

**JUL 25 2006**

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

**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

In re:	)	BAP No. CC-03-1052-PMaPa
	)	
MIGUEL SELWYN THOMAS,	)	Bk. No. SV 01-11666-AG
	)	
Debtor.	)	Adv. No. SV 02-01022-AG
	)	
ARVIS ASH,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>MEMORANDUM<sup>1</sup></b>
	)	
BYRON MOLDO, Chapter 7 Trustee,	)	
	)	
Appellee.	)	

On Remand from the United States Court of Appeals  
for the Ninth Circuit

Originally Argued and Submitted on  
October 23, 2003 at Pasadena, California

Filed - July 25, 2006

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

Honorable Arthur M. Greenwald, Bankruptcy Judge, Presiding

Before: PERRIS, MARLAR and PAPPAS,<sup>2</sup> Bankruptcy Judges.

<sup>1</sup> 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.

<sup>2</sup> Hon. Jim D. Pappas, Bankruptcy Judge for the District of Idaho, sitting by designation.

1 Appellant Ash is the mother of Miguel Selwyn Thomas, a debtor  
2 in a chapter 7<sup>3</sup> bankruptcy case. She appeals the bankruptcy court's  
3 judgment for the chapter 7 trustee setting aside a prepetition  
4 transfer of real property from debtor to Ash, arguing that the  
5 bankruptcy court erred in finding that the trustee had proved a  
6 fraudulent transfer. This panel reversed the bankruptcy court's  
7 judgment in November 2003. The trustee appealed to the Ninth  
8 Circuit, which remanded the appeal to us to consider the bankruptcy  
9 court's findings of fact that it made after a hearing on Ash's  
10 motion to amend the judgment. After considering the bankruptcy  
11 court's findings in denying appellant's motion to amend the  
12 judgment, we again REVERSE.

13 FACTS

14 In 1997, debtor bought a condominium from the Secretary of  
15 Housing and Urban Development. In 1998, debtor signed a note for  
16 \$44,644, secured by a Deed of Trust on the property in favor of  
17 Norwest Mortgage, Inc. Although debtor and Ash assert that Ash, not  
18 debtor, actually owned the property, the deed was in debtor's name,  
19 and he was the sole obligor on the trust deed.

20 On May 30, 2000, debtor conveyed the condominium to Ash by  
21 quitclaim deed, which recited that there was no consideration given  
22 for the transfer. The quitclaim deed was recorded on June 7, 2000.

23 In early 2001, debtor filed a chapter 7 bankruptcy petition.  
24 The chapter 7 trustee filed a complaint in the bankruptcy court,

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25 <sup>3</sup> Unless otherwise indicated, all chapter and section  
26 references are to the version of the Bankruptcy Code, 11 U.S.C.  
§§ 101-1330, in effect before the 2005 amendments.

1 seeking to set aside the condominium transfer as a fraudulent  
2 conveyance under Cal. Civ. Code § 3439, made applicable to this  
3 bankruptcy case by Bankruptcy Code § 544(b). After a trial, the  
4 bankruptcy court entered a judgment for the trustee.

5 After the bankruptcy court orally issued its ruling on January  
6 7, 2003, but before it had entered the judgment, Ash filed a motion  
7 to amend the judgment. She attached to the motion additional  
8 evidence that was not introduced at trial. The court entered its  
9 written judgment on January 22, 2003, without disposing of this  
10 motion. Ash filed a notice of appeal from the judgment on January  
11 27, 2003. When we realized that there was an outstanding tolling  
12 motion, we remanded the case to the bankruptcy court to resolve the  
13 motion. The bankruptcy court held an evidentiary hearing on the  
14 motion to amend, at which it considered the evidence Ash had  
15 submitted with her motion, as well as additional testimony and  
16 evidence. The court denied the motion to amend on August 14, 2003,  
17 and made additional findings based on the additional evidence  
18 presented on the motion to amend.

19 We issued our Memorandum decision on November 12, 2003,  
20 reversing the bankruptcy court's judgment. We did not consider the  
21 evidence presented at or the findings entered after the hearing on  
22 the motion to amend, because appellant had not filed an amended  
23 notice of appeal from the bankruptcy court's ruling on the motion to  
24 amend. Neither party filed revised briefs addressing any new  
25 evidence or findings, and we did not have the record from the  
26 hearing on remand.

1 The Ninth Circuit vacated our decision and remanded, holding  
2 that we had erred in failing to review the additional findings,  
3 which were based on the additional evidence presented at the hearing  
4 on the motion to amend.<sup>4</sup> In re Thomas, 428 F.3d 1266 (9th Cir.  
5 2005). We directed the parties to supplement the record on appeal  
6 with the evidence presented on the motion to amend, so we would have  
7 the same record before us that the bankruptcy court did.

8 Having now considered the additional evidence and findings, we  
9 again conclude that the bankruptcy court erred in finding that the  
10 transfer of the property from debtor to Ash was a fraudulent  
11 transfer.

#### 12 ISSUE

13 Whether the bankruptcy court erred in finding that the trustee  
14 established a fraudulent transfer under California law.

#### 15 STANDARD OF REVIEW

16 On appeal, Ash challenges several factual findings. "The  
17 bankruptcy court's findings of fact are reviewed for clear error[.]"  
18 In re Park-Helena Corp., 63 F.3d 877, 880 (9th Cir. 1995). Clear  
19 error exists when, after examining the evidence, the reviewing court  
20 is left with a definite and firm conviction that a mistake has been  
21 committed. U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).  
22 "This standard plainly does not entitle a reviewing court to reverse  
23

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24 <sup>4</sup> We have reviewed the transcript of the August 12, 2003,  
25 hearing on the motion to amend. Nowhere in that transcript does it  
26 appear that the bankruptcy court admitted into evidence any of the  
additional materials submitted by either Ash or the trustee.  
However, it is apparent that the court considered the evidence,  
because it relied on that evidence in making its findings.

1 the finding of the trier of fact simply because it is convinced that  
2 it would have decided the case differently." Anderson v. City of  
3 Bessemer City, N.C., 470 U.S. 564, 573 (1985). "Where there are two  
4 permissible views of the evidence, the factfinder's choice between  
5 them cannot be clearly erroneous." Id. at 574.

#### 6 DISCUSSION

7 Section 544(b) of the Bankruptcy Code gives a trustee the power  
8 to avoid any transfer of property of the debtor that a creditor  
9 could avoid under "applicable law."<sup>5</sup>

10 The trustee's complaint in this adversary proceeding alleged  
11 two state law claims: (1) that the quitclaim deed transfer was  
12 avoidable because debtor did not receive reasonably equivalent value  
13 for the transfer and, at the time of the transfer, debtor was  
14 insolvent; and (2) that debtor transferred the property with actual  
15 intent to hinder, delay, or defraud creditors.

16 The second claim, based on actual fraud, was clearly abandoned  
17 at trial.<sup>6</sup>

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19 <sup>5</sup> Section 544(b) allows the trustee to step into the shoes  
20 of a creditor who could, as of the date of the bankruptcy petition,  
21 avoid the transfer under state law. Ash does not dispute that there  
22 was at least one creditor in existence at the time of the transfer  
23 who still had a viable claim against debtor on the petition date.  
24 See In re Acequia, Inc., 34 F.3d 800, 807 (9th Cir. 1994) (trustee's  
§ 544(b) power is dependent on whether a creditor existed at the  
time the transfers were made that still had a viable claim against  
the debtor at the time the debtor filed bankruptcy).

25 <sup>6</sup> The bankruptcy court questioned the trustee's counsel at  
26 trial about his theory, and the trustee said that he was pursuing a  
claim that debtor had made the transfer for no consideration when  
debtor was insolvent, so that the trustee did not need to show  
intent. Transcript of January 7, 2003 trial at p. 5:17-20.

1           The first claim, which is based on constructive fraud, arises  
2 under Cal. Civ. Code § 3439.05, which provides that a transfer is  
3 fraudulent as to a current creditor if the transfer was made without  
4 reasonably equivalent value and "the debtor was insolvent at that  
5 time or the debtor became insolvent as a result of the transfer[.]"  
6 The bankruptcy court's findings after the trial focused on whether  
7 there was a creditor in existence on the date of the transfer,  
8 whether debtor was insolvent when the transfer was made, and whether  
9 there was consideration for the transfer. Transcript of January 7,  
10 2003 trial at pp. 24:10-25:9; 33:15-34:13; 51:7-53:22. The court  
11 concluded that debtor was insolvent because he was unable to pay his  
12 debts as they came due. See Cal. Civ. Code § 3439.02(c) ("A debtor  
13 who is generally not paying his or her debts as they become due is  
14 presumed to be insolvent.").

15           On the motion to amend and on appeal, the trustee does not rely  
16 on Cal. Civ. Code § 3439.05, but instead relies on Cal. Civ. Code  
17 § 3439.04(b)(2),<sup>7</sup> which provides that a transfer is fraudulent if it  
18 was made without reasonably equivalent value and the debtor  
19 "[i]ntended to incur, or believed or reasonably should have believed  
20 that he or she would incur, debts beyond his or her ability to pay  
21 as they became due." See Memorandum Decision and Order Denying  
22 Defendant's Motion to Amend Judgment at p. 1; Appellee's Brief at  
23 pp. 2, 5, 6. At oral argument, the trustee again stated that he

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24  
25           <sup>7</sup> Cal. Civ. Code § 3439.04 has since been amended to, among  
26 other things, renumber § 3439.04(b) to § 3439.04(a)(2). Because  
this action was tried under the earlier version, we will continue to  
refer to the statute by the version in effect at the time the matter  
was tried.

1 relies exclusively on § 3439.04(b)(2). The bankruptcy court  
2 expressly cited § 3439.04(b)(2) in its additional findings after the  
3 hearing on the motion to amend the judgment.

4 Because there is some confusion about which theory the  
5 bankruptcy court applied, we will consider whether the bankruptcy  
6 court's judgment could be upheld under either § 3439.04(b)(2) or  
7 § 3439.05. Both of these statutes are constructive, not actual,  
8 fraud provisions. In re Cohen, 199 B.R. 709, 715-16 & n.7 (9th Cir.  
9 BAP 1996).

10 1. Section 3439.04(b)(2)

11 Cal. Civ. Code § 3439.04 provides, as pertinent:

12 A transfer made or obligation incurred by a debtor is  
13 fraudulent as to a creditor, whether the creditor's claim arose  
14 before or after the transfer was made or the obligation was  
15 incurred, if the debtor made the transfer or incurred the  
16 obligation as follows:

15 . . . .

16 (b) Without receiving a reasonably equivalent value in exchange  
17 for the transfer or obligation, and the debtor:

18 . . . .

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

21 Cal. Civ. Code § 3439.04. The elements of a cause of action under  
22 this provision, which is part of California's adoption of the  
23 Uniform Fraudulent Transfer Act (UFTA), are: (1) the debtor made a  
24 transfer or incurred an obligation; (2) without receiving a  
25 reasonably equivalent value in exchange; and (3) the debtor intended  
26 to become or, "believed or reasonably should have believed that he"

1 would incur debts beyond his ability to pay as they came due. Cal.  
2 Civ. Code § 3494.04(b)(2). For purposes of California's fraudulent  
3 transfer provisions, a transfer of real property occurs when it is  
4 perfected as to good faith purchasers. Cal. Civ. Code  
5 § 3439.06(a)(1). Thus, the transfer in this case occurred when the  
6 deed was recorded on June 7, 2000.<sup>8</sup>

7 The party seeking avoidance bears the initial burden of proving  
8 all of the elements of the claim. See, e.g., In re Consol. Capital  
9 Equities Corp., 143 B.R. 80, 87 (Bankr. N.D. Tex. 1992) (applying  
10 California law).

11 A. Transfer of property

12 Ash asserts that the conveyance of the condominium did not  
13 constitute a transfer from debtor to her, because debtor did not in  
14 fact own the property. The trustee presented evidence that shows  
15 debtor was the owner of record of the property when the transfer was  
16 made: the original HUD Grant Deed, transferring the property to  
17 "Miguel S. Thomas - a single man," and the Deed of Trust, signed by  
18 debtor. In addition, there was evidence from debtor's 1999 and 2000  
19 tax returns that debtor had taken a deduction for payment of the  
20 mortgage interest.

21 Ash argued to the court that, although debtor's name was on the  
22 grant deed and trust deed, she was the actual owner of the  
23 condominium. According to Ash, debtor's name was on the property  
24

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25 <sup>8</sup> The bankruptcy court considered the date of the transfer  
26 to be May 30, 2000, the date when the property was conveyed by  
quitclaim deed. Under the evidence presented, the one-week  
difference in the transfer date does not affect the outcome.



1 because, as a U.S. citizen, he was eligible for the HUD grant, and  
2 he had more consistency in employment. In connection with her  
3 motion to amend the judgment, Ash sought to prove that she was the  
4 actual owner of the property by providing evidence that she  
5 sometimes paid the monthly mortgage payments and covered utilities  
6 and other living expenses for her son.

7 The court did not clearly err in accepting the trustee's  
8 evidence and finding that debtor owned the property on the date of  
9 the transfer. The evidence submitted by the trustee provided  
10 support for a finding that debtor, not Ash, was the owner of the  
11 property at the time he transferred it to her.

12 B. Reasonably equivalent value<sup>9</sup>

13 Ash asserts that she paid debtor \$3,600 for the transfer of the  
14 property. Additionally, Ash seems to assert that consideration was  
15 paid over several years when she invested money in the property.

16 "Fraudulent conveyance analysis focuses upon what the debtor  
17 surrendered and what the debtor received." Consol. Capital  
18 Equities, 143 B.R. at 87. Reasonable equivalence is determined from  
19 the perspective of a creditor. In re Bay Plastics, Inc., 187 B.R.  
20 315, 328 (Bankr. C.D. Cal. 1995) (applying Cal. Civ. Code § 3439.05).  
21 Under Cal. Civ. Code § 3439.03, "[v]alue is given for a transfer . .  
22 . if, in exchange for the transfer . . . , property is transferred or  
23 an antecedent debt is secured or satisfied . . . ."

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24  
25 <sup>9</sup> It is not clear whether Ash challenges this finding on  
26 appeal. Because the trustee had to prove a transfer for less than  
reasonably equivalent value, we will review the evidence on this  
element.

1 The trustee presented the quitclaim deed, executed by debtor on  
2 May 30, 2000, which recites that no consideration was given for the  
3 transfer. Ash presented no evidence that the recital in the  
4 quitclaim deed was wrong or that she paid money for the transfer.<sup>10</sup>  
5 In fact, debtor testified in his deposition that he did not get  
6 anything for transferring the property. Transcript of Deposition of  
7 Mr. Thomas at 54:25 - 55:2. The bankruptcy court did not clearly  
8 err in finding that no consideration was exchanged for the transfer  
9 of property.

10 C. Debtor's belief that he would become insolvent

11 In order to establish a claim under § 3439.04(b)(2), the  
12 trustee had to prove that debtor either intended to incur, or  
13 "believed or reasonably should have believed that he . . . would  
14 incur, debts beyond his . . . ability to pay as they became due."  
15 Cal. Civ. Code § 3439.04(b)(2). This element requires that the  
16 court consider debtor's intent or belief. See, e.g., In re Van  
17 Vleck, 211 B.R. 689, 693-94 (Bankr. E.D. Mo. 1997) (court must  
18 consider debtor's intent).

19 There is nothing in the court's findings, either after the  
20 January trial or after the hearing on the motion to amend the  
21 judgment, to indicate that the court considered debtor's intent or  
22 belief. The court found that debtor was insolvent because he did  
23 not have the ability to pay his debts as they became due.

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24  
25 <sup>10</sup> Ash argues that no consideration is necessary for a  
26 voluntary transfer to be valid. We have no reason to question the  
validity of the transfer. However, a valid transfer may be set  
aside if it meets the requirements of the fraudulent transfer  
statutes.

1 Transcript of January 7, 2003 trial at p. 51; Memorandum Decision  
2 entered August 14, 2003. But the court did not consider whether or  
3 find that debtor intended to become or believed or reasonably should  
4 have believed that he would become unable to pay his debts as they  
5 matured, which is an element of the trustee's claim under  
6 § 3439.04(b) (2).

7 Further, the trustee does not point to any evidence in the  
8 trial record from which the court could have made such a finding.  
9 The trustee conceded at oral argument that he had not provided proof  
10 of debtor's intent. He argued instead that intent could be inferred  
11 from the fact that, according to debtor's bankruptcy petition and  
12 schedules, debtor had one debt that existed on the date of the  
13 transfer and that debtor had been unemployed for more than a year  
14 before the transfer.

15 The problem with the trustee's argument is that, at the hearing  
16 on the motion to amend the judgment, the parties presented evidence  
17 to show that the information contained in debtor's schedules on  
18 which the trustee relied was incorrect. For example, there was  
19 evidence, and the bankruptcy court found, that debtor was in fact  
20 employed when he executed the quitclaim deed on May 30, 2000, and  
21 had income of \$30,138 in the year 2000. There was also evidence  
22 that debtor lost his job sometime in June 2000, although there is no  
23 evidence about whether the job was lost before or after June 7, the  
24 date of the transfer through the recording of the deed. Debtor also  
25 had other debts at the time of the transfer that totaled \$90,215.97.

26 The evidence would not have supported a finding of intent, nor

1 would it support an inference of that fact. Debtor was employed  
2 when he executed the quitclaim deed, and there was no evidence that  
3 he was unemployed when the deed was recorded (or that he knew he was  
4 going to lose his job before he lost it). The approximately \$90,000  
5 in debt included approximately \$40,000 that was secured debt on the  
6 property that was transferred and is the subject of this adversary  
7 proceeding; \$32,000 was a debt secured by a vehicle that debtor  
8 later surrendered to the lender. The trustee did not present any  
9 evidence about when these or the other debts were due. Debtor  
10 testified at his deposition that, until sometime in June 2000, he  
11 was employed and was paying his debts. Transcript of Deposition of  
12 Mr. Thomas at 59:13-20. The trustee does not explain how the  
13 bankruptcy court could infer from the evidence that debtor intended  
14 to incur debts beyond his ability to pay.

15 The bankruptcy court did not find and the trustee failed to  
16 present evidence from which the court could have found that debtor  
17 intended to incur or believed or reasonably should have believed  
18 that he would incur debts beyond his ability to pay. Therefore, if  
19 the bankruptcy court's judgment for the trustee was based on  
20 § 3439.04(b) (2), it was based on a clearly erroneous finding and  
21 must be reversed.

22 2. Section 3439.05

23 As we said above, the bankruptcy court's decision may have been  
24 based on Cal. Civ. Code § 3439.05,<sup>11</sup> which does not require proof of

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25 <sup>11</sup> Cal. Civ. Code § 3439.05 provides:

26 A transfer made or obligation incurred by a debtor is  
fraudulent as to a creditor whose claim arose before the

(continued...)

1 debtor's intent. Instead, that statute, like § 3439.04(b)(2),  
2 requires proof of a transfer of property of the debtor for less than  
3 reasonably equivalent value, but also requires proof that debtor was  
4 insolvent at the time of the transfer or became insolvent as a  
5 result of the transfer.

6 We have already explained that the bankruptcy court did not  
7 clearly err in finding that there was a transfer of property of the  
8 debtor for less than reasonably equivalent value. The issue with  
9 regard to § 3439.05 is whether there is evidence to support the  
10 court's finding that debtor was insolvent at the time of the  
11 transfer.

12 Under Cal. Civ. Code § 3439.02(a), a debtor is insolvent if his  
13 liabilities exceed his assets (the "balance sheet" definition of  
14 insolvency). In re Bay Plastics, Inc., 187 B.R. 315, 328 n.22  
15 (Bankr. C.D. Cal. 1995). Under § 3439.02(c), a debtor is presumed  
16 insolvent if he is generally not paying his debts as they become due  
17 (the "equity" or "cash flow" test). Id.

18 Here, the bankruptcy court found after the hearing on the  
19 motion to amend the judgment that debtor was insolvent, "as his  
20 debts far exceeded his income, establishing his inability to pay his  
21 debts as they became due." Memorandum Decision at 4. This finding  
22 mixes the balance sheet test and the cash flow test.

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23  
24 <sup>11</sup> (...continued)  
25 transfer was made or the obligation was incurred if the debtor  
26 made the transfer or incurred the obligation without receiving  
a reasonably equivalent value in exchange for the transfer or  
obligation and the debtor was insolvent at that time or the  
debtor became insolvent as a result of the transfer or  
obligation.

1           If the court's finding was based on the balance sheet test, it  
2 was error, because the court did not consider debtor's assets, but  
3 only his debts and his income. A balance sheet analysis requires  
4 more than a comparison between income and debt; it requires a  
5 comparison between assets and debt. Cal. Civ. Code § 3439.02(a).  
6 The trustee never explored whether debtor had assets that were not  
7 listed in his schedules (there were numerous errors in the schedules  
8 that were explained at the hearing). Debtor testified in his  
9 deposition that he had a vehicle securing the \$32,000 debt to  
10 Mitsubishi; there is no evidence of the value of the vehicle. Forty  
11 thousand dollars of the debt was secured by the condominium that was  
12 transferred. There is no evidence of whether that debt was  
13 oversecured or undersecured. It is also not clear whether the debt  
14 secured by a purchase money deed of trust should be included in the  
15 balance sheet when the asset is not included, because California law  
16 prohibits a deficiency judgment on such debts. See Cal. Code Civ.  
17 Pro. § 580b.

18           Nor does the evidence support a finding under the cash flow  
19 test. At the hearing on the motion to amend the judgment, the  
20 evidence showed that debtor had income of more than \$30,000 in 2000.  
21 He also had debts totaling approximately \$90,000 on the date of the  
22 transfer. The question is whether the bankruptcy court clearly  
23 erred when it held that the fact that debtor's income was  
24 substantially less than the total amount of his debts was enough to  
25 establish that he was unable to pay his debts as they became due.

26           California courts have not established what is sufficient

1 evidence for a creditor to prove that a debtor was presumptively  
2 insolvent by generally not paying his debts as they became due. To  
3 determine what is sufficient evidence to establish this element, it  
4 is appropriate for a court to look to other states that have adopted  
5 the UFTA. Cal. Civ. Code § 3439.11 ("This chapter shall be applied  
6 and construed to effectuate its general purpose to make uniform the  
7 law with respect to the subject of this chapter among states  
8 enacting it."). See Neumeyer v. Crown Funding Corp. of Am., 56 Cal.  
9 App. 3d 178, 187 (Cal. Ct. App. 1976), disapproved on other grounds  
10 by Liodas v. Sahadi, 19 Cal. 3d 278, 287 n.3 (1977) (holding that it  
11 was appropriate to look to decisions of courts of other states that  
12 had enacted the Uniform Fraudulent Conveyance Act for guidance in  
13 interpreting California's enactment of the Act); see also In re  
14 Image Worldwide, Ltd., 139 F.3d 574, 577 (7th Cir. 1998) (because the  
15 Illinois UFTA is a uniform act, the court may look to other cases  
16 interpreting other states' versions of the UFTA for assistance). No  
17 other state has outlined a test to determine if a debtor is  
18 insolvent under the cash flow test for insolvency under the UFTA.

19 The UFTA borrows this test from § 303(h) (1) of the Bankruptcy  
20 Code. First Fed. Sav. & Loan Ass'n of Galion, Ohio v. Napoleon, 701  
21 N.E.2d 350, 354 n.4 (Mass. 1998). See also Cal. Civ. Code  
22 § 3439.02, Leg. Comm. Comment 3 (comparing subdivision (c) to  
23 § 303(h) (1)). The comment refers to case law under this section and  
24 implies that an inquiry under § 3439.02(c) would be analogous to an  
25 inquiry under § 303(h) (1):

26 In determining whether a debtor is paying its debts generally  
as they become due, the court should look at more than the

1 amount and due dates of the indebtedness. The court should  
2 also take into account such factors as the number of the  
3 debtor's debts, the proportion of those debts not being paid,  
4 the duration of the nonpayment, and the existence of bona fide  
5 disputes or other special circumstances alleged to constitute  
6 an explanation for the stoppage of payments. The court's  
7 determination may be affected by a consideration of the  
8 debtor's payment practices prior to the period of alleged  
9 nonpayment and the payment practices of the trade or industry  
10 in which the debtor is engaged.

11 Cal. Civ. Code § 3439.02, Leg. Comm. Comment 3.

12 This inquiry comports with the case law that has developed  
13 under § 303(h)(1) of the Bankruptcy Code. See In re Vortex Fishing  
14 Sys., Inc., 277 F.3d 1057, 1072 (9th Cir. 2002) (the court adopts a  
15 "totality of the circumstances" test in deciding whether a debtor is  
16 generally paying his debts as they become due). "A finding that a  
17 debtor is generally not paying its debts 'requires a more general  
18 showing of the debtor's financial condition and debt structure than  
19 merely establishing the existence of a few unpaid debts.'" Id.  
20 (quoting In re Dill, 731 F.2d 629, 632 (9th Cir. 1984)).

21 Under this analysis, the bankruptcy court erred in finding that  
22 debtor was insolvent as of the date of the transfer. The trustee  
23 showed only that debtor had approximately \$90,000 in debts, and that  
24 he had an income of \$30,000 for the year in which the transfer  
25 occurred. The trustee did not provide evidence of debtor's payment  
26 history of the debts, how much payments were, when they were due,  
whether they were being paid and, if not, for how long.

Debtor testified in his deposition that, up until June 2000, he  
was paying his debts. Transcript of Deposition of Mr. Thomas at  
59:13-20. At the time he executed the quitclaim deed, he was still



1 working at the job he had held the year before, when his annual  
2 income had been approximately \$47,000. Id. at 59:17-19; 1999 Tax  
3 Return. Debtor lost that job sometime in June 2000, but the  
4 evidence does not show whether it was before or after the deed was  
5 recorded. Deposition of Mr. Thomas at 7:3-9. At the time the deed  
6 was recorded, debtor had purchased the Mitsubishi vehicle, but  
7 payments were not yet due. Id. at 32:6 - 33:14.

8 Evidence that debtor has a moderate income and also has debts  
9 that exceed his annual income, at least some of which are payable  
10 monthly,<sup>12</sup> is insufficient to establish that debtor was not paying  
11 his debts as they became due. Therefore, if the bankruptcy court's  
12 judgment for the trustee was based on \$ 3439.05, the bankruptcy  
13 court erred in finding that debtor was insolvent.

14 Because we conclude that the bankruptcy court erred in finding  
15 that the transfer was fraudulent under either § 3439.04(b)(2) or  
16 § 3439.05, we need not address Ash's remaining arguments. We also  
17 note that, even if we were inclined to address her other arguments,  
18 we would not address her new argument, raised for the first time  
19 after appellate briefing had closed, that the transfer could not be  
20 fraudulent because the property was exempt.

#### 21 CONCLUSION

22 The bankruptcy court clearly erred in finding that the transfer  
23 of property from debtor to Ash was a fraudulent transfer.  
24 Therefore, we REVERSE.

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25  
26 <sup>12</sup> We note that a substantial portion of the debts were  
secured and nearly half were subject to anti-deficiency provisions.  
Thus, the amount for which debtor would be personally liable if the  
creditors were to pursue their remedies is significantly less than  
the entire amount of debt.