

APR 11 2013

NOT FOR PUBLICATION

SUSAN M SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No. EC-12-1379-DJuMk
		)	
6	FRANCISCO LUJAN GARCIA and	)	Bk. No. 08-14334
	LIDUVINA GARCIA GARCIA,	)	
7		)	Adv. No. 09-01104
	Debtors.	)	
8	_____	)	
		)	
9	J. TONY SERRA,	)	
		)	
10	Appellant,	)	
		)	
11	v.	)	<b>M E M O R A N D U M<sup>1</sup></b>
		)	
12	JAMES E. SALVEN,	)	
	Chapter 7 Trustee,	)	
13		)	
	Appellee.	)	
14	_____	)	

Submitted without Oral Argument  
on March 22, 2013

Filed - April 11, 2013

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

Honorable W. Richard Lee, Bankruptcy Judge, Presiding

Appearances: Appellant J. Tony Serra, pro se, on brief; Trudi  
G. Manfredo, Esq. on brief for Appellee.

Before: DUNN, JURY and MARKELL, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8013-1.

1           Shortly before filing their chapter 7 bankruptcy petition,  
2 Francisco Lujan and Liduvina Garcia Garcia ("debtors") paid  
3 appellant, J. Tony Serra ("Serra"), in advance for his  
4 representation of their son in a criminal case.<sup>2</sup> The chapter 7  
5 trustee ("Trustee") initiated an adversary proceeding against  
6 Serra seeking to avoid the payment as a fraudulent transfer under  
7 § 548(a)(1)(B). The bankruptcy court ruled in the Trustee's  
8 favor, finding that he met his burden of proof under  
9 § 548(a)(1)(B).

10           On appeal, Serra challenges only the bankruptcy court's  
11 determinations as to whether the funds used to pay him were the  
12 debtors' property and whether the debtors received "reasonably  
13 equivalent value" for the transfer to Serra. We AFFIRM.  
14

15   **FACTS**<sup>3</sup>  
16

17           On May 1, 2008, the debtors' son, Miguel Angel Garcia, was  
18 booked into Madera County jail on an attempted murder charge. On  
19 May 15, 2008, the debtors paid \$30,000 ("funds") to Serra, an  
20 experienced criminal attorney, on their son's behalf to represent  
21 him in the criminal case. The debtors paid Serra by personal  
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23  
24

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25           <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

28           <sup>3</sup> We have taken most of the facts from the memorandum  
decisions of the bankruptcy court and the district court.

1 check from their joint bank account ("transfer").<sup>4</sup> Serra cashed  
2 the check the next day. He later acknowledged in a letter, dated  
3 August 28, 2008, that he received the check from the debtors  
4 ("receipt letter").

5 The debtors filed their chapter 7 bankruptcy petition on  
6 July 22, 2008. They did not disclose the transfer in their  
7 statement of financial affairs ("SOFA") or their schedules.

8 The debtors later amended their SOFA to disclose the  
9 transfer ("amended SOFA"). They listed the transfer date as  
10 May 16, 2008, and Serra as the transferee. They also stated the  
11 following:

12 Debtors' son, Miguel Angel Garcia, was charged with a  
13 crime. Friends and family entrusted Debtors with  
14 approximately \$29,000.00 to pay criminal defense  
15 attorney, J. Tony Serra, on son's behalf.

16 Approx. \$1,000.00 was transferred from son, Miguel  
17 Angel Garcia, to debtors, to also pay attorney J. Tony  
18 Serra.

19 Total for attorney fees was \$30,000. NO VALUE  
20 RECEIVED.

21 Notably, the debtors did not amend their schedules to list  
22 as creditors the friends and family members who allegedly  
23 contributed portions of the funds.

24 The Trustee is the duly appointed trustee in the debtors'  
25 chapter 7 case. He initiated an adversary proceeding against  
26 Serra by filing a complaint to avoid the transfer under  
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28 <sup>4</sup> Both of the debtors' names appeared on the check, along  
with their home address.

1 §§ 548 and 550<sup>5</sup> and to order Serra to turn over the transfer  
2 under § 542 ("complaint").<sup>6</sup> Representing himself, Serra answered  
3 the complaint with a general denial.

4 The Trustee later moved for summary judgment ("summary  
5 judgment motion"). He argued that no genuine issues of material  
6 fact existed because all of the elements to avoid the transfer  
7 under §§ 548 and 550 had been met. To buttress his summary  
8 judgment arguments, the Trustee pointed out that he sent Serra a  
9 request for admissions ("admissions request"). In the admissions  
10 request, he asked Serra to confirm the check's authenticity, the  
11 date and the amount of the transfer and the purpose of the  
12 transfer. The Trustee contended that the admissions request was  
13 deemed admitted when Serra failed to respond.

14 Serra did not answer the summary judgment motion but instead  
15 filed his own motion for summary judgment ("cross-motion"),  
16 asserting two affirmative defenses. First, he contended that the  
17 good faith exception under § 550(b)(1) applied.<sup>7</sup> Second, Serra  
18 argued that the debtors did receive reasonably equivalent value  
19 for the transfer in the form of their son's love, satisfaction

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21 <sup>5</sup> In the complaint, the Trustee did not cite the specific  
22 subsection of § 548 under which he sought to avoid the transfer.  
23 He did enumerate, however, all of the elements under  
§ 548(a)(1)(B).

24 <sup>6</sup> The Trustee originally sought to avoid the transfer under  
25 §§ 544, 548 and 550. But in his summary judgment motion, he  
sought to avoid the transfer under §§ 548 and 550 only.

26 <sup>7</sup> Under § 550(b)(1), a trustee cannot recover from a  
27 secondary or subsequent transferee any funds taken by such  
28 transferee in good faith and without knowledge of the voidability  
of the transfer to the initial transferee.

1 that they performed their moral and familial duties, and a  
2 "heightened self-esteem" brought about by increased respect from  
3 family and friends for their sacrifice.

4 The Trustee opposed the cross-motion, contending that the  
5 good faith exception under § 550(b)(1) did not apply because  
6 Serra was the initial transferee. He also pointed out various  
7 procedural defects, including Serra's failure to provide a  
8 statement of undisputed facts and to serve a notice of hearing  
9 with the cross-motion.

10 On November 18, 2009, the bankruptcy court held a hearing on  
11 the summary judgment motion and cross-motion ("summary judgment  
12 hearing").<sup>8</sup> Serra did not appear personally at the summary  
13 judgment hearing, but had another non-bankruptcy attorney appear  
14 on his behalf.<sup>9</sup> Serra's attorney requested that the bankruptcy  
15 court continue the summary judgment hearing to allow Serra to  
16 find a bankruptcy attorney and to file a response to the summary  
17 judgment motion. Tr. of November 18, 2009 hr'g, 6:19-23,  
18 7:23-25. The bankruptcy court denied Serra's request for a  
19 continuance of the summary judgment hearing. Tr. of November 18,  
20 2009, 8:17.

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21  
22 <sup>8</sup> Neither the Trustee nor Serra provided a copy of the  
23 transcript of the summary judgment hearing. We reviewed a copy  
24 from the bankruptcy court's electronic adversary proceeding  
25 docket. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert,  
Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989)(the BAP may take  
judicial notice of underlying bankruptcy records).

26 <sup>9</sup> Serra initially represented himself but later had two non-  
27 bankruptcy attorneys represent him. The bankruptcy court  
28 repeatedly advised Serra over the course of the adversary  
proceeding that he needed a bankruptcy attorney to represent him.

1           The bankruptcy court also denied the cross-motion "as being  
2 in improper form and not supported by evidence." Tr. of  
3 November 18, 2009 hr'g, 4:21-23. It further noted that the  
4 cross-motion had not been served with a notice of hearing. Tr.  
5 of November 18, 2009 hr'g, 4:23.

6           The bankruptcy court went on to grant the Trustee's summary  
7 judgment motion concluding that no triable issues of material  
8 fact existed. It determined that the debtors made the transfer  
9 two months prepetition. The bankruptcy court also determined  
10 that the debtors did not receive consideration for the transfer,  
11 i.e., that they did not "receive[] anything in return that  
12 enhanced the bankruptcy estate." Tr. of November 18, 2009 hr'g,  
13 8:24-25. It acknowledged that though the debtors "were trying in  
14 good faith to help their son . . . the measure of consideration  
15 here [under § 548 was] not good will and good feelings . . . it  
16 [was] whether the estate received anything back of value that  
17 could be used to pay creditors." Tr. of November 18, 2009 hr'g,  
18 9:11-16. It also determined that the debtors were insolvent at  
19 the time they made the transfer: that there was "substantially  
20 more debt when they filed bankruptcy than they have assets and no  
21 evidence of anything that would cause the decrease in the assets  
22 in the two months prior to the filing of the bankruptcy." Tr. of  
23 November 18, 2009 hr'g, 9:4-7.

24           Serra appealed to the district court, which affirmed the  
25 bankruptcy court on all but one of its determinations. The  
26 district court found that the bankruptcy court did not rule on  
27 the issue of whether the funds were the debtors' property. The  
28 district court concluded that it was unclear "whether the

1 [Trustee] established this element pursuant to summary judgment  
2 standards, and whether the bankruptcy court considered the  
3 evidence in the record." Order on Bankruptcy Appeal, 17:7-9.  
4 The district court remanded that single issue to the bankruptcy  
5 court for its determination.

6 The bankruptcy court held a trial on the remanded issue on  
7 June 1, 2012. Two days before the trial, Serra filed a document  
8 titled, "Defendant's Submission." In it, he advised the  
9 bankruptcy court that he waived both his appearance at and  
10 participation in the trial.<sup>10</sup>

11 Counsel for the Trustee appeared at the trial, but Serra did  
12 not. At the outset of the trial, the bankruptcy court noted that  
13 Serra had waived his appearance at and participation in the  
14 trial. Tr. of June 1, 2012 hr'g, 3:13-22.

15 The Trustee's counsel requested that the bankruptcy court  
16 enter all of the Trustee's exhibits as evidence, including copies  
17 of the check, the receipt letter and the debtors' bankruptcy  
18 schedules. Tr. of June 1, 2012 hr'g, 4:9-20. The bankruptcy  
19 court admitted all of the exhibits into evidence with no  
20 opposition from Serra. Tr. of June 1, 2012 hr'g, 4:19-20.

21 At the close of argument, the bankruptcy court pointed out  
22 that Serra did not provide any evidence regarding the  
23 contributions made by the debtors' friends and family to the  
24

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25 <sup>10</sup> Serra also advised the bankruptcy court that he intended  
26 to appeal the district court's decision. He made good on his  
27 intent, filing a notice of appeal on October 24, 2011. The Ninth  
28 Circuit dismissed his appeal for lack of jurisdiction on the  
ground that the district court's decision was not a final  
judgment under 28 U.S.C. § 1291.

1 funds; no evidence was given "as to when that was done, when it  
2 was put in [the debtors'] account, how long it was there, whether  
3 it was commingled with other money." Tr. of June 1, 2012 hr'g,  
4 8:1-3. The bankruptcy court stressed that it was "not prepared  
5 to find, based on that representation alone, that the debtors  
6 were just a conduit for this money." Tr. of June 1, 2012 hr'g,  
7 8:4-6. It found that the check was the debtors' property. Tr.  
8 of June 1, 2012 hr'g, 8:17-18. It thus ruled in the Trustee's  
9 favor. Tr. of June 1, 2012 hr'g, 8:22.

10 The bankruptcy court issued a minute order requiring the  
11 Trustee to submit factual findings and legal conclusions by  
12 June 14, 2012. Civil Minute Order. It allowed Serra until  
13 June 21, 2012, to file an opposition. Id.

14 Serra timely filed his opposition, arguing that the evidence  
15 did not support the bankruptcy court's ruling. Defendant's  
16 Objection to Court's Ruling of June 1, 2012. He contended that  
17 the sole issue before the bankruptcy court was whether the  
18 debtors were a conduit for the funds paid to him. Serra argued  
19 that the check did not address this issue; no evidence had been  
20 presented as to "the origin of [the funds;] whether it was  
21 provided by others; whether it was a loan to Debtors; when it was  
22 put into the account[;] whether it was derived from multiple  
23 deposits, and from multiple checks from others." Defendant's  
24 Objection to Court's Ruling of June 1, 2012, 2:4-7. He further  
25 noted that the debtors had not been examined. Defendant's  
26 Objection to Court's Ruling of June 1, 2012, 2:7-8.

27 The bankruptcy court issued its memorandum decision on  
28 July 17, 2012. It found that the Trustee met his burden in



1 demonstrating that the funds were the debtors' property. It  
2 determined that the evidence showed that the debtors wrote a  
3 personal check in the amount of \$30,000, payable to Serra from  
4 their joint bank account. It further noted that Serra had  
5 acknowledged in the receipt letter that the check came directly  
6 from the debtors.

7 The bankruptcy court reasoned that because the debtors'  
8 names appeared on the check,

9 it follow[ed] that Debtors had control over the  
10 associated bank account along with any funds in that  
11 account, including the \$30,000 that was later  
12 transferred. Given this control, the Debtors  
13 presumably had an ownership interest in the funds  
located in their bank account immediately before the  
Debtors transferred them to Serra via a personal check.  
[Citation omitted].

14 Memorandum Decision after Trial, 5:21-25.

15 It noted that Serra did not introduce any evidence  
16 "rebutting this presumption and showing that the \$30,000 can be  
17 traced to another source other than from the Debtors."

18 Memorandum Decision after Trial, 6:2-3. Because he did not  
19 appear at or participate in the trial, Serra failed to introduce  
20 any evidence to rebut this presumption.

21 Because it already formally decided the other elements of  
22 the Trustee's fraudulent transfer claim, the bankruptcy court  
23 ruled in his favor. It entered judgment against Serra on  
24 October 5, 2012.<sup>11</sup> Serra appealed.

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26 <sup>11</sup> The judgment provided that the funds were the debtors'  
27 property "immediately prior to the transfer to Serra." It  
28 further provided that the transfer was avoidable under § 548, as  
(continued...)

1 **JURISDICTION**<sup>12</sup>

2 The bankruptcy court had jurisdiction under 28 U.S.C.  
3 §§ 1334 and 157(b)(2)(E) and (H). We have jurisdiction under  
4 28 U.S.C. § 158.

5  
6 **ISSUES**

7 1) Did the bankruptcy court err in determining that the  
8 funds were the debtors' property?

9 2) Did the bankruptcy court err in determining that the

10 \_\_\_\_\_  
11 <sup>11</sup>(...continued)  
12 all of the other elements of the Trustee's claim had been decided  
13 on summary judgment. Id.

14 <sup>12</sup> Under Stern v. Marshall, 131 S. Ct. 2594 (2011), a  
15 bankruptcy court generally lacks authority to enter a final  
16 judgment on an action to avoid a fraudulent transfer under § 548.  
17 However, under Executive Benefits Ins. Agency v. Arkison  
18 (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553, 566-69 (9th  
19 Cir. 2012), a party waives or forfeits his right to a final  
20 judgment from an Article III court by failing to object timely to  
21 the bankruptcy court's jurisdiction or by participating in  
22 litigation before the bankruptcy court. Within the Ninth  
23 Circuit, such actions constitute implied consent. Bellingham  
24 Ins. Agency, Inc., 702 F.3d at 567-69.

25 Here, the Trustee asserted in the complaint that the  
26 bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and  
27 157. Serra filed an answer to the complaint on June 23, 2009.

28 We cannot access his answer to the complaint, however,  
because it was placed under seal, and neither he nor the Trustee  
has provided a copy of the answer in the record before us.  
Notably, Serra has not challenged on appeal the bankruptcy  
court's authority to enter the judgment on the Trustee's  
fraudulent transfer claim. Because Serra has not raised the  
issue of the bankruptcy court's jurisdiction over the Trustee's  
fraudulent transfer claim, he has waived or forfeited his right  
to adjudication by an Article III court. See Bellingham Ins.  
Agency, Inc., 702 F.3d at 568-69. We therefore proceed with our  
analysis.

1 debtors did not receive reasonably equivalent value for the  
2 transfer?

3 **STANDARDS OF REVIEW**

4 We review the bankruptcy court's factual findings for clear  
5 error and its legal conclusions de novo. Decker v. Tramiel  
6 (In re JTS Corp.), 617 F.3d 1102, 1109 (9th Cir. 2010).

7 A factual finding is clearly erroneous if it is "illogical,  
8 implausible or without support in the record." Retz v. Samson  
9 (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010). Where there  
10 is admitted evidence in the record to support the bankruptcy  
11 court's fact findings, an appellate court cannot substitute its  
12 views of the facts for those of the bankruptcy court. Anderson  
13 v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985). "Where  
14 there are two permissible views of the evidence, the factfinder's  
15 choice between them cannot be clearly erroneous." Id. at 574.

16  
17 **DISCUSSION**

18 A) Property of the debtor

19 To avoid a transfer as fraudulent under § 548(a)(1)(B), a  
20 bankruptcy trustee must demonstrate that: 1) the transfer  
21 involved the debtor's property; 2) the transfer was made within  
22 two years of filing the bankruptcy petition; 3) the debtor  
23 received less than reasonably equivalent value in exchange for  
24 the transfer; and 4) the debtor was insolvent at the time of the  
25 transfer or became insolvent because of it. Wyle v. C.H. Rider &  
26 Family (In re United Energy Corp.), 944 F.2d 589, 594 (9th Cir.  
27 1991). The bankruptcy trustee bears the burden of proof by a  
28 preponderance of the evidence. See, e.g., Western Wire Works,

1 Inc. v. Lawler (In re Lawler), 141 B.R. 425, 428 (9th Cir. BAP  
2 1992)("[T]he preponderance of the evidence standard applies in  
3 all bankruptcy proceedings grounded in allegations of fraud.")  
4 (citing Grogan v. Garner, 498 U.S. 279, 286-87 (1991)). See also  
5 5 Collier on Bankruptcy ¶ 548.11[1][b](Alan N. Resnick & Henry J.  
6 Sommer, eds., 16th ed. rev. 2012)(stating that because the  
7 bankruptcy trustee will be the plaintiff in a § 548(a) action, he  
8 has the burden of establishing his case).

9       On appeal, Serra disputes the bankruptcy court's  
10 determination as to whether the funds were the debtors' property.  
11 He argues that the bankruptcy court mistakenly relied on the bank  
12 statement, which only demonstrated that the funds came from the  
13 debtors' bank account. The bank statement did not show the  
14 actual source of the funds. Serra contends that there was no  
15 evidence showing whether the funds were the debtors' own or an  
16 accumulation of funds from different people.

17       Although "the term 'property of the debtor' is not defined  
18 in the Bankruptcy Code," it is defined broadly. Danning v. Bozek  
19 (In re Bullion Reserve of North America), 836 F.2d 1214, 1217  
20 (9th Cir. 1988). Generally, property belongs to the debtor "if  
21 its transfer will deprive the bankruptcy estate of something  
22 which could otherwise be used to satisfy the claims of  
23 creditors." Id. (defining "property of the debtor" within the  
24 context of § 547(b)). See also In re Kimura, 969 F.2d 806, 810  
25 (9th Cir. 1992)(defining property as "an aggregate of rights;  
26 'the right to dispose of a thing in every legal way, to possess  
27 it, to use it, and to exclude everyone else from interfering with  
28 it.'")(quoting Black's Law Dictionary 1095 (5th ed. 1979)).

1 Here, the Trustee presented evidence demonstrating that the  
2 debtors owned the funds. At the trial, his counsel submitted a  
3 copy of the check made out to Serra; the check listed the names  
4 of both debtors and their home address. Counsel for the Trustee  
5 also submitted a copy of the debtors' schedules, which listed a  
6 checking account with Wells Fargo Bank from which the check was  
7 issued. She also submitted a copy of the receipt letter wherein  
8 Serra acknowledged that the debtor, Francisco Lujan Garcia, had  
9 paid him by check. Serra did not challenge the admissibility of  
10 these documents.

11 Serra complains about the lack of evidence but he himself  
12 did not proffer any evidence to counter that proffered by the  
13 Trustee. Serra waived his right to present evidence by expressly  
14 declining to appear at and participate in the trial. He cannot  
15 now cavil the bankruptcy court's finding.

16 Based on the record before us, we determine that the Trustee  
17 satisfied his burden of proof by providing evidence demonstrating  
18 that the funds paid to Serra were the debtors' property. Serra  
19 did not offer any evidence to rebut the Trustee's evidence. We  
20 thus conclude that the bankruptcy court did not err in ruling in  
21 the Trustee's favor on the § 548(a)(1)(B) claim against Serra.

22  
23 B) Reasonably equivalent value

24 Serra also appeals the bankruptcy court's determination that  
25 the debtors did not receive reasonably equivalent value for the  
26 transfer. The district court affirmed the bankruptcy court's  
27 determination of this issue on summary judgment. Although Serra  
28 appealed the district court's ruling, the Ninth Circuit dismissed

1 his appeal because, in light of the district court's decision and  
2 remand, the disposition of the adversary proceeding was not  
3 final. See infra n.10.

4 The district court resolved the reasonably equivalent value  
5 issue in its decision on Serra's first appeal. If Serra seeks  
6 further review of that issue, he must take his arguments to the  
7 Ninth Circuit in a further appeal.<sup>13</sup> See 28 U.S.C. § 158(a) and  
8 (b).

9  
10 **CONCLUSION**

11 Based on the foregoing discussion and analysis, we AFFIRM.  
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17  
18 <sup>13</sup> We note that Serra did not present to the bankruptcy  
19 court any evidence demonstrating that the debtors received any  
20 "reasonably equivalent value" for their own benefit and,  
21 consequently, for the benefit of the estate. See Frontier Bank  
22 v. Brown (In re N. Merch., Inc.), 371 F.3d 1056, 1059 (9th Cir.  
23 2004)(stating that "the primary focus of Section 548 is on the  
24 net effect of the transaction on the debtor's estate and the  
25 funds available to the unsecured creditors"); Gough v. Titus  
26 (In re Christian & Porter Aluminum Co.), 584 F.2d 326, 337 (9th  
27 Cir. 1978)("Transfers made to benefit third parties are not made  
28 for 'fair' consideration. 'A general assignment of a debtor's  
property must be considered fraudulent if not made solely for the  
benefit of creditors . . . .'" )(quoting 4 Collier on Bankruptcy,  
¶ 67.33). See also Maddox v. Robertson (In re Prejean), 994 F.2d  
706, 708-09 (9th Cir. 1993)("reasonably equivalent value" under  
the California Fraudulent Transfer Act, which adopted the Uniform  
Fraudulent Transfer Act, is "determined from the standpoint of  
the creditors." ).