

APR 05 2006

NOT FOR PUBLICATION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**

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|-------------------------------|---|-------------------------------|-----------------|
| In re: |) | BAP Nos. | CC-05-1179-PaJK |
| |) | | CC-05-1207-PaJK |
| HEARTBEAT OF THE CITY, |) | | (Consolidated) |
| N.W., INC., |) | | |
| |) | Bk. No. | LA 99-45650-EC |
| Debtor. |) | Adv. No. | LA 01-02307-EC |
| _____ |) | | |
| HOWARD EHRENBERG, Chapter 7 |) | | |
| Trustee, |) | | |
| |) | | |
| Appellant, |) | | |
| |) | | |
| v. |) | MEMORANDUM¹ | |
| |) | | |
| BERT TENZER; HEARTBEAT OF THE |) | | |
| NATION, |) | | |
| |) | | |
| Appellees. |) | | |
| _____ |) | | |

Argued and Submitted on February 23, 2006
at Pasadena, California

Filed - April 5, 2006

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

Honorable Ellen Carroll, Bankruptcy Judge, Presiding.

Before: PAPPAS, JAROSLOVSKY² and KLEIN, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

² Hon. Alan Jaroslovsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

1 Howard Ehrenberg ("Ehrenberg"), the chapter 7³ trustee,
2 appeals two orders of the bankruptcy court entered in an adversary
3 proceeding: (1) Order and Judgment entered in favor of defendant
4 Bert Tenzer ("Tenzer") on May 6, 2005, "that Plaintiff [Ehrenberg]
5 take nothing by way of this complaint against Bert Tenzer"; and
6 (2) Order Denying Motion for Default Judgment against defendant
7 Heartbeat of the Nation ("HBN") entered April 20, 2005.⁴ We
8 AFFIRM.

9 **FACTS**

10 Tenzer is a writer, producer and director of theatrical
11 feature films for television. In 1990, he created a television
12 series called Heartbeat of the City ("HBOC"). HBOC is a series of
13 30-minute "infomercials," i.e., programs created to promote and
14 market products, services and commercial activities of various
15 business, commercial and professional interests and entities. To
16 produce and market HBOC, Tenzer formed a business called Heartbeat
17

18 ³ Unless otherwise indicated, all chapter, section and
19 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
20 1330 and to the Federal Rules of Bankruptcy Procedure, Rules
21 1001-9036, as promulgated and enacted prior to the effective date
of the Bankruptcy Abuse Prevention and Consumer Protection Act of
2005 ("BAPCA"), Pub.L. 109-8, 119 Stat. 23 (Apr. 20, 2005).

22 ⁴ The Clerk issued an Order on July 1, 2005, compelling
23 Ehrenberg to establish BAP jurisdiction in light of the apparent
interlocutory nature of the two orders on appeal. Ehrenberg
24 responded by submitting a copy of an Amended Judgment entered by
the bankruptcy court on July 28, 2005, providing "that the
25 Plaintiff shall take nothing by way of his complaint against
defendants Bert Tenzer and Heartbeat of the Nation and that
26 judgment is hereby entered in favor of defendants Bert Tenzer and
Heartbeat of the Nation." In an order entered September 23, 2005,
27 our motions panel determined that entry of the Amended Judgment
satisfied any finality concerns and consolidated the appeals. As
28 explained below, we agree with the conclusion of the motions
panel.

1 of the City U.S.A., Inc. ("HBOC-USA") and incorporated it in New
2 York.

3 From 1990 to 1997, Tenzer produced and marketed HBOC. In
4 addition to HBOC-USA, Tenzer formed a second company, Heartbeat of
5 the Nation ("HBN"), for the sole purpose of processing the payroll
6 of HBOC-USA. HBOC-USA would deposit funds as needed into an HBN
7 account which HBN then used to meet HBOC-USA's payroll.

8 On December 3, 1997, Tenzer sold all rights to the name and
9 concept of HBOC, and all the assets of HBOC-USA (but not the
10 corporate shell itself), to New World Holding, Inc. ("New World").
11 The December 3, 1997, sales agreement was signed by Tenzer and by
12 Anthony Moulton ("Moulton") as CEO of New World. The purchase
13 price was \$3 million, of which \$2 million was paid immediately and
14 \$1 million was to be paid to Tenzer in deferred monthly payments.
15 The agreement also provided that Tenzer would become an employee
16 for a period of five years and a director of New World, with his
17 compensation solely based on the number of shows he produced in
18 each calendar month, at the rate of \$15,000 for the first show and
19 \$10,000 for each additional show. Tenzer admits that he performed
20 his duties as writer, producer and director of shows until August
21 1999. Among his other duties was training new staff members,
22 which included the New World CFO, Ken McBride ("McBride").

23 Shortly after New World acquired the rights to HBOC, Tenzer
24 dissolved HBOC-USA and allowed HBN to become inactive. Moulton
25 incorporated a new company, Heartbeat of the City, N.W. ("HBOC-
26 NW"), the debtor in this bankruptcy case. HBOC-NW was treated as
27 a subsidiary of New World.

28

1 It is alleged that in 1998 and 1999, Moulton and McBride used
2 HBN for processing the payroll of HBOC-NW. Tenzer contends that
3 he repeatedly demanded that HBOC-NW cease using HBN for payroll
4 purposes.

5 Disputes arose between Tenzer and Moulton. On January 19,
6 1999, Tenzer and Moulton signed a new agreement by which Tenzer
7 resigned as CEO and director of HBOC-NW and New World; Moulton
8 assumed the position of CEO of HBOC-NW and New World in addition
9 to his position as Chairman.⁵ Tenzer became a consultant to the
10 corporations and continued as writer, director and producer of
11 HBOC. As consideration for the January 19 agreement, Tenzer was
12 to be paid all fees, stock acquisition and expenses due to Tenzer
13 from HBOC-NW through January 1999.

14 Tenzer admits receiving a payment of \$120,000 "for current
15 services" on or about February 6, 1999.

16 On March 8, 1999, another agreement was signed by Tenzer and
17 Moulton which provided for a buyout of all existing obligations to
18 Tenzer dating back to the 1997 purchase. Under this agreement,
19 Tenzer was to be paid \$8,000 per month for 46 months in settlement
20 of all amounts due to him for the purchase of his business under
21 the December 1997 purchase agreement. Tenzer was not required to
22 provide any services, nor to assume any continuing duties or
23 obligations to receive these payments. In the event of default in
24 the monthly payments for a period exceeding 45 days, Tenzer had

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26 ⁵ No corporate minutes, resolutions or other records of the
27 corporations identified in this appeal were included in the
28 excerpts of record for this appeal. Thus, there is no record of
when, or if, the corporations ever formally elected Tenzer or
Moulton to these positions. However, from the agreements, it
appears that Tenzer ceased to be an officer and director of HBOC-
NW and New World on January 19, 1999.

1 the right to accelerate all payments with the total amount
2 immediately due and payable. In addition, HBOC-NW, New World and
3 Moulton executed a general release holding Tenzer harmless for any
4 claims, litigation or liability of any kind.

5 Tenzer was not paid according to the terms of the March 1999
6 agreement, and in a July 20, 1999, letter, Gary J. Cohen, Tenzer's
7 attorney, informed Moulton that Tenzer was owed in excess of
8 \$500,000 in connection with the December 1997, January 1999 and
9 March 1999 agreements. The amount allegedly represented the sum
10 of the \$360,000 of accelerated payments of \$8,000 per month for 45
11 months, \$15,000 for five shows at \$3,000 per show, payments of
12 \$150,000 owed for the sale of stock, and attorneys' fees, costs
13 and interest.

14 On August 6, 1999, Tenzer and Moulton executed a Settlement
15 Agreement and Release among New World, HBOC-NW, Moulton as an
16 individual and Tenzer as an individual. Tenzer was to receive
17 \$100,000 in exchange for any claims he might have under the
18 December 1997, January 1999 or March 1999 agreements. Tenzer
19 acknowledged receipt of \$100,000 on or about August 5, 1999 "from
20 Tony Moulton."

21 HBOC-NW filed a chapter 7 bankruptcy petition on September
22 27, 1999. Appellant Howard Ehrenberg was appointed chapter 7
23 trustee.

24 In 2001, Ehrenberg commenced avoidance actions against
25 Moulton, McBride and Tenzer and HBN to recover alleged preferences
26 and fraudulent conveyances. The action against Moulton was
27 dismissed after Moulton moved to Connecticut where he filed his
28 own bankruptcy case. The action against McBride resulted in a

1 \$46,326.93 judgment in favor of Ehrenberg. The adversary
2 proceeding against Tenzer and HBN is the subject of this appeal.

3 The adversary proceeding against Tenzer and HBN was filed on
4 September 21, 2001.⁶ As described in a pre-trial order entered by
5 the bankruptcy court, Ehrenberg sought to avoid three preferential
6 transfers made to or for the benefit of Tenzer: the \$120,000
7 payment of February 6, 1999; the \$100,000 payment of August 5,
8 1999; and a payoff of a certain loan for approximately \$50,000
9 which is not at issue in this appeal. Ehrenberg also sought a
10 default judgment against HBN for an allegedly fraudulent transfer
11 in excess of \$115,000 made by debtor to HBN, arguing that the
12 debtor did not receive reasonably equivalent value for this
13 transfer.

14 The bankruptcy court conducted a one-day trial and,
15 thereafter, the parties submitted closing arguments. The
16 bankruptcy court issued oral findings of fact and conclusions of
17 law on April 19, 2005. It found in favor of Tenzer on all four
18 transfers that Ehrenberg sought to avoid. To implement its
19 decision, the bankruptcy court entered an order denying the motion
20 for default judgment against defendant HBN on April 20, 2005.

21
22 ⁶ Clerk's defaults were originally entered against Tenzer
23 and HBN. When Ehrenberg moved for default judgment, the bankruptcy
24 court dismissed this adversary proceeding along with the remaining
25 HBOC-NW avoidance actions that had been administratively
26 consolidated, because Ehrenberg had failed to file pretrial orders
27 in violation of local bankruptcy rules. Ehrenberg appealed the
28 dismissals to this Panel, which reversed the dismissals and
remanded to reinstate the adversary proceedings. Ehrenberg then
entered into a stipulation with Tenzer and HBN which provided for
setting aside the defaults against them and the filing of an
amended complaint by Ehrenberg. Ehrenberg filed his First Amended
Complaint against Tenzer and HBN on June 30, 2004. Tenzer filed
an Answer, but HBN failed to respond and a clerk's default was
entered.

1 Ehrenberg timely filed a notice of appeal concerning that order on
2 April 29, 2005.

3 An order that "Plaintiff take nothing by way of his complaint
4 against Bert Tenzer and that judgment is hereby entered in favor
5 of defendant Bert Tenzer" was entered on May 9, 2005. Ehrenberg
6 timely appealed that order on May 12, 2005.

7 Then, on July 28, 2005, the bankruptcy court entered an
8 Amended Judgment, providing that "plaintiff shall take nothing by
9 way of his complaint against defendants Bert Tenzer and Heartbeat
10 of the Nation, a California corporation, and that judgment is
11 entered in favor of defendants Bert Tenzer and Heartbeat of the
12 Nation, a California corporation." Ehrenberg appealed this third
13 order on August 9, 2005. On September 23, 2005, our motions panel
14 dismissed the appeal of the Amended Judgment as untimely.

15 Therefore, the Panel has before it the appeals of the
16 bankruptcy court orders of April 20, 2005, and May 9, 2005.

17 **JURISDICTION**

18 The bankruptcy court had jurisdiction over the avoidance
19 action pursuant to 28 U.S.C. § 1334 and § 157(a) and (b) (2) (F) and
20 (H).

21 Tenzer objects to this Panel's jurisdiction on appeal.
22 First, according to Tenzer, the Order Denying Judgment Against
23 Defendant Bert Tenzer, entered May 9, 2005, is not a final order
24 and was superseded when the Amended Judgment was entered on July
25 28, 2005. Once the Amended Judgment was entered, Tenzer argues,
26 the Order Denying Judgment was mooted. According to Tenzer, the
27 Amended Judgment became a final judgment when no appeal was taken
28 by Ehrenberg from that Amended Judgment.

1 Tenzer also argues that the Panel lacks jurisdiction to
2 consider an appeal from the Order Denying Default Judgment Against
3 Defendant Heartbeat of the Nation. He insists it, too, is an
4 interlocutory order.

5 We disagree with Tenzer's arguments. "Rule 54(b) controls
6 the analysis of finality [of judgments and orders] for purposes of
7 appeal in federal civil actions, including bankruptcy adversary
8 proceedings. Fed. R. Civ. P. 54(b), incorporated by Fed. R.
9 Bankr. P. 7054(a)." Belli v. Temkin (In re Belli), 268 B.R. 851,
10 855 (9th Cir. BAP 2001). Rule 54(b) provides that in an action
11 where more than one claim for relief is presented, and multiple
12 parties are involved, the bankruptcy court "may direct the entry
13 of a final judgment as to one or more but fewer than all of the
14 claims or parties only upon express determination that there is no
15 just reason for delay and upon express direction for entry of
16 judgment." There are two primary consequences if this so-called
17 "Rule 54(b) certification" is not present in an order: (1) the
18 order is interlocutory and not appealable as a final order; and
19 (2) the order may be revised by the bankruptcy court at any time
20 before entry of a judgment adjudicating all the claims as to all
21 the parties. Belli, 268 B.R. at 855-56.

22 Here, the bankruptcy court did not certify either of the
23 orders appealed as final for purposes of Rule 54(b), and thus,
24 neither was a final order for purposes of appeal under 28
25 U.S.C. § 158(a). However, as noted above, the Panel previously
26 considered the possible lack of jurisdiction over these appeals.
27 The Panel directed the Clerk to issue an Order to Ehrenberg on
28 July 1, 2005, compelling Ehrenberg to take steps necessary to

1 establish BAP jurisdiction in light of the apparently
2 interlocutory nature of the two orders on appeal. In response,
3 Ehrenberg provided the Panel with a copy of the bankruptcy court's
4 Amended Judgment of July 28, 2005, "that the Plaintiff shall take
5 nothing by way of his complaint against defendants Bert Tenzer and
6 Heartbeat of the Nation and that judgment is hereby entered in
7 favor of defendants Bert Tenzer and Heartbeat of the Nation."

8 Clearly, the July 28 Amended Judgment constitutes a final
9 judgment disposing of all remaining claims against all the parties
10 to this appeal by providing that Ehrenberg "take nothing by way of
11 his complaint against [Tenzer and HBN]." As a result, the prior
12 orders entered by the bankruptcy court became immediately
13 appealable. As the Ninth Circuit has observed in a similar
14 situation, "[a] failure to obtain a Rule 54(b) certification is
15 cured and finality is achieved as a practical matter when the
16 [trial court] has since adjudicated all claims with regard to all
17 parties." TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 695
18 (9th Cir. 2001). In other words, even if the two orders on appeal
19 were not final and appealable before, when the bankruptcy court
20 entered the Amended Judgment, any issues concerning finality of
21 the orders on appeal were resolved.

22 It is also of no consequence here that Ehrenberg did not
23 timely file his notice of appeal after entry of the Amended
24 Judgment. The Ninth Circuit has instructed in a similar setting
25 that any prematurity that may result from appealing a non-final
26 order is cured by the entry of a final judgment on the merits by
27 the trial court. Eastport Assoc. v. City of Los Angeles (In re
28 Eastport Assoc.), 935 Fd.2d 1071, 1075 (9th Cir. 1991). The

1 court explained,

2 Anderson v. Allstate Insurance Co., 630 F.2d
3 677 (9th Cir. 1980) set out the rule in this
4 circuit that once a final judgment is entered,
5 an appeal from an order that otherwise would
6 have been interlocutory is then appealable.
"There is no danger of piecemeal appeal
confronting us if we find jurisdiction here,
for nothing else remains in the federal
courts." Id. at 681.

7 935 F.2d at 1074; see also, Ehtridge v. Harbor House Rest., 861
8 F.2d 1389, 1402 (9th Cir. 1988) (finding jurisdiction because
9 "subsequent events can validate a prematurely filed appeal.")⁷

10 Simply put, the orders of the bankruptcy court are now final
11 and we have jurisdiction to adjudicate Ehrenberg's appeals under
12 28 U.S.C. § 158(a) and (b) (1).

13 STANDARD OF REVIEW

14 The issues on appeal involve whether the source of the two
15 payments Tenzer admits he received was property of the bankruptcy
16 estate of HBOC-NW, and whether the debtor received "reasonably
17 equivalent value" for other funds transferred to HBN.

18 Whether the payments to Tenzer were from property of the
19 debtor for purposes of § 547(b) is a question of fact. The
20 bankruptcy court's findings of fact, whether based on oral or
21 documentary evidence, shall not be set aside unless clearly
22 erroneous. FED. R. BANKR. P. 8013. Leichty v. Neary (In re
23 Strand), 375 F.3d 854, 857 (9th Cir. 2004). Review under the
24 clearly erroneous standard is significantly deferential; to

25
26 ⁷ This approach is consistent with other Rules, albeit not
27 precisely applicable in this setting. Under Rule 8002(a), a
28 premature notice of appeal filed by a party after announcement of
a decision by the bankruptcy court, but before the formal entry of
the judgment or order implementing that decision, is treated as
though filed after entry of such judgment or order.

1 reverse a bankruptcy court's fact finding requires that we hold a
2 "definite and firm conviction that a mistake has been committed."
3 Easley v. Cormartie, 532 U.S. 234, 242 (2001); Lentini v.
4 California Center for the Arts, Escondido, 370 F.3d 837, 843 (9th
5 Cir. 2004).

6 There is no clear statement in the Ninth Circuit case law
7 concerning whether determining if reasonably equivalent value has
8 been given for a transfer for purposes of § 548 is a question of
9 law, subject to de novo review, or a question of fact, subject to
10 the clearly erroneous standard. Eight other circuits,⁸ and the
11 leading treatise,⁹ consider the issue a question of fact.

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14 ⁸ Tex. Truck Ins. Agency v. Cure (In re Dunham), 110 F.3d
15 286, 288-89 (5th Cir. 1997) offered the following survey of
16 circuit cases determining whether reasonable equivalency is a
17 question of law, subject to de novo review, or a question of fact:
18 Consove v. Cohen (In re Roco Corp.), 701 F.2d 978, 982 (1st Cir.
19 1983) (factual issue to be reviewed for clear error); Klein v.
20 Tabatchnick & Emmer, 610 F.2d 1043, 1047 (2nd Cir. 1979) (fairness
21 of consideration is generally a question of fact); Morrison v.
22 Champion Credit Corp. (In re Dewey Barefoot), 952 F.2d 795, 800
23 (4th Cir. 1991) (factual determination that can only be set aside
24 if clearly erroneous); Bundles v. Baker (In re Bundles), 856 F.2d
815, 825 (7th Cir. 1988) (great deference to the district court);
Jacoway v. Anderson (In re Ozark Rest. Equip. Co., Inc.), 850 F.2d
342, 344 (8th Cir. 1988) (question of fact reversible only if
clearly erroneous); Clark v. Sec. Pac. Bus. Credit, Inc. (In re
Wes Dor, Inc.), 996 F.2d 237 (10th Cir. 1993) (suggesting fact
question); and Nordberg v. Arab Banking Corp. (In re Chase &
Sandborn Corp.), 904 F.2d 588, 593 (11th Cir. 1990) (fair
consideration is largely a question of fact). The Dunham court
noted that in the Ninth Circuit, according to Prejean, reasonable
equivalency is subject to de novo review.

25 ⁹ Whether the transfer is for "reasonably equivalent value"
26 in every case is largely a question of fact as to which
27 considerable latitude must be allowed to the trier of facts."
28 5 COLLIER ON BANKRUPTCY ¶ 548.05[1][b], pg. 548-35 (15th ed. Rev.
2000); see also, Salven v. Munday (In re Kemmer), 265 B.R. 224,
232 (Bankr. E.D. Cal. 2001) ("In order to determine whether a fair
economic exchange has occurred, the court must analyze all the
circumstances surrounding the transfer in question.").

1 In a slightly different context, the Ninth Circuit seemed to
2 analyze the reasonable equivalence of a transfer in a bankruptcy
3 case as a question of law. Maddox v. Robertson (In re Prejean),
4 994 F.2d 706, 708 (9th Cir. 1993). In Prejean, the court
5 determined that a transfer of security by a debtor to a sibling to
6 secure a "time-barred" debt constituted reasonably equivalent
7 value for purposes of the California fraudulent conveyance laws,
8 invoked in a trustee's avoidance action under § 544(b). The court
9 decided that "moral consideration" could constitute reasonably
10 equivalent value and that the bankruptcy court's refusal to avoid
11 the transfer was proper. The court described the issues raised in
12 the appeal as "legal ones," and the standard of review as de novo,
13 although, for authority, the court cited to its decision in a
14 § 523(a)(2) action. Prejean, 994 F.2d at 708 (citing Siriani v.
15 Nw. Nat. Ins. Co., of Milwaukee, Wisc. (In re Siriani), 967 F.2d
16 302, 303-304 (9th Cir. 1992).

17 The Panel notes that the language of the California and
18 federal bankruptcy fraudulent conveyance statutes are similar, and
19 we acknowledge Prejean's statement that "[t]he issues now in
20 dispute are legal ones" and that one of the issues considered in
21 that appeal was the propriety of the bankruptcy court's
22 determination of reasonable equivalent value for a transfer.
23 Nevertheless, under the overwhelming weight of authority, we
24 presume the Court of Appeals for the Ninth Circuit would consider
25 the bankruptcy court's ruling under § 548 on reasonably equivalent
26 value of a transfer to be a question of fact subject to review
27 under the clearly erroneous standard.

28

1 **ISSUES PRESENTED**

- 2 1. Did the bankruptcy court clearly err in finding that
3 Ehrenberg failed to prove that the payments to Tenzer of
4 \$120,000 on February 6, 1999, and of \$100,000 on August 5,
5 1999, were transfers of property of the debtor?
6 2. Did the bankruptcy court clearly err in finding that
7 reasonably equivalent value was given to debtor in exchange
8 for the funds transferred to HBN?

9 **DISCUSSION**

10 1. The bankruptcy court did not clearly err in declining to
11 find that the transfers to Tenzer were made from property of the
12 debtor.

13 Section 547(b) provides that a trustee may avoid a transfer
14 of an interest of the debtor in property that meets these
15 elements:

- 16 (1) to or for the benefit of a creditor;
17 (2) for or on account of an antecedent debt
owed by the debtor before such transfer was
made;
18 (3) made while the debtor was insolvent;
19 (4) made -
(A) on or within 90 days before the
20 filing of the petition;
or
(B) between ninety days and one year
21 before the filing of the petition, if such
creditor at the time of such transfer was an
22 insider; and
(5) that enables such creditor to receive more
23 than such creditor would receive if:
(A) the case were a case under chapter 7
24 of this title;
(B) the transfer had not been made; and
25 (C) such creditor received payment of such
debt to the extent provided by the provisions
26 of this title.

27 Section 547(g) assigns the burden of proving these elements
28 to the trustee. And each and every one must be proven before a

1 transfer may be avoided as a preference. Danning v. Bozak (In re
2 Bullion Reserve of N. Am.), 836 F.2d 1214, 1217 (9th Cir. 1988).
3 The burden of proof standard in preference actions is a
4 preponderance of the evidence. Arrow Elecs., Inc. v. Justus (In
5 re Kaypro), 218 F.3d 1070, 1073 (9th Cir. 2000).¹⁰ The converse of
6 these rules is equally apparent: a failure to prove any element of
7 a preference will doom a trustee's avoidance claim.

8 When the bankruptcy court evaluated Ehrenberg's two
9 preference claims against these standards, the court found
10 Ehrenberg failed to prove an essential element: that the
11 transfers in question were made from property of the debtor
12 corporation.

13 To show that a transfer of property of the debtor had
14 occurred, Ehrenberg directed the bankruptcy court's attention to
15 the testimony of Tenzer at trial, where the following exchange
16 occurred between Tenzer and Ehrenberg's counsel:

17 Counsel: Okay. Did, did you receive other
checks from debtor?
18 Tenzer: No.
Counsel: You never received any other checks
19 from debtor?
Tenzer: I received the two that we are
20 talking about, and there might have
been a few expense checks.
21 Counsel: So the two checks that we are
talking about, the hundred thousand
22

23 ¹⁰ Ehrenberg suggests that the bankruptcy court appeared to
24 apply a higher standard of proof than appropriate in both the
preference and fraudulent transfer actions. We disagree.
25 Although the bankruptcy judge did not expressly recite the
standard of proof she applied in making her decisions, we conclude
26 that her approach was consistent with a preponderance of the
evidence review, i.e., sufficient evidence to persuade a
reasonable trier of fact that the proposition being advanced is
27 more likely true than not. See U.S. v. Arnold & Baker Farms (In
re Arnold & Baker Farms), 177 B.R. 648, 654 (9th Cir. BAP 1994),
28 aff'd 85 F.3d 1415 (9th Cir. 1996).

1 dollar (\$100,000) check and the
2 hundred and twenty thousand dollar
3 check (\$120,000) are the only checks
4 you received from debtor?
5 Tenzer: Other than, as I say, there might
6 have been expense checks.

7 Trial Tr. 84:15-25 - 85:1, April 8, 2005. Ehrenberg also cited to
8 other portions of Tenzer's testimony and to his responses to
9 interrogatories where it would appear that Tenzer impliedly
10 supported Ehrenberg's argument that the checks he received for the
11 payments in question came from the debtor.

12 Contrary to Ehrenberg's arguments, the bankruptcy court found
13 Tenzer's testimony and responses to interrogatories "inconclusive"
14 concerning whether the funds used to pay Tenzer were property of
15 the estate. For example, the court compared the answers given by
16 Tenzer on direct examination by Ehrenberg's attorney in the
17 exchange cited above with his later testimony in response to
18 questions from Tenzer's own attorney on cross-examination:

19 Counsel: Okay. Did you in fact receive the
20 checks [for \$120,000 and \$100,000]
21 from debtor?
22 Tenzer: I received the checks, period.
23 Counsel: But, but, but any part of that -
24 Tenzer: I - the, the - I did not - had not
25 [sic] knowledge that it was from the
26 debtor.

27 Trial Tr. 109:20-24, April 8, 2005. The court considered the two
28 statements by Tenzer contradictory, and therefore, of little
29 value.

30 The bankruptcy court also examined the interrogatory
31 responses relied upon by Ehrenberg. It noted that the questions
32 asked to Tenzer were general and grouped payments together. As a
33 result, the court observed that, in his responses, Tenzer seemed

1 to focus less on the source of the payment than on the fact that
2 the payments were for services rendered. On the other hand, where
3 payments were referred to specifically, as in those
4 interrogatories focusing specifically on the \$120,000 or \$100,000
5 checks, the court noted that "there is no place that Mr. Tenzer
6 admits that he received a particular payment from the debtor and,
7 in several places in the testimony throughout the trial, as I
8 mentioned, stated that they had come from Mr. Moulton." Trial Tr.
9 6:8-11, April 19, 2005.

10 The bankruptcy court considered other aspects of the evidence
11 regarding the source of the \$120,000 and \$100,000 checks. One
12 issue concerned the bank that issued the checks. Although there
13 was no dispute that the checks were drawn on Chase Bank, the
14 bankruptcy court noted that because they were cashier's checks,
15 the funds used to purchase the checks could not be traced to any
16 particular account. Ehrenberg had been unable to obtain Chase
17 Bank records concerning these cashier's checks without knowing a
18 bank account number or location where the transactions might have
19 taken place.

20 The bankruptcy court pointed out that Ehrenberg had listed
21 both Moulton, who was the CEO of the debtor, and McBride, the
22 debtor's CFO, as potential witnesses, and that those two
23 individuals would presumably have knowledge of how and when the
24 two checks were obtained and the source of the funds. The court
25 found it significant that Ehrenberg neither summoned them to
26 testify, nor attempted to take their depositions, concerning these
27 critical issues.

28

1 Ehrenberg asked the bankruptcy court to infer that the funds
2 to purchase the checks were funded by debtor's assets because
3 debtor had a bank account at Chase, and there were sufficient
4 funds in the account to pay those checks on the dates they were
5 drawn. On the other hand, the court found that there was some
6 evidence that Moulton also had an account at Chase. Further, the
7 bankruptcy court observed that the only financial records
8 presented concerning the debtor's financial affairs in 1998 and
9 1999 showed that the debtor had \$2,400,000 in income in 1998 and
10 \$625,000 in income in 1999. The court found that having gross
11 annual income in those amounts did not necessarily establish that
12 in January 1999 the debtor had cash available to purchase a
13 \$120,000 check or in November 1999 that it had cash available to
14 purchase the \$100,000 check.

15 For all these reasons - Tenzer's arguably contradictory
16 testimony and vague responses to interrogatories; Ehrenberg's
17 failure to trace source funds of the checks to the debtor via bank
18 records; Ehrenberg's failure to call at trial or to depose the two
19 individuals most knowledgeable about the finances of the debtor
20 and the debtor's banking practice; and Ehrenberg's failure to
21 establish that the debtor had sufficient funds to purchase the
22 checks - the bankruptcy court concluded that Ehrenberg had not met
23 his burden of proving that the \$120,000 and \$100,000 checks to
24 Tenzer were transfers of property of the estate. On this record,
25 we cannot say the bankruptcy court committed clear error in this
26 regard. Instead, it appears the bankruptcy court applied the
27 correct legal standard in evaluating the preference claims, and it
28 supported its conclusion that no preference has been proven with

1 adequate findings of fact stated on the record.¹¹ While the
2 inferences sought by Ehrenberg may have been justified if drawn,
3 we are not persuaded that the bankruptcy court was required to
4 draw them as a matter of law. The decision by the bankruptcy
5 court to deny Ehrenberg's preference claims against Tenzer must
6 therefore be affirmed.

7
8 2. The bankruptcy court did not commit clear error in declining
9 to find that less than reasonably equivalent value was given to
10 debtor in exchange for funds transferred to HBN.

11 As a preliminary matter, we note the following paragraph in
12 Ehrenberg's Opening Brief regarding the fraudulent transfer claim:

13 In order to secure a Default Judgment against
14 Defendant Heartbeat of the Nation, Trustee
15 Ehrenberg's burden of proof was to state a
16 prima facia [sic] case that the transfer to
17 Defendant HBN was a fraudulent conveyance
18 under either State or Federal Law. This
19 required a showing that (a) a transfer was
20 made, (b) at a time when Debtor was insolvent,
21 (c) for less than adequate consideration.
22 See, CALIFORNIA CODE OF CIVIL PROCEDURE § 3439 and
23 11 U.S.C. § 548.

19 Ehrenberg never asserted a claim for avoidance of the
20 transfer from debtor to HBN under the California Uniform
21 Fraudulent Conveyance Act and his powers under § 544(b) in the
22 bankruptcy court. As a result, he can not now, for the first
23 time, argue such a claim on appeal.¹² Zenith Prods. v. AEG

24
25 ¹¹ As noted earlier, the bankruptcy court's rejection of a
26 third preference claim for payment of a \$50,000 debt on behalf of
27 Tenzer was not challenged in Ehrenberg's appeal.

27 ¹² Even were it possible for Ehrenberg to raise this new
28 claim at this late stage of the proceedings, we note that
(continued...)

1 Acquisition Corp. (In re AEG Acquisition Corp.), 161 B.R. 50 (9th
2 Cir. BAP 1993), citing U.S. v. Oregon, 769 F.2d 1410, 1414 (9th
3 Cir. 1985).¹³ And because Ehrenberg has not properly presented to
4 the bankruptcy court a fraudulent conveyance claim based on state
5 law, Ehrenberg cannot invoke the California rule that the burden
6 of proof shifts to the transferee once a showing has been made
7 that the debtor was insolvent when the transfer was made.
8 See Mayors v. Comm'r, 785 F.3d 756, 760 (9th Cir. 1986).

9 Ehrenberg also does not clearly indicate whether he seeks
10 avoidance of the transfer in question under § 548(a)(1)(A) or
11 (a)(1)(B). Because he never sought to establish in the bankruptcy
12 court that debtor made this transfer with the intent to hinder,
13 delay or defraud its creditors, and by focusing his argument on
14 "reasonably equivalent value," we assume that Ehrenberg is
15 proceeding under § 548(a)(1)(B), the subsection governing
16 constructive fraudulent transfers.

17 To avoid a constructive fraudulent transfer, Ehrenberg must
18 prove each and every one of the elements of § 548(a)(1)(B) by a
19 preponderance of the evidence:

20 _____
21 ¹²(...continued)

22 Ehrenberg failed to plead or prove an essential element of
23 a § 544(b)(1) claim in the bankruptcy court, (i.e., the existence
of an unsecured creditor holding an allowed claim who could avoid
the transfer).

24 ¹³ In Zenith Prods., this Panel noted that it might consider
25 entertaining a new issue on appeal under "extraordinary
26 circumstances." Zenith Prods., 161 B.R. at 55-56. The Panel and
the Ninth Circuit, however, are extremely reluctant to consider
27 new issues on appeal where the issue does not involve a "pure"
question of law. Id. at 56, citing Telco Leasing, Inc. v.
28 Transwestern Title Co., 630 F.2d 691, 692 (9th Cir. 1980). The
new issue here, an assertion of a claim for avoidance under state
law, is not a pure question of law.

1 The trustee may avoid any transfer of an
2 interest of the debtor in property, or any
3 obligation incurred by the debtor, that was
4 made or incurred on or within one year before
5 the filing of the petition, if the debtor
6 voluntarily or involuntarily . . .

7 (B) (i) received less than reasonably
8 equivalent value in exchange for such transfer
9 or obligation; and

10 (ii) (I) was insolvent on the date that such
11 transfer was made or such obligation was
12 incurred, or became insolvent as a result of
13 such transfer or obligation;

14 (II) was engaged in business or a transaction,
15 or was about to engage in business or a
16 transaction, for which any property remaining
17 with the debtor was an unreasonably small
18 capital; or

19 (III) intended to incur, or believed that the
20 debtor would incur, debts that would be beyond
21 the debtor's ability to pay as such debts
22 matured.

23 The trustee must show that the debtor received less than
24 reasonably equivalent value for the transfer. See Field v. United
25 States (In re Abatement Env'tl. Res., Inc.), 102 Fed. Appx. 272
26 (4th Cir. 2004); Mellon Bank, N.A. v. Metro. Commc'ns, Inc., 945
27 F.2d 655 (3rd Cir. 1991); CLC Corp. v. Citizens Bank of Cookville,
28 Tenn. (In re CLC Corp.), 833 F.2d 1011 (6th Cir. 1987). See also
5 COLLIER ON BANKRUPTCY ¶ 548.10 (2005).

6 The bankruptcy court did not address whether Ehrenberg
7 established all of the elements for avoidance of the transfer
8 under § 548(a)(1)(B).¹⁴ As it had done in its preference analysis,

9 ¹⁴ One key element of Ehrenberg's claim, that property of the
10 debtor was transferred from debtor to HBN, was admitted by the
11 parties. Although not mentioned in the bankruptcy court's
12 findings of fact, the deposition testimony of attorney Parker was
13 that she had reviewed the books and records of the debtor and they
14 showed that at least \$115,000 was transferred from HBOC-NW to HBN

(continued...)

1 the court concentrated on one of the required elements, and
2 finding Ehrenberg's proof lacking, the court denied the avoidance
3 claim. In particular, the bankruptcy court found Ehrenberg failed
4 to prove that the debtor received less than reasonably equivalent
5 value in exchange for the transfer in question. The court's
6 decision on this issue centered on whether there was proof that
7 the money transferred by debtor to HBN was used to make payroll
8 payments for debtor's employees, or whether the funds were used
9 for some other purpose, such as that alleged by Ehrenberg, to
10 benefit Tenzer.

11 Ehrenberg asserts in his Opening Brief that:

12 During pretrial discovery, as well as during
13 trial, Trustee Ehrenberg solicited evidence
14 from Defendant Tenzer, the sole officer,
15 director, and shareholder of Defendant HBN, in
16 support of Defendant Tenzer's allegation that
17 the \$126,338.00 transfer was used to pay wages
18 to individuals who rendered services for the
19 benefit of Debtor. Defendant Tenzer, however,
20 failed to produce any evidence to support this
21 claim. The only evidence presented by
22 Defendant Tenzer consisted of Defendant
23 Tenzer's Trial Exhibit I, a 1999 Tax Return,
24 which showed that HBN paid out \$126,338.00 in
25 wages in 1999. This tax return, however,
26 contains no evidence to whom those wages were
27 paid, or more specifically as was actually
28 required, evidence that these individuals
actually rendered services to or for the
benefit of Debtor. Note, the W-3s attached to
Defendant Tenzer's Trial Exhibit I, the 1999
Tax Return, were actually W-3s for the Tax
Year 1998.

24 The only evidence before the bankruptcy court concerning the
25 reasonable equivalence of the benefits or services received by

26 _____
27 ¹⁴(...continued)
28 in 1999. And Tenzer admitted that HBN received payroll funds from
HBOC-NW in 1999, and he had records showing who was paid with
those funds.

1 debtor in return for the funds transferred to HBN was: (1) the
2 testimony of Tenzer that the funds were intended for, and used
3 for, payment of debtor's payroll; (2) a tax return showing that
4 the payroll expenses on the tax return were approximately equal to
5 the amounts transferred by the debtor to HBN; (3) W-3 forms
6 attached to the tax return; (4) testimony of Mr. Firewalker, a
7 former employee of Debtor, who looked through the W-3 forms and
8 testified that they were for debtor's employees. Firewalker
9 testified that he recognized the names of the employees listed in
10 the returns because he had hired many of them for the debtor.

11 Ehrenberg argued that Tenzer and HBN failed to produce any
12 evidence to support its claim that \$126,338.00 transferred to HBN
13 was actually used to pay wages for HBOC-NW's staff. Ehrenberg
14 also noted that the W-3 forms attached to the tax return were for
15 the incorrect year. Finally, Ehrenberg argued that since Tenzer
16 had control of the tax records of HBN, his failure to produce
17 correct documentation concerning disposition of the transferred
18 funds should result in an adverse inference that the debtor
19 received no benefit from that transfer.

20 Ehrenberg's arguments are unavailing for the same reason:
21 they each assume it was Tenzer/HBN's burden to show the funds were
22 used to pay debtor's payroll, when instead, it was Ehrenberg's
23 burden to prove the funds were committed to some other use (i.e.,
24 to benefit Tenzer) for which debtor received no reasonably
25 equivalent value. While the evidence is not particularly
26 enlightening concerning the circumstances surrounding this
27 transfer, and there was some evidence that the funds, when
28 transferred to HBN, may not have been used to make payroll

1 payments, there was also evidence adduced at trial from which it
2 could be inferred that the money was indeed distributed by HBN for
3 debtor's payroll.

4 The bankruptcy court noted that Tenzer had historically used
5 HBN for purposes of making payroll payments, and that after Tenzer
6 sold the company, Moulton and his associates continued this
7 practice, something which Tenzer demanded they stop. During this
8 period, Tenzer had no control over the payroll account.

9 The bankruptcy court was also unpersuaded by Ehrenberg's tax
10 return evidence:

11 So the trustee wants the Court to make
12 inferences that because the wrong W-2's were
13 attached to the tax return any money that
14 actually was paid by the debtor Heartbeat of
15 the Nation must have gone to Mr. Tenzer, a
16 former Officer and Director of Heartbeat of
17 the Nation, and must have been paid for his
18 benefit. There is a complete failure of
evidence on this issue, and the trustee who
has the burden of proof here has not met it,
has not called any of the witnesses who could
have shed some light on the problem with the
tax return. And for that reason, I'm going to
find in favor of the - - Mr. Tenzer on this
claim as well.

19 Trial Tr. 21:3-13, April 19, 2005.

20 Again, it was Ehrenberg's burden to prove that debtor did not
21 receive reasonably equivalent value for the money transferred from
22 debtor to HBN. Instead, the bankruptcy court found: "I don't
23 think the trustee has established that there was a fraudulent
24 conveyance, that any benefit was given to Mr. Tenzer for anything
25 . . . less than fair value." Trial Tr., 22:9-12, April 19, 2005).

26 While the bankruptcy court might have inferred from the
27 evidence that the money transferred to HBN by the debtor was not
28 used to make payroll payments to the debtor's employees, the court

1 was not compelled to draw such an inference. In contrast, there
2 was evidence in the record from which the bankruptcy court could
3 infer that the funds in question were in fact used for payroll
4 payments for the debtor. Because there were two plausible
5 interpretations of the evidence, the bankruptcy court's finding
6 that Ehrenberg failed to prove that debtor received less than
7 reasonably equivalent value for funds transferred is not clearly
8 erroneous. S.E.C. v. Rubera, 350 F.3d 1084, 1093-94 (9th Cir.
9 2003) ("So long as the district court's view of the evidence is
10 plausible in light of the record viewed in its entirety, it cannot
11 be clearly erroneous, even if the reviewing court would have
12 weighed the evidence differently had it sat as the trier of
13 fact.").

14 **CONCLUSION**

15 For these reasons, we AFFIRM the decision of the bankruptcy
16 court in all respects.

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