

JAN 25 2007

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

1 In re: ) BAP No. WW-06-1181-PaMoS  
2 )  
3 THEODORE PRINCE and ) Bk. No. 01-10030  
4 DONNA PRINCE, )  
5 ) Adv. No. 02-01071  
6 Debtors. )  
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10 JUDY JONES, )  
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MEMORANDUM<sup>1</sup>

Argued and Submitted on November 16, 2006,  
at Seattle, Washington

Filed - January 25, 2007

Appeal from the United States Bankruptcy Court  
for the Western District of Washington

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding.

Before: PAPPAS, MONTALI and SMITH, Bankruptcy Judges

<sup>1</sup> 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.

1 The bankruptcy court determined that the transfer of \$7,500  
2 from debtors to an insider-creditor made within a year of filing  
3 their petition when they were insolvent was an avoidable  
4 preference pursuant to § 547(b)<sup>2</sup>, and thereafter denied the  
5 insider-creditor's motion for reconsideration. The creditor  
6 appealed both rulings. We AFFIRM.

7  
8 **FACTS**

9 Debtors Theodore Jacob Prince ("Ted") and Donna Marie Prince  
10 ("Donna") filed a petition for relief under chapter 7 of the  
11 Bankruptcy Code on January 3, 2001. Virginia Burdette ("Trustee")  
12 was appointed trustee.

13 On October 11, 1999, Judy Jones ("Appellant"), Ted's sister,  
14 loaned Debtors \$7,000. On October 12, 1999, Jerry Jones  
15 ("Jerry"), Appellant's husband and Debtors' brother-in-law, loaned  
16 Debtors \$8,000. Debtors paid Jerry \$8,500 on May 15, 2000; the  
17 check cleared the bank on May 19, 2000. Debtors paid Appellant  
18 \$7,500 on June 12, 2000; that check cleared on June 26, 2000  
19 ("Transfer Date").<sup>3</sup>

20 On January 28, 2002, Trustee commenced an adversary  
21 proceeding against Appellant and Jerry to recover the loan

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22 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
24 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
25 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.

26 <sup>3</sup> The dates the checks cleared the bank are significant here  
27 because, for purposes of determining whether an avoidable  
28 preference has occurred, the transfer is deemed to take place on  
the date the check is honored by the bank. Barnhill v. Johnson,  
503 U.S. 393, 394 (1992).

1 payments as preferential transfers pursuant to §§ 547(b) and 550.<sup>4</sup>  
2 The adversary proceeding came on for trial in the bankruptcy court  
3 on August 14, 2003. Based principally on the testimony of  
4 Trustee's accountant, the bankruptcy court determined that the  
5 Debtors were insolvent on and after May 14, 2000. Thus, the  
6 bankruptcy court ruled that the payments to Appellant and Jerry  
7 were avoidable preferences. Findings of Fact, Conclusions of Law  
8 and Judgment were entered on December 19, 2003.

9 Appellant, on her own behalf and that of Jerry, appealed the  
10 Judgment on January 2, 2004. The appeal was heard in the U.S.  
11 District Court for the Western District of Washington. During the  
12 course of the appeal, Trustee conceded that the transfer to Jerry  
13 was made when the Debtors were solvent. Thus, the district court  
14 reversed the bankruptcy court's determination that the transfer to  
15 Jerry was an avoidable preference.

16 The district court also concluded that Trustee's accountant  
17 made an error regarding a stock payment received by Debtors after  
18 the payment to Jerry, but before the transfer to Appellant, and  
19 that the bankruptcy court had relied on that error in deciding  
20 that Debtors were insolvent as of the Transfer Date. Therefore,  
21 the district court remanded the action to the bankruptcy court for  
22 additional proceedings to determine whether the transfer to  
23 Appellant on the Transfer Date was a preference and avoidable.

24 On February 6, 2006, the bankruptcy court conducted another  
25 trial regarding the alleged preferential transfer to Appellant.  
26 Trustee presented the testimony of Michael Peters, a realtor, who

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27  
28 <sup>4</sup> Appellant and Jerry conceded that they are relatives and  
insiders as to Debtors as defined in §§ 101(45) & (31).

1 addressed the value of Debtors' real property. Appellant called  
2 Ted as a witness, who testified, among other things, that the  
3 bankruptcy court should include as part of his assets on the  
4 Transfer Date certain items of personal property. He also  
5 testified about the existence and value of his tools and  
6 inventory.

7 In its oral ruling made at the conclusion of the trial, the  
8 bankruptcy court declined to adopt the opinion of Trustee's  
9 witness that the value of Debtors' real property was \$225,000 on  
10 the Transfer Date. Instead, the court determined that  
11 the value was \$245,000, although the court noted that there was  
12 some justification for the higher valuation proposed by Appellant  
13 of \$265,000. Tr. Hr'g 46:22 - 47:21. After trial, Appellant  
14 requested that the bankruptcy court review these numbers. The  
15 bankruptcy court's Supplemental Findings of Fact and Conclusions  
16 of Law, entered April 10, 2006, apparently agreed with Appellant,  
17 and found that "the value of the Debtors' residence on June 26,  
18 2006 was \$265,000."

19 Appellant was considerably less successful in persuading the  
20 bankruptcy court to accept the testimony of Ted regarding the  
21 various personal property assets and values:

22 The debtor's testimony concerning inventory  
23 is, at best, murky. He doesn't have any idea  
24 of what the inventory is. We go through this  
25 stuff about it being stolen later on. He  
26 first testified that normally it's not  
27 customary within the business that he was  
28 doing to have inventory. Then he testified  
that some of it was sold, and then he  
testified that it was stolen. None of this I  
find to be credible evidence. And I'm not  
going to allow anything for inventory. As far  
as personal property is concerned, the  
debtors' listed the amount that he has [on his

1 schedules]. He doesn't schedule [the  
2 furniture] anyway, but even if he did, there's  
3 a reduction in value. The whole thing with  
4 the tools is a mystery to me. I know he says  
5 he paid \$1300 for tools. Again, his evidence  
6 concerning what he had, his personal property  
7 knowledge is that he had a physical condition  
8 involving a stroke, he hasn't got a clue. And  
9 so I simply cannot allow that.

6 Tr. Hr'g 47:22 - 48:16.

7 The bankruptcy court's Supplemental Findings of Fact and  
8 Conclusions of Law summarized the facts regarding the insolvency  
9 issue as follows:

- 10 • On the Transfer Date, the Debtors' liabilities totaled  
11 \$282,035.99, consisting of \$62,990.34 in unsecured debt and  
12 \$219,045.65 in secured debt.
- 13 • The value of Debtors' real property on the Transfer Date was  
14 \$265,000.00. The value of cash in Debtors' checking  
15 accounts on that date was \$13,279.86. The value of Debtors'  
16 personal property on the Transfer Date was \$3,120.00. The  
17 bankruptcy court concluded that Ted's testimony regarding the  
18 value of inventory and tools was not credible. Thus, the  
19 court determined that the total value of Debtors' assets on  
20 the Transfer Date was \$281,399.86.
- 21 • On the Transfer Date, Debtors' liabilities exceeded their  
22 assets by \$616.13 and Debtors were insolvent on that date.<sup>5</sup>

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24 <sup>5</sup> The Panel notes that the difference between total  
25 liabilities of \$282,035.99 and total assets of \$281,399.86 is  
26 \$636.13, a difference of \$20 from the \$616.13 stated in the  
27 Supplemental Findings of Fact. We believe this is a typographical  
28 error and harmless error on three grounds. First, we have  
examined the record and all other values listed for assets and  
liabilities are correct. Second, at the hearing, the court  
correctly calculated the difference at \$636.13 (after allowing for  
(continued...)

1 Based upon these findings of fact and other evidence, the  
2 bankruptcy court concluded that the payment to Appellant was an  
3 avoidable preference. Tr. Hr'g 49:5-6. A judgment was entered on  
4 April 10, 2006.

5 On April 19, Appellant filed a motion for reconsideration  
6 pursuant to Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59.  
7 Appellant challenged the bankruptcy court's findings and  
8 conclusions concerning the personal property, and in particular,  
9 its refusal to consider the value of the tools and inventory  
10 allegedly in Debtors' possession on the Transfer Date.<sup>6</sup> The  
11 bankruptcy court denied the motion by order entered April 27,  
12 2006. Appellant filed this timely appeal of the judgment and the  
13 order denying the motion for reconsideration on May 2, 2006.

#### 14 15 JURISDICTION

16 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
17 §§ 1334 and 157(a) and (b) (2) (F). We have jurisdiction pursuant  
18 to 28 U.S.C. § 158(b).

19 \_\_\_\_\_  
20 <sup>5</sup>(...continued)  
21 an adjustment in the real estate value). Tr. Hr'g 43:22. Third,  
22 a \$20 error in computation of insolvency is immaterial when the  
23 liabilities exceed assets by over \$600; to the extent that it has  
any effect at all on the computation, it increases the amount of  
insolvency.

24 <sup>6</sup> In the reconsideration motion and in this appeal,  
25 Appellant also faults the bankruptcy court for its failure to  
26 reduce Debtors' liabilities by \$500 based upon a check allegedly  
27 sent by Debtors to Key Bank on June 16, 2000, which cleared  
28 Debtors' account on June 19, 2000. However, whether such a  
payment should be credited to Debtors' liabilities will not impact  
the ultimate resolution of the issues, since a reduction of debts  
in excess of \$617 would be required to render the Debtors solvent.  
Instead, the critical issues on appeal involve whether Debtors'  
assets were properly valued by the bankruptcy court.

1 **ISSUES**

- 2 1. Whether the bankruptcy court clearly erred in finding that  
3 Debtors were insolvent at the time of the transfer of \$7,500  
4 to Appellant.  
5 2. Whether the bankruptcy court abused its discretion in denying  
6 Appellant's motion for reconsideration.  
7

8 **STANDARD OF REVIEW**

9 Whether a debtor is insolvent for purposes of § 547 is a  
10 question of fact. Sierra Steel, Inc. v. Totten Tubes, Inc. (In re  
11 Sierra Steel, Inc.), 96 B.R. 275 (9th Cir. BAP 1989). We review  
12 the bankruptcy court's findings of fact for clear error and we  
13 must give due regard to the opportunity of the bankruptcy court to  
14 judge the credibility of the witnesses. FED. R. BANKR. P. 8013;  
15 Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985); Welther  
16 v. Donnell (In re Oakmore Ranch Mgmt.), 337 B.R. 222 (9th Cir. BAP  
17 2006). Review under the clearly erroneous standard is  
18 significantly deferential, requiring a "definite and firm  
19 conviction that a mistake has been committed." Easley v.  
20 Cromartie, 532 U.S. 234, 242 (2001).

21 The denial of a motion for reconsideration is reviewed for an  
22 abuse of discretion. Nunes v. Ashcroft, 348 F.3d 815 (9th Cir.  
23 2003).

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1 **DISCUSSION**

2 I.

3 The bankruptcy court did not clearly err in finding that  
4 Debtors were insolvent at the time of the transfer of \$7,500 to  
5 Appellant.

6 The bankruptcy court concluded that the transfer by Debtors  
7 to Appellant was an avoidable preference.<sup>7</sup> Appellant argues that  
8 the bankruptcy court clearly erred in its finding, required by §  
9 547(b) (3), that Debtors were insolvent on the Transfer Date.

10 Appellant contends the bankruptcy court incorrectly determined the  
11 value of the items of personal property allegedly owned by Debtors  
12 was \$3,120.00, the value Debtors listed in their schedules. In  
13 particular, Appellant asserts that the court erred as to three

14 \_\_\_\_\_  
15 <sup>7</sup> Section 547(b), specifying the elements of an avoidable  
preference, provides:

16 (b) Except as provided in subsection (c) of this section, the  
17 trustee may avoid any transfer of an interest of the debtor in  
property--

18 (1) to or for the benefit of a creditor;

19 (2) for or on account of an antecedent debt owed by the debtor  
before such transfer was made;

20 (3) made while the debtor was insolvent;

21 (4) made--

22 (A) on or within 90 days before the date of the filing of the  
petition; or

23 (B) between ninety days and one year before the date of the filing  
of the petition, if such creditor at the time of such transfer was  
an insider; and

24 (5) that enables such creditor to receive more than such creditor  
would receive if--

25 (A) the case were a case under chapter 7 of this title [11 USCS  
§§ 701 et seq.];

26 (B) the transfer had not been made; and

27 (C) such creditor received payment of such debt to the extent  
provided by the provisions of this title.

28 Appellant apparently concedes, or at least has not challenged on  
appeal, that all other requirements for a preference have been  
established in this action, other than that Debtors were  
insolvent.



1 specific findings of fact: (1) That Debtors had no inventory on  
2 the Transfer Date; (2) that the tools that Debtors purchased for  
3 \$1,300 on May 11, 2000, did not exist on the Transfer Date; and  
4 (3) that the furniture that Debtors apparently purchased from J.C.  
5 Penney on June 14, 2000, was not worth the purchase price.

6 Under § 547(g), Trustee was required to prove that Debtors  
7 were insolvent on the Transfer Date.<sup>8</sup> Section 101(32) defines  
8 "insolvent" as a "financial condition such that the sum of [the  
9 debtor's] debts is greater than all of such [debtor's] property,  
10 at a fair valuation, exclusive of (i) property transferred,  
11 concealed, or removed with intent to hinder, delay, or defraud  
12 such [debtor's] creditors; and (ii) property that may be exempted  
13 from property of the estate under section 522 of this title."  
14 This is the so-called "balance sheet test of insolvency." Merkel  
15 v. Comm'r, 192 F.3d 844, 855 (9th Cir. 1999).

16 In this case, Trustee has not alleged Debtors made any  
17 fraudulent transfers of property, nor does she challenge Debtors'  
18 exemptions. Thus, the bankruptcy court need only compare the  
19 value of Debtors' assets, net of exemptions, to the amount of  
20 their liabilities on the Transfer Date to determine whether  
21 Debtors were insolvent. We have reviewed the evidence and  
22 transcript of the June 6, 2006 trial, and we conclude that the  
23 bankruptcy court did not clearly err in finding, based upon the  
24 conflicting evidence, that Debtors were insolvent.

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26 <sup>8</sup> Under § 547(f), a debtor is presumed to be insolvent  
27 during the 90 days immediately preceding the date of the filing of  
28 the petition. Since the transfer to Appellant occurred more than  
90 days before Debtors filed their petition, this statutory  
presumption was unavailable to Trustee.

1           In making its findings, the bankruptcy court could consider  
2 Debtors' schedules, which were admitted into evidence without  
3 objection. On their schedules, Debtors listed a total of  
4 \$3,120.00 in personal property assets, but they did not list any  
5 tools or inventory, nor did they state that any tools or inventory  
6 had been lost or stolen. The schedules also did not list the  
7 furniture allegedly purchased from J.C. Penney, which Debtors  
8 claimed to still possess on the date of trial. Because they were  
9 executed by Debtors under penalty of perjury, the schedules could  
10 properly be considered by the bankruptcy court as evidence of  
11 Debtors' insolvency. See In re Mohring, 142 B.R. 389, 392 (Bankr.  
12 E.D. Cal. 1992) ("Since the schedules and lists are executed under  
13 penalty of perjury, they may be treated as affidavits that may be  
14 used under Federal Rule of Civil Procedure 43(e) for any purpose  
15 permitted by the Federal Rules of Evidence.").

16           On the other hand, the bankruptcy court heard testimony from  
17 Ted regarding the existence and value of the tools, inventory, and  
18 furniture. But the court characterized Ted's testimony regarding  
19 the inventory as "murky" and noted that "[h]e doesn't have any  
20 idea of what the inventory is." Tr. Hr'g 47:22-23. The court  
21 described the tool issue as a "mystery to me . . . and so I simply  
22 cannot allow it." Tr. Hr'g 48:11-16. Concerning the furniture,  
23 the bankruptcy court found that no furniture was listed in  
24 Debtors' schedules, even though Debtors still claimed to possess  
25 the furniture on the hearing date, and that, in any case, used  
26 furniture would not be worth the purchase price of new furniture  
27 as alleged by Appellant. Tr. Hr'g 48:7-11. The court summed up  
28 Ted's testimony as not credible. This credibility finding is

1 entitled to special deference by the appeals court. Anderson v.  
2 City of Bessemer, 470 U.S. 564, 573 (1985).

3 And contrary to Appellant's contention, the bankruptcy court  
4 did not specifically find that either the inventory or tools did  
5 not exist. Rather, the court found that Ted's testimony regarding  
6 the tools and inventory was not credible. No other evidence was  
7 offered to the bankruptcy court at trial to show that Debtors  
8 owned any tools or inventory<sup>9</sup> on the Transfer Date.

9 "Where there are two permissible views of the evidence, the  
10 factfinder's choice between them cannot be clearly erroneous."  
11 United States v. Elliott, 322 F.3d 710, 714 (9th Cir. 2003); SEC  
12 v. Rubera, 350 F.3d 1084, 1094 (9th Cir. 2003) (holding that if the  
13 trial court's account of the evidence is plausible in light of the  
14 record viewed in its entirety, the appeals court may not reverse  
15 even though convinced that had it been sitting as the trier of  
16 fact, it would have weighed the evidence differently). Given the  
17 conflict in the evidence, the bankruptcy court did not clearly err  
18 when it decided to believe the information in the schedules rather  
19 than Ted's testimony.

20 II.

21 The bankruptcy court did not abuse its discretion in denying  
22 Appellant's motion for reconsideration.

23 Reconsideration is appropriate if the trial court (1) is  
24 presented with newly discovered evidence, (2) committed clear  
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26 <sup>9</sup> There is some indication that the court had a statement in  
27 the record that Debtors had \$5,000 in inventory on or around the  
28 Transfer Date. However, testimony showed that that statement was  
prepared over two years after the Transfer Date by a bookkeeper  
without direct knowledge of the inventory.

1 error or the initial decision was manifestly unjust, or (3) if  
2 there is an intervening change in controlling law. Nunes v.  
3 Ashcroft, 348 F.3d 815, 815 (9th Cir. 2003). Here, the bankruptcy  
4 court did not abuse its discretion in declining to reconsider its  
5 decision.

6 Appellant, in both the reconsideration motion and in this  
7 appeal, challenges the bankruptcy court's findings on the basis of  
8 "manifest error." In the motion for reconsideration, she also  
9 points to "newly discovered evidence," specifically invoices,  
10 "that were not previously provided in discovery [that] clearly  
11 shows that [Ted's] testimony was credible [in] that he had at  
12 least \$6850.00 in inventory on June 26, 2000."

13 To establish that a bankruptcy court abused its discretion in  
14 denying a motion for reconsideration based upon newly discovered  
15 evidence, the movant must show that: "(1) the evidence was  
16 discovered after trial, (2) the exercise of due diligence would  
17 not have resulted in the evidence being discovered at an earlier  
18 stage and (3) the newly discovered evidence is of such magnitude  
19 that production of it earlier would likely have changed the  
20 outcome of the case." Far Out Prods., Inc. v. Oskar, 247 F.3d  
21 986, 993 (9th Cir. 2001) (citing Defenders of Wildlife v. Bernal,  
22 204 F.3d 920, 929 (9th Cir. 2000)). Here, the invoices were not  
23 "discovered after trial," but instead were apparently in Debtors'  
24 possession. That Debtors acknowledged that they had not provided  
25 the invoices in discovery does not obviate the requirement that  
26 Appellant show she diligently attempted to obtain the invoices  
27 prior to trial. And finally, there is no indication that the  
28 information in the invoices, discovered so late in the case, would

1 have changed the outcome of the trial. Even had the invoices been  
2 offered at trial, the bankruptcy court could have declined to  
3 accept them in preference to the information in Debtors'  
4 schedules.

5       The remaining assertions in the motion for reconsideration  
6 merely rehash Appellant's arguments disagreeing with the  
7 bankruptcy court's assessment that Ted's testimony was not  
8 credible. As noted above, the bankruptcy court was entitled to  
9 assign appropriate weight to the conflicting evidence in deciding  
10 whether Debtors were insolvent.

11       In sum, nothing in the motion for reconsideration shows there  
12 was newly discovered evidence, that the bankruptcy court committed  
13 clear error or that its ruling was manifestly unjust, nor was  
14 there any intervening change in the law. Thus, we conclude that  
15 the bankruptcy court did not abuse its discretion in denying the  
16 motion for reconsideration.

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18

**CONCLUSION**

19       For all the above reasons, we AFFIRM the bankruptcy court's  
20 April 10, 2006, judgment and April 27, 2006, order denying  
21 reconsideration of the motion.

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