

DEC 29 2005

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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NOT FOR PUBLICATION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 No.	CC-02-1268-KBaP
)		
BEACHPORT ENTERTAINMENT,)	Bk. No.	LA 99-41869-TD
)		
Debtor.)	Adv. No.	LA 01-02207-TD
)		
HOWARD M. EHRENBERG, Chapter)		
7 Trustee,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
CALIFORNIA STATE UNIVERSITY,)		
FULLERTON FOUNDATION,)		
)		
Appellee.)		

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

Originally Argued and Submitted on November 20, 2002
at Los Angeles, California

Filed - December 29, 2005

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

Before: KLEIN, BAUM² and PERRIS, Bankruptcy Judges.

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

²Hon. Redfield T. Baum, Sr., Bankruptcy Judge for the District of Arizona, sitting by designation.

1 The bankruptcy court granted the defendant's summary
2 judgment motion in a fraudulent transfer adversary proceeding
3 brought by the case trustee. We originally dismissed because the
4 appellant did not provide an appellate record adequate to permit
5 review. The court of appeals reversed the dismissal but, instead
6 of proceeding to review the summary judgment on the merits,
7 remanded to us. We required supplemental submissions to cure the
8 defects in the record. Further oral argument is not necessary
9 and has not been requested. We now REVERSE and REMAND.

10
11 FACTS

12 Debtor Beachport Entertainment ("Beachport") filed a chapter
13 7 bankruptcy case on August 26, 1999. Appellant Ehrenberg, the
14 chapter 7 trustee, filed a fraudulent transfer adversary
15 proceeding seeking to recover \$500,000 paid by Beachport to
16 appellee California State University, Fullerton Foundation
17 ("Foundation").

18 In January 1998, Beachport and the Trustees of California
19 State University, Fullerton ("CSUF"), entered into an agreement
20 that granted Beachport the exclusive right to produce outdoor
21 concerts at CSUF's sports complex. Agreement, Exhibit C to
22 Declaration of William Dickerson at 19-39. As part of the
23 arrangement, Beachport was to advance funds, to be recouped later
24 via a profit sharing agreement, to CSUF to make capital
25 improvements to the complex. Id. at 9, ¶ 6.2.

26 The Foundation is an entity that was established to
27 administer and manage contracts on behalf of CSUF. See Operating
28 Agreement, Exhibit B to Declaration of William Dickerson at 11-

1 17. Pursuant to that end, the Foundation accepted a payment of
2 \$500,000 representing capital improvement funds advanced by
3 Beachport under its agreement with CSUF. Beachport had
4 previously remitted a \$500,000 payment directly to CSUF, which,
5 in turn, forwarded the payment to the Foundation to begin
6 renovating the sports complex. The second payment of \$500,000
7 was made directly to the Foundation and is the payment that is
8 the subject of this adversary proceeding.

9 The Foundation moved for summary judgment on various
10 grounds: (1) suit against the Foundation was precluded by
11 Eleventh Amendment sovereign immunity; (2) the action was time-
12 barred; (3) under California law the Foundation was not a
13 transferee; (4) there was no lack of reasonably equivalent value
14 for the transfer; and (5) the Foundation acted in good faith.

15 In response, Ehrenberg contended that: (1) sovereign
16 immunity was not implicated because the Foundation was not an
17 agent of CSUF; (2) the Foundation had dominion and control over
18 the \$500,000 transfer; (3) in the absence of an agency
19 relationship, an act performed by the Foundation for CSUF cannot
20 constitute reasonably equivalent value to the estate; and (4)
21 there is an issue of fact as to whether Foundation acted in good
22 faith in its acceptance and administration of the \$500,000.

23 By way of reply, the Foundation filed objections to
24 Ehrenberg's proffered evidence and reiterated its arguments in
25 support of its motion.

26 According to a supplemental declaration filed by attorney
27 Paul Gale for the Foundation, the bankruptcy court issued a
28 tentative ruling that was not docketed by the clerk, that is not

1 otherwise part of the record, and that reads in its entirety:

2 TENTATIVE RULING: 1. MOVANT'S EVIDENTIARY OBJECTIONS
3 NUMBERS 1 AND 2, SUSTAINED, #3 OVERRULED. 2. OPPOSITION
4 OVERRULED. 3. MOTION GRANTED a. NO GENUINE ISSUE AS TO
5 ANY MATERIAL FACT. b. DEFENDANT IS ENTITLED TO JUDGMENT
6 AS A MATTER OF LAW, FOR EACH OF THE REASONS CITED BY
7 MOVANT. NO APPEARANCE IS NECESSARY. IF PARTIES PLAN
8 TO APPEAR, PLEASE NOTIFY THE COURT AND ALL OTHER
9 PARTIES PROMPTLY.

10 The declaration also states that "[a]t no time did I ever receive
11 any notice from counsel for appellant Howard Ehrenberg that she
12 wished to have oral argument on the Foundation's motion for
13 summary judgment."

14 The Foundation's summary judgment motion was granted without
15 further explanation by the trial court.

16 Ehrenberg contends that: (1) the court committed an "error
17 in judgment" by failing to conduct a hearing on the motion for
18 summary judgment and by failing to issue written findings of fact
19 and conclusions of law; (2) there was a genuine issue of fact as
20 to whether the Foundation acted as CSUF's agent; (3) because such
21 issue of fact exists, it was error to find that the Foundation
22 lacked dominion and control over the \$500,000, and it was error
23 to find that reasonably equivalent value inured to the estate.

24 JURISDICTION

25 The bankruptcy court had jurisdiction via 11 U.S.C. §§ 1334
26 and 157(b)(1). We have jurisdiction under 11 U.S.C. § 158(a)(1).

27 STANDARD OF REVIEW

28 We review summary judgment de novo. Svob v. Bryan (In re Bryan), 261 B.R. 240, 243 (9th Cir. BAP 2001).

1 ISSUES

- 2 1. Whether the court erred in failing to provide oral
3 argument and a formal statement of its reasoning.
4 2. Whether the Foundation is protected by sovereign
5 immunity.
6 3. Whether there are any genuine issues of material fact
7 that the Foundation accepted a fraudulent conveyance.
8

9 DISCUSSION

10 I

11 Ehrenberg asserts that the court's omission to conduct oral
12 argument, or to issue findings of fact and conclusions of law,
13 was error. We do not agree.

14 Federal Rule of Civil Procedure 52, as incorporated by
15 Federal Rule of Bankruptcy Procedure 7052, requires that trial
16 courts make findings of fact and conclusions of law after
17 conducting bench trials but explicitly disclaims the requirement
18 of findings of fact and conclusions of law on motions for summary
19 judgment.³ However, the lack of an explanation by the trial
20 court of why there is no genuine issue of material fact and why
21 judgment is required as a matter of law deprives the reviewing
22 court of the assistance of the trial court's analysis and
23 reasoning.

24 Summary judgment motions are to be granted "if the movant is
25 entitled to judgment as a matter of law." Celotex Corp. v.

27 ³"Findings of fact and conclusions of law are unnecessary
28 on decisions of motions under Rule 12 or 56 [summary
judgment]." Fed. R. Civ. P. 52.

1 Catrett, 477 U.S. 317, 322 (1986). Thus, the trial court's
2 function is one of legal analysis rather than of fact-finding.
3 On the other hand, ultimate issues of fact can be determined via
4 summary judgment. Here, it is unclear, due to the lack of
5 explanation from the bankruptcy court, exactly what fact-finding
6 role the court played.

7 The court's decision not to conduct oral argument was a
8 permissible exercise of its discretion. See Local Bankruptcy
9 Rule 9013-1, United States Bankruptcy Court, Central District of
10 California.⁴ In fact, according to the court's procedures and
11 the Declaration of Paul Gale, it was Ehrenberg's counsel's
12 responsibility to request oral argument and she did not do so.
13 Ehrenberg does not claim that the court's calendaring procedures
14 are improper, and to the extent the court did not entertain oral
15 argument, it appears that his counsel did not request argument.

16 Thus, we perceive no procedural error and proceed to the
17 question whether the Foundation was entitled to summary judgment
18 as a matter of law.

19 II

20 In order to affirm a court's decision to grant summary
21 judgment, "[v]iewing the evidence in the light most favorable to
22 the non-moving party, we must determine whether the bankruptcy
23 court correctly found that there are no genuine issues of
24 material fact and that the moving party is entitled to judgment
25

26
27 ⁴The Foundation points to Fed. R. Civ. P. 78, that allows
28 motions to be decided without oral argument. However, Fed. R.
Civ. P. 78 is not explicitly incorporated in the Federal Rules
of Bankruptcy Procedure.

1 as a matter of law. . . Fed. R. Bankr. P. 7056; Fed. R. Civ. P.
2 56(c).” Fogal Legware of Switzerland, Inc. v. Wills (In re
3 Wills), 243 B.R. 58, 62 (9th Cir. BAP 1999).

4 Summary judgment is “only proper ‘if the pleadings,
5 depositions, answers to interrogatories, and admissions on file,
6 together with the affidavits, if any, show that there is no
7 genuine issue as to any material fact and that the moving party
8 is entitled to judgment as a matter of law.’” Thorson v. Cal.
9 Student Aid Comm’n. (In re Thorson), 195 B.R. 101, 103-04 (9th
10 Cir. BAP 1996), citing Celotex Corp. v. Catrett, 477 U.S. 317,
11 322 (1986).

12 Here, the bankruptcy court merely stated that “Defendant is
13 entitled to judgment as a matter of law for each of the reasons
14 cited by movant.” Declaration of Paul Gale, Tentative Ruling.
15 In support of its motion, the Foundation cited at least nine
16 reasons.

17 Because we perceive genuine material issues of fact existing
18 in relation to most of the reasons cited by the Foundation in
19 support of the motion, we will reverse the bankruptcy court’s
20 judgment.

21 The Foundation’s central defense cited in support of the
22 motion is that, because of its status as an instrumentality of
23 the state, the complaint filed by Ehrenberg is tantamount to a
24 suit against the state of California and is therefore barred by
25 the Eleventh Amendment.

26 In opposition, Ehrenberg asserts that a genuine issue of
27 material fact exists as to whether the Foundation is indeed an
28 instrumentality of the state such that the suit is barred.

1 The Ninth Circuit has held that California state colleges
2 and universities enjoy Eleventh Amendment immunity from suit.
3 Mitchell v. Los Angeles Community College Dist., 861 F.2d 198,
4 201 (9th Cir. 1988) ("California state colleges and universities
5 are 'dependent instrumentalities of the state'" for Eleventh
6 Amendment purposes); Jackson v. Hayakawa, 682 F.2d 1344, 1350
7 (9th Cir. 1982) ("the University of California and the Board of
8 Regents are considered to be instrumentalities of the state for
9 purposes of the Eleventh Amendment").

10 The Foundation argues that it is an instrumentality of the
11 state because: (a) the Foundation was created to administer
12 contracts on behalf of CSUF and did so in this case; (b) the
13 Foundation used the \$500,000 for CSUF's benefit (capital
14 improvements to the sports complex); (c) the Foundation was
15 acting as CSUF's agent with respect to the contract; (d) the
16 Foundation was acting in its official capacity on CSUF's behalf;
17 and (e) if a judgment for the \$500,000 was imposed upon the
18 Foundation, CSUF would be forced to satisfy the judgment.

19 In support of its argument, the Foundation presented the
20 declaration of the Foundation's Executive Director stating that
21 the Foundation was administering this contract on behalf of CSUF,
22 and attaching invoices intended to show that the funds were
23 expended on renovation of the sports complex.

24 Because the bankruptcy court stated in its tentative
25 decision that it was granting summary judgment "for each of the
26 reasons cited by [Foundation]", we presume that the court granted
27 the Foundation's motion based on its Eleventh Amendment sovereign
28 immunity defense. This finding requires an absence of a genuine

1 issue of material fact on the question of whether the Foundation
2 is an agent or instrumentality of the state. We disagree with
3 this finding because such issues of fact exist for determination.

4 To determine whether the Foundation was an agent of CSUF for
5 Eleventh Amendment purposes, the following factors must be
6 evaluated: whether a judgment against the defendant would impact
7 the state treasury, whether the entity performs an essential
8 state function, whether the entity has the ability to sue or be
9 sued, whether the entity can take property in its own name rather
10 than in the name of the state, and finally, the "corporate status
11 of the entity." Jackson, 682 F.2d at 1350 (citation omitted).⁵

13 ⁵Neither of Ehrenberg's briefs recognize the appropriate
14 analysis for determination of whether the Foundation can enjoy
15 Eleventh Amendment immunity. Instead, and irrelevant to such
16 an analysis, Ehrenberg argues that the Foundation cannot show
17 it is an agent of the state under California agency law.
Whether or not an entity acts as an agent is not one of the
enumerated factors in the Eleventh Amendment analysis.

18 There may be a difference between who is an agent for a
19 state for Eleventh Amendment purposes (cf. Ex Parte Young, 209
U.S. 123 (1908)) and who is an agent under general agency law.

20 The Foundation addressed some of the appropriate factors
21 in its summary judgment motion, but not in its appellate brief.
22 In its summary judgment motion, the Foundation cites to the
Mitchell case for the proposition that "a California State
23 University's agents acting in their official capacities, such
as the Foundation here, share in the University's Eleventh
24 Amendment immunity." Motion for Summary Judgment at 7.
25 However, the discussion in Mitchell that referred to agents of
the state referred to individuals, not entities. Thus, an
26 agent, as an official of a state agency, may enjoy immunity,
but here, the suit is against an entity—the Foundation, not an
27 individual. Ehrenberg's opposition to the motion and appellate
briefs only address whether the Foundation was an "agent" of
28 CSUF, perhaps misconstruing the phrase "state agency" to be
defined by generally applicable state agency law. Ehrenberg's
discussion of state agency law thus misses the point in the
Eleventh Amendment context.

1 The most important factor in the inquiry is whether the
2 state treasury would be responsible for an adverse money judgment
3 against the entity. Id.

4 Here, the Foundation alleges that the state would be
5 responsible for an adverse judgment rendered against it. In
6 support of this allegation, the Foundation points to its
7 operating agreement with CSUF. The operating agreement is a
8 contract between the Foundation and CSUF defining the function,
9 purpose, and terms and conditions under which the Foundation will
10 operate. However, there is nothing in the operating agreement
11 that tends to show that the state or CSUF is responsible for the
12 Foundation's debts.

13 Indeed, a brief review of some of the terms of the
14 operating agreement tends to show that the Foundation operates as
15 a separate entity with fiscal responsibility for its own debts
16 that is not dependent on CSUF. To wit, the operating agreement
17 provides that the Foundation's "retained earnings and residual
18 amounts derived from administration of [its] functions and
19 activities" will be applied to satisfy debts incurred by the
20 Foundation and for establishment of capital reserves. Operating
21 Agreement at 2 ¶ 5. Another clause provides that the Foundation
22 is required to carry liability insurance, is solely responsible
23 for the premiums, and that the state and CSUF are to be
24 additional named insureds under the policy. Id. at 5. Finally,
25 the operating agreement provides that, should CSUF be found
26 liable for the Foundation's acts or omissions, CSUF is entitled
27 to indemnification. Id.

28

1 These various clauses add up to the conclusion that a
2 judgment against the Foundation is not likely to be paid from the
3 state treasury, because of both the Foundation's indemnification
4 responsibility and the fact that it appears to control and
5 maintain its finances on its own without the state's interference
6 or interest.

7 The crucial factor in the determination of whether the
8 Foundation acts as an arm of the state for Eleventh Amendment
9 purposes is far from determined. Whether or not a judgment
10 against the Foundation would be satisfied from the state treasury
11 is a genuine issue of material fact that precludes the entry of
12 summary judgment on the issue of the Foundation's claim that it
13 is protected from suit as an instrument of the state. See
14 Jackson, 682 F.2d at 1350.

15 Although the issue of whether the state would be responsible
16 for a judgment against the Foundation is not the sole factor to
17 be examined in determining immunity from suit, it is the most
18 important one. Id. at 1351. We note that at least one other
19 factor possibly militates against the grant of Eleventh Amendment
20 immunity from suit. That factor is the "corporate status of the
21 entity." Id. The Foundation is neither a state agency, nor is
22 it controlled by the legislature. The Foundation is a California
23 non-profit corporation. See Articles of Incorporation. In
24 determining whether the status of the entity militates in favor
25 of the grant of immunity, "the court looks to the way state law
26 treats the entity." Mitchell, 861 F.2d at 201. Without
27 performing an exhaustive analysis of California corporation law,
28 it is axiomatic that a private non-profit corporation is a

1 legally distinct entity from a state agency or a legislatively-
2 controlled entity such as a state university.

3 Since the Foundation is legally distinct from the state, the
4 question becomes whether the facts establish a connection with
5 the state that is close enough to provide a shield. Genuine
6 issues of material fact exist on this question, such as whether
7 the Foundation is an instrumentality of the state under
8 applicable jurisprudence. The court erred in granting the
9 Foundation's motion for summary judgment based on the
10 Foundation's alleged Eleventh Amendment immunity from suit.

11
12 III

13 The Foundation's summary judgment motion also asserts that
14 Ehrenberg's suit is time-barred. This is partially correct, but
15 not in a way that would be dispositive of the adversary
16 proceeding.

17 Ehrenberg's fraudulent transfer avoiding powers under the
18 Bankruptcy Code extend only to transfers "made or incurred on or
19 within one year before the date of the filing of the petition."
20 11 U.S.C. § 548(a). Ehrenberg's complaint concedes that the
21 transfer was made 18 months before the filing of the petition.
22 Thus, to the extent the suit relies on § 548, the action is time-
23 barred. This, however, turns out to be a distinction without
24 much of a difference because Ehrenberg also invokes California's
25 fraudulent transfer laws by way of 11 U.S.C. § 544, which do not
26 contain the one-year limitation period.

27 Ehrenberg's complaint states that relief is sought both
28 "under state and federal law." Under § 544(b), a trustee may

1 avoid a transfer if a creditor could have done so under state
2 law.⁶

3 California's Uniform Fraudulent Transfer Act provides that:

4 A transfer made or obligation incurred by a debtor is
5 fraudulent as to a creditor whose claim arose before
6 the transfer was made or the obligation was incurred if
7 the debtor made the transfer or incurred the obligation
8 without receiving a reasonably equivalent value in
9 exchange for the transfer or obligation and the debtor
10 was insolvent at that time or the debtor became
11 insolvent as a result of the transfer or obligation.

12 CAL. CIV. CODE § 3439.05.

13 California's fraudulent conveyance statute is "similar in
14 form and substance to the [bankruptcy] code's fraudulent transfer
15 provisions, and the Ninth Circuit has held that the state laws
16 may be interpreted contemporaneously." Gill v. Maddalena (In re
17 Maddalena), 176 B.R. 551, 553 (Bankr. C.D. Cal. 1995), citing
18 Wyle v. C.H. Rider & Family (In re United Energy Corp.), 944 F.2d
19 589, 594 (9th Cir. 1991). We have elsewhere parsed at length the
20 differences between California and federal fraudulent transfer
21 law. Plotkin v. Pomona Valley Imports, Inc. (In re Cohen), 199
22 B.R. 709, 716-20 (9th Cir. BAP 1996).

23 As applicable here, the main difference in treatment of
24 fraudulent conveyances under state law and federal law is that
25 the one-year limit on avoidable transfers does not apply to
26 transfers under state law. Therefore, although the federal law
27 component of Ehrenberg's complaint is barred, the state law
28 component is not.

29 ⁶"[T]he trustee may avoid any transfer of an interest of
30 the debtor in property or any obligation incurred by the debtor
31 that is voidable under applicable law by a creditor." 11
32 U.S.C. § 544(b).

1 IV

2 When one turns to the merits, there are a number of issues
3 regarding the elements of a constructive fraudulent transfer.
4

5 A

6 In the absence of proof of actual intent to hinder, delay,
7 or defraud a creditor, a necessary finding of an avoidable
8 fraudulent transfer under California law is that the debtor must
9 not have received "reasonably equivalent value" for the transfer.
10 That is to say, if the debtor received "reasonably equivalent
11 value" for the \$500,000 payment, the transfer is not avoidable by
12 the trustee. Cohen, 199 B.R. at 718.

13 The Foundation contends that Beachport received reasonably
14 equivalent value for the \$500,000 because, in exchange, Beachport
15 received an exclusive license to promote events at CSUF's sports
16 complex.

17 Ehrenberg's response to the Foundation's allegation that
18 Beachport received reasonably equivalent value for the \$500,000
19 payment is that, unless the Foundation shows that it was acting
20 as an agent of CSUF, Beachport received nothing from the
21 Foundation in exchange for the \$500,000. Ehrenberg also asserts
22 that "there is sufficient probative evidence in the record to
23 support" a finding that Beachport did not receive reasonably
24 equivalent value. However, that assertion lays bare; it is not
25 accompanied by an explanation of what the sufficiently probative
26 evidence is that supports it.

27 The Foundation offered competent evidence, via declaration
28 in support of its motion, that Beachport possibly received some

1 value for the transfer. In fact, although Beachport does not
2 appear to be currently exercising its right to produce events at
3 the sports complex, "because of the exclusive rights granted to
4 Beachport under the Agreement, CSUF has never solicited any other
5 entertainment entity to promote concerts."

6 However, what is lacking in the record is evidence regarding
7 the actual value of the so-called exclusive license granted
8 Beachport. Ehrenberg does not refute the Foundation's evidence
9 that Beachport received the license in exchange for the transfer,
10 but the Foundation does not present any evidence at all that the
11 license is actually worth anything. As such, a genuine issue of
12 material fact remains for determination: did Beachport receive
13 reasonably equivalent value for the \$500,000 transfer?

14 The mere fact that the Foundation appears to have
15 established that Beachport received an exclusive license to
16 promote events shows perhaps that some "value" might have been
17 received for the transfer, but such evidence does not go to
18 whether that value was "reasonably equivalent." The Foundation
19 has the burden of proof on the issue of reasonably equivalent
20 value, and its evidence presented in support of its summary
21 judgment motion does not shift the burden to Ehrenberg to negate
22 the Foundation's affirmative defense. Celotex, 477 U.S. at 328
23 ("It is the defendant's task to negate, if he can, the claimed
24 basis for the suit," White, J. concurring).

25
26 B

27 Another essential element to avoiding a constructively
28 fraudulent transfer is that the debtor must have been insolvent

1 at the time of the transfer or rendered insolvent by it. CAL.
2 CIV. CODE § 3439.05.

3 The Foundation's motion for summary judgment did not address
4 this essential element. Therefore, a genuine issue of material
5 fact remains as to whether Beachport was insolvent at the time of
6 the transfer or rendered insolvent by it.⁷

7
8 C

9 The Foundation also contends that it cannot be liable for
10 the transfer because a trustee may only recover a transfer from
11 the initial transferee. This is incorrect as a matter of
12 statute.

13 A trustee may recover the transferred property or its value
14 from "the initial transferee" or "any immediate or mediate
15 transferee of such initial transferee." 11 U.S.C. § 550(a). The
16 Foundation contends that it did not exercise dominion and control
17 over the \$500,000, could not put the funds toward its own use,
18 and therefore was not the initial transferee under § 550(a)(1).
19 The motion, however, is silent on the issue of whether the
20 Foundation is an "immediate or mediate transferee of such initial
21 transferee." 11 U.S.C. § 550(a)(2).

22 The Foundation claims to provide evidence, in the form of
23 the William Dickerson declaration, that shows that it was not the
24
25

26
27 ⁷In support of his contention that Beachport was
28 insolvent, Ehrenberg points to copies of Beachport's bankruptcy
schedules. While not dispositive on the issue, the schedules
are sufficient to raise a genuine issue of material fact.

1 initial transferee.⁸ That evidence is rebutted however, by
2 evidence that the \$500,000 was paid directly to the Foundation,
3 not CSUF. Whether or not the Foundation was the initial
4 transferee is a genuine issue of material fact that cannot be
5 resolved based on the evidence available.

6
7 D

8 While the Foundation may not have been the initial
9 transferee, it may have been an "immediate or mediate
10 transferee." Therein lies another genuine issue of material fact
11 that has yet to be determined.

12 If the Foundation was an immediate or mediate transferee, it
13 may be able to avail itself of the safe harbor defense pursuant
14 to 11 U.S.C. § 550(b). To the extent that the Foundation is an
15 immediate or mediate transferee, the transfer cannot be avoided
16 if it took the transfer in good faith and for value. 11 U.S.C.
17 § 550(b); Danning v. Miller (In re Bullion Reserve), 922 F.2d
18 544, 547 (9th Cir. 1991).

19 Here, the Foundation's argument in support of the fact that
20 it took the transfer in good faith is that Ehrenberg did not
21 present any evidence to rebut the Foundation's contention that,
22 "[p]rior to being served with plaintiff's complaint, the
23 Foundation had no knowledge of the debtor's financial condition
24 and was unaware of any facts that would have led it to believe
25

26
27 ⁸Stating that, pursuant to the Foundation's operating
28 agreement, the transfer was made pursuant to CSUF's agreement
with Beachport, and was made for CSUF's benefit. Motion for
Summary Judgment at 12.

1 that the debtor intended to hinder, delay or defraud its
2 creditors.”

3 Ehrenberg attempted to refute this evidence by offering
4 copies of newspaper articles alleging some sort of conspiracy at
5 CSUF in its system of awarding contracts. The Foundation
6 objected to this evidence, the bankruptcy court sustained the
7 objections, and Ehrenberg does not contend to this court that the
8 court erred in sustaining the Foundation’s evidentiary
9 objections. That evidence will not be considered.

10 Because there is a genuine issue of material fact on the
11 issue of what value, if any, Beachport received for the transfer,
12 the Foundation is not yet entitled to the safe harbor of a
13 transferee that takes in good faith and for value. Furthermore,
14 the Foundation’s evidence on good faith is a bare assertion, or
15 conclusion, that it took the transfer in good faith, a question
16 that is inherently fact-intensive. Accordingly, the Foundation’s
17 good faith in taking the transfer is another genuine issue of
18 material fact that calls for a further determination.

19
20 V

21 Ehrenberg did not respond to the Foundation’s motion in
22 absolute conformity with the requirements of Federal Rule of
23 Civil Procedure 56, as incorporated by Federal Rule of Bankruptcy
24 Procedure 7056. Rule 56(e) requires that a nonmoving party must
25 provide evidence, such as affidavits, that “set forth specific
26 facts showing that there is a genuine issue for trial.” Here,
27 Ehrenberg’s arguments and evidence largely miss the mark.
28 However, summary judgment may only be entered “if appropriate.”

1 Id. Although Ehrenberg's response to the motion is not
2 overwhelming, where we have determined that there are multiple
3 issues of fact yet to be determined, entry of summary judgment is
4 not "appropriate." Hirsch & Barrans, The Analysis & Decision of
5 Summary Judgment Motions (Fed. Jud. Ctr. 1991) at 48-49.

6
7 CONCLUSION

8 There was no procedural error. However, multiple genuine
9 issues of material fact exist: whether a judgment against the
10 Foundation would be satisfied from the state treasury, whether
11 the Foundation is an instrumentality of the state, whether
12 Beachport received reasonably equivalent value for the transfer,
13 whether Beachport was rendered insolvent by it, whether the
14 Foundation was the initial, an immediate or a mediate transferee,
15 and whether the Foundation took the transfer in good faith and
16 for value.

17 In sum, and because there remain multiple genuine issues of
18 material fact, the grant of summary judgment was error. REVERSED
19 and REMANDED.
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