OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	AZ-06-1339-MoPaBr
)		
SEDONA CULTURAL PARK, INC.,)	Bk. No.	04-18409
)		
Debtor.)	Adv. No.	05-00558
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WILLIAM PIERCE, Chapter 7)		
Trustee,)		
)		
Appellant,)		
)		
v.)	<u>MEMORANDUM</u> ¹	
)		
OLLIE HOWARD,)		
)		
Appellee.)		
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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.

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

12 I. FACTS

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

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

24
25 ³ Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
28 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).

1 recorded, provides:

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5 Donors no longer applicable, then in such event the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

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

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

21 Debtor filed its voluntary Chapter 7 petition on October 20,
22 2004 (the "Petition Date"). On July 25, 2005, Appellee filed a
23 complaint praying for a declaratory judgment that Debtor's
24 bankruptcy estate holds no interest in the Property and directing
25 its reconveyance to Appellee. Trustee filed an Answer and
26 Counterclaim seeking to avoid Appellee's unrecorded interest in
27 the Property under the Endowment Agreement pursuant to Section
28 544. 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

1 bankruptcy court issued a minute order stating in relevant part:

2 [Trustee] asserts a superior claim to the
3 property under Section 544 because the endowment
4 agreement was not recorded. [Appellee] claims that
5 [Trustee] and the estate are bound by the terms of
6 the endowment agreement.

7 Section 541(d) of the Code provides, in part,
8 "Property in which the debtor holds . . . only
9 legal title and not an equitable interest, . . . ,
10 becomes property of the estate under subsection
11 (a)(1) or (2) of this section only to the extent of
12 the debtor's legal title to such property, but not
13 to the extent of any equitable interest in such
14 property that the debtor does not hold". The
15 debtor had legal title when the case was filed.
16 However, it appears that was all the debtor held,
17 i.e., legal title. [Appellee] held the equitable
18 interests, namely the life estates and the right to
19 return of the property if the charitable/cultural
20 mission changed substantially, which it did with
21 the filing of the chapter 7. See: Bequier v.
22 [I.R.S.], 496 U.S. 53, 110 S.Ct. 2258, 110 L.Ed.2d
23 46 (1990) (It is well settled principle that
24 debtors do not own an equitable interest in
25 property . . . they hold in trust for another).

26 Such view is further supported by new Section
27 541(f)⁴ which provides that property transferred
28 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.

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.

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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 --

* * *

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.

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

9 11 U.S.C. § 544(a) (3) (emphasis added).

10 At oral argument before us there was some discussion whether
11 the Endowment Agreement creates any "transfer" within the meaning
12 of the statute. But it is not essential that there be any
13 transfer: "Although [Section 544(a) (3)] empowers the trustee to
14 avoid transfers, by its terms it also applies if no transfer has
15 taken place." In re Seaway Express Corp., 912 F.2d 1125, 1128-30
16 (9th Cir. 1990). State law governs the extent to which Trustee's
17 rights and powers as a hypothetical bona fide purchaser under
18 Section 544(a) (3) will defeat the obligations under the Endowment
19 Agreement. See id.

20 It is well established that Trustee's rights as a
21 hypothetical bona fide purchaser under Section 544(a) (3) are
22 limited by any constructive or inquiry notice that such a
23 purchaser would have under state law. In re Deuel, ___ B.R. ___,
24 2006 WL 4010577 (9th Cir. BAP 2006). In this case a hypothetical
25 purchaser from Debtor would be on notice that Appellee was
26 occupying the Property. But as Trustee argues, that is consistent
27 with the recorded quitclaim deed which reserves a life estate in
28 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

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

11 According to Appellee, the Endowment Agreement created a
12 trust under which Debtor was obliged to reconvey its interest in
13 the Property, that trust failed, and she is the beneficiary of a
14 resulting trust under Arizona law. The Endowment Agreement (p. 4)
15 describes Debtor as "trustee of this Endowment" and also refers
16 (pp. 2, 6, and 7) to Debtor's Board of Directors as trustees. We
17 assume without deciding that Appellee is the beneficiary of a
18 resulting trust⁶ and holds what the bankruptcy court described as
19 an equitable interest in the Property. See Restatement (Second)
20 of Trusts, § 401(1) and Comment (c). See also In re Estate of

21
22 ⁶ As stated by one case, discussed below, "In our opinion,
23 it is irrelevant whether the trust was an express trust or a
24 resulting trust" Blalak v. Mid Valley Transp., 175 Ariz.
25 538, 540; 858 P.2d 683, 685 (1993). The important thing is that
26 "the world was not placed on notice that a trust relationship
27 existed, whether that trust arose from an express trust or a
28 resulting trust." Id.

25 Appellee has not alleged that any other form of trust
26 existed, such as a charitable trust, and we express no opinion
27 whether the outcome would be different in that circumstance. But
28 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).

1 Harber, 99 Ariz. 323, 327; 409 P.2d 31, 35 (1965) (following
2 Restatement (Second) of Trusts); In re Washburn & Roberts, Inc.,
3 795 F.2d 870, 872 (9th Cir. 1986) (holding that under Washington
4 law and the Restatement (Second) of Trusts, "A resulting trust may
5 arise . . . [w]here a private or charitable trust fails in whole
6 or in part.") (citations omitted).

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

9 § 33-412. Invalidity of unrecorded instruments as
10 to bona fide purchaser or creditor

11 A. All bargains, sales and other conveyances
12 whatever of lands, tenements and hereditaments,
13 whether made for passing an estate of freehold or
14 inheritance or an estate for a term of years, and
15 deeds of settlement upon marriage, whether of land,
16 money or other personal property, and deeds of
17 trust and mortgages of whatever kind, shall be void
18 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.

17 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.

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

20 Arizona law also provides,

21 § 33-411. Invalidity of unrecorded instrument as
22 to bona fide purchaser; acknowledgment required for
23 proper recording; recording of instruments
acknowledged in another state; exception

24 * * *

25 A. No instrument affecting real property gives
26 notice of its contents to subsequent purchasers or
27 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.

28 Ariz. Rev. Stat. § 33-411(A).

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

9 Although generally American courts construe
10 recording laws as requiring and authorizing the
11 recording of equitable as well as legal interests, 45 Am.Jur. Records and Recording Laws § 49 (1943),
12 Arizona appears to have confined the operation of
13 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). . . .

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

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

17 . . . The amicus curiae memorandum advances the
18 position that our opinion is overly broad in its
19 statement that Arizona appears to have confined the
20 operation of A.R.S. § 33-412 to legal interests in
21 land. We agree.

22 Our holding is limited to the facts with which
23 we were presented. The opinion insofar as it
24 relates to Arizona's recording laws should be read
25 to hold only that a resulting trust, in order to be
26 enforceable against a creditor, need not be
27 recorded under the provisions of A.R.S. § 33-412.

28 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

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

8 A creditor is entitled to execute only on the
9 interest its debtor holds in property. Thus,
10 property held by a debtor in trust is not subject
11 to attachment for the debtor's debts. . . . This
12 is the rule in absence of a recording statute
13 requiring a different result. . . . In Arizona at
14 least since 1910, the recording statutes have not
15 required that an equitable interest in land be
16 recorded to be valid against creditors or third
17 party bona fide purchasers.

18 As was held in Luke v. Smith, 13 Ariz. 155,
19 108 P. 494 (1910), aff'd, 227 U.S. 379, 33 S.Ct.
20 356, 57 L.Ed. 558 (1913), the recording statutes
21 making all conveyances of land void as to creditors
22 and subsequent purchasers for value, unless
23 acknowledged and recorded, do not cover equitable
24 liens, which need not be recorded to prevail over
25 judgment creditors of the actual titleholder. See
26 also Jarvis v. Chanslor & Lyon Co., 20 Ariz. 134,
27 177 P. 27 (1919).

28 * * *

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

1 as in this case. Id., 187 Ariz. at 302-03, 928 P.2d at 726-27.
2 The equitable interest was a constructive trust, not a resulting
3 trust such as Appellee asserts. Finally, the constructive trust
4 arose because the property owner persuaded a contractor not to
5 obtain a mechanics' lien, and one of Hunnicuttt's three grounds for
6 distinguishing Blalak was that "where a legal remedy such as a
7 statutory [mechanic's or materialman's] lien exists, but has not
8 been utilized, a claimant should not be permitted to substitute an
9 equitable remedy." Hunnicuttt, 187 Ariz. at 304-05, 928 P.2d at
10 728-29. Despite these differences between Hunnicuttt and the case
11 before us, it faced the same issue of whether an unrecorded
12 equitable interest has priority over a later bona fide purchaser
13 for value, and its comments about Blalak are useful in this case.

14 First, Hunnicuttt suggests that Blalak's statements about bona
15 fide purchasers are dicta, because the case involved a judgment
16 creditor not a bona fide purchaser. Hunnicuttt, 187 Ariz. at 304,
17 928 P.2d at 728. See also Kaufmann v. M & S Unlimited, L.L.C.,
18 211 Ariz. 314, 317 n. 6; 121 P.3d 181, 184 n. 6 (2d App. Div.,
19 2005) (describing Blalak's conclusions as "questionable").

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

22 . . . Blalak and the other Arizona cases on
23 which it relied involved the superiority of an
24 unrecorded equitable interest over a judgment
25 creditor's lien. See Jarvis v. Chanslor & Lyon
26 Co., 20 Ariz. 134, 177 P. 27 (1919); Luke v. Smith,
27 13 Ariz. 155, 108 P. 494 (1910), aff'd, 227 U.S.
28 379, 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,

1 883 (App.1982). Unlike a BFP or lender for value,
2 a judgment creditor has not relied on the recorded
3 title in purchasing or extending credit on the
4 property. Therefore,

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

13 Osin v. Johnson, 243 F.2d 653, 657 (D.C. Cir.
14 1957).

15 In other words,

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

25 Restatement (First) of Restitution § 173 cmt. j
26 (1937). See also 4 Scott, The Law of Trusts
27 § 308.1 at 194 (4th ed. 1989) ("A judgment creditor
28 is not a purchaser for value.").

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

Finally, Hunnicut 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 distinguish[e] 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

1 BFP, unlike a judgment lienholder, does not take
2 subject to an equitable lien. See Henry I. Siegel
3 Co., Inc. v. Holliday, 663 S.W.2d 824, 828 (Tex.
4 1984); Gordy v. Morton, 624 S.W.2d 705 (Tex. App.
5 1981). Courts in other states are in agreement.
6 See Lewis v. Superior Court, 30 Cal.App.4th 1850,
7 1879, 37 Cal.Rptr.2d 63, 82 (1994); Kolker v. Gorn,
8 193 Md. 391, 398, 67 A.2d 258, 261 (1949) ("it is
9 well established that a judgment creditor is not in
10 the position of a bona fide purchaser, and his
11 claim is subject to prior, undisclosed equities.");
12 Aberdeen Federal Savings & Loan Ass'n v. Empire
13 Manufactured Homes, Inc., 36 Wash.App. 81, 85, 672
14 P.2d 409, 411 (1983).

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

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

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

The other factual differences in Hunnicut 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.

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

7 The lien of a judgment does not attach to the
8 mere legal title to property existing in the
9 judgment debtor, when the equitable and beneficial
title is in another, as where land is . . . subject
to a parol agreement to reconvey,

10 However, it has been held that the beneficial
11 owner may be estopped to assert title against the
12 lien of a judgment obtained by one who extended
credit to the holder of the legal title without
knowledge of the equities.

13 50 C.J.S. Judgments § 578 (emphasis added, footnotes omitted).

14 Trustee more closely resembles the latter category of one who
15 extended credit without knowledge of the equities. As a
16 hypothetical bona fide purchaser, he is deemed to have extended
17 credit to Debtor in reliance on the record title and without
18 knowledge of Donors' equitable interest under the unrecorded
19 Endowment Agreement. In re Gurs, 27 B.R. 163, 165 (9th Cir. BAP
20 1983).

21 Another treatise suggests that Hunnicut is also consistent
22 with the law of trusts:

23 Equitable liens and trusts are both subject to
24 the application of the bona fide purchaser rule.
25 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.

26 George G. Bogert et al., The Law Of Trusts And Trustees § 32 (Rev.
27 2d ed. 2006), text accompanying n. 21 (citing, inter alia,
28 Blalak).

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

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

17 The bankruptcy court nevertheless held that Debtor's interest
18 in the Property is limited to bare legal title under Section
19 541(d).⁷ That conclusion is at odds with the case law in this
20

21 ⁷ Section 541(d) provides, in full:

22 Property in which the debtor holds, as of the
23 commencement of the case, only legal title and not an
24 equitable interest, such as a mortgage secured by real
25 property, or an interest in such a mortgage, sold by the
26 debtor but as to which the debtor retains legal title to
27 service or supervise the servicing of such mortgage or
28 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).

1 circuit. "[T]he majority rule is that § 541(d) does not limit the
2 trustee's powers over real property under § 544(a)(3)" and the
3 Ninth Circuit follows the majority rule. Seaway, 912 F.2d at
4 1128-30 (following In re Tleel, 876 F.2d 769, 772-74 (9th Cir.
5 1989)).

6 Under the majority rule Sections 541 and 544 are
7 complementary, not conflicting, sources of Trustee's rights and
8 powers. "Section 541(d) does not have anything to say about the
9 effects of § 544(a)(3). It forbids including property in the
10 debtor's estate 'under subsection (a) of this section' and does
11 not address whether property may be included under some other part
12 of the Code." Belisle v. Plunket, 877 F.2d 512, 515 (7th Cir.
13 1989) (cited with approval in Seaway, 912 F.2d at 1128). See
14 generally In re Great Plains W. Ranch Co., Inc., 38 B.R. 899
15 (Bankr. C.D. Cal. 1984) (explaining theory of Sections 541 and
16 544(a)(3)) (cited with approval in Seaway, 912 F.2d 1125, passim).

17 We recognize that Seaway and Tleel involved constructive
18 trusts whereas Appellee claims to be the beneficiary of a
19 resulting trust. See generally In re Markair, Inc., 172 B.R. 638,
20 641-42 (9th Cir. BAP 1994) (explaining difference between
21 constructive and resulting trusts); In re Golden Triangle Capital,
22 Inc., 171 B.R. 79 (9th Cir. BAP 1994) (same). Theoretically that
23 could make a difference. In Markair and Golden Triangle, neither
24 of which involved real property or any recording statutes, we
25 recognized that property held in trust can be excluded from the
26 bankruptcy estate. In Markair we added, "[a] resulting trust can
27 defeat the trustee's strong arm powers under § 544." 172 B.R. at
28 642 (emphasis added). That is so, but whether a resulting trust

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

8 If we had any doubt that the Bankruptcy Code applies state
9 law under Section 544(a)(3) notwithstanding the existence of a
10 resulting trust, such doubt would be resolved by Tleel itself,
11 which explicitly recognized "the possibility that under certain
12 circumstances the corpus of a valid resulting trust may become
13 estate property upon exercise of section 544(a)(3)'s avoidance
14 powers." Tleel, 876 F.2d at 772 (emphasis added) (distinguishing
15 Matter of Torrez, 63 B.R. 751 (9th Cir. BAP 1986), aff'd, 827 F.2d
16 1299 (9th Cir.1987)). See also Roman Catholic Archbishop, 335
17 B.R. at 878 (rejecting argument that Tleel does not apply to
18 charitable or express trusts because "it was not the character of
19 the trust [in Tleel] that determined whether the interest was
20 avoidable, but whether there was constructive notice of that
21 interest at the time of bankruptcy"); In re Loewen Group Int'l,
22 Inc., 292 B.R. 522, 527 (Bankr. D. Del. 2003) ("the differences
23 between a constructive trust and a resulting trust are immaterial
24 in this § 544(a)(3) context"); Burns v. Creech, 350 B.R. 24, 31
25 (Bankr. M.D.N.C. 2006) ("Even if the Court had imposed a resulting
26 trust, Section 544(a)(3) and North Carolina law combine to provide
27 that the rights of a bona fide purchaser are superior to those of
28 a beneficiary of a resulting trust.").

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

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

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

26 11 U.S.C. § 541(f).

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

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

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

5 **V. CONCLUSION**

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

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

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