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OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: HMA SALES, LLC, Debtor.	BAP No. NV-08-1161-MoPaD Bk. No. 07-12694 Adv. No. 07-01214
ALLEN ABOLAFIA, Appellant, v. LISA M. POULIN, Chapter 11 Trustee,[2] Appellee.	**M E M O R A N D U M**[1]

Submitted on January 23, 2009
at Pasadena, California

Filed - February 13, 2009

Appeal from the United States Bankruptcy Court
for the District of Nevada (Las Vegas)

Hon. Linda B. Riegle, Bankruptcy Judge, Presiding.

Before: MONTALI, PAPPAS and DUNN, Bankruptcy Judges.

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[1]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.

[2]The captions of the parties' briefs reflect that HMA Sales, LLC, is now the appellee. Because the parties have not obtained an order substituting HMA Sales for Trustee as appellee, our docket reflects Trustee as the appellee.

The bankruptcy court entered summary judgment holding that a prepetition $1 million payment to the appellant constituted an avoidable fraudulent and preferential transfer and that additional transfers totaling $373,850 were avoidable preferences. We AFFIRM the conclusion that the $1 million transfer was constructively fraudulent and that the $373,850 payments were preferential.

I. FACTS

On December 29, 2000, USA Investment Partners, LLC ("USA") and appellant Allen Abolafia ("Appellant") entered into an operating agreement (the "Operating Agreement) to form HMA Sales, LLC ("HMA"). USA was the majority and managing member of HMA; Appellant was the minority (31%) member of HMA. HMA owned and operated the Royal Hotel (the "Property") in Las Vegas, Nevada.

The Operating Agreement provided that no distributions could be made by HMA to its members unless it had sufficient cash to pay basic operating expenses and obligations to third parties. From such excess funds (defined as "available funds"), the first $200,000 would be distributed in accordance with the members' equity interests. The next available funds would be used to repay loans to HMA from members, and the next available funds would be used to repay initial and additional capital contributions.

Appellant learned in or before August 2005 that USA asserted a claim in excess of $28 million for loans made to HMA. Appellant disputed that HMA owed this amount to USA. HMA entered into a contract for the sale of the Property. Appellant, concerned that the proceeds of the sale would be insufficient to

provide him any distribution under the Operating Agreement, purportedly objected to the sale. To resolve the objections of Appellant to the sales price and to prevent Appellant from formally objecting to or interfering with the sale, Appellant and USA entered into a settlement agreement ("Settlement Agreement") providing that Appellant would receive $1,000,000.00 upon the sale of the Property if the sale was consummated for 100 percent of HMA's equity in the Property. The Settlement Agreement, however, specifically stated in paragraph 3 that such a distribution would occur "after providing for the debts of HMA, other than the obligations due the Managers, Agents and affiliates of USA." Emphasis added.

The Settlement Agreement, executed in September 2005, contained the following relevant recitals:

> WHEREAS, the parties hereto are all members of [HMA] and are governed by [the Operating Agreement], and
>
> WHEREAS, [HMA] has recently entered into a Contract for the sale of [the Property] . . . , which comprises the primary asset owned by [HMA], and is now subject to terms of sale and pending escrow instructions, and
>
> WHEREAS, said sale, expected to represent 100% of the equity in HMA in [the Property], could result in a sale, directly or indirectly, of only 60% of HMA's equity therein, depending upon certain conditions set forth in the sales agreements and escrow instructions, and
>
> WHEREAS, USA is the holder of the majority membership interest in HMA and controls the activities of HMA, especially the pending sale, and has the power and authority to direct the allocation and distribution of the proceeds of said sale, and
>
> WHEREAS, the proceeds of said sale are to be used first to pay off any third party obligations of HMA including certain secured obligations comprising encumbrances on [the Property] as well as to pay off certain unsecured obligations of HMA, as provided for in the Operating Agreement, and the parties contemplate that a balance of

monies will be distributed to the Members in accordance with the Operating Agreement, and

WHEREAS, [Appellant] is concerned that under the distribution provisions of the Operating Agreement, the balance of monies for distribution to the members will predominantly go to USA, as return of invested capital, and preferred return on that invested capital, and

WHEREAS, [Appellant] believes that the sales price for [the Property] is possibly insufficient to cover all of HMA's obligations to return capital to USA and pay the preferred return on that capital and thus [Appellant] may receive little or no distribution of cash under the terms of the Operating Agreement, and by reason thereof, objects to the said sale, and

WHEREAS, [Appellant], as a minority member of HMA, has the right to object to said sale and, if he deems it appropriate, to initiate proceedings to enjoin said sale, but does not desire to do so if at all possible, and

WHEREAS, USA, and its principals, desire to allay [Appellant's] concerns and preclude the initiation of any proceedings to enjoin or in any way interrupt said pending sale of the said property, . . .

Emphasis added. Based on those recitals, USA and Appellant agreed to the following:

1. The parties desire to resolve the dispute concerning the amount of the pending sales price for the said property by insuring that [Appellant] receives a minimum amount of money and thereby precluding [Appellant's] right to object to the said sale and take any action to enjoin or interfere therewith, all pursuant and subject thereto.

2. USA and [Appellant] agree and acknowledge that as of August 31, 2005, the amount of capital contributed to HMA by USA is $28,627,462, and the accrued preferred return on such capital is $10,846,102. . . .

3. USA and its principals . . . agree that, notwithstanding the provisions for distributions set out in the Operating Agreement, from the proceeds of the sale of [the Property] after providing for the debts of HMA, other than the obligations due the Managers, Officers, Agents and affiliates of USA, the following sum(s) shall be allocated and paid to [Appellant]:

A. If the sale is consummated for 100% of HMA's equity in [the Property], then, not less that [sic] One

> Million Dollars ($1,000,000.00) will be allocated and paid (distributed) to [Appellant], or his order; . . .
>
> Provided further, that in the event there is sufficient funds from the operations or sale of the assets of HMA, then [Appellant] shall be entitled to his share of any further distributions from HMA, less any amounts paid as described above.
>
> 4. [Appellant] agrees that he will take no action regarding or in any manner interfere with the pending sale of [the Property].
>
> 5. It is the intention of the parties hereto that the execution of this Agreement shall be effective as a settlement of, and a bar to, each and every claim described above hereof that [Appellant] has or may have against USA in connection with the said sale, it being understood that this Agreement does not relieve any of the parties of their respective obligations concerning the winding up of the business affairs of HMA, including but not limited to, the collection of proceeds of contracts receivable and all matters related thereto, and any such cash distributable from this winding up shall be distributed in accordance with the Operating Agreement.
>
> . . .
>
> 7. This Agreement is made to buy peace and for no other reason. . . .

Emphasis added.

On June 19, 2006, HMA executed a promissory note in favor of Appellant in the amount of $225,000.00 (the "First Note"). On July 14, 2006, HMA executed a promissory note in favor of Appellant in the amount of $135,000 (the "Second Note").

On December 22, 2006, HMA sold the Property for more than $29,000,000. Appellant received $1,000,000 of the sale proceeds directly from escrow (the "$1M Distribution") pursuant to the Settlement Agreement. Appellant also received $373,850.00 directly from escrow as repayment of principal and interest of the First Note and the Second Note (the "Note Repayments").

On May 10, 2007, HMA filed a voluntary chapter 11[3] petition. The bankruptcy court thereafter entered an order appointing Lisa M. Poulin ("Trustee") as chapter 11 Trustee. On November 19, 2007, Trustee filed a complaint against Appellant seeking, inter alia, avoidance of the $1M Distribution and the Note Repayments as constructively fraudulent transfers under section 548(a)(1)(B) and avoidance of the Note Repayments as preferential transfers under section 547(b).

On January 24, 2008, Appellant filed a motion for summary judgment alleging that the $1M Distribution was not a fraudulent transfer as he tendered services to HMA of a reasonably equivalent value. Appellant acknowledged that the $1M Distribution was made pursuant to the terms of the Settlement Agreement. Appellant averred that after execution of the Settlement Agreement, he worked daily with the purchasers of the Property and, but for his services, the sale would not have occurred. For the purposes of the summary judgment motion, the bankruptcy court assumed (as do we) that these allegations are accurate.[4]

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[3]Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as revised by The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

[4]Appellant did not argue to the bankruptcy court or to us that his waiver of his right to object to the sale constituted "reasonable value" for the $1M Distribution. To the contrary, his statements on page 4 of his Reply Brief indicate that his agreement to forbear was of little value, as he likely would not have opposed the sale in any event. Appellant acknowledged that

(continued...)

In response to Appellant's motion for summary judgment, Trustee noted that the Settlement Agreement did not set forth any provision tying the $1M Distribution to future services to be rendered by Appellant. Rather, according to its own terms, the Settlement Agreement was executed to settle a dispute regarding the adequacy of funds to pay Appellant under the Operating Agreement; in other words, the Settlement Agreement modified the terms for the return of capital under the Operating Agreement.[5]

Trustee filed a counter-motion for a summary judgment avoiding the $1M Distribution and the Note Repayments as fraudulent transfers and avoiding the Note Repayments as preferential. Trustee also sought a judicial declaration that the $1M Distribution was an illegal distribution of profits under Nevada law governing limited liability companies.

In support of her counter-motion, Trustee filed a declaration stating that HMA was insolvent on the date that Appellant received the $1M Distribution and the Note Repayments. Trustee also declared that, as of that date, many of HMA's unsecured debts of third party creditors were due and owing, and

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[4](...continued)
objecting to the sale would not have been in his best interests and that it would have been "a waste of his time, effort and money for him to tie up the sale of the Royal Hotel to likely not receive his loan repayment." Appellant's Reply Brief at page 4. "There is not a direct trade off of relinquishing one right for the other, as [Appellant] had the choice to exercise his options and that does not mean that he would absolutely of [sic] exercised his options had it not been for the Settlement Agreement." Id.

[5]The Settlement Agreement also precluded Appellant from objecting to or moving to enjoin the sale.

that the $1M Distribution was made before payments to these creditors.[6] Appellant did not dispute these allegations.

In response to Trustee's counter-motion for summary judgment, Appellant again argued that the $1M Distribution was not a distribution of capital but was instead a payment for his "working on the sale of the hotel." In response to Trustee's request for summary judgment on the preference claim, Appellant simply stated that Appellant was not a creditor, that no antecedent debt existed, and the transfers to him from the proceeds of the sale were "contemporaneous exchange[s] for new value given to the debtor."

At the initial hearing on the motions for summary judgment, the bankruptcy court announced that it would deny Appellant's motion but requested further briefing on whether the $1M Distribution was a preferential transfer, as Trustee had not previously asserted or argued that position.[7] Trustee filed a

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[6]Trustee also declared that Appellant did not actually advance the funds described in the First Note and Second Note, but that USA did. Whether or not this is true, the Note Repayments were preferential transfers, as discussed later.

[7]On page 3 of the complaint, Trustee defined the $1M Distribution as "the Transfer" and the Note Repayments as the "Payments." In her section 548(a)(1)(B) claim (Second Claim for Relief), Trustee identified both the "Payments" and the "Transfer" as constructively fraudulent. In her section 547 preference claim (Eighth Claim for Relief), however, Trustee identified <u>only</u> the Payments as preferential. In her cross-motion for summary judgment, Trustee did not argue that the $1M Distribution (i.e., the Transfer) was preferential. The possibility that the $1M Distribution was preferential was first raised at the initial hearing on Trustee's motion for summary judgment, and the bankruptcy court directed the parties to submit further briefing on the issue.

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supplemental brief addressing this issue, but Appellant filed only a declaration that did not make any legal arguments.

At the second hearing, the bankruptcy court held that by its own unambiguous terms, the Settlement Agreement did not require Appellant to provide the services he described in order to receive the $1M Distribution and that those services therefore did not provide reasonably equivalent value for that distribution:

> Reading this settlement agreement, there is no way of reading this settlement agreement and keeping in mind that this agreement's governed by Nevada law, and Nevada's parol-evidence rules are very strict law of substantive law.
>
> Evidence is not permitted which would in any manner alter the terms of an agreement or introduce terms inconsistent with respect to the agreement.
>
> * * *
>
> Now, the point here is that there is no way to now take this pig's ear and turn it into a silk purse. This is a settlement agreement that talks solely about the right to compensation for the distribution and, importantly, waives and relinquishes any other claims that [Appellant] may have had against HMA by paragraph 5.
>
> So, therefore, I find that it was not for services. It was for a distribution, and it's a fraudulent conveyance because there was no reasonably-equivalent value given because it was a distribution as

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[7](...continued)

To date, the complaint has not been amended to assert that the $1M Distribution is preferential, and Rule 15(b) (allowing amendment of pleadings to conform to evidence) is inapplicable when a matter is decided on summary judgment. Crawford v. Gould, 56 F.3d 1162, 1168-69 (9th Cir. 1995). Appellant, however, has not asked us to reverse on these grounds. More importantly, we need not address the issue of whether the $1M Distribution was preferential because, as discussed later, we affirm the bankruptcy court's conclusion that it was constructively fraudulent.

> opposed to payment of a creditor.

Transcript, Hearing of May 5, 2008, at pages 31-35.

Applying section 548, the bankruptcy court concluded that the $1M Distribution was a constructively fraudulent transfer:

> It was for the benefit of an insider. It was incurred within one year before the date of filing. The debtor received less than reasonably-equivalent value and was insolvent on the date of the transfer.

Id. at 34. The court further found that the Note Repayments were preferential:

> And then as to the loans I find the loans are preferences. It was an antecedent debt. The debt was incurred. Whether it was incurred before July of '06, it's an antecedent debt. It wasn't paid 'til September.
>
> There is no evidence that it was intended by the debtor and the creditor to be a substantially-contemporaneous exchange, and it was not substantially-contemporaneous.

Id. The court also concluded that the $1 Million Distribution was preferential.

On June 11, 2008, the bankruptcy court entered an order denying Appellant's motion for summary judgment and granting in part and denying in part Trustee's counter-motion. Consistent with the court's conclusions on the record, the order granted summary judgment as to Trustee's claim (Count 2 of the Complaint) that the $1M Distribution was constructively fraudulent and that the Note Repayments (Count 8) were preferential. The order further stated that "[t]he court notes that the [$1M Distribution] would also be a preferential transfer under the circumstances expressed by the Court in its findings and

conclusions."[8]

On June 20, 2008, Appellant filed his notice of appeal. On July 24, 2008, the bankruptcy court entered an order dismissing those counts of the Complaint not mentioned in the summary judgment order. On August 15, 2008, our clerk issued an order stating that the appealed order appeared interlocutory. In response, the bankruptcy court entered a separate final judgment. In light of this judgment and the order dismissing the balance of the counts of the Complaint, this panel entered an order on September 24, 2008, that the appeal is from a final order.

On September 3, 2008, the bankruptcy court entered an order substituting HMA as plaintiff in place of Trustee. Neither

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[8]The order contains other language granting relief much broader than that discussed by the court at the hearing. While the court held that the $1M Distribution was constructively fraudulent under section 548(a)(1)(B), it did not address an element essential to a judgment for actual fraud: whether HMA as transferor had acted with intent to defraud. The order, however, purports to grant summary judgment in Trustee's favor on all counts of fraudulent transfer, including those for actual fraud under section 548(a)(1)(A) and Nevada state law. To be consistent with the court's oral ruling, the order should have granted summary judgment only as to Counts 2 and 8 of the Complaint instead of Counts 1, 3 and 4. Moreover, although the bankruptcy court did not conclude on the record that the $1M Distribution violated Nevada's laws governing the distributions of the profits and contributions of a limited liability company, the order states that summary judgment would be entered in Trustee's favor on her fifth claim for relief (declaratory relief under Nev. Rev. Stat. § 86.343).

Appellant has not raised these discrepancies as grounds for reversal. We need not address them, as we affirm on the grounds that the $1M Distribution was constructively fraudulent (Count 2) and that the Note Repayments were preferential (Count 8).

Trustee nor HMA has sought an order from this panel substituting HMA as appellee in this appeal.

II. ISSUES

A. Did the bankruptcy court err in granting summary judgment avoiding the $1M Distribution as a fraudulent transfer under section 548(a)(1)(b)?

B. Did the bankruptcy court err in granting summary judgment avoiding the Note Repayments as preferential transfers?

III. STANDARD OF REVIEW

We review de novo the bankruptcy court's ruling on a motion for summary judgment. Conestoga Serv. Corp. v. Executive Risk Indem., Inc., 312 F.3d 976, 980 (9th Cir. 2002); Lopez v. Emergency Serv. Restoration, Inc. (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP 2007); Woodworking Enters., Inc. v. Baird (In re Baird), 114 B.R. 198, 201 (9th Cir. BAP 1990). Viewing the evidence in the light most favorable to the non-moving party (i.e., Appellant), we determine whether the bankruptcy court correctly found that there are no genuine issues of material fact and that the moving party (i.e., Trustee) is entitled to judgment as a matter of law. Baird, 114 B.R. at 201; Carolco Television, Inc. v. Nat'l Broad. Co. (In re De Laurentiis Entm't Group Inc.), 963 F.2d 1269, 1271-72 (9th Cir. 1992).

IV. JURISDICTION

As noted in our order of September 24, 2008, this appeal is from a final order. The bankruptcy court had jurisdiction pursuant to 28 U.S.C. § 1334 and § 157(b)(2)(B) and (F) and we have jurisdiction under 28 U.S.C. § 158.

V. DISCUSSION

A. Was the $1M Distribution a Constructively Fraudulent Transfer?

Section 548 establishes the powers of a trustee or debtor-in-possession to avoid fraudulent transfers. Under this section, a bankruptcy court can set aside "not only transfers infected by actual fraud but certain other transfers as well[,] so-called constructively fraudulent transfers." BFP v. Resolution Trust Corp., 511 U.S. 531, 535 (1994). Section 548(a)(1)(B) permits avoidance of constructively fraudulent transfers by insolvent debtors. To obtain relief under this subsection, Trustee had to demonstrate "(1) that [HMA] had an interest in property; (2) that a transfer of that interest occurred within one year of the filing of the bankruptcy petition; (3) that [HMA] was insolvent at the time of the transfer or became insolvent as a result thereof; and (4) that [HMA] received 'less than a reasonably equivalent value in exchange for such transfer.'" Id.

Here, no dispute exists that HMA had an interest in the Property and the proceeds of the sale of the Property. No dispute exists that the $1M Distribution and the Note Repayments from HMA's sale proceeds occurred within one year of the petition date. Trustee offered undisputed evidence that HMA was insolvent at the time of these transfers. Only the fourth element, whether HMA received "less than a reasonably equivalent value in exchange for such transfer," is at issue.

Appellant contends that his services in selling the Property constituted "reasonably equivalent value." We assume for the purposes of the appeal that he did provide such services and that

the services did provide value to HMA. That said, the bankruptcy court correctly held that, as a matter of undisputed fact, the $1M Distribution was not made in exchange for such services, and thus those services did not provide "a reasonably equivalent value in exchange for such transfer or obligation." 11 U.S.C. § 548(a)(1)(B)(I).

Appellant admitted that he received the $1M Distribution pursuant to the terms of the Settlement Agreement. The Settlement Agreement did not require Appellant to provide the services in order to recover the $1M Distribution. As noted by the bankruptcy court in its oral ruling, the Settlement Agreement itself reflects that it is a compromise between HMA's members as to the distribution of equity. The Settlement Agreement allowed Appellant to receive a return on his equity interests before repayment of loans to officers, agents, managers and affiliates of USA, notwithstanding the Operating Agreement.[9] Appellant

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[9]Paragraph 3 of the Settlement Agreement, like the Operating Agreement itself, contemplated payment of the "debts of HMA [other than those of the USA insiders]" before payment to Appellant. Trustee introduced undisputed evidence that debts owing to HMA's unsecured creditors on the date of the $1M Distribution remained unpaid as of the petition date. Thus, the $1M Distribution seems to have violated the terms of the Settlement Agreement itself, further demonstrating that HMA did not receive reasonably equivalent value for the $1M Distribution.

That said, the largest unsecured creditor appears to be USA. To the extent that any amounts recovered from Appellant actually are collected and distributed to creditors, the Settlement Agreement would govern any distribution to USA, its agents, managers, officers and affiliates. In other words, while the transfers may be avoided for the benefit of creditors, the modification of the Operating Agreement set forth in the Settlement Agreement may still be effective as between USA and

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produced no evidence that he infused $1 million of capital into HMA or that he had loaned funds to HMA in excess of the First and Second Notes. No evidence exists that HMA received reasonably equivalent value in exchange for the $1M Distribution.[10]

As reflected in the recitals and paragraphs 2 and 4 of the Settlement Agreement, Appellant had only one obligation to fulfil in order to receive the $1M Distribution: not object to or interfere with the pending sale. He agreed to forbear from exercising his rights as a minority member. Appellant did not argue to the bankruptcy court or to us that his forbearance provided reasonably equivalent value for the $1M Distribution. By not making this argument, he has waived it. See Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001) (stating that "issues which are not specifically and distinctly argued and raised in a party's opening brief are waived").

Even if Appellant had made such an argument, he admitted on page 4 of his reply brief that "it would likely have not been in [his] best interest to hold up the sale of [the Property] regardless of the Settlement Agreement because he was shown that there was not enough funds to pay back the obligations owed to

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[9](...continued)
Appellant and may govern the priority of their respective distributions.

[10]The evidence offered by Appellant in support of his contention that he provided reasonably equivalent value refers to the services he rendered with respect to the sale. As the bankruptcy court correctly held, the $1M Distribution was not made "in exchange for" those services, but as part of the Settlement Agreement.

him. . . . Therefore, it would have been a waste of his time, effort and money to tie up the sale[.]" In light of these admissions, Appellant would have been hard-pressed to demonstrate that his forbearance was reasonably equivalent in value to the $1M Distribution.

In summary, the unambiguous terms of the Settlement Agreement did not make payment of the $1M Distribution contingent on the provision of Appellant's services; Appellant would have been entitled to receive the payment even if he had not provided the services. As a matter of undisputed fact, the services did not provide reasonably equivalent value "in exchange" for the $1M Distribution. As Trustee established the existence of the other elements of a constructively fraudulent transfer (e.g., insolvency) as a matter of undisputed fact, we affirm the bankruptcy court's summary judgment avoiding the $1M Distribution under section 548(a)(1)(B).[11]

B. Were the Note Repayments Preferential?

Section 547(b) enables a trustee to recover for the benefit of the estate certain preferential transfers made by a debtor prior to bankruptcy. Section 547(b) establishes five elements of a preference action. To avoid a transfer under section 547(b), a trustee must prove that the transfer was made (1) to or for the benefit of a creditor, (2) on account of an antecedent

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[11]In light of our holding, we do not have to decide whether the bankruptcy court erred in entering judgment declaring that the $1M Distribution was actually fraudulent under section 548(a)(1)(A), that the $1M Distribution was a preferential transfer under section 547, and that the $1M Distribution was an illegal distribution under Nevada Revised Statutes § 86.343.

debt, (3) while the debtor is insolvent, (4) within 90 days of filing the bankruptcy petition, or, if the transferee is an insider, within one year of the petition date, and (5) in such a way that it enables the creditor to receive more than if the transfer had not been made. 11 U.S.C. § 547(b)(1)-(5); USAA Fed. Sav. Bank v. Thacker (In re Taylor), 390 B.R. 654, 660 (9th Cir. BAP 2008).

The record reflects as a matter of undisputed fact that Appellant was the beneficiary of the First Note and Second Note executed by HMA in June and July 2006; Appellant was thus a creditor of HMA, thereby satisfying section 547(b)(1).[12] The record also reflects as a matter of undisputed fact that Appellant received the Note Repayments from HMA upon close of escrow, which occurred on December 22, 2006. Consequently, the Note Repayments were made on antecedent debts (the First Note and the Second Note) existing at least five months prior to payment. Gugino v. Coble (In re Callaway), 2008 WL 4261087 (Bankr. D. Id., Sept. 12, 2008) ("a debt is antecedent for preference purposes if it was incurred prior to the transfer"). Section 547(b)(2) has thus been satisfied.

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[12]Even though Appellant's reply in support of his motion for summary judgment stated (without authority or analysis) that he was not a creditor of HMA, he admitted in paragraph 6 of his declaration in support of the motion that he made loans to HMA on June 19, 2006, and July 14, 2006 in the amounts of $225,000 and $135,000. Trustee asserted that USA actually funded these loans, but we assume for purposes of this appeal that Appellant's declaration is accurate; if Appellant had not advanced the funds and was thus not a creditor, the Note Repayments could be avoided as constructively fraudulent under section 548(a)(1)(B).

Appellant did not dispute Trustee's declaration that HMA was insolvent at the time the disbursements (including the Note Repayments) from the sale proceeds of the Property were made; section 547(b)(3) has therefore been satisfied. In paragraph 88 of his answer to the complaint, Appellant admitted that he was an insider of HMA. Consequently, the one year time period of section 547(b)(4)(B) is applicable. The Note Repayments were made in December 22, 2006, less than six months prior to the petition date (May 10, 2007). Therefore, as a matter of undisputed fact, section 547(b)(4) has been satisfied.

Finally, HMA's bankruptcy schedules reflect that it had $21,548,209.93 in assets and $41,955,986.15 in general unsecured debt. See HMA's Schedules filed on June 11, 2007, as Docket No. 74 in Case No. 07-12694. Even assuming that Appellant would be entitled to repayment as a general unsecured creditor (instead of being subordinated to non-insider third-party creditors pursuant to the Operating Agreement), he clearly would not receive full repayment in chapter 7 on the First Note and the Second Note, given the extent of HMA's unsecured liabilities as opposed to its assets. As the Note Repayments were sufficient to pay both notes in full, Appellant received more than he would have under a chapter 7 liquidation. Section 547(b)(5) has been satisfied.

Trustee demonstrated that, as a matter of law and undisputed fact, the elements of a preferential transfer under section 547(b) exist here. Appellant did not establish the existence of a material fact in dispute with respect to these issues. The question now facing us is whether Appellant established the existence of issues of material fact with respect to his

affirmative defenses of contemporaneous exchange, of new value and of payment in the ordinary course of business. We conclude that he has not.[13]

1. Contemporaneous Exchange

Section 547(c)(1) provides that a trustee may not avoid a transfer to the extent the transfer was

> (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
>
> (B) in fact a substantially contemporaneous exchange.

11 U.S.C. § 547(c)(1).

Therefore, in order to prevail on this affirmative defense, a transferee must demonstrate that (1) a substantially contemporaneous exchange occurred and that (2) new value was given to the debtor. Sulmeyer v. Suzuki (In re Grand Chevrolet, Inc., 25 F.3d 728, 733 (9th Cir. 1994). Appellant failed to present evidence as to either prong; to the contrary, the admissions of Appellant are inconsistent with the defense of contemporaneous exchange. Appellant admitted that the Note Repayments were made to satisfy the First Note and the Second Note; those notes were executed, at a minimum, six months prior to the payment. The payment and the debt were not "substantially contemporaneous" exchanges.

As the Ninth Circuit held in McClendon v. Cal-Wood Door (In re Wadsworth Bldg. Components, Inc.), 711 F.2d 122, 124 (9th Cir. 1987), a payment made within the preference period on an existing

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[13]Appellant mentioned these defenses with respect to the $1M Distribution in his opening brief, although he did not clearly state that the defenses applied to the Note Repayments as well.

obligation is not a "contemporaneous exchange." See also Sanyo Electric, Inc. v. Taxel (In re World Fin. Serv. Center, Inc.), 78 B.R. 239, 241 (9th Cir. BAP 1987), aff'd, 860 F.2d 1090 (9th Cir. 1988) ("[W]hen a payment, made within the preference period, was applied to an existing obligation it is not a 'contemporaneous exchange' pursuant to § 547(c)(1). This is so regardless of whether the creditor extended value when the payment was tendered by the debtor."). Therefore Appellant's admission establishes that this defense is unavailable to him.

2. New Value

Section 547(c)(4) provides that a trustee may not avoid a transfer "to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor." 11 U.S.C. § 547(c)(4) (emphasis added). New value is defined in relevant part as "[m]oney or money's worth in goods, services, or new credit." 11 U.S.C. § 547(a)(2). Appellant contends that he gave new value in the form of services to facilitate the sale, but he provided no evidence that he provided such services after the transfer (i.e., after the closing of the sale, when the Note Repayments were made). In light of his contentions that his services were provided to ensure that the Property was sold, such services could not have been provided after the sale closed, or after the transfer.[14] The exception of section 547(c)(5) is therefore inapplicable.

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[14]Appellant stated in his initial declaration that such services were rendered "before and after" execution of the Settlement Agreement (in September 2005). He further declared in his second declaration that he provided such services over a two-year period.

3. Transfer in the Ordinary Course of Business

A transfer on account of an antecedent debt is not an avoidable preference to the extent the debt was incurred in the ordinary course of business and the payment (1) was made in the ordinary course of business or financial affairs of the debtor and the transferee; or (2) the payment was made according to ordinary business terms. 11 U.S.C. § 547(c)(2). Given that Appellant contended for the first time on appeal that distributions made to him (including, presumably, the Note Repayments) were made in the ordinary course of business, he introduced no evidence to support such a contention. To the contrary, the evidence shows that the distributions to him were not in the ordinary course of business; such distributions violated the Operating Agreement, which required third-party non-insiders to be paid before members such as Appellant could be repaid on any loans made to HMA. The ordinary course defense of section 547(c)(2) is therefore inapplicable.

In summary, the bankruptcy court did not err in entering summary judgment that the Note Repayments were avoidable preferences. As a matter of undisputed fact and law, the elements of section 547(b) have been satisfied, and Appellant has established no defense under section 547(c).

VI. CONCLUSION

For the foregoing reasons, we AFFIRM the bankruptcy court's summary judgment avoiding the $1M Distribution as constructively fraudulent under section 548(a)(1)(B) and avoiding the Note Repayments as preferential under section 547.