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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NOT FOR PUBLICATION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.	CC-06-1380-BPaMa
)	BAP No.	CC-06-1381-BPaMa
7	SHANEL ANN STASZ,)		
)	Bk. No.	LA 05-43980-AA
8	Debtor.)	Adv. No.	LA 06-01481-AA
9	_____)		
	SHANEL ANN STASZ; THE ESTATE)		
10	OF CARL E. LOVELL, JR.,)		
)		
11	Appellants,)		
)		
12	v.)	MEMORANDUM ¹	
)		
13	ROSENDO GONZALEZ, Chapter 7)		
	Trustee,)		
14)		
	Appellee.)		
15	_____)		

Argued and Submitted on July 27, 2007
at Pasadena, California

Filed - August 9, 2007

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

Honorable Alan M. Ahart, Bankruptcy Judge, Presiding

Before: BRANDT, PAPPAS and MARLAR,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. James M. Marlar, U.S. Bankruptcy Judge for the District of Arizona, sitting by designation.

1 The bankruptcy court granted the chapter 7³ trustee's motion for
2 summary judgment setting aside as a fraudulent conveyance the transfer
3 of debtor's condominium to a Nevada irrevocable trust.

4
5 **I. FACTS**

6 In May 2000 Shanel Stasz and Hugo Quackenbush entered into a
7 settlement agreement. Almost immediately, the parties began to disagree
8 about compliance with its terms, and Quackenbush initiated arbitration
9 proceedings to enforce the confidentiality clause of the agreement. The
10 arbitrator issued an interim restraining order in November 2000.

11 In July 2001, Stasz executed a series of estate planning documents,
12 including the Alta Loma Ultra Trust dated July 10, 2001 ("Trust), a
13 Private Annuity Agreement, and a quitclaim deed conveying her condominium
14 located at West Hollywood, California ("Property") to the Trust. The
15 deed was recorded in November 2001.

16 In September 2002 Quackenbush obtained a judgment against Stasz for
17 approximately \$1.5 million, confirming the arbitrator's award. That
18 judgment was later determined nondischargeable by the bankruptcy court.⁴

19 On 1 July 2005 Quackenbush sued Stasz and Carl E. Lovell, Jr.,
20 trustee of the Trust, in Los Angeles County Superior Court, seeking to
21

22 ³ Absent contrary indication, all "Code," chapter and section
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to
24 its amendment by the Bankruptcy Abuse Prevention and Consumer
25 Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from
26 which this appeal arises was filed before its effective date
27 (generally 17 October 2005).

28 All "Rule" references are to the Federal Rules of Bankruptcy
Procedure, and all "FRCP" references are to the Federal Rules of Civil
Procedure. "CCC" references are to the California Civil Code.

⁴ We recently affirmed that judgment. BAP No. CC-06-1202-
KMoD. An appeal to the Ninth Circuit is pending.

1 set aside as fraudulent Stasz's 2001 conveyance of the Property to the
2 Trust.⁵ Stasz filed a chapter 7 petition on 13 October 2005. The
3 fraudulent conveyance action was removed to the bankruptcy court, and the
4 chapter 7 trustee, Rosendo Gonzalez ("Trustee"), substituted as
5 plaintiff.⁶

6 On 12 July 2006 the Trustee moved for summary judgment, which the
7 bankruptcy court granted. Debtor and transferee filed timely separate
8 notices of appeal but filed joint briefs. They did not appear for
9 argument. We AFFIRM.

11 II. JURISDICTION

12 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and
13 § 157(b) (1) and (b) (2) (H), and we do under 28 U.S.C. § 158(c).

15 III. ISSUE

16 Whether the bankruptcy court erred in granting summary judgment to
17 Trustee.

19 IV. STANDARD OF REVIEW

20 We review the bankruptcy court's grant of summary judgment de novo.
21 In re Jung Sup Lee, 335 B.R. 130, 135 (9th Cir. BAP 2005). Viewing the
22 evidence in the light most favorable to the non-moving party, we must
23 determine whether there are any genuine issues of material fact and

25 ⁵ The complaint was timely under CCC § 3439.09, which sets a
26 four-year statute of limitations on fraudulent conveyance actions.
27 The Property was transferred 10 July 2001 and the deed recorded in
28 November 2001; the complaint was filed 1 July 2005.

⁶ The Trustee is authorized under § 544(b) to pursue state
fraudulent transfer actions.

1 whether the bankruptcy court correctly applied relevant substantive law.
2 In re Bishop, Baldwin, Rewald, Dillingham, & Wong, Inc., 819 F.2d 214,
3 215 (9th Cir. 1987).

5 V. DISCUSSION

6 Trustee sought summary judgment under CCC § 3439.04, which defines
7 actually and constructively fraudulent transfers:

8 A transfer made or obligation incurred by a debtor is
9 fraudulent as to a creditor, whether the creditor's claim
10 arose before or after the transfer was made or the obligation
11 was incurred, if the debtor made the transfer or incurred the
12 obligation as follows:

11 (1) With actual intent to hinder, delay, or defraud any
12 creditor of the debtor.

13 (2) Without receiving a reasonably equivalent value in
14 exchange for the transfer or obligation, and the debtor
15 either:

16 (A) Was engaged or was about to engage in a business or a
17 transaction for which the remaining assets of the debtor were
18 unreasonably small in relation to the business or transaction.

19 (B) Intended to incur, or believed or reasonably should have
20 believed that he or she would incur, debts beyond his or her
21 ability to pay as they became due.

22 CCC § 3439.04(a).

23 Appellants argue that summary judgment was inappropriate because
24 there were issues of material fact with respect to reasonably equivalent
25 value and intent.

26 **A. Actually Fraudulent Transfer**

27 It is undisputed that Stasz transferred assets, and that Quackenbush
28 was a creditor, either at the time of or shortly after the transfer.
Trustee therefore needed only to show that the transfer was made with
actual intent to hinder, delay, or defraud to prove an actually

1 fraudulent transfer. See Kirkeby v. Superior Court of Orange County,
2 33 Cal. 4th 642, 648 (2004) ("A fraudulent conveyance is a transfer by
3 the debtor of property to a third person undertaken with the intent to
4 prevent a creditor from reaching that interest to satisfy its claim.")

5 Intent may be shown by circumstantial evidence. Factors the court
6 may consider include:

- 7 (1) Whether the transfer or obligation was to an insider.
- 8 (2) Whether the debtor retained possession or control of the
9 property transferred after the transfer.
- 10 (3) Whether the transfer or obligation was disclosed or
11 concealed.
- 12 (4) Whether before the transfer was made or obligation was
13 incurred, the debtor had been sued or threatened with suit.
- 14 (5) Whether the transfer was of substantially all the debtor's
15 assets.
- 16 (6) Whether the debtor absconded.
- 17 (7) Whether the debtor removed or concealed assets.
- 18 (8) Whether the value of the consideration received by the
19 debtor was reasonably equivalent to the value of the asset
20 transferred or the amount of the obligation incurred.
- 21 (9) Whether the debtor was insolvent or became insolvent
22 shortly after the transfer was made or the obligation was
23 incurred.
- 24 (10) Whether the transfer occurred shortly before or shortly
25 after a substantial debt was incurred.
- 26 (11) Whether the debtor transferred the essential assets of
27 the business to a lienholder who transferred the assets to an
28 insider of the debtor.

CCC § 3439.04(b).

Several of these factors are undisputed in the record and support
a finding of actual intent: First, after transferring the Property to
the Trust, Stasz continued to live there rent-free and pay taxes (through
her LLC) (factor #2). Second, at the time of the transfer, Stasz was

1 involved in litigation with Quackenbush (factor #4). Third, the transfer
2 was of substantially all of her assets (factor #5). Fourth, the transfer
3 of all her assets likely rendered her insolvent, but even if it did not,
4 the arbitrator made the first interim arbitration award of \$400,000 four
5 months later (factors #9 and #10).

6 The only CCC § 3439.04(b) factor at issue is whether Stasz received
7 reasonably equivalent value. Appellants also dispute Trustee's evidence
8 of Stasz's statements indicating an intent to protect her assets from
9 creditors.

10

11 **1. Reasonably equivalent value**

12 Although the record contains no evidence of the value of the
13 Property (Stasz did not list it on Schedule A), the fact that Stasz was
14 paying property taxes on it, via a limited liability company she owned,
15 as she testified at her 341 meeting, establishes that it had some value.

16 It is undisputed that the sole consideration for the transfer of the
17 Property was the Private Annuity Agreement ("PAA"). Paragraph 2.4 of the
18 PAA provides that Stasz will not receive any payments until she reaches
19 age 85, more than 47 years after the transfer. As the trial judge noted,
20 Stasz valued the PAA at \$0 in her schedules. Transcript, 30 August 2006,
21 page 4. Nevertheless, appellants argue that there was evidence the PAA
22 constituted "valid consideration": namely, the 9 August 2006 declaration
23 of Carl E. Lovell, Jr., opining that "the private annuity was worth the
24 fair market value of the said real property at the time of the sale, July
25 10, 2001" But, of course, he assigned no monetary value to
26 either the annuity or the Property, nor did he show any foundation for
27 his valuation of either.

28

1 Upon presentation of Trustee's evidence of the PAA's lack of value
2 (debtor's schedules, and the Trust itself), the burden shifted to
3 appellants to present significant probative evidence raising a genuine
4 issue of material fact. "A motion for summary judgment may not be
5 defeated . . . by evidence that is 'merely colorable' or 'is not
6 significantly probative.'" Anderson v. Liberty Lobby, Inc., 477 U.S.
7 242, 249-50 (1986). The inquiry is "whether the evidence presents a
8 sufficient disagreement to require submission to a [factfinder] or
9 whether it is so one-sided that one party must prevail as a matter of
10 law." Id. at 251-52.

11 Appellants also argue that the PAA was "valid consideration" as a
12 matter of law, citing Stern v. C.I.R., 747 F.2d 555 (9th Cir. 1984)
13 ("Stern II") and Stern v. United States, 650 F. Supp. 16 (D. Nev. 1986).
14 The cited cases support the general proposition that a private annuity
15 may be valid consideration and/or treated as an equal exchange for tax
16 purposes. Their applicability in this context is questionable: the
17 issue is not whether a private annuity could be valid consideration, but
18 whether the one at issue here was reasonably equivalent in value to the
19 Property.

20 Appellants do not address the rule that reasonably equivalent value
21 is evaluated from the point of view of creditors. See In re Prejean, 994
22 F.2d 706, 708-09 (9th Cir. 1993); In re Roosevelt, 176 B.R. 200, 207-08
23 (9th Cir. BAP 1994). They did not come forward with any evidence of the
24 present value of the annuity other than Lovell's circular and conclusory
25 statement, which was devoid of any analysis or foundation, insufficient
26 to defeat a motion for summary judgment. See In re Lewis, 97 F.3d 1182,
27 1187 (9th Cir. 1996). A trier of fact, on that evidence, could not find
28 the present value of an annuity with payments commencing 47 years in the

1 future was reasonably equivalent in value to the Property from the
2 standpoint of creditors.

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4 **2. Intent**

5 Summary judgment is seldom granted when intent is at issue.
6 However, "summary judgment is appropriate if all reasonable inferences
7 defeat the claims of one side, even when intent is at issue." In re
8 Gertsch, 237 B.R. 160, 165 (9th Cir. BAP 1999) (citations omitted). See
9 also Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir.
10 1990) ("Even in cases where elusive concepts such as motive or intent are
11 at issue, summary judgment may be appropriate if the non-moving party
12 rests merely upon conclusory allegations, improbable inferences, and
13 unsupported speculation.")

14 Appellants argue that Trustee did not meet his burden because he
15 relied solely on Stasz's "misquoted" § 341 meeting testimony. The
16 Trustee submitted a transcript of Stasz's § 341 meeting in which Stasz
17 acknowledged that one of the purposes of the estate planning was to
18 protect assets from creditors:

19 McClellan:⁷ For estate planning, what does that mean to
20 you?

21 Stasz: It means that assets that I . . . had would
22 transfer to my . . . beneficiaries, with
minimal tax invasion, and yes they would be
protected from creditors

23 Section 341 Meeting Transcript, 10 March 2006, page 15. Appellants argue
24 that this statement is misleading because Stasz also indicated that that
25 was not the primary purpose for the transfer. But Appellants cite no
26 authority for the proposition that protection of assets from creditors
27 must be the sole or primary purpose for a fraudulent transfer, and we

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⁷ Pat McClellan, counsel for the Trustee.

1 know of none. And Stasz's testimony can fairly be read as acknowledging
2 a purpose to protect assets from creditors – the "they" in the passage
3 quoted logically refers to "assets," not "beneficiaries," who need no
4 protection from Stasz's creditors.

5 Appellants also argue that the § 341 meeting transcript was
6 improperly used as evidence on summary judgment. But they cite to no
7 authority prohibiting consideration of § 341 testimony, only legislative
8 history stating that the purpose of the meeting is "informational; it is
9 not intended to be an interrogation to which the debtor must give
10 specific answers which could be used against the debtor in some later
11 proceeding." H.R. Rep. No. 103-835, at 43 (1994), reprinted in 1994
12 U.S.C.C.A.N. 3340, 3351.

13 We could find no Ninth Circuit authority considering the
14 admissibility of § 341 testimony, but the Eleventh Circuit has held that
15 a bankruptcy court erred by not admitting § 341 testimony in ruling on
16 a creditor's objection to exemptions. In re Jost, 136 F.3d 1455, 1459
17 (11th Cir. 1998); see also In re Hardy, 319 B.R. 5, 6 (Bankr. M.D. Fla.
18 2004) (noting that § 341 testimony is admissible as a rebuttal or
19 impeachment tool, but questioning its admissibility as substantive
20 evidence).

21 In any event, we need not determine the appropriateness or
22 admissibility of the transcript. It is not the sole evidence relied upon
23 by Trustee. The circumstantial evidence supports a finding of the
24 requisite intent even without Stasz's statements, and it is not clear
25 from the record that the bankruptcy court relied on those statements.
26 If it did, and if that consideration was error, it was harmless. See 28
27 U.S.C. § 2111; FRCP 61, incorporated by Rule 9005. We do not reverse for
28

1 harmless error. In re Maximus Computers, Inc., 278 B.R. 189, 194 (9th
2 Cir. BAP 2002).

3 Appellants also object to any consideration of Stasz' state court
4 complaint filed 24 November 2004 against Lovell and others which contains
5 statements indicating one of the purposes of the trust was to protect her
6 assets from creditors. Appellants indicate the complaint was never
7 verified by Stasz and was ultimately dismissed because it was defective.
8 This complaint does not seem to have formed a basis for the bankruptcy
9 court's ruling, but even if it did, the harmless error analysis above
10 would apply, as there was enough circumstantial evidence of intent
11 without it.

12 Finally, as noted above, we review summary judgment de novo. Only
13 Stasz's bare assertion to the contrary in her declaration in support of
14 Lovell's opposition to summary judgment controverts the reasonable
15 inference from the Trustee's showing that she intended to hinder or delay
16 her creditors. That is not sufficient to raise an issue of material fact
17 respecting her intent, Gertsch, 237 B.R. at 165; Medina-Munoz, 896 F.2d
18 at 8, and thus summary judgment that there was an actually fraudulent
19 transfer was proper.

20

21 **B. Constructively Fraudulent Transfer**

22 The bankruptcy court concluded that the transfer of the Property was
23 also constructively fraudulent because Stasz did not receive reasonably
24 equivalent value for the Property, and because she was made insolvent by
25 the transfer ("reasonably should have believed that he or she would incur
26 debts beyond his or her ability to pay as they became due").

27 The reasonably equivalent value analysis set forth above applies
28 equally in this context, and appellants do not dispute insolvency. The

1 bankruptcy court did not err in ruling that the transfer was
2 constructively fraudulent.

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4 **C. Additional issues**

5 We need not reach the Trustee's argument that the Trust was a sham,
6 nor appellants' that the bankruptcy court erred in "not applying Nevada
7 law." They articulate no basis for the application of Nevada law: the
8 Property is located in California, Stasz resides there, and filed her
9 bankruptcy petition there: while the trust instrument provides that the
10 "validity, construction, and all rights under the trust" are to be
11 governed by the laws of the United States and the state of Nevada, those
12 are not the issues in this adversary proceeding.

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VI. CONCLUSION

15 The bankruptcy court did not err in granting summary judgment.
16 Trustee sustained his burden of coming forward with evidence to support
17 the fraudulent transfer claims; appellants did not come forward with
18 evidence sufficient to show a genuine issue of material fact.

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Accordingly, we AFFIRM.

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