NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re JOE B. CHALEUNRATH, Debtor.	BAP No. EC-06-1081-BMoS Bk. No. 05-10943 Adv. No. 05-01214
JAMES E. SALVEN, Chapter 7 Trustee, Appellant, v. VIENGSAVANH CHALEUNRATH; VIENGDAVANH CHALEUNRATH, Appellees.	**M E M O R A N D U M**[1]

Argued and Submitted on July 21, 2006 at
Sacramento, California

Filed - September 5, 2006

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

Honorable Richard T. Ford, Bankruptcy Judge, Presiding

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Before: BRANDT, MONTALI and SMITH, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

Eighteen months before debtor filed a chapter 7[2] petition, he transferred his partial interest in the family home to two of his sons. The trustee filed a complaint to avoid the transfer. Just before trial, defendants raised the defense of resulting trust. The trustee objected to evidence supporting that defense, and to the testimony of a daughter of debtor, which objections the bankruptcy court overruled, entering judgment in favor of the defendants.

We AFFIRM.

I. FACTS

Most of the pertinent facts are set forth in the stipulated facts, summarized here:

In August 1999, debtor Joe Chaleunrath, his wife (Bouaphien Chaleunrath) and son, appellee Viengsavanh Chaleunrath, purchased residential property in Fresno, California, holding title as joint tenants. (We refer to debtor's community interest as the "Property".) A mortgage in the amount of $61,989 was solely in debtor's name. Debtor, his wife, daughter Tana, and some other family members lived in the Property; it is not clear whether either appellee lived there.

A fire destroyed the Property in 2001, and debtor and his family lived in a hotel for several months while it was rebuilt. The homeowner's insurance, which was in debtor's name only, did not cover

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[2] Absent contrary indication, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from which the adversary proceeding and these appeals arise was filed before its effective date (generally 17 October 2005). "Rule" references are to the Federal Rules of Bankruptcy Procedure, "FRE" references are the Federal Rules of Evidence and "CCC" references are to the California Civil Code.

the entire hotel bill. A charge of $21,601 was left owing to Creditor Mediators, Inc. ("CMI"), presumably a collection agency.

In August of 2003 debtor and his wife transferred, for no consideration, their partial interest in the Property to two of their sons, appellees Viengsavanh Chaleunrath and Viengdavanh Chaleunrath, as joint tenants. Thereafter, Viengsavanh Chaleunrath refinanced with a lien of approximately $65,000 against the Property; the fair market value is $220,000. No calculation of the equity and no evidence regarding any other liens is in the record provided us.

In February of 2005, debtor filed a chapter 7 petition.[3] Debtor's schedules and statement of affairs showed that the debtor is retired, and that since 1999 his only income has been social security of $600-$700 monthly. He scheduled assets of $2,420, and two liabilities, the CMI bill and a $950 debt for "medical reimbursement." He scheduled two monthly expenses relating to the property: insurance and real property taxes.

James Salven ("trustee") was appointed Chapter 7 trustee. At the § 341 meeting, debtor disclosed the 2003 transfer of Property to his sons. The trustee thereafter filed an adversary proceeding to avoid the transfer and to recover its value under § 550 and 551.

In their trial brief, appellees raised a resulting trust defense, which had not been pleaded in an answer. The trustee neither filed a trial brief nor moved for a continuance, but objected at trial to evidence supporting that defense. The court overruled the objection. Neither party introduced any exhibits; the record contains no

[3] Although it is not in the record provided, we may take judicial notice of the petition and schedules, and do. In re Atwood, 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

documentation for the original purchase, any loan, mortgage payments, the transfer, or the refinance. The defense called two witnesses and introduced deposition testimony of one of the appellees. Trial Transcript, 18 February 2006 at 5.

1. Tana Chaleunrath

Tana testified that she lives at the Property and that her parents do not work outside the home and have never made mortgage payments, stating "I know my parents didn't because they don't have the money." Id. at 11. Tana takes them to cash their social security checks, which are applied to groceries, clothing and other bills for the seven family members who live at the Property. Id. She conceded that she never actually saw a check or money order for the down payment, but basing her knowledge on "talk amongst the family," she testified that her brother Viengsavanh made the down payment to purchase the Property in 1999 because he was employed, and as the oldest child, it was his responsibility to pay for the mortgage. Id. at 11 and 18. After she began working she also helped make the loan payments "because he's been paying all this time." Id. at 7.

Regarding the 2003 transfer, Tana testified it was to allow Viengsavanh to refinance and obtain a lower interest rate, and because her father "can't speak English so it was hard for us to communicate with anyone." Id. at 16-17. She also testified that she initially believed when she received the hotel bill (no copy in the excerpts of record) it was covered by the insurance. Id. at 21.

The court overruled the trustee's objection that Tana lacked personal knowledge of who made the payments on the Property, id. at 6-7,

and also overruled his motion to strike her prior testimony on grounds she lacked personal knowledge about the down payment. Id. at 13.

2. Viengsavanh Chaleunrath

Viengsavanh testified that he made the down payment for the purchase of the Property with some financial help from another brother, Nino, who lived out of state, and that the reason title was jointly in his parents' name was because "I needed his [presumably debtor's] income to get the loan." Id. at 22-23. He made the down payment of approximately $3000-$4000, the loan payments (with some assistance from Tana), and the homeowner's insurance premiums. Id. Although he has the check stubs showing his payments, they were not introduced into evidence. Id. at 27. In 2003, Viengsavanh asked his parents to transfer title to him so he could refinance, obtain a lower interest rate, and reduce the loan period to 15 years. Id. at 23.

3. Viengdavanh Chaleunrath Deposition

The defense introduced appellee Viengdavanh's deposition. He testified that another brother, Nino, helped make the down payment on the property, and that Viengsavanh is responsible for making the mortgage payments. He explained that the reason his parents were on title although they didn't own an interest in the Property was that "in our [Laotian] culture we have to take care of our family. My older brother ha[s] to take care of the parents . . . . It's when you try to keep your parents' reputation of [sic] the community." Deposition Transcript of Viengdavanh Chaleunrath, at 13-14.

4. Ruling

Adopting the stipulated facts as amended, Trial Transcript, at 36, the court entered oral findings and conclusions. Without making factual findings on the elements of the fraudulent transfer claim under CCC § 3439.04, the court found:

> [T]hat the defendant made the down payment for the house . . . . There's no evidence that the debtor, Joe, made any payments.
>
> So, the Court is finding for the defendant.
>
> [T]he controlling law in this particular case is the Torrez [63 B.R. 751 (9th Cir. BAP 1986); aff'd, 827 F.2d 1299 (9th Cir. 1987)] case . . . . In that case it does talk about resulting trust, and the state's interpretation of what a resulting trust is in California.
>
> The Court finds that [Torrez] is applicable in this case. Although the facts are slightly different, not substantially.
>
> So, the plaintiff loses in this particular case. Judgment is for the defendant. . . .

Trial Transcript at 37-38.

The trustee timely appealed.

II. JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and § 157(a), (b)(2)(A), (H) and (O). We do under 28 U.S.C. § 158(c).

III. ISSUES[4]

1. Evidentiary issues:

a. Whether the bankruptcy court abused its discretion in admitting evidence supporting the resulting trust defense; and

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[4] The interests of the debtor's wife were potentially affected by this adversary proceeding but she was not named as a party. The parties have not briefed how California community property law might impact this situation, but it does not change the disposition of this appeal, so we do not address it.

b. Whether the bankruptcy court abused its discretion in admitting testimony of Tana Chaleunrath over the trustee's objection that she lacked personal knowledge;

2. Whether debtor held the Property in a resulting trust in favor of defendants; and

3. Whether debtor's transfer of his interest in the Property was fraudulent.

IV. STANDARDS OF REVIEW

A. We review a bankruptcy court's evidentiary rulings for abuse of discretion. In re Carolan, 204 B.R. 980, 984 (9th Cir. BAP 1996); Security Farms v. International Bhd. of Teamsters, Chauffers, Warehousemen & Helpers, 124 F.3d 999, 1011 (9th Cir. 1997). They are not to be reversed unless the ruling is manifestly erroneous. General Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997).

B. We review the trial court's conclusions of law, including interpretation of the Bankruptcy Code and Rules, de novo, with no deference given to the trial court's conclusions. Rule 8013; In re Staffer, 262 B.R. 80, 82 (9th Cir. BAP 2001), aff'd, 306 F.3d 967 (9th Cir. 2002); In re Pardee, 218 B.R. 916, 919 (9th Cir. BAP 1998), aff'd, 193 F.3d 1083 (9th Cir. 1999).

C. We review findings of fact for clear error. Rule 8013. A factual finding is clearly erroneous if, after reviewing the record, we have a firm and definite conviction that a mistake has been committed. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985).

D. We review a bankruptcy court's decision on waiver of an unpleaded affirmative defense for abuse of discretion. In re National Lumber & Supply, Inc., 184 B.R. 74, 77 (9th Cir. BAP 1995).

E. The harmless error rule applies to review of bankruptcy orders and judgments. Rule 9005, incorporating FRCP 61, provides in part: "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." See also 28 U.S.C. § 2111; In re Maximus Computers, Inc., 278 B.R. 189, 194 (9th Cir. BAP 2002). And error may not be predicated upon exclusion or admission of evidence where that evidence makes no difference to the outcome of the case or proceeding. See FRE 103(a); In re Pine Mountain, Ltd., 80 B.R. 171, 173 (9th Cir. BAP 1987).

F. We may consider any issue supported by the record and may affirm on any basis supported by the record, even where the issue was not expressly considered by the bankruptcy court. Rule 8013; In re E.R. Fegert, Inc., 887 F.2d 955, 957 (9th Cir. 1989) (citing In re Pizza of Hawaii, Inc., 761 F.2d 1374, 1379 (9th Cir. 1985)).

V. DISCUSSION

A. Evidentiary Rulings

The trustee argues that the bankruptcy court abused its discretion in allowing evidence in support of the resulting trust defense and in permitting Tana to testify regarding the sources of the payments on the Property.

1. Affirmative Defense

An affirmative defense is that which is "extraneous to the plaintiff's prima facie case, which [denies] the plaintiff's right to recover even if the allegations of the complaint are true." National Lumber, 184 B.R. at 77. The trustee is correct that the claim of

resulting trust is an affirmative defense which defendants should have pleaded:

> Although . . . resulting trust is [not] enumerated as an affirmative defense that must be raised in an answer . . . , [it] seem[s] to constitute "an avoidance" of the Trustee's action and therefore qualif[ies] as an affirmative [defense] under [FRCP 8(C)'s] "catch-all" clause.

In re Hixon, 387 F.3d 695, 701 (8th Cir. 2004).

But it is within the bankruptcy court's discretion to determine whether an affirmative defense is waived if not pleaded. Appellees raised the defense in their trial brief, filed two weeks before trial, so trustee was not taken by surprise. He neither filed a trial brief nor sought to strike the defense before trial, nor asked for a continuance, nor argued that he was prejudiced. Absent a showing of prejudice, an affirmative defense may be raised at summary judgment. See National Lumber, 184 B.R. at 79; Camarillo v. McCarthy, 998 F.2d 638, 639 (9th Cir. 1993). We see no reason why the same rule should not pertain in this context. We note also that the trustee did not argue prejudice in his briefs to us, waiving that issue on appeal. In re Sedona Inst., 220 B.R. 74, 76 (9th Cir. BAP 1998).

Finally, the same evidence (chain of title, down payment, and mortgage payments) related to the trustee's prima facie case. There was no abuse of discretion in allowing evidence on the defense of resulting trust.

2. Tana's Knowledge

The trustee also challenges the overruling of his objections to Tana's testimony, arguing she lacks personal knowledge of the family finances. FRE 602 provides in pertinent part:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness

> has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.

The determination of whether a witness has adequate personal knowledge is left to the discretion of the trial court, and

> [t]estimony should not be excluded for lack of personal knowledge unless no reasonable juror could believe that the witness had the ability and opportunity to perceive the event that he testifies about.

U.S. v. Hickey, 917 F.2d 901, 904-05 (6th Cir. 1990) (citations omitted).

That is not the situation here. Tana had the ability and opportunity to gain knowledge about the Property and the family's finances from her own involvement in the family's affairs. She was a participating member of the family, lived at the Property with her parents at all relevant times, was familiar with her parents' financial affairs, indeed helped them handle their finances, and she shared in family expenses.

Admitting Tana's testimony was not an abuse of discretion. Even if it were, it would be harmless error: the remaining evidence was sufficient to support the judgment.

B. Merits

1. Resulting Trust?

Property held in trust for others is excluded from property of the estate. § 541(a)(1); Torrez, 63 B.R. at 753-54. Appellees' contention is that debtor (and his wife) possessed only a legal, and never an equitable, interest in the Property, and that under the doctrine of resulting trust, Viengsavanh was the equitable owner. Thus, the 2003 conveyance was only of bare legal title, not a transfer of value.

State law, here California, determines whether a valid trust exists: "a resulting trust is implied by operation of law whenever a party pays the purchase price for a parcel of land and places the title to that land in the name of another." Id. at 754.

Ordinarily a resulting trust arises in favor of the payor of the purchase price of property, or a part thereof, when title is taken in the name of another. The trust arises from the natural presumption that it was the intention that the ostensible purchaser should acquire and hold the property for the one who paid for it. Lloyds Bank California v. Wells Fargo Bank, 187 Cal. App. 3d 1038, 1043, 232 Cal. Rptr. 339 (1986). To establish a resulting trust the party claiming it must assert "clearly, convincingly and unambiguously the precise amount or proportion of the consideration [paid]." Id. at 1044.

The evidence at trial lacked detail of the dollar amounts of the various payments, and was devoid of corroborating documentation or tracing of the down payment or the payments servicing the loan. But the trustee did not challenge the conclusion that although title changed in 2003, the source of the payments on the Property did not--debtor paid nothing of the down payment, nor did he make or contribute to a single monthly payment.

Although the evidence is skimpy, in the absence of anything contradictory, it is clear, cogent, and unambiguous: debtor never paid anything for or on the Property. The lack of precise amounts is of no moment, as we are not faced with an allocation issue. Although there was no explanation why the insurance was in debtor's name, the payment evidence was uncontroverted. The presumption of a resulting trust was not rebutted. Debtor had only bare legal title to, and no economic interest in, the Property.

2. Avoidable Transfer?

Section 544(b)(1) permits trustees to "avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law." This includes transfers voidable under CCC § 3439.04, California's fraudulent transfer law. Decker v. Advantage Fund, Ltd., 362 F.3d 593, 596 (9th Cir. 2004).

CCC § 3439.04 provides in part:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:
>
> > (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.
> >
> > (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:
> >
> > > (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
> > >
> > > (B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.
>
> (b) In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following:
>
> > (1) Whether the transfer or obligation was to an insider.
> >
> > (2) Whether the debtor retained possession or control of the property transferred after the transfer.
> > (3) Whether the transfer or obligation was disclosed or concealed.
> >
> > (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
> >
> > (5) Whether the transfer was of substantially all the debtor's assets.

> (6) Whether the debtor absconded.
>
> (7) Whether the debtor removed or concealed assets.
>
> (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 incurred.
>
> (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
>
> (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.
>
> (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

Fraudulent intent is a question of fact, and "proof often consists of inferences from the circumstances surrounding the transfer." Filip v. Bucurenciu, 129 Cal. App. 4th 825, 834, 28 Cal. Rptr. 3d 884, 890 (2005). The appellate court must "accept any reasonable interpretation of the evidence which supports the trial court's decision." Id. at 833, 28 Cal. Rptr. 3d at 889.

The trustee introduced no evidence of the debtor's history, finances, or when debtor received notice of the debt to CMI or learned that it would not be covered by his insurance, etc., or of the terms of the transfer and refinancing. Neither proof of claim (both of which trustee filed under Rule 3004) attached any supporting documentation or even indicated a date on which those claims arose.

Some of the factors which CCC § 3439.04(b) sets forth as indicating fraudulent intent are present. On the stipulated facts, there was a transfer to a family member (subparagraph (1)), of debtor's only significant asset (5), without consideration (8), apparently taking place after the obligation to CMI was incurred (10), but Debtor retained possession (2).

The trustee argues concealment, subparagraph (b)(3), but the Statement of Financial Affairs, question 10, requires disclosure of property transferred within one year before the petition date. As the transfer in question occurred approximately 18 months prepetition, and Debtor did disclose the transfer at the § 341 meeting, it is unclear which disclosure requirement trustee alleges was breached.

But without the transcript of the § 341 meeting (and none is in the record), it is impossible to review the sufficiency (or not) of disclosure, and there is no basis to find any "concealment" under (b)(3). Where something is omitted from the excerpts which it is appellant's burden to provide, Rule 8009, In re Kritt, 190 B.R. 382, 387 (9th Cir. BAP 1995), we are entitled to presume that appellant does not regard the missing item, here the § 341 meeting transcript, as helpful to the appeal. In re Gionis, 170 B.R. 675, 680-81 (9th Cir. BAP 1994), aff'd, 92 F.3d 1192 (9th Cir. 1996) (table); In re McCarthy, 230 B.R. 414, 416-417 (9th Cir. BAP 1999).

Although debtor retained possession of the Property, that is unremarkable — he is a retiree living on Social Security with his wife and family, and the transfer was within the family in a family-oriented culture. The only explanation before the court, that the Property was held in debtor's name as a formality, and that the transfer to the appellees was necessary for refinancing, is plausible. There was no contrary evidence. The trustee failed to establish a nexus between the transfer and debtor's filing a bankruptcy petition to discharge the CMI obligation 18 months later.

The statutory factors do not create a mathematical formula; no minimum number of factors must be present. Filip, 129 Cal. App. 4th at 834, 28 Cal. Rptr. 3d at 890. The evidence does not clearly show an

actually fraudulent transfer, and having only bare legal title, debtor transferred nothing which required reasonably equivalent value. See In re Turner, 335 B.R. 140, 145-46 (Bankr. N.D. Cal. 2005) modified on reconsideration, 345 B.R. 674 (Bankr. N.D. Cal. 2006) (a transfer is "constructively fraudulent" where debtor does not receive reasonably equivalent value and it is made when the debtor is insolvent, but not "actually fraudulent" unless that transfer is done with intent to hinder, delay or defraud).

Although there was no explicit finding that the transfer was not fraudulent, we may affirm on any basis that supports that conclusion. Here the debtor held bare legal title — he transferred nothing of value requiring reasonable equivalence — and the evidence would support a finding that he lacked an intent to hinder, delay, or defraud.

VI. CONCLUSION

The bankruptcy court did not abuse its discretion in overruling trustee's evidentiary objection to the testimony of Tana Chaleunrath, and, in any event, it was harmless. Nor was the overruling of trustee's objection to resulting trust an abuse of discretion.

The bankruptcy court did not err in finding a resulting trust, and the record supports judgment for defendants on the trustee's fraudulent transfer claim. We AFFIRM.