

SEP 18 2007

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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NOT FOR PUBLICATION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

In re:)	BAP Nos.	NC-06-1263-SDR
)		NC-06-1336-SDR
STEPHEN BRIAN TURNER,)		(Consolidated)
)		
Debtor.)	Bk. No.	02-44874
)		
)	Adv. No.	02-07273
)		
SUSANA C. TURNER,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM ¹	
)		
JOHN T. KENDALL, Chapter 7)		
Trustee,)		
)		
Appellee.)		

Argued by Telephone Conference and
Submitted on March 23, 2007

Filed - September 18, 2007

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

Honorable Leslie Tchaikovsky, Bankruptcy Judge, Presiding

Before: SMITH, DUNN and RADCLIFFE,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. Albert E. Radcliffe, U.S. Bankruptcy Judge for the District of Oregon, sitting by designation.

1 Following a three-day trial, the bankruptcy court entered a
2 judgment in favor of the trustee finding that the 2001 transfer
3 of debtor's home to his wife was fraudulent under § 548(a)³ and
4 thus avoidable. Debtor's wife sought reconsideration of the
5 judgment, which the court granted in part. After reconsidering
6 the evidence, the court amended the judgment so turnover of the
7 home was based exclusively on an alter ego liability theory. We
8 AFFIRM.

9 **I. FACTS**

10 A. Pre-Bankruptcy Actions

11 In November 1991, Stephen Brian Turner ("Debtor") and his
12 wife Susana (collectively, the "Turners") acquired title to and
13 began living in a residence located in Alameda County, California
14 (the "Home"). The deed transferring title to the Home was
15 recorded on November 25, 1991, and indicates that the Home was
16 granted to "Stephen B. Turner and Susana C. Turner, husband and
17 wife, as community property."

18 The Turners executed a written transmutation agreement in
19 June 1992. Pursuant to the agreement, Debtor transferred his
20 community property interest in the Home to Susana as her separate
21 property, and in return, Susana transferred her community
22 property interest in the couple's paramedical business to Debtor
23 as his separate property. During this time, the Turners were
24 allegedly having marital difficulties which they hoped to resolve

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 (October 17,
2005) of The Bankruptcy Abuse Prevention and Consumer Protection
Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 through the transmutation agreement. The agreement was never
2 recorded.

3 In 1994, Debtor attended a seminar on "asset protection"
4 presented by Robert Matthews ("Matthews"). At Matthews'
5 suggestion, Debtor consulted a tax attorney knowledgeable about
6 the formation of foreign trusts. The attorney prepared a
7 document entitled "Declaration of Trust" ("GG Trust
8 Declaration"), which the Turners signed on June 30, 1995, but
9 never recorded. The GG Trust Declaration established an
10 irrevocable Bahamian trust (the "GG Trust") and declared that
11 specific assets, including the Home, were to be held in trust for
12 the Turners' three children. There is no evidence that title to
13 the Home was ever transferred to the GG Trust.

14 In the spring of 1995, Debtor once again met with Matthews
15 to discuss asset protection strategies. During this meeting, the
16 two discussed the transmutation agreement and the GG Trust
17 Declaration, as well as Matthews' preference for limited
18 liability companies for holding real property rather than
19 offshore trusts.

20 In 1997, Ah Beng Yeo and E.A. Martini (collectively,
21 "Judgment Creditors") initiated an action against Debtor in state
22 court based on tortious conduct allegedly committed in mid-1995.
23 Shortly thereafter, at Debtor's direction, Matthews created Real
24 Investment Capital Holdings LLC ("RICH"), a limited liability
25 company, and Proset Enterprises, Inc. ("Proset"), a Nevada
26 corporation. The GG Trust is the 99% owner of RICH and the sole
27 shareholder of Proset. Proset owns the remaining 1% of RICH LLC.
28 Alfred Cheung, Susana's brother who resides in Hong Kong, is

1 Proset's president and secretary.

2 In early 1998, after the filing of the civil complaint but
3 before the money judgment was entered against Debtor⁴, the
4 Turners executed a grant deed (the "1998 Deed") transferring
5 title to the Home to RICH in March 1998 (the "1998 Transfer").
6 The 1998 Deed was recorded in April of that year.

7 On March 16, 1999, approximately seven months after the
8 state court judgment was entered, Debtor, acting on behalf of
9 RICH, executed a deed of trust in favor of Proset (the "Proset
10 Deed"), encumbering the Home to secure a line of credit.⁵ The
11 Proset Deed was recorded on March 18, 1999, and identified Debtor
12 as the managing partner of RICH.

13 On September 22, 1999, the Judgment Creditors recorded an
14 abstract of judgment in Alameda County. Thereafter, in October
15 1999, they filed a fraudulent conveyance action against the
16 Turners in Contra Costa Superior Court. On May 31, 2001, the
17 Judgment Creditors obtained a writ of execution which they
18 attempted to execute against the Home.

19 In June 2001, Debtor prepared a marriage dissolution
20 petition for Susana. In the petition, Debtor and Susana
21 stipulated that the Home (which had previously been transferred
22 to RICH) should be confirmed as Susana's separate property (the
23 "Turner Marital Settlement Agreement"). A dissolution judgment
24 was entered in September 2001 (the "Turner Dissolution

25 ⁴ The state court entered a million dollar judgment in favor
26 of the Judgment Creditors in August 1998.

27 ⁵ Debtor testified at trial that there was never any draw on
28 the line of credit. Thus, the Proset Deed did not secure any
debt.

1 Judgment"). Although divorced, Debtor and Susana both continued
2 to reside in the Home and file joint tax returns identifying
3 themselves as married.

4 On December 27, 2001, RICH executed a deed (the "2001 Deed")
5 transferring title to the Home to Susana (the "2001 Transfer").
6 The 2001 Deed was signed by Nancy Lake, the trustee of the GG
7 Trust, and recorded on that same day.

8 Debtor filed for chapter 7 relief on September 10, 2002.
9 Subsequently, the fraudulent conveyance action was removed to the
10 bankruptcy court and the chapter 7 trustee ("Trustee")
11 substituted in as the real party in interest.

12 B. The Bankruptcy

13 On January 14, 2004, Trustee filed his first amended
14 complaint (the "FAC") against Susana, Just In Case Holdings
15 Inc.⁶, Proset, RICH, the GG Trust, and Nancy Lake as the trustee
16 of the GG Trust (collectively, "Defendants").⁷ The FAC asserted
17 four claims for relief. The first and second claims prayed for
18 avoidance of all the transfers related to 1) the 1992
19 transmutation agreement, 2) the GG Trust, 3) the 1998 Deed, 4)
20 the Proset Deed, 5) the Turner Marital Settlement Agreement, 6)
21 the Turner Dissolution Judgment, and 7) the 2001 Deed
22 (collectively, the "Transfers") as actually and constructively
23 fraudulent under § 548(a), § 544 and California Civil Code ("CC")
24 § 3439 et seq. The third claim sought a determination that,
25 despite the Transfers, Debtor retained an equitable interest in

26 ⁶ Just In Case Holdings Inc. is a Nevada corporation that
27 was formed on July 31, 2002 by Debtor.

28 ⁷ The original complaint also named Debtor as a defendant.

1 the Home when he filed for bankruptcy, and, that being the case,
2 the Home should be declared property of the estate. Under the
3 fourth claim, Trustee sought turnover of the Home under § 542(a).

4 1. The Trial Memorandum Decision

5 Following a three-day trial, the bankruptcy court took the
6 matter under submission.⁸ The court issued its memorandum
7 decision on December 5, 2005 ("Trial Decision") in which it
8 determined that "all of the transfers in question were made with

9 ⁸ Prior to the matter going to trial, the bankruptcy court
10 heard two different summary judgment motions - one filed by
11 Defendants on March 5, 2004, and a subsequent one filed by
Trustee on December 23, 2004.

12 Defendants' summary judgment motion contended that, among
13 other things, under California's Uniformed Fraudulent Transfer
14 Act ("CUFTA"), the definition of "asset" includes only the
15 unencumbered, nonexempt value of a debtor's property. At the
16 time of the 1998 Transfer, the Home did not have any
17 unencumbered, nonexempt value. Therefore, they were entitled to
18 summary judgment in their favor on both fraudulent transfer
19 claims. On July 27, 2004, the court denied the motion. Although
it agreed with the Defendants' definition of "asset" under CUFTA,
it held that there was a triable issue of fact with respect to
whether the Home had any unencumbered, nonexempt value at the
time of the 1998 Transfer.

20 Trustee's summary judgment motion asked the court to
21 summarily adjudicate in his favor that 1) the 1998 Transfer was
22 made with the actual intent to hinder, delay, or defraud the
23 Judgment Creditors, 2) the 1998 Transfer was made for less than
24 reasonably equivalent value at a time when Debtor was insolvent
25 or that it rendered him insolvent, and 3) the transfer of the
26 Proset Deed was avoidable under § 544(b). The court entered its
27 memorandum decision granting the motion in part and denying it in
28 part on February 17, 2005 ("February 17 memorandum decision").
Specifically, it granted Trustee's request to summarily
adjudicate the issues of reasonably equivalent value and
insolvency and denied summary judgment as to the fraudulent
intent issue and any issues concerning the avoidance of the
Proset Deed. An order evidencing the court's findings was
entered on March 9, 2005.

1 actual intent to hinder, delay, or defraud creditors." Trial
2 Decision at 9, Dec. 5, 2005. In this regard, the court found
3 that the evidence established that

4 all of the transfers were to insiders; the Debtor
5 retained possession and control of the Home after the
6 all [sic] transfers; the Debtor had been sued before
7 most of the transfers; no consideration was received
8 for the transfers; and the Debtor was rendered
9 insolvent by the transfers.

10 Id. at 9 n.7. It also found that Debtor received no
11 consideration for any of the Transfers and that the Transfers
12 rendered him insolvent.

13 In addition, the court concluded that RICH and Proset were
14 Debtor's alter egos, noting Debtor's testimony that the entities
15 were created, and their relationships structured, to maximize the
16 protection of his assets, particularly the Home. While the court
17 recognized that asset protection is permitted when done for a
18 legitimate business purpose, it found that RICH and Proset were
19 created solely for the improper purpose of shielding the Home
20 from creditors. Relying on *Fleet Credit Corp. v. TML Bus Sales,*
21 *Inc.*, 65 F.3d 119 (9th Cir. 1995), the court determined that the
22 transfer of the Home by RICH to Susana in 2001 should be treated
23 as a fraudulent transfer by Debtor and that the "only relevant
24 transfer to be avoided [was] the transfer reflected by the 2001
25 Deed."⁹ Trial Decision at 12, Dec. 5, 2005.

26 ⁹ Notably, in its memorandum decision addressing Defendants'
27 motion for partial summary judgment entered on July 27, 2004, the
28 court indicated that the transfer of the 1998 Deed was the
critical one for fraudulent transfer purposes. Because the 1998
Transfer occurred more than one year before the filing of the
petition, the court assumed that Trustee's remedy was limited to
(continued...)

1 The 2001 Transfer occurred on December 27, 2001, within one
2 year of the bankruptcy filing. Therefore, the court held that
3 Trustee was entitled to avoid the 2001 Transfer of the Home to
4 Susana under § 548(a)(1)(A) and (a)(1)(B).

5 The effect of avoiding the 2001 Transfer was to revert title
6 to the Home back to RICH. Because Debtor and Susana were
7 divorced prior to the bankruptcy filing, the court found that the
8 entire interest in the Home ultimately reverted to Debtor as his
9 separate property based on the court's determination that RICH is
10 Debtor's alter ego. This finding entitled Trustee to the
11 turnover of the Home's entire value under § 542.

12 On January 20, 2006, a judgment was entered in favor of
13 Trustee ("Judgment").

14 2. The New Trial Memorandum Decision

15 Following the entry of the Judgment, the Turners filed a
16 motion seeking: (1) amendment of the Judgment, (2)
17 reconsideration, (3) a new trial, and (4) a stay of enforcement
18 of the Judgment (the "New Trial Motion"). They asserted that the
19 court erred in determining that there was an actual and
20 constructive fraudulent conveyance of the Home, that the 2001
21 Deed was the operative deed for the purpose of the fraudulent
22 conveyance claim, that Debtor held an equitable interest in the

23

⁹(...continued)

24 avoidance of the asset transferred pursuant to the 1998 Deed
25 under CC § 3439 et seq. (CUFTA). Under CC § 3439.01(a), an asset
26 is defined to include only the unencumbered, nonexempt value of
27 the property transferred. If the 1998 Transfer had been the
28 operative transfer, Trustee would only be entitled to a judgment
avoiding the transfer of the Home to the extent of its asset
value. Based on the testimony of Trustee's appraiser, the court
determined the asset value of the Home in 1998 was \$7,700.

1 GG Trust, and that RICH was the alter ego of Debtor. In
2 addition, they argued that the Judgment violated Susana's due
3 process rights because the statutory scheme for finding a
4 fraudulent conveyance under § 727, § 548, and CUFTA were
5 internally inconsistent.

6 The court rejected most of the arguments in the New Trial
7 Motion but did find persuasive the argument that Susana did not
8 have an adequate opportunity to address the following issues:

9 (1) whether the court erred by treating RICH LLC as the
10 Debtor's alter ego, and (2) whether the court's
11 conclusion that the 2001 Transfer was avoidable as a
12 fraudulent transfer pursuant to 11 U.S.C. § 548 was
erroneous because the grant deed executed in 2001,
purporting to transfer the House from RICH to Susana,
was invalid.

13 New Trial Decision at 3, June 29, 2006.¹⁰ It therefore provided
14 the parties with the opportunity to brief these issues.

15 On June 29, 2006, the court issued its ruling on the New
16 Trial Motion ("New Trial Decision"). As to the alter ego issue,
17 the court was not persuaded by the Turners' argument that Debtor
18 could not be held as RICH's alter ego because he was not named as
19 an owner or shareholder. Rather, it read California law as
20 recognizing an alter ego relationship when two conditions are
21 met: "(1) a unity of interest and ownership such that the person
22 and the entity cannot fairly be considered separate and (2)
23 adherence to the fiction of the separate existence of the entity

24
25 ¹⁰ This memorandum decision was not included as part of the
26 record; nevertheless, we may take judicial notice of it. Harris
27 v. U.S. Trustee (In re Harris), 279 B.R. 254, 261 n.4 (9th Cir.
28 BAP 2002) ("A judicially noticed fact must be one not subject to
reasonable dispute in that it is . . . capable of accurate and
ready determination by resort to sources whose accuracy cannot
reasonably be questioned.").

1 and the individual would work an injustice." New Trial Decision
2 at 5, June 29, 2006. The court found that the evidence presented
3 during trial satisfied both prongs.

4 With respect to the validity of the 2001 Deed, the court
5 agreed with the Turners that it was invalid. Consequently, the
6 2001 Transfer was ineffective and ownership of the Home was held
7 by RICH, and not Susana, at the time of the bankruptcy filing.
8 Based on its finding that RICH was Debtor's alter ego, the court
9 concluded that the Home was property belonging to Debtor, and
10 thus, property of the estate.

11 Given the Turners' concession regarding the invalidity of
12 the 2001 Deed, the court determined that the Judgment required
13 modification because the "prior ruling--that the 2001 Transfer
14 should be avoided as a fraudulent transfer pursuant to 11 U.S.C.
15 § 548--[was] clearly erroneous." Id. at 7. On July 14, 2006,
16 the court entered an amended judgment nunc pro tunc in which it
17 directed that the Home should be turned over to Trustee ("Amended
18 Judgment").

19 Susana appealed on July 21, 2006.¹¹ Following the filing of
20 the appeal, the bankruptcy court approved Trustee's motion to
21 sell the Home on August 14, 2006.¹² At oral argument, Susana's
22 counsel informed us that the Home sold for over \$900,000.

23 ¹¹ Subsequent to the filing of the notice of appeal of the
24 Amended Judgment, the bankruptcy court entered an order granting
25 in part and denying in part the New Trial Motion in accordance
26 with the reasons stated in its New Trial Decision. Susana filed
27 a notice of appeal as to that order on September 20, 2006. That
28 appeal has been consolidated with Susana's appeal of the Amended
Judgment.

¹² The order granting the sale was not included in the
record, however, we may take judicial notice of it. See supra
note 10.

1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
3 and 28 U.S.C. § 157(b) (1) and (b) (2) (E), (H). We have
4 jurisdiction under 28 U.S.C. § 158.

5 **III. ISSUES**

- 6 1) Whether the court erred in holding that the Home was solely
7 property of the estate based upon its alter ego finding;
8 2) Whether Trustee holds a valid fraudulent transfer claim;
9 3) Whether Trustee is entitled to the increased equity in the
10 Home that accumulated subsequent to the 1998 Transfer;
11 4) Whether the court abused its discretion in denying the New
12 Trial Motion; and
13 5) Whether the bankruptcy court abused its discretion in
14 admitting evidence concerning Debtor's 1994 conviction.

15 **IV. STANDARDS OF REVIEW**

16 We review a bankruptcy court's conclusions of state and
17 federal law and questions of statutory interpretation de novo.
18 *Movitz v. Baker (In re Triple Star Welding Inc.)*, 324 B.R. 778,
19 788 (9th Cir. BAP 2005); *Smith v. Lachter (In re Smith)*, 352 B.R.
20 702, 705 (9th Cir. BAP 2006). Accordingly, a determination of a
21 fraudulent transfer based on undisputed facts is reviewed de
22 novo. *Trujillo v. Grimmett (In re Trujillo)*, 215 B.R. 200, 203
23 (9th Cir. BAP 1997). A bankruptcy court's findings of facts are
24 reviewed for clear error. *Id.*

25 A bankruptcy court's decision to deny a motion for
26 reconsideration or a motion for a new trial is reviewed for an
27 abuse of discretion. *First Ave. W. Bldg., LLC v. James (In re*
28 *OneCast Media, Inc.)*, 439 F.3d 558, 561 (9th Cir. 2006); see

1 United States v. Bhagat, 436 F.3d 1140, 1145 (9th Cir. 2006).
2 Rulings on admissibility of evidence are also reviewed for an
3 abuse of discretion. United States v. Rice, 38 F.3d 1536, 1542
4 (9th Cir. 1994). An abuse of discretion will be found if the
5 court "base[d] its ruling upon an erroneous view of the law or a
6 clearly erroneous assessment of the evidence." Triple Star, 324
7 B.R. at 788. "The panel also finds an abuse of discretion if it
8 has a definite and firm conviction that the bankruptcy court
9 committed a clear error of judgment in the conclusion it
10 reached." Id.

11 On appeal, we may affirm the bankruptcy court on any ground
12 supported by the record, even if it differs from the bankruptcy
13 court's stated rationale. Pollard v. White, 119 F.3d 1430, 1433
14 (9th Cir. 1997).

15 V. DISCUSSION

16 A. The Alter Ego Finding

17 Susana argues that the bankruptcy court erred in finding
18 that RICH is the alter ego of Debtor because Debtor has no
19 ownership interest in RICH and, under California law, alter ego
20 liability cannot be imposed absent ownership. We agree.

21 The law of the forum state is used to determine whether an
22 entity is an alter ego of an individual. SEC v. Hickey, 322 F.3d
23 1123, 1128 (9th Cir. 2003). In California, an alter ego
24 relationship exists if "(1) [there is] such unity of interest and
25 ownership that separate personalities of the corporation and the
26 individual no longer exist and (2) that, if the acts are treated
27 as those of the corporation alone, an inequitable result will
28 follow." Mesler v. Bragg Mgmt. Co., 702 P.2d 601, 606 (Cal.

1 1985) (emphasis added). While there is "no litmus test" for the
2 existence of an alter ego relationship, there are two general
3 requirements that must be present: ownership and the specter of
4 fraud. Hickey, 322 F.3d at 1128-29 (interpreting California
5 law). Accordingly, if the individual has no ownership in the
6 entity, there can be no alter ego finding. Id. at 1128
7 ("Ownership is a pre-requisite to alter ego liability, and not a
8 mere 'factor' or 'guideline.'"); Firstmark Capital Corp. v.
9 Hempel Fin. Corp., 859 F.2d 92, 94 (9th Cir. 1988) ("Ownership of
10 an interest in the corporation is an essential part of the
11 element of unity of ownership and interest."); see also Riddle v.
12 Leuschner, 335 P.2d 107 (Cal. 1959) (finding the wife was the
13 alter ego of the subject corporation based on her ownership of a
14 single share but the husband was not because he held no stock).

15 Members of limited liability companies are "subject to
16 liability under the same circumstances and to the same extent as
17 corporate shareholders under common law principles governing
18 alter ego liability." People v. Pac. Landmark, LLC, 29 Cal.
19 Rptr. 3d 193, 199 (Ct. App. 2005); Cal. Corp. Code § 17101(b).

20 While there is evidence to support a unity of interest
21 finding, there is no evidence that Debtor was an owner or
22 shareholder of either RICH or Proset - a pre-requisite for alter
23 ego liability. Rather, the evidence establishes that the GG
24 Trust owns a 99% membership interest in RICH and that Proset owns
25 the remaining 1% membership interest.¹³ In addition, the record
26

27 ¹³ Limited liability companies consist of members who own
28 membership interests. Pac. Landmark, 29 Cal. Rptr. 3d at 198.
Each limited liability company must have at least two members who
own membership interests to be valid. Id.

1 indicates that the GG Trust was the sole shareholder of Proset¹⁴
2 and that the GG Trust was controlled by two unrelated trustees,
3 Nancy Lake and Janis Galanis. The beneficiaries of the GG Trust
4 were the Turner's children.

5 The fact that Debtor may have served as the "managing
6 partner" of RICH at some point¹⁵ does not resolve the ownership
7 issue because a manager need not be a member of a limited
8 liability company. Cal. Corp. Code § 17151(a). There is no
9 evidence of Debtor's membership interest.

10 The bankruptcy court's determination that the Home is
11 property of the estate is based entirely upon its erroneous alter
12 ego finding. Accordingly, the court's ultimate ruling that the
13 Home is property of the estate cannot be affirmed on an alter ego
14 theory.

15 B. The Fraudulent Transfer Claim¹⁶

16 Section 544(b) permits a trustee to avoid any transfer
17 voidable by unsecured creditors pursuant to state law. 11 U.S.C.

18
19 ¹⁴ Proset was dissolved prior to the removal of the
20 complaint.

21 ¹⁵ The Proset Deed, which evidenced the line of credit
22 extended to Proset by RICH, was signed by Debtor as RICH's
managing partner.

23 ¹⁶ The only relevant conveyances for fraudulent transfer
24 purposes are those associated with the 1992 transmutation
25 agreement and the 1998 Deed. See infra, p. 15 and note 17. Both
26 these transfers were made more than one year before the
27 bankruptcy filing. As such, Trustee's § 548(a)(1) claim is not
28 applicable to these transfers because they were made outside of
the one year reach back period. 11 U.S.C. § 548(a)(1) ("[t]he
trustee may avoid any transfer of an interest of the debtor in
property . . . that was made . . . on or within one year before
the date of the filing of the petition"). Our analysis is
therefore limited to the application of § 544(b) and CUFTA.

1 § 544(b); Sherwood Partners, Inc. v. Lycos, Inc., 394 F.3d 1198,
2 1201 (9th Cir. 2005). Under CUFTA, a creditor is able to avoid
3 the transfer of a debtor's asset that is actually or
4 constructively fraudulent and which is made within four years
5 prior to the date the avoidance action is filed. CC §§ 3439.07 &
6 3439.09.

7 For Trustee to be entitled to turnover of all or part of the
8 Home's value, there must be a finding that one of the transfers
9 represents a fraudulent conveyance. The FAC lists seven
10 transfers upon which Trustee asserts an actual and/or
11 constructive fraudulent transfer action can be based: 1) the 1992
12 transmutation agreement, 2) the GG Trust, 3) the 1998 Deed, 4)
13 the Proset Deed, 5) the Turner Marital Settlement Agreement, 6)
14 the Turner Dissolution Judgment, and 7) the 2001 Deed. Susana
15 contends that the relevant transfer is the 1992 transmutation
16 agreement. We disagree and find that the transfer of the 1998
17 Deed is the operative one for fraudulent conveyance purposes.¹⁷

18
19 ¹⁷ The transfers other than those related to the 1992
20 transmutation agreement and the 1998 Deed are irrelevant to our
21 analysis. As to the GG Trust transfer, there is no evidence in
22 the record that the Home was ever transferred to the GG Trust.
23 Therefore, avoidance of that transfer would not have any effect
24 on Debtor's interest in the Home. In regards to the Proset Deed
25 and the 2001 Deed transfers, those deeds were entered into
26 between RICH and third parties (i.e., Susana and Proset). RICH
27 and Proset are not the alter egos of Debtor. As such, Debtor
28 cannot be found to be liable for the Proset Deed and the 2001
Deed transfers. Moreover, the Turner Marital Settlement
Agreement and the Turner Dissolution Judgment had no legal effect
on Debtor's interest in the Home because both Susana and Debtor
transferred whatever interest they held in the Home to RICH
pursuant to the 1998 Deed. Thus, when the Turner Marital
Settlement Agreement and Turner Dissolution Judgment were entered
into, Debtor held no interest in the Home which he could
transfer.

1 1. The 1992 transmutation agreement

2 Under California law, a married person may by agreement
3 transmute an asset in which he has a community property interest
4 into the separate property of his spouse. Cal. Fam. Code
5 § 850(a). A transmutation is valid between spouses if it is made
6 in writing by an express declaration approved by the adversely
7 affected spouse, In re Marriage of Benson, 116 P.3d 1152, 1153
8 (Cal. 2005), but will remain ineffective against third parties
9 until it is recorded or notice of it is provided, Cal. Fam. Code
10 § 852(b). Transmutations are subject to the laws governing
11 fraudulent transfers. Id. § 851.

12 Here, the 1992 transmutation agreement was made in writing
13 by express declaration approved by Debtor and Susana. Pursuant
14 to the agreement, Susana obtained the Home as her separate
15 property and, in return, Debtor received the family business as
16 his separate property. Although the agreement was valid between
17 Debtor and Susana as of June 1992, it was never recorded.¹⁸
18 Consequently, it never took effect against third parties nor did
19 it have any affect on the title or ownership status of the Home.
20 Id. § 852(b); see also Finalco, Inc. v. Roosevelt (In re
21 Roosevelt), 87 F.3d at 311, 315 nn.4-5 (9th Cir. 1996), amended
22 by, 98 F.3d 1169 (9th Cir. 1996), overruled on other grounds by,

23
24
25 ¹⁸ Pursuant to the transmutation agreement, it could have
26 been "recorded at any time . . . by either party in any place . .
27 . authorized by law for the recording of documents affecting
28 title to or ownership status of property[.]" Hence, Debtor or
Susana could have caused the transmutation agreement to be
effective against third parties at any time from the date of
execution by recording it. There is no evidence that either
tried to do so.

1 Murray v. Bammer (In re Bammer), 131 F.3d 788 (9th Cir. 1997).¹⁹

2 In support of her argument that the relevant transfer date
3 is the effective date of the 1992 transmutation agreement, Susana
4 asserts that 1) the analysis for determining when a transfer is
5 "made" should be the same for § 548 and CUFTA purposes as it is
6 for § 727 purposes, and 2) the application of different
7 definitions for when a transfer is made is unconstitutional.

8 a. The making of the transfer

9 Relying on the Ninth Circuit's decision In re Roosevelt, 87
10 F.3d 311 (9th Cir. 1996), Susana argues that, for CUFTA purposes,
11 the transfer of the Home should be deemed "made" as of the date
12 the 1992 transmutation agreement became effective between she and
13 Debtor. Roosevelt does not support this proposition.

14 At issue in Roosevelt was whether, *for purposes of*
15 *§ 727(a)(2)*²⁰, a transfer is made when it is effective between
16 the parties or when it is effective against third parties. 87

17 ¹⁹ In light of the other "transfers" of the Home later made
18 by Debtor, Susana, and their affiliates, the evidentiary record
19 is clear that Debtor and Susana never treated the "transfer" of
20 the Home supposedly effected by the 1992 transmutation agreement
21 as effective.

22 ²⁰ Section 727(a)(2) states,

23 (a) The court shall grant the debtor a discharge,
24 unless-

25 (2) the debtor, with intent to hinder, delay, or
26 defraud a creditor or an officer of the estate
27 charged with custody of property under this title,
28 has transferred, removed, destroyed, mutilated, or
concealed, or has permitted to be transferred,
removed, destroyed, mutilated, or concealed-

(A) property of the debtor, within one year
before the date of the filing of the
petition; or

(B) property of the estate, after the date of
the filing of the petition[.]

1 F.3d at 315. Importantly, the court there noted that, unlike
2 § 548 (the Bankruptcy Code fraudulent transfer statute),
3 § 727(a)(2) does not define when a transfer is made.²¹ Although
4 both § 548(d) and § 727(a)(2) pertain to the fraudulent transfer
5 of property belonging to the debtor, the Roosevelt court
6 determined that the purposes underlying each differ in ways that
7 impact the analysis of when a transfer is deemed made. Id. at
8 317. Section 727(a)(2) "centers on the debtor's wrongdoing in or
9 in connection with the bankruptcy case." S. Rep. No. 598, 95th
10 Cong., 2d Sess. 98 (1978), reprinted in 1978 U.S.C.C.A.N. 5787,
11 5884. Because § 727(a)(2) "premises denial of discharge on
12 certain conduct of the debtor in relation to his assets and
13 creditors if done with 'intent to hinder, delay or defraud[,]'"
14 there is some suggestion that the transfer which is contemplated
15 by § 727(a)(2) should be deemed made at "the time of the debtor's
16 activity and not when the activity is somehow fully-insulated
17 from the claims of other creditors." Roosevelt, 87 F.3d at 317
18 (citing First Nat'l Bank & Trust Co. of Fremont v. Shreves (In re
19 Kock), 20 B.R. 453, 454 (Bankr. D. Neb. 1982)). In contrast,
20 § 548 is more concerned with protecting creditors than punishing

21
22 ²¹ Under the Code's fraudulent transfer statute,

23 a transfer is made when such transfer is so perfected
24 that a bona fide purchaser from the debtor against whom
25 applicable law permits such transfer to be perfected
26 cannot acquire an interest in the property transferred
27 that is superior to the interest in such property of
28 the transferee, but if such transfer is not so
perfected before the commencement of the case, such
transfer is made immediately before the date of the
filing of the petition.

11 U.S.C. § 548(d)(1).

1 a debtor for his wrongdoing. See id. Under § 548, a trustee has
2 "the power to avoid transactions and bring them back into the
3 debtor's estate, a power that is not limited to situations where
4 the debtor acted with the intent to defraud." Id. Based on the
5 primary purposes of the two statutes, the Roosevelt court found
6 that the transfer date for purposes of § 548 does not apply to
7 fraudulent transfer claims made pursuant to § 727(a)(2).

8 In contrast to the issue before the Roosevelt court, CUFTA
9 expressly defines the date a transfer is presumed made. See CC
10 § 3439.06(a)-(b). Because Susana offers no authority or
11 persuasive argument as to why we should not apply CUFTA's
12 definition or why Roosevelt would suggest otherwise, the CUFTA
13 definition found in CC § 3439.06 governs our determination of
14 when the 1992 transmutation agreement transfer was made.

15 Under CC § 3439.06,

16 A transfer is made with respect to . . . real property
17 . . . when the transfer is so far perfected that a good
18 faith purchaser of the asset from the debtor against
19 whom applicable law permits the transfer to be
perfected cannot acquire an interest in the asset that
is superior to the interest of the transferee.

20 CC § 3439.06(a)(1). If the transfer has not been perfected in
21 accordance with the applicable state law prior to the
22 commencement of a fraudulent transfer action, then "the transfer
23 is deemed made immediately before the commencement of the
24 action." Id. § 3439.06(b).

25 As discussed above, because the 1992 transmutation agreement
26 was never recorded, i.e., perfected, CC § 3439.06(b) governs the
27 operative date of the transfer. Pursuant to this subsection, the
28 transfer is deemed to have been made in October 1999, just prior

1 to the filing of the action by the Judgment Creditors.

2 The problem, however, with using the transmutation agreement
3 transfer as the critical conveyance, is that it was "made" in
4 October 1999, over a year after the date of the 1998 Transfer.²²
5 In light of the ineffectiveness of the transmutation of the Home
6 to Susana as to third parties, and the fact that the 1998
7 Transfer was made prior to the transmutation agreement transfer,
8 we view the 1998 Transfer as the first effective conveyance of
9 Debtor's community property interest in the Home and the relevant
10 transfer for Trustee's fraudulent transfer claim.

11 b. Constitutionality of § 727, § 548, and CUFTA

12 Having determined that the transfer date for purposes of
13 § 548 and CUFTA is different from that of § 727, we next turn to
14 Susana's argument that the application of different definitions
15 of when a transfer is "made" renders one or all of the statutes
16 unconstitutional because they present "an internally inconsistent
17 statutory scheme[] which violate[s] the substantive Due Process
18 clauses of the 5th and 14th Amendments." Appellant's Opening
19 Brief at 22-23, Jan. 26, 2007. Due to these inconsistencies,
20 Susana contends that the statutes are void for vagueness due to
21 their failure to provide notice of what the law prescribes.

22 In order for a statute to be deemed unconstitutional, it
23 must be so vague as not to provide a "person of ordinary
24 intelligence a reasonable opportunity to know what is
25 prohibited." Grayned v. Rockford, 408 U.S. 104, 108 (1972). As
26 we have earlier noted, the purposes underlying fraudulent

27 ²² In March 1998, Debtor and Susana by grant deed
28 transferred the Home to RICH. The deed was recorded that April.
Based on the recordation date, the 1998 Deed transfer is deemed
to have been made in April 1998. CC § 3439.06(a)(1).

1 transfers governed by § 727(a)(2) on the one hand, and those
2 governed by § 548 and CUFTA on the other hand, are fundamentally
3 different. That being the case, as the Ninth Circuit determined
4 in Roosevelt, the defined transfer date under § 548, and by
5 implication CUFTA, need not be applied to actions under
6 § 727(a)(2). See Roosevelt, 87 F.3d at 316. The fact that a
7 court could find a particular transaction to be fraudulent under
8 § 548 and CUFTA but not under § 727(a)(2), is of no consequence
9 and raises no discernable constitutional issues. None of the
10 constitutional arguments presented by Susana on this appeal
11 persuade us otherwise.

12 2. The 1998 Deed

13 For the transfer of the 1998 Deed to be deemed fraudulent
14 and avoidable, we must determine that 1) the 1998 Deed was
15 executed with fraudulent intent or was a constructive fraudulent
16 conveyance, and 2) the Home, at the time of the 1998 Transfer,
17 held some asset value which Trustee can avoid.

18 a. Fraudulent intent

19 An actual fraudulent transfer is one made by the debtor with
20 the "actual intent to hinder, delay, or defraud [a] creditor."
21 CC § 3439.04(a). Because intent is difficult to prove, case law
22 has evolved to allow actual intent to be established by reference
23 to external circumstances (i.e., badges of fraud). See United
24 States v. Markarian, 385 F.3d 1187, 1191-92 (9th Cir. 2004);
25 Kupetz v. Wolf, 845 F.2d 842, 846 (9th Cir. 1988). Under
26 California law, the badges of fraud from which an inference of
27 fraudulent intent may be drawn include:

28 (1) Whether the transfer or obligation was to an
insider.

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

13 CC § 3439.04(b); Markarian, 385 F.3d 1191-92 (9th Cir. 2004).

14 Based upon the evidence presented at trial, the bankruptcy
15 court found that Debtor made the 1998 Transfer with actual
16 fraudulent intent. The presence of the following six "badges of
17 fraud," one or more of which provides evidence from which an
18 inference of fraudulent intent may be drawn, sufficiently support
19 the court's finding: (1) retention of control over property, (2)
20 presence of a lawsuit, (3) transfer of substantially all assets,
21 (4) insolvency, (5) incurrence of a substantial debt, and (6) an
22 absence of reasonably equivalent value received for the transfer.
23 CC § 3439.04(b).

24 First, it is undisputed that Debtor retained control over of
25 the Home after the execution of the 1998 Deed. At all times,
26 Debtor lived at the Home and paid the monthly mortgage. Second,
27 by the time of the 1998 Transfer, the Judgment Creditors had
28 filed a million dollar tort action against Debtor. Third, the

1 1998 Transfer caused Debtor to transfer away substantially all of
2 his assets except those related to the paramedical business.
3 Fourth, Debtor was rendered insolvent by the transfer. Fifth,
4 the 1998 Transfer was made only four months before the Judgment
5 Creditors' million dollar judgment was entered. And sixth, there
6 is no evidence that Debtor received reasonably equivalent value
7 for the Home from RICH in executing the 1998 Deed. In fact, the
8 evidence indicates that no value was given at all.

9 Because these badges of fraud clearly support a fraudulent
10 intent finding, we find that the bankruptcy court did not err in
11 determining that Debtor had the actual intent to defraud his
12 creditors when he transferred his interest in the Home to RICH.

13 b. Constructive fraud

14 A transfer will be considered constructively fraudulent if,
15 when it was made, the debtor did not receive reasonably
16 equivalent value in exchange for the transfer and the debtor was
17 insolvent at that time or became insolvent as a result of the
18 transfer. CC § 3439.05; Gill v. Stern (In re Stern), 345 F.3d
19 1036, 1042 n.6 (9th Cir. 2003).

20 Here, there is no evidence of Debtor receiving any monetary
21 value for the 1998 Transfer when it was made. Moreover, because
22 Debtor is neither a beneficiary of the GG Trust nor an owner of
23 RICH, he could not have obtained any increase in the value of his
24 interests in those entities in exchange for the 1998 Transfer.
25 Debtor does not dispute this, but instead relies on the fact that
26 he obtained value for the transfer of the Home when the 1992
27 transmutation agreement was entered into. As discussed above,
28 this is not the relevant transfer for the fraudulent conveyance

1 claim. Thus, whether he obtained any value for the execution of
2 the 1992 transmutation agreement has no bearing on whether he
3 received reasonably equivalent value for the 1998 Grant Deed.

4 In addition, it is undisputed that at the time of the 1998
5 Transfer, Debtor did not have \$1 million in assets to cover the
6 possible damages claim the Judgment Creditors held as alleged in
7 the state court complaint. Although the 1998 Grant Deed was
8 executed and recorded a few months prior to the issuance of the
9 Judgment, at the time of its transfer, Debtor knew about the
10 possibility of becoming liable for the Judgment. Nevertheless,
11 he still chose to transfer the Home, which could have been used
12 to pay off part of the Judgment. While Debtor may have been able
13 to pay the Judgment prior to the Home's transfer, after the 1998
14 Transfer he clearly did not have the assets to do so. Thus, the
15 1998 Transfer also rendered Debtor insolvent for CUFTA purposes.

16 Based on the foregoing, we agree with the bankruptcy court's
17 finding that the 1998 Transfer was constructively fraudulent.

18 c. Remedies under CUFTA

19 The record supports the bankruptcy court's finding that the
20 1998 Transfer of the Home was actually and constructively
21 fraudulent and therefore voidable. Under CUFTA, a creditor's
22 remedies for a fraudulent transfer include "avoidance of a
23 transfer, attachment, and the equitable remedies of injunction
24 and receivership as well as 'any other relief the circumstances
25 may require.'" Filip v. Bucurenciu, 28 Cal. Rptr. 3d 884, 887
26 (Ct. App. 2005) (citing CC § 3439.07(a)(3)(C)).

27 CC § 3439.07(a)(1) allows a creditor to obtain "[a]voidance
28 of the transfer . . . to the extent necessary to satisfy the

1 creditor's claim." To the extent a transfer is voidable by a
2 creditor, "the creditor may recover judgment for the value of the
3 asset transferred . . . or the amount necessary to satisfy the
4 creditor's claim, whichever is less." CC § 3439.08(b). The
5 asset value of a transfer "equal[s] the value of the asset at the
6 time of the transfer, subject to adjustment as the equities may
7 require." Id. § 3439.08(c). "Asset" is defined as the value of
8 the property minus the amount encumbered by valid liens and
9 exempt under nonbankruptcy law. Id. § 3439.01(a)(1)-(2).

10 Notwithstanding the fact that the bankruptcy court
11 ultimately ruled that the 2001 Transfer was the relevant
12 conveyance, during the pre-trial stage of the proceeding, the
13 court identified the 1998 Transfer as the critical one. Thus, at
14 the court's direction, Susana and Trustee each presented expert
15 witness testimony as to the unencumbered, nonexempt value of the
16 Home at the time of the 1998 Transfer. Susana's appraiser
17 testified that the Home had no asset value at the time of the
18 transfer, while Trustee's appraiser valued the unencumbered,
19 nonexempt value of the Home at \$7,700. Though the court found
20 both appraisers credible, it ultimately found the methodology of
21 Trustee's expert to be the more credible of the two, and
22 therefore, accepted the latter's valuation.

23 On appeal, there appears to be no objection to the
24 bankruptcy court's finding that the asset value of the Home in
25 1998 was \$7,700. In fact, Susana states in both the opening and
26 reply briefs that the available net equity as of April 1998 was
27 \$7,700. We, therefore, adopt the court's finding and hold that
28 Trustee can avoid \$7,700 of the 1998 Transfer pursuant to CC

1 § 3439.07(a)(1).

2 C. The Equitable Remedy Available To Trustee

3 CUFTA "is not the exclusive remedy by which fraudulent
4 conveyances may be attacked"; they "may also be attacked by . . .
5 a common law action." Macedo v. Bosio, 104 Cal. Rptr. 2d 1, 6
6 (Ct. App. 2001); Fleet Nat'l Bank v. Valente (In re Valente), 360
7 F.3d 256, 261-62 (1st Cir. 2004). Trustee asserts that Debtor
8 retained an equitable interest in the Home after the execution
9 and recordation of the 1998 Grant Deed. Hence, when Debtor filed
10 for bankruptcy, the increased equity in the Home was property of
11 the estate based upon this interest. Trustee's claim has a
12 strong basis in California law under the resulting trust
13 doctrine.

14 Under California law, "[a] resulting trust arises from a
15 transfer of property under circumstances showing that the
16 transferee was not intended to take the beneficial interest." "
17 Siegel v. Boston (In re Sale Guar. Corp.), 220 B.R. 660, 664 (9th
18 Cir. BAP 1998) (citing Am. Motorists Ins. Co. v. Cowman, 179 Cal.
19 Rptr. 747, 752 (Ct. App. 1982)). When a transfer is recognized
20 to be fraudulent as to a debtor's creditors, the creditors can
21 seek to impose a resulting trust upon the debtor's equitable
22 interests in the transferred property for their benefit. See In
23 re Torrez, 63 B.R. 751, 753-54 (9th Cir. BAP 1986) (applying
24 California law).

25 Here, the record supports a finding that RICH was not
26 intended to take a beneficial interest in the Home. After the
27 1998 Transfer, Debtor retained all important incidents of
28 ownership in the Home: possession, the duty to pay expenses

1 (i.e., mortgage, utility bills, property taxes²³), and the right
2 to claim a tax deduction for mortgage payments. Moreover, there
3 is no evidence that RICH paid any consideration for the Home, and
4 the facts suggest no basis to infer a gift to RICH. In addition,
5 neither RICH nor the GG Trust (the 99% owner of RICH) filed any
6 response to Trustee's FAC arguing that Debtor did not hold an
7 equitable interest in the Home at the time of his bankruptcy
8 filing.

9 The evidence compels a finding of a resulting trust, with
10 RICH holding legal title to the Home in trust for Debtor, who
11 retained an equitable interest in the Home at the time of the
12 transfer. When Debtor filed for bankruptcy, this equitable
13 interest became property of the estate. 11 U.S.C. § 541. Under
14 § 542 Trustee is entitled to turnover of Debtor's equitable
15 interest in the Home including the increased equity.²⁴

16 _____
17 ²³ After the divorce, Susana testified that whenever she
18 needed money for the mortgage payment, property taxes, or utility
19 bills she would ask Debtor for the money, and he would write her
a check for the requested amount. Susana would deposit the check
into her account and then pay the bills out of that account.

20 ²⁴ Prior to the bankruptcy, RICH transferred the Home to
21 Susana in 2001. Both Trustee and Susana agree that when the 2001
Deed was recorded it was invalid due to it not being in
22 compliance with CC § 1183, which requires that if a deed is made
outside the United States and acknowledged by a notary public,
23 there must be proof that the signature of the notary public was
proved "(1) before a judge of a court of record of the country
24 where the proof . . . is made, or (2) by an American diplomatic
officer, consul, general counsel, vice consul, or consular agent,
25 or (3) by an apostille affixed to the instrument[.]" CC § 1183.
26 Nevertheless, Susana argues that even though the 2001 Deed was
invalid at the time of recordation, CC § 1207 causes it to now be
27 effective.

28 CC § 1207 states,

(continued...)

1 D. The New Trial Motion

2 On appeal, Susana argues that the bankruptcy court abused
3 its discretion in denying the "post judgment motions for a new
4 trial and to vacate, amend, modify, and/or reconsider the
5 judgment." Appellant's Opening Brief at 29-30, Jan. 26, 2007.
6 We disagree.

7 The post-trial motions were all filed in a single document -
8 the New Trial Motion. The New Trial Motion was denied in part
9 and granted in part. The bankruptcy court denied reconsideration
10 of the following matters as lacking merit: 1) whether the court
11 committed legal and/or factual error in determining that a) there
12 was an actual and constructive fraudulent conveyance of the Home
13 and b) Debtor held an equitable interest in the GG Trust, 2)
14 whether Susana's due process rights were being violated, and 3)
15 whether the Judgment was punitive (collectively, the "Denied
16 Issues").

17 Rule 9023, which incorporates Federal Rule of Civil
18

19 ²⁴ (...continued)

20 Any instrument affecting the title to real property,
21 one year after the same has been copied into the proper
22 book of record, kept in the office of any county
23 recorder, imparts notice of its contents to subsequent
24 purchasers and encumbrancers, notwithstanding any
25 defect, omission, or informality in the execution of
26 the instrument, or in the certificate of acknowledgment
27 thereof, or the absence of any such certificate; but
28 nothing herein affects the rights of purchasers or
encumbrancers previous to the taking effect of this
act.

The 2001 Deed was recorded on December 27, 2001. It would not
have become valid under CC § 1207 until December 27, 2002.
Debtor filed for bankruptcy on September 10, 2002. As such,
Debtor's equitable interest in the Home became property of the
estate prior to Susana having valid legal title to it.

1 Procedure ("FRCP") 59, provides the legal standard for granting a
2 new trial or amendment to a judgment. Fed. R. Bankr. P. 9023.
3 Although there are no specific grounds listed for when a FRCP 59
4 motion should be granted, one "should not be granted, absent
5 highly unusual circumstances, unless [the bankruptcy court] is
6 presented with newly discovered evidence, committed clear error,
7 or if there is an intervening change in the controlling law."
8 McDowell v. Calderon, 197 F.3d 1253, 1255 (9th Cir. 1999)
9 (emphasis in original).

10 Rule 9024, which incorporates FRCP 60(b), is similar to FRCP
11 59 and allows for reconsideration of an issue based upon:

12 (1) mistake, inadvertence, surprise, or excusable
13 neglect; (2) newly discovered evidence which by due
14 diligence could not have been discovered in time to
15 move for a new trial under Rule 59(b); (3) fraud . . .
16 misrepresentation, or other misconduct of an adverse
17 party; (4) the judgment is void; (5) the judgment has
18 been satisfied . . . or (6) any other reason justifying
19 relief from the operation of the judgment.

20 Fed. R. Civ. P. 60(b).

21 For purposes of this appeal, Susana has not sufficiently
22 articulated how the bankruptcy court abused its discretion in
23 denying a new trial, amendment to the Judgment, or
24 reconsideration of the Judgment as to the Denied Issues in the
25 New Trial Motion. The opening brief and reply both fail to
26 indicate how the New Trial Motion demonstrated the existence of
27 newly discovered evidence, clear legal or factual error by the
28 court, an intervening change in the controlling law, fraud or
misrepresentation by Trustee, that the Judgment was void or had
been satisfied, or any other reason justifying relief. Because
the New Trial Motion did not provide sufficient grounds for a new

1 trial, amendment to the Judgment, or reconsideration of the
2 Judgment in regard to the Denied Issues, we find that the
3 bankruptcy court did not abuse its discretion in declining to
4 grant the relief requested therein.

5 E. Admissibility Of Debtor's 1994 Conviction

6 During trial, the bankruptcy court admitted into evidence a
7 misdemeanor conviction related to a sexual assault claim that was
8 entered against Debtor in 1994.²⁵ Susana objected to its
9 admission as irrelevant. The court found the conviction relevant
10 to Debtor's state of mind in regards to whether he "had some
11 awareness of a potential claim in 1992" which would have
12 influenced him to enter into the 1992 transmutation agreement in
13 order to avoid potential civil liability and future creditors.²⁶
14 Hr'g Tr. 8:11, Mar. 10, 2005.

15 Relevant evidence is defined in Federal Rule of Evidence
16 ("FRE") 401 as "evidence having any tendency to make the
17 existence of any fact that is of consequence to the determination
18 of the action more probable or less probable than it would be
19 without the evidence." Evidence that is relevant may be
20 excluded, however, under FRE 403 "if its probative value is
21 substantially outweighed by the danger of unfair prejudice,
22 confusion of the issues, misleading the jury, or by
23 considerations of undue delay, waste of time, or needless
24

25 ²⁵ It should be noted that the conviction was later expunged
pursuant to Cal. Penal Code § 1203.4.

26 ²⁶ Because we find the 1998 Transfer to be the operative
27 transfer, the admission of the conviction in connection with the
28 1992 transmutation agreement is irrelevant. Nevertheless, as
Susana raised the matter as a significant issue in her briefs on
appeal, we have addressed and disposed of the issue.

1 presentation of cumulative evidence." Fed. R. Evid. 403.
2 Bankruptcy courts "have wide latitude in ruling on the relevancy
3 of evidence." United States v. Alvarez, 358 F.3d 1194, 1217 (9th
4 Cir. 2004).

5 Here, the 1994 conviction tends to render the reason that
6 Debtor entered into the 1992 transmutation agreement for
7 fraudulent purposes more probable. If Debtor was engaging in
8 unlawful activity, he may have had reason to believe that a civil
9 action money judgment could result from his tortious conduct
10 (i.e., assault). Susana has argued from the beginning that the
11 relevant transfer for fraudulent conveyance purposes was the one
12 associated with the 1992 transmutation agreement. Trustee
13 appropriately should have the opportunity to present evidence to
14 support his argument that the 1992 transmutation agreement was
15 entered into fraudulently.

16 Furthermore, Susana's assertion that admission of the
17 conviction is unduly prejudicial is without merit. The fact that
18 this conviction was later expunged would not affect its
19 relevancy. The bankruptcy court was not using the conviction as
20 evidence of Debtor's character.²⁷ The bankruptcy court did not
21 abuse its discretion in allowing evidence of the conviction to be
22 presented to determine Debtor's state of mind as to why he
23 entered into the 1992 transmutation agreement.

24 VI. CONCLUSION

25 Although we find that the bankruptcy court erred in basing
26 the Amended Judgment on an alter ego theory, we may "affirm on
27 any ground supported by the record, even if it differs from the

28

²⁷ We note parenthetically that the bankruptcy court
conducted a bench trial and not a trial before a jury.

1 rationale of the [bankruptcy court].” Pollard, 119 F.3d at 1433.
2 Therefore, based on our resulting trust finding, we AFFIRM the
3 Amended Judgment. We also AFFIRM the court’s denial of the New
4 Trial Motion and admission of Debtor’s criminal conviction.

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